law [or custodial investigation]. xxx The assistance of lawyers, while desirable, is not indispensable. The legal profession was not engrafted in the due process clause xxx." While a few years later, the Court declared that "[t]he right to counsel in civil cases exists just as forcefully as in criminal cases"[161] [and is] "a very basic requirement of substantive due process xxx. Indeed, the rights to counsel and to due process of law are two of the fundamental rights guaranteed by the Constitution to any person under investigation, be the proceeding administrative, civil or criminal."[162]

If there stand the legal principles of resolving doubt in favor of the accused or the laborer, or that the presumption is always against the waiver of constitutional rights, or that preliminary investigation is meant to save a respondent from harassment, and the State, its resources, the author can only hope that the arguments raised here may, someday, given that the issues affect the liberty, if not the very life of an accused, serve as a catalyst for the Court to rethink its present position. The *Miranda* doctrine, as a rule of exclusion, initially resulted in the acquittal of a possible kidnapper-rapist and other alleged unsavory characters. As despicable as that may seem, *Miranda* was founded upon the axiom that "[t]he quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law."[163] While the author is certainly unopposed to this, what this article merely wishes to underscore is that fealty to sound legal bases and precedent be not disdained.

[161] Telan v. Court of Appeals, 202 SCRA 534, 540-541 (1991).

[162] Salaw v. NLRC, 202 SCRA 7, 13 (1991).

[163] Miranda, 384 U.S. at 727.

CONSTITUTIONALISM AND THE NARVASA COURT

JOAQUIN G. BERNAS, S.J.*

INTRODUCTION

Let me first say that I consider it an honor to be invited to give this lecture on "Constitutionalism and the Narvasa Court." It is, however, an honor which I approach with no small degree of trepidation. I take it that the invitation involves not merely a matter of summarizing what the Narvasa Court has said, which would not be a perilous task, but also offering personal reflections on the work of the Court. When you consider that the membership of the Court consists of some of the best legal minds of the country, accepting the invitation on that understanding and for delivery in the lions' den itself borders on recklessness. For that reason and for purposes of self-protection, I have decided to be eclectic. I will discuss mainly cases where the Justices of the Court themselves were not in unanimity. In that way I am assured that in whatever position I might take I will find support from at least one or other of the lions.

CONSTITIONALISM

By way of situationer, let me say a few general words about my understanding of constitutionalism.

Modern liberal constitutionalism as we have it now consists of five irreducible elements. First, there is a differentiation and distribution of functions. On the horizontal level, the distribution is among the legislative, executive, and judicial departments. On the vertical level, there is sharing of power between the national government and local governments — very pronounced in a federal system but not so pronounced in our unitary system. Second, there is a planned mechanism for cooperation among the three main power organs. The mechanism acts as the familiar system of "checks and balances." Third, there is a system for breaking deadlocks among the three power holders. Fourth, there is an amendatory process, which is essentially a mechanism for adjusting the constitution to changing socio-political conditions. The amendatory process is also one of the vehicles through which popular sovereignty is expressed. Fifth and finally, there is a delineation of areas of private life which are fenced off from encroachment by power holders.

*The Editorial Board acknowledges the invaluable support of Atty. Anton M. Elicano, Staff Head, Office of Chief Justice Hilario G. Davide, Jr., Supreme Court of the Philippines, in soliciting Fr. Bernas's article.

The tragedy of constitutionalism is that dictators have learned to turn it against itself. As one writer has put it (whose name escapes me at the moment), "A written constitution imbues any political regime with a sort of respectability. The Machiavellians have come to realize that the democratic credo is the shingle under which they can pursue their sinister trade. The written constitution thus has become the protective coloring for the operation of naked power." We see this, for instance, in the Internal Security Act of Malaysia which enjoys a permanence similar to an organic act. More familiarly, we saw it in the operation of Amendment No. 6.[1]

One of the responsibilities of our Supreme Court is to insure that constitutionalism as we have it today is preserved as genuine constitutionalism. My task today is to try to show how the Narvasa Court has performed this task. Needless to say, I can safely give the advanced verdict that the Narvasa Court, even if one might not agree with everything it has said, has not taken the side of the Machiavellians.

