

**IN THE MATTER OF THE APPLICATION FOR A WRIT OF HABEAS
CORPUS OF: BERNABE BUSCAYNO, PETITIONER, VS. HON. JUAN
PONCE ENRILE, SECRETARY OF NATIONAL DEFENSE; GEN. ROMEO
C. ESPINO, ...**

G.R. No. L-47185. January 15, 1981

Ponente: FERNANDO, C.J.

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FERNANDO, C.J.:

In essence, the decisive issue posed in this habeas corpus and prohibition proceeding, filed on October 25, 1977, namely, the power of military tribunals to try individuals, not members of the armed forces, was raised and decided adversely to the claim of petitioner Bernabe Buscayno in the leading case of *Aquino Jr. v. Military Commission*.^[1] A novel aspect is, however, sought to be imparted by the allegation that respondent Military Commission "lost on October 17, 1976, the judicial power vested in it by the respondent Secretary, now Minister, of the National Defense^[2] to conduct the trial of persons charged with the commission of crimes defined by the penal statutes of the land, when, on said date, the Filipino people terminated the authoritarian regime, or military dictatorship established by the Commander-in-Chief of the Armed Forces of the Philippines, when they ratified the amendments to the Constitution"^[3] and the contention that whatever judgment will be rendered by it against petitioner would be violative of Section 9, Article X of the Constitution.^[4] For reasons to be hereinafter set forth specifically, this Court sees no valid distinction sufficient to call for a different ruling. There is no justification for granting the remedies prayed for.

Such conclusion gains reinforcement from the fact that in the Comment^[5] submitted by respondents to petitioner's urgent supplemental petition,^[6] filed on December 3, 1977, reiterating but this time in a much more detailed manner, the alleged denial of procedural due process, an order of the President to respondent Secretary of National Defense dated November 29, 1977 was quoted in full. Insofar as pertinent, it reads: "While according to the records, ample opportunity has been granted the accused to exercise their rights under the law and the constitution, in view of the severity of the charges against them and the consequent penalty that has been imposed upon them, that is death and although the trial has lasted several years during which time the Military Commission has given them every opportunity to have a fair trial, in the interest of justice, you are hereby directed to see to it that they get another opportunity and that the Military Commission reopen the trial for the purpose of receiving such arguments, witnesses and other evidences as the two accused and other co-accused may wish to present."^[7] Even on the assumption then that the proceedings before respondent Commission were vitiated by constitutional infirmity, the above Presidential order to respondent Secretary, now Minister, of National Defense, if availed of, would attain the purpose sought to be achieved by petitioner.

The facts as set forth in the petition are with some modifications admitted in the answer. Petitioner was arrested in Barrio Sto. Rosario, Mexico, Pampanga, as ranking leader of the Communist Party of the Philippines (CPP), the Hukbong Mapagpalaya ng Bayan (HMB) or the New People's Army (NPA), and was accused in two criminal cases, one for violation of R.A. No. 1700 and another for murder, both pending with respondent Military

Commission No. 2. He is likewise an accused in the MV Karagatan case for rebellion before Military Commission No. 1. Prior to his arrest, his trial before respondent Military Commission had started; it continued thereafter after he was duly arraigned. Then, on October 25, 1977, this petition was filed, to be followed by the urgent supplemental petition, of December 3, 1977.

As noted at the outset, this petition must be dismissed.

