

JOSUE JAVELLANA, PETITIONER, VS. THE EXECUTIVE SECRETARY, THE SECRETARY OF NATIONAL DEFENSE, THE SECRETARY OF JUSTICE AND THE SECRETARY OF FINANCE, RESPONDENTS.

G.R. No. L-36142. March 31, 1973

Ponente: CONCEPCION, C.J.

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CONCEPCION, C.J.:

The above-entitled five (5) cases are a sequel of cases G. R. Nos. L-35935, L-35929, L-35940, L-35941, L-35942, L-35948, L-35953, L-35961, L-35965 and L-35979, decided on January 22, 1973, to which We will hereafter refer collectively as the plebiscite cases.

Background of the Plebiscite Cases

The factual setting thereof is set forth in the decision therein rendered, from which We quote:

"On March 16, 1967, Congress of the Philippines passed Resolution No. 2, which was amended by Resolution No. 4 of said body, adopted on June 17, 1969, calling a Convention to propose amendments to the Constitution of the Philippines. Said Resolution No. 2, as amended, was implemented by Republic Act No. 6132, approved on August 24, 1970, pursuant to the provisions of which the election of delegates to said Convention was held on November 10, 1970, and the 1971 Constitutional Convention began to perform its functions on June 1, 1971. While the Convention was in session on September 21, 1972, the President issued Proclamation No. 1081 placing the entire Philippines under Martial Law. On November 29, 1972, the Convention approved its Proposed Constitution of the Republic of the Philippines. The next day, November 30, 1972, the President of the Philippines issued Presidential Decree No. 73, 'submitting to the Filipino people for ratification or rejection the Constitution of the Republic of the Philippines proposed by the 1971 Constitutional Convention, and appropriating funds therefor,' as well as setting the plebiscite for said ratification or rejection of the Proposed Constitution on January 15, 1973.

"Soon after, or on December 7, 1972, Charito Planas filed, with this Court, Case G.R. No. L-35925, against the Commission on Elections, the Treasurer of the Philippines and the Auditor General, to enjoin said 'respondents or their agents from implementing Presidential Decree No. 73, in any manner, until further orders of the Court;' upon the grounds, inter alia, that said Presidential Decree 'has no force and effect as law because the calling * * * of such plebiscite, the setting of guidelines for the conduct of the same, the prescription of the ballots to be used and the question to be answered by the voters, and the appropriation of public funds for the purpose, are, by the Constitution, lodged exclusively in Congress, * * *,' and 'there is no proper submission to the people of said Proposed Constitution set for January 15, 1973, there being no freedom of speech, press and assembly, and there being no sufficient time to inform the people of the contents thereof.'

"Substantially identical actions were filed, on December 8, 1972, by Pablo C. Sanidad against the Commission on Elections (Case G.R. No. L-35929); on December 11, 1972, by Gerardo Roxas, et al., against the Commission on Elections, the Director of Printing, the National Treasurer and the Auditor General (Case G.R. No. L-35940), by Eddie B. Monteclaro against the Commission on Elections and the Treasurer of the Philippines (Case G.R. No. L-35941), and by Sedfrey A. Ordoñez, et al. against the National Treasurer and the

Commission on Elections (Case G.R. No. L-35942); on December 12, 1972, by Vidal Tan, et al., against the Commission on Elections, the Treasurer of the Philippines, the Auditor General and the Director of Printing (Case G.R. No. L-35948), and by Jose W. Diokno and Benigno S. Aquino against the Commission on Elections (Case G.R. No. L-35953); on December 14, 1972, by Jacinto Jimenez against the Commission on Elections, the Auditor General, the Treasurer of the Philippines and the Director of the Bureau of Printing (Case G.R. No. L-35961), and by Raul M. Gonzales against the Commission on Elections, the Budget Commissioner, the National Treasurer and the Auditor General (Case G.R. No. L-35965); and on December 16, 1972, by Ernesto C. Hidalgo against the Commission on Elections, the Secretary of Education, the National Treasurer and the Auditor General (Case G.R. No. L-35979).

"In all these cases, except the last (G.R. No. L-35979), the respondents were required to file their answers 'not later than 12:00 (o'clock) noon of Saturday, December 16, 1972.' Said cases were, also, set for hearing and partly heard on Monday, December 18, 1972, at 9:30 a.m. The hearing was continued on December 19, 1972. By agreement of the parties, the aforementioned last case - G.R. No. L-35979 - was also, heard, jointly with the others, on December 19, 1972. At the conclusion of the hearing, on that date, the parties in all of the aforementioned cases were given a short period of time within which 'to submit their notes on the points they desire to stress.' Said notes were filed on different dates, between December 21, 1972, and January 4, 1973.

"Meanwhile, or on December 17, 1972, the President had issued an order temporarily suspending the effects of Proclamation No. 1081, for the purpose of free and open debate on the Proposed Constitution. On December 23, the President announced the postponement of the plebiscite for the ratification or rejection of the Proposed Constitution. No formal action to this effect was taken until January 7, 1973, when General Order No. 20 was issued, directing 'that the plebiscite scheduled to be held on January 15, 1973, be postponed until further notice.' Said General Order No. 20, moreover, 'suspended in the meantime' the 'order of December 17, 1972, temporarily suspending the effects of Proclamation No. 1081 for purposes of free and open debate on the proposed Constitution.'

"In view of these events relative to the postponement of the aforementioned plebiscite, the Court deemed it fit to refrain, for the time being, from deciding the aforementioned cases, for neither the date nor the conditions under which said plebiscite would be held were known or announced officially. Then, again, Congress was, pursuant to the 1935 Constitution, scheduled to meet in regular session on January 22, 1973, and since the main objection to Presidential Decree No. 73 was that the President does not have the legislative authority to call a plebiscite and appropriate funds therefor, which Congress unquestionably could do, particularly in view of the formal postponement of the plebiscite by the President - reportedly after consultation with, among others, the leaders of Congress and the Commission on Elections the Court deemed it more imperative to defer its final action on these cases.

"In the afternoon of January 12, 1973, the petitioners in Case G.R. No. L-35948 filed an 'urgent motion,' praying that said case be decided 'as soon as possible, preferably not later than January 15, 1973.' It was alleged in said motion, inter alia:

'6. That the President subsequently announced the issuance of Presidential Decree No. 86 organizing the so-called Citizens Assemblies, to be consulted on certain public questions [Bulletin Today, January 1, 1973];

'7. That thereafter it was later announced that "the Assemblies will be asked if they favor or oppose -

"[1] The New Society;

"[2] Reforms instituted under Martial Law;

"[3] The holding of a plebiscite on the proposed new Constitution and when (the tentative new dates given following the postponement of the plebiscite from the original date of January 15 are February 19 and March 5);

"[4] The opening of the regular session slated on January 22 in accordance with the existing Constitution despite Martial Law." [Bulletin Today, January 3, 1973.]

'8. That it was later reported that the following are to be the forms of the questions to be asked to the Citizens Assemblies: -

"[1] Do you approve of the New' Society?

"[2] Do you approve of the reform measures under martial law?

"[3] Do you think that Congress should meet - again in regular session?

"[4] How soon would you like the plebiscite on the new Constitution to be held?" [Bulletin Today, January 5, 1973].

'9. That the voting by the so-called Citizens Assemblies was announced to take place during the period from January 10 to January 15, 1973;

'10. That on January 10, 1973, it was reported that one more question would be added to the four (4) questions previously announced, and that the forms of the questions would be as follows: -

"[1] Do you like the New Society?

"[2] Do you like the reforms under martial law?

"[3] Do you like Congress again to hold sessions?

"[4] Do you like the plebiscite to be held later?

"[5] Do you like the way President Marcos is running the affairs of the government?" [Bulletin Today, January 10, 1973; additional question underscored.]

'11. That on January 11, 1973, it was reported that six (6) more questions would be submitted to the so-called Citizens Assemblies

"[1] Do you approve of the citizens assemblies as the base of popular government to decide issues of national interests?

"[2] Do you approve of the new constitution?

"[3] Do you want a plebiscite to be called to ratify the new Constitution?

"[4] Do you want the elections to be held in November, 1973 in accordance with the provisions of the 1935 Constitution?

"[5] If the elections would not be held, when do you want the next elections to be called?

"[6] Do you want martial law to continue?"

[Bulletin Today, January 11, 1973; italics supplied.]

'12. That according to reports, the returns with respect to the six (6) additional questions quoted above will be on a form similar or identical to Annex "A" hereof;

'13. That attached to page 1 of Annex "A" is another page, which we marked as Annex "A-1", and which reads:

"COMMENTS ON

QUESTION No. 1

In order to broaden the base of citizens' participation in government.

QUESTION No. 2

But we do not want the Ad Interim Assembly to be convoked. Or if it is to be convened at all, it should not be done so until after at least seven (7) years from the approval of the New Constitution by the Citizens Assemblies.

QUESTION No. 3

The vote of the Citizens Assemblies should already be considered the plebiscite on the New Constitution.

If the Citizens Assemblies approve of the New Constitution, then the new Constitution should be deemed ratified.

QUESTION No. 4

We are sick and tired of too frequent election. We are fed up with politics, of so many debates and so much expenses.

QUESTION No. 5

Probably a period of at least seven (7) years moratorium on elections will be enough for stability to be established in the country, for reforms to take root and normalcy to return.

QUESTION No. 6

We want President Marcos to continue with Martial Law. We want him to exercise his powers with more authority. We want him to be strong and firm so that he can accomplish all his reform programs and establish normalcy in the country. If all other measures fail, we want President Marcos to declare a revolutionary government along the lines of the new Constitution without the ad interim Assembly."

'Attention is respectfully invited to the comments on "Question No. 3," which reads: -

"QUESTION No. 3

The vote of the Citizens Assemblies should be considered the plebiscite on the New Constitution.

If the Citizens Assemblies approve of the New Constitution, then the new Constitution should be deemed ratified."

This, we are afraid, and therefore allege, is pregnant with ominous possibilities.

'14. That, in the meantime, speaking on television and over the radio, on January 7, 1973, the President announced that the limited freedom of debate on the proposed Constitution was being withdrawn and that the proclamation of martial law and the orders and decrees issued thereunder would thenceforth strictly be enforced [Daily Express, January 8, 1973];

'15. That petitioners have reason to fear, and therefore state, that the question added in the last list of questions to be asked to the Citizens Assemblies, namely:—

"Do you approve of the New Constitution?" – in relation to the question following it:—

"Do you still want a plebiscite to be called to ratify the new Constitution?" –

would be an attempt to by-pass and short-circuit this Honorable Court before which the question of the validity of the plebiscite on the proposed Constitution is now pending;

'16. That petitioners have reason to fear, and therefore allege, that if an affirmative answer to the two questions just referred to will be reported then this Honorable Court and the entire nation will be confronted with a fait accompli which has been attained in a highly unconstitutional and undemocratic manner;

'17. That the fait accompli would consist in the supposed expression of the people approving the proposed Constitution;

'18. That, if such event would happen, then the case before this Honorable Court could, to all intents and purposes, become moot because, petitioners fear, and they therefore allege, that on the basis of such supposed expression of the will of the people through the Citizens Assemblies, it would be announced that the proposed Constitution, with all its defects, both congenital and otherwise, has been ratified;

'19. That, in such a situation, the Philippines will be facing a real crisis and there is likelihood of confusion if not chaos, because then the people and their officials will not know which Constitution is in force.

'20. That the crisis mentioned above can only be avoided if this Honorable Court will immediately decide and announce its decision on the present petition;

'21. That with the withdrawal by the President of the limited freedom of discussion on the proposed Constitution which was given to the people pursuant to Sec. 3 of Presidential Decree No. 73, the opposition of respondents to petitioners' prayer that the proposed plebiscite be prohibited has now collapsed and that a free plebiscite can no longer be held.'

"At about the same time, a similar prayer was made in a 'manifestation' filed by the petitioners in L-35949, 'Gerardo Roxas, et al. vs. Commission on Elections, et al.,' and L-35942, 'Sedfrey A. Ordoñez, et al. vs. The National Treasurer, et al.'

"The next day, January 13, 1973, which was a Saturday, the Court issued a resolution requiring the respondents in said three (3) cases to comment on said 'urgent motion' and 'manifestation,' 'not later than Tuesday noon, January 16, 1973.' Prior thereto, or on January 15, 1973, shortly before noon, the petitioners in said G.R. No. L-35948 filed a 'supplemental motion for issuance of restraining order and inclusion of additional respondents,' praying

'* * * that a restraining order be issued enjoining and restraining Commission on Elections, as well as the Department of Local Governments and its head, Secretary Jose Roño; the Department of Agrarian Reforms and its head, Secretary Conrado Estrella; the National Ratification Coordinating Committee and its Chairman, Guillermo de Vega; their deputies, subordinates and substitutes, and all other officials and persons who may be assigned such task, from collecting, certifying, and announcing and reporting to the President or other officials concerned, the so-called Citizens' Assemblies referendum results allegedly obtained when they were supposed to have met during the period comprised between January 10 and January 15, 1973, on the two questions quoted in paragraph 1 of this Supplemental Urgent Motion.'

"In support of this prayer, it was alleged –

'3. That petitioners are now before this Honorable Court in order to ask further that this Honorable Court issue a restraining order enjoining herein respondents, particularly respondent Commission on Elections as well as the Department of Local Governments and its head, Secretary Jose Roño; the Department of Agrarian Reforms and its head, Secretary Conrado Estrella; the National Ratification Coordinating Committee and its Chairman, Guillermo de Vega; and their deputies, subordinates and/or substitutes, from collecting, certifying, announcing

and reporting to the President the supposed Citizens' Assemblies referendum results allegedly obtained when they were supposed to have met during The period between January 10 and January 15, 1973, particularly on the two questions quoted in paragraph 1 of this Supplemental Urgent Motion;

'4. That the proceedings of the so-called Citizens' Assemblies are illegal, null and void particularly insofar as such proceedings are being made the basis of a supposed consensus for the ratification of the proposed Constitution because: -

[a] The elections contemplated in the Constitution, Article XV, at which the proposed constitutional amendments are to be submitted for ratification, are elections at which only qualified and duly registered voters are permitted to vote, whereas, the so-called Citizens' Assemblies were participated in by persons 15 years of age and older, regardless of qualifications or lack thereof, as prescribed in the Election Code;

[b] Elections or plebiscites for the ratification of constitutional amendments contemplated in Article XV of the Constitution have provisions for the secrecy of choice and of vote, which is one of the safeguards of freedom of action, but votes in the Citizens' Assemblies were open and were cast by raising hands;

[c] The Election Code makes ample provisions for free, orderly and honest elections, and such provisions are a minimum requirement for elections or plebiscites for the ratification of constitutional amendments, but there were no similar provisions to guide and regulate proceedings of the so-called Citizens' Assemblies;

[d] It is seriously to be doubted that, for lack of material time, more than a handful of the so-called Citizens' Assemblies have been actually formed, because the mechanics of their organization were still being discussed a day or so before the day they were supposed to begin functioning: -

'Provincial governors and city and municipal mayors had been meeting with barrio captains and community leaders since last Monday [January 8, 1973] to thresh out the mechanics in the formation of the Citizens' Assemblies and the topics for discussion.' [Bulletin Today, January 10, 1973]

'It should be recalled that the Citizens' Assemblies were ordered formed only at the beginning of the year [Daily Express, January 1, 1973], and considering the lack of experience of the local organizers of said assemblies, as well as the absence of sufficient guidelines for organization, it is too much to believe that such assemblies could be organized at such a short notice.

'5. That for lack of material time, the appropriate amended petition to include the additional officials and government agencies mentioned in paragraph 3 of this Supplemental Urgent Motion could not be completed because, as noted in the Urgent Motion of January 12, 1973, the submission of the proposed Constitution to the Citizens' Assemblies was not made known to the public until January 11, 1973. But be that as it may, the said additional officials and agencies may be properly included in the petition at bar because: -

[a] The herein petitioners have prayed in their petition for the annulment not only of Presidential Decree No. 73, but also of "any similar decree, proclamation, order or instruction."

so that Presidential Decree No. 86, insofar at least as it attempts to submit the proposed Constitution to a plebiscite by the so-called Citizens' Assemblies, is properly in issue in this case, and those who enforce, implement, or carry out the said Presidential Decree No. 86, and the instructions incidental thereto 'clearly fall within the scope of this petition;

[b] In their petition, petitioners sought the issuance of a writ of preliminary injunction restraining not only the respondents named in the petition but also their "agents" from implementing not only Presidential Decree No. 73, hut also "any other proclamation in relation to the holding of a plebiscite on January 15, 1973 for the purpose of

submitting to the Filipino people for their ratification or rejection the 1972 Draft or proposed Constitution approved by the Constitutional Convention on November 30, 1973"; and finally,

[c] Petitioners prayed for such other relief which may be just and equitable. [p. 39, Petition].

'Therefore, viewing the case from all angles, the officials and government agencies mentioned in paragraph 3 of this Supplemental Urgent Motion, can lawfully be reached by the processess of this Honorable Court by reason of this petition, considering, furthermore, that the Commission on Elections has under our laws the power, among others, of:

"(a) Direct and immediate supervision and control over national, provincial, city, municipal and municipal district officials required by law to perform duties relative to the conduct of elections on matters pertaining to the enforcement of the provisions of this Code * * *. " [Election Code of 1971, Sec. 3]

'6. That unless the petition at bar is decided immediately and the Commission on Elections, together with the officials and government agencies mentioned in paragraph 3 of this Supplemental Urgent Motion are restrained or enjoined from collecting, certifying, reporting or announcing to the President the results of the alleged voting of the so-called Citizens' Assemblies, irreparable damage will be caused to the Republic of the Philippines, the Filipino people, the cause of freedom and democracy, and the petitioners herein because:

[a] After the result of the supposed voting on the questions mentioned in paragraph 1 hereof shall have been announced, a conflict will arise between those who maintain that the 1935 Constitution is still in force, on the one hand, and those who will maintain that it has been superseded by the proposed Constitution, on the other, thereby creating confusion, if not chaos;

[b] Even the jurisdiction of this Court will be subject to serious attack because the advocates of the theory that the proposed Constitution has been ratified by reason of the announcement of the results of the proceedings of the so-called Citizens' Assemblies will argue that, General Order No. 3, which shall also be deemed ratified pursuant to the Transitory Provisions of the proposed Constitution, has placed Presidential Decree Nos. 73 and 86 beyond the reach and jurisdiction of this Honorable Court.'

"On the same date - January 15, 1973 - the Court passed a resolution requiring the respondents in said case G.R. No. L-35948 to 'file an answer to the said motion not later than 4 P.M., Tuesday, January 16, 1973,' and setting the motion for hearing 'on January 17, 1973, at 9:30 a.m.' While the case was being heard, on the date last mentioned, at noontime, the Secretary of Justice called on the writer of this opinion and said that, upon instructions of the President, he (the Secretary of Justice) was delivering to him (the writer) a copy of Proclamation No. 1102, which had just been signed by the President. Thereupon, the writer returned to the Session Hall and announced to the Court, the parties in G.R. No. L-35948 – inasmuch as the hearing in connection therewith was still going on – and the public there present that the President had, according to information conveyed by the Secretary of Justice, signed said Proclamation No. 1102, earlier that morning. Thereupon, the writer read Proclamation No. 1102 which is of the following tenor:

'BY THE PRESIDENT OF THE PHILIPPINES

'PROCLAMATION NO. 1102

'ANNOUNCING THE RATIFICATION BY THE FILIPINO PEOPLE OF THE CONSTITUTION PROPOSED BY THE 1971 CONSTITUTIONAL CONVENTION.

'WHEREAS, the Constitution proposed by the nineteen hundred seventy-one Constitutional Convention is subject to ratification by the Filipino people;

'WHEREAS, Citizens Assemblies were created in barrios, in municipalities and in districts/wards in chartered cities pursuant to Presidential Decree No. 86, dated December 31, 1972, composed of all persons who are residents of the barrio, district or ward for at least six months, fifteen years of age or over, citizens of the Philippines and who are registered in the list of Citizen Assembly members kept by the barrio, district or ward secretary;

'WHEREAS, the said Citizens Assemblies were established precisely to broaden the base of citizen participation in the democratic process and to afford ample opportunity for the citizenry to express their views on important national issues;

'WHEREAS, responding to the clamor of the people and pursuant to Presidential Decree No. 86-A, dated January 5, 1973, the following questions were posed before the Citizens Assemblies or Barangays: Do you approve of the New Constitution? Do you still want a plebiscite to be called to ratify the new Constitution?

'WHEREAS, fourteen million nine hundred seventy-six thousand five hundred sixty one (14,976,561) members of all the Barangays (Citizens Assemblies) voted for the adoption of the proposed Constitution, as against seven hundred forty-three thousand eight hundred sixty-nine (743,869) who voted for its rejection; while on the question as to whether or not the people would still like a plebiscite to be called to ratify the new Constitution, fourteen million two hundred ninety-eight thousand eight hundred fourteen (14,298,814) answered that there was no need for a plebiscite and that the vote of the Barangays (Citizens Assemblies) should be considered as a vote in a plebiscite;

'WHEREAS, since the referendum results show that more than ninety-five (95) per cent of the members of the Barangays (Citizens Assemblies) are in favor of the new Constitution, the Katipunan ng Mga Barangay has strongly recommended that the new Constitution should already be deemed ratified by the Filipino people;

'NOW, THEREFORE, I, FERDINAND E. MARCOS, President of the Philippines, by virtue of the powers in me vested by the Constitution, do hereby certify and proclaim that the Constitution proposed by the nineteen hundred and seventy-one (1971) Constitutional Convention has been ratified by an overwhelming majority of all of the votes cast by the members of all the Barangays (Citizens Assemblies) throughout the Philippines, and has thereby come into effect.

'IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the Republic of the Philippines to be affixed.

'Done in the City of Manila, this 17th day of January, in the year of Our Lord, nineteen hundred and seventy-three.

(Sgd.) FERDINAND E. MARCOS

'President of the Philippines

'By the President:

'ALEJANDRO MELCHOR

'Executive Secretary'

"Such is the background of the cases submitted for Our determination. After admitting some of the allegations made in the petition in L-35948 and denying the other allegations thereof, respondents therein alleged in their answer thereto, by way of affirmative defenses: 1) that the 'questions raised' in said petition 'are political in character'; 2) that 'the Constitutional Convention acted freely and had plenary authority to propose not only amendments but a Constitution which would supersede the present Constitution'; 3) that 'the President's call for a plebiscite and the appropriation of funds for this purpose are valid'; 4) that 'there is not an improper submission' and 'there can be a plebiscite under Martial Law'; and 5) that the 'argument that the Proposed

Constitution is vague and incomplete, makes an unconstitutional delegation of power, includes a referendum on the proclamation of Martial Law and purports to exercise judicial power' is 'not relevant and * * * without merit.' Identical defenses were set up in the other cases under consideration.

"Immediately after the hearing held on January 17, 1973, or since the afternoon of that date, the Members of the Court have been deliberating on the aforementioned cases and, after extensive discussions on the merits thereof, have deemed it best that each Member write his own views thereon and that thereafter the Chief Justice should state the result or the votes thus cast on the points in issue. Hence, the individual views of my brethren in the Court are set forth in the opinions attached hereto, except that, instead of writing their separate opinions, some Members have preferred to merely concur in the opinion of one of our colleagues."

Then the writer of said decision expressed his own opinion on the issues involved therein, after which he recapitulated the views of the Members of the Court, as follows:

"1. There is unanimity on the justiciable nature of the issue on the legality of Presidential Decree No. 73.

"2. On the validity of the decree itself, Justices Makalintal, Castro, Fernando, Teehankee, Esguerra and myself, or six (6) Members of the Court, are of the opinion that the issue has become moot and academic, whereas Justices Barredo, Makasiar and Antonio voted to uphold the validity of said Decree.

"3. On the authority of the 1971 Constitutional Convention to pass the proposed Constitution or to incorporate therein the provisions contested by the petitioners in L-35948, Justices Makalintal, Castro, Teehankee and Esguerra opine that the issue has become moot and academic. Justices Fernando, Barredo, Makasiar, Antonio and myself have voted to uphold the authority of the Convention.

"4. Justice Fernando, likewise, expressed the view that the 1971 Constitutional Convention had authority to continue in the performance of its functions despite the proclamation of Martial Law. In effect, Justices Barredo, Makasiar and Antonio hold the same view.

"5. On the question whether the proclamation of Martial Law affected (the proper submission of the proposed Constitution to a plebiscite, insofar as the freedom essential therefor is concerned, Justice Fernando is of the opinion that there is a repugnancy between the election contemplated under Art. XV of the 1935 Constitution and the existence of Martial Law, and would, therefore, grant the petitions were they not moot and academic. Justices Barredo, Antonio and Esguerra are of the opinion that that issue involves questions of fact which cannot be predetermined, and that Martial law per se does not necessarily preclude the factual possibility of adequate freedom of the purposes contemplated.

"6. On Presidential Proclamation No. 1102, the following views were expressed:

"a. Justices Makalintal, Castro, Fernando, Teehankee, Makasiar, Esguerra and myself are of the opinion that the question of validity of said Proclamation has not been properly raised before the Court, which, accordingly, should not pass upon such question.

"b. Justice Barredo holds that the issue on the constitutionality of Proclamation No. 1102 has been submitted to and should be determined by the Court, and that the 'purported ratification of the Proposed Constitution * * * based on the referendum among Citizens' Assemblies falls short of being in strict conformity with the requirements of Article XV of the 1935 Constitution,' but that such unfortunate drawback notwithstanding, 'considering all other related relevant circumstances, * * * the new Constitution is legally recognizable and should be recognized as legitimately in force.'

"c. Justice Zaldivar maintains unqualifiedly that the Proposed Constitution has not been ratified in accordance with Article XV of the 1935 Constitution, and that, accordingly, it has no force and effect whatsoever.

"d. Justice Antonio feels 'that the Court is not competent to act' on the issue whether the Proposed Constitution

has been ratified by the people or not, 'in the absence of any judicially discoverable and manageable standards,' since the issue 'poses a question of fact.'

"7. On the question whether or not these cases should be dismissed, Justices Makalintal, Castro, Barredo, Makasiar, Antonio and Esguerra voted in the affirmative, for the reasons set forth in their respective opinions. Justices Fernando, Teehankee and the writer similarly voted, except as regards Case No. L-35948 as to which they voted to grant to the petitioners therein a reasonable period of time within which to file appropriate pleadings should they wish to contest the legality of Presidential Proclamation No. 1102. Justice Zaldivar favors the granting of said period to the petitioners in said Case No. L-35948 for the aforementioned purpose, but he believes, in effect, that the Court should go farther and decide on the merits everyone of the cases under consideration.

Accordingly; the Court – acting in conformity with the position taken by six (6) of its members,[1] with three (3) members dissenting,[2] with respect to G. R. No. L-35948, only, and another member[3] dissenting, as regards all of the cases – dismissed the same, without special pronouncement as to costs.

The Present Cases

Prior thereto, or on January 20, 1973, Josue Javellana filed Case G. R. No. L-36142 against Executive Secretary and the Secretaries of National Defense, Justice and Finance, to restrain said respondents "and their subordinates or agents, from implementing any of the provisions of the proposed Constitution not found in the present Constitution" – referring to that of 1935. The petition therein, filed by Josue Javellana, as a "Filipino citizen, and a qualified and registered voter" and as "a class suit, for himself, and in behalf of all citizens and voters similarly situated," was amended on or about January 24, 1973. After reciting in substance the facts set forth in the decision in the plebiscite cases, Javellana alleged that the President had announced "the immediate implementation of the New Constitution, thru his Cabinet, respondents including," and that the latter "are acting without, or in excess of jurisdiction in implementing the said proposed Constitution" upon the ground: "that the President, as Commander-in-Chief of the Armed Forces of the Philippines, is without authority to create the Citizens' Assemblies"; that the same "are without power to approve the proposed Constitution * * *"; "that the President is without power to proclaim the ratification by the Filipino people of the proposed Constitution"; and "that the election held to ratify the proposed Constitution was not a free election, hence null and void."

Similar actions were filed, on January 23, 1973, by Vidal Tan, J. Antonio Araneta, Alejandro Roces, Manuel Crudo, Antonio U. Miranda, Emilio de Peralta and Lorenzo M. Tañada, against the Executive Secretary, the Secretaries of Finance, Justice, Land Reform, and National Defense, the Auditor General, the Budget Commissioner, the Chairman of the Presidential Commission on Reorganization, the Treasurer of the Philippines, the Commission on Elections and the Commissioner of Civil Service;[4] on February 3, 1973, by Eddie Monteclaro, personally and as President of the National Press Club of the Philippines, against the Executive Secretary, the Secretary of Public Information, the Auditor General the Budget Commissioner and the National Treasurer;[5] and on February 12, 1973, by Napoleon V. Dilag, Alfredo Salapantan, Jr., Leonardo Asodisen, Jr. and Raul M. Gonzalez,[6] against the Executive Secretary, the Secretary of National Defense, the Budget Commissioner and the Auditor General.

Likewise, on January 23, 1973, Gerardo Roxas, Ambrosio Padilla, Jovito R. Salonga, Salvador H. Laurel,[7] Ramon V. Mitra, Jr. and Eva Estrada-Kalaw, the first as "duly elected Senator and Minority Floor Leader of the Senate," and the others as "duly elected members" thereof, filed Case G. R. No. L-36165, against the Executive Secretary, the Secretary of National Defense, the Chief of Staff of the Armed Forces of the Philippines, the Secretary of General Services, the President and the President Pro Tempore of the Senate. In their petition – as amended on January 26, 1973 – petitioners Gerardo Roxas, et al. allege, inter alia, that the term of office of three

(3) of the aforementioned petitioners[8] would expire on December 31, 1975, and that of the others[9] on December 31, 1977; that pursuant to our 1935 Constitution, "which is still in force," Congress of the Philippines "must convene for its 8th Session on Monday, January 22, 1973, at 10:00 A. M., which is the regular customary hour of its opening session"; that "on said day, from 10:00 A. M. up to the afternoon," said petitioners, "along with their other colleagues, were unlawfully prevented from using the Senate Session Hall, the same having been closed by the authorities in physical possession and control of the Legislative Building"; that "(a)t about 5:00 to 6:00 P.M. of the said day, the premises of the entire Legislative Building were ordered cleared by the same authorities, and no one was allowed to enter and have access to said premises"; that "(r)espondent Senate President Gil J. Puyat and, in his absence, respondent President Pro Tempore Jose Roy were asked by petitioning Senators to perform their duties under the law and the Rules of the Senate, but unlawfully refrained and continue to refrain from doing so"; that the petitioners "are ready and willing to perform their duties as duly elected members of the Senate of the Philippines," but respondents Secretary of National Defense, Executive Secretary and Chief of Staff, "through their agents and representatives, are preventing petitioners from performing their duties as duly elected Senators of the Philippines"; that "the Senate premises in the Congress of the Philippines Building * * * are occupied by and are under the physical control of the elements of military organizations under the direction of said respondents"; that, as per "official reports, the Department of General Services * * * is now the civilian agency in custody of the premises of the Legislative Building"; that respondents "have unlawfully excluded and prevented, and continue to so exclude and prevent" the petitioners "from the performance of their sworn duties, invoking the alleged approval of the 1972 (1973) Constitution of the Philippines by action of the so-called Citizens' Assemblies on January 10, 1973 to January 15, 1973, as stated in and by virtue of Proclamation No. 1102 signed and issued by the President of the Philippines"; that "the alleged creation of the Citizens' Assemblies as instrumentalities for the ratification of the Constitution of the Republic of the Philippines" is inherently illegal and palpably unconstitutional; that respondents Senate President and Senate President Pro Tempore "have unlawfully refrained and continue to refrain from and/or unlawfully neglected and continue to neglect the performance of their duties and functions as such officers under the law and the Rules of the Senate" quoted in the petition; that because of events supervening the institution of the plebiscite cases, to which reference has been made in the preceding pages, the Supreme Court dismissed said cases on January 22, 1973, by a majority vote, upon the ground that the petitions therein had become moot and academic; that the alleged ratification of the 1972 (1973) Constitution "is illegal, unconstitutional and void and * * * cannot have superseded and revoked the 1935 Constitution," for the reasons specified in the petition as amended; that, by acting as they did, the respondents and their "agents, representatives and subordinates * * * have excluded the petitioners from an office to which" they "are lawfully entitled"; that "respondents Gil J. Puyat and Jose Roy have unlawfully refrained from convening the Senate for its 8th session, assuming general jurisdiction over the Session Hall and the premises of the Senate and * * * continue such inaction up to this time and * * * a writ of mandamus is warranted in order to compel them to comply with the duties and functions specifically enjoined by law"; and that "against the above mentioned unlawful acts of the respondents, the petitioners have no appeal nor other speedy and adequate remedy in the ordinary course of law except by invoking the equitable remedies of mandamus and prohibition with the provisional remedy of preliminary mandatory injunction."

Premised upon the foregoing allegations, said petitioners prayed that, "pending hearing on the merits, a writ of preliminary mandatory injunction be issued ordering the respondents Executive Secretary, the Secretary of National Defense, the Chief of Staff of the Armed Forces of the Philippines, and the * * * Secretary of General Services, as well as all their agents, representatives and subordinates to vacate the premises of the Senate of the Philippines and to deliver physical possession of the same to the President of the Senate or his authorized representative"; and that "after hearing, judgment be rendered declaring null and void Proclamation No. 1102 * * * and any order, decree, or proclamation having the same import and objective, issuing the writs of prohibition

and mandamus, as prayed for against the above-mentioned respondents, and making the writ of injunction permanent; and that a writ of mandamus be issued against the respondents Gil J. Puyat and Jose Roy directing them to comply with their duties and functions as President and President Pro Tempore, respectively, of the Senate of the Philippines, as provided by law and the Rules of the Senate."

Required to comment on the above-mentioned petitions and/or amended petitions, respondents filed, with the leave of Court first had and obtained, a consolidated comment on said petitions and/or amended petitions, alleging that the same ought to have been, dismissed outright; controverting petitioners' allegations concerning the alleged lack or impairment of the freedom of the 1971 Constitutional Convention to approve the proposed Constitution, its alleged lack of authority to incorporate certain contested provisions thereof, the alleged lack of authority of the President to create and establish Citizens' Assemblies "for the purpose of submitting to them the matter of ratification of the new Constitution," the alleged "improper or inadequate submission of the proposed constitution," the "procedure for ratification adopted * * * through the Citizens' Assemblies"; and maintaining that: (1) "(t)he Court is without jurisdiction to act on these petitions"; (2) the questions raised therein are "political in character and therefore nonjusticiable"; (3) "(t)here was substantial compliance with article XV of the 1935 Constitution"; (4) "(t)he Constitution was properly submitted to the people in a free, orderly and honest election"; (5) "Proclamation No. 1102, certifying the results of the election, is conclusive upon the courts"; and (6) "(t)he amending process, outlined in Article XV of the 1935 Constitution is not exclusive of other modes of amendment."

Respondents Puyat and Roy, in said Case G.R. No. L-36165, filed their separate comment therein; alleging that "(t)he subject matter" of said case "is a highly political question which, under the circumstances, this * * * Court would not be in a position to act upon judicially," and that, in view of the opinions expressed by three members of this Court in its decision in the plebiscite cases, in effect upholding the validity of Proclamation No. 1102, "further proceedings in this case may only be an academic exercise in futility."

On February 5, 1973, the Court issued a resolution requiring respondents in L-36236 to comment on the petition therein not later than Saturday, February 10, 1973, and setting the case for hearing on February 12, 1973, at 9:30 a.m. By resolution dated February 7, 1973, this Court resolved to consider the comments of the respondents in cases G.R. Nos. L-36142, L-36164 and L-36165, as motions to dismiss the petitions therein, and to set said cases for hearing on the same date and time as L-36236. On that date, the parties in G.R. No. L-36283[10] agreed that the same be, likewise, heard, as it was, in fact, heard jointly with the aforementioned cases G.R. Nos. L-36142, L-36164, L-36165 and L-36236. The hearing, which began on February 12, 1973, shortly after 9:30 a.m., was continued not only that afternoon, but, also, on February 13, 14, 15 and 16, morning and afternoon, after which the parties were granted up to February 24, 1973, noon, within which to submit their notes of oral arguments and additional arguments, as well as the documents required of them or whose presentation was reserved by them. The same resolution granted the parties until March 1, 1973, to reply to the notes filed by their respective opponents. Counsel for the petitioners in G.R. Nos. L-36164 and L-36165 filed their aforementioned notes on February 24, 1973, on which date the Solicitor General sought an extension of time up to March 3, 1973, within which to file his notes, which was granted, with the understanding that said notes shall include his reply to the notes already filed by the petitioners in G.R. Nos. L-36164 and L-36165. Counsel for the petitioners, likewise, moved and were granted an extension of time, to expire on March 10, 1973, within which to file, as they did, their notes in reply to those submitted by the Solicitor General on March 3, 1973. On March 21, 1973, petitioners in L-36165 filed a "Manifestation and Supplemental Rejoinder," whereas the Office of the Solicitor General submitted in all these cases a "Rejoinder, to Petitioners' Replies."

After deliberating on these cases, the members of the Court agreed that each would write his own opinion and

serve a copy thereof on his colleagues, and this they did. Subsequently, the Court discussed said opinions and votes were cast thereon. Such individual opinions are appended hereto.

Accordingly, the writer will first express his personal opinion on the issues before the Court. After the exposition of his aforesaid opinion, the writer will make, concurrently with his colleagues in the Court, a resume or summary of the votes by them in these cases.

Writers Personal Opinion

I

Alleged academic futility of further proceedings in G.R. No. L-36165.

This defense or theory, set up by counsel for respondents Gil J. Puyat and Jose Roy in G.R. No. L-36165, and, also, by the Solicitor General, is predicated upon the fact that, in Our decision in the plebiscite cases, Mr. Justice Barredo had expressed the view that the 1935 Constitution had "pro tanto passed into history" and "been legitimately supplanted by the Constitution now in force by virtue of Proclamation No. 1102 * * *"; that Mr. Justice Antonio did not feel "that this Court is competent to act" in said cases "in the absence of any judicially discoverable and manageable standards" and because "the access to relevant information is insufficient to assure the correct determination of the issue," apart from the circumstance that "the new constitution has been promulgated and great interests have already arisen under it" and that the political organ of the Government has recognized its provisions; whereas, Mr. Justice Esguerra had postulated that "(w)ithout any competent evidence * * * about the circumstances attending the holding" of the "referendum or plebiscite" thru the Citizens' Assemblies, he "cannot say that it was not lawfully held" and that, accordingly, he assumed "that what the proclamation (No. 1102) says on its face is true and until overcome by satisfactory evidence" he could not "subscribe to the claim that such plebiscite was not held accordingly"; and that he accepted "as a fait accompli that the Constitution adopted (by the 1971 Constitutional Convention) on November 30, 1972, has been duly ratified."

Counsel for respondents Gil J. Puyat and Jose Roy goes on to say that, under these circumstances, "it seems remote or improbable that the necessary eight (8) votes under the 1935 Constitution, and much less the ten (10) votes required by the 1972 (1973) Constitution, can be obtained for the relief sought in the Amended Petition" in G.R. No. L-36165.

I am unable to share this view. To begin with, Mr. Justice Barredo announced publicly, in open court, during the hearing of these cases, that he was and is willing to be convinced that his aforementioned opinion in the plebiscite cases should be reconsidered and changed. In effect, he thus declared that he had an open mind in connection with the cases at bar, and that in deciding the same he would not necessarily adhere to said opinion if the petitioners herein succeeded in convincing him that their view should be sustained.

Secondly, counsel for the aforesaid respondents had apparently assumed that, under the 1935 Constitution, eight (8) votes are necessary to declare invalid the contested Proclamation No. 1102. I do not believe that this assumption is borne out by any provision of said Constitution Section 10 of Article VIII thereof reads:

"All cases involving the constitutionality of a treaty or law shall be heard and decided by the Supreme Court in banc, and no treaty or law may be declared unconstitutional without the concurrence of two-thirds of all the members of the Court."

Pursuant to this section, the concurrence of two-thirds of all the Members of the Supreme Court is required only to declare a "treaty or law" unconstitutional. Construing said provision, in a resolution dated September 16, 1949, then Chief Justice Moran, voicing the unanimous view of the Members of this Court, postulated:

"* * * There is nothing either in the Constitution or in the Judiciary Act requiring the vote of eight Justices to nullify a rule or regulation or an executive order issued by the President. It is very significant that in the previous drafts of section 10, Article VIII of the Constitution, 'executive order' and 'regulation' were included among those that required for their nullification the vote of two-thirds of all the members of the Court. But 'executive order' and 'regulation' were later deleted from the final draft (Aruego, *The Framing of the Philippine Constitution*, Vol. I, pp. 495, 496), and thus a mere majority of six members of this Court is enough to nullify them." [11]

The distinction is not without reasonable foundation. The two-thirds vote (eight [8] votes) requirement, indeed, was made to apply only to treaty and law, because, in these cases, the participation of the two other departments of the government – the Executive and the Legislative – is present, which circumstance is absent in the case of rules, regulations and executive orders. Indeed, a law (statute) passed by Congress is subject to the approval or veto of the President, whose disapproval cannot be overridden except by the vote of two-thirds (2/3) of all members of each House of Congress.[12] A treaty is entered into by the President with the concurrence of the Senate,[13] which is not required in the case of rules, regulations or executive orders which are exclusive acts of the President. Hence, to nullify the same, a lesser number of votes is necessary in the Supreme Court than that required to invalidate a law or treaty.