I cannot cover all the decisions that have been promulgated during Chief Justice Andres Narvasa's watch. I will try to cover the more important ones during the period roughly from January 1992 to the present — to the extent that the more recent decisions have been made available to me by the office of Justice Davide through his indefatigable slave Atty. Anton Elicaño.

I shall divide my lecture into three parts. First, issues arising from the Bill of Rights, or the constitution of liberty. Second, issues arising from distribution and separation of powers, or the constitution of government. Third, issues arising from autonomy and the amendatory process or the constitution of sovereignty.

I. CONSTITUTION OF LIBERTY

A. Freedom of Speech

I begin with the all important freedom of expression. The significant decisions on freedom of expression of the Narvasa Court all involve prior restraint. These are *National Press Club v. Comelec*,[2] *Tolentino v. Secretary of Finance*,[3] and very recently *In re: Petition to Annul Resolution 98-7-02-SC*[4] regarding demonstrations in the vicinity of courts.

[1] Amendment No. 6 to the 1973 Constitution, effective after the incumbent President proclaimed that the amendments were ratified by a majority of the votes cast in a referendum plebiscite held on October 16-17, 1976, in essence allowed the President to legislate. Amendment No. 6 read: "Whenever in the judgment of the President (Prime Minister), there exists a grave emergency or a threat or imminence thereof, or whenever the interim Batasang Pambansa or the regular National Assembly fails or is unable to act adequately on any matter for any reason that in his judgment requires immediate action, he may, in order to meet the exigency, issue the necessary decrees, orders, or letters of instructions, which shall form part of the law of the land."

[2] 207 SCRA 1 (1992).

[3] 235 SCRA 630 (1994).

[4] A.M. No. 98-7-02-SC, July 7, 1998.

The prior restraint decision which has had perhaps the greatest influence in recent times, both in the United States and in the Philippines, is the celebrated 1971 case of *New York Times v. United States*.[5] The case involved an attempt to prevent publication of excerpts from a classified Pentagon study entitled "History of U.S. Decision Making Process on Vietnam Policy." In reprobating the ban on its publication, the US Supreme Court reaffirmed the traditional presumption against prior restraint. The Court said: "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."[6] For this reason, whereas normally any one who challenges the validity of government action bears the burden of proof of invalidity, in cases of prior restraint the rule is reversed and the Government is made to carry the "heavy burden of showing justification for the enforcement of such a restraint."[7] A very narrow exception was allowed to this rule in *Near v. Minnesota* which said that "only governmental allegation and proof that publication must inevitably, directly and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order."[8]

The 1992 National Press Club case involved Section 11(b) of Republic Act No. 6646, Section 11(b) which made it unlawful "for any newspaper, radio broadcasting or television station, other mass media, or any person making use of the mass media to sell or to give free of charge print space or air time for campaign or other political purposes except to the Commission as provided under Section 90 and 92 of Batas Pambansa Blg. 881." Batas Pambansa Blg. 881 had also commanded the Commission to procure print space and broadcast time to be allocated impartially among the candidates.

The National Press Club case, of course, was not the first time the Court had to deal with restraints on media during election periods.[9] Thus the Court could fall back on these previous cases. In upholding the reasonableness of the provisions the Court said that the objective of the prohibition was equalizing, as far as practicable, the situation of rich and poor candidates by preventing the former from enjoying undue advantage offered by huge campaign "war chests."

Further, the command to the Commission on Elections to make avenues for expression available both in print and broadcast media was seen as a saving grace. The Court said that the provision on freedom of expression must be read in conjunction with the power given to the Commission on Elections to supervise and regulate media during elections as well as with the various provisions in the Constitution which place a high premium on equalization of opportunities as an element of the social justice provision which the 1987 Constitution has extended beyond the economic arena into the political arena.

[5] 403 U.S. 713 (1971).

[6] 403 U.S. 713 (1971).

[7] 403 U.S. 713 (1981).

[8] 283 U.S. 697 (1931).