1. To demonstrate the lack of merit of the argument advanced by petitioner that from and after October 17, 1976, respondent Military Commission was deprived of any power to try petitioner as in the plebiscite then held, the Filipino people terminated the authoritarian regime "or military dictatorship established by the Commander-in-Chief" in General Order No. 1 dated September 22, 1972, it suffices to quote this relevant excerpt from the opinion of then Chief Justice Makalintal in *Aquino Jr. v. Ponce Enrile*:^[8] "In the first place I am convinced (as are the other Justices), without need of receiving evidence as in an ordinary adversary court proceeding, that a state of rebellion existed in the country when Proclamation No. 1081 was issued. It was a matter of contemporary history within the cognizance not only of the courts but of all observant people residing here at the time. Many of the facts and events recited in detail in the different 'Whereases' of the proclamation are of common knowledge. The state of rebellion continues up to the present. The argument that while armed hostilities go on in several provinces in Mindanao there are none in other regions except in isolated pockets in Luzon, and that therefore there is no need to maintain martial law all over the country, ignores the sophisticated nature and ramifications of rebellion in a modern setting. It does not consist simply of armed clashes between organized and identifiable groups on fields of their own choosing. It includes subversion of the most subtle kind, necessarily clandestine and operating precisely where there is no actual fighting. Underground propaganda, through printed newssheets or rumors disseminated in whispers; recruitment of armed and ideological adherents, raising of funds, procurement of arms and material, fifth-column activities including sabotage and intelligence—all these are part of the rebellion which by their nature are usually conducted far from the battle fronts. They cannot be counteracted effectively unless recognized and dealt with in that context."^[9] This, too: "Secondly, my view, which coincides with that of other members of the Court as stated in their opinions, is that the question of validity of Proclamation No. 1081 has been foreclosed by the transitory provision of the 1973 Constitution [Art. CVII, Sec. 3(2)] that 'all proclamations, orders, decrees, instructions, and acts promulgated, issued or done by the incumbent President shall be part of the law of the land and shall remain valid, legal, binding and effective even after * * * the ratification of this Constitution * * *.' To be sure, there is an attempt in these cases to resuscitate the issue of the effectivity of the new Constitution. All that, however, is behind us now. The question has been laid to rest by our decision in *Javellana v. Executive Secretary* (L-36142, 50 SCRA 30, March 31, 1973), and of course by the existing political realities both in the conduct of national affairs and in our relations with other countries."^[10] It may be added that in the address of President Marcos delivered before the American Newspaper Publishers Association in Honolulu on April 22, 1980, he quoted with approval the view of Willoughby as to the significance of the martial law provision found in our Constitution, Proclamation No. 1081 being based on the commander-in-chief clause of the 1935 Constitution vesting on the President the power to do so under the circumstances therein enumerated: "There is, then, strictly speaking, no such thing in American law as a declaration of martial law whereby military law is substituted for civil law. So-called declarations of martial law are, indeed, often made, but their legal effect goes no further than to warn citizens that the military powers have been called upon by the executive to assist him in the maintenance of law and order and that, while the emergency lasts, they must, upon pain of arrest and punishment not commit any acts which will in any way render more difficult the restoration of order and the enforcement of law."^[11] The President likewise referred to Burdick and Willis, two other eminent constitutional scholars of note, who expressed the same view.^[12]

2. It is not to be lost sight of that he is Commander-in-Chief precisely because he is the incumbent President. Thus

this Court in *Aquino Jr. v. Commission on Elections*,^[13] enabled him to "promulgate proclamations, orders and decrees during the period of Martial Law essential to the security and preservation of the Republic, to the defense of the political and social liberties of the people and to the institution of reforms to prevent the resurgence of rebellion or insurrection or secession or the threat thereof as well as to meet the impact of a worldwide recession, inflation or economic crisis which presently threatens all nations including highly developed countries."^[14] Moreover, this decision reiterated the ratification of such orders and decrees in these words: "To dissipate all doubts as to the legality of such lawmaking authority by the President during the period of Martial Law, Section 3(2) of Article XVII of the new Constitution expressly affirms that all the proclamations, orders, decrees, instructions and acts he promulgated, issued or did prior to the approval by the Constitutional Convention on November 30, 1972 and prior to the ratification by the people on January 17, 1973 of the new Constitution, are 'part of the law of the land, and shall remain valid, legal, binding and effective even after the lifting of Martial Law or the ratification of this Constitution, unless modified, revoked or superseded by subsequent proclamations, orders, decrees, instructions or other acts of the incumbent President, or unless expressly and specifically modified or repealed by the regular National Assembly.'"^[15]