Although the foregoing refers to rules, regulations and executive orders issued by the President, the dictum applies with equal force to executive proclamations, like said Proclamation No. 1102, inasmuch as the authority to issue the same is governed by section 63 of the Revised Administrative Code, which provides:

"Administrative acts and commands of the (Governor-General) President of the Philippine's touching the organization or mode of operation of the Government or rearranging or readjusting any of the districts, divisions, parts, or ports of the (Philippine Islands) Philippines and all acts and commands governing the general performance of duties by public employees or disposing of issues of general concern shall be made effective in executive orders.

"Executive orders fixing the dates when specific laws, resolutions, or orders are to have or cease to (have) effect and any information concerning matters of public moment determined by law, resolution, or executive orders, may be promulgated in an executive proclamation, with all the force of an executive order." [14]

In fact, while executive orders embody administrative acts or commands of the President, executive proclamations are mainly informative and declaratory in character, and so does counsel for respondents Gil J. Puyat and Jose Roy maintain in G.R. No. L-36165.[15] As a consequence, an executive proclamation has no more than "the force of an executive order," so that, for the Supreme Court to declare such proclamation unconstitutional, under the 1935 Constitution, the same number of votes needed to invalidate an executive order, rule or regulation – namely, six (6) votes – would suffice.

As regards the applicability of the provisions of the proposed new Constitution, approved by the 1971 Constitutional Convention, in the determination of the question whether or not it is now in force, it is obvious that such question depends upon whether or not the said new Constitution has been ratified in accordance with the requirements of the 1935 Constitution, upon the authority of which said Constitutional Convention was called and approved the proposed Constitution. It is well settled that the matter of ratification of an amendment to the Constitution should be settled by applying the provisions of the Constitution in force at the time of the alleged ratification or the old Constitution.[16]

II

Does the issue on the validity of Proclamation No. 1102 partake of the nature of a political, and, hence, non-justiciable question?

The Solicitor General maintains in his comment the affirmative view and this is his main defense. In support thereof, he alleges that "petitioners would have this Court declare as invalid the New Constitution of the Republic" from which – he claims – "this Court now derives its authority"; that "nearly 15 million of our body politic from the age of 15 years have mandated this Constitution to be the New Constitution and the prospect of unsettling acts done in reliance on it caution against interposition of the power of judicial review"; that "in the case of the New Constitution, the government has been recognized in accordance with the New Constitution"; that "the country's foreign relations are now being conducted in accordance with the new charter"; that "foreign governments have taken note of it"; that the "plebiscite cases" are "not precedents for holding questions regarding proposal and ratification justiciable"; and that "to abstain from judgment on the ultimate issue of constitutionality is not to abdicate duty."

At the outset, it is obvious to me that We are not being asked to "declare" the new Constitution invalid. What petitioners dispute is the theory that it has been validly ratified by the people, especially that they have done so in accordance with Article XV of the 1935 Constitution. The petitioners maintain that the conclusion reached by the Chief Executive in the dispositive portion of Proclamation No. 1102 is not borne out by the whereases preceding the same, as the predicates from which said conclusion was drawn; that the plebiscite or "election" required in said Article XV has not been held; that the Chief Executive has no authority, under the 1935 Constitution, to dispense with said election or plebiscite; that the proceedings before the Citizens' Assemblies did not constitute and may not be considered as such plebiscite; that the facts of record abundantly show that the aforementioned Assemblies could not have been held throughout the Philippines from January 10 to January 15, 1973; and that, in any event, the proceedings in said Assemblies are null and void as an alleged ratification of the new Constitution proposed by the 1971 Constitutional Convention, not only because of the circumstances under which said Assemblies had been created and held, but, also, because persons disqualified to vote under Article V of the Constitution were allowed to participate therein, because the provisions of our Election Code were not observed in said Assemblies, because the same were not held under the supervision of the Commission on Elections, in violation of section 2 of Article X of the 1935 Constitution, and because the existence of Martial Law and General Order No. 20, withdrawing or suspending the limited freedom to discuss the merits and demerits of said proposed Constitution, impaired the people's freedom in voting thereon, particularly a viva voce, as it was done in many instances, as well as their ability to have a reasonable knowledge of the contents of the document on which they were allegedly called upon to express their views.

Referring now more specifically to the issue on whether the new Constitution proposed by the 1971 Constitutional Convention has been ratified in accordance with the provisions of Article XV of the 1935 Constitution is a political question or not, I do not hesitate to state that the answer must be in the negative. Indeed, such is the position taken by this Court,[17] in an endless line of decisions, too long to leave any room for possible doubt that said issue is inherently and essentially justiciable. Such, also, has been the consistent position of the courts of the United States of America, whose decisions have a persuasive effect in this jurisdiction, our constitutional system in the 1935 Constitution being patterned after that of the United States. Besides, no plausible reason has, to my mind, been advanced to warrant a departure from said position, consistently with the form of government established under said Constitution.

Thus, in the aforementioned plebiscite cases,[18] We rejected the theory of the respondents therein that the question whether Presidential Decree No. 73 calling a plebiscite to be held on January 15, 1973, for the

ratification or rejection of the proposed new Constitution, was valid or not, was not a proper subject of judicial inquiry because, they claimed, it partook of a political nature, and We unanimously declared that the issue was a justiciable one. With identical unanimity, We overruled the respondents' contention in the 1971 habeas corpus cases,[19] questioning Our authority to determine the constitutional sufficiency of the factual bases of the Presidential proclamation suspending the privilege of the writ of habeas corpus on August 21, 1971, despite the opposite view taken by this Court in *Barcelon vs. Baker*[20] and *Montenegro vs. Castañeda*,[21] insofar as it adhered to the former case, which view We, accordingly, abandoned and refused to apply. For the same reason, We did not apply and expressly modified, in *Gonzales vs. Commission on Elections*,[22] the political-question theory adopted in *Mabanag vs. Lopez Vito*. [23] Hence, respondents herein urge Us to reconsider the action thus taken by the Court and to revert to and follow the views expressed in *Barcelon vs. Baker* and *Mabanag vs. Lopez Vito*. [24]

The reasons adduced in support thereof are, however, substantially the same as those given in support of the political-question theory advanced in said habeas corpus and plebiscite cases, which were carefully considered by this Court and found by it to be legally unsound and constitutionally untenable. As a consequence, Our decision in the aforementioned habeas corpus cases partakes of the nature and effect of a *stare decisis* which gained added weight by its virtual reiteration in the plebiscite cases:

The reason why the issue under consideration and other issues of similar character are justiciable, not political, is plain and simple. One of the principal bases of the non-justiciability of so-called political questions is the principle of separation of powers – characteristic of the Presidential system of government – the functions of which are classified or divided, by reason of their nature, into three (3) categories, namely: (1) those involving the making of laws, which are allocated to the legislative department; (2) those concerned mainly with the enforcement of such laws and of judicial decisions applying and/or interpreting the same, which belong to the executive department; and (3) those dealing with the settlement of disputes, controversies or conflicts involving rights, duties or prerogatives that are legally demandable and enforceable, which are apportioned to courts of justice. Within its own sphere - but only within such sphere - each department is supreme and independent of the others, and each is devoid of authority, not only to encroach upon the powers or field of action assigned to any of the other departments, but, also, to inquire into or pass upon the advisability or wisdom of the acts performed, measures taken or decisions made by the other departments – provided that such acts, measures or decisions are within the area allocated thereto by the Constitution. [25]

This principle of separation of powers under the Presidential system goes hand in hand with the system of checks and balances, under which each department is vested by the Fundamental Law with some powers to forestall, restrain or arrest a possible or actual misuse or abuse of powers by the other departments. Hence, the appointing power of the Executive, his pardoning power, his veto power, his authority to call the Legislature or Congress to special sessions and even to prescribe or limit the object or objects of legislation that may be taken up in such sessions, etc. Conversely, Congress or an agency or arm thereof - such as the Commission on Appointments – may approve or disapprove some appointments made by the President. It, also, has the power of appropriation, to "define, prescribe, and apportion the jurisdiction of the various courts," as well as that of impeachment. Upon the other hand, under the judicial power vested by the Constitution, the "Supreme Court and * * * such inferior courts as may be established by law," may settle or decide with finality, not only justiciable controversies between private individuals or entities, but, also, disputes or conflicts between a private individual or entity, on the one hand, and an officer or branch of the government, on the other, or between two (2) officers or branches of service, when the latter officer or branch is charged with acting without jurisdiction or in excess thereof or in violation of law. And so, when a power vested in said officer or branch of the government is absolute or unqualified, the acts in the exercise of such power are said to be political in nature, and, consequently, non-justiciable or beyond

judicial review. Otherwise, courts of justice would be arrogating upon themselves a power conferred by the Constitution upon another branch of the service to the exclusion of the others. Hence, in *Tañada vs. Cuenco*,^[26] this Court quoted with approval from *In re McConaughy*,^[27] the following:

" 'At the threshold of the case we are met with the assertion that the questions involved are political, and not judicial. If this is correct, the court has no jurisdiction as the certificate of the state canvassing board would then be final, regard-less of the actual vote upon the amendment. The question thus raised is a fundamental one; but it has been so often decided contrary to the view contended for by the Attorney General that it would seem to be finally settled.

* * * * *

" ' * * * What is generally meant, when it is said that a question is political, and not judicial, is that it is a matter which is to be exercised by the people in their primary political capacity, or that it has been specifically delegated to some other department or particular officer of the government, with discretionary power to act. See *State vs. Cunningham*, 81 Wis. 497, N.W. 724, 15 L.R.A. 561; *In re Gunn*, 50 Kan. 155; 32 Pac. 470, 948, 19 L.R.A. 519; *Green vs. Mills*, 69 Fed. 852, 16 C.C.A. 516, 30 L.R.A. 90; *Fletcher vs. Tuttle*, 151 Ill. 41, 37 N.E. 683, 25 L.R.A. 143, 42 Am. St. Rep. 220. Thus the Legislature may in its discretion determine whether it will pass a law or submit a proposed constitutional amendment to the people. The courts have no judicial control over such matters, not merely because they involve political questions, but because they are matters which the people have by the Constitution delegated to the Legislature. The Governor may exercise the powers delegated to him, free from judicial control, so long as he observes the laws and acts within the limits of the power conferred. His discretionary acts cannot be controllable, not primarily because they are of a political nature, but because the Constitution and laws have placed the particular matter under his control. But every officer under a constitutional government must act according to law and subject to its restrictions, and every departure therefrom or disregard thereof must subject him to that restraining and controlling power of the people, acting through the agency of the judiciary; for it must be remembered that the people act through courts, as well as through the executive or the Legislature. One department is just as representative as the other and the judiciary is the department which is charged with the special duty of determining the limitations which the law places upon all official action. The recognition of this principle, unknown except in Great Britain and America, is necessary, to "the end that the government may be one of laws and not of men" — words which Webster said were the greatest contained in any written constitutional document.' (Italics supplied.)"

and, in an attempt to describe the nature of a political question in terms, it was hoped, understandable to the laymen, We added that " * * * the term 'political question' connotes, in legal parlance, what it means in ordinary parlance, namely, a question of policy" in matters concerning the government of a State, as a body politic. "In other words, in the language of *Corpus Juris Secundum* (supra), it refers to those questions which; under the Constitution, are to be decided by the people in their sovereign capacity; or in regard to which full discretionary authority has been delegated to the Legislature or executive branch of the government.' It is concerned with issues dependent upon the wisdom, not legality, of a particular measure."

Accordingly, when the grant of power is qualified, conditional or subject to limitations, the issue on whether or not the prescribed qualifications or conditions have been met, or the limitations respected, is justiciable or non-political, the crux of the problem being one of legality or validity of the contested act, not its wisdom. Otherwise, said qualifications, conditions or limitations — particularly those prescribed or imposed by the Constitution — would be set at naught. What is more, the judicial inquiry into such issue and the settlement thereof are the main functions of court of justice under the Presidential form of government adopted in our 1935 Constitution, and the system of checks and balances, one of its basic predicates. As a consequence, We have neither the authority nor the discretion to decline passing upon said issue, but are under the ineluctable obligation — made particularly more exacting and peremptory by our oath, as members of the highest Court of the land, to

support and defend the Constitution — to settle it. This explains why, in *Miller vs. Johnson*,^[28] it was held that courts have a "duty, rather than a power"; to determine whether another branch of the government has "kept within constitutional limits." Not satisfied with this postulate, the court went farther and stressed that, if the Constitution provides how it may be amended — as it is our 1935 Constitution — "then, unless the manner is followed, the judiciary as the interpreter of that constitution, will declare the amendment invalid."^[29] In fact, this very Court — speaking through Justice Laurel, an outstanding authority on Philippine Constitutional Law, as well as one of the highly respected and foremost leaders of the Convention that drafted the 1935 Constitution — declared, as early as July 15, 1936, that "(i)n times of social disquietude or political excitement, the great landmarks of the Constitution are apt to be forgotten or marred, if not entirely obliterated. In cases of conflict the judicial department is the only constitutional organ which can be called upon to determine the proper allocation of powers between the several departments" of the government.^[30]

The Solicitor General has invoked *Luther vs. Borden*^[31] in support of its stand that the issue under consideration is non-justiciable in nature. Neither the factual background of that case nor the action taken therein by the Federal Supreme Court has any similarity with or bearing on the cases under consideration.

Luther vs. Borden was an action for trespass filed by Luther with the Circuit Court of the United States against Borden and others for having forcibly entered into Luther's house, in Rhode Island, sometime in 1842. The defendants who were in the military service of said former colony of England, alleged in their defense that they had acted in obedience to the commands of a superior officer, because Luther and others were engaged in a conspiracy to overthrow the government by force and the state had been placed by competent authority under Martial Law. Such authority was the charter government of Rhode Island at the time of the Declaration of Independence, for — unlike other states which adopted a new Constitution upon secession from England — Rhode Island retained its form of government under a British Charter, making only such alterations, by acts of the Legislature, as were necessary to adapt it to its subsequent condition as an independent state. It was under this form of government when Rhode Island joined other American states in the Declaration of Independence and, by subsequently ratifying the Constitution of the United States, became a member of the Union. In 1843, it adopted a new Constitution.

Prior thereto, however, many citizens had become dissatisfied with the charter government. Memorials addressed by them to the Legislature having failed to bring about the desired effect, meetings were held and associations formed — by those who belonged to this segment of the population — which eventually resulted in a convention called for the drafting of a new Constitution to be submitted to the people for their adoption or rejection. The convention was not authorized by any law of the existing government. The delegates to such convention framed a new Constitution which was submitted to the people. Upon the return of the votes cast by them, the convention declared that said Constitution had been adopted and ratified by a majority of the people and became the paramount law and Constitution of Rhode Island.

The charter government, which was supported by a large number of citizens of the state, contested, however, the validity of said proceedings. This notwithstanding, one Thomas W. Dorr, who had been elected governor under the new Constitution of the rebels, prepared to assert authority by force of arms, and many citizens assembled to support him. Thereupon, the charter government passed an Act declaring the state under Martial Law and adopted measures to repel the threatened attack and subdue the rebels. This was the state of affairs when the defendants, who were in the military service of charter government and were to arrest Luther, for engaging in the support of the rebel government — which was never able to exercise any authority in the state — broke into his house.

Meanwhile, the charter government had taken measures to call its own convention to revise the existing form of government. Eventually, a new constitution was drafted by a convention held under the authority of the charter

government, and thereafter was adopted and ratified by the people. "(T)he times and places at which the votes were to be given, the persons who were to receive and return them, and the qualifications of the voters having all been previously authorized and provided for by law passed by the charter government," the latter formally surrendered all of its powers to the new government, established under its authority, in May 1843, which had been in operation uninterruptedly since then.

About a year before, or in May 1842, Dorr, at the head of a military force, had made an unsuccessful attempt to take possession of the state arsenal in Providence, but he was repulsed, and, after an "assemblage of some hundreds of armed men under his command at Chepachet in the June following, which dispersed upon approach of the troops of the old government, no further effort was made to establish" his government. "* * * until the Constitution of 1843" — adopted under the auspices of the charter government — "went into operation, the charter government continued to assert its authority and exercise its powers and to enforce obedience throughout the state * * *."

Having offered to introduce evidence to prove that the constitution of the rebels had been ratified by the majority of the people, which the Circuit Court rejected, apart from rendering judgment for the defendants, the plaintiff took the case for review to the Federal Supreme Court which affirmed the action of the Circuit Court, stating:

"It is worthy of remark, however, when we are referring to the authority of State decisions, that the trial of Thomas W. Dorr took place after the constitution of 1843 went into operation. The judges who decided that case held their authority under that constitution; and it is admitted on all hands that it was adopted by the people of the State, and is the lawful and established government. It is the decision, therefore, of a State court, whose judicial authority to decide upon the constitution and laws of Rhode Island is not questioned by either party to this controversy, although the government under which it acted was framed and adopted under the sanction and laws of the charter government.

"The point, then raised here has been already decided by the courts of Rhode Island. The question relates, altogether, to the constitution and laws of that State; and the well settled rule in this court is, that the courts of the United States adopt and follow the decisions of the State courts in questions which concern merely the constitution and laws of the State.

"Upon what ground could the Circuit Court of the United States which tried this case have departed from this rule, and disregarded and overruled the decisions of the courts of Rhode Island? Undoubtedly the courts of the United States have certain powers under the Constitution and laws of the United States which do not belong to the State courts. But the power of determining that a State government has been lawfully established, which the courts of the State disown and repudiate, is not one of them. Upon such a question the courts of the United States are bound to follow the decisions of the State tribunals, and must therefore regard the charter government as the lawful and established government during the time of this contest." [32]

It is thus apparent that the context within which the case of *Luther vs. Borden* was decided is basically and fundamentally different from that of the cases at bar. To begin with, the case did not involve a federal question, but one purely municipal in nature. Hence, the Federal Supreme Court was "bound to follow the decisions of the State tribunals" of Rhode Island upholding the constitution adopted under the authority of the charter government. Whatever else was said in that case constitutes, therefore, an obiter dictum. Besides, no decision analogous to that rendered by the State Court of Rhode Island exists in the cases at bar. Secondly, the states of the Union have a measure of internal sovereignty upon which the Federal Government may not encroach, whereas ours is a unitary form of government, under which our local governments derive their authority from the national government. Again, unlike our 1935 Constitution, the charter or organic law of Rhode Island contained no provision on the manner, procedure or conditions for its amendment.

Then, too, the case of *Luther vs. Borden* hinged more on the question of recognition of government, than on recognition of constitution, and there is a fundamental difference between these two (2) types of recognition, the first being generally conceded to be a political question, whereas the nature of the latter depends upon a number of factors, one of them being whether the new Constitution has been adopted in the manner prescribed in the Constitution in force at the time of the purported ratification of the former, which is essentially a justiciable question. There was, in *Luther vs. Borden*, a conflict between two (2) rival governments, antagonistic to each other, which is absent in the present cases. Here, the Government established under the 1935 Constitution is the very same government whose Executive Department has urged the adoption of the new or revised Constitution proposed by the 1971 Constitutional Convention and now alleges that it has been ratified by the people.

In short, the views expressed by the Federal Supreme Court in *Luther vs. Borden*, decided in 1849, on matters other than those referring to its power to review decisions of a state court concerning the constitution and government of that state, not the Federal Constitution or Government, are manifestly neither controlling, nor even persuasive in the present cases, having — as the Federal Supreme Court admitted — no authority whatsoever to pass upon such matters or to review decisions of said state court thereon. In fact, referring to that case, the Supreme Court of Minnesota had the following to say:

"*Luther vs. Borden*, 7 How. 1, 12 L. Ed. 581, is always cited by those who assert that the courts have no power to determine questions of a political character. It is interesting historically, but it has not the slightest application to the case at bar. When carefully analyzed, it appears that it merely determines that the federal courts will accept as final and controlling a decision of the highest court of a state upon a question of the construction of the Constitution of the state. * * *." [33]

Baker vs. Carr, [34] cited by respondents, involved an action to annul a Tennessee statute apportioning the seats in the General Assembly among the counties of the State, upon the theory that the legislation violated the equal protection clause. A district court dismissed the case upon the ground, among others, that the issue was a political one, but, after a painstaking review of the jurisprudence on the matter, the Federal Supreme Court reversed the appealed decision and held that said issue was justiciable and non-political, inasmuch as: " * * * (d)eciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution * * *."

Similarly, in *Powell vs. McCormack*, [35] the same Court, speaking through then Chief Justice, Warren, reversed a decision of the Court of Appeals of New York affirming that of a Federal District Court, dismissing *Powell's* action for a declaratory judgment declaring thereunder that he — whose qualifications were uncontested — had been unlawfully excluded from the 90th Congress of the U.S. Said dismissal was predicated upon the ground, *inter alia*, that the issue was political, but the Federal Supreme Court held that it was clearly a justiciable one.

The Supreme Court of Minnesota undertook a careful review of American jurisprudence on the matter. Owing to the lucidity of its appraisal thereof, We append the same to this opinion as Annex A thereof.

After an exhaustive analysis of the cases on this subject, the Court concluded:

"The authorities are thus practically uniform in holding that whether a constitutional amendment has been properly adopted according to the requirements of an existing Constitution is a judicial question. There can be little doubt that the consensus of judicial opinion is to the effect that it is the absolute duty of the judiciary to determine whether the Constitution has been amended in the manner required by the Constitution, unless a special tribunal has been created to determine the question; and even then many of the courts hold that the tribunal cannot be permitted to illegally amend the organic law. * * *." [36]

In the light of the foregoing, and considering that Art. XV of our 1935 Constitution prescribes the method or procedure for its amendment, it is clear to my mind that the question whether or not the revised Constitution drafted by the 1971 Constitutional Convention has been ratified in accordance with said Art. XV is a justiciable one and non-political in nature, and that it is not only subject to judicial inquiry, but, also, that it is the Court's bounden duty to decide such question.

The Supreme Court of the United States has meaningfully postulated that "the courts cannot reject as 'no law suit' " – because it allegedly involves a political question – "a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority." [37]

III

Has the proposed new or revised Constitution been ratified conformably to said Art. XV of the 1935 Constitution?

Petitioners in L-36142 maintain the negative view, upon the ground: (1) that the President "is without authority to create the Citizens' Assemblies" through which, respondents maintain, the proposed new Constitution has been ratified; (2) that said Assemblies "are without power to approve the proposed Constitution"; (3) that the President "is without power to proclaim the ratification by the Filipino people of the proposed Constitution"; and (4) that "the election held (in the Citizens' Assemblies) to ratify the proposed Constitution was not a free election, hence null and void."

Apart from substantially reiterating these grounds in support of said negative view, the petitioners in L-36164 contend: (1) that the President "has no power to call a plebiscite for the ratification or rejection" of the proposed new Constitution or "to appropriate funds for the holding of the said plebiscite"; (2) that the proposed new or revised Constitution "is vague and incomplete," as well as "contains provisions which are beyond the powers of the 1971 Convention to enact," thereby rendering it "unfit for * * * submission to the people"; (3) that "(t)he period of time between November 30, 1972 when the 1972 draft was approved and January 11-15, 1973," when the Citizens' Assemblies supposedly ratified said draft, "was too short, worse still, there was practically no time for the Citizens' Assemblies to discuss the merits of the Constitution which the majority of them have not read and which they never knew would be submitted to them for ratification until they were asked the question — 'do you approve the New Constitution?' during the said days of the voting"; and that "(t)here was altogether no freedom of discussion and no opportunity to concentrate on the matter submitted to them when the 1972 draft was supposedly submitted to the Citizens' Assemblies for ratification."

Petitioner in L-36236 added, as arguments in support of the negative view, that: (1) "(w)ith a government-controlled press, there can never be a fair and proper submission of the proposed Constitution to the people"; and (2) Proclamation No. 1102 is null and void "(i)nasmuch as the ratification process" prescribed "in the 1935 Constitution was not followed."

Besides adopting substantially some of the grounds relied upon by the petitioners in the above-mentioned cases, the petitioners in L-36283 argue that "(t)he creation of the Citizens' Assemblies as the vehicle for the ratification of the Constitution was a deception upon the people since the President announced the postponement of January 15, 1973 plebiscite to either February 19 or March 5, 1973." [38]

The reasons adduced by the petitioners in L-36165 in favor of the negative view have already been set forth earlier in this opinion. Hence, it is unnecessary to reproduce them here. So it is, with respect to the positions taken in L-36165 by counsel for therein respondents Gil J. Puyat and Jose Roy – although more will be said later about them – and by the Solicitor General, on behalf of the other respondents in that case and the respondents in the

other cases.

1. What is the procedure prescribed by the 1935 Constitution for its amendment?

Under section 1 of Art. XV of said Constitution, three (3) steps are essential, namely:

1. That the amendments to the Constitution be pro-posed either by Congress or by a convention called for that purpose, "by a vote of three-fourths of all the Members of the Senate and the House of Representatives voting separately," but "in joint session assembled";
2. That such amendments be "submitted to the people for their ratification" at an "election"; and
3. That such amendments be "approved by a majority of the votes cast" in said election.

Compliance with the first requirement is virtually conceded, although the petitioners in L-36164 question the authority of the 1971 Constitutional Convention to incorporate certain provisions into the draft of the new or revised Constitution. The main issue in these five (5) cases hinges, therefore, on whether or not the last two (2) requirements have been complied with.

2. Has the contested draft of the new or revised Constitution been "submitted to the people for their ratification" conformably to Art. XV of the Constitution?

In this connection, other provisions of the 1935 Constitution concerning "elections" must, also, be taken into account, namely, section 1 of Art. V and Art. X of said Constitution. The former reads:

"Section 1. Suffrage may be exercised by male citizens of the Philippines not otherwise disqualified by law, who are twenty-one years of age or over and are able to read and write, and who shall have resided in the Philippines for one year and in the municipality wherein they propose to vote for at least six months preceding the election. The National Assembly shall extend the right of suffrage to women if in a plebiscite which shall be held for that purpose within two years after the adoption of this Constitution, not less than three hundred thousand women possessing the necessary qualifications shall vote affirmatively on the question."

Sections 1 and 2 of Art. X of the Constitution ordain in part:

"Section 1. There shall be an independent Commission on Elections composed of a Chairman and two other Members to be appointed by the President with the consent of the Commission on Appointments, who shall hold office for a term of nine years and may not be reappointed. * * *

“* * * * *

"Sec. 2. The Commission on Elections shall have exclusive charge of the enforcement and administration of all laws relative to the conduct of elections and shall exercise all other functions which may be conferred upon it by law. It shall decide, save those involving the right to vote, all administrative questions, affecting elections, including the determination of the number and location of polling places, and the appointment of election inspectors and of other election officials. All law enforcement agencies and instrumentalities of the Government, when so required by the Commission, shall act as its deputies for the purpose of insuring free, orderly, and honest elections. The decisions, orders, and rulings of the Commission shall be subject to review by the Supreme Court.

“* * * * *”[39]

a. Who may vote in a plebiscite under Art. V of the Constitution?

Petitioners maintain that section 1 of Art. V of the Constitution is a limitation upon the exercise of the right of suffrage. They claim that no other persons than "citizens of the Philippines not otherwise disqualified by law, who

are twenty-one years of age or over and are able to read and write, and who shall have resided in the Philippines for one year and in the municipality wherein they propose to vote for at least six months preceding the election," may exercise the right of suffrage in the Philippines. Upon the other hand, the Solicitor General contends that said provision merely guarantees the right of suffrage to persons possessing the aforementioned qualifications and none of the disqualifications prescribed by law, and that said right may be vested by competent authorities in persons lacking some or all of the aforementioned qualifications, and possessing some of the aforesaid disqualifications. In support of this view, he invokes the permissive nature of the language - "(s)uffrage may be exercised" — used in section 1 of Art. V of the Constitution, and the provisions of the Revised Barrio Charter, Republic Act No. 3590, particularly sections 4 and 6 thereof, providing that citizens of the Philippines "eighteen years of age or over," who are registered in the list of barrio assembly members, shall be members thereof and may participate as such in the plebiscites prescribed in said Act.

I cannot accept the Solicitor General's theory. Art. V of the Constitution declares who may exercise the right of suffrage, so that those lacking the qualifications therein prescribed may not exercise such right. This view is borne out by the records of the Constitutional Convention that drafted the 1935 Constitution. Indeed, section 1 of Art. V of the 1935 Constitution was largely based on the report of the committee on suffrage of the Convention that drafted said Constitution, which report was, in turn, "strongly influenced by the election laws then in force in the Philippines * * *"[40] Said committee had recommended: (1) "That the right of suffrage should be exercised only by male citizens of the Philippines." (2) "That it should be limited to those who could read and write." (3) "That the duty to vote should be made obligatory." It appears that the first recommendation was discussed extensively in the Conven-tion, and that, by way of compromise, it was eventually agreed to include, in section 1 of Art. V of the Constitution, the second sentence thereof imposing upon the National Assembly, established by the original Constitution — instead of the bicameral Congress subsequently created by amend-ment of said Constitution — the duty to "extend the right of suffrage to women, if in a plebiscite to be held for that purpose within two years after the adoption of this Constitution, not less than three hundred thousand women possessing the necessary qualifications shall vote affirmatively on the question."[41]

The third recommendation on "compulsory" voting was, also, debated upon rather extensively, after which it was rejected by the Convention.[42] This accounts, in my opinion, for the permissive language used in the first sentence of said Art. V. Despite some debates on the age qualification — amendments having been proposed to reduce the same to 18 or 20, which were rejected, and the residence qualification, as well as the disqualifications to the exercise of the right of suffrage — the second recommendation limiting the right of suffrage to those who could "read and write" was — in the language of Dr. Jose M. Aruego, one of the Delegates to said Convention "readily approved in the Convention without any dissenting vote," although there was some debate on whether the Fundamental Law should specify the language or dialect that the voter could read and write, which was decided in the negative.[43]

What is relevant to the issue before Us is the fact that the constitutional provision under consideration was meant to be and is a grant or conferment of a right to persons possessing the qualifications and none of the disqualifications therein mentioned, which in turn, constitute a limitation of or restriction to said right, and cannot, accordingly, be dispensed with, except by constitutional amendment. Obvi-ously, every such constitutional grant or conferment of a right is necessarily a negation of the authority of Congress or of any other branch of the Government to deny said right to the subject of the grant — and, in this sense only, may the same partake of the nature of a guarantee. But, this does not imply, not even remotely, that the Fundamental Law allows Congress or anybody else to vest in those lacking the qualifications and having the disqualifications mentioned in the Constitution the right of suffrage.

At this juncture, it is noteworthy that the committee on suffrage responsible for the adoption of section 1 of Art. V of the Constitution was "strongly influenced by the election laws then in force in the Philippines." Our first Election Law was Act 1582, passed on January 9, 1907, which was partly amended by Acts 1669, 1709, 1726 and 1768, and incorporated into the Administrative Code of 1916 — Act 2657 — as chapter 20 thereof, and then in the Administrative Code of 1917 — Act 2711 — as chapter 18 thereof, which, in turn, was amended by Act 3387, approved on December 3, 1927. Sections 431 and 432 of said Code of 1917, prescribing, respectively, the qualifications for and disqualifications from voting, are quoted below.[44] In all of these legislative acts, the provisions concerning the qualifications of voters partook of the nature of a grant or recognition of the right of suffrage, and, hence, of a denial thereof to those who lacked the requisite qualifications and possessed any of the statutory disqualifications. In short, the history of section 1, Art. V of the Constitution, shows beyond doubt that the same con-ferred — not guaranteed — the authority to exercise the right of suffrage to persons having the qualifications prescribed therein and none of the disqualifications to be specified in ordinary laws and, by necessary implication, denied such right to those lacking any of said qualifications or having any of the aforementioned disqualifications.

This view is further bolstered by the fact that the 1971 Constitutional Convention sought the submission to a plebiscite of a "partial amendment" to said section 1 of Art. V of the 1935 Constitution, by reducing the voting age from twenty-one (21) years to eighteen (18) years, which, how-ever, did not materialize on account of the decision of this Court in *Tolentino vs. Commission on Elections*,[45] granting the writs of prohibition and injunction therein applied for, upon the ground that, under the Constitution, all of the amendments adopted by the Convention should be submitted in "an election" or a single election, not separately or in several or distinct elections, and that the proposed amendment sought to be submitted to a plebiscite was not even a complete amendment, but a "partial amendment" of said section 1, which could be amended further, after its ratification, had the same taken place, so that the afore-mentioned partial amendment was, for legal purposes, no more than a provisional or temporary amendment. Said partial amendment was predicated upon the generally accepted contemporary construction that, under the 1935 Constitution, persons below- twenty-one (21) years of age could not exercise the right of suffrage, without a previous amendment of the Constitution.

Upon the other hand, the question, whether 18-year-old members of barrio assemblies may vote in barrio assembly plebiscites is, to say the least, a debatable one. Indeed, there seems to be a conflict between the last paragraph of said section 6 of Rep. Act No. 3590,[46] pursuant to which the "majority vote of all the barrio assembly members" (which include all barrio residents 18 years of age or over, duly registered in the list of barrio assembly members) is necessary for the approval, in an assembly plebiscite, of "any budgetary, supplemental appropriations or special tax ordinances," whereas, according to the paragraph preceding the penultimate one of said section,[47] "(a)ll duly registered barrio assembly members qualified to vote" — who, pursuant to section 10 of the same Act, must be citizens "of the Philippines, twenty-one years of age or over, able to read and write," and residents of the barrio "during the six months immediately preceding the election, duly registered in the list of voters" and "not otherwise disqualified * * *" — just like the provisions of the present and past election codes of the Philippines and Art. V of the 1935 Constitution — "may vote in the plebiscite."

I believe, however, that the apparent conflict should be resolved in favor of the 21-year-old members of the assembly, not only because this interpretation is in accord with Art. V of the Constitution, but, also, because provisions of a Constitution — particularly of a written and rigid one, like ours — are generally accorded a mandatory status — unless the intention to the contrary is manifest, which is not so as regards said Art. V — for otherwise they would not have been considered sufficiently important to be included in the Fundamental Law of the land,[48] Besides, it would be illogical, if not absurd, to believe that Republic Act No. 3590 requires, for the most important measures for which it demands — in addition to the favorable action of the barrio council — the

approval of the barrio assembly through a plebiscite, lesser qualifications than those prescribed in dealing with ordinary measures for which such plebiscite need not be held.

It is similarly inconceivable that those who drafted the 1935 Constitution intended section 1 of Art. V thereof to apply only to elections of public officers, not to plebiscites for the ratification of amendments to the Fundamental Law or a revision thereof, or of an entirely new Constitution, and to permit the legislature to require lesser qualifications for such ratification, notwithstanding the fact that the object thereof is much more important — if not fundamental, such as the basic changes introduced in the draft of the revised Constitution adopted by the 1971 Constitutional Convention, which are intended to be in force permanently, or, at least for many decades, and to affect the way of life of the nation — and, accordingly, demands greater experience and maturity on the part of the electorate than that required for the election of public officers,[49] whose average term ranges from 2 to 6 years.

It is admitted that persons 15 years of age or over, but below 21 years, regardless of whether or not they possessed the other qualifications laid down in both the Constitution and the present Election Code,[50] and of whether or not they are disqualified under the provisions of said Constitution and Code,[51] or those of Republic Act No. 3590[52] have participated and voted in the Citizens' Assemblies that have allegedly ratified the new or revised Constitution drafted by the 1971 Constitutional Convention.

In fact, according to the latest official data, the total number of registered voters 21 years of age or over in the entire Philippines, available in January 1973, was less than 12 million. Yet, Proclamation No. 1102 states that 14,976,561 "members of all the Barangays (Citizens Assemblies) voted for the adoption of the proposed Constitution, as against * * * 743,869 who voted for its rejection," whereas, on the question whether or not the people still wanted a plebiscite to be called to ratify the new Constitution, "* * * 14,298,814 answered that there was no need for a plebiscite and that the vote of the Barangays (Citizens Assemblies) should be considered as a vote in a plebiscite." In other words, it is conceded that the number of people who allegedly voted at the Citizens' Assemblies far exceeded the number of registered voters under the Election Code in force in January 1973.

It is thus clear that the proceedings held in such Citizens' Assemblies — and We have more to say on this point in subsequent pages — were fundamentally irregular, in that persons lacking the qualifications prescribed in section 1 of Art. V of the Constitution were allowed to vote in said Assemblies. And, since there is no means by which the invalid votes of those less than 21 years of age can be separated or segregated from those of the qualified voters, the proceedings in the Citizens' Assemblies must be considered null and void.[53]

It has been held that "the power to reject an entire poll * * * should be exercised * * * in a case where it is impossible to ascertain with reasonable certainty the true vote," as where "it is impossible to separate the legal votes with the illegal or spurious * * *." [54]

In *Usman vs. Commission on Elections, et al.*, [55] We held:

"Several circumstances, defying exact description and dependent mainly on the factual milieu of the particular controversy, have the effect of destroying the integrity and authenticity of disputed election returns and of avoiding their prima facie value and character. If satisfactorily proven, although in a summary proceeding, such circumstances as alleged by the affected or interested parties, stamp the election returns with the indelible mark of falsity and irregularity, and, consequently, of unreliability, and justify their exclusion from the canvass."

Then, too, the 1935 Constitution requires "a majority of the votes cast" for a proposed amendment to the Fundamental Law to be "valid" as part thereof, and the term "votes cast" has a well-settled meaning.

"The term 'votes cast' * * * was held in *Smith vs. Benville County Commissioners*, 65 N.W. 956, 64 Min. 16, to have been used as an equivalent of 'ballots cast.' " [56]

"The word 'cast' is defined as to deposit formally or officially." [57]

"It seems to us that a vote is cast when a ballot is deposited indicating a 'choice.' The word 'cast' means 'deposit' (a ballot) formally or officially * * *.

* * * In simple words, we would define a 'vote cast' as the exercise on a ballot of the choice of the voter in the measure proposed." [58]

In short, said Art. XV envisages — with the term "votes cast" — choices made on ballots — not orally or by raising hands — by the persons taking part in plebiscites. This is but natural and logical, for, since the early years of the American regime, we had adopted the Australian Ballot System, with its major characteristics, namely, uniform official ballots prepared and furnished by the Government and secrecy in the voting, with the advantage of keeping records that permit judicial inquiry, when necessary, into the accuracy of the election returns. And the 1935 Constitution has been so consistently interpreted in all plebiscites for the ratification or rejection of proposed amendments thereto, from 1935 to 1967. Hence, the viva voce voting in the Citizens' Assemblies was and is null and void ab initio.

b. How should the plebiscite be held? (COMELEC supervision indispensable; essential requisites)

Just as essential as compliance with said Art. V of the 1935 Constitution is that of Art. X thereof, particularly its sections 1 and 2. Indeed, section 1 provides that "(t)here shall be an independent Commission on Elections * * *." The point to be stressed here is the term "independent." Indeed, why was the term used?

In the absence of said constitutional provision as to the independence of the Commission, would it have been dependent upon either Congress or the Judiciary? The answer must be in the negative, because the functions of the Commission — "enforcement and administration" of election laws — are neither legislative nor judicial in nature, and, hence, beyond the field allocated to either Congress or courts of justice. Said functions are by their nature essentially executive, for which reason, the Commission would be under the "control" of the President, pursuant to section 10, paragraph (1) of Art. VII of the Constitution, if Art. X thereof did not explicitly declare that it (the Commission) is an "independent" body. In other words, in amending the original 1935 Constitution, by inserting therein said Art. X, on the Commission on Elections, the purpose was to make said Commission independent principally of the Chief Executive.

And the reason therefor is, also, obvious. Prior to the creation of the Commission on Elections as a constitutional organ, election laws in the Philippines were enforced by the then Department of the Interior, through its Executive Bureau, one of the offices under the supervision and control of said Department. The same — like other departments of the Executive Branch of the Government — was, in turn, under the control of the Chief Executive, before the adoption of the 1935 Constitution, and had been — until the abolition of said Department, sometime ago — under the control of the President of the Philippines, since the effectivity of said Fundamental Law. Under the provisions thereof, the Executive could so use his power of control over the Department of the Interior and its Executive Bureau as to place the minority party at such a great, if not decisive, disadvantage, as to deprive it, in effect, of the opportunity to defeat the political party in power, and, hence, to enable the same to perpetuate itself therein. To forestall this possibility, the original 1935 Constitution was amended by the establishment of the Commission on Elections as a constitutional body independent primarily of the President of the Philippines.

The independence of the Commission was sought to be strengthened by the long term of office of its members — nine (9) years, except those first appointed [59] the longest under the Constitution, second only to that of the Auditor General, [60] by providing that they may not be removed from office except by impeachment, placing them, in this respect, on the same plane as the President, the Vice-President, the Justices of the Supreme Court and the Auditor General; that they may not be reappointed; that their salaries "shall be neither increased nor

diminished during their term of office"; that the decisions of the Commission "shall be subject to review by the Supreme Court" only^[61] that "(n)o pardon, parole, or suspension of sentence for the violation of any election law may be granted without the favorable recommendation of the Commission"^[62]; and that its chairman and members "shall not, during their continuance in office, engage in the practice of any profession, or intervene, directly or indirectly, in the management or control of any private enterprise which in anyway may be affected by the functions of their office; nor shall they, directly or indirectly, be financially interested in any contract with the Government or any subdivision or instrumentality thereof."^[63] Thus, the framers of the amendment to the original Constitution of 1935 endeavored to do everything possible to protect and insure the independence of each member of the Commission.