[9] National Press Club v. Comelec, 207 SCRA 1 (1992).

But perhaps the most significant pronouncement in the National Press Club decision was its pronouncement on burden of proof. The majority opinion said:

> The technical effect of Article IX (C) (4) of the Constitution may be seen to be that no presumption of invalidity arises in respect of exercises of supervisory or regulatory authority on the part of the Comelec for the purpose of securing equal opportunity among candidates for political office, although such supervision or regulation may result in some limitation of the rights of free speech and free press. For supervision or regulation of the operations of media enterprises is scarcely conceivable without such accompanying limitation. Thus, the applicable rule is the general, time-honored one — that a statute is presumed to be constitutional and that the party asserting its unconstitutionality must discharge the burden of clearly and convincingly proving that assertion.

The decision recognized that the law might not fully achieve the desired objective of equalizing political opportunities; but having categorized the law as an ordinary exercise of police power, the Court was satisfied that it passed the test of reasonableness. It said:

> True enough Section 11 (b) does not, by itself or in conjunction with Sections 90 and 92 of the Omnibus Election Code, place political candidates on complete and perfect equality inter se without regard to their financial affluence or lack thereof. But a regulatory measure that is less than perfectly comprehensive or which does not completely obliterate the evil sought to be remedied, is not for that reason alone constitutionally infirm. The Constitution does not, as it cannot, exact perfection in governmental regulation. All it requires, in accepted doctrine, is that the regulatory measure under challenge bear a reasonable nexus with the constitutionally sanctioned objective. . . .

Thus it was that, when this year the objection to Section 11(b) was revived in *Osmeña v. Comelec,*[10] on the ground that the law had not achieved its objective and had in fact caused harmful effects, the Court asked for proof and dismissed the challenge for want of proof.

This is how jurisprudence on election speech stands today. It might be observed, however, that the power to regulate mass media during election period is given by Article IX (C) (4) to the Commission on Elections. But the power of the Commission on Elections is to enforce election laws and not to promulgate election laws. Thus the power given by Article IX (C) (4) presupposes a valid law. But the Court has interpreted this provision not just as an empowerment of the Comelec but also as an expansion of the power of Congress to the extent of reversing the doctrine on the presumed invalidity of prior restraint. I anticipate that there will be further debate on this issue.

Related to the National Press Club case and the Osmeña case is *Telecommunications and Broadcast Attorneys, Inc. v. Comelec.*[11] To my mind, however, this is more a "taking" case and an "equal protection" case rather than a freedom of expression

[10] G.R. No. 132231, March 31, 1998.

[11] G.R. No. 132922, April 21, 1998.

case although it is intimately related to free expression. The challenge in the case was to Section 92 of the Omnibus Election Code, B.P. Blg. 881, which requires television and radio stations to give free broadcast time to the Comelec for allocation to various candidates. The law was challenged as a taking of private property without just compensation. But since radio stations and television stations are public utilities, the Court treated Section 92 merely as an amendment to existing franchises or as a precondition to a grant of new franchises. The Court relied on Article XII, Section 11 which says that no public utility franchise may be granted "except under the condition that it shall be subject to amendment, alteration, or repeal by the Congress when the common good so requires."

This is thus different from the "taking" which was involved in the prohibition of the posting of decals in cars and other private places. *Adiong v. Comelec*[12] proscribed the invasion of private property even in the name of orderly elections. Moreover, the Court had to distinguish radio and television from print media which is not required to give free print space. The distinction was attributed, among others, to the fact that government spends much to make television and radio broadcasts possible and to the fact that radio and television make use of the airwaves which under the regalian doctrine belong to the state.

In another case, *Tolentino v. Secretary of Finance,*[13] print media did not claim immunity from general tax laws as intrusive on its freedom. Rather print media challenged a provision in the Value Added Tax Law, R.A. No. 7716, which withdrew its Value Added Tax (VAT) exemption. Before R.A. No. 7716, among the transactions exempted from VAT were:

> (f) Printing, publication, importation or sale of books and any newspaper, magazine, review, or bulletin which appears at regular intervals with fixed prices for subscription and sale and which is devoted principally to the publication of advertisements.

