

**RAMON MITRA, JR., NAPOLEON RAMA, EMMANUEL T. SANTOS,
ERNIE RONDON, ANTONIO MARTINEZ, JEJOMAR BINAY, RODRIGO H.
MELCHOR, JOAQUIN (TITONG) ROCES, RAFAEL YAP, AND MEL
LOPEZ, PETITI...**

G.R. No. 56503. April 04, 1981

Ponente: FERNANDO, C.J.

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FERNANDO, C.J.:

In essence, this petition for mandamus and prohibition is not dissimilar from the prohibition proceedings just dismissed filed respectively by former delegates Samuel C. Occena and Ramon A. Gonzales.[1] All three suits proceed on the assumption that the present Constitution is not in force and effect. There is this variation. In the last two paragraphs of this petition, the plea is made for the holding of a plebiscite so that the people may vote on the ratification of the Constitution, now in force, but as to them still in the stage of proposal. In the event it is rejected, so their thinking goes, then the 1935 Constitution, which in the view of petitioners was suspended by the establishment of an authoritarian regime by the Commander-in-Chief of the Armed Forces after the proclamation of martial law, could be once more operative with the lifting of martial law on January 17, 1981. As in the Occena and Gonzales petitions, there is what was therein referred to as a "rather unorthodox aspect" in "the assertion that the 1973 Constitution is not the fundamental law, the Javellana ruling to the contrary notwithstanding." [2] This excerpt from the opinion is, therefore, fully applicable: "To put it at its mildest, such an approach has the arresting charm of novelty - but nothing else. It is in fact self-defeating, for if such were indeed the case, petitioners have come to the wrong forum. We sit as a Court duty-bound to uphold and apply that Constitution. To contend otherwise as was done here would be, quite clearly, an exercise in futility." [3]

A similar judgment is thus indicated. The petition must be dismissed. If there is a further expression of view on the part of the Court, it is to clear the misapprehension that seems to be current in certain legal quarters about the import of the Javellana decision [4] and the role of the President as Commander-in-Chief during the period of martial law.

1. What is the ruling in *Javellana v. Executive Secretary*? [5] Rightfully, it is ranked by eminent jurists and academicians abroad as one of the most significant manifestations of the exercise of the function of judicial review. Apparently, this awesome and delicate power has implications still not adequately grasped. By virtue of this prerogative, the Supreme Court either checks or legitimates the acts of a coordinate department, challenged in an appropriate legal proceeding. The decision rendered then, whether one of approval or of rejection, of validity or of unconstitutionality, is controlling. To go back to *Javellana v. Executive Secretary*. The ruling cannot be any clearer. The dispositive portion reads: "[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." [6] As far as there being "no further judicial obstacle" to the operative character of the 1973

Constitution, there can be no doubt that such is the view of eight of the ten members of the Court. Petitioners apparently did not take note of the immediately preceding paragraph of the opinion of the then Chief Justice Concepcion, who, while one of the dissenters, spoke for the Court on the voting: "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." [7] Both the statements of "there being no further judicial obstacle" as well as the negative form in which mention is made of there being "not enough votes to declare that the new Constitution" is not in force reflect the traditional mode in which constitutional issues are passed upon in accordance with the American concept of judicial review. The function of judicial review, as observed by Justice Laurel in the leading case of *Angara v. Electoral Commission*, [8] reflects the adoption of the American type of constitutional government "where the written constitution is interpreted and given effect by the judicial department." [9] In the event therefore that the decision rendered may give rise to doubts and perplexities, there is comfort and assurance in the thought expressed by the same eminent jurist in another leading case of *Villena v. Secretary of Interior*: [10] "Familiarity with the essential background of the type of government established under our Constitution, in the light of certain well-known principles and practices that go with the system, should offer the necessary explanation." [11] One of such practices is the manner in which the dispositive portion of a decision in a suit contesting the validity of a legislative or executive act is worded. It was noted that Justice Holmes had a penchant for the double negative. A favorite phrase of his was that the statute "was not unconstitutional." That is of the essence of judicial review. For one of its basic postulates is the presumption of validity. The burden of proof is thus on the person assailing the action taken by a coordinate branch. There is no need therefore of an affirmative finding as to its being constitutional. It suffices that it has not been shown to be otherwise. It is likewise by virtue of such presumption that Justice Malcolm correctly asserted: "To doubt is to sustain." [12] Scholars in the field of constitutional law have even gone further. They maintain that when the Supreme Court or some members thereof whose votes are crucial deem the question raised as a political [13] and not judicial resulting in the dismissal action, there was, even then, a manifestation of power of judicial review at work. The Court, by ruling that it was without jurisdiction, allowed the political branches to have their way. In that sense, to use a favorite phrase of Thomas Reed Powell, the Court was silently vocal and not silently silent. In *Javellana*, the Court assumed jurisdiction, but only two of the ten members then were of the view and so voted that the 1973 Constitution is not in force. There is no affront to logic, it would seem, for us to dismiss the petitions and accordingly rule that "there is no further judicial obstacle to the new Constitution being considered in force and effect." As was pointed out in the joint decision in the *Occena and Gonzales* petitions: "That is the meaning of the concluding statement in *Javellana*. Since then, this Court has invariably applied the present Constitution. The latest case in point is *People v. Sola*, promulgated barely two weeks ago. During the first year alone of the effectivity of the present Constitution, at least ten cases may be cited." [14]