With respect to the functions thereof as a body, section 2 of said Art. X ordains that "(t)he Commission on Elections shall have exclusive charge of the enforcement and administration of all laws relative to the conduct of elections, "apart from such other "functions which may be conferred upon it by law." It further provides that the Commission "shall decide, save those involving the right to vote, all administrative questions, affecting elections, including the determination of the number and location of polling places, and the appointment of election inspectors and of other election officials." And, to forestall possible conflicts or frictions between the Commission, on the one hand, and the other offices or agencies of the executive department, on the other, said section 2 postulates that "(a)ll law enforcement agencies and instrumentalities of the Government, when so required by the Commission, shall act as its deputies for the purpose of insuring free, orderly, and honest elections." Not satisfied with this, it declares, in effect, that "(t)he decisions, orders, and rulings of the Commission" shall not be subject to review, except by the Supreme Court.

In accordance with the letter and spirit of said Art. X of the Constitution, Rep. Act No. 6388, otherwise known as the Election Code of 1971, implements the constitutional powers of the Commission on Elections and grants additional powers thereto, some of which are enumerated in sections 5 and 6 of said Act, quoted below.^[64] Moreover, said Act contains, inter alia, detailed provisions regulating contributions and other (corrupt) practices; the establishment of election precincts; the designation and arrangement of polling places, including voting booths, to protect the secrecy of the ballot; the formation of lists of voters, the identification and registration of voters, the proceedings therefor, as well as for the inclusion in, or exclusion or cancellation from said list and the publication thereof; the establishment of municipal, provincial and national files of registered voters; the composition and appointment of boards of election inspectors; the particulars of the official ballots to be used and the precautions to be taken to insure the authenticity thereof; the procedure for the casting of votes; the counting of votes by boards of inspectors; the rules for the appreciation of ballots and the preparation and disposition of election returns; the constitution and operation of municipal, provincial and national boards of canvassers; the representation of political parties and/or their candidates in each election precinct; the proclamation of the results, including, in the case of election of public officers, election contests, and the jurisdiction of courts of justice in cases of violations of the provisions of said Election Code and the penalties for such violations.

Few laws may be found with such a meticulous and elaborate set of provisions aimed at "insuring free, orderly, and honest elections," as envisaged in section 2 of Art. X of the Constitution. Yet, none of the foregoing constitutional and statutory provisions was followed by the so-called Barangays or Citizens' Assemblies. And no reasons have been given, or even sought to be given therefor. In many, if not most, instances, the elections were held a viva voce, thus depriving the electorate of the right to vote secretly — one of the most fundamental and critical features of our election laws from time immemorial — particularly at a time when the same was of utmost importance, owing to the existence of Martial Law.

In *Glenn vs. Guan*,^[65] involving the casting of many votes, openly, without complying with the requirements of

the law pertinent thereto, it was held that the "election officers" involved "cannot be too strongly condemned" therefor and that if they "could legally dispense with such requirement * * * they could with equal propriety dispense with all of them, including the one that the vote shall be by secret ballot, or even by ballot at all * * *."

Moreover, upon the formal presentation to the Executive of the proposed Constitution drafted by the 1971 Constitutional Convention, or on December 1, 1972, Presidential Decree No. 73 (on the validity of which — which was contested in the plebiscite cases, as well as in the 1972 habeas corpus cases.[66] We need not, in the cases at bar, express any opinion) was issued, calling a plebiscite, to be held on January 15, 1973, at which the proposed Constitution would be submitted to the people for ratification or rejection; directing the publication of said proposed Constitution; and declaring, inter alia, that "(t)he provisions of the Election Code of 1971, insofar as they are not inconsistent" with said decree — excepting those "regarding rights and obligations of political parties and candidates" — "shall apply to the conduct of the plebiscite." Indeed, section 2 of said Election Code of 1971 provides that "(a)ll elections of public officers except barrio officials and plebiscites shall be conducted in the manner provided by this Code." General Order No. 20, dated January 7, 1973, postponing, until further notice, "the plebiscite scheduled to be held on January 15, 1973," said nothing about the procedure to be followed in the plebiscite to take place at such notice, and no other order or decree has been brought to Our attention, expressly or impliedly repealing the provisions of Presidential Decree No. 73, insofar as said procedure is concerned.

Upon the other hand, said General Order No. 20 expressly suspended "the provisions of Section 3 of Presidential Decree No. 73 insofar as they allow free public discussion of the proposed Constitution * * * temporarily suspending the effects of Proclamation No. 1081 for the purposes of free and open debate on the proposed Constitution * * *." This specific mention of the portions of the decrees or orders or instructions suspended by General Order No. 20 necessarily implies that all other portions of said decrees, orders or instructions and, hence, the provisions of Presidential Decree No. 73 outlining the procedure to be followed in the plebiscite for the ratification or rejection of the proposed Constitution — remained in force, assuming that said Decree is valid.

It is claimed that by virtue of Presidential Decree No. 86-A — the text of which is quoted below[67] — the Executive declared, inter alia, that the collective views expressed in the Citizens' Assemblies "shall be considered in the formulation of national policies or programs and, wherever practicable, shall be translated into concrete and specific decisions"; that such Citizens' Assemblies "shall consider vital national issue * * * like the holding of the plebiscite on the new Constitution * * * and others in the future, which shall serve as guide or basis for action or decision by the national government"; and that the Citizens' Assemblies "shall conduct between January 10 and 15, 1973, a referendum on important national issues, including those specified in paragraph 2 hereof, and submit the results thereof to the Department of Local Governments and Community Development immediately thereafter, * * *." As in Presidential Decree No. 86, this Decree No. 86-A do not and cannot exclude the exercise of the constitutional supervisory power of the Commission on Elections or its participation in the proceedings in said Assemblies, if the same had been intended to constitute the "election" or plebiscite required in Art. V of the 1935 Constitution. The provision of Presidential Decree No. 86-A directing the immediate submission of the result thereof to the Department of Local Governments and Community Development is not necessarily inconsistent with, and must be subordinate to the constitutional power of the commission on Elections to exercise its "exclusive" authority over the "enforcement and administration of all laws relative to the conduct of elections," if the proceedings in the Assemblies would partake of the nature of an "election" or plebiscite for the ratification or rejection of the proposed Constitution.

We are told that Presidential Decree No. 86 was further amended by Presidential Decree No. 86-B, dated January 7, 1973, ordering "that important national issues shall from time to time be referred to the Barangays (Citizens Assemblies) for resolution in accordance with Presidential Decree No. 86-A dated January 5, 1973 and that the

initial referendum shall include the matter of ratification of the Constitution proposed by the 1971 Constitutional Convention" and that "(t)he Secretary of the Department of Local Governments and Community Development shall insure the implementation of this order." As in the case of Presidential Decrees Nos. 86 and 86-A, the foregoing directives do not necessarily exclude the exercise of the powers vested by the 1935 Constitution in the Commission on Elections, even if the Executive had the authority to repeal Art. X of our Fundamental Law — which he does not possess. Copy of Presidential Decree No. 86-B is appended hereto as Annex B hereof.

The point is that, such of the Barrio Assemblies as were held took place without the intervention of the Commission on Elections, and without complying with the provisions of the Election Code of 1971 or even of those of Presidential Decree No. 73. What is more, they were held under the supervision of the very officers and agencies of the Executive Department sought to be excluded therefrom by Art. X of the 1935 Constitution. Worse still, said officers and agencies of the Executive Department, who had been publicly urged and ostensibly promised to work for the ratification of the proposed revised Constitution would be favored thereby, owing to the practically indefinite extension of their respective terms of office in consequence of section 9 of the Transitory Provisions, found in Art. XVII of the proposed Constitution, without any elections therefor. And the procedure therein mostly followed is such that there is no reasonable means of checking the accuracy of the returns filed by the officers who conducted said plebiscites. This is another patent violation of Art. X of the Constitution which can hardly be sanctioned. And, since the provisions of this article form part of the fundamental scheme set forth in the 1935 Constitution, as amended, to ensure the "free, orderly, and honest" expression of the people's will, the aforementioned violation thereof renders null and void the contested proceedings or alleged plebiscite in the Citizens' Assemblies, insofar as the same are claimed to have ratified the revised Constitution proposed by the 1971 Constitutional Convention. " * * * all authorities agree that the legal definition of an election, as well as that which is usually understood by the term, is a choosing or a selection by those having a right to participate (in the selection) of those who shall fill the office, or of the adoption or rejection of any public measure affecting the territory involved 15 Cyc. 279; Lewis vs. Boynton, 25 Cols. 486, 55 Pac. 732; Saunders vs. Haynes, 13 Col. 145; Seaman vs. Baughman, 82 Iowa 216, 47 N.W. 1062, 9 L.R.A. 170. Bouvier's Law Dictionary." [68]

IV

Has the proposed Constitution aforementioned been approved by a majority of the people in the Citizens' Assemblies allegedly held throughout the Philippines?

Respondents maintain the affirmative, relying upon Proclamation No. 1102, the validity of which is precisely being contested by petitioners herein. Respondents claim that said proclamation is "conclusive" upon this Court, or is, at least, entitled to full faith and credence, as an enrolled bill; that the proposed Constitution has been, in fact, ratified, approved or adopted by the "overwhelming" majority of the people; that Art. XV of the 1935 Constitution has thus been "substantially" complied with; and that the Court should refrain from passing upon the validity of Proclamation No. 1102, not only because such question is political in nature, but, also, because should the Court invalidate the proclamation, the former would, in effect, veto the action of the people in whom sovereignty resides and from whom its powers are derived.

The major flaw in this process of rationalization is that it assumes, as a fact, the very premise on which it is predicated, and which, moreover, is contested by the petitioners. As the Supreme Court of Minnesota has aptly put it —

" * * * every officer under a constitutional government must act according to law and subject to its restrictions, and every departure therefrom or disregard thereof must subject him to the restraining and controlling power of the people, acting through the agency of the judiciary; for it must be remembered that the people act through

courts, as well as through the executive or the Legislature. One department is just as representative as the other, and the judiciary is the department which is charged with the special duty of determining the limitations which the law places upon all official action. * * *."

Accordingly, the issue boils down to whether or not the Executive acted within the limits of his authority when he certified in Proclamation No. 1102 "that the Constitution proposed by the nineteen hundred and seventy-one (1971) Constitutional Convention has been ratified by an overwhelming majority of all of the votes cast by the members of all the Barangays (Citizens Assemblies) throughout the Philippines, and has thereby come into effect."

In this connection, it is not claimed that the Chief Executive had personal knowledge of the data he certified in said proclamation. Moreover, Art. X of the 1935 Constitution was precisely inserted to place beyond the Executive the power to supervise or even exercise any authority whatsoever over "all laws relative to the conduct of elections," and, hence, whether the elections are for the choice or selection of public officers or for the ratification or rejection of any proposed amendment, or revision of the Fundamental Law, since the proceedings for the latter are, also, referred to in said Art. XV as "elections."

The Solicitor General stated, in his argument before this Court, that he had been informed that there was in each municipality a municipal association of presidents of the citizens' assemblies for each barrio of the municipality; that the president of each such municipal association formed part of a provincial or city association of presidents of such municipal associations; that the president of each one of these provincial or city associations in turn formed part of a National Association or Federation of Presidents of such Provincial or City Associations; and that one Francisco Cruz from Pasig, Rizal, as President of said National Association or Federation, reported to the President of the Philippines, in the morning of January 17, 1973, the total result of the voting in the citizens' assemblies all over the country from January 10 to January 15, 1973. The Solicitor General further intimated that the said municipal associations had reported the results of the citizens' assemblies in their respective municipalities to the corresponding Provincial Association, which, in turn, transmitted the results of the voting in the province to the Department of Local Governments and Community Development, which tabulated the results of the voting in the citizens assemblies through out the Philippines and then turned them over to Mr. Francisco Cruz, as President or acting President of the National Association or Federation, whereupon Mr. Cruz, acting in a ceremonial capacity, reported said results (tabulated by the Department of Local Governments and Community Development) to the Chief Executive, who, accordingly, issued Proclamation No. 1102.

The record shows, however, that Mr. Cruz was not even a member of any barrio council since 1972, so that he could not possibly have been a member on January 17, 1973, of a municipal association of presidents of barrio or ward citizens' assemblies, much less of a Provincial, City or National Association or Federation of Presidents of any such provincial or city associations.

Secondly, at the conclusion of the hearing of these cases on February 16, 1973, and in the resolution of this Court of the same date, the Solicitor General was asked to submit, together with his notes on his oral argument, a true copy of the aforementioned report of Mr. Cruz to the President and of the "(p)roclamation, decree, instruction, order, regulation or circular, if any, creating or directing or authorizing the creation, establishment or organization" of said municipal, provincial and national associations, but neither a copy of said alleged report to the President, nor a copy of any said "(p)roclamation, decree, instruction, order, regulation or circular," has been submitted to this Court. In the absence of said report, "(p)roclamation, decree, instruction," etc., Proclamation No. 1102 is devoid of any factual and legal foundation. Hence, the conclusion set forth in the dispositive portion of said Proclamation No. 1102, to the effect that the proposed new or revised Constitution had been ratified by the majority of the votes cast by the people, cannot possibly have any legal effect or value.

The theory that said proclamation is "conclusive" upon the Court is clearly untenable. If it were, acts of the Executive and those of Congress could not possibly be annulled or invalidated by courts of justice. Yet, such is not the case. In fact, even a resolution of Congress declaring that a given person has been elected President or Vice-President of the Philippines as provided in the Constitution[69] is not conclusive upon the courts. It is no more than prima facie evidence of what is attested to by said resolution.[70] If assailed directly in appropriate proceedings, such as an election protest, if and when authorized by law, as it is in the Philippines, the Court may receive evidence and declare, in accordance therewith, who was duly elected to the office involved.[71] If prior to the creation of the Presidential Electoral Tribunal, no such protest could be filed, it was not because the resolution of Congress declaring who had been elected President or Vice-President was conclusive upon courts of justice, but because there was no law permitting the filing of such protest and declaring what court or body would hear and decide the same. So too, a declaration to the effect that a given amendment to the Constitution or revised or new Constitution has been ratified by a majority of the votes cast therefor, may be duly assailed in court and be the object of judicial inquiry, in direct proceedings therefor — such as the cases at bar — and the issue raised therein may and should be decided in accordance with the evidence presented.

The case of *In re McConaughy*[72] is squarely in point. "As the Constitution stood from the organization of the state" - of Minnesota - "all taxes were required to be raised under the system known as the 'general property tax.' Dissatisfaction with the results of this method and the development of more scientific and satisfactory methods of raising revenue induced the Legislature to submit to the people an amendment to the Constitution which provided merely that taxes shall be uniform upon the same class of subjects. The proposed amendment was submitted at the general election held in November 1906 and in due time it was certified by the state canvassing board and proclaimed by the Governor as having been legally adopted. Acting upon the assumption that the amendment had become part of the Constitution, the Legislature enacted statutes providing for a State Tax Commission and a mortgage registry tax, and the latter statute, upon the same theory, was held constitutional" by said Court. "The district court found that the amendment had not in fact been adopted and on this appeal" the Supreme Court was "required to determine the correctness of that conclusion."

Referring to the effect of the certification of the State Board of Canvassers created by the Legislature and of the proclamation made by the Governor based thereon, the Court held: "It will be noted that this board does no more than tabulate the reports received from the various county boards and add up and certify the results. *State vs. Mason*, 45 Wash 234, 88 Pac. 126, 9 L.R.A. (U.S.) 1221. It is settled law that the decisions of election officers, and canvassing boards are not conclusive and that the final decision must rest with the courts, unless the law declares that the decisions of the board shall be final" — and there is no such law in the cases at bar. " * * * The correctness of the conclusion of the state board rests upon the correctness of the returns made by the county boards and it is inconceivable that it was intended that this statement result should be final and conclusive regardless of the actual facts. The proclamation of the Governor adds nothing in the way of conclusiveness to the legal effect of the action of the canvassing board. Its purpose is to formally notify the people of the state of the result of the voting as found by the canvassing board. *James on Const. Conv.* (4th. Ed.) sec. 523."

In *Bott vs. Wartz*,[73] the Court reviewed the statement of results of the election made by the canvassing board, in order that the true results could be judicially determined. And so did the court in *Rice vs. Palmer*. [74]

Inasmuch as Art. X of the 1935 Constitution places under the "exclusive" charge of the Commission on Elections, "the enforcement and administration of all laws relative to the conduct of elections," independently of the Executive, and there is not even a certification by the Commission in support of the alleged results of the citizens' assemblies relied upon in Proclamation No. 1102 — apart from the fact that on January 17, 1973 neither the alleged president of the Federation of Provincial or City Barangays nor the Department of Local Governments had

certified to the President the alleged result of the citizens' assemblies all over the Philippines — it follows necessarily that, from a constitutional and legal viewpoint, Proclamation No. 1102 is not even *prima facie* evidence of the alleged ratification of the proposed Constitution.

Referring particularly to the cases before Us, it will be noted that, as pointed out in the discussion of the preceding topic, the new or revised Constitution proposed by the 1971 Constitutional Convention was not ratified in accordance with the provisions of the 1935 Constitution. In fact, it has not even been ratified in accordance with said proposed Constitution, the minimum age requirement therein for the exercise of the right of suffrage being eighteen (18) years, apart from the fact that Art. VI of the proposed Constitution requires "secret" voting, which was not observed in many, if not most, Citizens' Assemblies. Besides, both the 1935 Constitution and the proposed Constitution require a "majority of the votes cast" in an election or plebiscite called for the ratification of an amendment or revision of the first Constitution or the effectivity of the proposed Constitution, and the phrase "votes cast" has been construed to mean "votes made in writing," not orally, as it was in many Citizens' Assemblies.[75]

Even counsel for Gil J. Puyat and Jose Roy, as respondents in L-36165, asserts openly that Art. XV of the Constitution has not been complied with, and since the alleged substantial compliance with the requirements thereof partakes of the nature of a defense set up by the other respondents in these cases, the burden of proving such defense which, if true, should be within their, peculiar knowledge — is clearly on such respondents. Accordingly, if despite the extensive notes and documents submitted by the parties herein, the members of the Court do not know or are not prepared to say whether or not the majority of the people or of those who took part in the Citizens' Assemblies have assented to the proposed Constitution, the logical step would be to give due course to these cases, require the respondents to file their answers, and the plaintiffs their reply, and, thereafter, to receive the pertinent evidence and then proceed to the determination of the issues raised thereby. Otherwise, we would be placing upon the petitioners the burden of disproving a defense set up by the respondents, who have not so far established the truth of such defense.

Even more important, and decisive, than the foregoing is the circumstance that there is ample reason to believe that many, if not most, of the people did not know that the Citizens' Assemblies were, at the time they were held, plebiscites for the ratification or rejection of the proposed Constitution. Hence, in Our decision in the plebiscite cases, We said, *inter alia*:

"Meanwhile, or on December 17, 1972, the President had issued an order temporarily suspending the effects of Proclamation No. 1081, for the purpose of free and open debate on the Proposed Constitution. On December 23, the President announced the postponement of the plebiscite for the ratification or rejection of the Proposed Constitution. No formal action to this effect was taken until January 7, 1973, when General Order No. 20 was issued, directing 'that the plebiscite scheduled to be held on January 15, 1973, be postponed until further notice.' Said General Order No. 20, moreover, 'suspended in the meantime' the 'order of December 17, 1972, temporarily suspending the effects of Proclamation No. 1081 for purposes of free and open debate on the proposed Constitution.'

"In view of these events relative to the postponement of the aforementioned plebiscite, the Court deemed it fit to refrain, for the time being, from deciding the aforementioned cases, for neither the date nor the conditions under which said plebiscite would be held were known or announced officially. Then, again, Congress was, pursuant to the 1935 Constitution, scheduled to meet in regular session on January 22, 1973, and since the main objection to Presidential Decree No. 73 was that the President does not have the legislative authority to call a plebiscite and appropriate funds therefor, which Congress unquestionably could do, particularly in view of the formal postponement of the plebiscite by the President — reportedly after consultation with, among others the leaders of Congress and the Commission on Elections — the Court deemed it more imperative to

defer its final action on these cases."

And, apparently, the parties in said cases entertained the same belief, for, on December 23, 1972 — four (4) days after the last hearing of said cases^[76] the President announced the postponement of the plebiscite scheduled by Presidential Decree No. 73 to be held on January 15, 1973, after consultation with the Commission on Elections and the leaders of Congress, owing to doubts on the sufficiency of the time available to translate the proposed Constitution into some local dialects and to comply with some pre-electoral requirements, as well as to afford the people a reasonable opportunity to be posted on the contents and implications of said transcendental document. On January 7, 1973, General Order No. 20 was issued formally, postponing said plebiscite "under further notice." How can said postponement be reconciled with the theory that the proceedings in the Citizens' Assemblies scheduled to be held from January 10 to January 15, 1973, were "plebiscites," in effect, accelerated, according to the theory of the Solicitor General, for the ratification of the proposed Constitution? If said Assemblies were meant to be the plebiscites or elections envisaged in Art. XV of the Constitution, what, then, was the "plebiscite" postponed by General Order No. 20? Under these circumstances, it was only reasonable for the people who attended such assemblies to believe that the same were not an "election" or plebiscite for the ratification or adoption of said proposed Constitution.

And, this belief is further bolstered up by the questions propounded in the Citizens' Assemblies, namely:

"[1] Do you like the New Society?

"[2] Do you like the reforms under martial law?

"[3] Do you like Congress again to hold, sessions?

"[4] Do you like the plebiscite to be held later?

"[5] Do you like the way President Marcos is running the affairs of the government?" [Bulletin Today, January 10, 1973; additional question underscored.]

"[6] Do you approve of the citizens assemblies as the base of popular government to decide issues of national interests?

"[7] Do you approve of the new Constitution?

"[8] Do you want a plebiscite to be called to ratify the new Constitution?

"[9] Do you want the elections to be held in November, 1973 in accordance with the provisions of the 1935 Constitution?

"[10] If the elections would not be held, when do you want the next elections to be called?

"[11] Do you want martial law to continue?"

[Bulletin Today, January 11, 1973]

To begin with, questions nos. 1, 2, 3, 4, 5, 6, 9, 10 and 11 are not proper in a plebiscite for the ratification of a proposed Constitution or of a proposed amendment thereto. Secondly, neither is the language of question No. 7 — "Do you approve of the new Constitution? " One approves "of" the act of another, which does not need such approval for the effectivity of said act, which the first person, however, finds to be good, wise or satisfactory. The approval of the majority of the votes cast in a plebiscite is, however, essential for an amendment to the Constitution to be valid as part thereof. Thirdly, if the proceedings in the Citizens' Assemblies constituted a plebiscite, question No. 8 would have been unnecessary and improper, regardless of whether question No. 7 were answered affirmatively or negatively. If the majority of the answers to question No. 7 were in the affirmative the

proposed Constitution would have become effective and no other plebiscite could be held thereafter in connection therewith, even if the majority of the answers to question No. 8 were, also, in the affirmative. If the majority of the answers to question No. 7 were in the negative, neither may another plebiscite be held, even if the majority of the answers to question No. 8 were in the affirmative. In either case, not more than one plebiscite could be held for the ratification or rejection of the proposed Constitution. In short, the insertion of said two (2) questions — apart from the other questions adverted to above — indicate strongly that the proceedings therein did not partake of the nature of a plebiscite or election for the ratification or rejection of the proposed Constitution.

Indeed, I can not, in good conscience, declare that the proposed Constitution has been approved or adopted by the people in the citizens' assemblies all over the Philippines, when it is, to my mind, a matter of judicial knowledge that there have been no such citizens' assemblies in many parts of Manila and suburbs, not to say, also, in other parts of the Philippines. In a letter of Governor Efren B. Pascual of Bataan, dated January 15, 1973, to the Chief Executive, the former reported:

"* * * This report includes a resumee (sic) of the activities we undertook in effecting the referendum on the eleven questions you wanted our people consulted on and the Summary of Results thereof for each municipality and for the whole province.

"* * * * *"

"* * * Our initial plans and preparations, however, dealt only on the original five questions. Consequently, when we received an instruction on January 10 to change the questions, we urgently suspended all scheduled Citizens' Assembly meetings on that day and called all Mayors, Chiefs of Offices and other government officials to another conference to discuss with them the new set of guidelines and materials to be used.

"On January 11, * * * another instruction from the top was received to include the original five questions among those to be discussed and asked in the Citizens' Assembly meetings. With this latest order, we again had to make modifications in our instructions to all those managing and supervising the holding of the Citizens' Assembly meetings throughout the province. * * * Aside from the coordinators we had from the Office of the Governor, the splendid cooperation and support extended by almost all government officials and employees in the province, particularly of the Department of Education, PC and PACD personnel, provided us with enough hands to trouble shoot and implement sudden changes in the instructions anytime and anywhere needed. * * *

"* * * As to our people, in general, their enthusiastic participation showed their preference and readiness to accept this new method of government to people consultation in shaping up government policies."

Thus, as late as January 10, 1973, the Bataan officials had to suspend "all scheduled Citizens' Assembly meetings * * *" and call all available officials "* * *" to discuss with them the new set of guidelines and materials to be used * * *." Then, "on January 11 * * * another instruction from the top was received to include the original five questions among those to be discussed and asked in the Citizens' Assembly meetings. With this latest order, we again had to make modifications in our instructions to all those managing and supervising the holding of the Citizens' Assembly meetings throughout the province. * * * As to our people, in general, their enthusiastic participation showed their preference and readiness to accept the new method of government to people consultation in shaping up government policies."

This communication manifestly shows: 1) that, as late as January 11, 1973, the Bataan officials had still to discuss — not put into operation — means and ways to carry out the changing instructions from the top on how to organize the citizens' assemblies, what to do therein and even what questions or topics to propound or touch in said assemblies; 2) that the assemblies would involve no more than consultations or dialogues between people and government — not decisions to be made by the people; and 3) that said consultations were aimed only at "shaping up government policies" and, hence, could not, and did not, partake of the nature of a plebiscite for the ratification

or rejection of a proposed amendment of a new or revised Constitution, for the latter does not entail the formulation of a policy of the Government, but the making of a decision by the people on the new way of life, as a nation, they wish to have, once the proposed Constitution shall have been ratified.

If this was the situation in Bataan — one of the province nearest to Manila — as late as January 11, 1973, one can easily imagine the predicament of the local officials and people in the remote barrios in northern and southern Luzon, in the Bicol region, in the Visayan Islands and Mindanao. In fact, several members of the Court, including those of their immediate families and their household, although duly registered voters in the area of Greater Manila, were not even notified that citizens' assemblies would be held in the places where their respective residences were located. In the Prohibition and Amendment case,[77] attention was called to the "duty cast upon the court of taking judicial cognizance of anything affecting the existence and validity of any law or portion of the Constitution * * *." In line with its own pronouncement in another case, the Federal Supreme Court of the United States stressed, in *Baker vs. Carr*,[78] that "a court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared."

In the light of the foregoing, I cannot see how the question under consideration can be answered or resolved otherwise than in the negative.

V

Have the people acquiesced in the proposed Constitution?

It is urged that the present Government of the Philippines is now and has been run, since January 17, 1973, under the Constitution drafted by the 1971 Constitutional Convention; that the political department of the Government has recognized said revised Constitution; that our foreign relations are being conducted under such new or revised Constitution; that the Legislative Department has recognized the same; and that the people, in general, have, by their acts or omissions, indicated their conformity thereto.

As regards the so-called political organs of the Government, I gather that respondents refer mainly to the offices under the Executive Department. In a sense, the latter performs some functions which, from a constitutional viewpoint, are political in nature, such as in recognizing a new state or government, in accepting diplomatic representatives accredited to our Government, and even in devising administrative means and ways to better carry into effect Acts of Congress which define the goals or objectives thereof, but are either imprecise or silent on the particular measures to be resorted to in order to achieve the said goals or delegate the power to do so, expressly or impliedly, to the Executive. This, notwithstanding, the political organ of a government that purports to be republican is essentially the Congress or Legislative Department. Whatever may be the functions allocated to the Executive Department — specially under a written, rigid Constitution, with a republican system of Government like ours — the role of that Department is inherently, basically and fundamentally executive in nature — to "take care that the laws be faithfully executed," in the language of our 1935 Constitution.[79]

Consequently, I am not prepared to concede that the acts of the officers and offices of the Executive Department, in line with Proclamation No. 1102, connote a recognition thereof or an acquiescence thereto. Whether they recognized the proposed Constitution or acquiesce thereto or not is something that cannot legally, much less necessarily or even normally, be deduced from their acts in accordance therewith, because they are bound to obey and act in conformity with the orders of the President, under whose "control" they are, pursuant to the 1935 Constitution. They have absolutely no other choice, specially in view of Proclamation No. 1081 placing the Philippines under Martial Law. Besides, by virtue of the very decrees, orders and instructions issued by the President thereafter, he had assumed all powers of Government — although some question his authority to do so — and, consequently, there is hardly anything he has done since the issuance of Proclamation No. 1102, on January

17, 1973 — declaring that the Constitution proposed by the 1971 Constitutional Convention has been ratified by the overwhelming majority of the people — that he could not do under the authority he claimed to have under Martial Law, since September 21, 1972, except the power of supervision over inferior courts and its personnel, which said proposed Constitution would place under the Supreme Court, and which the President has not ostensibly exercised, except as to some minor routine matters, which the Department of Justice has continued to handle, this Court having preferred to maintain the status quo in connection therewith pending final determination of these cases, in which the effectivity of the aforementioned Constitution is disputed.

Then, again, a given department of the Government cannot generally be said to have "recognized" its own, acts. Recognition normally connotes the acknowledgment by a party of the acts of another. Accordingly, when a subordinate officer or office of the Government complies with the commands of a superior officer or office, under whose supervision and control he or it is, the former merely obeys the latter. Strictly speaking, and from a legal and constitutional viewpoint, there is no act of recognition involved therein. Indeed, the lower officer or office, if he or it acted otherwise, would just be guilty of insubordination.

Thus, for instance, the case of *Taylor vs. Commonwealth*[80] — cited by respondents herein in support of the theory of the people's acquiescence — involved a constitution ordained in 1902 and "proclaimed by a convention duly called by a direct vote of the people of the state to revise and amend the Constitution of 1869. The result of the work of that Convention has been recognized, accepted and acted upon as the only valid Constitution of the State" by —

1. The "Governor of the State in swearing fidelity to it and proclaiming it, as directed thereby";
2. The "Legislature in its formal official act adopting a joint resolution July 15, 1902, recognizing the Constitution ordained by the Convention * * *";
3. The "individual oaths of its members to support it, and by its having been engaged for nearly a year, in legislating under it and putting its provisions into operation * * *";
4. The "judiciary in taking the oath prescribed thereby to support it and by enforcing its provisions * * *"; and
5. The "people in their primary capacity by peacefully accepting it and acquiescing in it, by registering as voters under it to the extent of thousands throughout the State, and by voting, under its provisions, at a general election for their representatives in the Congress of the United States."

Note that the New Constitution of Virginia, drafted by a convention whose members were elected directly by the people, was not submitted to the people for ratification or rejection thereof. But, it was recognized, not by the convention itself, but by other sectors of the Government, namely, the Governor; the Legislature — not merely by individual acts of its members, but by formal joint resolution of its two (2) chambers; by the judiciary; and by the people, in the various ways specified above. What is more, there was no martial law. In the present cases, none of the foregoing acts of acquiescence was present. Worse still, there is martial law, the strict enforcement of which was announced shortly before the alleged citizens' assemblies. To top it all, in the *Taylor* case, the effectivity of the contested amendment was not contested judicially until about one (1) year after the amendment had been put into operation in all branches of the Government, and complied with by the people who participated in the elections held pursuant to the provisions of the new Constitution. In the cases under consideration, the legality of Presidential Decree No. 73 calling a plebiscite to be held on January 15, 1973, was impugned as early as December 7, 1972, or five (5) weeks before the scheduled plebiscite, whereas the validity of Proclamation No. 1102 declaring on January 17, 1973, that the proposed Constitution had been ratified — despite General Order No. 20, issued on January 7, 1972, formally and officially suspending the plebiscite until further notice was impugned

as early as January 20, 1973, when L-36142 was filed or three (3) days after the issuance of Proclamation No. 1102.

It is further alleged that a majority of the members of our House of Representatives and Senate have acquiesced in the new or revised Constitution, by filing written statements opting to serve in the Ad Interim Assembly established in the Transitory Provisions of said Constitution. Individual acts of recognition by members of our legislature, as well as of other collegiate bodies under the government, are invalid as acts of said legislature or bodies, unless its members have performed said acts in session duly assembled, or unless the law provides otherwise, and there is no such law in the Philippines. This is a well-established principle of Administrative Law and of the Law of Public Officers, and no plausible reason has been adduced to warrant departure therefrom.[81]

Indeed, if the members of Congress were generally agreeable to the proposed Constitution, why did it become necessary to padlock its premises to prevent its meeting in session on January 22, 1973, and thereafter as provided in the 1935 Constitution? It is true that, theoretically, the members of Congress, if bent on discharging their functions under said Constitution, could have met in any other place, the building in which they perform their duties being immaterial to the legality of their official acts. The force of this argument is, however, offset or dissipated by the fact that, on or about December 27, 1972, immediately after a conference between the Executive, on the one hand, and members of Congress, on the other, some of whom expressed the wish to meet in session on January 22, 1973, as provided in the 1935 Constitution, a Daily Express columnist (Primitivo Mijares) attributed to Presidential Assistant Guillermo de Vega a statement to the effect that " 'certain members of the Senate appear to be missing the point in issue' when they reportedly insisted on taking up first the question of convening Congress." The Daily Express of that date,[82] likewise, headlined, on its front page, a "Senatorial Plot Against 'Martial Law Government' Disclosed." Then, in its issue of December 29, 1972, the same paper imputed to the Executive an appeal "to diverse groups involved in a conspiracy to undermine" his powers "under martial law to desist from provoking a constitutional crisis * * * which may result in the exercise by me of authority which I have not exercised."

No matter how good the intention behind these statements may have been, the idea implied therein was too clear and ominous for any member of Congress who thought of organizing, holding or taking part in a session of Congress, not to get the impression that he could hardly do so without inviting or risking the application of Martial Law to him. Under these conditions, I do not feel justified in holding that the failure of the members of Congress to meet since January 22, 1973, was due to their recognition, acquiescence in or conformity with the provisions of the aforementioned Constitution, or its alleged ratification.

For the same reasons, especially because of Proclamation No. 1081, placing the entire Philippines under Martial Law, neither am I prepared to declare that the people's inaction as regards Proclamation No. 1102, and their compliance with a number of Presidential orders, decrees and/or instructions — some or many of which have admittedly had salutary effects — issued subsequently thereto amounts, constitutes or attests to a ratification, adoption or approval of said Proclamation No. 1102. In the words of the Chief Executive, "martial law connotes power of the gun, meant coercion by the military, and compulsion and intimidation." [83] The failure to use the gun against those who comply with the orders of the party wielding the weapon does not detract from the intimidation that Martial Law necessarily connotes. It may reflect the good, reasonable and wholesome attitude of the person who has the gun, either pointed at others, without pulling the trigger, or merely kept in its holster, but not without warning that he may or would use it if he deemed it necessary. Still, the intimidation is there, and inaction or obedience of the people, under these conditions, is not necessarily an act of conformity or acquiescence. This is specially so when we consider that the masses are, by and large, unfamiliar with the parliamentary system, the new form of government introduced in the proposed Constitution, with the particularity

that it is not even identical to that existing in England and other parts of the world, and that even experienced lawyers and social scientists find it difficult to grasp the full implications of some provisions incorporated therein.

As regards the applicability to these cases of the "enrolled bill" rule, it is well to remember that the same refers to a document certified to the President — for his action under the Constitution — by the Senate President and the Speaker of the House of Representatives, and attested to by the Secretary of the Senate and the Secretary of the House of Representatives, concerning legislative measures approved by the two Houses of Congress. The argument of the Solicitor General is, roughly, this: If the enrolled bill is entitled to full faith and credence and, to this extent, it is conclusive upon the President and the judicial branch of the Government, why should Proclamation No. 1102 merit less consideration than an enrolled bill?

Before answering this question, I would like to ask the following: If, instead of being certified by the aforementioned officers of Congress, the so-called enrolled bill were certified by, say, the President of the Association of Sugar Planters and/or Millers of the Philippines, and the measure in question were a proposed legislation concerning Sugar Plantations and Mills sponsored by said Association, which even prepared the draft of said legislation, as well as lobbied actually for its approval, for which reason the officers of the Association, particularly its aforementioned president — whose honesty and integrity are unquestionable — were present at the deliberations in Congress when the same approved the proposed legislation, would the enrolled bill rule apply thereto? Surely, the answer would have to be in the negative. Why? Simply because said Association President has absolutely no official authority to perform in connection therewith, and, hence, his certification is, legally, as good as non-existent.

Similarly, a certification, if any, of the Secretary of the Department of Local Governments and Community Development about the tabulated results of the voting in the Citizens' Assemblies allegedly held all over the Philippines — and the records do not show that any such certification, either to the President of the Philippines or to the President of the Federation or National Association of presidents of Provincial Associations of presidents of municipal associations of presidents of barrio or ward assemblies of citizens — would not, legally and constitutionally, be worth the paper on which it is written. Why? Because said Department Secretary is not the officer designated by law to superintend plebiscites or elections held for the ratification or rejection of a proposed amendment or revision of the Constitution and, hence, to tabulate the results thereof. Worse still, it is the officer or department which, according to Article X of the 1935 Constitution, should not and must not be allowed to participate in said plebiscite — if plebiscite there was.

After citing approvingly its ruling in *United States vs. Sandoval*,^[84] the Highest Court of the United States declared that courts "will not stand impotent before an obvious instance of a manifestly unauthorized exercise of power."^[85]

I cannot honestly say, therefore, that the people have impliedly or expressly indicated their conformity to the proposed Constitution.

VI

Are the Parties entitled to any relief?

Before attempting to answer this question, a few words must be said about the procedure followed in these five (5) cases. In this connection, it should be noted that the Court has not as yet decided whether or not to give due course to the petitions herein or to require the respondents to answer thereto. Instead, it has required the respondents to comment on the respective petitions — with three (3) members of the Court voting to dismiss them outright and then considered the comments thus submitted by the respondents as motions to dismiss, as well as set

the same for hearing. This was due to the transcendental nature of the main issue raised, the necessity of deciding the same with utmost dispatch, and the main defense set up by respondents herein, namely, the alleged political nature of said issue, placing the same, according to respondents, beyond the ambit of judicial inquiry and determination. If this defense was sustained, the cases could readily be dismissed; but, owing to the importance of the questions involved, a reasoned resolution was demanded by public interest. At the same time, respondents had cautioned against a judicial inquiry into the merits of the issues posed on account of the magnitude of the evil consequences, it was claimed, which would result from a decision thereon, if adverse to the Government.

As a matter of fact, some of those issues had been raised in the plebiscite cases, which were dismissed as moot and academic, owing to the issuance of Proclamation No. 1102 subsequently to the filing of said cases, although before the rendition of judgment therein. Still one of the members of the Court (Justice Zaldivar) was of the opinion that the aforementioned issues should be settled in said cases, and he, accordingly, filed an opinion passing upon the merits thereof. On the other hand, three (3) members of the Court – Justices Barredo, Antonio and Esguerra – filed separate opinions favorable to the respondents in the plebiscite cases, Justice Barredo holding "that the 1935 Constitution has pro tanto passed into history and has been legitimately supplanted by the Constitution in force by virtue of Proclamation 1102." [86] When the petitions at bar were filed, the same three (3) members of the Court, consequently, voted for the dismissal of said petitions. The majority of the members of the Court did not share, however, either view, believing that the main question that arose before the rendition of said judgment had not been sufficiently discussed and argued as the nature and importance thereof demanded.

The parties in the cases at bar were accordingly given every possible opportunity to do so and to elucidate on and discuss said question. Thus, apart from hearing the parties in oral argument for five (5) consecutive days — morning and afternoon, or a total of exactly 26 hours and 31 minutes — their respective counsel filed extensive notes on their oral arguments, as well as on such additional arguments as they wished to submit, and reply notes or memoranda, in addition to rejoinders thereto, aside from a sizeable number of documents in support of their respective contentions, or as required by the Court. The arguments, oral and written, submitted have been so extensive and exhaustive, and the documents filed in support thereof so numerous and bulky, that, for all intents and purposes, the situation is as if — disregarding forms the petitions had been given due course and the cases had been submitted for decision.

Accordingly, the majority of the members of the Court believe that they should express their views on the aforementioned issues as if the same were being decided on the merits, and they have done so in their individual opinions attached hereto. Hence, the resume of the votes cast and the tenor of the resolution, in the last pages hereof, despite the fact that technically the Court has not, as yet, formally given due course to the petitions herein.