When R.A. No. 7716 withdrew this exemption, the Philippine Press Institute complained that the law had singled out the press for discriminatory treatment because broadcast media still enjoyed exemption. The Court observed:

> We have carefully examined this argument, but we are unable to find a differential treatment of the press by the law, much less any censorial motivation for its enactment. If the press is now required to pay a value-added tax on its transactions, it is not because it is being singled out, much less targeted, for special treatment but only because of the removal of the exemption previously granted to it by law. The withdrawal of exemption is all that is involved in these cases. Other transactions, likewise previously granted exemption, have been delisted as part of the scheme to expand the base and the scope of the VAT system. The law would perhaps be open to the charge of discriminatory treatment if the only privilege withdrawn had been that granted to the press. But that is not the case.

[12] 207 SCRA 712 (1992).

[13] 235 SCRA 630 (1994).

As to broadcast media, the Court observed:

> The argument that, by imposing the VAT only on print media whose gross sales exceeds P480,000 but not more than P750,000, the law discriminates is without merit since it has not been shown that as a result the class subject to tax has been unreasonably narrowed. The fact is that this limitation does not apply to the press alone but to all sales. Nor is impermissible motive shown by the fact that print media and broadcast media are treated differently. The press is taxed on its transactions involving printing and publication, which are different from the transactions of broadcast media. There is thus a reasonable basis for the classification.

Another significant prior restraint case is *Iglesia ni Kristo v. Court of Appeals*.[14] The case involved two related questions. First, may the Board of Review for Motion Pictures be authorized to require submission of television programs to prior censorship? Second, was the Board correct in disallowing the showing of VTR tapes on the ground that they "offend and constitute an attack against other religions which [attack] is expressly prohibited by law?"

The second question more properly belongs under the free exercise clause of the Constitution and will be discussed under that topic. But the first question raises the issue of prior censorship of movies.

The discussion of this censorship case is inseparably linked with religious liberty. Nonetheless there is enough in the discussion of the case which touches on the general question of prior submission to censorship whether the subject matter of the television show or movie is religious or secular. On this general question the decision is satisfied with citing the empowerment of the Board given by Presidential Decree (P.D.) No. 1986.

Section 3 of P.D. No. 1986 confers generous powers on the Censorship Board. It says:

> Sec. 3 Powers and Functions. — The BOARD shall have the following functions, powers and duties:
>
> xxx xxx xxx
>
> b) To screen, review and examine all motion pictures as herein defined, television programs, including publicity materials such as advertisements, trailers and stills, whether such motion pictures and publicity materials be for theatrical or non-theatrical distribution for television broadcast or for general viewing, imported or produced in the Philippines and in the latter case, whether they be for local viewing or for export.
>
> c) To approve, delete objectionable portions from and/or prohibit the importation, exportation, production, copying, distribution, sale, lease, exhibition and/or television broadcast of the motion pictures, television programs and publicity materials, subject of the preceding paragraph, which, in the judgment of the BOARD applying contemporary Filipino cultural values as a standard, are objectionable for being immoral, indecent, contrary to law and/or good customs, injurious to the prestige of the Republic of the Philippines and its people, or with a dangerous tendency to encourage the commission of violence or of a wrong or crime, such as but not limited to:
>
> i) Those which tend to incite subversion, insurrection, rebellion or sedition against the State, or otherwise threaten the economic and/or political stability of the State;
>
> ii) Those which tend to undermine the faith and confidence of the people, their government and/or duly constituted authorities;
>
> iii) Those which glorify criminals or condone crimes;
>
> iv) Those which serve no other purpose but to satisfy the market for violence or pornography;
>
> v) Those which tend to abet the traffic in and use of prohibited drugs;
>
> vi) Those which are libelous or defamatory to the good name and reputation of any person, whether living or dead;
>
> vii) Those which may constitute contempt of court or of any quasi-judicial tribunal, or pertain to matters which are sub-judice in nature.