3. Whatever doubts may still exist as to the power of respondent Military Commission to try petitioner should be dispelled, as was set forth in the opening sentence of this opinion by the aforesaid *Aquino Jr. v. Military Commission* decision.^[16] Justice Antonio, now retired, as ponente, left no doubt on that score. Thus: "We hold that the respondent Military Commission No. 2 has been lawfully constituted and validly vested with jurisdiction to hear the cases against civilians, including the petitioner. 1. The Court has previously declared that the proclamation of Martial Law (Proclamation No. 1081) on September 21, 1972, by the President of the Philippines is valid and constitutional and that its continuance is justified by the danger posed to the public safety. 2. To preserve the safety of the nation in times of national peril, the President of the Philippines necessarily possesses broad authority compatible with the imperative requirements of the emergency. On the basis of this, he has authorized in General Order No. 8 (September 27, 1972) the Chief of Staff, Armed Forces of the Philippines, to create military tribunals to try and decide cases 'of military personnel and such other cases as may be referred to them.' In General Order No. 12 (September 30, 1972), the military tribunals were vested with jurisdiction 'exclusive of the civil courts,' among others, over crimes against public order, violations of the Anti-Subversion Act, violations of the laws on firearms, and other crimes which in the face of the emergency, are directly related to the quelling of the rebellion and preservation of the safety and security of the Republic. In order to ensure a more orderly administration of justice in the cases triable by the said, military tribunals, Presidential Decree No. 39 was promulgated on November 7, 1972, providing for the 'Rules Governing the Creation, Composition, Jurisdiction, Procedure and Other Matters Relevant to Military Tribunals.' These measures he had the authority to promulgate, since this Court recognized that the incumbent President, under paragraphs 1 and 2 of Section 3 of Article XVII of the new Constitution, had the authority to 'promulgate proclamations, orders and decrees during the period of martial law essential to the security and preservation of the Republic, to the defense of the political and social liberties of the people and to the institution of reforms to prevent the resurgence of the rebellion or insurrection or secession or the threat thereof * * *.' Pursuant to the aforesaid Section 3[1] and [2] of Article XVII of the Constitution, General Orders No. 8, dated September 27, 1972 (authorizing the creation of military tribunals), No. 12, dated September 30, 1972 (defining the jurisdiction of military tribunals and providing for the transfer from the civil courts to military tribunals of cases involving subversion, sedition, insurrection or rebellion, etc.), and No. 39, dated November 7, 1972, as amended (prescribing the procedures before military tribunals), are now 'part of the law of the land.'"^[17]

4. It was likewise held therein that to recognize such competence of a military commission would amount to sanctioning a disregard of procedural due process. As was made clear in the opinion of Justice Antonio: "Neither

are We impressed with petitioner's argument that only thru a judicial proceeding before the regular courts can his right to due process be preserved. The guarantee of due process is not a guarantee of any particular form of tribunal in criminal cases. A military tribunal of competent jurisdiction, accusation in due form, notice and opportunity to defend and trial before an impartial tribunal, adequately meet the due process requirement. Due process of law does not necessarily mean a judicial proceeding in the regular courts. The guarantee of due process, viewed in its procedural aspect, requires no particular form of procedure. It implies due notice to the individual of the proceedings, an opportunity to defend himself and 'the problem of the propriety of the deprivations, under the circumstances presented, must be resolved in a manner consistent with essential fairness.' It means essentially a fair and impartial trial and reasonable opportunity for the preparation of defense. Here, the procedure before the Military Commission, as prescribed in Presidential Decree No. 39, assures observance of the fundamental requisites of procedural due process, due notice, on essentially fair and impartial trial and reasonable opportunity for the preparation of the defense." [18]

5. This decision likewise authoritatively settles the question as to the alleged lack of impartiality, Justice Antonio expressing the view of the Court in these words: "it is, however, asserted that petitioner's trial before the military commission will not be fair and impartial, as the President had already prejudged petitioner's cases and the military tribunal is a mere creation of the President, and 'subject to his control and direction.' We cannot, however, indulge in unjustified assumptions. Prejudice cannot be presumed, especially if weighed against the great confidence and trust reposed by the people upon the President and the latter's legal obligation under his oath to 'do justice to every man.' Nor is it justifiable to conceive, much less presume, that the members of the military commission, the Chief of Staff of the Armed Forces of the Philippines, the Board of Review and the Secretary of National Defense, with their corresponding staff judge advocates, as reviewing authorities, through whom petitioner's hypothetical conviction would be reviewed before reaching the President, would all be insensitive to the great principles of justice and violate their respective obligations to act fairly and impartially in the premises." [19]

6. One other issue raised by petitioner remains. It was likewise contended that a judgment of respondent Military Commission would be violative of Article X, Section 9 of the Constitution. That provision requires that a decision of a court of record "shall clearly and distinctly state the facts and the law on which it is based." The proceeding in a military commission terminates with a guilty or not guilty verdict. Hence this objection. It can be said of course that a military commission is not a court of record within the meaning of this Article on the judiciary. Moreover, the procedure followed, including the form the judgment takes, was given the seal of approval in the above Aquino decision citing the applicable section of the Article on Transitory Provisions. [20] That would remove any taint of unconstitutionality. It may be stated further that the record of the proceedings are available to the reviewing authorities. Hence any imputation of arbitrariness sought to be avoided by the above provision would not be warranted.