2. Nor is this all. The scholarly opinion of then Chief Justice Roberto Concepcion, while in dissent, acknowledged that even without valid ratification, a new constitution could come into force and effect by the acquiescence of the people, referring in particular to the leading case of *Taylor v. Commonwealth*. [15] Other cases may be cited. [16] There is this excerpt in a separate opinion in *Javellana*: "Independently of the lack of validity of the ratification of the new Constitution, if it be accepted by the people, in whom sovereignty resides according to the Constitution, then his Court cannot refuse to yield assent to such a political decision of the utmost gravity, conclusive in its effect. Such a fundamental principle is meaningless if it does not imply, to follow Laski, that the nation as a whole

constitutes the 'single center of ultimate reference,' necessarily the possessor of that 'power that is able to resolve disputes by saying the last word.' If the origins of the democratic polity enshrined in the 1935 Constitution with the declaration that the Philippines is a republican state could be traced back to Athens and to Rome, it is no doubt true, as McIver pointed out, that only with the recognition of the nation as the separate political unit in public law is there the juridical recognition of the people composing it 'as the source of political authority.' From them, as Corwin did stress, emanate 'the highest possible embodiment of human will,' which is supreme and must be obeyed. To avoid any confusion and in the interest of clarity, it should be expressed in the manner ordained by law. Even if such were not the case, however, once it is manifested, it is to be accepted as final and authoritative. The government which is merely an agency to register its commands has no choice but to submit. Its officials must act accordingly. No agency is exempt from such a duty, not even this Court. In that sense, the lack of regularity in the method employed to register its wishes is not fatal in its consequences. Once the fact of acceptance by the people of a new fundamental law is made evident, the judiciary is left with no choice but to accord it recognition. The obligation to render obeisance falls on the courts as well."^[17] Even petitioners must be aware that aside from the referendum that led to the ratification of the present Constitution, there was a second one held on July 27 and 28 in 1973,^[18] and another on February 27 and 28 in 1975.^[19] The 1976 amendments to the Constitution were adopted in the referendum held on October 16 and 17 of that year.^[20] Then on December 17, 1977, there was again held a referendum.^[21] The fact that the people went to the polls would be indicative of their acquiescence in the present Constitution. Nor could petitioners be unaware that two elections have been held under the present Constitution, one for members of the Interim Batasang Pambansa on April 7, 1978 and the other for local government officials on January 30, 1980. In the face of the above clearly-manifested recognition of the force and effect of the present Constitution, by the people, including those in the opposition, it would seem that any argument to the contrary should be consigned to a well-merited limbo.