[14] 259 SCRA 529 (1996).

Did the Iglesia case uphold the entirety of the standards for censorship found in P.D. No. 1986? I believe it did not. Nor indeed was there a challenge to the constitutionality of the law in its totality. Iglesia simply rejected the claim that the Board had no authority to require prior submission of religious programs. It said:

> We thus reject petitioner's postulate that its religious program is per se beyond review by the respondent Board. Its public broadcast on TV of its religious program brings it out of the bosom of internal belief. Television is a medium that reaches even the eyes and ears of children. The Court iterates the rule that the exercise of religious freedom can be regulated by the State when it will bring about the clear and present danger of some substantive evil which the State is duty bound to prevent, i.e., serious detriment to the more overriding interest of public health, public morals, or public welfare. A *laissez faire* policy on the exercise of religion can be seductive to the liberal mind but history counsels the Court against its blind adoption as religion is and continues to be a volatile area of concern in our country today. Across the sea and in our shore, the bloodiest and bitterest wars fought by men were caused by irreconcilable religious differences. Our country is still not safe from the recurrence of this stultifying strife considering our warring religious beliefs and the fanaticism with which some of us cling and claw to these beliefs. Even now, we have yet to settle the near century old strife in Mindanao, the roots of which have been nourished by the mistrust and misunderstanding between our Christian and Muslim brothers and sisters. The bewildering rise of weird religious cults espousing violence as an article of faith also proves the wisdom of our rule rejecting a strict let alone policy on the exercise of religion. For sure, we shall continue to subject any act pinching the space for the free exercise of religion to a heightened scrutiny but we shall not leave its rational exercise to the irrationality of man. For when religion divides and its exercise destroys, the State should not stand still.

Moreover, the Court reaffirmed the doctrine on burden of proof in prior restraint cases. It said:

> Deeply ensconced in our fundamental law is its hostility against all prior restraints on speech, including religious speech. Hence, any act that restrains speech is hobbled by the presumption of invalidity and should be greeted with furrowed brows. It is the burden of the respondent Board to overthrow this presumption. If it fails to discharge this burden, its act of censorship will be struck down. It failed in the case at bar.

The Court found that the government had not satisfied this requirement. But what would satisfy the Court? In the context of religious speech, the Court said that religious speech could be regulated by the State "when it will bring about the clear and present danger of some substantive evil which the States is duty bound to prevent, i.e., serious detriment to the more overriding interest of public health, public morals, or public welfare."

Finally, and this is of great interest to producers of movies and entertainment programs, could an administrative agency such as the Board of Censors be given the authority to impose a ban on the showing of a movie or television program? Or should the administrative agency be required to obtain a prohibitory order from a court of law as American jurisprudence does? In *Freedman v. Maryland*[15] the U.S. Court had held:

> Applying the settled rule of our cases, we hold that a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system. First, the burden of proving that the film is unprotected expression must rest on the censor. As we said in Speiser v. Randall, 357 U.S. 513, 526, "Where the transcendent value of speech is involved, due process certainly requires . . . that the State bear the burden of persuasion to show that the appellants engaged in criminal speech." Second, while the State may require advance submission of all films, in order to proceed effectively to bar all showings of unprotected films, the requirement cannot be administered in a manner which would lend an effect of finality to the censor's determination whether a film constitutes a protected expression. The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint. See Bantam Books, Inc. v. Sullivan, supra; A Quantity of Books v. Kansas, 378 U.S. 205; Marcus v. Search Warrant, supra; Manual Enterprises, Inc. v. Day, 370 U.S. 478, 518-519. To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film. Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. Moreover, we are well aware that, even after expiration of a temporary restraint, an administrative refusal to license, signifying the censor's view that the film is unprotected, may have a discouraging effect on the exhibitor. See Bantam Books, Inc. v. Sullivan, supra. Therefore, the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.

[15] 380 U.S. 51, 58-59 (1965).