7. It may be noted that less than a year ago, in an exhaustive opinion by Justice Makasiar, this Court once again sustained the power of the President to create military commissions or courts martial to try not only members of the armed forces but also civilian offenders. [21] Counsel for petitioner, in his voluminous pleadings, was quite vehement in his assertion that there was a marked failure to abide by constitutional processes. Such an attitude is reminiscent of the aphorism of Holmes that certitude is not the test of certainty. For beginning with *Javellana v. Executive Secretary*, [22] decided on March 31, 1973, up to and including *Sanidad v. Commission on Elections*, [23] decided five days before the October 17, 1976 plebiscite, the question raised in the former case being the validity of the ratification of the present Constitution and in the latter the power of the President to propose amendments, this Court performed its awesome and delicate power of judicial review. In the three Aquino cases referred to in the body of the opinion, the question raised and decided dealt with the presidential

authority to issue the challenged decrees. It is quite apparent, therefore, that to stigmatize the existing government between September 22, 1972 to October 17, 1976 as a military dictatorship is bereft of any support in law. The Constitution remained supreme, with the fundamental principle of civilian supremacy upheld.[24]

Nothing said in this opinion is to be construed or to be understood as in any way lending approval to any failure to accord full respect to all the rights of an accused person conformably to my concurrence and dissent set forth in the aforesaid Aquino Jr. v. Military Commission decision and in accordance with the Universal Declaration of Human Rights as well as the Covenant on Civil and Political rights.

WHEREFORE, the petition is dismissed for lack of merit. No costs.

Barredo, Makasiar, Aquino, Fernandez, Guerrero, Abad Santos, De Castro, and Melencio-Herrera, JJ., concur.

Teehankee, J., files a separate opinion.

Concepcion, Jr., J., on leave.

[1] L-37364, May 9, 1975, 63 SCRA 546. Justice Teehankee and retired Justice Muñoz Palma dissented. The writer of this opinion filed a separate concurrence and dissent.

[2] The other respondents are Gen. Romeo C. Espino, Chief of Staff, AFP; Gen. Fidel V. Ramos, Chief, Philippine Constabulary; the Military Commission No. 2; and Col. Miguel V. Aure, Philippine Constabulary.

[3] Petition, 6-7.

[4] According to Article X, Section 9 of the Constitution: "Every decision of a court of record shall clearly and distinctly state the facts and the law on which it is based. The Rules of Court shall govern the promulgation of minute resolutions."

[5] Comment dated December 12, 1977. Solicitor General Estelito P. Mendoza was assisted by Assistant Solicitor General Reynato S. Puno and Solicitor Ramon A. Barcelona.

[6] Urgent Supplemental Petition dated December 1, 1977.

[7] Comment, 18.

[8] L-35546, September 17, 1974, 59 SCRA 183.

[9] Ibid, 240-241.

[10] Ibid, 241.

[11] This excerpt appeared in a concurrence and dissent in Aquino Jr. v. Ponce Enrile at 303. It came from the writer of this opinion.

[12] Ibid.

[13] L-40004, January 31, 1975, 62 SCRA 275.

[14] Ibid. Justice Makasiar as ponente quoted Rossiter on Constitutional Dictatorship 7, 303 (1948) as well as the concurring opinion of Chief Justice Stone in Duncan v. Kahanamoku, 327 US 304.

[15] Ibid.

[16] 63 SCRA 546.

[17] Ibid, 573-574.

[18] Ibid, 576-578. The footnotes in the opinion of Justice Antonio are omitted.

[19] Ibid, 579. The ponente of this opinion, in his concurrence and dissent, was of a different mind. His view, however, did not prevail. In speaking for the Court, therefore, he feels bound by the decision reached by the majority.

[20] Article XVII of the Constitution.

[21] Gumaua v. Major General Romeo Espino, L-36188, February 29, 1980.

[22] L-36142, March 31, 1973, 50 SCRA 30.

[23] L-44640, October 12, 1976, 73 SCRA 333.

[24] According to Article II, Section 8: "Civilian authority is at all times supreme over the military." It may be observed parenthetically that distinguished counsel for petitioner continued his extensive practice before the courts of the land during the period characterized by him as without any constitutional foundation in vehement language reminiscent of what Dean Pound called Epithetical Jurisprudence.