3. There is an even graver misapprehension of the significance of the President being the Commander-in-Chief of the Armed Forces and the restricted concept of martial law as known to American jurisprudence well-nigh authoritative in this jurisdiction. The provision of the 1935 Constitution by virtue of which martial law was declared reads as follows: "The President shall be commander-in-chief of all armed forces of the Philippines and, whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion, insurrection, or rebellion. In case of invasion, insurrection, or rebellion, or imminent danger thereof, when the public safety requires it, he may suspend the privileges of the writ of habeas corpus, or place the Philippines or any part thereof under martial law."^[22] The commander-in-chief clause is traceable to the United States Constitution,^[23] which however does not empower the American President to declare martial law. It is quite apparent that the framers of the 1935 Constitution, including some of the greatest legal luminaries of the Philippines, all devoted to the concept of civilian supremacy, expanded the commander-in-chief clause on the assumption that the President, as the highest civilian authority, should not be bereft of competence to deal with any danger to the State whether posed by external aggression or internal subversion. He was thus empowered to suspend the privilege of the writ of habeas corpus and to declare martial law. At any rate, there was nothing novel in such a provision as far as the Philippines is concerned. It owed its origin to the Philippine Autonomy Act of 1916, more popularly known as the Jones Law,^[24] which was in turn based on the Organic Act of Hawaii of 1899.^[25] State Constitutions of Massachusetts,^[26] New Hampshire,^[27] Rhode Island,^[28] Vermont,^[29] Maine,^[30] Maryland,^[31] Tennessee,^[32] West Virginia,^[33] and Alaska^[34] likewise contain martial law provisions. Neither the Colorado nor the Texas Constitutions has a provision of that character, in the former the privilege of the writ could be suspended^[35] and in the latter a statute was enacted to enable its Governor to do so.^[36] As interpreted by the American Supreme Court in the leading cases of *Moyer v. Peabody*,^[37] the opinion coming from Justices Holmes, and *Sterling v. Constantin*,^[38] with Chief Justice Hughes as ponente, these two decisions along with that of *Duncan v. Kahanamoku*,^[39] made clear that martial law as understood in American

jurisprudence is subject to judicial scrutiny and thus far from being all-encompassing. To be more specific, martial law, according to Willoughby, "goes no further than to warn citizens that the military powers have been called upon by the executive to assist him in the maintenance of law and order, and that, while the emergency lasts, they must upon pain of arrest and punishment, not commit any acts which will in any way render more difficult the restoration of order and the enforcement of law." [40] Burdick, [41] Willis, [42] and Schwartz [43] wrote in the same vein. Parenthetically, it may be observed that President Ferdinand E. Marcos announced in a speech in Hawaii on April 22, 1980 that the Philippines is partial to the Willoughby approach. [44] There is this modification though as announced in the ponencia of Justice Makasiar in *Aquino, Jr. v. Commission on Elections*: [45] "We affirm the proposition that as Commander-in-Chief and enforcer or administrator of martial law, the incumbent President of the Philippines can promulgate proclamations, orders and decrees during the period of Martial Law essential to the security and preservation of the Republic, to the defense of the political and social liberties of the people and to the institution of reforms to prevent the resurgence of rebellion or insurrection or secession or the threat thereof as well as to meet the impact of a worldwide recession, inflation or economic crisis which presently threatens all nations including highly developed countries." [46] That is the extent of the influence exerted by the view of Rossiter. [47] There is thus adherence to the pronouncement of Justice Black in the above-cited *Duncan v. Kahanamoku*, [48] a case of Hawaiian origin: "Legislatures and courts are not merely cherished American institutions; they are indispensable to our government." [49] The Interim Batasang Pambansa was provided for in the 1976 Amendments to the Constitution, the opening sentence of its first section reading: "There shall be, in lieu of the interim National Assembly, an interim Batasang Pambansa." [50] The judiciary, during the period of martial law from September 21, 1972 to January 17, 1981, performed its functions and discharged its responsibility as a separate branch of the government. It never ceased all the while to exercise the power of judicial review. The validity of the proclamation of martial law was challenged and unanimously upheld in *Aquino, Jr. v. Commission on Elections*. [51] Mention had already been made of *Javellana v. Executive Secretary* [52] where, as noted, the transcendental issue posed was whether or not the 1973 Constitution was in force and effect, with the Court dismissing the petitions by a vote of six to four and ruling by a vote of eight to two that there was "no further judicial obstacle to the New Constitution being considered in force and effect," and *Aquino, Jr. v. Commission on Elections*, [53] where the question raised was as to the competence of the President to issue orders and decrees having the force and effect of law, with the Court ruling that he could do so, the ratio decidendi being the aforesaid excerpt quoted from the ponencia of Justice Makasiar. [54] There are two other decisions equally signifying that this Court had never been hesitant to assume jurisdiction in cases assailing the validity of Presidential acts. The first is *Aquino Jr v. Military Commission*, [55] where the power of the President to create a military commission with jurisdiction to try civilians for certain specified offences connected with the rebellion, was sustained, the opinion being penned by Justice Antonio. [56] The other is *Sanidad v. Commission on Elections*, [57] where the authority of the President to propose amendments to the Constitution, the interim National Assembly not having been convened, was sanctioned. [58] It is not to be lost sight of either that in *Dumlao v. Commission on Elections*, [59] decided on January 22, 1980, while martial law was still in force, this Court nullified a portion of Section 4 of Batas Pambansa Blg. 52, which would consider the filing of charges for the commission of any crime arising from acts of disloyalty or amounting to subversion, insurrection, or rebellion, before the Civil Court or military tribunal after preliminary investigation as prima facie evidence of such fact. Justice Melencio-Herrera was the ponente. [60]