The majority preferred not to follow American doctrine on this subject. The Narvasa Court majority acknowledged that the thesis [of Freedman] had "a lot to commend itself;" but, no thanks, the Court preferred to follow a 1921 Philippine Supreme Court decision which upheld the power of the Director of Posts to determine whether printed matter was of a libelous character.[16]

Thus the concern expressed in *Freedman* remains:

> Without these safeguards, it may prove too burdensome to seek review of the censor's determination. Particularly in the case of motion pictures, it may take very little to deter exhibition in a given locality. The exhibitor's stake in any one picture may be insufficient to warrant a protracted and onerous course of litigation. The distributor, on the other hand, may be equally unwilling to accept the burdens and delays of litigation in a particular area when, without such difficulties, he can freely exhibit his film in most of the rest of the country; for we are told that only four States and a handful of municipalities have active censorship laws.

Fortunately, as our recent history has shown, that the more controversial actions of the Censorship Board have been reversed by the Office of the President thus depriving the Supreme Court of the opportunity to grapple with movie censorship. But I recall a speech of a retired justice who expressed his regret that he missed the chance of writing a valedictory decision on "Schindler's List".

Related to this censorship case and illustrative of the sensitiveness of censorship is *Aquino-Sarmiento v. Morato*,[17] where one of the members of the Board of Review of Motion Pictures had sought access to the voting slips which contained the evaluation of movies made by individual members of the Board. In denying access to the voting slips, the Chairman had appealed to the sanctity of the individual censor's conscience. He said that the voting slips partook of "the nature of conscience votes and as such, [were] purely and completely private and personal." Not surprisingly the Court disagreed saying that "the individual voting slips accomplished by the members concerned [were] acts made pursuant to their official functions, and as such [were] neither personal nor private in nature but public in character."

Finally, the most recent prior restraint decision involved the rule promulgated by the Supreme Court governing demonstrations in the vicinity of courts.[18] Among the prescriptions was the following:

Demonstrators, picketers, rallyists and all other similar persons are enjoined from holding any activity on the sidewalks and streets adjacent to, in front of, or within a radius of two hundred (200) meters from, the outer boundary of the Supreme Court Building, any Hall of Justice, and any other building that houses at

[16] Sotto v. Ruiz, 41 Phil 468 (1921).

[17] 203 SCRA 515 (1991).

least one (1) court sala. Such activities unquestionably interrupt and hamper the working conditions in the salas, offices and chambers of the courts.

The validity of the resolution was challenged on at least two grounds. First, that it was an arrogation of legislative power thereby violating separation of powers. Second, that it transgressed freedom of expression. Since in effect the challenge asked the Court to shoot its own feet, the outcome perhaps should have been predictable.

The Court characterized the argument based on separation of powers as "low watts" asserting against it what might be called the high wattage right to promulgate "rules regulating conduct of demonstrations in the vicinity of courts to assure our people of an impartial and orderly administration of justice." Quite obviously the Court was appealing to its power to promulgate rules of procedure which, however, according to the Constitution, "shall not diminish, increase, or modify substantive rights." In fact, to the contrary, the new Constitution asserts the power of the Court to promulgate rules for the protection of rights. In the Narvasa Court's view, however, it would seem, curtailment of assemblies outside court premises do not diminish substantive rights and may be done by the Court itself without waiting for Congress to act.

American practice, of course, is not normative of what we should do but it is interesting to compare how our Court has handled the problem with the manner in which the U.S. Supreme Court has handled a similar matter. The U.S. Supreme Court, in *United States v. Grace*,[19] had occasion to deal not with its own rule but with an act of Congress. The law involved said:

> It shall be unlawful to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to display therein any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement.

The question raised was whether the curtailment on communicative activity and assembly could be applied to "sidewalks" immediately outside the Supreme Court grounds. The U.S. Supreme Court considered the proscription unconstitutional when applied to sidewalks. The Court characterized the sidewalks immediately outside the Supreme Court building as a "public place" like streets and parks historically associated with the free exercise of expressive activities. They are considered without more to be "public forums." The Court said: ["In such places, the government's ability to permissibly restrict expressive conduct is very limited: the government [that is, Congress] may enforce reasonable time, place, and manner regulations as long as the restrictions are content — neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."] The Court further said that the ["sidewalks comprising the outer boundaries of the Court grounds are indistinguishable from any other sidewalks in Washington, D.C., and we can discern no reason why they should be treated

[18] A.M. No. 98-7-02. SC, July 7, 1998.