SEPARATE DISSENTING OPINION**TEEHANKEE, J.:**

On the basic issue of the invalidity of trial of civilians, like petitioner, by military tribunals or commissions, and reiterating my dissent in *Aquino vs. Military Commission No. 2, et al.*[1] and *Gumaua vs. Espino*[2] that civilians are entitled to trial by the regular civil courts which have remained open and have been regularly functioning all this time notwithstanding the imposition of martial law on September 21, 1972 and that their constitutional right to due process demands that they be tried by judicial process by the regular independent courts of justice with all the specific constitutional, statutory and procedural safeguards embodied in the judicial process and not by executive or military process, I vote to grant the petition at bar for the issuance of a writ of prohibition declaring null and void the proceedings against petitioner before respondent military commission and directing that the charges against him be duly endorsed to the corresponding civil court for proper trial and determination.

1. For brevity's sake, I will simply refer here to my extensive dissenting opinions in the cited cases. It need be emphasized only that courts-martial or military courts or commissions are admittedly not courts and do not form part of the judicial system exercising judicial power which is vested by the Constitution exclusively in the Supreme Court and such inferior courts as are duly established by law.[3] As held by the Court in *Ruffy vs. Chief of Staff*,[4] "Courts-martial are agencies of executive character..... and they are in fact simply instrumentalities of the executive power, provided by Congress for the President as Commander in Chief, to aid him in properly commanding the army and navy and enforcing discipline therein, and utilized under his orders or those of his authorized military representatives."

As stated by the now Chief Justice in his separate opinion in *Gumaua*, supra, referring to his earlier concurring and dissenting opinion in *Aquino vs. Military Commission No. 2*, supra, "were it not for the above mandate of the Transitory Provisions [Article XVII, section 3, par. (2), 1973 Constitution], the submission of petitioner as to a military commission being devoid of jurisdiction over civilians elicits approval. The controlling principle, to my

mind, is that supplied in the opinion of the United States Supreme Court in *Duncan v. Kahanamoku* [327 U.S. 304, 322 (1946)], a decision impressed with the greatest relevance inasmuch as it interpreted the specific section found in the Hawaiian Organic Act, which was also a feature of the Philippine Autonomy Act, the source of the martial law provision in the 1935 Constitution.' As was pointed out in the *Duncan* opinion penned by Justice Black: 'Courts and their procedural safeguards are indispensable to our system of government. They were set up by our founders to protect the liberties they valued. Ex parte Quirin, supra, 317 U.S. at page 19, 63 S. Ct. at page 6, 87 L. Ed. 3. Our system of government clearly is the antithesis of total military rule and the founders of this country are not likely to have contemplated complete military dominance within the limits of a Territory made part of this country and not recently taken from an enemy. They were opposed to governments that placed in the hands of one man the power to make, interpret and enforce the laws. Their philosophy has been the people's throughout the history. For that reason we have maintained legislatures chosen by citizens or their representatives and courts and juries to try those who violate legislative enactments. We have always been especially concerned about the potential evils of summary criminal trials and have guarded against them by provisions embodied in the constitution itself.' x x x The phrase 'martial law' as employed in that Act, therefore, while intended to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the island against actual or threatened rebellion or invasion, [it] was not intended to authorize the supplanting of courts by military courts." [5]

For those who subscribe to the fundamental principle first enunciated in *Ex parte Milligan* [6] that "The Constitution is a law for rulers and for people equally in war and in peace and covers with the shield of its protection all classes of men at all times and under all circumstances" and developed by Willis that "Martial law proper, that is, military law in case of insurrection, riots, and invasions, is not a substitute for the civil law, but is rather an aid to the execution of civil law. Declarations of martial law go no further than to warn citizens that the executive has called upon the military power to assist him in the maintenance of law and order. While martial law is in force, no new powers are given to the executive and no civil rights of the individual, other than the writ of habeas corpus, are suspended. The relations between the citizen and his state are unchanged," [7] the trial of civilians by military courts for civil offenses under general law (in contrast to military law) must be deemed contrary to the cardinal postulate of supremacy of civilian authority over the military expressly mandated in both the 1935 and 1973 Constitutions.