And, now, here are my views on the reliefs sought by the parties.

In L-36165, it is clear that we should not issue the writ of mandamus prayed for against Gil J. Puyat and Jose Roy, as President and President Pro Tempore respectively of the Senate, it being settled in our jurisdiction, based upon the theory of separation of powers, that the judiciary will not issue such writ to the head of a co-equal department, like the aforementioned officers of the Senate.

In all other respects and with regard to the other respondents in said case, as well as in cases L-36142, L-36164, L-36236 and L-36283, my vote is that the petitions therein should be given due course, there being more than *prima facie* showing that the proposed Constitution has not been ratified in accordance with Article XV of the 1935 Constitution, either strictly or substantially, or has been acquiesced in by the people or a majority thereof; that said proposed Constitution is not in force and effect; and that the 1935 Constitution is still the Fundamental Law of the Land, without prejudice to the submission of said proposed Constitution to the people at a plebiscite

for its ratification or rejection in accordance with Articles V, X and XV of the 1935 Constitution and the provisions of the Revised Election Code in force at the time of such plebiscite.

Perhaps others would feel that my position in these cases overlooks what they might consider to be the demands of "judicial statesmanship," whatever may be the meaning of such phrase. I am aware of this possibility, if not probability; but "judicial statesmanship," though consistent with Rule of Law, cannot prevail over the latter. Among consistent ends or consistent values, there always is a hierarchy, a rule of priority.

We must realize that the New Society has many achievements which would have been very difficult, if not impossible, to accomplish under the old dispensation. But, in and for the judiciary, statesmanship should not prevail over the Rule of Law. Indeed, the primacy of the law or of the Rule of law and faithful adherence thereto are basic, fundamental and essential parts of statesmanship itself.

Resume of the Votes Cast and the Court's Resolution

As earlier stated, after the submittal by the members of the Court of their individual opinions and/or concurrences as appended hereto, the writer will now make, with the concurrence of his colleagues, a resume or summary of the votes cast by each of them.

It should be stated that by virtue of the various approaches and views expressed during the deliberations, it was agreed to synthesize the basic issues at bar in broad general terms in five questions for purposes of taking the votes. It was further agreed of course that each member of the Court would expound in his individual opinion and/or concurrence his own approach to the stated issues and deal with them and state (or not) his opinion thereon singly or jointly and with such priority, qualifications and modifications as he may deem proper, as well as discuss thereon other related issues which he may consider vital and relevant to the cases at bar.

The five questions thus agreed upon as reflecting the basic issues herein involved are the following:

1. Is the issue of the validity of Proclamation No. 1102 a justiciable, or political and therefore non-justiciable, question?
2. Has the Constitution proposed by the 1971 Constitutional Convention been ratified validly (with substantial, if not strict, compliance) conformably to the applicable constitutional and statutory provisions?
4. Has the aforementioned proposed Constitution been acquiesced in (with or without valid ratification) by the people?
5. Are petitioners entitled to relief? And

Is the aforementioned proposed Constitution in force?

The results of the voting, premised on the individual views expressed by the members of the Court in their respective opinions and/or concurrences, are as follows:

1. On the first issue involving the political-question doctrine, Justices Makalintal, Zaldivar, Castro, Fernando, Teehankee and myself, or six (6) members of the Court, hold that the issue of the validity of Proclamation No. 1102 presents a justiciable and non-political question. Justices Makalintal and Castro did not vote squarely on this question, but, only inferentially, in their discussion of the second question. Justice Barredo qualified his vote, stating that "inasmuch as it is claimed that there has been approval by the people, the Court may inquire into the question of whether or not there has actually been such an approval, and, in the affirmative, the Court should keep its hands-off out of respect to the people's will, but, in the negative, the Court may determine from both factual and legal angles whether or not Article XV of the 1935 Constitution has been complied with." Justices Makasiar,

Antonio and Esguerra, or three (3) members of the Court hold that the issue is political and "beyond the ambit of judicial inquiry."

2. On the second question of validity of the ratification, Justices Makalintal, Zaldivar, Castro, Fernando, Teehankee and myself, or six (6) members of the Court also hold that the Constitution proposed by the 1971 Constitutional Convention was not validly ratified in accordance with Article XV, section 1 of the 1935 Constitution, which provides only one way for ratification, i.e., "in an election or plebiscite held in accordance with law and participated in only by qualified and duly registered voters." [87]

Justice Barredo qualified his vote, stating that "(A)s to whether or not the 1973 Constitution has been validly ratified pursuant to Article XV, I still maintain that in the light of traditional concepts regarding the meaning and intent of said Article, the referendum in the Citizens' Assemblies, specially in the manner the votes therein were cast, reported and canvassed, falls short of the requirements thereof. In view, however, of the fact that I have no means of refusing to recognize as a judge that factually there was voting and that the majority of the votes were for considering as approved the 1973 Constitution without the necessity of the usual form of plebiscite followed in past ratifications, I am constrained to hold that, in the political sense, if not in the orthodox legal sense, the people may be deemed to have cast their favorable votes in the belief that in doing so they did the part required of them by Article XV, hence, it may be said that in its political aspect, which is what counts most, after all, said Article has been substantially complied with, and, in effect, the 1973 Constitution has been constitutionally ratified."

Justices Makasiar, Antonio and Esguerra, or three (3) members of the Court hold that under their view there has been in effect substantial compliance with the constitutional requirements for valid ratification.

3. On the third question of acquiescence by the Filipino people in the aforementioned proposed Constitution, no majority vote has been reached by the Court.

Four (4) of its members, namely, Justices Barredo, Makasiar, Antonio and Esguerra hold that "the people have already accepted the 1973 Constitution." [88]

Two (2) members of the Court, namely, Justice Zaldivar and myself hold that there can be no free expression, and there has even been no expression, by the people qualified to vote all over the Philippines, of their acceptance or repudiation of the proposed Constitution under Martial Law. Justice Fernando states that "(I)f it is conceded that the doctrine stated in some American decisions to the effect that independently of the validity of the ratification, a new Constitution once accepted or acquiesced in by the people must be accorded recognition by the Court, I am not at this stage prepared to state that such doctrine calls for application in view of the shortness of time that has elapsed and the difficulty of ascertaining what is the mind of the people in the absence of the freedom of debate that is a concomitant feature of martial law."

Three (3) members of the Court express their lack of knowledge and/or competence to rule on the question. Justices Makalintal and Castro are joined by Justice Teehankee in their statement that "Under a regime of martial law, with the free expression of opinions through the usual media vehicles restricted, (they) have no means of knowing, to the point of judicial certainty, whether the people have accepted the Constitution." [89]

4. On the fourth question of relief, six (6) members of the Court, namely, Justices Makalintal, Castro, Barredo, Makasiar, Antonio and Esguerra voted to DISMISS the petition. Justices Makalintal and Castro so voted on the strength of their view that "(T)he effectivity of the said Constitution, in the final analysis, is the basic and ultimate question posed by these cases to resolve which considerations other than judicial, and therefore beyond the competence of this Court, [90] are relevant and unavoidable." [91]

Four (4) members of the Court, namely, Justices Zaldivar, Fernando, Teehankee and myself voted to deny respondents' motion to dismiss and to give due course to the petitions.

5. On the fifth question of whether the new Constitution of 1973 is in force:

Four (4) members of the Court, namely, Justices Barredo, Makasiar, Antonio and Esguerra hold that it is in force by virtue of the people's acceptance thereof;

Four (4) members of the Court, namely, Justices Makalintal, Castro, Fernando and Teehankee cast no vote thereon on the premise stated in their votes on the third question that they could not state with judicial certainty whether the people have accepted or not accepted the Constitution;

and

Two (2) members of the Court, namely, Justice Zaldivar and myself voted that the Constitution proposed by the 1971 Constitutional Convention is not in force;

with the result that there are not enough votes to declare that the new Constitution is not in force.

ACCORDINGLY, by virtue of the majority of six (6) votes of Justices Makalintal, Castro, Barredo, Makasiar, Antonio and Esguerra with the four (4) dissenting votes of the Chief Justice and Justices Zaldivar, Fernando and Teehankee, all the aforementioned cases are hereby dismissed. This being the vote of the majority, there is no further judicial obstacle to the new Constitution being considered in force and effect. It is so ordered.

Makalintal, Ruiz Castro, Barredo, Makasiar, Antonio, and Esguerra, JJ., voted to dismiss the cases.

Zaldivar, J., dissents in line with the personal opinion of the Chief Justice, and also dissents in a separate opinion.

Fernando, J., dissents in conformity with the personal views of the Chief Justice, except as to such portions thereof on which he expresses his own thoughts as set forth in his dissenting opinion.

Teehankee, J., dissents in conformity with the Chief Justice's personal opinion and files a separate dissent.

[1] Justices Makalintal, Castro, Barredo, Makasiar, Antonio and Esguerra.

[2] Chief Justice Concepcion and Justices Fernando and Teehankee.

[3] Justice Zaldivar.

[4] Case G. R. No. L-36164.

[5] Case G. R. No. L-36236.

[6] Case G. R. No. L-36283.

[7] Who withdrew as petitioner on January 25, 1973.

[8] Originally, Gerardo Roxas, Ambrosio Padilla and Salvador II, Laurel. Now, after the withdrawal of the latter, the first two (2) only.

[9] Namely, Jovito R. Salonga, Ramon V. Mitra, Jr. and Eva Estrada- Kalaw.

[10] Napoleon V. Wag, et al. vs. Executive Secretary, et al.

[11] Araneta vs. Dinglasan, 84 Phil. 431, 437-438. See, also, Gonzales vs. Commission on Elections, L-28196 & L-28224, Nov. 9, 1967. Italics supplied.

[12] Art. VI, sec. 20(1), Constitution.

[13] Art. VII, sec. 10(7), Constitution.

[14] Italics supplied.

[15] Sec page 4, last paragraph, of his Comment dated Feb. 6, 1973.

[16] In re Opinion of Justices, 107 Atl. 673, 5 A. L. R. 1412; Crawford, Secretary of State vs. Gilchrist, 59 So. Rep. 963; McAdams vs. Henley, 273 So. Rep. 355; Egbert v. City of Demseith, 74 N. D. 1, 168 A. L. R. 621, 24 N. W. 2nd 907; State ex rel. Landis, Atty. Gen. vs. Thompson, 163 So. Rep. 270; St. Louis Brequing Association vs. George H. Moore, 64 L. ed. 947; Ellingham vs. Dye, 99 N. E. Rep. 18; Johnson vs. Craft, 87 So. Rep. 375.

[17] Mun. of Malabang vs. Benito, L-28113, Mar. 28, 1969; NAWASA vs. Piguing, et al., L-35573, Oct. 11, 1968; Fernandez vs. P. Cuerva & Co., L-21114, Nov. 25, 1967; Gonzales vs. Commission on Elections, L-28224, Nov. 29, 1967; Bara Lidasan vs. COMELEC, L-28089, Oct. 25, 1967; Mun. of San Juan vs. NAWASA, L-22047, Aug. 31, 1967; Mun. of San Joaquin vs. Siva, L-19870, Mar. 18, 1967; Pelayo vs. Auditor General, L-23825, Dec. 24, 1965; Philippine Constitution Association vs. Gimenez, L-23326, Dec. 18, 1965; Mun. of La Carlota vs. NAWASA, L-20232, Sept. 30, 1964; Guevara vs. Inocentes, L-25577, Mar. 15, 1966; Gillera vs. Fernandez, L-20741, Jan. 31, 1964; Siguiente vs. Secretary of Justice, L-20370, Nov. 29, 1963; Mun. of Naguilian vs. NAWASA, L-18540, Nov. 29, 1963; Herrera vs. Liwag, L-20079, Sept. 30, 1963; Aytona vs. Castillo, L-19313, Jan. 19, 1962; La Mallorca, etc. vs. Ramos, et al., L-15476, Sept. 19, 1961; Tan vs. De Leon, et al., L-15254, Sept. 16, 1961; Macias vs. Commission on Elections, L-18684, Sept. 14, 1961; Philippine Tobacco Flue-Curing & Redrying Corp. vs. Sabugo, et al., L-16017, Aug. 31, 1961; Miller vs. Mardo, L-15138, July 31, 1961; Cu Bu Liong vs. Estrella, et al., L-14212, July 31, 1961; Pampanga Sugar Development Co., Inc. vs. Fuentes, et al., L-14738, July 31, 1961; Earnshaw Docks & Honolulu Iron Works vs. Mardo, et al., L-14759, July 31, 1961; Liwanag vs. Central Azucarera Don Pedro, L-15372, July 31, 1961; Lecura vs. Regional Office No. 3, etc., L-15582, July 31, 1961; Pitogo vs. Sen Bee Trading Co., et al., L-15693, July 31, 1961; Pascual vs. Sec. of Public Works and Communications, L-10405, Dec. 29, 1960; Corominas, Jr. vs. Labor Standards Commission, L-14837, June 30, 1961; City of Baguio vs. NAWASA, L-12032, Aug. 31, 1959; City of Cebu vs. NAWASA, L-12892, April 20, 1960; Montes vs. Civil Service Board of Appeals, 101 Phil. 490; Rutter vs. Esteban, 93 Phil. 68; Araneta vs. Dinglasan, 84 Phil. 368; Borromeo vs. Mariano, 41 Phil. 322.

[18] G. R. Nos. L-35925, L-35929, L-35940, L-35941, L-35942, L-35948, L-35953, L-35961, L-35965 and L-35979, I decided on January 22, 1973.

[19] L-33964, Teodosio Lansang, et al. vs. Brigadier-General Eduardo M. Garcia; L-33965, Rogelio V. Arienda vs. Secretary of National Defense, et al.; L-33973, Luzvimindo David vs. Gen. Eduardo Garcia, et al.; L-33962, Felicidad G. Prudente vs. General Manuel Yan, et al.; L-34004, Domingo E. de Lara vs. Brigadier-General Eduardo M. Garcia; L-34013, Reynaldo Rimando vs. Brigadier Gen. Eduardo M. Garcia; L-34039, Carlos C. Rabago vs. Brig. Gen. Eduardo Garcia, et al.; L-34265, Antolin Oreta, Jr. vs. Gen. Eduardo Garcia, et al.; and L-14339, Gary B. Olivar, et al. vs. Gen. Eduardo Garcia, et al.

[20] 5 Phil. 87.

[21] 91 Phil. 882.

[22] G. R. Nos. L-28196 and L-28224, Nov. 9, 1967.

[23] 78 Phil 1.

[24] Supra.

[25] In re McConaughy, 119 N. W. 408, 417.

[26] 103 Phil. 1051, 1067.

[27] 119 N.W. 408, 411, 417.

[28] 92 Ky. 589, 18 S. W. 522, 523.

[29] Citing *Koehler vs. Hill*, 60 Iowa 543, 14 N. W. Rep. 738, and 15 N. W. Rep. 609; *State vs. Tufly*, 19 Nev. 391, 12 Pac. Rep. 835, *Supra*, p. 524.

[30] *Angara vs. Electoral Commission*, 63 Phil. 139, 157. Italics supplied.

[31] 12 L.ed. 581 (1849).

[32] *Luther vs. Borden*, *supra*. p. 598. Italics supplied.

[33] In re *McConaughy*, *supra*, p. 416. Italics supplied.

[34] 369 U. S. 186, 7 L. ed. 2d. 663, 82 S. Ct. 691 (March 26, 1962).

[35] 395 U. S. 486, 23 L. ed. 2d. 491, 89 S. Ct. 1944 (1969).

[36] In re *McConaughy*, 119 N. W. 408, 415. Italics supplied. The observation as to the uniformity of authorities on the matter has been reiterated in *Winget vs. Holm*, 244 N. W. 329, 332.

[37] *Baker vs. Carr*, 369 U. S. 186, 7 L. ed. 663, 686, 82 S. Ct. 691.

[38] See p. 5 of the Petition.

[39] Italics supplied.

[40] *The Framing of the Philippine Constitution*, by Aruego, Vol. 1, p. 215.

[41] *The Framing of the Philippine Constitution*, by Aruego, Vol. 1, pp. 215, 221, 227-228.

[42] *Ibid.* pp. 222-224.

[43] *Id.*, pp. 224-227.

[44] "SEC. 431. Qualifications prescribed for voters.- Every male person who is not a citizen or subject of a foreign power, twenty-one years of age or over, who shall have been a resident of the Philippines for one year and of the municipality in which he shall offer to vote for six months next preceding the day of voting is entitled to vote in all elections if comprised within either of the following three classes:

"(a) Those who, under the laws in force in the Philippine Islands upon the twenty-eighth day of August, nineteen hundred and sixteen, were legal voters and had exercised the right of suffrage.

"(b) Those who own real property to the value of five hundred pesos, declared in their name for taxation purposes for a period of not less than one year prior to the date of the election, or who annually pay thirty pesos or more of the established taxes.

"(c) Those who are able to read and write either Spanish, English, or a native language.

"SEC. 432. Disqualifications.- The following persons shall be disqualified from voting:

"(a) Any person who, since the thirteenth day of August, eighteen hundred and ninety-eight, has been sentenced by final judgment to suffer not less than eighteen months of imprisonment, such disability not having been removed by plenary pardon.

"(b) Any person who has violated an oath of allegiance taken by him to the United States.

"(c) Insane or feeble-minded persons.

"(d) Deaf-mutes who cannot read and write.

"(e) Electors registered under subsection (c) of the next preceding section who, after failing to make a sworn statement to the satisfaction of the board of inspectors at any of its two meetings for registration and revision, that they are incapacitated for preparing their ballots due to permanent physical disability, present themselves at the hour of voting as incapacitated, irrespective of whether such incapacity be real or feigned."

[45] L-34150, October 16 and November 4, 1971.

[46] "For taking action on any of the above enumerated measures, majority vote of all the barrio assembly members registered in the list of the barrio secretary is necessary."

[47] "All duly registered barrio assembly members qualified to vote may vote in the plebiscite. Voting procedures may be made either in writing as in regular elections, and/or declaration by the voters to the board of election tellers. The board of election tellers shall be the same board envisioned by section 8, paragraph 2 of this Act, in case of vacancies in this body, the barrio council may fill the same."

[48] *Eduards vs. Lesueur*, 53 S.W. 1130; *Johnson vs. Grand Forks County*, 113 N.W. 1071; *Ellingham vs. Dye* (1912), 178 Ind. 336, 99 N.E. 1; *State vs. Marcus*, 160 Wis. 354, 152 N.W. 419.

[49] In *Alcantara vs. Secretary of the Interior*, 61 Phil. 459, this Court held that "when a state constitution enumerates and fixes the qualifications of those who may exercise the right of suffrage, the legislature cannot take from nor add to said qualifications unless the power to do so is conferred upon it by the constitution itself."

Since suffrage, according to Webster, is a voice given not only in the choice of a man for an office or trust, but, also, in deciding a controverted question, it follows, considering the said ruling in *Alcantara*, that the constitutional qualifications for voters apply equally to voters in elections to public office and to voters in a plebiscite.

Similarly, the Revised Election Code provides in its section 2 that all elections of public officers by the people" and all votings in connection with plebiscites shall be conducted in conformity with the provisions of said Code.

[50] Republic Act No. 6388, section 101 of which, in part, provides:

"SEC. 101. Qualifications prescribed for a voter.- Every citizen of the Philippines, not otherwise disqualified by law, twenty-one years of age or over, able to read and write, who shall have resided in the Philippines for one year and in the city, municipality or muni-cipal district wherein he proposes to vote for at least six months immediately preceding the election, may vote at any election.

"* * * * *

[51] "SEC. 102. Disqualifications.- The following persons shall not be qualified to vote:

"(a) Any person who has been sentenced by final judgment to suffer an imprisonment of not less than one year, such disability not having been removed by plenary pardon: Provided, however, That any person disqualified to vote under this paragraph shall auto-matically re-acquire the right to vote upon expiration of ten years after service of sentence unless during such period, he shall have been sentenced by final judgment to suffer an imprisonment of not less than one year.

"(b) Any person who has been adjudged by final judgment by competent court of having violated his allegiance to

the Republic of the Philippines.

"(c) Insane or feeble-minded persons.

"(d) Person who cannot prepare their ballots themselves.

[52] "SEC. 10. * * *

"The following persons shall not be qualified to vote:

"a. Any person who has been sentenced by final judgment to suffer one year or more of imprisonment within two years after service of his sentence;

"b. Any person who has violated his allegiance to the Republic of the Philippines; and

"c. Insane or feeble-minded persons."

[53] 20 C.J., 179-181, quoted in *Demeterio vs. Lopez*, 50 Phil. 43, 60. See, also, *Garchitorena vs. Crescini*, 39 Phil. 258.

[54] *Baldaf vs. Gunson*, 8 P. 2d. 265. See, also, *Martin vs. McGarr*, 117 P. 323; *Glenn vs. Guan*, 64 S.W. 2d. 168. Italics supplied.

[55] L-33325 and L-34043, December 29, 1971.

[56] *Hopkins vs. City of Daluth*, 83 N.W. 536, 538. Italics supplied.

[57] *Maddox vs. Board of State Canvassers*, 149 P. 2d. 112, 115. Italics supplied.

[58] *Port of Palm Beach District, et al. vs. State*, 22 So. 2d. 581, 582-583. Italics supplied.

[59] Art. X, section 1 of the 1935 Constitution.

[60] Ten (10) years.

[61] Art. X, section 2 of the 1935 Constitution.

[62] *Ibid.*

[63] Art. X, section 3 of the 1935 Constitution.

[64] "SEC. 5. Organization of the Commission on Elections.— The Commission shall adopt its own rules of procedure. Two members of the Commission shall constitute a quorum. The concurrence of two members shall be necessary for the pronouncement or issuance of a decision, order or ruling.

"The Commission shall have an executive officer and such other subordinate officers and employees as may be necessary for the efficient performance of its functions and duties, all of whom shall be appointed by the Commission in accordance with the Civil Service Law and rules.

"The executive officer of the Commission, under the direction of the Chairman, shall have charge of the administrative business of the Commission, shall have the power to administer oaths in connection with all matters involving the business of the Commission, and shall perform such other duties as may be required of him by the Commission.

"SEC; 6. Power of the Commission to Investigate and to Hear Controversy and Issue Subpoena.— The Commission or any of the members thereof shall, in compliance with the requirement of due process, have the

power to summon the parties to a controversy pending before it, issue subpoenae and subpoenae duces tecum and otherwise take testimony in any investigation or hearing pending before it, and delegate such power to any officer of the Commission who shall be it, and delegate such power to any officer of the Commission who shall be a member of the Philippine Bar. In case of failure of a witness to attend, the Commission, upon proof of service of the subpoenae to said witness, may issue a warrant to arrest the witness and bring him before the Commission or officer before whom his attendance is required. The Commission shall have the power to punish contempts provided for in the Rules of Court under the same procedure and with the same penalties provided therein. Any controversy submitted to the Commission shall after compliance with the requirements of due process be heard and decided by it within thirty days after submission of the case.

"The Commission may, when it so requires, deputize any member of any national or local law enforcement agency and/or instrumentality of the government to execute under its direct and immediate supervision any of its final decisions, orders, instructions or rulings.

"Any decision, order or ruling of the Commission on Election controversies may be reviewed by the Supreme Court by writ of certiorari in accordance with the Rules of Court or such applicable laws as may be enacted.

"Any violation of any final executory decision, order or ruling of the Commission shall constitute contempt thereof."

[65] 64 S.W. 2d. 168.

[66] L-35538, Roces, et al. vs. Secretary of National Defense, et al.; L-35539, Diokno vs. Hon. Enrile, et al.; L-35540, Soliven, et al vs. Secretary of National Defense, et al.; L-35546, Aquino, Jr., et al. vs. Hon. Enrile, et al.; L-35547, Garcia II vs. Hon. Enrile, et al.; L-35567, Doronila, et al. vs. Secretary of National Defense, et al.; L-35573, Rondon vs. Hon. Enrile, et al.

[67]

"PRESIDENTIAL DECREE NO. 86-A

"STRENGTHENING AND DEFINING THE ROLE

OF BARANGAYS (CITIZENS ASSEMBLIES)

"WHEREAS, on the basis of preliminary and initial reports from the field as gathered from barangays (citizens assemblies) that have so far been established, the people would like to decide for themselves questions or issues, both local and national, affecting their day-to-day lives and their future;

"WHEREAS, the barangays (citizens assemblies) would like themselves to be the vehicle for expressing the views of the people on important national issues;

"WHEREAS, such barangays (citizens assemblies) desire that they be given legal status and due recognition as constituting the genuine, legitimate and valid expression of the popular will; and

"WHEREAS, the people would like the citizens assemblies to conduct immediately a referendum on certain specified questions such as the ratification of the new Constitution, continuance of martial law, the convening of Congress on January 22, 1973, and the elections in November 1973 pursuant to the 1935 Constitution.

"NOW, THEREFORE, I, FERDINAND E. MARCOS, President of the Philippines, by virtue of the powers vested in me by the Constitution as Commander-in-Chief of all Armed Forces of the Philippines do hereby

declare as part of the law of the land the following:

"1. The present barangays (citizens assemblies) are created under Presidential Decree No. 86 dated December 31 1972, shall constitute the base for citizen participation in governmental affairs and their collective views shall be considered in the formulation of national policies or programs and, wherever practicable, shall be translated into concrete and specific decision;

"2. Such barangays (citizens assemblies) shall consider vital national issues now confronting the country, hike the holding of the plebiscite on the new Constitution, the continuation of martial rule, the convening of Congress on January 22, 1973, and the holding of elections in November 1973, and others in the future, which shall serve as guide or basis for action or decision by the national government;

"3. The barangays (citizens assemblies) shall conduct between January 10 and 15, 1973, a referendum on important national issues, including those specified in paragraph 2 hereof, and submit the results thereof to the Department of Local Governments and Community Development immediately thereafter, pursuant to the express will of the people as reflected in the reports gathered from the many thousands of barangays (citizens assemblies) throughout the country.

"4. This Decree shall take effect immediately.

"Done in the City of Manila, this 5th day of January, in the year of Our Lord, nineteen hundred and seventy-three." (*Italics supplied*).

[68] *McKinney vs. Barker*, 180 Ky. 526, 203 S.W. 303, 304.

[69] Art. VII, section 2, 1935 Constitution.

[70] *Michael W. Roche vs. Lamb, et al.* 306 N.Y.S. 2d. 515, (Dec. 17, 1969); *State ex rel. Suthre vs. Bryne*, 258 N.W. 121; *State ex rel. Shriver vs. Hayes*, 76 N.E. 2d. 869; *Smith vs. Bangham*, 76 P. 2d. 1022; *McKin vs. Brast, et al.*, 117 S.E. 875; *Head vs. Hood*, 107 So. 854; *State ex rel Watson vs. Pigg*, 46 N.E. 232.

[71] See cases cited in the preceding footnote. See, also, *Tiegs vs. Patterson*, 318 P. 2d. 588; *State ex rel. Brown vs. St. Joseph*, 95 N.E. 2d. 632; *Williamson vs. State Election Board*, 431 P. 2d. 352; *Baker vs. Conway*, 108 So. 18; *Cohoon vs. Swain*, 5 S.E. 2d. ; *State ex rel vs. Walcott*, 83 A. 2d. 762; *Doyly vs. Ries*, 285 N.W. 480; *Grossglaus vs. Board of Election*, 86 N.E. 2d. 245; *Walker vs. Hughes*, 36 A. 2d. 47; *Reese vs. Dempsey*, 152 P. 2d. 157; *Dodd vs. Gower*, 62 S.W. 2d. 1; *Galloways vs. Bradburn*, 82 S.W. 1013; *Hagan vs. Henry*, 76 S.W. 2d. 994.

[72] 106 Minn. 392, 119 N.W. 408, 409.

[73] 63 N.J. Law, 289.

[74] 78 Ark. 439, 96 S.W. 396.

[75] See cases listed on page 49, footnotes 3, 4 and 5.

[76] On December 19, 1972.

[77] 24 Kansas 700, 714. See, also, *State ex rel. Williams vs. Robb*, 183 P. 2d. 223, 228; *Harris vs. Shanahan*, 387 P. 2d. 771, 784, 785.

[78] 369 U.S. 186, 7 L. ed. 2d. 663, 684. Citing *Chaselton Corp. vs. Sinclair*, 264 U.S. 543, 547, 548, 68 L. ed. 841, 843, 44 S. Ct. 405.

[79] Art. VII, section 10, paragraph (1).

[80] 101 Va. 529, 44 S. E. 754.

[81] *Marifosquic, et al. vs. Luna*, 101 Phil. 1223 (unreported); 37 Am. Jur. 669; 62 C.J.S. 749-750; *Guevara vs. Inocentes*, L-25577, March 15, 1966.

[82] Which, in some respects, is regarded as an organ of the Administration, and the news items published therein are indisputably censored by the Department of Public Information.

[83] *Daily Express*, November 29, 1972, p. 4. Italics supplied.

[84] 231 U.S. 28, 58 L. ed. 107, 114, 34 S. Ct. 1.

[85] *Baker vs. Carr*, 369 U.S. 186, 7 L. ed. 2d. 663, 82 S. Ct. 691.

[86] Justice Barredo's opinion in the plebiscite cases.

[87] Joint Opinion of Justices Makalintal and Castro, p. 3.

[88] Justice Barredo's language.

[89] At p. 16, joint opinion of Justices Makalintal and Castro.

[90] Joint Opinion of Justices Makalintal and Castro, pp. 12-16.

[91] At p. R, *idem*.

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CONCURRING OPINION

BARREDO, J.:

As far as I am concerned, I regard the present petitions as no more than mere reiterations of the Supplemental Petitions filed by Counsel Lorenzo M. Tañada on January 15, 1973 in the so-called Plebiscite Cases decided by this Court on January 22, 1973. Of course, there are amplifications of some of the grounds previously alleged, and in the course of the unprecedented five-day hearing that was held from February 12, to 16 last, more extensive and illuminating arguments were heard by Us, but, in my estimation, and with due recognition of the sincerity, brilliance and eloquence of counsels, nothing more cogent and compelling than what had already been previously presented by Counsel Tañada is before Us now. Accordingly, I cannot see any reason why I should change the position I took in regard to the earlier cases. I reiterate, therefore, the vote I cast when these petitions were initially considered by the Court, namely, to dismiss them.

In view, however, of the transcendental importance of the issues before the Court and the significance to our people and in history of the individual stands of the members of the Court in relation to said issues and to the final outcome of these cases, and considering that I reserved before the filing of a more extended opinion, I will take this opportunity to explain further why I hold that the 1973 Constitution is already in force, if only to clarify that

apart from the people's right of revolution to which I made pointed reference in my previous opinion, I can see now, after further reflection, that the vote of the people in the referendum in the Citizens Assemblies held on January 10 to 15, 1973, upon the result of which Proclamation 1102 is based, may be viewed more importantly as a political act than as a purely legal one, with the result that such vote to consider the 1973 Constitution as ratified without the necessity of holding a plebiscite in the form followed in the previous ratification plebiscites in 1935 of the Constitution itself, 1937 of women's suffrage, 1939 of the amendments to the Ordinance Appended to the Constitution, 1940 of the re-election of the President, the bicameral legislature and the Commission on Elections, 1947 of the parity amendment and 1967, rejecting the proposed increase in the members of the House of Representatives and eligibility of members of Congress to the Constitutional Convention, may be deemed as a valid ratification substantially in compliance with the basic intent of Article XV of the 1935 Constitution. If indeed this explanation may be considered as a modification of my rationalization then, I wish to emphasize that my position as to the fundamental issue regarding the enforceability of the new Constitution is even firmer now than ever before. As I shall elucidate anon, paramount considerations of national import have led me to the conviction that the best interests of all concerned would be best served by the Supreme Court holding that the 1973 Constitution is now in force, not necessarily as a consequence of the revolutionary concept previously suggested by me, but upon the ground that as a political, more than as a legal, act of the people, the result of the referendum may be construed as a compliance with the substantiality of Article XV of the 1935 Constitution.

I

The facts that gave rise to these proceedings are historical and well known. Generally, they may be taken judicial notice of. They revolve around the purported ratification of the Constitution of 1973 declared in Proclamation 1102 issued by the President on January 17, 1973.

Pursuant to a joint resolution of the Congress sitting as a constituent assembly approved on March 16, 1967, delegates to a constitutional convention to propose amendments to the Constitution of 1935 were elected in accordance with the implementing law, Republic Act 6132, on November 10, 1970. Known as the Constitutional Convention of 1971, the assembly began its sessions on June 1, 1971. After encountering a lot of difficulties, due to bitter rivalries over important positions and committees and an incomprehensible fear of overconcentrating powers in their officers, the delegates went about their work in comparatively slow pace, and by the third quarter of 1972 had finished deliberations and second-reading voting only on an insignificant number of proposals — until September 21, 1972, when the President, not altogether unexpectedly, yet abruptly, issued Proclamation 1081 declaring martial law throughout the country. An attempt was made to have the Convention recessed until after the lifting of martial law, and not long after the motion of Delegate Kalaw to such effect was turned down, the activities within the assembly shifted to high gear. As if unmindful of the arrest and continued detention of several of its members, the convention gathered swift momentum in its work, and on November 30, 1972, it approved by overwhelming vote the draft of a complete constitution, instead of mere specific amendments of particular portions of the Constitution of 1935. Needless to say, before martial law was declared, there was full and unlimited coverage of the workings in the convention by the mass media. At the same time, public debates and discussions on various aspects of proposed amendments were not uncommon.

Earlier, on November 22, 1972, the Convention had approved Resolution No. 5843 proposing "to President Ferdinand E. Marcos that a decree be issued calling a plebiscite for the ratification of the proposed new Constitution on such appropriate date as he shall determine and providing for the necessary funds therefor." Acting under this authority, on December 1, 1972, the President issued Presidential Decree No. 73 submitting the draft constitution for ratification by the people at a plebiscite set for January 15, 1973. This order contained provisions more or less similar to the plebiscite laws passed by Congress relative to the past plebiscites held in

connection with previous proposed amendments.

In connection with the plebiscite thus contemplated, General Order No. 17 was issued ordering and enjoining the authorities to allow and encourage public and free discussions on the proposed constitution. Not only this, subsequently, under date of December 17, 1972, the President ordered the suspension of the effects of martial law and lifted the suspension of the privilege of the writ of habeas corpus insofar as activities connected with the ratification of the draft constitution were concerned. These two orders were not, however, to last very long. On January 7, 1973, the President, invoking information related to him that the area of public debate and discussion he had opened by his previous orders was being taken advantage of by subversive elements to defeat the purposes for which they were issued and to foment public confusion, withdrew said orders and enjoined full and stricter implementation of martial law.

In the meantime, the President had issued on December 31, 1972 Presidential Decree No. 86 creating Citizens Assemblies "so as to afford ample opportunities for the citizenry to express their views on important national issues" and one of the questions presented to said assemblies was: "Do you like the plebiscite on the proposed Constitution to be held later" So, in the same order of January 7, 1973, General Order No. 20, the President ordered, "that the plebiscite scheduled to be held on January 15, 1973, be postponed until further notice."

In the meanwhile also, on January 5, 1973, the President issued Presidential Decree No. 86-A providing as follows:

"PRESIDENTIAL DECREE NO. 86-A

STRENGTHENING AND DEFINING THE ROLE OF BARANGAYS

(CITIZENS ASSEMBLIES)

WHEREAS, on the basis of preliminary and initial reports from the field as gathered from barangays (citizens assemblies) that have so far been established, the people would like to decide for themselves questions or issues, both local and national, affecting their day-to-day lives and their future;

WHEREAS, the barangays (citizens assemblies) would like themselves to be the vehicle for expressing the views of the people on important national issues;

WHEREAS, such barangays (citizens assemblies) desire that they be given legal status and due recognition as constituting the genuine, legitimate and valid expression of the popular will; and

WHEREAS, the people would like the citizens assemblies to conduct immediately a referendum on certain specified questions such as the ratification of the new Constitution, continuance of martial law, the convening of Congress on January 22, 1973, and the elections in November 1973 pursuant to the 1935 Constitution.

NOW, THEREFORE, I, FERDINAND E. MARCOS, President of the Philippines, by virtue of the powers vested in me by the Constitution as Commander-in-Chief of all Armed Forces of the Philippines, do hereby declare as part of the law of the land the following:

1. The present barangays (citizens assemblies) are created under Presidential Decree No. 86 dated December 31, 1972, shall constitute the base for citizen participation in governmental affairs and their collective views shall be considered in the formulation of national policies or programs and, wherever practicable, shall be translated into concrete and specific decision;
2. Such barangays (citizens assemblies) shall consider vital national issues now confronting the country, like the holding of the plebiscite on the new Constitution, the continuation of martial rule, the convening of

Congress on January 22, 1973, and the holding of elections in November 1973, and others in the future, which shall serve as guide or basis for action or decision by the national government;

3. The barangays (citizens assemblies) shall conduct between January 10 and 15, 1973, a referendum on important national issues, including those specified in paragraph 2 hereof, and submit the results thereof to the Department of Local Governments and Community Development immediately thereafter, pursuant to the express will of the people as reflected in the reports gathered from the many thousands of barangays (citizens assemblies) throughout the country.

4. This Decree shall take effect immediately.

Done in the City of Manila, this 5th day of January, in the year of Our Lord, nineteen hundred and seventy-three."

And on January 7, 1973, this was followed by Presidential Decree No. 86-B reading thus:

"PRESIDENTIAL DECREE NO. 86-B

DEFINING FURTHER THE ROLE OF BARANGAYS (CITIZENS ASSEMBLIES)

WHEREAS, since their creation pursuant to Presidential Decree No. 86 dated December 31, 1972, the Barangays (Citizens Assemblies) have petitioned the Office of the President to submit to them for resolution important national issues;

WHEREAS, one of the questions persistently mentioned refers to the ratification of the Constitution proposed by the 1971 Constitutional Convention;

"WHEREAS, on the basis of the said petitions, it is evident that the people believe that the submission of the proposed Constitution to the Citizens Assemblies or Barangays should be taken as a plebiscite in itself in view of the fact that freedom of debate has always been limited to the leadership in political, economic and social fields and that it is now necessary to bring this down to the level of the people themselves through the Barangays or Citizens Assemblies;

NOW THEREFORE, I, FERDINAND E. MARCOS, President of the Philippines, by virtue of the powers in me vested by the Constitution, do hereby order that important national issues shall from time to time be referred to the Barangays (Citizens Assemblies) for resolution in accordance with Presidential Decree No. 86-A dated January 5, 1973 and that the initial referendum shall include the matter of ratification of the Constitution proposed by the 1971 Constitutional Convention.

The Secretary of the Department of Local Governments and Community Development shall insure the implementation of this Order.

Done in the City of Manila, this 7th day of January in the year of Our Lord, nineteen hundred and seventy-three."

And so it was that by January 10, 1973, when the Citizens Assemblies thus created started the referendum which was held from said date to January 15, 1973, the following questions were submitted to them:

"(1) Do you like the New Society?

"(2) Do you like the reforms under martial law?

"(3) Do you like Congress again to hold sessions?

"(4) Do you like the plebiscite to be held later?

"(5) Do you like the way President Marcos is running the affairs of the government? "

but on January 11, 1973, six questions were added as follows:

"(1) Do you approve of the citizens assemblies as the base of popular government to decide issues of national interests?

"(2) Do you approve of the New Constitution?

"(3) Do you want a plebiscite to be called to ratify the new Constitution?

"(4) Do you want the elections to be held in November, 1973 in accordance with the provisions of the 1935 Constitution?

"(5) If the elections would not be held, when do you want the next elections to be called?

"(6) Do you want martial law to continue?"

It is not seriously denied that together with the questions, the voters were furnished "comments" on the said questions more or less suggestive of the answer desired. It may be assumed that the said "comments" came from official sources, albeit specifically unidentified. As petitioners point out, the most relevant of these "comments" were the following:

"COMMENTS ON

" * * * * *

"QUESTION No. 2

But we do not want the Ad Interim Assembly to be convoked. Or if it is to be convened at all, it should not be done so until after at least seven (7) years from the approval of the New Constitution by the Citizens Assemblies.

"QUESTION No. 3

The vote of the Citizens Assemblies should already be considered the plebiscite on the New Constitution.

If the Citizens Assemblies approve of the new Constitution, then the new Constitution should be deemed ratified."

The Solicitor General claims, and there seems to be no showing otherwise, that the results of the referendum were determined in the following manner:

"Thereafter, the results of the voting were collated and sent to the Department of Local Governments. The transmission of the results was made by telegram, telephone, the provincial government SSB System in each province connecting all towns; the SSB communication of the PACD connecting most provinces; the Department of Public Information Network System; the Weather Bureau Communication System connecting provincial capitals and the National Civil Defense Network connecting all provincial capitals. The certificates of results were then flown to Manila to confirm the previous figures received by the aforementioned means of transmission. The certificates of results tallied with the previous figures taken with the exception of few cases of clerical errors.

"The Department adopted a system of regionalizing the receiving section of the Citizens Assemblies operation at the Department wherein the identity of the barrio and the province was immediately given to a staff in charge of each region. Every afternoon at 2:00 o'clock, the 11 regions submitted the figures they received from the field to the central committee to tabulate the returns. The last figures were tabulated at 12 midnight of

January 16, 1973 and early morning of January 17, 1973 and were then communicated to the President by the Department of Local Governments."