4. There can be no justification then for the reckless assertion that upon the proclamation of martial law and while it was in force, constitutionalism, in terms of the exercise of the power of judicial review and respect for individual rights, no longer held sway in the Philippines. It was Justice Lionel Keith Murphy, of the High Court of Australia, whose advocacy of a written bill of rights for his country has won him an international reputation as a devoted and eloquent champion of human rights who was the Second Comparative Law Lecturer of the Integrated

Bar of the Philippines. In that lecture, he appraised the role of this Court during martial law thus: "The judicial system in the Philippines had undergone difficult times, and much stress has been placed on it by the necessity to resolve great issues arising in a series of cases: The Anti-Subversion, The Plebiscite, The Ratification, The Martial Law, the Referendum, The Right to Counsel and the Military Tribunal Cases." [61] He said further: "Throughout these cases, one can observe with admiration, the concern of the judiciary to maintain the fundamental liberties of the people even under the most difficult conditions." [62] He continued his appraisal of the work of the Supreme Court during martial law thus: "Violations of human rights have occurred and do occur in the Philippines. Violations of human rights have occurred and do occur in Australia. I will mention some shortly. They occur in the United States and elsewhere. But the Philippines and the United States have courts which are able to enforce mandatory provisions in the Bill of Rights. Your Supreme Court does so daily, openly and in reasoned decision given by your Justices." [63] To paraphrase a recognized authority in American Constitutional law and one of the most respected American legal scholars, Professor Paul A. Freund, it is not too much to expect of any counsel appearing before the Supreme Court that there should be on his part a certain degree of awareness of the pitfalls and delusions of certitude in view of the complexity of the strands in the web of constitutionalism which the Court must disentangle. [64] There is still much to be said of this aphorism of Justice Holmes: "Certitude is not the test of certainty." In the field of constitutional law, the need for reexamining the continuing validity of doctrines in the light of changing circumstances cannot be denied. Familiarity with such doctrines, to refer anew to what was stated by Justice Laurel, is, however, a prime requisite.

WHEREFORE, the petition is dismissed for lack of merit.

Barredo, Makasiar, Aquino, Concepcion, Jr., Fernandez, Guerrero, De Castro, and Melencio-Herrera, JJ., concur. Teehankee, J., files a separate opinion.

Abad Santos, J., on official leave.

[1] G.R. No. 56350, *Occena v. The Commission on Elections* and G.R. No. 56404, *Gonzales v. The National Treasurer and the Commission on Elections*. A joint decision was promulgated on the two above petitions two days ago.

[2] *Ibid*, 2.

[3] *Ibid*.

[4] *Javellana v. Executive Secretary*, L-36142, March 31, 1973, 50 SCRA 30.

[5] 50 SCRA 30.

[6] *Ibid*, 141.

[7] *Ibid*.

[8] 63 Phil. 139 (1936).

[9] *Ibid*, 160.

[10] 67 Phil. 451 (1939).

[11] *Ibid*, 464. Justice Laurel was speaking of such lack of familiarity as of 1937. The situation has not improved at all. It may have grown worse. One explanation is that after 1946, American constitutional law appears to be a neglected subject except in the University of the Philippines College of Law and two or three other leading law schools.