2. It will be recalled that after the filing of the petition at bar on October 25, 1977 and the imposition of the death sentence on petitioner and his co-accused by respondent military commission in the evening of November 25, 1977 (despite counsel's averment that his motion for postponement to prepare for trial had been granted by the commission's law member but later disregarded by the commission and that petitioner had as yet to present a single defense witness), the President of the Philippines issued an Order on November 30, 1977 after taking note of petitioner's "serious dispute (of) the actuations of the military commission" and assertions of having been summarily denied due process and the right to present evidence in his defense, ordering the reopening of the trial as follows:

"While according to the records, ample opportunity has been granted the accused to exercise their rights under the law and the Constitution, in view of the severity of the charges against them and the consequent penalty that has been imposed upon them, that is death, and although the trial has lasted several years during which time the military commission has given them every opportunity to have a fair trial, in the interest of justice, you are hereby directed to see to it that they get another opportunity and that the military commission reopen the trial for the purpose of receiving such arguments, witnesses and other evidence as the two accused and other co-accused may wish to present." [8]

Such reopening has not proceeded since petitioner and his co-accused challenged the whole membership of the commission and questioned the right of the same respondent military court, as directed by respondent Secretary (now Minister) of National Defense to proceed with the reception of "argument, testimony of witnesses and other evidence" of the accused. The majority judgment, penned by the Chief Justice, does not touch this point, but I hold that if the military commission's jurisdiction to try civilians were upheld as the majority has so done, still Article 50-A of the Articles of War on rehearings expressly and categorically provides *inter alia* that "Such rehearing shall take place before a court composed of officers or officers and enlisted men, not members of the court which first heard the case" and therefore there should be constituted an altogether different military commission composed of members entirely different from those who first heard the case, and had already adjudged the trial counsel's evidence sufficient to convict and impose the death penalty and who could hardly be expected to have the cold neutrality of an impartial judge and have an open mind at the rehearing.[9] And consequently, in such event the new military commission composed of entirely new members should rehear the entire case as a matter of simple justice and fair play, specially if it be established as he claims, that he had been misled and deceived into waiving his right to be present at the trial.

3. Petitioner's submittal that from and after the approval of the constitutional amendments of October 17, 1976, respondent military commission was deprived of any power to try petitioner as in the plebiscite then held, "the Filipino people terminated the authoritarian regime or military dictatorship established by the Commander-in-Chief of the Armed Forces of the Philippines," although imprecisely formulated, is but an echo of the President's own declaration in 1974 that "martial law should have legally terminated on January 17, 1973, when the New Constitution was ratified" but that "the popular clamor manifested in the referendum [was] that the National Assembly be temporarily suspended" and the reaction in the July, 1973 referendum "was violently against stopping the use of martial law powers," adding that "I intend to submit this matter at least once a year to the people, and when they say we should shift to the normal functions of government, then we will do so." [10]

Thus, in my separate opinion in *Gonzales vs. Comelec*, [11] I held that "(T)he general question of 'Do you want the President to continue exercising such [martial law] powers' even if viewed as 'purely consultative' is subject to grave constitutional objection. The continuance of martial law hardly presents an appropriate subject for submittal in a referendum. In *Aquino, Jr. vs. Enrile*, a good number of the members of the Court voted to erode the Court's unanimous ruling to the contrary in *Lansang vs. Garcia* and held that 'the determination of the necessity for the exercise of the power to declare martial law [and also to declare its termination] is within the exclusive domain of the President and his determination is final and conclusive upon the courts and upon all persons.' But when the conditions of rebellion (or invasion) which have called for the declaration of martial law under the Constitution no longer exist in the President's determination, then martial law itself thereby ceases to exist, regardless of the holding of any referendum or the outcome thereof. Prescinding from the question of whether it is subject to judicial review and determination, the termination of martial law is not a matter of choice for the people (who much less than the courts can have 'judicially discoverable and manageable standards' nor 'the complete picture of the emergency' to make the determination) but a matter of the President's constitutional duty to determine and declare the termination of martial law when the necessity therefor has ceased. As necessity creates the rule, so it limits its duration."

It is gratifying to note from press reports the unqualified announcement of the President as to the imminent lifting of martial law without resort to any referendum.