The development culminated in the issuance by the President of Proclamation 1102 on January 17, 1973. Said proclamation reads:

"PROCLAMATION NO. 1102 ANNOUNCING THE RATIFICATION BY THE FILIPINO PEOPLE OF THE CONSTITUTION PROPOSED BY THE 1971 CONSTITUTIONAL CONVENTION.

WHEREAS, the Constitution proposed by the nineteen hundred seventy-one Constitutional Convention is subject to ratification by the Filipino people;

"WHEREAS, Citizens Assemblies were created in barrios in municipalities and in districts/wards in chartered cities pursuant to Presidential Decree No. 6, dated December 31, 1972, composed of all persons who are residents of the barrio, district or ward for at least six months, fifteen years of age or over, citizens of the Philippines and who are registered in the list of Citizen Assembly members kept by the barrio, district or ward secretary;

WHEREAS, the said Citizens Assemblies were established precisely to broaden the base of citizen participation in the democratic process and to afford ample opportunity for the citizenry to express their views on important national issues;

WHEREAS, responding to the clamor of the people and pursuant to Presidential Decree No. 86-A, dated January 5, 1973, the following questions were posed before Citizens' Assemblies or Barangays: Do you approve of the New Constitution? Do you still want a plebiscite to be called to ratify the new Constitution?

WHEREAS, fourteen million nine hundred seventy-six thousand five hundred sixty one (14, 976, 561) members of all the Barangays (Citizens Assemblies) voted for the adoption of the proposed Constitution, as against seven hundred forty-three thousand eight hundred sixty nine (743,869) who voted for its rejection; while on the question as to whether or not the people would still like a plebiscite to be called to ratify the new Constitution, fourteen million two hundred ninety-eight thousand eight hundred fourteen (14, 298,814) answered that there was no need for a plebiscite and that the vote of the Barangays (Citizens Assemblies) should be considered as a vote in a plebiscite;

WHEREAS, since the referendum results show that more than ninety-five (95) percent of the members of the Barangays (Citizens Assemblies) are in favor of the New Constitution, the Katipunan ng Mga Barangay has strongly recommended that the new Constitution should already be deemed ratified by the Filipino people;

NOW, THEREFORE, I, FERDINAND E. MARCOS, President of the Philippines, by virtue of the powers in me vested by the Constitution, do hereby certify and proclaim that the Constitution proposed by the nineteen hundred and seventy-one (1971) Constitutional Convention has been ratified by an overwhelming majority of all of the votes cast by the members of all the Barangays (Citizens Assemblies) throughout the Philippines, and has thereby come into effect.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the Republic of the Philippines to be affixed.

Done in the City of Manila, this 17th day of January, in the year of Our Lord, nineteen hundred and seventy-three."

The first attempt to question the steps just enumerated taken by the President was in the so-called Plebiscite Cases, ten in number, which were filed by different petitioners during the first half of December 1972.[1] Their common target then was Presidential Decree No. 73, but before the said cases could be decided, the series of moves tending in effect to make them moot and academic insofar as they referred exclusively to the said

Presidential Decree began to take shape upon the issuance of Presidential Decree No. 86-A, quoted above. And when Presidential Decree No. 86-B, also above-quoted, was issued and the six additional questions which were first publicized on January 11, 1973 were known, together with the "comments", petitioners sensed that a new and unorthodox procedure was being adopted to secure approval by the people of the new Constitution, hence Counsel Tañada, not being satisfied with the fate of his urgent motion for early decision of the above ten cases dated January 12, 1973, filed on January 15, 1973, his supplemental motion seeking the prohibition against and injunction of the proceedings going on. Principal objective was to prevent that the President be furnished the report of the results of the referendum and thereby disable him from carrying out what petitioners were apprehensively foreseeing would be done - the issuance of some kind of proclamation, order or decree, declaring that the new Constitution had been ratified. Reacting swiftly, the Court resolved on the same day, January 15, which was Monday, to consider the supplemental motion as a supplemental petition and to require the respondents to answer the same the next Wednesday, January 17th, before the hour of the hearing of the petition which was set for 9:30 o'clock in the morning of that day. The details of what happened that morning form part of the recital of facts in the decision rendered by this Court in the ten cases on January 22, 1973 and need not be repeated here. Suffice it to state now that before the hearing could be closed and while Counsel Tañada was still insisting on his prayer for preliminary injunction or restraining order, the Secretary of Justice arrived and personally handed to the Chief Justice a copy of Proclamation 1102 which had been issued at about 11:00 o'clock that same morning. In other words, the valiant and persistent efforts of petitioners and their counsels were overtaken by adverse developments, and in the mind of the majority of the members of the Court, the cases had become academic. For my part, I took the view that even on the basis of the supplemental petition and the answer thereto filed by respondents, the Court could already decide on the fundamental issue of the validity of Proclamation 1102, as Justices Zaldivar, Antonio and Esguerra also believed, inasmuch as Counsel Tañada's pleading and argument had anticipated its issuance, but the majority felt it was not ready to resolve the matter, for lack, according to them, of full ventilation, and so, the decision reserved to petitioners the filing of the "appropriate" cases, evidently, the present ones.

II

At the threshold, I find myself confronted by a matter which, although believed to be inconsequential by my learned brethren, I strongly feel needs special attention. I refer to the point raised by Counsel Arturo M. Tolentino for respondents Gil J. Puyat and Jose Roy, who have been sued as President and President Pro Tempore of the Senate, to the effect that the change in the composition of the Supreme Court provided for in the 1973 Constitution, from the 11-man tribunal under the 1935 Constitution to a 15-man Court, makes of these cases which were filed after January 17, 1973, the date when Proclamation 1102 declared the new Constitution as ratified, political in nature and beyond our jurisdiction. The main consideration submitted in this connection is that inasmuch as the number of votes needed for a decision of this Court has been increased from six to eight in ordinary cases and from eight to ten for the declaration of unconstitutionality of a treaty, executive agreement^[2] or law, the Court would have to resolve first as a prejudicial question whether the Court is acting in these cases as the 15-man or the 11-man Court, in which event, it would be faced with the dilemma that if it acts either as the former or as the latter, it would be prejudging the very matter in issue one way or the other, and, in effect, it would be choosing between two constitutions, which is a political determination not within the Court's competence.

While I agree that the problem is at first blush rather involved, I do not share the view that the premises laid down by counsel necessarily preclude this Court from taking a definite stand on whether the Court is acting in these cases as the 15-man or the 11-man Court. I feel very strongly that the issue should not be ignored or dodged, if

only to make the world know that the Supreme Court of the Philippines is never incognizant of the capacity in which it is acting, much less lacking in courage or wisdom to resolve an issue that relates directly to its own composition. What a disgrace it would be to admit that this Supreme Court does not know, to use a common apt expression, whether it is fish or fowl. Withal, scholars and researchers who might go over our records in the future will inevitably examine minutely how each of us voted and upon what considerations we have individually acted, and, indeed, doubts may arise as to whether or not, despite the general result we might announce, there had been the requisite number of votes for a valid collegiate action.

For instance, it may be argued that the present cases do not involve an issue of unconstitutionality, hence, if we are acting as the 11-man Court, only six votes would suffice to declare Proclamation 1102 ineffective, and if upon analysis of our respective opinions it should be inferable therefrom that six of us have considered the matter before the Court as justiciable and at the same time have found the procedure of ratification adopted in Presidential Decrees 86-A and 86-B and related orders of the President as not being in conformity with Article XV of the old Constitution, a cloud would exist as to the efficacy of the dispositive portion of Our decision dismissing these cases, even if we have it understood that by the vote of six justices in favor of such dismissal, We intended to mean that the implementation or enforcement of the new Constitution now being done could continue.

Be that as it may, I am against leaving such an important point open to speculation. By nature I am averse to ambiguity and equivocation, and as a member of the Supreme Court, the last thing I should knowingly countenance is uncertainty as to the juridical significance of any decision of the Court which is precisely being looked upon as the haven in which doubts are supposed to be authoritatively dispelled. Besides, from the very nature of things, one thing is indubitably beyond dispute - we cannot act in both capacities of a 15-man and an 11-man Court at the same time, in like manner that it is inconceivable that the 1935 and 1973 Constitutions can be considered by Us as both in force. Our inescapable duty is to make a choice between them, according to what law and other considerations inherent to our function- dictate. I cannot bear the thought that someone may someday say that the Supreme Court of the Philippines once decided a case without knowing the basis of its authority to act or that it was ever wanting in judicial courage to define the same.

Accordingly, with full consciousness of my limitations but compelled by my sense of duty and propriety to straighten out this grave issue touching on the capacity in which the Court is acting in these cases, I hold that we have no alternative but to adopt in the present situation the orthodox rule that when the validity of an act or law is challenged as being repugnant to a constitutional mandate, the same is allowed to have effect until the Supreme Court rules that it is unconstitutional. Stated differently, We have to proceed on the assumption that the new Constitution is in force and that We are acting in these present cases as the 15-man Supreme Court provided for therein. Contrary to counsel's contention, there is here no prejudgment for or against any of the two constitutions. The truth of the matter is simply that in the normal and logical conduct of governmental activities, it is neither practical nor wise to defer the course of any action until after the courts have ascertained their legality, not only because if that were to be the rule, the functioning of government would correspondingly be undesirably hesitant and cumbersome, but more importantly, because the courts must at the first instance accord due respect to the acts of the other departments, as otherwise, the smooth running of the government would have to depend entirely on the unanimity of opinions among all its departments, which is hardly possible, unless it is assumed that only the judges have the exclusive prerogative of making and enforcing the law, aside from being its sole interpreter, which is contrary to all norms of juridical and political thinking. To my knowledge, there is yet no country in the world that has recognized judicial supremacy as its basic governmental principle, no matter how desirable we might believe the idea to be.

Indeed, it is not hard to visualize the difficulty if not absurdity of Our acting on the assumption that this Court is still functioning under the 1935 Constitution. It is undeniable that the whole government, including the provincial, municipal and barrio units and not excluding the lower courts up to the Court of Appeals, is operating under the 1973 Constitution. Almost daily, presidential orders and decrees of the most legislative character affecting practically every aspect of governmental and private activity as well as the relations between the government and the citizenry are pouring out from Malacañang under the authority of said Constitution. On the other hand, taxes are being exacted and penalties in connection therewith are being imposed under said orders and decrees. Obligations have been contracted and business and industrial plans have been and are being projected pursuant to them. Displacements of public officials and employees in big numbers are going on in obedience to them. For the ten justices of the Supreme Court to constitute an island of resistance in the midst of these developments, which even unreasoning obstinacy cannot ignore, much less impede, is unimaginable, let alone the absurd and complicated consequences such a position entails in the internal workings within the judiciary among its different components, what with the lower courts considering such orders and decrees as forming part of the law of the land in making their orders and decisions, whereas the Supreme Court is holding, as it were, their effectivity at bay if it is not being indifferent to or ignoring them.

It is suggested that the President, being a man of law, is committed to abide by the decision of the Supreme Court, and if the Court feels that it cannot in the meantime consider the enforcement of the new Constitution, he can wait for its decision. Accepting the truth of this assertion, it does not necessarily follow that by this attitude of the President, he considers the Supreme Court as still operating under the Old Constitution. Quite on the contrary, it is a fact that he has given instructions for the payment of the justices in accordance with the rate fixed in the New Constitution. Not only that, his official alter ego, the Secretary of Justice, has been shoving to this Court, since January 18, 1973, all matters related to the administrative supervision of the lower courts which by the new charter has been transferred from the Department of Justice to the Supreme Court, and as far as I know, the President has not countermanded the Secretary's steps in that direction. That, on the other hand, the President has not augmented the justices of the Court to complete the prescribed number of fifteen is, in my appraisal, of no consequence, considering that with the presence of ten justices who are in the Court now, there is a working quorum, and the addition of new justices cannot in anyway affect the voting on the constitutional questions now before Us because, while there are sufficient justices to declare by their unanimous vote the illegality of Proclamation 1102, the votes of the justices to be added would only be committed to upholding the same, since they cannot by any standard be expected to vote against the legality of the very Constitution under which they would be appointed.

Moreover, what makes the premise of presumptive validity preferable and, even imperative, is that We are dealing here with a whole constitution that radically modifies or alters not only the form of our government from presidential to parliamentary but also other constitutionally based institutions vitally affecting all levels of society. It is, to my mind, unrealistic to insist on that, fundamentally, the 1973 Constitution is the same 1935 Constitution with a few improvements. A cursory perusal of the former should convince anyone that it is in essence a new one. While it does retain republicanism as the basic governmental tenet, the institutional changes introduced thereby are rather radical and its social orientation is decidedly more socialistic, just as its nationalistic features are somewhat different in certain respects. One cannot but note that the change embraces practically every part of the old charter, from its preamble down to its amending and effectivity clauses, involving as they do the statement of general principles, the citizenship and suffrage qualifications, the articles on the form of government, the judiciary provisions, the spelling out of the duties and responsibilities not only of citizens but also of officers of the government and the provisions on the national economy as well as the patrimony of the nation, not to mention the distinctive features of the general provisions. What is more, the transitory provisions notably depart from

traditional and orthodox views in that, in general, the powers of government during the interim period are more or less concentrated in the President, to the extent that the continuation or discontinuance of what is now practically a one-man-rule, is even left to his discretion. Notably, the express ratification of all proclamations, orders, decrees and acts previously issued or done by the President, obviously meant to encompass those issued during martial law, is a commitment to the concept of martial law powers being implemented by President Marcos, in defiance of traditional views and prevailing jurisprudence, to the effect that the Executive's power of legislation during a regime of martial law is all inclusive and is not limited to the matters demanded by military necessity. In other words, the new constitution unlike any other constitution countenances the institution by the executive of reforms which normally is the exclusive attribute of the legislature.

Withal, the best proofs that by its expressed and implied intent, the Constitution of 1973 is a new one, are that (1) Section 16 of its Article XVII which provides that this constitution shall "supersede the Constitution of nineteen hundred and thirty-five and all amendments thereto" and (2) its transitory provisions expressly continue the effectivity of existing laws, offices and courts as well as the tenure of all incumbent officials, not adversely affected by it, which would have been unnecessary if the old constitution were being merely amended.

The new Constitution, in its Section 10, Article XVII, provides that "(T)he incumbent members of the Judiciary (which include the Chief Justice and Associate Justices of the Supreme Court) may continue in office (under the new constitution) until they reach the age of seventy years, etc." By virtue of the presumptive validity of the new charter, all of Us form part of the 15-man Court provided for therein and, correspondingly, We have in legal contemplation, ceased in the meanwhile to be members of the 11-man Court in the 1935 Constitution. Should the Court finally decide that the new Constitution is invalid, then We would automatically revert to our positions in the 11-man Court, otherwise, We would just continue to be in our membership in the 15-man Court, unless We feel We cannot in conscience accept the legality of its existence. On the other hand, if it is assumed that We are still the 11-man Court and it happens that Our collective decision is in favor of the new constitution, it would be problematical for any dissenting justice to consider himself as included automatically in the 15-man Court, since that would be tantamount to accepting a position he does not honestly believe exists.

III

In brief, the main contention of the petitioners is that Proclamation 1102 is invalid because the ratification of the 1973 Constitution it purports to declare as having taken place as a result of the referendum above-referred to is ineffective, since it cannot be said on the basis of the said referendum that said Constitution has been "approved by a majority of the votes cast at an election" in the manner prescribed by Article XV of the Constitution of 1935. More specifically, they maintain that the word "election" in the said Article has already acquired a definite accepted meaning out of the consistent holding in the past of ratification plebiscites, and accordingly, no other form of ratification can be considered contemplated by the framers of the Old Constitution than that which had been followed in 1935, 1937, 1939, 1940, 1946 and 1967, the last three or four of which were held under the supervision of the Commission on Elections. Furthermore, they emphatically deny the veracity of the proclaimed results of the referendum because, according to them the referendum was a farce and its results were manufactured or prefabricated, considering that Mr. Francisco Cruz, who is supposed to have submitted the final report to the President, which served as basis for Proclamation 1102, had no official authority to render the same, and it is inconceivable and humanly impossible for anyone to have been able to gather, tabulate and canvass the 15 million votes allegedly reported within the short period of time employed. Of course, they also contend that in any event, there was no proper submission because martial law per se creates constructive duress which deprives the voters of the complete freedom needed for the exercise of their right of choice and actually, there was neither time nor opportunity for real debate before they voted.

On the other hand, the position of the Solicitor General as counsel for the respondents is that the matter raised in the petitions is a political one which the courts are not supposed to inquire into, and, anyway, there has been a substantial compliance with Article XV of the 1935 Constitution, inasmuch as, disregarding unessential matters of form, the undeniable fact is that the voting in the referendum resulted in the approval by the people of the New Constitution.

I need not dwell at length on these variant positions of the parties. In my separate opinion in the Plebiscite Cases, I already made the observation that in view of the lack of solemnity and regularity in the voting as well as in the manner of reporting and canvassing conducted in connection with the referendum, I cannot say that Article XV of the Old Constitution has been complied with, albeit I held that nonetheless, the Constitution of 1973 is already in force. In order, however, to make myself clearer on some relevant points, I would like to add a few considerations to what I have already said in the former cases.

In my opinion in those cases, the most important point I took into account was that in the face of the Presidential certification through Proclamation 1102 itself that the New Constitution has been approved by a majority of the people and having in mind facts of general knowledge which I have taken judicial notice of, I am in no position to deny that the result of the referendum was as the President had stated. I can believe that the figures referred to in the proclamation may not be accurate, but I cannot say in conscience that all of them are manufactured or prefabricated, simply because I saw with my own eyes that people did actually gather and listen to discussions, if brief and inadequate for those who are not abreast of current events and general occurrences, and that they did vote. I believe I can safely say that what I have seen have also been seen by many others throughout the country and unless it can be assumed, which honestly, I do not believe to be possible, that in fact there were actually no meetings held and no voting done in more places than those wherein there were such meetings and votings, I am not prepared to discredit entirely the declaration that there was voting and that the majority of the votes were in favor of the New Constitution. If in fact there were substantially less than 14 million votes of approval, the real figure, in my estimate, could still be significant enough and legally sufficient to serve as basis for a valid ratification.

It is contended, however, that the understanding was that the referendum among the Citizens Assemblies was to be in the nature merely of a loose consultation and not an outright submission for purposes of ratification. I can see that at the outset, when the first set of questions was released, such may have been the idea. It must not be lost sight of, however, that if the newspaper reports are to be believed, and I say this only because petitioners would consider the newspapers as the official gazettes of the administration, the last set of six questions were included precisely because the reaction to the idea of mere consultation was that the people wanted greater direct participation, thru the Citizens Assemblies, in decision-making regarding matters of vital national interest. Thus, looking at things more understandingly and realistically, the two questions emphasized by counsel, namely, (1) Do you approve of the New Constitution? and (2) Do you want a plebiscite to be called to ratify the new Constitution? should be considered no longer as loose consultations but as direct inquiries about the desire of the voters regarding the matters mentioned.

Accordingly, I take it that if the majority had expressed disapproval of the new Constitution, the logical consequence would have been the complete abandonment of the idea of holding any plebiscite at all. On the other hand, it is very plain to see that since the majority has already approved the new Constitution, a plebiscite would be superfluous. Clear as these rationalizations may be, it must have been thought that if the holding of a plebiscite was to be abandoned, there should be a direct and expressed desire of the people to such effect in order to forestall as much as possible any serious controversy regarding the non-holding of the plebiscite required by the letter of Section 16 of Article XVII, the effectivity clause, of the new Constitution. Oddly enough, the "comments"

accompanying the questions do strongly suggest this view. And as it turned out, the majority found no necessity in holding a plebiscite.

In connection with the question, Do you approve of the New Constitution? capital is being made of the point that as so framed, the thrust of the said question does not seek an answer of fact but of opinion. It is argued that it would have been factual were it worded categorically thus - Do you approve the New Constitution? The contention would have been weighty were it not unrealistic. I remember distinctly that the observation regarding the construction of the subject question was not originally made by any of the talented counsels for petitioners. It came from Mr. Justice Fred Ruiz Castro whose mastery of the English language can rightly be the cause of envy of even professors of English. None of the other members of the Court, as far as I can recall, ever noticed how the said question is phrased, or if anyone of Us did, I am not aware that he gave it more than passing attention. What I mean is that if neither any of the distinguished and learned counsels nor any member of the Court understood the said question otherwise than calling for a factual answer instead of a mere opinion, how could anyone expect the millions of unlettered members of the Citizens Assemblies to have noticed the point brought out by Justice Castro? Truth to tell, I myself did not realize the difference until Justice Castro gave it emphasis. Besides, reading the question in the light of the accompanying "comment" corresponding to it in particular, I am certain that any one who answered the same understood it in no other sense than a direct inquiry as to whether or not, as a matter of fact, he approves the New Constitution, and naturally, his affirmative answer must be taken as a categorical vote of approval thereof, considering, particularly, that according to the reported result of the referendum said answer was even coupled with the request that the President defer the convening of the Interim National Assembly.

It is also contended that because of this reference in the answer to that question to the deferment of the convening of the interim assembly, the said answer is at best a conditional approval not proper nor acceptable for purposes of a ratification plebiscite. The contention has no basis. In the interest of accuracy, the additional answer proposed in the pertinent "comment" reads as follows: "But we do not want the Ad interim Assembly to be convoked, etc." On the assumption that the actual answer, as reported, was of similar tenor, it is not fair to ascribe to it the imposition of a condition. At the most, the intention is no more than a suggestion or a wish.

As regards said "comments", it must be considered that after martial law was declared, the circumstances surrounding the making of the Constitution acquired a different and more meaningful aspect, namely, the formation of a new society. From the point of view of the President and on the basis of intelligence reports available to him, the only way to meet the situation created by the subversive elements was to introduce immediately effective reforms calculated to redeem the people from the depth of retrogression and stagnation caused by rampant graft and corruption in high places, influence peddling, oligarchic political practices, private armies, anarchy, deteriorating conditions of peace and order, the social inequalities widening the gap between the rich and the poor, and many other deplorable long standing maladies crying for early relief and solution. Definitely, as in the case of the rebellious movement that threatened the Quirino Administration, the remedy was far from using bullets alone. If a constitution was to be approved as an effective instrument towards the eradication of such grave problems, it had to be approved without loss of time and sans the cumbersome processes that, from the realistic viewpoint, have in the past obstructed rather than hastened the progress of the people. Stated otherwise, in the context of actualities, the evident objective in having a new constitution is to establish new directions in the pursuit of the national aspirations and the carrying out of national policies. Only by bearing these considerations in mind can the "comments" already referred to be properly appreciated. To others said "comments" may appear as evidence of corruption of the will of those who attended the assemblies, but actually, they may also be viewed in the same light as the sample ballots commonly resorted to in the elections of officials, which no one can contend are per se means of coercion. Let us not forget that the times are abnormal and

prolonged dialogue and exchange of ideas are not generally possible, nor practical, considering the need for faster decisions and more resolute action. After all voting on a whole new constitution is different from voting on one, two or three specific proposed amendments, the former calls for nothing more than a collective view of all the provisions of the whole charter, for necessarily, one has to take the good together with the bad in it. It is rare for anyone to reject a constitution only because of a few specific objectionable features, no matter how substantial, considering the ever present possibility that after all it may be cured by subsequent amendment. Accordingly, there was need to indicate to the people the paths open to them in their quest for the betterment of there conditions, and as long as it is not shown that those who did not agree to the suggestions in the "comments" were actually compelled to vote against their will, I am not convinced that the existence of said "comments" should make any appreciable difference in the Court's appraisal of the result of the referendum.

I must confess that the fact that the referendum was held during martial law detracts somehow from the value that the referendum would otherwise have had. As intimated, however, in my former opinion, it is not fair to condemn and disregard the result of the referendum barely because of martial law per se. For one thing, many of the objectionable features of martial law have not actually materialized, if only because the implementation of martial law since its inception has been generally characterized by restraint and consideration, thanks to the expressed wishes of the President that the same be made "Philippine style", which means without the rigor that has attended it in other lands and other times. Moreover, although the restrictions on the freedom of speech, the press and movement during martial law do have their corresponding adverse effects on the area of information which should be open to a voter, in its real sense what "chills" his freedom of choice and mars his exercise of discretion is the suspension of the privilege of the writ of habeas corpus. The reason is simply that a man may freely and correctly vote even if the needed information he possesses as to the candidates or issues being voted upon is more or less incomplete, but when he is subject to arrest and detention without investigation and without being informed of the cause thereof, that is something else which may actually cause him to cast a captive vote. Thus it is the suspension of the writ of habeas corpus accompanying martial law that can cause possible restraint on the freedom of choice in an election held during martial law. It is a fact, however, borne by history and actual experience, that in the Philippines, the suspension of the privilege of the writ of habeas corpus has never produced any chilling effect upon the voters, since it is known by all that only those who run afoul of the law, saving inconsequential instances, have any cause for apprehension in regard to the conduct by them of the normal activities of life. And so it is recorded that in the elections of 1951 and 1971, held while the privilege of writ of habeas corpus was under suspension, the Filipino voters gave the then opposition parties overwhelming if not sweeping victories, in defiance of the respective administrations that ordered the suspensions.

At this juncture, I think it is fit to make it clear that I am not trying to show that the result of the referendum may be considered as sufficient basis for declaring that the New Constitution has been ratified in accordance with the amending clause of the 1935 Constitution. I reiterate that in point of law, I find neither strict nor substantial compliance. The foregoing discussion is only to counter, if I may, certain impressions regarding the general conditions obtaining during and in relation to the referendum which could have in one way or another affected the exercise of the freedom of choice and the use of discretion by the members of the Citizens Assemblies, to the end that as far as the same conditions may be relevant in my subsequent discussions of the acceptance by the people of the New Constitution they may also be considered.

IV

It is my sincere conviction that the Constitution of 1973 has been accepted or adopted by the people. And on this premise, my considered opinion is that the Court may no longer decide these cases on the basis of purely legal considerations. Factors which are non-legal but nevertheless ponderous and compelling cannot be ignored, for

their relevancy is inherent in the issue itself to be resolved.

In my opinion in the Plebiscite Cases, I joined my colleagues in holding that the question of whether or not there was proper submission under Presidential Decree No. 73 is justiciable, and I still hold that the propriety of submission under any other law or in any other form is constitutionally a fit subject for inquiry by the courts. The ruling in the decided cases relied upon by petitioners are to this effect. In view, however, of the factual background of the cases at bar which include ratification itself, it is necessary for me to point out that when it comes to ratification, I am persuaded that there should be a boundary beyond which the competence of the courts no longer has any reason for being, because the other side is exclusively political territory reserved for their own dominion by the people.

The main basis of my opinion in the previous cases was acceptance by the people. Others may feel there is not enough indication of such acceptance in the record and in the circumstances the Court can take judicial notice of. For my part, I consider it unnecessary to be strictly judicial in inquiring into such fact. Being personally aware, as I have already stated, that the Citizens Assemblies did meet and vote, if irregularly and crudely, it is not for me to resort, for the purposes of these cases, to judicial tape and measure, to find out with absolute precision the veracity of the total number of votes actually cast. After all, the claims that upon a comparison of conflicting reports, cases of excess votes may be found, even if extrapolated will not, as far as I can figure out, suffice to overcome the outcome officially announced. Rather than try to form a conclusion out of the raw evidence before Us which the parties did not care to really complete, I feel safer by referring to the results announced in the proclamation itself. Giving substantial allowances for possible error and downright manipulation, it must not be overlooked that, after all, their having been accepted and adopted by the President, based on official reports submitted to him in due course of the performance of duty of appropriate subor-dinate officials, has elevated them to the category of an act of a coordinate department of the government which under the principle of separation of powers is clothed with presumptive correctness or at least entitled to a high degree of acceptability, until overcome by better evidence, which in these cases does not exist. In any event, considering the unorthodoxy of the procedure adopted and the difficulty of an accurate checking of all the figures, I cannot conceive of any manageable means of acquiring information upon which to predicate a denial, I have no alternative but to rely on What has been officially declared. At this point, I would venture to express the feeling that if it were not generally conceded that there has been sufficient showing of the acceptance in question, by this time, there would have been already demonstrative and significant indications of a rather widespread, if not organized resistance in one form or another. Much as they are to be given due recognition as magnificent manifestations of loyalty and devotion, to principles. I cannot accord to the filing of these cases as indicative enough of the general attitude of the people.

It is true that in the opinion I had the privilege of penning, for the Court in Tolentino vs. Comelec, 41 SCRA 702, I made strong and unequivocal pronouncements to the effect that any amendment to the Constitution of 1935, to be valid, must appear to have been made in strict conformity with the requirements of Article XV thereof. What is more, that decision asserted judicial competence to inquire into the matter of compliance or non-compliance as a justiciable matter. I still believe in the correctness of those views and I would even add that I sincerely feel it reflects the spirit of the said constitutional provision. Without trying to strain any point, however. I submit the following considerations in the context of the peculiar circumstances of the cases now at bar, which are entirely different from those in the backdrop of the Tolentino rulings I have referred to:

1. Consider that in the present case what is involved is not just an amendment of a particular provision of an existing Constitution; here, it is, as I have discussed earlier above, an entirely new Constitution that is being proposed. This important circumstance makes a great deal of difference.

No less than counsel Tolentino for herein respondents Puyat and Roy, who was himself the petitioner in the case I

have just referred to, is now inviting Our attention to the exact language of Article XV and suggesting that the said Article may be strictly applied to proposed amendments but may hardly govern the ratification of a new Constitution. It is particularly stressed that the Article specifically refers to nothing else but "amendments to this Constitution" which if ratified "shall be valid as part of this Constitution." Indeed, how can a whole new constitution be by any manner of reasoning an amendment to any other constitution and how can it, if ratified, form part of such other constitution? In fact, in the Tolentino case I already somehow hinted this point when I made reference in the resolution denying the motion for reconsideration to the fact that Article XV must be followed "as long as any amendment is formulated and submitted under the aegis of the present Charter." Said resolution even added, "(T)his is not to say that the people may not, in the exercise of their inherent revolutionary powers, amend the Constitution or promulgate an entirely new one otherwise".

It is not strange at all to think that the amending clause of a constitution should be confined in its application only to proposed changes in any part of the same constitution itself, for the very fact that a new constitution is being adopted implies a general intent to put aside the whole of the old one, and what would be really incongruous is the idea that in such an eventuality, the new Constitution would subject its going into effect to any provision of the constitution it is to supersede, to use the language precisely of Section 16, Article XVII, the effectivity clause, of the New Constitution. My understanding is that generally, constitutions are self-born, they very rarely, if at-all, come into being, by virtue of any provision of another constitution.[3] This must be the reason why every constitution has its own effectivity clause, so that if, the Constitutional Convention had only anticipated the idea of the referendum and provided for such a method to be used in the ratification of the New Constitution, I would have had serious doubts as to whether Article XV could have had priority of application.

2. When an entirely new constitution is proposed to supersede the existing one, we cannot but take into consideration the forces and the circumstances dictating the replacement. From the very nature of things, the proposal to ordain a new constitution must be viewed as the most eloquent expression of a people's resolute determination to bring about a massive change of the existing order, a meaningful transformation of the old society and a responsive reformation of the contemporary institutions and principles. Accordingly, should any question arise as to its effectivity and there is some reasonable indication that the new charter has already received in one way or another the sanction of the people, I would hold that the better rule is for the courts to defer to the people's judgment, so long as they are convinced of the fact of their approval, regardless of the form by which it is expressed, provided it be reasonably feasible and reliable. Otherwise stated, in such instances, the courts should not bother about inquiring into compliance with technical requisites, and as a matter of policy should consider the matter non-justiciable.

3. There is still another circumstance which I consider to be of great relevancy. I refer to the ostensible reaction of the component elements, both collective and individual, of the Congress of the Philippines. Neither the Senate nor the House of Representatives has been reported to have even made any appreciable effort or attempt to convene as they were supposed to do under the Constitution of 1935 on January 22, 1973 for the regular session. It must be assumed that being composed of experienced, knowledgeable and courageous members, it would not have been difficult for said parliamentary bodies to have conceived some ingenious way of giving evidence of their determined adherence to the Constitution under which they were elected. Frankly, much as I admire the efforts of the handful of senators who had their picture taken in front of the padlocked portals of the Senate chamber, I do not feel warranted to accord such act as enough token of resistance. As counsel Tolentino has informed the court, there was nothing to stop the senators and the congressmen to meet in any other convenient place and somehow officially organize themselves in a way that can logically be considered as a session, even if nothing were done than to merely call the roll and disperse. Counsel Tolentino even pointed out that if there were not enough members to form a quorum, any smaller group could have ordered the arrest of the absent members. And with

particular relevance to the present cases, it was not constitutionally indispensable for the presiding officers to issue any call to the members to convene, hence the present prayers for mandamus have no legal and factual bases. And to top it all, quite to the contrary, the records of the Commission on Elections show that at least 15 of 24 senators and over 95 out of less than 120 members of the House of Representative, have officially and in writing exercised the option given to them to join the Interim National Assembly under the New Constitution, thereby manifesting their acceptance of the new charter.

Now, having these facts in mind, and it being obvious that of the three great departments of the government under the 1935 Constitution, two, the Executive and the Legislative, have already accepted the New Constitution and recognized its enforceability and enforcement, I cannot see how this Supreme Court can by judicial fiat hold back the political developments taking place and for the sake of being the guardian of the Constitution and the defender of its integrity and supremacy make its judicial power prevail against the decision of those who were duly chosen by the people to be their authorized spokesmen and representatives. It is not alone the physical futility of such a gesture that concerns me. More than that, there is the stark reality that the Senators and the Congressmen, no less than the President, have taken the same oath of loyalty to the Constitution that we, the Justices, have taken and they are, therefore, equally bound with Us to preserve and protect the Constitution. If as the elected representatives of the people, they have already opted to accept the New Constitution as the more effective instrument for the fulfillment of the national destiny, I really wonder if there is even any idealistic worth in Our desperately clinging by Ourselves alone to Our sworn duty vis-a-vis the 1935 Constitution. Conscious of the declared objectives of the new dispensation and cognizant of the decisive steps being taken, with the least loss of time, towards their accomplishment, I cannot but feel apprehensive that instead of serving the best interests of our people, which to me is in reality the real meaning of our oath of office, the Court might be standing in the way of the very thing our beloved country needs to retrieve its past glory and greatness. In other words, it is my conviction that, what these cases demand most of all is not a decision demonstrative of our legal erudition and Solomonic wisdom, but an all-rounded judgment resulting from the consideration of all relevant circumstances, principally the political, or, in brief, a decision more political than legal, which a court can render only by deferring to the apparent judgment of the people and the announcement thereof by the political departments of the government and declaring the matter non-justiciable.

4. Viewed from the strictly legal angle and in the light of judicial methods of ascertainment, I cannot agree with the Solicitor General that in the legal sense, there has been at least substantial compliance with Article XV of the 1935 Constitution, but what I can see is that in a political sense, the answers to the referendum questions were not given by the people as legal conclusions. I take it that when they answered that by their signified approval of the New Constitution, they do not consider it necessary to hold a plebiscite, they could not have had in mind any intent to do what was constitutionally improper. Basically accustomed to proceed along constitutional channels, they must have acted in the honest conviction that what was being done was in conformity with prevailing, constitutional standards. We are not to assume that the sovereign people were indulging in a futile exercise of their supreme political right to choose the fundamental charter by which their lives, their liberties and their fortunes shall be safeguarded. In other words, we must perforce infer that they meant their decision to count, and it behooves this Court to render judgment herein in that context. It is my considered opinion that viewed understandingly and realistically, there is more than sufficient ground to hold that, judged by such intent and, particularly, from the political standpoint, the ratification of the 1973 Constitution declared in Proclamation 1102 complies substantially with Article XV of the 1935 Charter, specially when it is considered that the most important element of the ratification therein contemplated is not in the word "election", which conceivably can be in many feasible and manageable forms but in the word "approved" which may be said to constitute the substantiality of the whole article, so long as such approval is reasonably ascertained. In the last analysis,

therefore, it can be rightly said, even if only in a broad sense, that the ratification here in question was constitutionally justified and justifiable.

5. Finally, if any doubt should still linger as to the legitimacy of the New Constitution on legal grounds, the same should be dispelled by viewing the situation in the manner suggested by Counsel Tolentino and by the writer of this opinion in his separate opinion, oft-referred to above, in the Plebiscite Cases – that is, as an extra-constitutional exercise by the people, under the leadership of President Marcos, of, their inalienable right to change their fundamental charter by any means they may deem appropriate, the moment they are convinced that the existing one is no longer responsive to their fundamental, political and social needs nor conducive to the timely attainment of their national destiny. This is not only the teaching of the American Declaration of Independence but is indeed, a truth that is self-evident. More, it should be regarded as implied in every constitution that regardless of the language of its amending clause, once the people have given their sanction to a new charter, the latter may be deemed as constitutionally permissible even from the point of view of the preceding constitution. Those who may feel restrained to consider this view out of respect to the import of Tolentino vs. Comelec, supra., would be well advised to bear in mind that that case was decided in the context of submission, not of accomplished ratification.

V

The language of the disputed amending clause of the 1935 Constitution should not be deemed as the be all and end all of the nation. More important than even the Constitution itself, with all its excellent features, are the people living under it — their happiness, their posterity and their national destiny. There is nothing that cannot be sacrificed in the pursuit of these objectives, which constitute the totality of the reasons for national existence. The sacred liberties and freedoms enshrined in it and the commitment and consecration thereof to the forms of democracy we have hitherto observed are mere integral parts of this totality; they are less important by themselves.

What seems to me to be bothering many of our countrymen now is that by denying the present petitions, the Court would be deemed as sanctioning, not only the deviations from traditional democratic concepts and principles but also the qualified curtailment of individual liberties now being practiced, and this would amount, if it is feared, to a repudiation of our oath to support and defend the Constitution of 1935. This is certainly something one must gravely ponder upon. When I consider, however, that the President, the Vice-President, the members of both Houses of Congress, not to speak of all the executive departments and bureaus under them, as well as all the lower courts, including the Court of Appeals, have already accepted the New Constitution as an instrument of a meaningful nationwide-all-level change in our government and society purported to make more realistic and feasible, rather than idealistic and clumsily deliberative, the attainment of our national aspirations, I am led to wonder, whether or not we, as members of the Supreme Court are being true to our duty to our people by refusing to follow suit and to accept the realities of the moment, despite our being convinced of the sincerity and laudableness of their objectives, only because we feel that by the people's own act of ratifying the Constitution of 1935, they have so encased themselves within its provisions and may, therefore, no longer take measures to redeem themselves from the situation brought about by the deficiencies of the old order, unless they act in strict conformity therewith. I cannot believe that any people can be so stifled and enchained. In any event, I consider it a God-given attribute of the people to disengage themselves, if necessary, from any covenant that would obstruct their taking what subsequently appears to them to be the better road to the promotion and protection of their welfare. And once they have made their decision in that respect, whether sophisticatedly or crudely, whether in legal form or otherwise, certainly, there can be no court or power on earth that can reverse them.

I would not be human if I should be insensitive to the passionate and eloquent appeals of Counsels Tañada and

Salonga that these cases be decided on the basis of conscience. That is exactly what I am doing. But if counsels mean that only by granting their petitions can this Court be worthily the bulwark of the people's faith in the government, I cannot agree, albeit my admiration and respect are all theirs for their zeal and tenacity, their industry and wisdom, their patriotism and devotion to principle. Verily, they have brought out everything in the Filipino that these cases demand.

In times of national emergencies and crises, not arising from foreign invasion, we need not fear playing opposite roles, as long as we are all animated by sincere love of country and aim exclusively at the attainment of the national destiny. Our heroes of the past, Rizal, Bonifacio, Aguinaldo, Antonio Luna, Mabini and so also with our patriots of the recent generations, Quezon, Osmeña, Roxas, Laurel and Recto, to mention only some of them, had their differences of views — and they did not hesitate to take diametrically opposing sides that even reached tragic proportions, but all of them are admired and venerated.

It is my faith that to act with absolute loyalty to our country and people is more important than loyalty to any particular precept or provision of the Constitution to the Constitution itself. My oath to abide by the Constitution hinders me to whatever course of action I feel sincerely is demanded by the welfare and best interest of the people.

In this momentous juncture of our history, what is imperative is national unity. May God grant that the controversies the events leading to these cases have entailed will heal after the decision herein is promulgated; so that all of us Filipinos may forever join hands in the pursuit of our national destiny.

IN VIEW OF ALL THE FOREGOING, I vote to dismiss all these petitions for mandamus and prohibition without costs.

Makasiar, Antonio, and Esguerra, JJ., concur insofar as not inconsistent with their respective separate opinion.

[1] Charito Planas vs. Comelec, et al., L-35925, January 22, 1973; Pablo C. Sanidad vs. Comelec, 1,35929, January 22, 1973; Gerardo Roxas, etc., et al. vs. Comelec, et al., 1,35940, January 22, 1973; Eddie B. Monteclaro vs. Comelec, et al. 1,35941, January 22, 1973; Sedfrey A. Ordenez, et al. vs. The National Treasurer of the Philippines, et al., L-35942; Vidal Tan, et al. vs. Comelec, et al., L-35948, January 22, 1973; Jose W. Diokno, et al. vs. Comelec, L-35953, January 22, 1973; Jacinto Jimenez vs. Comelec, et al., L-35961, January 22, 1973; Raul M. Gonzales vs. Comelec, et al., L-35965, January 22, 1973 and Ernesto Hidalgo vs. Comelec, et al., L-35979, January 22, 1973.