[12] *Yu Cong Eng v. Trinidad*, 47 Phil. 385, 414 (1925).

[13] In *Javellana*, the votes of then Justices Makalintal and Castro, while counted as among those who held the view that the amendments were not ratified in the manner- prescribed by the Constitution, reflected in reality their conviction that the 1973 Constitution was a new one and therefore outside judicial competence.

[14] G. R. No. 56350 and G. R. No. 56404, April 12, 1981. *Sola*, G. R. Nos. 56158-64, was promulgated March 17, 1981. Of the ten cases cited, the first, *Garcia v. Domingo*, L-30104, July 25, 1973, is reported in 52 SCRA 155 and the last, *Asian Surety and Insurance Co. v. Herrera*, L-25232, December 20, 1973, is reported in 54 SCRA 312. It was also noted that the first of such cases, *Garcia*, was promulgated on July 25, 1973 with the writer of this opinion as ponente and the next case, *Buendia*, also on the same date, with Justice Teehankee as ponente, both of whom were dissenters in *Javellana*, but who felt bound to abide by the majority decision.

[15] 101 Va. 529, 44 SE 754 (1903).

[16] Cf. *Miller v. Johnson*, 92 Ky. 589, 18 SW 522 (1892); *Arie v. State*, 23 Okl. 166, 100 P. 23 (1909) and *Hammond v. Clark*, 136 Ga. 313, 71 SE 479 (1911).

[17] *Ibid*, 327-328. The quotations from Laski may be found in his *Grammar of Politics*, 4th ed., 34 (1937); McIver in his *The Web of Government* 84 (1947); and Corwin in his article, *The Higher Law Background of American Constitutional Law* in 1 *Selected Essays* 3 (1938).

[18] P.D. No. 229 (1973).

[19] Proclamation No. 1366 as amended by Proclamation No. 1366-A (1975).

[20] P.D. 991 (1976).

[21] P.D. 1229 (1977).

[22] Article VII, Section 10, par. (2) of the 1935 Constitution.

[23] According to Article II, Section 2 of the United States Constitution: "The President shall be Commander in Chief of the Army and Navy of the United States, and the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the Principal Officer in each of the Executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves or Pardons for Offenses against the United States, except in Cases of Impeachment." As is obvious, no mention is made either of the power to suspend the privilege of the writ of habeas corpus but President Lincoln did so in the American Civil War.

[24] Section 21 of the Philippine Autonomy Act reads as follows: "[The Governor-General] may, in case of rebellion or invasion or imminent danger thereof, when the public safety requires it, suspend the privileges of the writ of habeas corpus or place the Islands or any part thereof under martial law. * * *."

[25] Section 67 of the Hawaiian Organic Act vesting such power in the then Territorial Governor.

[26] Art. XXVIII.

[27] Arts. 34 and 51.

[28] Art. I, Sec. 18.

[29] Art. 17.

[30] Art. I, Sec. 14.

[31] Art. 32.

[32] Art. I, Sec. 25.

[33] Art. III, Sec. 12.

[34] Art. III, Sec. 20.

[35] Article II, Section 21.

[36] Revised Civil Statutes, Articles 5778, 5834 and 5889.

[37] 212 US 78 (1909).

[38] 287 US 378 (1932).

[39] 327 US 304 (1946).

[40] 3 Willoughby on the Constitution, 2nd ed., 1951 (1929).

[41] Burdick, The Law of the American Constitution 261 (1922).

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

[43] II Schwartz, The Powers of Government 244 (1963).

[44] The Third World Alternatives (Speech delivered before the American Newspaper Publishers Association.

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

[46] Ibid, 298.

[47] Rossiter, Constitutional Dictatorship, 7. 303 (1918) was cited.

[48] 327 US 304 (1946).

[49] Ibid, 323.

[50] 1976 Amendments to the Constitution, 1. The Interim National Assembly under the 1973 Constitution was never convened.

[51] L-35546, September 17, 1974, 59 SCRA 183. The Court spoke through the then Chief Justice Makalintal. The writer of this opinion dissented insofar as the Court would consider moot and academic a habeas corpus petition if the detention ceased but with the physical freedom of the erstwhile detainees still restricted under the terms of release.

[52] 50 SCRA 30.

[53] 62 SCRA 275.