4. As to the ruling in *Aquino vs. Comelec* [12] citing the President's martial law powers as Commander-in-Chief to justify the trial of civilians by military commissions, suffice it to quote my contrary opinion therein that "(R)ossiter, as extensively cited by the Solicitor General, has thus stressed that 'the measures adopted in the

prosecution of a constitutional dictatorship should never be permanent in character or effect. * * * The actions directed to this end should therefore be provisional. * * * Permanent laws, whether adopted in regular or irregular times are for parliaments to enact,' and that 'a radical act of permanent character, one working lasting changes in the political and social fabric (which) is indispensable to the successful prosecution of the particular constitutional dictatorship * * * must be resolutely taken and openly acknowledged [as exemplified by U. S. President Lincoln's emancipation proclamation] * * *. Nevertheless, it is imperative that any action with such lasting effects should eventually receive the positive approval of the people or of their representatives in the legislature," and "(E)ven from the declared Presidential objective of using Martial Law powers to institutionalize reforms and to remove the causes of rebellion, such powers by their very nature and from the plain language of the Constitution are limited to such necessary measures as will safeguard the Republic and suppress the rebellion (or invasion) and measures directly connected with removing the root causes thereof, such as the tenant emancipation proclamation. The concept of martial law may not be expanded, as the main opinion does, to cover the lesser threats of 'worldwide recession, inflation or economic crisis which presently threatens all nations in derogation of the Constitution."

5. The "law of the land" or so-called "validating provision" in the Transitory Provision, Article XVII, section 3, paragraph 2 of the 1973 Constitution cannot be invoked as "dissipating all doubts" as to the legality or jurisdiction of the military commissions' challenged acts over civilians like petitioner.

I pointed out in my separate opinion in *Aquino vs. Military Commission No. 2*, supra, that "(T)he cited Transitory Provision, known as the validating provision puts the imprimatur of a law upon the President's acts and decrees under martial law which were not within or beyond his allocated constitutional powers. As aptly stated by Justice Muñoz Palma in her separate opinion in the Habeas Corpus cases, the people could not by the 1973 Constitution have thrown away 'all their precious liberties, the sacred institutions enshrined in their Constitution, for that would be the result if we say that the people have stamped their approval on all the acts of the President executed after the proclamation of martial law irrespective of any taint of injustice, arbitrariness, oppression, or culpable violation of the Constitution that may characterize such acts. Surely, the people acting through their constitutional delegates could not have written a fundamental law which guarantees their rights to life, liberty and property, and at the same time in the same instrument provide for a weapon that could spell death to these rights,'" adding that "(T)he contention that the decrees and orders on military commissions as 'part of the law of the land are beyond question' really begs the question, for as was stressed by Justice Muñoz Palma, it would be 'incongruous' that while the acts of the regular National Assembly as the 'permanent repository of legislative power' are subject to judicial review, 'the acts of its temporary substitute, that is the incumbent President' such as the decrees and orders in question would be claimed to be 'beyond question,'" and that "(I)ndeed, the majority resolution recognizes that 'Of course, from the fact that the President has this range of discretion, it does not necessarily follow that every action he may take, no matter how unjustified by the exigency, would bear the imprimatur of validity.'"

The imperative consideration is that the general Transitory Provision could in no way supersede or nullify the specific allocation of jurisdiction and judicial power to the Supreme Court and the regular courts established by law as mandated in the 1973 Constitution itself to the exclusion of executive or non-judicial instrumentalities like the military commissions, and therefore any decrees or orders encroaching upon the jurisdiction of the regular courts over civilians, far from being validated by the Transitory Provision must be deemed abrogated by the Constitution itself.

I thus concluded that "(W)hile the decrees and orders on military tribunals were made part of the law of the land by the cited Transitory Provision (assuming that they had been properly submitted for the purpose) still this general and transitory provision can in no way supersede or nullify the specific allocation of jurisdiction and judicial power to the Supreme Court and the regular courts of justice as established by law under Article X

Section 1 of the Constitution nor their proper exercise of jurisdiction to the exclusion of non-judicial agencies, under Section 8 of Article XVII which provides that:

'SEC. 8. All courts existing at the time of the ratification of this Constitution shall continue and exercise their jurisdiction, until otherwise provided by law in accordance with this Constitution, and all cases pending in said courts shall be heard, tried, and determined under the laws then in force. The provisions of the existing Rules of Court not inconsistent with this Constitution shall remain operative unless amended, modified, or repealed by the Supreme Court or the National Assembly.'

and necessarily "(I)nsofar as the questioned decrees and orders encroached upon the jurisdiction of the regular courts over the trial of civilians, they must be deemed abrogated by the cited provisions of the Constitution itself, in accordance with the established rule that statutes as well as executive orders and regulations that are inconsistent with and transgress the provisions of a New Constitution must be deemed repealed thereby."