[2] Executive Agreements are not included in the corresponding provision of the 1935 Constitution.

[3] It must be recalled that in the Tolentino case, the Constitutional Convention intended to submit one amendment which was to form part of the Constitution still being prepared by it separately from the rest of the other parts of such constitution still unfinished, and We held that a piece-meal submission was improper. We had no occasion to express any view as to how a whole new constitution may be ratified.

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FOR DISMISSAL OF PETITIONS

ESGUERRA, J.:

These petitions seek to stop and prohibit the respondents Executive Officers from implementing the Constitution signed on November 30, 1972; in L-36165, to compel respondents Gil Puyat and Jose J. Roy, President and President Pro-Tempore, respectively, of the Senate under the 1935 Constitution, to convene the Senate in regular session which should have started on January 22, 1973; to nullify Proclamation No. 1102 of the President, issued on January 17, 1973, which declared the ratification of the Constitution on November 30, 1972, by the Filipino people, through the barangays or Citizens' Assemblies established under Presidential Decree No. 86 issued on December 31, 1972, which were empowered under Presidential Decree No. 86-A, issued on January 5, 1973, to act in connection with the ratification of said Constitution.

Grounds for the petitions are as follows:

1. That the Constitutional Convention was not a free forum for the making of a Constitution after the declaration of Martial Law on September 21, 1972.
2. The Convention was not empowered to incorporate certain provisions in the 1972 Constitution because they are highly unwise and objectionable and the people were not sufficiently informed about them.
3. The President had no authority to create and empower the Citizens' Assemblies to ratify the new Constitution at the referendum conducted in connection therewith, as said assemblies were merely for consultative purposes, and
4. The provisions of Article XV of the 1935 Constitution prescribing the manner of amending the same were not duly observed.

The petitions were not given due course immediately but were referred to the Solicitor General as counsel for the respondents for comment, with three members of the Court, including the undersigned, voting to dismiss them outright. The comments were considered motions to dismiss which were set for hearing and extensively argued. Thereafter both parties submitted their notes and memoranda on their oral arguments.

I

The issues raised for determination, on which the resolution of the Motion to Dismiss hinges, are as follows:

1. Is the question presented political and, hence, beyond the competence of this Court to decide, or is it justiciable and fit for judicial determination?
2. Was the new Constitution of November 30, 1972, ratified in accordance with the amending process prescribed by Article XV of the 1935 Constitution?
3. Has the new Constitution been accepted and acquiesced in by the Filipino people?
4. Is the new Constitution actually in force and effect?
5. If the answers to question Nos. 3 and 4 be in the affirmative, are petitioners entitled to the reliefs prayed for?

II.

The pivotal question in these cases is whether the issue raised is highly political and, therefore, not justiciable. I maintain that this Court should abstain from assuming jurisdiction, but, instead, as an act of judicial

statesmanship, should dismiss the petitions. In resolving whether or not the question presented is political, joint discussion of issues Nos. 1, 3 and 4 is necessary so as to arrive at a logical conclusion. For after the acceptance of a new Constitution and acquiescence therein by the people by putting it into practical operation, any question regarding its validity should be foreclosed and all debates on whether it was duly or lawfully ushered into existence as the organic law of the state become political and not judicial in character.

The undisputed facts that lead to the issuance of Proclamation No. 1102 and Presidential Decrees Nos. 86 and 86-A are fully set forth in the majority and dissenting opinions in the Plebiscite cases decided on January 22, 1973, and need not be repeated here.

Petitioners seek to set at naught Proclamation No. 1102 and Presidential Decrees Nos. 86 and 86-A, claiming that the ratification of the new Constitution pursuant to the said decrees is invalid and of no effect. Presidential Decree No. 86 organized the barangays or Citizens' Assemblies composed of all citizens at least fifteen years of age, and through these assemblies the proposed 1972 Constitution was submitted to the people for ratification. Proclamation No. 1102 of the President announced or declared the result of the referendum or plebiscite conducted through the Citizens' Assemblies, and that 14,976,561 members thereof voted for the ratification of the new Constitution and 743,869 voted against it. Petitioners assail these two acts of the President as unauthorized and devoid of legal effect.

But looking through the veneer of judicial conformity with which the petitions have been adroitly contrived, what is sought to be invalidated is the new Constitution itself —the very framework of the present Government since January 17, 1973. The reason is obvious. The Presidential decrees set up the means for the ratification and acceptance of the new Constitution and Proclamation No. 1102 simply announced the result of the referendum or plebiscite by the people through the Citizens' Assemblies. The Government under the new Constitution has been running on its tracks normally and apparently without obstruction in the form of organized resistance capable of jeopardizing its existence and disrupting its operation. Ultimately the issue is whether the new Constitution may be set aside by this Court. But has it the power and authority to assume such a stupendous task when the result of such invalidation would be to subject this nation to divisive controversies that may totally destroy the social order which the Government under the new Constitution has been admirably protecting and promoting under Martial Law? That the new Constitution has taken deep root and the people are happy and contented with it is a living reality which the most articulate critics of the new order cannot deny. 95 out of 108 members of the House of Representatives have opted to serve in the interim National Assembly provided for under the new Constitution. 15 out of 24 Senators have done likewise. The members of the Congress did not meet anymore last January 22, 1973, not because they were really prevented from so doing but because of no serious effort on their parts to assert their offices under the 1935 Constitution. In brief the Legislative Department under the 1935 Constitution is a thing of the past. The Executive Department has been fully reorganized; new appointments of key executive officers including those of the Armed Forces were extended and they took an oath to support and defend the new Constitution. The courts, except the Supreme Court by reason of these cases, have administered justice under the new Constitution. All government offices have dealt with the public and performed their functions according to the new Constitution and laws promulgated thereunder.

If the real purpose of the petitions is to set aside the new Constitution, how can this Court justify its assumption of jurisdiction when no power has * * * conferred upon it the jurisdiction to declare the Constitution or any part thereof null and void? It is the height of absurdity and impudence for a court to wage open war against the organic act to which it owes its existence. The situation in which this Court finds itself does not permit it to pass upon the question whether or not the new Constitution has entered into force and has superseded the 1935 Constitution. If it declares that the present Constitution has not been validly ratified, it has to uphold the 1935 Constitution as still

the prevailing organic law. The result would be too anomalous to describe, for then this Court would have to declare that it is governed by one Constitution or the 1935 Constitution, and the legislative and executive branches by another or the 1972 Constitution.

If it declares that the 1972 Constitution is now operative, how can it exercise judicial discretion in these cases when it would have no other choice but to uphold the new Constitution as against any other one? In the circumstances it would be bereft of judicial attributes as the matter would then be not meet for judicial determination, but one addressed to the sovereign power of the people who have already spoken and delivered their mandate by accepting the fundamental law on which the government of this Republic is now functioning. To deny that the new Constitution has been accepted and actually is in operation would be flying in the face of reason and pounding one's bare head against a veritable stone wall or a heavily reinforced concrete, or simply "kicking the deadly pricks" with one's bare foot in an effort to eliminate the lethal points.

When a Constitution has been in operation for sometime, even without popular gratification at that, submission of the people thereto by the organization of the government provided therein and observance of its prescriptions by public officers chosen thereunder, is indicative of approval. Courts should be slow in nullifying a Constitution claimed to have been adopted not in accordance with Constitutional or statutory directives [Miller vs. Johnson, 92 Ky. 589; 189 S. W. 522; Taylor vs. Commonwealth, 101; Va. 829; 44 S. E. 754; Smith vs. Good, 34 F 204, 207; Wiston vs. Ryan, 70 Neb. 211; 97 N. W. 347].

In Miller vs. Johnson, supra, the Court said:

"* * * But it is a case where a new constitution has been formed and promulgated according to the forms of law. Great interests have already arisen under it; important rights exist by virtue of it; persons have been convicted of the highest crimes known to the law, according to its provisions; the political power of the government has in many ways recognized it; and, under such circumstances, it is our duty to treat and regard it as a valid constitution, and now the organic law of our state. We need not consider the validity of the amendments made after the convention reassembled. If the making of them was in excess of its power, yet, as the entire instrument has been recognized as valid in the manner suggested, it would be equally an abuse of power by the judiciary, and violative of the rights of the people, — who can and properly should remedy the matter, if not to their liking, — if it were to declare the instrument or a portion invalid, and bring confusion and anarchy upon the state." (Italics supplied)

In Smith vs. Good, supra, the Court said:

"It is said that a state court is forbidden from entering upon such an inquiry when applied to a new constitution, and not an amendment, because the judicial power presupposes an established government, and if the authority of that government is annulled and overthrown, the power of its courts is annulled with it; and therefore, if a state court should enter upon such an inquiry, and come to the conclusion that the government under which it acted had been displaced by an opposing government, it would cease to be a court, and it would be incapable of pronouncing a judicial decision upon the question before it; but, if it decides at all, it must necessarily affirm the existence of the government under which it exercises its judicial powers." (Italics supplied)

These rules are all traceable to Luther vs. Borden, 48 U.S. 7 How.), 12 L. Ed. 581, 598 (1849) where it was held:

"Judicial power presupposes an established government capable of enacting laws and enforcing their execution, and of appointing judges to expound and administer them. The acceptance of the judicial office is a recognition of the authority of the government from which it is derived. And if the authority of that government is annulled and overthrown, the power of its courts and other officers is annulled with it. And if a State court should enter upon the inquiry proposed in this case, and should come to the conclusion that the government under which it acted had been put aside and displaced by an opposing government it would cease

to be a court, and be incapable of pronouncing a judicial decision upon the question it undertook to try. If it decides at all as a court, it necessarily affirms the existence and authority of the government under which it is exercising judicial power."

The foreign relations of the Republic of the Philippines have been normally conducted on the basis of the new Constitution and no state with which we maintain diplomatic relations has withdrawn its recognition of our government. (For particulars about executive acts done under the new Constitution, see pages 22-25 of the Comments of the Solicitor General, dated February 3, 1973.)

Certainly the invalidation of Proclamation No. 1102 and Presidential Decrees Nos. 86 and 86-A by this Court would smack of plain political meddling which is described by the United States Supreme Court as "entering a political thicket" in *Colegrove vs. Green*, 328 U.S. p. 549. At this juncture it would be the better part of wisdom for this Court to adopt the proper attitude towards political upheavals and realize that the question before Us is political and not fit for judicial determination. For a political question is one entrusted to the people for judgment in their sovereign capacity (*Tañada vs. Cuenco*, G.R. No. L-10520, Feb. 28, 1967; 100 Phil. 1101), or to a co-equal and coordinate branch of the Government (*Vera vs. Arellano*, 77 Phil. 192; *Mabanag vs. Lopez Vito*, 78 Phil. 1; *Alejandrino vs. Quezon*, 46 Phil. 35; *Cabili vs. Francisco*, G. R. No. 4638, May 8, 1931). A case involves a political question when there would be "the impossibility of undertaking independent resolutions without expressing a lack of respect due to coordinate branches of government", or when there is "the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

To preserve the prestige and eminence that this Court has long enjoyed as the "ultimate organ of the 'Supreme Law of the Land' in that vast range of legal problems often strongly entangled in popular feeling on which this Court must pronounce", let us harken to the following admonition of Justice Frankfurter in his dissent in *Baker vs. Carr*, 369 U.S.A. 186; 82 S. Ct. 691; 7 L. Ed. 2d. 663:

"The Court's authority - possessed neither of the purse nor the sword - ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and appearance, from political entanglements and abstention from injecting itself into the clash of political forces in political settlement. * * *." (Italics supplied)

The people have accepted and submitted to a new Constitution to replace the 1935 Constitution. The new organic law is now in the plenitude of its efficacy and vigor. We are now living under its aegis and protection and only the cynics will deny this. This Court should not in the least attempt to act as a super-legislature or a super-board of canvassers and sow confusion and discord among our people by pontificating that there was no valid ratification of the new Constitution. The sober realization of its proper role and delicate function and its consciousness of the limitations on its competence, especially in situations like this, are more in keeping with the preservation of our democratic tradition than the blatant declamations of those who wish the Court to engage in their brand of activism and would not mind plunging it into the whirlpool of passion and emotion in an effort to capture the intoxicating applause of the multitude.

FOR ALL THE FOREGOING, I vote to dismiss all petitions.

Barredo, Makasiar, and Antonio, JJ., concur.

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TEEHANKEE, J.:

The masterly opinion of the Chief Justice wherein he painstakingly deals with the momentous issues of the cases at bar in all their complexity commands my concurrence.

I would herein make an exposition of the fundamental reasons and considerations for my stand.

The unprecedented and precedent-setting issue submitted by petitioners for the Court's resolution is the validity and constitutionality of Presidential Proclamation No. 1102 issued on January 17, 1973, certifying and proclaiming that the Constitution proposed by the 1971 Constitutional Convention "has been ratified by an overwhelming majority of all the votes cast by the members of all the Barangays (Citizens Assemblies) throughout the Philippines, and has thereby come into effect."

More specifically, the issue submitted is whether the purported ratification of the proposed Constitution by means of the Citizens Assemblies has substantially complied with the mandate of Article XV of the existing Constitution of 1935 that duly proposed amendments thereto, in toto or parts thereof, "shall be valid as part of this Constitution when approved by a majority of the votes cast at an election at which the amendments are submitted to the people for their ratification." [1]

A necessary corollary issue is whether the purported ratification of the proposed Constitution as signed on November 30, 1972 by the 1971 Constitutional Convention may be said also to have substantially complied with its own mandate that "(T)his Constitution shall take effect immediately upon its ratification by a majority of the votes cast in a plebiscite called for the purpose and except as herein provided, shall supersede the Constitution of Nineteen hundred and thirty-five and all amendments thereto." [2]

Respondents contend that "(A)lthough apparently what is sought to be annulled is Proclamation No. 1102, what petitioners really seek to invalidate is the new Constitution," and their actions must be dismissed, because.

- "the Court may not inquire into the validity of the procedure for ratification" which is "political in character" and that "what is sought to be invalidated is not an act of the President but of the people;
- "(T)he fact of approval of the new Constitution by an overwhelming majority of the votes cast as declared and certified in Proclamation No. 1102 is conclusive on the courts;
- "Proclamation No. 1102 was issued by the President in the exercise of legislative power under martial law. * * * Alternatively, or contemporaneously, he did so as 'agent' of the Constitutional Convention;"
- "alleged defects, such as absence of secret voting, enfranchisement of persons less than 21 years, non-supervision (by) the Comelec are matters not required by Article XV of the 1935 Constitution"; (sic)
- "after ratification, whatever defects there might have been in the procedure are overcome and mooted (and muted) by the fact of ratification"; and
- "(A)ssuming finally that Article XV of the 1935 Constitution was not strictly followed, the ratification of the new Constitution must nonetheless be respected. For the procedure outlined in Article XV was not intended to be exclusive of other procedures, especially one which contemplates popular and direct participation of the citizenry * * *." [3]

To test the validity of respondents' submittal that the Court, in annulling Proclamation No. 1102 would really be "invalidating the new Constitution", the terms and premises of the issues have to be defined.

- Respondents themselves assert that "Proclamation No. 1102 * * * is plainly merely declaratory of the fact

that the 1973 Constitution has been ratified and has come into force."[4]

– The measure of the fact of ratification is Article XV of the 1935 Constitution. This has been consistently held by the Court in the Gonzales:[5] and Tolentino[6] cases.

– In the Tolentino case, this Court emphasized "that the provisions of Section 1 of Article XV of the Constitution, dealing with the procedure or manner of amending the fundamental law are binding upon the Convention and the other departments of the government. It must be added that * * * they are no less binding upon the people."[7]

– In the same Tolentino case, this Court further proclaimed that "as long as any amendment is formulated and submitted under the aegis of the present Charter, any proposal for such amendment which is not in conformity with the letter, spirit and intent of the Charter for effecting amendments, cannot receive the sanction of this court."[8]

- As continues to be held by a majority of this Court, proposed amendments to the Constitution "should be ratified in only one way, that is, in an election or plebiscite held in accordance with law and participated in only by qualified and duly registered voters"[9] and under the supervision of the Commission on Elections.[10]

– Hence, if the Court declares Proclamation 1102 null and void because on its face, the purported ratification of the proposed Consti-tution has not faithfully nor substantially observed nor complied with the mandatory requirements of Article XV of the (1935) Constitution, it would not be "invalidating" the proposed new Constitution but would be simply declaring that the announced fact of ratification thereof by means of the Citizens Assemblies referendums does not pass the constitutional test and that the proposed new Constitution has not constitutionally come into existence.

– Since Proclamation 1102 is acknowledged by respondent to be "plainly merely declaratory" of the disputed fact of ratification, they cannot assume the very fact to be established and beg the issue by citing the self-same declaration as proof of the purported ratification therein declared.

What complicates the cases at bar is the fact that the proposed 1972 Constitution was enforced as having immediately taken effect upon the issuance on January 17, 1973 of Proclamation 1102 and the question of whether "confusion and disorder in government affairs would (not) result" from a judicial declaration of nullity of the purported ratification is raised by the Solicitor-General on behalf of respondents.

A comparable precedent of great crisis proportions is found in the Emergency Powers cases,[11] wherein the Court in its Resolution of September 16, 1949 after judgment was initially not obtained on August 26, 1949 for lack of the required six (6) votes, finally declared in effect that the pre-war emergency powers delegated by Congress to the President, under Commonwealth Act 671 in pursuance of Article VI, section 26 of the Constitution, had ceased and became inoperative at the latest in May, 1946 when Congress met in its first regular session on May 25, 1946.

Then Chief Justice Manuel V. Moran recited the great interests and important rights that had arisen under executive orders "issued in good faith and with the best of intentions by three successive Presidents, and some of them may have already produced extensive effects on the life of the nation" - in the same manner as may have arisen under the bona fide acts of the President now in the honest belief that the 1972 Constitution had been validly ratified by means of the Citizens Assemblies referendums - and indicated the proper course and solution therefor, which were duly abided by and confusion and disorder as well as harm to public interest and innocent parties thereby avoided as follows:

"Upon the other hand, while I believe that the emergency powers had ceased in June 1945, I am not prepared to hold that all executive orders issued thereafter under Commonwealth Act No. 671, are per se null and, void. It

must be borne in mind that these executive orders had been issued in good faith and with the best of intentions by three successive Presidents, and some of them may have already produced extensive effects in the life of the nation. We have, for instance, Executive Order No. 73, issued on November 12, 1945, appropriating the sum of P6,750,000 for public works; Executive Order No. 86, issued on January 7, 1946, amending a previous order regarding the organization of the Supreme Court; Executive Order No. 89, issued on January 1, 1946, reorganizing the Courts of First Instance; Executive Order No. 184, issued on November 19, 1948, controlling rice and palay to combat hunger; and other executive orders appropriating funds for other purposes. The consequences of a blanket nullification of all these executive orders will be unquestionably serious and harmful. And I hold that before nullifying them, other important circumstances should be inquired into, as for instance, whether or not they have been ratified by Congress expressly or impliedly, whether their purposes have already been accomplished entirely or partially, and in the last instance, to what extent; acquiescence of litigants; de facto officers; acts and contracts of parties acting in good faith; etc. It is my opinion that each executive order must be viewed in the light of its peculiar circumstances, and, if necessary and possible, before nullifying it, precautionary measures should be taken to avoid harm to public interest and innocent parties."[12]

Initially, then Chief Justice Moran voted with a majority of the Court to grant the Araneta and Guerrero petitions holding null and void the executive orders on rentals and export control but to defer judgment on the Rodriguez and Barredo petitions for judicial declarations of nullity of the executive orders appropriating the 1949-1950 fiscal year budget for the government and P6 million for the holding of the 1949 national elections. After rehearing, he further voted to also declare null and void the last two executive orders appropriating funds for the 1949 budget and elections, completing the "sufficient majority" of six as against four dissenting justices "to pronounce a valid judgment on that matter." [13]

Then Chief Justice Moran, who penned the Court's majority resolution, explained his vote for annulment despite the great difficulties and possible "harmful consequences" in the following passage, which bears re-reading:

"However, now that the holding of a special session of Congress for the purpose of remedying the nullity of the executive orders in question appears remote and uncertain, I am compelled to, and do hereby, give my unqualified concurrence in the decision penned by Mr. Justice Tuason declaring that these two executive orders were issued without authority of law.

"While in voting for a temporary deferment of the judgment I was moved by the belief that positive compliance with the Constitution by the other branches of the Government, which is our prime concern in all these cases, would be effected, and indefinite deferment will produce the opposite result because it would legitimize a prolonged or permanent evasion of our organic law. Executive orders which are, in our opinion, repugnant to the Constitution, would be given permanent life, opening the way or practices which may undermine our constitutional structure.

"The harmful consequences which, as I envisioned in my concurring opinion, would come to pass should the said executive orders be immediately declared null and void, are still real. They have not disappeared by reason of the fact that a special session of Congress is not now forthcoming. However, the remedy now lies in the hands of the Chief Executive and of Congress, for the Constitution vests in the former the power to call a special session should the need for one arise, and in the latter, the power to pass a valid appropriations act.

"That Congress may again fail to pass a valid appropriations act is a remote possibility, for under the circumstances it fully realizes its great responsibility of saving the nation from breaking down; and furthermore, the President in the exercise of his constitutional powers may, if he so desires, compel Congress to remain in special session till it approves the legislative measures most needed by the country.

"Democracy is on trial in the Philippines, and surely it will emerge victorious as a permanent way of life in this country, if each of the great branches of the Government, within its own allocated sphere, complies with its

own constitutional duty, uncompromisingly and regardless of difficulties.

"Our Republic is still young, and the vital principles underlying its organic structure should be maintained firm and strong, hard as the best of steel, so as to insure its growth and development along solid lines of a stable and vigorous democracy." [14]

The late Justice Pedro Tuason who penned the initial majority judgment (declaring null and void the rental and export control executive orders) likewise observed that "(T)he truth is that under our concept of constitutional government, in times of extreme perils more than in normal circumstances 'the various branches, executive, legislative, and judicial,' given the ability to act, are called upon 'to perform the duties and discharge the responsibilities committed to them respectively.'" [15]

It should be duly acknowledged that the Court's task of discharging its duty and responsibility has been considerably lightened by the President's public manifestation of adherence to constitutional processes and of working within the proper constitutional framework as per his press conference of January 20, 1973, wherein he stated that "(T)he Supreme Court is the final arbiter of the Constitution. It can and will probably determine the validity of this Constitution. I did not want to talk about this because actually there is a case pending before the Supreme Court. But suffice it to say that I recognize the power of the Supreme Court. With respect to appointments, the matter falls under a general provision which authorizes the Prime Minister to appoint additional members to the Supreme Court. Until the matter of the new Constitution is decided, I have no intention of utilizing that power." [16]

Thus, it is that as in an analogous situation wherein the state Supreme Court of Mississippi held that the questions of whether the submission of the proposed constitutional amendment of the State Constitution providing for an elective, instead of an appointive, judiciary and whether the proposition was in fact adopted, were justiciable and not political questions, we may echo the words therein of Chief Justice Whitfield that "(W)e do not seek a jurisdiction not imposed upon us by the Constitution. We could not, if we would, escape the exercise of that jurisdiction which the Constitution has imposed upon us. In the particular instance in which we are now acting, our duty to know what the Constitution of the state is, and in accordance with our oaths to support and maintain it in its integrity, imposed on us a most difficult and embarrassing duty, one which we have not sought, but one which, like all others, must be discharged." [17]

I

In confronting the issues at bar, then, with due regard for my colleagues' contrary views, we are faced with the hard choice of maintaining a firm and strict - perhaps, even rigid - stand that the Constitution is a "superior paramount law, unchangeable by ordinary means" save in the particular mode and manner prescribed therein by the people, who, in Cooley's words, so "tied up (not only) the hands of their official agencies, but their own hands as well" [18] in the exercise of their sovereign will or a liberal and flexible stand that would consider compliance with the constitutional article on the amending process as merely directory rather than mandatory.

The first choice of a strict stand, as applied to the cases at bar, signifies that the Constitution "may be amended in toto or otherwise exclusively "by approval by a majority of the votes cast in an election at which the amendments are submitted to the people for their ratification", [19] participated in only by qualified and duly registered voters twenty-one years of age or over [20] and duly supervised by the Commission on Elections, [21] in accordance with the cited mandatory constitutional requirements.

The alternative choice of a liberal stand would permit a disregard of said requirements on the theory urged by respondents that "the procedure outlined in Article XV was not intended to be exclusive of other procedures

especially one which contemplates popular and direct participation of citizenry",[22] that the constitutional age and literacy requirements and other statutory safeguards for ascertaining the will of the majority of the people may likewise be changed as "suggested, if not prescribed, by the people (through the Citizens Assemblies) themselves",[23] and that the Comelec is constitutionally "mandated to oversee * * * elections (of public officers) and not plebiscites." [24]

To paraphrase U.S. Chief Justice John Marshall who first declared in the historic 1803 case of *Marbury vs. Madison*[25] the U.S. Supreme Court's power of judicial review and to declare void laws repugnant to the Constitution, there is no middle ground between these two alternatives. As Marshall expounded it. "(T)he Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act, contrary to the Constitution, is not law; if the latter part be true, then written constitutions are absurd attempts on the part of a people, to limit a power, in its own nature, illimitable."

As was to be restated by Justice Jose P. Laurel a century and a third later in the 1936 landmark case of *Angara vs. Electoral Commission*,[26] "(T)he Constitution sets forth in no uncertain language the restrictions and limitations upon governmental powers and agencies. If these restrictions and limitations are transcended it would be inconceivable if the Constitution had not provided for a mechanism by which to direct the course of government along constitutional channels, for then the distribution of powers would be mere verbiage, the bill of rights mere expression of sentiment, and the principles of good government mere political apothegms. Certainly, the limitations and restrictions embodied in our Constitution are real as they should be in any living Constitution."

Justice Laurel pointed out that in contrast to the United States Constitution, the Philippine Constitution as "a definition of the powers of government" placed upon the judiciary the great burden of "determining the nature, scope and extent of such powers" and stressed that "when the judiciary mediates to allocate constitutional boundaries, it does not assert any superiority over the other departments * * * but only asserts the solemn and sacred obligation entrusted to it by the Constitution to determine conflicting claims of authority under the Constitution and to establish for the parties in an actual controversy the rights which the instrument secures and guarantees to them."

II

Marshall was to utter much later in the equally historic 1819 case of *McCulloch vs. Maryland*[27] the "climactic phrase",[28] "we must never forget that it is a constitution we are expounding," - termed by Justice Frankfurter as "the single most important utterance in the literature of constitutional law - most important because most comprehensive and comprehending." [29] This enduring concept to my mind permeated this Court's exposition and rationale in the hallmark case of *Tolentino*, wherein we rejected the contentions on the Convention's behalf "that the issue * * * is a political question and that the Convention being a legislative body of the highest order is sovereign, and as such, its acts impugned by petitioner are beyond the control of Congress and the Courts." [30]

This Court therein made its unequivocal choice of strictly requiring faithful (which really includes substantial) compliance with the mandatory requirements of the amending process.

1. In denying reconsideration of our judgment of October 16, 1971 prohibiting the submittal in an advance election of the 1971 Constitutional Convention's Organic Resolution No. 1 proposing to amend Article V, section 1 of the Constitution by lowering the voting age to 18 years (vice 21 years)30a "without prejudice to other amendments that will be proposed in the future * * * on other portions of the amended section", this Court stated that "the constitutional provision in question (as proposed) presents no doubt which may be resolved in favor of respondents and intervenors. We do not believe such doubt can exist only because it is urged that the end sought

to be achieved is to be desired Paraphrasing no less than the President of the Constitutional Convention of 1934, Claro M. Recto, let those who would put aside, invoking grounds at best controversial, any mandate of the fundamental law purportedly in order to attain some laudable objective bear in mind that someday somehow others with purportedly more laudable objectives may take advantage of the precedent and continue the destruction of the Constitution, making those who laid down the precedent of justifying deviations from the requirements of the Constitution the victims of their own folly."[31]

2. This Court held in Tolentino that:

"* * * as to matters not related to its internal operation and the performance of its assigned mission to propose amendments to the Constitution, the Convention and its officers and members are all subject to all the provisions of the existing Constitution. Now We hold that even as to its latter task of proposing amendments to the Constitution, it is subject to the provisions of Section 1 of Article XV. This must be so, because it is plain to Us that the framers of the Constitution took care that the process of amending the same should not be undertaken with the same ease and facility in changing an ordinary legislation. Constitution making is the most valued power, second to none, of the people in a constitutional democracy such as the one our founding fathers have chosen for this nation, and which we of the succeeding generations generally cherish. And because the Constitution affects the lives, fortunes, future and every other conceivable aspect of the lives of all the people within the country and those subject to its sovereignty, every degree of care is taken in preparing and drafting it. A constitution worthy of the people for which it is intended must not be prepared in haste without adequate deliberation and study. It is obvious that correspondingly, any amendment of the Constitution is of no less importance than the whole Constitution itself, and perforce must be conceived and prepared with as much care and deliberation. From the very nature of things, the drafters of an original constitution, as already observed earlier, operate, without any limitations, restraints or inhibitions save those that they may impose upon themselves. This is not necessarily true of subsequent conventions called to amend the original constitution. Generally, the framers of the latter see to it that their handiwork is not lightly treated and as easily mutilated or changed, not only for reasons purely personal but more importantly, because written constitutions are supposed to be designed so as to last for some time, if not for ages, or for, at least, as long as they can be adopted to the needs and exigencies of the people, hence, they must be insulated against precipitate and hasty actions motivated by more or less passing political moods or fancies. Thus, as a rule, the original constitutions carry with them limitations and conditions, more or less stringent, made so by the people themselves, in regard to the process of their amendment. And when such limitations or conditions are so incorporated in the original constitution, it does not lie in the delegates of any subsequent convention to claim that they may ignore and disregard such conditions because they are as powerful and omnipotent as their original counterparts."[32]

3. This Court in Tolentino likewise formally adopted the doctrine of proper submission first advanced in *Gonzales vs. Comelec*,[33] thus

"We are certain no one can deny that in order that a plebiscite for the ratification of an amendment to the Constitution may be validly held, it must provide the voter not only sufficient time but ample basis for an intelligent appraisal of the nature of the amendment per se as well as its relation to the other parts of the Constitution with which it has to form a harmonious whole. In the context of the present state of things, where the Convention has hardly started considering the merits of hundreds, if not thousands, of proposals to amend the existing Constitution, to present to the people any single proposal or a few of them cannot comply with this requirement. We are of the opinion that the present Constitution does not contemplate in Section 1 of Article XV a plebiscite or 'election' wherein the people are in the dark as to frame of reference they can base their judgment on. We reject the rationalization that the present Constitution is a possible frame of reference, for the simple reason that intervenors themselves are stating the sole purpose of the proposed amendment is to enable the eighteen year olds to take part in the election for the ratification of the Constitution to be drafted by the Convention. In brief, under the proposed plebiscite, there can be, in the language of Justice Sanchez, speaking for the six members of the Court in *Gonzales*, supra, 'no proper submission.'"[34]

4. Four other members of the Court[35] in a separate concurrence in Tolentino, expressed their "essential agree-ment" with Justice Sanchez' separate opinion in Gonzales on the need for "fair submission (and) intelligent consent or rejection" as "minimum requirements that must be met in order that there can be a proper submission to the people of a proposed constitutional amendment" thus:

"* * * amendments must be fairly laid before the people for their blessing or spurning. The people are not to be mere rubber stamps. They are not to vote blindly. They must be afforded ample opportunity to mull over the original provisions, compare them with the proposed amendments, and try to reach a conclusion as the dictates of their conscience suggest, free from the incubus of extraneous or possibly insidious influences. We believe the word 'submitted' can only mean that the government, within its maximum capabilities, should strain every effort to inform every citizen of the provisions to be amended, and the proposed amendments and the meaning, nature and effects thereof. By this, we are not to be understood as saying that, if one citizen or 100 citizens or 1,000 citizens cannot be reached, then there is no submission within the meaning of the word as intended by the framers of the Constitution. What the Constitution in effect directs is that the government, in submitting an amendment for ratification, should put every instrumentality or agency within its structural framework to enlighten the people, educate them with respect to their act of ratification or rejection. For as we have earlier stated, one thing is submission and another is ratification. There must be fair submission, intelligent consent or rejection." [36]

They stressed further the need for undivided attention, sufficient information and full debate, conformably to the intentment of Article XV, section 1 of the Constitution, in this wise:

"A number of doubts or misgivings could conceivably and logically assail the average voter. Why should the voting age be lowered at all, in the first place? Why should the new voting age be precisely 18 years, and not 19 or 20? And why not 17? Or even 16 or 15? Is the 18-year old as mature as the 21-year old so that there is no need of an educational qualification to entitle him to vote? In this age of permissiveness and dissent, can the 18-year old be relied upon to vote with judiciousness when the 21-year old, in the past elections, has not performed so well? If the proposed amendment is voted down by the people will the Constitutional Convention insist on the said amendment? Why is there an unseemly haste on the part of the Constitution Convention in having this particular proposed amendment ratified at this particular time? Do some of the members of the Convention have future political plans which they want to begin to subserve by the approval this year of this amendment? If this amendment is approved, does it thereby mean that the 18-year old should not also shoulder the moral and legal responsibilities of the 21-year old? Will he be required to render compulsory military service under the colors? Will the age of contractual consent be reduced to 18 years? If I vote against this amendment, will I not be unfair to my own child who will be 18 years old, come 1973?

"The above are just samplings from here, there and everywhere - from a domain (of searching questions) the bounds of which are not immediately ascertainable. Surely, many more questions can be added to the already long litany. And the answers cannot be had except as the questions are debated fully, pondered upon purposefully, and accorded undivided attention.

"Scanning the contemporary scene, we say that the people are not, and by election time, will not be, sufficiently informed of the meaning, nature and effects of the proposed constitutional amendment. They have not been afforded ample time to deliberate thereon conscientiously. They have been and are effectively distracted from a full and dispassionate consideration of the merits and demerits of the proposed amendment by their traditional pervasive involvement in local elections and politics. They cannot thus weigh in tranquility the need for and the wisdom of the proposed amendment." [37]

5. This Court therein dismissed the plea of disregarding the mandatory requirements of the amending process "in favor of allowing the sovereign people to express their decision on the proposed amendments" as "anachronistic in the realm of constitutionalism and repugnant to the essence of the rule of law," in the following terms:

" * * * The preamble of the Constitution says that the Constitution has been ordained by the 'Filipino people, imploring the aid of Divine Providence.' Section 1 of Article XV is nothing more than a part of the Constitution thus ordained by the people. Hence, in construing said section, We must read it as if the people had said, 'This Constitution may be amended, but it is our will that the amendment must be proposed and submitted to Us for ratification only in the manner herein provided.' * * * Accordingly, the real issue here cannot be whether or not the amending process delineated by the present Constitution may be disregarded in favor of allowing the sovereign people to express their decision on the proposed amendments, if only because it is evident that the very idea of departing from the fundamental law is anachronistic in the realm of constitutionalism and repugnant to the essence of the rule of law; rather, it is whether or not the provisional nature, of the proposed amendment and the manner of its submission to the people for ratification or rejection conform with the mandate of the people themselves in such regard, as expressed in the Constitution itself." [38]

6. This Court, in not heeding the popular clamor, thus stated its position: "(I)t would be tragic and contrary to the plain compulsion of these perspectives, if the Court were to allow itself in deciding this case to be carried astray by considerations other than the imperatives of the rule of law and of the applicable provisions of the Constitution. Needless to say, in a larger measure than when it binds other departments of the government or any other official or entity, the Constitution imposes upon the Court the sacred duty to give meaning and vigor to the Constitution, by interpreting and construing its provisions in appropriate cases with the proper parties and by striking down any act violative thereof. Here, as in all other cases, We are resolved to discharge that duty." [39]

7. The Chief Justice, in his separate opinion in Tolentino concurring with this Court's denial of the motion for reconsideration, succinctly restated this Court's position on the fundamentals, as follows:

– On the premature submission of a partial amendment proposal, with a "temporary provisional or tentative character": — " * * * a partial amendment would deprive the voters of the context which is usually necessary for them to make a reasonably intelligent appraisal of the issue submitted for their ratification or rejection. * * * Then, too, the submission to a plebiscite of a partial amendment, without a definite frame of reference, is fraught with possibilities which may jeopardize the social fabric. For one thing, it opens the door to wild speculations. It offers ample opportunities for overzealous leaders and members of opposing political camps to unduly exaggerate the pros and cons of the partial amendment proposed. In short, it is apt to breed false hopes and create wrong impressions. As a consequence, it is bound to unduly strain the people's faith in the soundness and validity of democratic processes and institutions."

– On the plea to allow submission to the sovereign people of the "fragmentary and incomplete" proposal, although inconsistent with the letter and spirit of the Constitution: "The view, has, also, been advanced that the foregoing considerations are not decisive on the issue before Us, inasmuch as the people are sovereign, and the partial amendment involved in this case is being submitted to them. The issue before Us is whether or not said partial amendment may be validly submitted to the people for ratification 'in a plebiscite to coincide with the local elections in November 1971,' and this particular issue will not be submitted to the people. What is more, the Constitution does not permit its submission to the people. The question sought to be settled in the scheduled plebiscite is whether or not the people are in favor of the reduction of the voting age."

– On a "political" rather than "legalistic" approach: "Is this approach to the problem too 'legalistic?' This term has several possible connotations. It may mean strict adherence to the law, which in the case at bar is the Supreme Law of the land. On this point, suffice it to say that, in compliance with the specific mandate of such Supreme Law, the members of the Supreme Court have taken the requisite 'oath to support and defend the Constitution.' * * * Then, again, the term 'legalistic' may be used to suggest inversely that the somewhat strained interpretation of the Constitution being urged upon this Court be tolerated or, at least, overlooked, upon the theory that the partial amendment on the voting age is badly needed and reflects the will of the people, specially the youth. This course of action favors, in effect, the adoption of a political approach,

inasmuch as the advisability of the amendment and an appraisal of the people's feeling thereon are political matters. In fact, apart from the obvious message of the mass media, and, at times, of the pulpit, the Court has been literally bombarded with scores of handwritten letters, almost all of which bear the penmanship and the signature of girls, as well as the letterhead of some sectarian educational institutions, generally stating that the writer is 18 years of age and urging that she or he be allowed to vote. Thus, the pressure of public opinion has been brought to bear heavily upon the Court for a reconsideration of its decision in the case at bar.

"As above stated, however, the wisdom of the amendment and the popularity thereof are political questions beyond our province. In fact, respondents and the intervenors originally maintained that We have no jurisdiction to entertain the petition herein, upon the ground that the issue therein raised is a political one. Aside from the absence of authority to pass upon political question, it is obviously improper and unwise for the bench to delve into such questions owing to the danger of getting involved in politics, more likely of a partisan nature, and, hence, of impairing the image and the usefulness of courts of justice as objective and impartial arbiters of justiciable controversies.

"Then, too, the suggested course of action, if adopted, would constitute a grievous disservice to the people and the very Convention itself. Indeed, the latter and the Constitution it is in the process of drafting stand essentially for the Rule of Law. However, as the Supreme Law of the land, a Constitution would not be worthy of its name, and the Convention called upon to draft it would be engaged in a futile undertaking, if we did not exact faithful adherence to the fundamental tenets set forth in the Constitution and compliance with its provisions were not obligatory. If we, in effect, approved, consented to or even overlooked a circumvention of said tenets and provisions, because of the good intention with which Resolution No. 1 is animated, the Court would thereby become the Judge of the good or bad intentions of the Convention and thus be involved in a question essentially political in nature.

"This is confirmed by the plea made in the motions for reconsideration in favor of the exercise of judicial statesmanship in deciding the present case. Indeed, 'politics' is the word commonly used to epitomize compromise, even with principles, for the sake of political expediency or the advancement of the bid for power of a given political party. Upon the other hand, statesmanship is the expression usually availed of to refer to high politics or politics on the highest level. In any event, politics, political approach, political expediency and statesmanship are generally associated, and often identified, with the dictum that 'the end justifies the means.' I earnestly hope that the administration of justice in this country and the Supreme Court, in particular, will never adhere to or approve or indorse such dictum." [40]

8. In the writer's own separate concurring opinion in Tolentino, he pointed out that although "(M)ovants' submittal that '(T)he primary purpose for the submission of the proposed amendment lowering the voting age to the plebiscite on November 8, 1971 is to enable the youth 18 to 20 years who comprise more than three (3) million of our population to participate in the ratification of the new Constitution in 1972' so as 'to allow young people who would be governed by the new Constitution to be given a say on what kind of Constitution they will have' is a laudable and, * * * those urging the vitality and importance of the proposed constitutional amendment and its approval ahead of the complete and final draft of the new Constitution must seek a valid solution to achieve it in a manner sanctioned by the amendatory process ordained by our people in the present Constitution" [41] - so that there may be "submitted, not piece-meal, but by way of complete and final amend-ments as an integrated whole (integrated either with the subsisting Constitution or with the new proposed Constitution) * * *."