[54] Justice Teehankee concurred and dissented, confining such power legislative in character "to the law of necessity of the preservation of the state which gave rise to the proclamation (including appropriations for operations of the government and its agencies and instrumentalities.)" At 316-317. The writer of this opinion, who

in his work as a co-author with Senator Lorenzo M. Tanada on the 1935 Constitution, the fourth edition of which came out in 1953, is of the view that Willoughby's formulation is controlling. So he had occasion to state anew in his concurring and dissenting opinion in *Aquino, Jr. v. Ponce Enrile*, 59 SCRA 184, 303. In this second *Aquino Jr.* decision, he did not feel it necessary to express any opinion on the power of the President to issue decrees with the force and effect of law in conformity with such stand. Nonetheless, as the ponencia of Justice Makasiar represented the plurality opinion, accuracy and respect for the now prevailing view of the Court call for his words reflecting the more expansive concept of the martial law powers of the President being quoted in full. For his part, and not as ponente in this case, the writer of this opinion adheres to his view.

[55] L-37364, May 9, 1975, 63 SCRA 546.

[56] Justices Teehankee and Munoz Palma, now retired, dissented. The writer dissented on due process ground but admitted that under the Transitory Provisions of the 1973 Constitution, Article XVII, Section 3, par. (2), all "proclamations, orders, decrees, instructions, and acts promulgated, issued, or done by the incumbent President shall be part of the law of the land, ***." The ruling of this case as well as of *Javellana* and the two previous *Aquino Jr.* cases was relied upon in *Gumaua v. Espino*, L-36188, 37586, February 29, 1980, 96 SCRA 402 with Justice Makasiar as ponente. There was a concurrence from the writer of this opinion and a dissent from Justice Teehankee.

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

[58] Justice Martin wrote the principal opinion but in view of his adoption of well-nigh plenary powers of the Executive under martial law as advocated by Rossiter spoke only for himself. The late Chief Justice Castro and Justices Barredo, Antonio and Concepcion Jr. wrote concurring opinions. The writer of this opinion expressly dissented from the stand of Justice Martin but concurred in the result. Justice *Aquino* limited himself to such a concurrence. Justices Teehankee and Munoz Palma dissented. Justice Makasiar concurred but dissented insofar as the Court held that the proposal to amend the Constitution is a judicial, rather than a political question. In *Peralta v. Commission on Elections*, L-47771, March 11, 1978, 82 SCRA 30, the Supreme Court rejected the contention that Presidential Decree No. 1296, The 1978 Election Code, was tainted by unconstitutionality in some of its provisions. The writer of this opinion concurred and dissented. Justices Teehankee and Munoz Palma dissented.

[59] L-52245, January 22, 1980, 95 SCRA 392.

[60] Justices Barredo, Abad Santos and the writer of this opinion had separate concurrences. Justice Teehankee filed a separate opinion dissenting from the adverse ruling on the candidacy of petitioner Dumlao, declining to rule on the invalidity of the first part of Section 4 of the Act in question, and concurring with the pronouncement that the mere filing of charges shall be *prima facie* cause for disqualification is void.

[61] Murphy, *Human Rights and the Judiciary: Reflections on the Australian and Philippine Experience*, Second Comparative Law Lecture, March 17, 1981, 5. The challenge against the validity of the Anti-Subversion Act failed, the decision of the Court being announced in *People v. Ferrer*, L-32613-14, December 27, 1972, 48 SCRA 382, with the then Justice, later Chief Justice Castro, as ponente. The writer of this opinion dissented. In the denial of the motion for reconsideration, reported in 56 SCRA 793, Justice Teehankee concurred and dissented in a separate opinion. The writer of this opinion stood fast in his dissent.

[62] *Ibid.*

[63] *Ibid.*, 5-6. There is relevance to the compliment paid by Dr. Akinola Aguda, on eminent authority in comparative legal institutions, in his comprehensive monograph submitted to the Second International Conference of Appellate Judges held in Sydney and Canberra, Australia, May 19-26, 1980. He singled out for high praise the

ruling in *Lansang v. Garcia*, L-33964, December 11, 1971, reported in 42 SCRA 448, with the then Chief Justice Concepcion as ponente, that the suspension of the privilege of the writ of habeas corpus raises a judicial and not a political question. For him such a ruling is unique and unprecedented in countries that have adopted the Anglo-American legal system.