[19] U.S. v. Grace (citation not available).

any differently. Sidewalks, of course, are among those areas of public property that traditionally have been held open to the public for expressive activities, and are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property."]

Our Court is more jealous in protecting courts from outside influence. The Guidelines it has issued cover not just the court premises nor just the sidewalks immediately fronting courts but an area up to a radius of 200 meters from the outer boundary of courts. Conceivably it can even cover private property near a courthouse. Incidentally, it is also more extensive than the prohibited area for the sale of liquor in the vicinity of schools! In justification the Court says: "It is sadly observed that judicial independence and the orderly administration of justice have been threatened not only by contemptuous acts inside, but also by irascible demonstrations outside, the courthouses. They wittingly or unwittingly spoil the ideal of sober, non-partisan proceedings before a cold and neutral judge."

One might ask, however, whether the target of the rule is speech or communication which can "spoil the ideal of sober, non-partisan proceedings before a cold and neutral judge" or rather physical disturbance which can disturb public peace and discombobulate the judicial mind. The answer to this question might be found in *Webb v. de Leon*.[20] There the question was about the kind of publicity or communicative activity that can get in the way of due process. What the Court said of the Department of Justice Investigating Panel can also be said of judges. The Court said:

> Be that as it may, we recognize that pervasive and prejudicial publicity under certain circumstances can deprive an accused of his due process right to fair trial. Thus, in *Martelino, et al. vs. Alejandro*, et al., we held that to warrant a finding of prejudicial publicity there must be allegation and proof that the judges have been unduly influenced, not simply that they might be, by the barrage of publicity. In the case at bar, we find nothing in the records that will prove that the tone and content of the publicity that attended the investigation of petitioners fatally infected the fairness and impartiality of the DOJ Panel. Petitioners cannot just rely on the subliminal effects of publicity on the sense of fairness of the DOJ Panel, for these are basically unbeknown and beyond knowing. To be sure, the DOJ Panel is composed of an Assistant Chief State Prosecutor and Senior State Prosecutors. Their long experience in criminal investigation is a factor to consider in determining whether they can easily be blinded by the klieg lights of publicity. Indeed, their 26-page Resolution carries no indubitable indicia of bias for it does not appear that they considered any extra-record evidence except evidence properly adduced by the parties. The length of time the investigation was conducted despite its summary nature and the generosity with which they accommodated the discovery motions of petitioners speak well of their fairness. At no instance, we note, did petitioners seek the disqualification of any member of the DOJ Panel on the ground of bias resulting from their bombardment of prejudicial publicity.[21]

[20] 247 SCRA 652 (1995).

[21] 247 SCRA 652, 691-692 (1995).

B. Freedom of Association

Closely related to freedom of speech and the press is freedom of association. Freedom of association was the issue in *United Pepsi-Cola Supervisory Union (UPSU) v. Laguesma*.[22] The concrete issue was whether Article 245 of the Labor Code, in so far as it prohibits managerial employees from joining, assisting, or forming any labor organization violated Article III, Section 8 of the Constitution.

To fully appreciate the meaning of this decision, it is important to look at the history of the controversy. Prior to the Labor Code of 1974, everyone, including managerial employees, had the right to form unions. This was affirmed in *Caltex Filipino Managers and Supervisors Association v. Court of Industrial Relations*[23] which said that the right of managerial personnel to organize was "not merely a statutory creation" but something "fortified by our Constitution." Notwithstanding this pronouncement, however, Article 246 of the 1974 Labor Code prohibited managerial employees from joining, assisting, and forming any labor organization. Article 245 of the same Code also took away the right of security guards.