9. The universal validity of the vital constitutional precepts and principles above-enunciated can hardly be gainsaid. I fail to see the attempted distinction of restricting their application to proposals for amendments of particular provisions of the Constitution and not to so-called entirely new Constitutions Amendments to an existing Constitution presumably may be only of certain parts or in toto, and in the latter case would give rise to an entirely new Constitution. Where this Court held in Tolentino that "any amendment of the Constitution is of no

less importance than the whole Constitution itself and perforce must be conceived and prepared with as much care and deliberation", it would appear that the reverse would equally be true; which is to say, that the adoption of a whole new Constitution would be of no less importance than any particular amendment and therefore the necessary care and deliberation as well as the mandatory restrictions and safeguards in the amending process ordained by the people themselves so that "they (may) be insulated against precipitate and hasty actions motivated by more or less passing political moods or fancies" must necessarily equally apply thereto.

III

1. To restate the basic premises, the people provided in Article XV of the Constitution for the amending process only "by approval by a majority of the votes cast at an election at which the (duly proposed) amendments are submitted to the people for their ratification."

The people ordained in Article V, section 1 that only those thereby enfranchised and granted the right of suffrage may speak the "will of the body politic", viz, qualified literate voters twenty-one years of age or over with one year's residence in the country and six months' residence in the municipality where they have registered.

The people, not as yet satisfied, further provided by amendment duly approved in 1940 in accordance with Article XV, for the creation of an independent Commission on Elections with "exclusive charge" for the purpose of "insuring free, orderly and honest elections" and ascertaining the true will of the electorate and more, as ruled by this Court in Tolentino, in the case of proposed constitutional amendments, insuring proper submission to the electorate of such proposals.[42]

2. A Massachusetts case[43] with a constitutional system and provisions analogous to ours, best defined the uses of the term "people" as a body politic and "people" in the political sense who are synonymous with the qualified voters granted the right to vote by the existing Constitution and who therefore are "the sole organs through which the will of the body politic can be expressed."

It was pointed out therein that "(T)he word 'people' may have somewhat varying significations dependent upon the connection in which it is used. In some connections in the Constitution it is confined to citizens and means the same as citizens. It excludes aliens. It includes men, women, and children. It comprehends not only the sane, competent, law-abiding and educated, but also those who are wholly or in part dependents and charges upon society by reason of immaturity, mental or moral deficiency or lack of the common essentials of education. All these persons are secured by the fundamental guarantees of the Constitution in life, liberty, and property and the pursuit of happiness, except as these may be limited for the protection of society."

In the sense of "body politic (as) formed by voluntary association of individuals" governed by a constitution and common laws in a "social compact * * * for the common good" and in another sense of "people" in a "practical sense" for "political purposes" it was therein fittingly stated that "(I)n this sense, 'people' comprises many who, by reason of want of years, of capacity or of the educational requirements of Article 20 of the amendments of the Constitution, can have no voice in government and who yet are entitled to all the immunities and protection established by the Constitution. 'People' in this aspect is coextensive with the body politic. But it is obvious that 'people' cannot be used with this broad meaning in a political signification. The 'people' in this connection means that part of the entire body of inhabitants who under the Constitution are intrusted with the exercise of the sovereign power and the conduct of government. The 'people' in the Constitution in a practical sense means those who under the existing Constitution possess the right to exercise the elective franchise and who, while that instrument remains in force unchanged, will be the sole organs through which the will of the body politic can be expressed. 'People' for political purposes must be considered synonymous with qualified voters."

As was also ruled by the U.S. Supreme Court, "* * * While the people are thus the source of political power, their governments, national and state, have been limited by written constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulse of mere majorities." [44]

From the text of Article XV of our Constitution, requiring approval of amendment proposals "by a majority of the votes cast at an election at which the amendments are submitted to the people for their ratification", it seems obvious as above-stated that "people" as therein used must be considered synonymous with "qualified voters" as enfranchised under Article V, section I of the Constitution, since only "people" who are qualified voters can exercise the right of suffrage and cast their votes.

3. Sound constitutional policy and the sheer necessity of adequate safeguards as ordained by the Constitution and implementing statutes to ascertain and record the will of the people in free, orderly and honest elections supervised by the Comelec make it imperative that there be strict adherence to the constitutional requirements laid down for the process of amending in toto or in part the supreme law of the land.

Even at the barrio level [45] the Revised Barrio Charter fixes certain safeguards for the holding of barrio plebiscites thus: "SEC. 6. Plebiscite. – A plebiscite may be held in the barrio when authorized by a majority vote of the members present in the barrio assembly, there being a quorum, or when called by at least four members of the barrio council: Provided however, That no plebiscite shall be held until after thirty days from its approval by either body, and such plebiscite has been given the widest publicity in the barrio, stating the date, time and place thereof, the questions or issues to be decided, action to be taken by the voters, and such other information relevant to the holding of the plebiscite." [46]

As to voting at such barrio plebiscites, the Charter further requires that "(A)ll duly registered barrio assembly members qualified to vote may vote in the plebiscite. Voting procedures may be made either in writing as in regular elections, and/or declaration by the voters to the board of election tellers." [47]

The subjects of the barrio plebiscites are likewise delimited thus: "A plebiscite may be called to decide on the recall of any member of the barrio council. A plebiscite shall be called to approve any budgetary, supplemental appropriations or special tax ordinances" and the required majority ' vote is also specified: "(F)or taking action on any of the above enumerated measures, majority vote of all the barrio assembly members registered in the list of the barrio secretary is necessary." [48]

The qualifications for voters in such barrio plebscites and elections of barrio officials [49] comply with the suffrage qualifications of Article V, section 1 of the Constitution and provide that "(S)EC. 10. Qualifications of Voters and Candidates.— Every citizen of the Philippines, twenty one years of age or over, able to read and write, who has been a resident of the barrio during the six months immediately preceding the election, duly registered in the list of voters kept by the barrio secretary, who is not otherwise disqualified, may vote or be a candidate in the barrio elections." [50]

IV

1. Since it appears on the face of Proclamation 1102 that the mandatory requirements under the above-cited constitutional articles have not been complied with and that no election or plebiscite for ratification as therein provided as well as in section 16 of Article XVII of the proposed Constitution itself [51] has been called or held, there cannot be said to have been a valid ratification.

2. Petitioners raised serious questions as to the veracity and genuineness of the reports or certificates of results purportedly showing unaccountable discrepancies in seven figures in just five provinces [52] between the reports as certified by the Department of Local Governments and the reports as directly submitted by the provincial and

city executives, which latter reports respondents disclaimed inter alia as not final and complete or as not signed;^[53] whether the reported votes of approval of the proposed Constitution conditioned upon the non-convening of the interim National Assembly provided in Article XVII, section 1 thereof,"^[54] may be considered as valid; the allegedly huge and uniform votes reported; and many others.

3. These questions only serve to justify and show the basic validity of the universal principle governing written constitutions that proposed amendments thereto or in replacement thereof may be ratified only in the particular mode or manner prescribed therein by the people. Under Article XV, section 1 of our Constitution, amendments thereto may be ratified only in the one way therein provided, i. e. in an election or plebiscite held in accordance with law and duly supervised by the Commission Elections, and which is participated in only by qualified and duly registered voters. In this manner, the safeguards provided by the election code generally assure the true ascertainment of the results of the vote and interested parties would have an opportunity to thresh out properly before the Comelec all such questions in pre-proclamation proceedings.

4. At any rate, unless respondents seriously intend to question the very statements and pronouncements in Proclamation 1102 itself which shows on its face, as already stated, that the mandatory amending process required by the (1935) Constitution was not observed, the cases at bar need not reach the stage of answering the host of questions, raised by petitioners against the procedure observed by the Citizens Assemblies and the reported referendum results — since the purported ratification is rendered nugatory by virtue of such non-observance.

5. Finally, as to respondents' argument that the President issued Proclamation 1102 "as 'agent' of the Constitutional Convention"^[55] under Resolution No. 5844 approved on November 22, 1973, and "as agent of the Convention the President could devise other forms of plebiscite to determine the will of the majority vis-a-vis the ratification of the proposed Constitution."^[56]

The minutes of November 22, 1972 of the Convention, however, do not at all support this contention. On the contrary, the said minutes fully show that the Convention's proposal and "agency" was that the President issue a decree precisely calling a plebiscite for the ratification of the proposed new Constitution on an appropriate date, under the charge of the Comelec, and with a reasonable period for an information campaign, as follows:

"12. Upon recognition by the Chair, Delegate Duavit moved for the approval of the resolution, the resolution portion of which read as follows:

'RESOLVED, AS IT IS HEREBY RESOLVED, that the 1971 Constitutional Convention propose to President Ferdinand E. Marcos that a decree be issued calling a plebiscite for the ratification of the proposed New Constitution on such appropriate date as he shall determine and providing for the necessary funds therefor, and that copies of this resolution as approved in plenary session be transmitted to the President of the Philippines and the Commission on Elections for implementation.'

"He suggested that in view of the expected approval of the final draft of the new Constitution by the end of November 1972 according to the Convention's timetable, it would be necessary to lay the groundwork for the appropriate agencies of the government to undertake the necessary preparation for the plebiscite.

"* * * * *

"12.2 Interpellating, Delegate Pimentel (V.) contended that the resolution was unnecessary because section 15, Article XVII on the Transitory Provision, which had already been approved on second and third readings, provided that the new constitution should be ratified in a plebiscite called for the purpose by the incumbent President. Delegate Duavit replied that the provision referred to did not include the appropriation of funds for the plebiscite and that, moreover, the resolution was intended to serve formal notice to the President and the Commission on Elections to initiate the necessary preparations.

"* * * * *

"12.4 Interpellating, Delegate Madarang suggested that a reasonable period for an information campaign was necessary in order to properly apprise the people of the implications and significance of the new charter. Delegate Duavit agreed, adding that this was precisely why the resolution was modified to give the President the discretion to choose the most appropriate date for the plebiscite.

"12.5 Delegate Laggui asked whether a formal communication to the President informing him of the adoption of the new Constitution would not suffice considering that under Section 15 of the Transitory Provisions, the President would be duty-bound to call a plebiscite for its ratification. Delegate Duavit replied in the negative, adding that the resolution was necessary to serve notice to the proper authorities to prepare everything necessary for the plebiscite.

"12.6 In reply to Delegate Britanico, Delegate Duavit stated that the mechanics for the holding of the plebiscite would be laid down by the Commission on Elections, in coordination with the President.

"12.7 Delegate Catan inquired if such mechanics for the plebiscite could include a partial lifting of martial law in order to allow the people to assemble peaceably to discuss the new Constitution. Delegate Duavit suggested that the Committee on Plebiscite and Ratification could coordinate with the COMELEC on the matter.

"12.8 Delegate Guzman moved for the previous question. The Chair declared that there was one more interpellant and that a prior reservation had been made for the presentation of such a motion. 1.8a Delegate Guzman withdrew his motion.

"12.9 Delegate Astilla suggested in his interpellation that there was actually no need for such a resolution in view of the provision of section 15, Article XVII on the Transitory Provisions. Delegate Duavit disagreed, pointing out that the said provision did not provide for the funds necessary for the purpose.

"13. Delegate Ozamiz moved to close the debate and proceed to the period of amendment.

"13.1. Floor Leader Montejo stated that there were no reservations to amend the resolution.

"13.2 Delegate Ozamiz then moved for the previous question. Submitted to a vote, the motion was approved.

"Upon request of the Chair, Delegate Duavit restated the resolution for voting.

"14.1 Delegate Ordoñez moved for nominal voting. Submitted to a vote, the motion was lost.

"14.2 Thereupon, the Chair submitted the resolution to a vote. It was approved by a show of hands."[57]

I, therefore, vote to deny respondents' motion to dismiss and to give due course to the petitions.

[1] Section 1, which is the lone section of Art. XV; italics supplied.

[2] Article XVII, section 16, proposed Constitution of Nov. 30, 1972; italics supplied.

[3] All quotations from respondents' memo of arguments dated March 2, 1973, pp. 2-5; italics supplied.

[4] Respondents' memo dated March 2, 1973, p. 8; italics supplied.

[5] *Gonzales vs. Comelec*, 21 SCRA 774 (Nov. 9, 1967).

[6] *Tolentino vs. Comelec*, 41 SCRA 702 (Oct. 16, 1971).

[7] Resolution on motion for reconsideration in *Tolentino vs. Comelec*, L-34150; dated Nov. 4, 1971, at page 3, per Barredo, J. with seven Justices concurring; italics supplied.

[8] *Idem*, at page 4, italics supplied.

[9] Joint opinion of JJ. Makalintal and Castro, p. 3.

[10] Article X, sec. 1 of the Constitution entrusts "exclusive charge" of the conduct of elections to the Comelec. See also the Election Code of 1971.

[11] *Araneta vs. Dinglasan* (L-2044); *Araneta vs. Angeles* (L-2756); *Rodriguez vs. Treasurer* (1,3054); *Guerrero vs. Commissioner of Customs*; and *Barredo vs. Comelec* (L-3056), jointly decided and re-reported in 84 Phil. 368.

[12] *Idem*, at pp. 384-385; italics supplied.

[13] *Idem*, at p. 437.

[14] *Idem*, at pp. 435-437.

[15] *Idem* at p. 383. Justice Tuason further duly noted that "These, observations, though beyond the issue as formulated in this decision, may, we trust, also serve to answer the vehement plea that for the good of the Nation, the President should retain his extraordinary powers as long as turmoil and other ills directly or indirectly trace-able to the late war harass the Philippines."

[16] Petitioner Monteclaro's notes of oral argument dated February 23, 1973, p. 2. and Annex A thereof.

[17] *State vs. Powell*, 77 Miss. 543, 27 South 927.

[18] *Cooley's Constitutional Limitations*, 8th Ed., Vol I, p. 81. 19

[19] Article XV, sec. 1, Constitution.

[20] Article V, sec. 1, Constitution.

[21] Article X, sec. 2, Constitution.

[22] Respondents' memo dated March 2, 1973, p. 5.

[23] Respondents' Comment dated Feb. 3, 1973, p. 67.

[24] *Idem*, at p. 46; note in italics supplied.

[25] 1 Cranch 137 (1803).

[26] 63 Phil. 134 (1936).

[27] 4 Wheaton 316 (1819).

[28] Dean Pollak's "The Constitution and the Supreme Court", Vol. I, p. 221.

[29] Justice Felix Frankfurter, *Of Law and Men* (1956), p. 5.

[30] *Tolentino vs. Comelec*, L-34150; decision of October 16, 1971, per Barredo, J. at P. 8.

30a Con-Con Res. No. 1 proposing the urgent lowering of the voting age to enfranchise the 18-year olds retained the "permissive" language of section 1, Art. V. Thus, the proposed amendment read: "Section 1. Suffrage may be exercised by (male) citizens of the Philippines not otherwise disqualified by law, who are (twenty-one) EIGHTEEN years of age or over and are able to read and write * *"

[31] Resolution of Nov. 4. 1971, per Barredo, J. at p. 15.

[32] Decision of Oct. 16, 1971, at p. 21.

[33] 21 SCRA 774 (Nov, 9, 1967).

[34] Decision of Oct. 16, 1971, at p. 24.

[35] Reyes, J. B. L. (now retired), Zaldivar, Castro and Makasiar, JJ.

[36] Idem at pp. 1-2.

[37] Idem at p. 3.

[38] Resolution of Nov. 4, 1971 in Tolentino, per Barredo, J., pp. 3-4.

[39] Decision of Oct. 16, 1971 in Tolentino, per Barredo, J. at p. 19.

[40] AU quotations are from the Chief Justice's concurring opinion in Tolentino, pp. 4-7.

[41] Separate op. of J. Teehankee concurring in Res. of No. 4, 1971 in Tolentino, pp. 8, 9-10.

[42] This Court thus declared in Tolentino the Con-Con voting age reduction resolution as null and void and prohibited its submittal at the 1971 elections for lack of proper submission since it did not "provide the voter * * * ample basis for an intelligent appraisal of the amendment." Dec. of October 16, 1971, per Barredo, J.

[43] In re Opinion of Justices, 115 N.E. Rep. 922-923.

[44] Duncan vs. McCall, 139 U.S. 449, 35 L. Ed. 219.

[45] Barrios are units of municipalities or municipal districts in which they are situated * * *." Rep. Act 3590, sec. 2.

[46] Rep. Act 3590, sec. 6, par. 1.

[47] Idem, par. 2.

[48] Idem, par. 3 and 4, emphasis supplied.

[49] One barrio lieutenant and six barrio councilmen; "Voting shall be by secret ballot. *." Idem, sec. 8.

[50] Idem, sec. 10, emphasis supplied. The same section further disqualifies persons convicted by final judgment to suffer one year or more of imprisonment "within two years after service" or who have violated their allegiance to the Republic and insane or feeble-minded person.

[51] Supra, p. 2.

[52] Rizal, Cavite, Bataan, Camarines Sur and Negros Occidental, petitioners' manifestation and supplemental rejoinder dated March 21, 1973 in L-36165.

[53] Respondents' rejoinder dated March 20, 1973 and sin-rejoinder dated March 29, 1973.

[54] Under Proclamation No. 1103 dated Jan. 17, 1973, it is recited that "fourteen million nine hundred seventy six thousand five hundred sixty-one (14,976,561) members of all the Barangays voted for the adoption of the proposed Constitution, as against seven hundred forty-three thousand eight hundred sixty-nine (743,869) who voted for its rejection; but a majority of those who approved the new Constitution conditioned their votes on the demand that the interim National Assembly provided in Its Transitory Provisions should not be convened."

[55] Respondents' memo dated March 2, 1973, supra, p. 2.

[56] As restated by Barredo, J. in his separate op. in the plebiscite cases, who, however, did not look on the same with favor, since the "constitutional point (that the Comelec has exclusive charge of the conduct of elections and plebiscites) seems to have been overlooked in the Assemblies."

[57] Convention Minutes of Nov. 22, 1972 submitted as Annex A of petitioner-delegate Sedfrey A. Ordonez et al. in the plebiscite case 1-35942, par. 12 of petition and admitted in par. 4 of answer of therein respondents dated Dec. 15, 1972.

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CONCURRING AND DISSENTING OPINION

ZALDIVAR, J.:

In these five cases, the main issue to be resolved by this Court is whether or not the Constitution proposed by the Constitutional Convention of 1971 had been ratified in accordance with the provisions of Article XV of the 1935 Constitution. In the plebiscite cases, which were decided by this Court on January 22, 1973',[1] I held the view that this issue could be properly resolved by this Court, and that it was in the public interest that this Court should declare then whether or not the proposed Constitution, had been validly ratified. The majority of this Court, however, was of the view that the issue was not squarely raised in those cases, and so the Court, as a body, did not make any categorical pronouncement on the question of whether or not the Constitution proposed by the 1971 Convention was validly ratified I was the only one who expressed the opinion that the proposed Constitution was not validly ratified and therefore "it should not be given force and effect."

The Court is now called upon to declare, and to inform the people of this country, whether or not that proposed Constitution had been validly ratified and had come into effect.

The Solicitor General, however, contends that this Court has no jurisdiction to resolve the issue that we have mentioned because that issue is a political question that cannot be decided by this Court. This contention of the Solicitor General is untenable. A political question relates to "those questions which under the Constitution are to be decided by the people in their sovereign capacity or in regard to which full discretionary authority has been delegated to the legislative, or to the executive, branch of the government.[2] The courts have the power to determine whether the acts of the executive are authorized by the Constitution and the laws whenever they are brought before the court in a judicial proceeding. The judicial department of the government exercises a sort of controlling, or rather restraining, power over the two other departments of the government. Each of the three departments, within its proper constitutional sphere, acts independently of the other, and restraint is only placed on one department when that sphere is actually transcended. While a court may not restrain the executive from committing an unlawful act, it may, when the legality of such an act is brought before it in a judicial proceeding, declare it to be void, the same as it may declare a law enacted by the legislature to be unconstitutional.[3] It is a settled doctrine that every officer under a constitutional government must act according to law and subject to its restrictions, and every departure therefrom, or disregard thereof, must subject him to the restraining and controlling power of the people, acting through the agency of the judiciary. It must be remembered that the people act through the courts, as well as through the executive or the legislature. One department is just as representative

as the other, and the judiciary is the department which is charged with the special duty of determining the limitations which the law places upon all official actions.[4] In the case of *Gonzales vs. Commission on Elections*,[5] this Court ruled that the issue as to whether or not a resolution of Congress acting as a constituent assembly violates the Constitution is not a political question and is therefore subject to judicial review. In the case of *Avelino vs. Cuenca*[6], this Court held that the exception to the rule that courts will not interfere with a political question affecting another department is when such political question involves an issue as to the construction and interpretation of the provisions of the constitution. And so, it has been held that the question of whether a constitution shall be amended or not is a political question which is not in the power of the court to decide, but whether or not the constitution has been legally amended is a justiciable question.[7]

My study on the subject of whether a question before the court is political or judicial, based on decisions of the courts in the United States - where, after all, our constitutional system has been patterned to a large extent - made me arrive at the considered view that it is in the power of this Court, as the ultimate interpreter of the Constitution, to determine the validity of the proposal, the submission, and the ratification of any change in the Constitution. Ratification or non-ratification of a constitutional amendment is a vital element in the procedure to amend the constitution, and I believe that the Court can inquire into, and decide on, the question of whether or not an amendment to the constitution, as in the present cases, has been ratified in accordance with the requirements prescribed in the Constitution that was amended. And so, in the cases now before Us, I believe that the question of whether or not the Constitution proposed by the 1971 Constitutional Convention had been validly ratified or not is a justiciable question.

The Chief Justice, in his opinion, has discussed lengthily the subject on whether or not, the cases, before Us involve a political, or a judicial, question. I fully concur with his conclusion that the question involved in these cases is justiciable.

On the question now of whether or not the Constitution proposed by the 1971 Constitutional Convention has been validly ratified, I am reproducing herein pertinent portions of my dissenting opinion in the plebiscite cases:

"The ratification of the Constitution proposed by the 1971 Constitutional Convention must be done in accordance with the provisions of Section I, Article XV of the 1935 Constitution of the Philippines, which reads:

'Section 1. The Congress in joint session assembled by a vote of three fourths of all the Members of the Senate and of the House of Representatives voting separately, may propose amendments to the Constitution or call a convention for that purpose. Such amendments shall be valid as part of this Constitution when approved by a majority of the votes cast at an election at which the amendments are submitted to the people for their ratification.'

"It is in consonance with the above-quoted provision of the 1935 Constitution that on March 16, 1967, the Congress of the Philippines passed Resolution No. 2 calling a convention to propose amendments to the Constitution of the Philippines. Sec. 7 of said Resolution No. 2 reads as follows:

'SECTION 7. The amendments proposed by the Convention shall be valid and considered part of the Constitution when approved by a majority of the votes cast in an election at which they are submitted to the people for their ratification pursuant to Article XV of the Constitution.'

"It follows that from the very resolution of the Congress of the Philippines which called for the 1971 Constitutional Convention there was a clear mandate that the amendments proposed by the 1971 Convention, in order to be valid and considered part of the Constitution, must be approved by majority of the votes cast in an election at which they are submitted to the people for their ratification as provided in the Constitution.

"This Court, in the case of *Tolentino vs. Commission on Elections*, L-35140, October 16, 1971 (41 SCRA

715), speaking through Mr. Justice Barredo, said:

'The Constitutional Convention of 1971, as any other convention of the same nature, owes its existence and derives all its authority and power from the existing Constitution of the Philippines. This Convention has not been called by the people directly as in the case of a revolutionary convention which drafts the first Constitution of an entirely new government born of either a war of liberation from a mother country or of a revolution against an existing government or of a bloodless seizure of power a la coup d'etat. As to such kind of conventions, it is absolutely true that the convention is completely without restraint and omnipotent all wise, and it is as to such conventions that the remarks of Delegate Manuel Roxas of the Constitutional Convention of 1934 quoted by Senator Pelaez refer. No amount of rationalization can belie the fact that the current convention came into being only because it was called by a resolution of a joint session of Congress acting as a constituent assembly by authority of Section 1, Article XV of the present Constitution * *

* * * * *

'As to matters not related to its internal operation and the performance of its assigned mission to propose amendments to the Constitution, the Convention and its officers and members are all subject to all the provisions of the existing Constitution. Now we hold that even as to its latter task of proposing amendments to the Constitution, it is subject to the provisions of Section 1 of Article XV.'

"In Proclamation No. 1102, issued on January 17, 1973, the President of the Philippines certified that as a result of the voting before the barangays (Citizens' Assemblies) 14, 976,561 members of the barangays voted for the adoption of the proposed Constitution, as against 743,869 who voted for its rejection, and on the basis of the overwhelming majority of the votes cast by the members of all the barangays throughout the Philippines the President proclaimed that the Constitution proposed by the 1971 Convention has been ratified and has thereby come into effect.

"It is very plain from the very wordings of Proclamation No. 1102 that the provisions of Section 1 of Article XV of the Constitution of 1935 were not complied with. It is not necessary that evidence be produced before this Court to show that no elections were held in accordance with the provisions of the Election Code. Proclamation No. 1102 unequivocally states that the proposed Constitution of 1972 was voted upon by the barangays. It is very clear, therefore, that the voting held in these barangays is not the election contemplated in the provisions of Section 1, Article XV, of the 1935 Constitution. The election contemplated in said constitutional provision is an election held in accordance with the provisions of the election law, where only the qualified and registered voters of the country would cast their votes, where official ballots prepared for the purpose are used, where the voters would prepare their ballots in secret inside the voting booths in the polling places established in the different election precincts throughout the country, where the election is conducted by election inspectors duly appointed in accordance with the election law, where the votes are canvassed and reported in a manner provided for in the election law. It was this kind of election that was held on May 14, 1935, when the Constitution of 1935 was ratified; on April 30, 1937, when the amendment to the Constitution providing for Women's Suffrage was ratified; on June 18, 1940, when the 1940 Amendments to the Constitution were ratified; on March 11, 1947 when the Parity Amendment to the Constitution was ratified; and on November 14, 1967 when the amendments to the Constitution to increase the number of Members of the House of Representatives and to allow the Members of Congress to run in the elections for Delegates to the Constitutional Convention of 1971 were rejected.

"I cannot see any valid reason why the practice or procedure in the past, in implementing the constitutional provision requiring the holding of an election to ratify or reject an amendment to the Constitution, has not been followed in the case of the Constitution proposed by the 1971 Constitutional Convention.

"It is my view that the President of the Philippines cannot by decree order the ratification of the proposed 1972

Constitution thru a voting in the barangays and make said result the basis for proclaiming the ratification of the proposed constitution. It is very clear, to me, that Proclamation No. 1102 was issued in complete disregard or in violation, of the provisions of Section 1 of Article XV of the 1935 Constitution.

"Proclamation No. 1102 mentions, furthermore, that on the question as to whether or not the people would still like a plebiscite to be called to ratify the new Constitution, 14,298,814 members of the barangays answered that there was no need for a plebiscite but that the vote of the barangays should be considered a vote in a plebiscite. It would thus appear that the barangays assumed the power to determine whether a plebiscite as ordained in the Constitution be held or not. Indeed, the provision of Section 1, Article XV of the Constitution was completely disregarded.

"The affirmative votes cast in the barangays are not the votes contemplated in Section 1 of Article XV of the 1935 Constitution. The votes contemplated in said constitutional provision are votes obtained through the election processes as provided by law.

'An election is the embodiment of the popular will, the expression of the sovereign power of the people. In common parlance an election is the act of casting and receiving the ballots, counting them, and making the return.' (Hontiveros vs. Altavas, 24 Phil. 632, 637).

'Election' implies a choice by an electoral body at the time substantially in the manner and with the safeguards provided by law with respect to some question or issue. (Leffel vs. Brown, Corn. Pl., 159 N.E. 2d 807, 808 cited in 29 C.J.S. 13 at footnote 6.5).

'* * * the statutory method whereby qualified voters or electors pass on various public matters submitted to them - the election of officers, national, state, county, township - the passing on various other questions submitted for their determination.' (29 C.J.S. 13, citing Iowa-Illinois Gas & Elec. Co. vs. City of Bettendorf, 41 N.W. 2d 1, 5, 241 Iowa 358).

'Election' is expression of choice by voters of body politic. (Ginsburg vs. Giles, 72 S.W. 2d 438, 254 Ky. 720, in Words and Phrases, Permanent Edition, p. 234).

'The right to vote may be exercised only on compliance with such statutory requirements as have been set up by the legislature.' (People ex rel. Rago vs. Lipsky, 63 N.E. 2d 642, 327 111. App. 63; Rothfels vs. Southworth, 356 P. 2d 612, 11, Utah 2d 169 in 29 C.J.S. 38). (Italics supplied).

"In this connection I herein quote the pertinent provisions of the Election Code of 1971.

'Sec. 2. Applicability of this Act. — All elections of public officers except barrio officials and plebiscites shall be conducted in the manner provided by this Code.'

'Sec. 99. Necessity of registration to be entitled to vote. — In order that a qualified voter may vote in any regular or special election or in any plebiscite, he must be registered in the permanent list of voters for the city, municipality or municipal district in which he resides: Provided, That no person shall register more than once without first applying for cancellation of his previous registration.' (Italics supplied). (Please see also Sections 100-102, Election Code of 1971, R.A. No. 6388).

"It is stated in Proclamation No. 1102 that the voting was done by the members of citizens assemblies who are 15 years of age or over. Under the provision of Section 1 of Article V of the 1935 Constitution the age requirement to be a qualified voter is 21 years or over.

"But what is more noteworthy is the fact that the voting in the barangays, except in very few instances, was done by the raising of hands by the persons indiscriminately gathered to participate in the voting, where even children below 15 years of age were included. This is a matter of common observation, or of common

knowledge, which the Court may take judicial notice of. To consider the votes in the barangays as expressive of the popular will and use them as the basis in declaring whether a Constitution is ratified or rejected is to resort to a voting by demonstrations, which would mean the rule of the crowd, which is only one degree higher than the rule by the mob. Certainly, so important a question as to whether the Constitution, which is the supreme law of the land, should be ratified or not, must not be decided by simply gathering people and asking them to raise their hands in answer to the question of whether they vote for or against a proposed Constitution. The election processes as provided by law should be strictly observed in determining the will of the sovereign people in a democracy. In our Republic the will of the people must be expressed through the ballot in a manner that is provided by law.

"It is said that in a democracy the will of the people is the supreme law. Indeed, the people are sovereign, but the will of the people must be expressed in a manner as the law and the demands of a well-ordered society require. The rule of law must prevail even over the apparent will of the majority of the people, if that will had not been expressed, or obtained, in accordance with the law. Under the rule of law public questions must be decided in accordance with the Constitution and the law. This is specially true in the case of the adoption of a constitution or in the ratification or an amendment to the Constitution.

"The following citations are, to me, very relevant in the effort to determine whether the I proposed Constitution of 1972 had been validly ratified, or not:

'When it is said that 'the people' have the right to alter or amend the constitution, it must not be understood that this term necessarily includes all the inhabitants of the state. Since the question of the adoption or rejection of a proposed new constitution or constitutional amendment must be answered by a vote, the determination of it rests with those who, by the existing constitution, are accorded the right of suffrage. But the qualified electors must be understood in this, as in many other cases, as representing those who have not the right to participate in the ballot. If a constitution should be abrogated, and a new one adopted, by the whole mass of people in a state, acting through representatives not chosen by the 'people' in the political sense of the term, but by the general body of the populace, the movement would be extra-legal.' (Black's Constitutional Law, Second Edition, pp. 47-48).

'The theory of our political system is that the ultimate sovereignty is in the people, from whom springs all legitimate authority. The people of the Union created a national constitution, and conferred upon it powers of sovereignty over certain subjects, and the people of each State created a State government, to exercise the remaining powers of sovereignty so far as they were disposed to allow them to be exercised at all. By the constitution which they establish, they not only tie up the hands of their official agencies, but their own hands as well; and neither the officers of the State, nor the whole people as an aggregate body, are at liberty to take action in opposition to this fundamental law.' (Cooley's Constitutional Limitations, 8th Edition, Vol. I, p. 81 cited in *Graham vs. Jones*, 3 So. 2d. 761, 782).

'The theory that a favorable vote by the electorate, however unanimous, on a proposal to amend a constitution, may cure, render innocuous, all or any antecedent failures to observe commands of that Constitution in respect of the formulation or submission of proposed amendments thereto, does not prevail in Alabama, where the doctrine of the stated theory was denied, in obvious effect, by the pronouncement 60 years ago of broad, wholesome constitutional principles in *Collier vs. Frierson*, supra, as quoted in the original opinion, ante. The people themselves are bound by the Constitution; and, being so are powerless, whatever their numbers, to change or thwart its mandates, except through the peaceful means of a constitutional convention, or of amendment according to the mode therein prescribed, or through the exertion of the original right of revolution. 'The Constitution may be set aside by revolution, but it can only be amended in the way it provides,' said Hobson, C. J., in *McCreary vs. Speer*, 156 Ky. 783, 791, 162 S. W. 99, 103. (*Johnson vs. Craft, et al.*, 87 So. 375, 385, 387, On Rehearing).

'The fact that a majority voted for the amendment, unless the vote was taken as provided by the Constitution, is not sufficient to make a change in that instrument. Whether a proposed amendment has been legally adopted is a judicial question, for the court must uphold and enforce the Constitution as written until it is amended in the way which it provides for.' Wood vs. Tooker, 15 Mont. 8, 37 Pac. 840, 25 L.R.A. 560; McConaughty vs. State, 106 Minn. 409, 119 N.W. 408; Oakland Paving Company vs. Hilton, 69 Cal. 499, 11 Pac. 3; Utter vs. Mosely, 16 Idaho 274, 100 Pac. 1958, 133 Am. St. Rep. 94, 18 Ann. Cas. 723. (McCreary vs. Speer, 162 S.W. 99, 104).

'Provisions of a constitution regulating its own amendment, * * * are not merely directory, but are mandatory; and a strict observance of every substantial requirement is essential to the validity of the proposed amendment. These provisions are as binding on the people as on the legislature, and the former are powerless by vote of acceptance to give legal sanction to an amendment the submission of which was made in disregard of the limitations contained in the constitution.' (16 C.J.S. 35-36 cited in Graham vs. Jones, 3 So. 2d 761, 782).

'It is said that chaos and confusion in the governmental affairs of the State will result from the Court's action in declaring the proposed constitutional amendment void. This statement is grossly and manifestly inaccurate. If confusion and chaos should ensue, it will not be due to the action of the Court but will be the result of the failure of the drafters of the joint resolution to observe, follow and obey the plain essential provisions of the Constitution. Furthermore, to say that, unless the Court disregards its sworn duty to enforce the Constitution, chaos and confusion will result, is an inherently weak argument in favor of the alleged constitutionality of the proposed amendment. It is obvious that, if the Court were to countenance the violations of the sacramental provisions of the Constitution, those who would thereafter desire to violate it and disregard its clear mandatory provisions would resort to the scheme of involving and confusing the affairs of the State and then simply tell the Court that it was powerless to exercise one of its primary functions by rendering the proper decree to make the Constitution effective.' (Graham vs. Jones, 3 So. 2d. 761, 793-794).

"In our jurisprudence I find an instance where this Court did not allow the will of the majority to prevail, because the requirements of the law were not complied with. In the case of Monsale vs. Nico, 83 Phil. 758, Monsale and Nico were both candidates for the office of Municipal Mayor of Miagao, Iloilo, in the elections of November 11, 1947. Monsale had duly filed his certificate of candidacy before the expiration of the period for the filing of the same. However, on October 10, 1947, after the period for the filing of certificate of candidacy, Monsale withdrew his certificate of candidacy. But on November 7, 1947 Monsale attempted to revive his certificate of candidacy by withdrawing the withdrawal of his certificate of candidacy. The Commission on Elections, on November 8, 1947, ruled that Monsale could no longer be a candidate. Monsale nevertheless proceeded with his candidacy. The boards of inspectors in Miagao, however, did not count the votes cast for Monsale upon the ground that the votes cast for him were stray votes, because he was considered as having no certificate of candidacy. On the other hand, the boards of inspectors credited Nico with 2,291 votes, and Nico was proclaimed elected. Monsale filed a protest against the election of Nico in the Court of First Instance of Iloilo. In the count of the ballots during the proceedings in the trial court it appeared that Monsale had obtained 2,877 votes while Nico obtained 2,276 votes, or a margin of 601 votes in favor of Monsale. The Court of First Instance of Iloilo decided the election protest in favor of Monsale. Upon appeal by Nico, this Court reversed the decision of the lower court. This Court declared that because Monsale withdrew his certificate of candidacy his attempt to revive lit by withdrawing his withdrawal of his certificate of candidacy did not restore the effectiveness of his certificate of candidacy, and this Court declared Nico the winner in spite of the fact that Monsale had obtained more votes than he.

"We have cited this Monsale case to show that the will of the majority of the voters would not be given effect, as declared by this Court, if certain legal requirements have not been complied with in order to render the votes valid and effective to decide the result of an election.

"And so, in the cases now before this Court, the fact that the voting in the citizens assemblies (barangays) is

not the election that provided for in the 1935 Constitution for the ratification of the amendment to the Constitution, the affirmative votes cast in those assemblies can not be made the basis for declaring the ratification of the proposed 1972 Constitution, in spite of the fact that it was reported that 14,976,561 members of the citizens assemblies voted for the adoption as against 743,869 for the rejection, because the votes thus obtained were not in accordance with the provisions of Section 1 of Article XV of the 1935 Constitution of the Philippines. The rule of law must be upheld.

"My last observation: One of the valid grounds against the holding of the plebiscite on January 15, 1973, as provided in Presidential Decree No. 73, is that there is no freedom on the part of the people to exercise their right of choice, because of the existence of martial law in our country. The same ground holds true as regards the voting of the barangays on January 10 to 15, 1973. More so, because by General Order No. 20, issued on January 7, 1973, the President of the Philippines ordered 'that the provisions of Section 3 of Presidential Decree No. 73 in so far as they allow free public discussion of the proposed constitution, as well as my order of December 17, 1972 temporarily suspending the effects of Proclamation No. 1081 for the purpose of free and open debate on the proposed constitution, be suspended in the meantime.' It is, therefore, my view that voting in the barangays on January 10-15, 1973 was not free, and so this is one added reason why the results of the voting in the barangays should not be made the basis for the proclamation of the ratification of the proposed Constitution.

"It is my view, therefore, that Proclamation No. 1102 is repugnant to the 1935 Constitution, and so it is invalid, and should not be given effect. The Constitution of 1972 proposed by the 1971 Constitutional Convention should be considered as not yet ratified by the people of this Republic, and so it should not be given force and effect."

It is urged by the Solicitor General, however, that the voting in the citizen's assemblies was a substantial compliance with the provisions of Article XV of the 1935 Constitution. The Solicitor General maintains that the primary thrust of the provision of Article XV of the 1935 Constitution is that "to be valid, amendments must gain the approval of the majority in recognition of the democratic postulate that sovereignty resides in the people." It is not disputed that in a democracy sovereignty resides in the people. But the term "people" must be understood in its constitutional meaning, and they are "those persons who are permitted by the Constitution to exercise the elective franchise." [8] Thus, in Section 2 of Article VII of the 1935 Constitution, it is provided that "The President shall hold his office during a term of four years and, together with the Vice-President chosen for the same term, shall be elected by direct vote of the people * * *" Certainly under that constitutional provision the "people" who elect directly the President and the Vice-President are no other than the persons who, under the provisions of the same Constitution, are granted the right to vote. In like manner the provision in Section 1 of Article II of the 1935 Constitution which says "Sovereignty resides in the people and all government authority emanates from them", the "people" who exercise the sovereign power are no other than the persons who have the right to vote under the Constitution. In the case of *Garchitorena vs. Crescini*, [9] this Court, speaking through Mr. Justice Johnson, said, "In democracies, the people, combined, represent the sovereign power of the State. Their sovereign authority is expressed through the ballot, of the qualified voters, in duly appointed elections held from time to time, by means of which they choose their officials for definite fixed periods, and to whom they entrust, for the time being, as their representatives, the exercise of the powers of government." In the case of *Moya vs. Del Fierro*, [10] this Court, speaking through Mr. Justice Laurel, said, "As long as popular government is an end to be achieved and safeguarded, suffrage, whatever may be the modality and form devised, must continue to be the means by which the great reservoir of power must be emptied into the receptacular agencies wrought by the people through their Constitution in the interest of good government and the common weal. Republicanism, in so far as it implies the adoption of a representative type of government, necessarily points to the enfranchised citizen as a particle of popular sovereignty and as the ultimate source of the established authority." And in the case of *Abanil vs. Justice of the Peace of Bacolod*, [11] this Court said: "In the scheme of our present republican

government, the people are allowed to have a voice therein through the instrumentality of suffrage to be availed of by those possessing certain prescribed qualifications. The people, in clothing a citizen with the elective franchise for the purpose of securing a consistent and perpetual administration of the government they ordain, charge him with the performance of a duty in the nature of a public trust, and in that respect constitute him a representative of the whole people. This duty requires that the privilege thus bestowed should be exercised, not exclusively for the benefit of the citizen or class of citizens professing it, but in good faith and with an intelligent zeal for the general benefit and welfare of the state. (U.S. vs. Cruikshank 92 U.S. 588) * * *." There is no question, therefore, that when we talk of sovereign people, what is meant are the people who act through the duly qualified and registered voters who vote during an election that is held as provided in the Constitution or in the law.