[64] Freund, *On Understanding the Supreme Court* 18 (1950).

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DISSENTING OPINION

TEEHANKEE, J.:

As in the Court's decision released on April 4, 1981 in the prohibition proceedings[1] of *Occeña vs. Comelec and Gonzales vs. National Treasurer*, I am constrained to vote to give due course to the petition at bar for the same reasons stated in my dissent therein, particularly that the controlling doctrine of fair and proper submission as laid down by the Court in *Tolentino vs. Comelec*[2] specially in the light of the proposed complex, complicated and radical changes of our structure of government requires that the people be given adequate time and information as to the amendments to be voted upon for their conscientious deliberation and intelligent consent or rejection.

As stated in the decision penned by the Chief Justice, a variation in the petition at bar is made whereby petitioners pray for the holding of a plebiscite for the people to vote anew on the ratification of the 1973 Constitution since six members out of the ten members of the Supreme Court[3] held in the ratification cases, *Javellana vs. Executive Secretary, et al.*[4] "that the (1973) 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.'"[5]

On the third question then addressed in 1973 by the Supreme Court with regard to whether there was acquiescence by the Filipino people in the 1973 Constitution, "three (3) members of the Court expressed 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 '(U)nder 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.'"

Necessarily, on the fifth and last question then posed of whether the new (1973) Constitution was in force and effect, "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."

But with a majority of six votes[6] dismissing the petition challenging the validity of the President's proclamation of ratification and of coming into effect of the 1973 Constitution, the entire Supreme Court and particularly the dissenting Justices have had to abide under the Rule of Law by the dismissal decision of the majority and to recognize and operate under the 1973 Constitution as the fundamental charter of the government and the people. I expressly stated this in my separate opinion in the 1974 Martial Law cases, *Aquino, Jr. vs. Enrile*[7] et al., and

reiterate the same, as follows:

“Petitioner’s first reason for withdrawal is subjective. After mentioning various factors, particularly, the fact that five of the six Justices (including the writer) who held in the Ratification cases that the 1973 Constitution had not been validly ratified, and taken on October 29, 1973 an oath to support and defend the New Constitution, he expresses his feeling that ‘(I) cannot reasonably expect either right or reason, law or justice, to prevail in my case,’ that ‘the unusual length of the struggle also indicates that its conscience is losing the battle’ and that ‘since I do not wish to be a party to an adverse decision, I must renounce every possibility of favorable judgment.’ A party’s subjective evaluation of the Court’s action is actually of no moment, for it has always been recognized that this Court, possessed of neither the sword nor the purse, must ultimately and objectively rest its authority on sustained public confidence in the truth, justice, integrity and moral force of its judgments.

“Petitioner’s second reason for withdrawal reads: ‘(S)econd, in view of the new oath that its members have taken, the present Supreme Court is a new Court functioning under a New ‘Constitution’, different from the Court and the Constitution under which I applied for my release. I was willing to be judged by the old Court under the Old Constitution, but not by the new Court under the New ‘Constitution, x x’

“Petitioner is in error in his assumption that this Court is a ‘new Court functioning under a New Constitution different from the Court and the Constitution under which [he] applied for [his] release.’ The same Supreme Court has continued save that it now operates under Article X of the 1973 Constitution which inter alia increased its component membership from eleven to fifteen and transferred to it administrative supervision over all courts and personnel thereof with the power of discipline and dismissal over judges of inferior courts, in the same manner that the same Republic of the Philippines (of which the Supreme Court is but a part) has continued in existence but now operates under the 1973 Constitution.

“During the period of ninety days that the Ratification cases were pending before the Court until its dismissal of the cases per its resolution of March 31, 1973 became final on April 17, 1973, the Executive Department was operating under the 1973 Constitution in accordance with President Ferdinand E. Marcos’ Proclamation No. 1102 on January 17, 1973 announcing the ratification and coming into effect of the 1973 Constitution while this Court as the only other governmental department continued to operate under the 1935 Constitution pending its final resolution on the said cases challenging the validity of Proclamation No. 1102 and enforcement of the New Constitution. (As per the Court’s resolution of January 23, 1973, it declined to take over from the Department of Justice the administrative supervision over all inferior courts expressing its sense that ‘it is best that the status quo be maintained until the case aforementioned (Javellana vs. Exec. Secretary) shall have been finally resolved x x ‘).