6. Withal, the caveat in the last part of the Chief Justice's opinion for the Court that "(N)othing said in this opinion is to be construed or to be understood as in any way lending approval to any failure to accord full respect to all the rights of an accused person conformably to my concurrence and dissent set forth in the aforesaid Aquino, Jr. v. Military Commission decision and in accordance with the Universal Declaration of Human Rights as well as the Covenant on Civil and Political rights," is to be welcomed.

As I stressed in my separate opinion in Aquino vs. Military Commission No. 2, supra, citing the treatise on martial law of then Judge Advocate General, later Associate Justice, Guillermo S. Santos, "Necessity limits both the extent of powers that may be exercised under martial law, and the duration of its exercise. No life may be taken, no individual arrested or confined, or held for trial, no property destroyed, or appropriated, no rights of the individual may be curtailed or suspended except where necessity justifies such interference with the person or the property. Any action on the part of the military that is not founded on the reasonable demands of necessity is a gross usurpation of power, illegal, unjustified, and improper. The broad mantle of martial law cannot cover acts illegal because not justified by necessity, nor proper under the circumstances. This principle is based not only upon the fundamental precepts of constitutionalism, but rests on sound reason - that where the action of the matter is not necessary for the public ends of the state they are illegal, and the mere fact that martial law exists will not be a ground for their justification." [13]

7. The Court has taken judicial notice of the President's announcement of the phase-out of the military commissions and of his order to transfer the pending cases therein to the regular civil courts. [14] It should be noted that with the implementation of such transfer, the serious challenge made by petitioner against respondent commission's competence and authority under Article 50-A of the Articles of War to hear his case at the reopening as ordered by the President since November 30, 1977, (supra, paragraph 2 hereof), would become moot, and the charges against petitioner should forthwith be transferred to the corresponding civil court for proper proceedings and determination.

[1] 63 SCRA 546 (May 9, 1975).

[2] 96 SCRA 402 (Feb. 29, 1980).

[3] Article X, section 1, 1973 Constitution.

[4] 75 Phil. 875 (1946); emphasis supplied.

[5] Emphasis supplied.

[6] 4 Wall. 123 (1866).

[7] Willis on Constitutional Law, 449 (1936).

[8] Rollo; Petitioner's Memorandum, at page 653.

[9] The cited Article of War reads: "ART. 50-A. Rehearing. - When the President or any reviewing or confirming authority disapproves or vacates a sentence the execution of which has not heretofore been duly ordered, he may authorize or direct a rehearing. Such rehearing shall take place before a court composed of officers or officers and enlisted men, not members of the court which first heard the case. Upon such rehearing the accused shall not be tried for any offense of which he was not found guilty by the first court, and no sentence in excess of or more severe than the original sentence shall be imposed unless the sentence be based upon a finding of guilty of an offense not considered upon the merits in the original proceedings: Provided, That such rehearing shall be had in all cases where a finding and sentence have been vacated by reason of the action of the board of review approved by the Judge Advocate General holding the record of trial, legally insufficient to support the findings or sentence, or errors of law have been committed injuriously affecting the substantial rights of the accused unless in accord with such action, and the recommendations of the Judge Advocate General thereon, the findings or sentence are approved in part only, or the record is returned for revision, or unless the case is dismissed by order of the reviewing or confirming authority. After any such rehearing had on the order of the President, the record of trial shall, after examination by the board of review, be transmitted by the Judge Advocate General, with the Board's opinion and his recommendations to the Chief of Staff for the action of the President. (As amended by RA 516)". [Emphasis supplied.]

[10] U.S. News and World Report interview with President Marcos, reported in Phil. Daily Express issue of August 18, 1974, cited in my separate opinion in Aquino vs. Ponce Enrile, 59 SCRA 183, 321 (1974).

[11] G.R. No. L-40117, February 22, 1975, reported in the Supreme Court's publication of cases under Martial Law and the New Society, 3rd Ed., page 1405; emphasis supplied.

[12] 62 SCRA 275 (January 31, 1975).

[13] Santos: Martial Law, 2nd ed., pp. 77-78, citing Winthrop, p. 820; Fairman, p. 48; Wiener, p. 14.

[14] See Jose Ma. Sison, et al. vs. Ponce Enrile, L-49579, promulgated also on this date.

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