The term "election" as used in Section 1 of Article XV of the 1935 Constitution should be construed along with the term "election" as used in the provisions of Section 4 of the Philippine Independence Act of the Congress of the United States, popularly known as the Tydings-McDuffie Law (Public Act No. 127). Said Section 4 of the Tydings-McDuffie Law provides as follows:

"Section 4. After the President of the United States has certified that the constitution conforms with the provisions of this act, it shall be submitted to the people of the Philippine Islands for their ratification or rejection at an election to be held within four months after the date of such certification, on a date to be fixed by the Philippine Legislature, at which election the qualified voters of the Philippine Islands shall have an opportunity to vote directly for or against the proposed constitution and ordinance appended thereto. Such election shall be held in such manner as may be prescribed by the Philippine Legislature, to which the return of the election shall be made. The Philippine Legislature shall by law provide for the canvassing of the return and shall certify the result to the Governor-General of the Philippine Islands, together with a statement of the votes cast, and a copy of said constitution and ordinances. If a majority of the votes cast shall be for the constitution, such vote shall be deemed an expression of the will of the people of the Philippine Islands in favor of Philippine Independence, and the Governor-General shall, within thirty days after receipt of the certification from the Philippine Legislature, issue a proclamation for the election of officers of the government of the Commonwealth of the Philippine Islands provided for in the Constitution * * *."

It can safely be said, therefore, that when the framers of the 1935 Constitution used the word "election" in Section 1 of Article XV of the 1935 Constitution they had no other idea in mind except the elections that were periodically held in the Philippines for the choice of public officials prior to the drafting of the 1935 Constitution, and also the "election" mentioned in the Independence Act at which "the qualified voters of the Philippine Islands shall have an opportunity to vote directly for or against the proposed constitution * * *." It is but logical to expect that the framers of the 1935 Constitution would provide a mode of ratifying an amendment to that Constitution similar to the mode of ratifying the original Constitution itself.

It is clear, therefore, that the ratification of any amendment to the 1935 Constitution could only be done by holding an election, as the term "election" was understood, and practiced, when the 1935 Constitution was drafted. The alleged referendum in the citizens assemblies — participated in by persons aged 15 years or more, regardless of whether they were qualified voters or not, voting by raising their hands, and the results of the voting reported by the barrio or ward captain to the municipal mayor, who in turn submitted the report to the Provincial Governor, and the latter forwarding the reports to the Department of Local Governments, all without the intervention of the Commission on Elections which is the constitutional body which has exclusive charge of the enforcement and administration of all laws relative to the conduct of elections — was not only a non-substantial compliance with the provisions of Section 1 of Article XV of the 1935 Constitution but a downright violation of said constitutional provision. It would be indulging in sophistry to maintain that the voting in the citizens assemblies amounted to a substantial compliance with the requirements prescribed in Section 1 of Article XV of

the 1935 Constitution.

It is further contended by the Solicitor General, that even if the Constitution proposed by the 1971 Constitutional Convention was not ratified in accordance with the provisions of Section 1 of Article XV of the 1935 Constitution, the fact is that after the President of the Philippines had issued Proclamation No. 1102 declaring that the said proposed Constitution "has been ratified by an overwhelming majority of all the votes cast by the members of all the barangays (citizens assemblies) throughout the Philippines and had thereby come into effect" the people have accepted the new Constitution. What appears to me, however, is that practically it is only the officials and employees under the executive department of the Government who have been performing their duties apparently in observance of the provisions of the new Constitution. It could not be otherwise, because the President of the Philippines, who is the head of the executive department, had proclaimed that the new Constitution had come into effect, and his office had taken the steps to implement the provisions of the new Constitution. True it is, that some 92 members of the House of Representatives and 15 members of the Senate, of the Congress of the Philippines had expressed their option to serve in the interim National Assembly that is provided for in Section 2 of Article XVII of the proposed Constitution. It must be noted, however, that of the 15 senators who expressed their option to serve in the interim National Assembly only one of them took his oath of office; and of the 92 members of the House of Representatives who opted to serve in the interim National Assembly, only 22 took their oath of office. The fact, that only one Senator out of 25, and only 22 Representatives out of 110, took their oath of office, is an indication that only a small portion of the members of Congress had manifested their acceptance of the new Constitution. It is in the taking of the oath of office where the affiant says that he swears to "support and defend the Constitution" that the acceptance of the Constitution is made manifest. I agree with counsel for petitioners in L-36165 (Gerardo Roxas, et al. vs. Alejandro Melchor, et al) when he said that the members of Congress who opted to serve in the interim National Assembly did so only *ex abundante cautela*, or by way of a precaution, or making sure, that in the event the new Constitution becomes definitely effective and the interim National Assembly is convened they can participate in legislative work in their capacity as duly elected representatives of the people, which otherwise they could not do if they did not manifest their option to serve, and that option had to be made within 30 days from January 17, 1973, the date when Proclamation No. 1102 was issued. Of course, if the proposed Constitution does not become effective, they continue to be members of Congress under the 1935 Constitution. Let it be considered that the members of the House of Representatives were elected in 1969 to serve a term which will yet expire on December 31, 1973. Whereas, of the Senators who opted to serve in the interim National Assembly, the term of some of them will yet expire on December 31, 1973, some on December 31, 1975, and the rest on December 31, 1977. Let it be noted that 9 Senators did not opt to serve in the interim National Assembly, and 18 members of the House of Representatives also did not opt to serve in the interim National Assembly.

Neither can it be said that the people have accepted the new Constitution. I cannot, in conscience, accept the reported affirmative votes in the citizens assemblies as a true and correct expression by the people of their approval, or acceptance, of the proposed Constitution. I have my serious doubts regarding the proposed Constitution during the voting in the citizens' assemblies, and I have also my serious doubts regarding the freedom of the people to express their views regarding the proposed Constitution during the voting in the citizens assemblies, and I have also my serious doubts regarding the truthfulness and accuracy of the reports of the voting in the citizens assemblies. This doubt has been engendered in my mind after a careful examination and study of the records of these cases, particularly with respect to the reports of the voting in the citizens assemblies. Perhaps, it may be said that the people, or the inhabitants of this country, have acquiesced to the new Constitution, in the sense that they have continued to live peacefully and orderly under the government that has been existing since January 17, 1973 when it was proclaimed that the new Constitution came into effect. But what could the people

do? In the same way that the people have lived under martial law since September 23, 1972, they also have to live under the government as it now exists, and as it has existed since the declaration of martial law on September 21, 1972, regardless of what Constitution is operative - whether it is the 1935 Constitution or the new Constitution. Indeed, there is nothing that the people can do under the circumstances, known to all, and which I do not consider necessary to state in this opinion. I cannot agree, therefore, with my worthy colleagues in the Court who hold the view that the people have accepted the new Constitution, and that because the people have accepted it, the new Constitution should be considered as in force, regardless of the fact that it was not ratified in accordance with the provisions of Section 1 of Article XV of the 1935 Constitution.

It is my honest view that the Constitution proposed by the 1971 Constitutional Convention has not come into effect. I do not say, however, that the proposed Constitution is invalid. To me, the validity of the proposed Constitution is not in issue in the cases before Us. What the petitioners assail is not the validity of the proposed Constitution but the validity of Presidential Proclamation No. 1102 which declares the proposed Constitution as having been ratified and has come into effect. It being my considered view that the ratification of the proposed Constitution as proclaimed in Proclamation 1102, is not in accordance with the provisions of Section 1 of Article XV of the 1935 Constitution, I hold that Proclamation No. 1102 is invalid and should not be given force and effect. The proposed Constitution, therefore, should be considered as not yet validly ratified, and so it is not in force. The proposed Constitution may still be submitted to a plebiscite in conformity with Section 1 of Article XV of the 1935 Constitution. Incidentally, I must state that the 1935 Constitution is still in force, and this Court is still functioning under the 1935 Constitution.

I sincerely believe that the proposed Constitution may still be submitted to the people in an election or plebiscite held in accordance with the provisions of Section 1 of Article XV of the 1935 Constitution. In fact, as we have adverted to in this opinion, this was the mandate of Congress when, on March 16, 1967, it passed Resolution No. 2 calling a convention to propose amendments to the 1935 Constitution. The Court may take judicial notice of the fact that the President of the Philippines has reassured the nation that the government of our Republic since the declaration of martial law is not a revolutionary government, and that he has been acting all the way in consonance with his powers under the Constitution. The people of this Republic has reason to be happy because, according to the President, we still have a constitutional government. It being my view that the 1935 Constitution is still in force, I believe Congress may still convene and pass a law calling for an election at which the Constitution proposed by the 1971 Constitutional Convention will be submitted to the people for their ratification or rejection. s A plebiscite called pursuant to Section 1 of Article XV of the 1935 Constitution is an assurance to our people that we still have in our country the Rule of Law, and that the democratic system of government that has been implanted in our country by the Americans, and which has become a part of our social and political fabric, is still a reality.

The views that I have expressed in this opinion are inspired by a desire on my part to bring about stability in the democratic and constitutional system in our country. I feel that if this Court would give its imprimatur to the ratification of the proposed Constitution, as announced in Proclamation No. 1102, it being very clear that the provisions of Section 1 of Article XV of the 1935 Constitution had not been complied with, We will be opening the gates for a similar disregard of the Constitution in the future. What I mean is that if this Court now declares that a new Constitution is now in force because the members of the citizens assemblies had approved said new Constitution, although that approval was not in accordance with the procedure and the requirements prescribed in the 1935 Constitution, it can happen again in some future time that some amendments to the Constitution may be adopted, even in a manner contrary to the existing Constitution and the law, and then said proposed amendment is submitted to the people in any manner and what will matter is that a basis is claimed that there was approval by the people. There will not be stability in our constitutional system, and necessarily no stability in our government.

As a member of this Court I only wish to contribute my humble efforts to prevent the happening of such a situation in the future.

It appearing to me that the announced ratification of the proposed Constitution through the voting in the citizens assemblies is a clear violation of the 1935 Constitution, what I say in this opinion is simply an endeavor on my part to be true to my oath of office to defend and support the 1935 Constitution. I am inspired by what the great jurist and statesman, Jose P. Laurel, said:

"Let our judges be as it were the vestal keepers of the purity and sanctity of our Constitution, and the protection and vindication of popular rights will be safe and secure in their reverential guardianship."

I only wish to help prevent, if I can, democracy, and the liberties of our people from vanishing in our land, because, as Justice George Sutherland of the U.S. Supreme Court said:

"(t)he saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time."

I concur fully with the personal views expressed by the Chief Justice in the opinion that he has written in these cases. Along with him, I vote to deny the motion to dismiss and to give due course to the petitions in these cases.

[1] Charito Planas vs. Commission on Election; et al, L-35925; Pablo C. Sanidad vs. Commission on Elections, L-35929; Gerardo Roxas etc., et al. vs. Commission on Elections. et al, L-35940; Eddie B. Montecharo vs. The Commission on Elections, et al, L-35941; Sedrey A. Ordanez, et al, vs. The National Treasurer of the Philippines, et al, L-35942; Vidal Tan, et al vs. Commission on Elections, et al., L-35948; Jose W. Diokno, et at., vs. The Commission on Elections. L-35953; Jacinto Jimenez vs. Commission on Election; et at, L-35961; Raul M. Gonzales vs. The Honorable Commission on Elections, et al., L-35965; Ernesto Hidalgo vs. Commission on Elections, et al, L-35979.

[2] See Tanada, et al. vs. Cuenco, L-10520, Feb. 28, 1957; Baker vs. Carr, 369 U.S. 186 (1962).

[3] See 16 Am. Jur. 2d. p. 468, Note 14, and cases cited therein.

[4] Cooke vs. Iverson, 108 Minn. 388, 122 NW 251.

[5] L-38196, November 9, 1967, 21 SCRA 774.

[6] 83 Phil. 1957.

[7] McConaughy vs. Secretary of State, 119 N.W. 408, 413; 32A Words and Phrases p. 516. See also the plebiscite cases, mentioned in footnote 1, ante.

[8] Cooley, Constitutional Limitation, 8th Ed., Vol. I, p. 82.

[9] 39 Phil. 258, 268.

[10] 69 Phil. 199, 204.

[11] 70 Phil. 28, 31.

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MAKALINTAL and CASTRO, JJ.:

The preliminary question before this Court was whether or not the petitioners had made out a sufficient prima facie case in their petitions to justify their being given due course. Considering on the one hand the urgency of the matter and on the other hand its transcendental importance, which suggested the need for hearing the side of the respondents before that preliminary question was resolved, We required them -to submit their comments on the petitions. After the comments were filed We considered them as motions to dismiss so that they could be orally argued. As it turned out, the hearing lasted five days, morning and afternoon, and could not have been more exhaustive if the petitions had been given due course from the beginning.

The major thrust of the petitions is that the act of the Citizens Assemblies as certified and proclaimed by the President on January 17, 1973 (Proclamation No. 1102) was not an act of ratification, let alone a valid one, of the proposed Constitution, because it was not in accordance with, the existing Constitution (of 1935) and the Election Code of 1971. Other grounds are relied upon by the petitioners in support of their basic proposition, but to our mind they are merely subordinate and peripheral.

Article XV, Section 1, of the 1935 Constitution provides that amendments (proposed either by Congress in joint session or by a Convention called by it for the purpose) "shall be valid as part-of this Constitution when approved by a majority of the votes cast at an election at which the amendments are submitted to the people for their ratification." At the time that Constitution was approved by the Constitutional Convention on February 8, 1935, and ratified in a plebiscite held on the following May 14, the word "election" had already a definite meaning in our law and jurisprudence. It was not a vague and amorphous concept, but a procedure prescribed by statute for ascertaining the people's choices among candidates for public offices, or their will on important matters submitted to them, pursuant to law, for approval. It was in this sense that the word was used by the framers in Article XV (also in Articles VI and VII), and in accordance with such procedure that plebiscites were held to ratify the very same Constitution in 1935 as well as the subsequent amendments thereto, thus: in 1939 (Ordinance appended to the Constitution); 1940 (establishment of a bicameral legislature; eligibility of the President and the Vice-President for reelection; creation of the Commission of Elections); 1947 (Parity Amendment); and 1967 (increase in membership of the House of Representatives and eligibility of members of Congress to run for the Constitutional Convention without forfeiture of their offices).

The Election Code of 1971, in its Section 2, states that "all elections of public officers except barrio officials and plebiscites shall be conducted in the manner provided by this Code." This is statutory requirement designed, as were the other election laws previously in force, to carry out the constitutional mandate relative to the exercise of the right of suffrage, and with specific reference to the term "plebiscites," the provision of Article XV regarding ratification of constitutional amendments.

The manner of conducting elections and plebiscites provided by the Code is spelled out in other sections thereof. Section 99 requires that qualified voters be registered in a permanent list, the qualifications being those set forth in Article V, Section 1, of the 1935 Constitution on the basis of age, (21), literacy and residence. These qualifications are reiterated in Section 101 of the Election Code. Section 102 enumerates the classes of persons disqualified to vote. Succeeding sections prescribe the election paraphernalia to be used, the procedure for registering voters, the records of registration and the custody thereof, the description and printing of official ballots, the actual casting of votes and their subsequent counting by the boards of inspectors, the rules for appreciation of ballots, and then the canvass and proclamation of the results.

With specific reference to the ratification of the 1972 draft constitution, several additional circumstances should be considered:

(1) This draft was prepared and approved by a Convention which had been convened pursuant to Resolution No. 2 passed by Congress on March 16, 1967, which provides:

"Sec. 7. The amendments proposed by the Convention shall be valid and considered part of the Constitution when approved by a majority of the votes cast in an election at which they are submitted to the people for their ratification pursuant to Article XV of the Constitution."

(2) Article XVII, Section 16, of the draft itself states:

"Sec. 16. This Constitution shall take effect immediately upon its ratification by a majority of the votes cast in a plebiscite called for the purpose and, except as herein provided, shall supersede the Constitution of nineteen hundred and thirty-five and all amendments thereto."

The same procedure is prescribed in Article XVI, Section 2, for the ratification of any future amendment to or revision of the said Constitution.

(3) After the draft Constitution was approved by the Constitutional Convention on November 30, 1972 the said body adopted Resolution No. 5843, proposing "to President Ferdinand E. Marcos that a decree be issued calling a plebiscite for the ratification of the proposed New Constitution on such appropriate date as he shall determine and providing for the necessary funds therefor." Pursuant to said Resolution the President issued Decree No. 73 on the same day, calling a plebiscite to be held on January 15, 1973, at which the proposed Constitution "shall be submitted to the people for ratification or rejection." The Decree had eighteen (18) sections in all, prescribing in detail the different steps to be taken to carry out the process of ratification, such as: (a) publication of the proposed Constitution in English and Pilipino; (b) freedom of information and discussion; (c) registration of voters; (d) appointment of boards of election inspectors and designation of watchers in each precinct; (e) printing of official ballots; manner of voting to insure freedom and secrecy thereof; canvass of plebiscite returns; and (h) in general, compliance with the provisions of the Election Code of 1971, with the Commission on Elections exercising its constitutional and statutory powers of supervision of the entire process.

There can hardly be any doubt that in everybody's view from the framers of the 1935 Constitution through all the Congresses since then to the 1971 Constitutional Convention amendments to the Constitution should be ratified in only one way, that is, in an election or plebiscite held in accordance with law and participated in only by qualified and duly registered voters. Indeed, so concerned was this Court with the importance and indispensability of complying with the mandate of the (1935) Constitution in this respect that in the recent case of Tolentino vs. Commission on Elections, No. L-34150; October 16, 1971 (41 SCRA 702), a resolution of the (1971) Constitutional Convention submitting a proposed amendment for ratification to a plebiscite to be held in November 1971 was declared null and void. The amendment sought to reduce the voting age from twenty-one to eighteen years and was approved by the Convention for submission to a plebiscite ahead of and separately from other amendments still being or to be considered by it, so as to enable the youth to be thus enfranchised to participate in the plebiscite for the ratification of such other amendments later. This Court held that such separate submission was violative of Article XV, Section 1, of the Constitution, which contemplated that "all the amendments to be proposed by the same Convention must be submitted to the people in a single 'election' or plebiscite." [1] Thus a grammatical construction based on a singular, instead of plural, rendition of the word "election" was considered a sufficient ground to rule out the plebiscite which had been called to ratify a proposed amendment in accordance with the procedure and under all the safeguards provided in the Election Law.

In the cases now before Us what is at issue is not merely the ratification of just one amendment, as in Tolentino

vs. COMELEC, but the ratification of an entire charter setting up a new form of government; and the issue has arisen not because of a disputed construction of one word or one provision in the 1935 Constitution but because no election or plebiscite in accordance with that Constitution and with the Election Code of 1971 was held for the purpose of such ratification.

The Citizens Assemblies which purportedly ratified the draft Constitution were created by Presidential Decree No. 86 dated December 31, 1972, "to broaden the base of citizen participation in the democratic process and to afford ample opportunities for the citizenry to express their views on important national issues." The Assemblies "shall consist of all persons who are residents of the barrio, district or ward for at least six months, fifteen years of age or over, citizens of the Philippines and who are registered in the lists of Citizen Assembly members kept by the barrio, district or ward secretary." By Presidential Decree No. 86-A, dated January 5, 1973, the Assemblies were convened for a referendum between January 10 and 15, to "consider vital national issues now confronting the country, like the holding of the plebiscite on the new Constitution, the continuation of martial rule, the convening of Congress on January 22, 1973, and the holding of elections in November 1973."

On January 5, 1973 the newspapers came out with a list of four questions to be submitted to the Citizens Assemblies, the fourth one being as follows: "How soon would you like the plebiscite on the new Constitution to be held?" It should be noted in this connection that the President had previously announced that he had ordered the postponement of the plebiscite which he had called for January 15, 1973 (Presidential Decree No. 73) for the ratification of the draft Constitution, and that he was considering two new dates for the purpose - February 19 or March 5; that he had ordered that the registration of voters (pursuant to Decree No. 73) be extended to accommodate new voters; and that copies of the new Constitution would be distributed in eight dialects to the people (Bulletin Today, December 24, 1972.)

On January 10, 1973 it was reported that one more question would be added to the original four which were to be submitted to the Citizens Assemblies. The question concerning the plebiscite was reworded as follows: "Do you like the plebiscite to be held later?" The implication, it may likewise be noted, was that the Assemblies should express their views as to when the plebiscite should be held, not as to whether or not it should be held at all.

The next day, January 11, it was reported that six additional questions would be submitted, namely:

"(1) Do you approve of the citizens assemblies as the base of popular government to decide issues of national interest?

"(2) Do you approve of the New Constitution?

"(3) Do you want a plebiscite to be called to ratify the new Constitution?

"(4) Do you want the elections to be held in November, 1973 in accordance with the provisions of the 1935 Constitution?

"(5) If the elections would not be held, when do you want the next elections to be called?

"(6) Do you want martial law to continue?"

[Bulletin Today, January 11, 1973; italics supplied]

Appended to the six additional questions above quoted were the suggested answers, thus:

"COMMENTS ON

QUESTION No. 1

In order to broaden the base of citizens' participation in government.

QUESTION No. 2

But we do not want the Ad Interim Assembly to be convoked. Or if it is to be convened at all, it should not be done so until after at least seven (7) years from the approval of the New Constitution by the Citizens Assemblies.

QUESTION No. 3

The vote of the Citizens Assemblies should already be considered the plebiscite on the New Constitution.

If the Citizens Assemblies approve of the New Constitution, then the new Constitution should be deemed ratified.

QUESTION No. 4

We are sick and tired of too frequent elections. We are fed up with politics, of so many debates and so much expenses.

QUESTION No. 5

Probably a period of at least seven (7) years moratorium on elections will be enough for stability to be established in the country, for reforms to take root and normalcy to return.

QUESTION No. 6

We want President Marcos to continue with Martial Law. We want him to exercise his powers with more authority. We want him to be strong and firm so that he can accomplish all his reform programs and establish normalcy in the country. If all other measures fail, we want President Marcos to declare a revolutionary government along the lines of the new Constitution without the ad interim Assembly."

So it was that on January 11, 1973, the second day of the purported referendum, the suggestion was broached, for the first time, that the plebiscite should be done away with and a favorable vote by the Assemblies deemed equivalent to ratification. This was done, not in the questionnaire itself, but in the suggested answer to question No. 3. Strangely, however, it was not similarly suggested that an unfavorable vote be considered as rejection.

There should be no serious dispute as to the fact that the manner in which the voting was conducted in the Citizens Assemblies, assuming that such voting was held, was not within the intendment of Article XV, Section 1, of the 1935 Constitution nor in accordance with the Election Code of 1971. The referendum can by no means be considered as the plebiscite contemplated in Section 2 of said Code and in Article XVII, Section 16, of the draft Constitution itself, or as the election intended by Congress when it passed Resolution No. 2 on March 16, 1967 calling a Convention for the revision of the 1935 Constitution. The Citizens Assemblies were not limited to qualified, let alone registered, voters, but included all citizens from the age of fifteen, and regardless of whether or not they were illiterates, feeble-minded, or ex-convicts^[2] these being the classes of persons expressly disqualified from voting by Section 102 of the Election Code. In short, the constitutional and statutory qualifications were not considered in the determination of who should participate. No official ballots were used in the voting; it was done mostly by acclamation or open show of hands. Secrecy, which is one of the essential features of the election process, was not therefore observed. No set of rules for counting the votes or of tabulating them and reporting the figures was prescribed or followed. The Commission on Elections, which is the constitutional body charged with

the enforcement and administration of all laws relative to the conduct of elections, took no part of all, either by way of supervision or in the assessment of the results.

It has been suggested that since according to Proclamation No. 1102 the overwhelming majority of all the members of the Citizens Assemblies had voted for the adoption of the proposed Constitution there was a substantial compliance with Article XV, Section 1, of the 1935 Constitution and with the Election Code of 1971. The suggestion misses the point entirely. It is of the essence of a valid exercise of the right of suffrage that not only must a majority or plurality of the voters carry the day but that the same must be duly ascertained in accordance with the procedure prescribed by law. In other words the very existence of such majority or plurality depends upon the manner of its ascertainment, and to conclude that it exists even if it has not been ascertained according to law is simply to beg the issue, or to assume the very fact to be established. Otherwise no election or plebiscite could be questioned for non-compliance with the provisions of the Election Law as long as it is certified that a majority of the citizens had voted favorably or adversely on whatever it was that was submitted to them to vote upon.

However, a finding that the ratification of the draft Constitution by the Citizens Assemblies, as certified by the President in Proclamation No. 1102, was not in accordance with the constitutional and statutory procedure laid down for the purpose does not quite resolve the questions raised in these cases. Such a finding, in our opinion, is on a matter which is essentially justiciable, that is, within the power of this Court to inquire into. It imports nothing more than a simple reading and application of the pertinent provisions of the 1935 Constitution, of the Election Code and of other related laws and official acts. No question of wisdom or of policy is involved. But from this finding it does not necessarily follow that this Court may justifiably declare that the Constitution has not become effective, and for that reason give due course to these petitions or grant the writs herein prayed for. The effectivity of the said Constitution, in the final analysis, is the basic and ultimate question posed by these cases, to resolve which considerations other than judicial, and therefore beyond the competence of this Court, are relevant and unavoidable.

Several theories have been advanced respectively by the parties. The petitioners lay stress on the invalidity of the ratification process adopted by the Citizens Assemblies and on that premise would have this Court grant the reliefs they seek. The respondents represented by the Solicitor General, whose theory may be taken as the official position of the Government, challenge the jurisdiction of this Court on the ground that the questions raised in the petitions are political and therefore non-justiciable, and that in any case popular acquiescence in the new Constitution and the prospect of unsettling acts done in reliance thereon should caution against interposition of the power of judicial review. Respondents Gil J. Puyat and Jose Roy (in L-36165), in their respective capacities as President and President Pro-Tempore of the Senate of the Philippines, and through their counsel, Senator Arturo Tolentino, likewise invoke the political question doctrine, but on a ground not concurred in by the Solicitor General, namely, that "the approval of the 1973 Constitution by the people was made under a revolutionary government, in the course of a successful political revolution, which was converted by act of the people to the present de jure government under the 1973 Constitution."

Heretofore, constitutional disputes which have come before this Court for adjudication proceeded on the assumption, conceded by all, that the Constitution was in full force and effect, with the power and authority of the entire Government behind it; and the task of this Court was simply to determine whether or not the particular act or statute that was being challenged contravened some rule or mandate of that Constitution. The process employed was one of interpretation and synthesis. In the cases at bar there is no such assumption: the Constitution (1935) has been derogated and its continued existence as well as the validity of the act of derogation is the issue. The legal problem posed by the situation is aggravated by the fact that the political arms of the Government — the

Executive Departments and the two Houses of Congress — have accepted the new Constitution as effective: the former by organizing themselves and discharging their functions under it, and the latter by not convening on January 22, 1973 or at any time thereafter, as ordained by the 1935 Constitution, and in the case of a majority of the members by expressing their option to serve in the Interim National Assembly in accordance with Article XVII, Section 2, of the 1973 Constitution.[3]

The theory advanced by Senator Tolentino, as counsel for respondents Puyat and Roy, may be taken up and restated at some length if only because it would constitute, if sustained, the most convenient ground for the invocation of the political-question doctrine. In support of his theory, Senator Tolentino contends that after President Marcos declared martial law on September 21, 1972 (Proclamation No. 1081) he established a revolutionary government when he issued General Order No. 1 the next day, wherein he proclaimed "that I shall govern the nation and direct the operation of the entire government, including all its agencies and instrumentalities, in my capacity, and shall exercise all the powers and prerogatives appurtenant and incident to my position as such Commander-in-Chief of all the Armed Forces of the Philippines." By this order, it is pointed out, the Commander-in-Chief of the Armed Forces assumed all the powers of government — executive, legislative, and judicial; and thereafter proceeded to exercise such powers by a series of Orders and Decrees which amounted to legislative enactments not justified under martial law and, in some instances, trenched upon the domain of the judiciary, by removing from its jurisdiction certain classes of cases, such as "those involving the validity, legality, or constitutionality of Proclamation No. 1081, or of any decree, order or act issued, promulgated or performed by me or by my duly designated representative pursuant thereto." (General Order No. 3 as amended by General Order No. 3-A, dated September 24, 1972.) The ratification by the Citizens Assemblies, it is averred, was the culminating act of the revolution, which thereupon converted the government into a de jure one under the 1973 Constitution.

If indeed it be accepted that the Citizens Assemblies had ratified the 1973 Constitution and that such ratification as well as the establishment of the government thereunder formed part of a revolution, albeit peaceful, then the issue of whether or not that Constitution has become effective and, as a necessary corollary, whether or not the government legitimately functions under it instead of under the 1935 Constitution, is political and therefore non-judicial in nature. Under such a postulate what the people did in the Citizens Assemblies should be taken as an exercise of the ultimate sovereign power. If they had risen up in arms and by force deposed the then existing government and set up a new government in its place, there could not be the least doubt that their act would be political and not subject to judicial review but only to the judgment of the same body politic that is the people. This concept of what is a political act, in the context just set forth, is based on realities. If a new government gains authority and dominance through force, it can be effectively challenged only by a stronger force; no judicial dictum can prevail against it. We do not see that the situation would be any different, as far as the doctrine of judicial review is concerned, if no force had been resorted to and the people, in defiance of the existing Constitution but peacefully because of the absence of any appreciable opposition, ordained a new Constitution and succeeded in having the government operate under it. Against such a reality there can be no adequate judicial relief; and so courts forbear to take cognizance of the question but leave it to be decided through political means.

The logic of the political-question doctrine is illustrated in a statement of the U.S. Supreme Court in a case[4] relied upon, curiously enough, by the Solicitor General, who disagrees with the revolutionary-government theory of Senator Tolentino. The case involved the issue of which of two opposing governments struggling for supremacy in the State of Rhode Island was the lawful one. The issue had previously come up in several other cases before the courts of the State, which uniformly held that the inquiry belonged to the political power and not to the judicial. Commenting on the ruling thus arrived at, the U.S. Supreme Court said: "And if a State court should enter upon the inquiry proposed in this case, and should come to the conclusion that the government under which

it acted had been put aside and displaced by an opposing government, it would cease to be a court, and incapable of pronouncing a judicial decision upon the question it undertook to try. If it decides at all as a court, it necessarily affirms the existence and authority of the government under which it is exercising judicial power." In other words, since the court would have no choice but to decide in one way alone in order to be able to decide at all, the question could not be considered proper for judicial determination.

It should be noted that the above statement from *Luther vs. Borden* would be applicable in the cases at bar only on the premise that the ratification of the Constitution was a revolutionary act and that the government now functioning under it is the product of such revolution. However, we are not prepared to agree that the premise is justified.

In the first place, with specific reference to the questioned ratification, several significant circumstances may be noted (1) The Citizens Assemblies were created, according to Presidential Decree No. 86, "to broaden the base of citizen participation in the democratic process and to afford ample opportunities for the citizenry to express their views on important national issues." (2) The President announced, according to the *Daily Express* of January 2, 1973, that "the referendum will be in the nature of a loose consultation with the people." (3) The question, as submitted to them on the particular point at issue here, was "Do you approve of the Constitution?" (4) President Marcos, in proclaiming that the Constitution had been ratified, stated as follows: "(S)ince the referendum results show that more than ninety-five (95) per cent of the members of the Barangays (Citizens Assemblies) are in favor of the new Constitution, the Katipunan ng mga Barangay has strongly recommended that the new Constitution should already be deemed ratified by the Filipino people." (5) There was not enough time for the Citizens Assemblies to really familiarize themselves with the Constitution, much less with the many other subjects that were submitted to them. In fact the plebiscite planned for January 15, 1973 under Presidential Decree No. 73 had been postponed to an indefinite date, the reasons for the postponement being, as attributed to the President in the newspapers, that "there was little time to campaign for or against ratification" (*Daily Express*; Dec. 22, 1972); "that he would base his decision (as to the date of the plebiscite) on the compliance by the Commission (on Elections) on the publication requirement of the new Charter and on the position taken by national leaders" (*Daily Express*, Dec. 23, 1972); and that "the postponement would give us more time to debate on the merits of the Charter." (*Bulletin Today*, Dec. 24, 1972.)

The circumstances above enumerated lead us to the conclusion that the Citizens Assemblies could not have understood the referendum to be for the ratification of the Constitution, but only for the expression of their views on a consultative basis. Indeed, if the expression of those views had been intended as an act of ratification (or of rejection as a logical corollary) - there would have been no need for the Katipunan ng mga Barangay to recommend that the Constitution should already be deemed ratified, for recommendation imports recognition of some higher authority in whom the final decision rests.

But then the President, pursuant to such recommendation, did proclaim that the Constitution had been ratified and had come into effect. The more relevant consideration, therefore, as far as we can see, should be as to what the President had in mind in convening the Citizens Assemblies, submitting the Constitution to them and proclaiming that the favorable expression of their views was an act of ratification. In this respect subjective factors, which defy judicial analysis and adjudication, are necessarily involved.

In positing the problem within an identifiable frame of reference we find no need to consider whether or not the regime established by President Marcos since he declared martial law and under which the new Constitution was submitted to the Citizens Assemblies was a revolutionary one. The pivotal question is rather whether or not the effectivity of the said Constitution by virtue of Presidential Proclamation No. 1102, upon the recommendation of the Katipunan ng mga Barangay, was intended to be definite and irrevocable, regardless of non-compliance with

the pertinent constitutional and statutory provisions prescribing the procedure for ratification. We must confess that after considering all the available evidence and all the relevant circumstances we have found no reasonably reliable answer to the question. On one hand we read, for instance, the following public statements of the President:

Speaking about the proclamation of martial law, he said:

"I reiterate what I have said in the past: there is no turning back for our people.

"We have committed ourselves to this revolution. We have pledged to it our future, our fortunes, our lives, our destiny. We have burned our bridges behind us. Let no man misunderstand the strength of our resolution."
(A Report to the Nation, Jan. 7, 1973.)

On the occasion of the signing of Proclamation No. 1102 on January 17, 1973, the President said the following, among other things:

"* * * We can, perhaps delimit the power of the people to speak on legal matters, on justiciable matters, on matters that may come before the experts and interpreters of the law. But we cannot disqualify the people from speaking on what we and the people consider purely political matters especially those that affect the fundamental law of the land.

"* * * The political questions that were presented to the people are exactly those that refer to the form of government which the people want * * *. The implications of disregarding the people's will are too awesome to be even considered. For if any power in government should even dare to disregard the people's will there would be valid ground for revolt."

"* * * Let it be known to everybody that the people have spoken and they will no longer tolerate any attempt to undermine the stability of their Republic; they will rise up in arms not in revolt against the Republic but in protection of the Republic which they have installed. It is quite clear when the people say, we ratify the Constitution, that they mean they will not discard, the Constitution."

On January 19, 1973 the Daily Express published a statement of the President made the day before, from which the following portion is quoted:

"* * * the times are too grave and the stakes too high for us to permit the customary concessions to traditional democratic process to hold back our people's clear and unequivocal resolve and mandate to meet and overcome the extraordinary challenges presented by these extra-ordinary times."

On the same occasion of the signing of Proclamation No. 1102 the President made pointed reference to "the demand of some of our citizens * * * that when all other measures should fail, that the President be directed to organize and establish a Revolutionary Government," but in the next breath added: "* * * if we do ratify the Constitution, how can we speak of a Revolutionary Government? They cannot be compatible * * *." "(I)t is my feeling," he said, "that the Citizens' Assemblies which submitted this recommendation merely sought to articulate their impatience with the status quo that has brought about anarchy, confusion and misery to the masses * * *." The only alternatives which the President clearly implied by the foregoing statements were the ratification of the new Constitution and the establishment of a revolutionary government, the latter being unnecessary, in his opinion, because precisely the Constitution had been ratified. The third obvious alternative was entirely ruled out, namely, a return to the 1935 Constitution, for it was the status quo under that Constitution that had caused "anarchy, confusion and misery." The message seems clear: rather than return to such status quo, he would heed the recommendation of the Citizens' Assemblies to establish a revolutionary government, because that would be the only other way to carry out the reforms he had envisioned and initiated - reforms which, in all fairness and honesty, must be given credit for the improved quality of life in its many aspects, except only in the field of civil

liberties.

If there is any significance, both explicit and implicit, and certainly unmistakable, in the foregoing pronouncements, it is that the step taken in connection with the ratification of the Constitution was meant to be irreversible, and that nothing anyone could say would make the least difference. And if this is a correct and accurate assessment of the situation, then we would say that since it has been brought about by political action and is now maintained by the government that is in undisputed authority and dominance, the matter lies beyond the power of judicial review.

On the other hand, by avowals no less significant if not so emphatic in terms, President Marcos has professed fealty to the Constitution. In "Today's Revolution: Democracy" he says:

"I believe, therefore, in the necessity of Revolution as an instrument of individual and social change * * * but that in a democratic society, revolution is of necessity, constitutional, peaceful, and legal."

In his TV address of September 23, 1972, President Marcos told the nation:

"I have proclaimed martial law in accordance with the powers vested in the President by the Constitution of the Philippines.

"* * * * *

"I repeat, this is not a military takeover of civil government functions. The Government of the Republic of the Philippines which was established by our people in 1946 continues.

"* * * * *

"I assure you that I am utilizing this power vested in me by the Constitution to save the Republic and reform our society * * *

"I have had to use this constitutional power in order that we may not completely lose the civil rights and freedom which we cherish * * *

"* * * We are against the wall. We must now defend the Republic with the stronger powers of the Constitution." (Vital Documents, pp. 1-12; Italics supplied).

In the report of an interview granted by the President to the Newsweek Magazine (published in the issue of January 29, 1973), the following appears:

"* * * * *

"Q. Now that you have gotten off the constitutional track, won't you be in serious trouble if you run into critical problems with your programs?

"A. I have never gotten off the constitutional track. Everything I am doing is in accordance with the 1935 Constitution. The only thing is that instead of 18-year-olds voting, we have allowed 15-year-olds the right to vote. But the 15-year-olds of today are high-school students, if not graduates, and they are better informed than my contemporaries at that age. On the matter of whether it is constitutional to proclaim martial law, it is constitutional because the Constitution provides for it in the event of invasion, insurrection, rebellion or immediate danger thereof. We may quarrel about whether what we have gone through is sufficient cause to proclaim martial law but at the very least there is a danger of rebellion because so many of our soldiers have been killed. You must remember this (martial law provision) was lifted from the American legislation that was the fundamental law of our country.

"* * * * *

In the light of this seeming ambivalence, the choice of what course of action to pursue belongs to the President. We have earlier made reference to subjective factors on which this Court, to our mind, is in no position to pass judgment. Among them is the President's own assessment of the will of the people as expressed through the Citizens Assemblies and of the importance of the 1973 Constitution to the successful implementation of the social and economic reforms he has started or envisioned. If he should decide that there is no turning back, that what the people recommended through the Citizens Assemblies, as they were reported to him, demanded that the action he took pursuant thereto be final and irrevocable, then judicial review is out of the question.

In articulating our view that the procedure of ratification that was followed was not in accordance with the 1935 Constitution and related statutes, we have discharged our sworn duty as we conceive it to be. The President should now perhaps decide, if he has not already decided, whether adherence to such procedure is weighty enough a consideration, if only to dispel any cloud of doubt that may now and in the future shroud the nation's Charter.

In the deliberations of this Court one of the issues formulated for resolution is whether or not the new Constitution, since its submission to the Citizens Assemblies, has found acceptance among the people, such issue being related to the political-question theory propounded by the respondents. We have not tarried on the point at all since we find no reliable basis on which to form a judgment. Under a regime of martial law, with the free expression of opinions through the usual media vehicles restricted, we have no means of knowing, to the point of judicial certainty, whether the people have accepted the Constitution. In any event we do not find the issue decisive insofar as our vote in these cases is concerned To interpret the Constitution — that is judicial. That the Constitution should be deemed in effect because of popular acquiescence — that is political, and therefore beyond the domain of judicial review.

We therefore vote not to give due course to the instant petitions.

[1] The undersigned (Justice Querube C. Makalintal) who had reserved his right to do so, filed a separate dissenting opinion when the Court denied a motion for reconsideration, and voted in favor of the validity of the questioned Resolution. Mr. Justice Enrique M. Fernando joined in the dissent.

[2] Thus by Presidential Decree No. 86 what the Constitutional Convention itself had proposed unsuccessfully as an amendment to the 1935 Constitution, reducing the voting age from 21 to 18, but the submission of which to a plebiscite was declared invalid by this Court in *Tolentino vs. COMELEC*, became a reality of an even more far-reaching import - since fifteen-year olds were included in the Citizens Assemblies.

[3] According to the Solicitor General 92 Congressmen and 15 Senators (both numbers constituting majorities) have expressed their option.

[4] *Luther vs. Borden*, 48 U.S. (7 Haw.) 1, 12 L. Ed. 581 (1849).

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