“Such a situation could not long endure wherein the only two great departments of government, the Executive and the Judicial, for a period of three months were operating under two different Constitutions (presidential and parliamentary). When this Court’s resolution of dismissal of the Ratification cases by a majority of six to four Justices became final and was entered on April 18, 1973 ‘with the result that there (were) not enough votes to declare that the New Constitution is not in force,’ the Court and particularly the remaining three dissenting Justices (notwithstanding their vote with three others that the New Constitution had not been validly ratified) had to abide under the Rule of Law by the decision of the majority dismissing the cases brought to enjoin the enforcement by the Executive of the New Constitution and had to operate under it as the fundamental charter of the government, unless they were to turn from legitimate dissent to internecine dissidence for which they have neither the inclination nor the capability.

“The Court as the head of the Judicial Department thenceforth assumed the power of administrative supervision over all courts and all other functions and liabilities imposed on it under the New Constitution. Accordingly, this Court and all other existing inferior courts continue to discharge their judicial function and to hear and determine all pending cases filed or submitted under the Old (1935) Constitution as well as new cases

under the New (1973) Constitution with the full support of the members of the Integrated Bar of the Philippines (none of whom has made petitioner's claim that this is a 'new Court' different from the 'old Court').

"A major liability imposed upon all members of the Court and all other officials and employees was that under Article XVII, Section 9 of the Transitory Provisions which was destructive of their tenure and called upon them 'to vacate their respective offices upon the appointment and qualification of their successors.' Their taking the oath on October 29, 1973 'to preserve and defend the New Constitution' by virtue of their 'having been continued in office' on the occasion of the oath-taking of three new members of the Court pursuant to Article XV, Section 4 was meant to assure their 'continuity of tenure' by way of the President having exercised the power of replacement under the cited provision and in effect replaced them with themselves as members of the Court with the same order of seniority."

Unless the Javellana ruling is overturned by this Court itself and the passage and attrition of time show the futility of expecting such a contingency, the 1973 Constitution stands as the supreme law of the land, by which the validity and constitutionality of official acts are tested.

A final note on the modification of the limitation of the martial law clause of the Constitution cited in the Chief Justice's opinion whereby it would be expanded to cover also worldwide recession and economic crises as stated in Justice Makasiar's ponencia in *Aquino, Jr. vs. Comelec*[8]. I maintain my dissent therein that "even from the declared Presidential objective of using Martial Law powers to institutionalize reforms and to remove the causes of rebellion, such powers by their very nature and from the plain language of the Constitution are limited to such necessary measures as will safeguard the Republic and suppress the rebellion (or invasion) and measures directly connected with removing the root cause thereof, such as the tenant emancipation proclamation. The concept of martial law may not be expanded, as the main opinion does, to cover the lesser threats of 'worldwide recession, inflation or economic crisis which presently threatens all nations' in derogation of the Constitution." If the concept of martial law were to be so expanded, and with the world always in crisis, there would be no end to martial law.

[1] G. R. Nos. 56350 and 56404, respectively.

[2] 41 SCRA 702 and Resolution denying motion for reconsideration dated November 4, 1971.

[3] Namely, then Chief Justice Roberto Concepcion, and then Justices Querube C. Makalintal, Calixto O. Zaldivar, Fred Ruiz Castro, Enrique M. Fernando and Claudio Teehankee; J. Antonio P. Barredo filed a qualified vote; and JJ. Felix V. Makasiar, Felix Q. Antonio and Salvador V. Esguerra "held that under their view there has been in effect substantial compliance with the constitutional requirements for valid ratification."

[4] 50 SCRA 30 (March 31, 1973).

[5] Joint opinion of Justices Makalintal and Castro.

[6] Composed of JJ. Makalintal, Castro, Barredo, Makasiar, Antonio and Esguerra as against the four dissenting votes of then Chief Justice Concepcion, JJ. Zaldivar, Fernando and Teehankee.

[7] 59 SCRA 183 (September 17, 1974).

[8] 62 SCRA 275 (January 31, 1975).

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