This was the situation when the 1986 Constitutional Commission reformulated Article III, Section 8 which now says "The right of the people including those employed in the public and private sectors to form associations, unions or societies for purposes not contrary to law shall not be abridged." The question posed by the ponencia in *United Pepsi-Cola* was whether the amended version in the 1987 Constitution, which inserted "whether employed by the State or private establishments," restored the right of managerial employees taken away by Article 246 of the 1994 Labor Code.

In resolving the issue the Court had recourse to the records of the Constitutional Commission and pointed to the fact that in his sponsorship of the insertion "whether employed by the State or private establishments" Commissioner Lerum expressed his desire to restore the right of supervisors and security guards. From this the ponencia drew the conclusion that whereas the right of supervisors and security guards had been restored, the right of managerial employees was not restored.

I suggest that the recourse to constitutional history by the Court did not go far enough. I suggest that the Court should have gone back all the way to the 1935 Constitution.

The original constitutional provision on the right to form associations was inserted in the Bill of Rights by the 1935 Constitutional Convention. The proposed provision read: "The right to form associations for purposes not contrary to law shall not be abridged." The proponent of the provision was Delegate Laurel and he had borrowed it from Article 20, title IV, of the Malolos Constitution; but, as Laurel himself admitted, the right, although not protected by explicit constitutional guarantee either in the American Constitution or in early Philippine constitutional law,

[22] G.R. No. 122226, March 25, 1998

[23] 47 SCRA 112 (1972).

was already a recognized constitutional right.[24] Hence, the focus of the debate was not on whether the right should be guaranteed but rather whether the phraseology of Laurel's proposal was a desirable one. The objection was to the phrase "for purposes not contrary to law." It was thought that the phrase would render the guarantee as useless because it could be interpreted by courts to mean that the existence or legality of associations depended on the whim of the legislature. But the meaning that was accepted was that the right was subject to a valid exercise of police power.[25] Thus it was that in the *Caltex* case the limitation on managerial employees was not considered a valid exercise of police power.

It is unfortunate that the 1974 Labor Code did not honor this meaning of the right. And it is even more unfortunate that *United Pepsi Cola* preferred not to follow the teaching of *Caltex*. But I believe that the outcome of *United Pepsi Cola* was perhaps dictated by an understanding of the right to unionize as necessarily including the right to bargain collectively and even to strike. I believe that this understanding could have been avoided if the discussion had been broadened to include Article XIII, Section 3 which says "It shall guarantee the rights of all workers to self-organization, collective bargaining and negotiations, and peaceful concerted activities, including the right to strike in accordance with law." Lerum himself, in defending this provision, said that the right to organize is not necessarily inseparable from the right to strike. And for that matter it is not inseparable from the right to bargain collectively as shown in Court decisions involving members of cooperatives.[26] In sum, therefore, I would suggest that managerial employees cannot be denied the right to organize even if they may be denied the right to strike.

C. Free Exercise and Non-Establishment

I come now to religion in the Constitution. In this regard, only the free exercise clause has come into significant play. The non-establishment clause played but a minor role.

> The Narvasa Court had occasion to deal with a revival of the Flag Salute Case. Almost thirty years earlier the Court in *Gerona v. Secretary of Education*,[27] had upheld the validity of the law requiring flag salute by students even against the contention that it did violence to free exercise of religion. The Court then, in what I have considered on other occasions as an illegitimate attempt to engage in theologizing, said: ["The flag is not an [religious] image but a symbol of the Republic of the Philippines, an emblem of national sovereignty, of national cohesion and of freedom and liberty which it and the Constitution guarantee and protect. Considering the complete separation of church and state in our system of government, the flag is utterly devoid of any religious significance. Saluting the flag conse-

[24] 3 Journal of the [1934] Constitutional Convention of the Philippines 1036 (Francisco ed., 1961).

[25] *Id.* at 1138-40.

[26] Cooperative Rural Bank of Davao City, Inc. v. Ferrer-Calleja, 165 SCRA.

[27] 106 Phil. 11 (1969).

quently does not involve any religious ceremony."] In *Ebralinag v. Division Superintendent of Schools of Cebu*,[28] however, the Narvasa Court equivalently said that, if for the Jehovah's Witnesses saluting the flag was a religious exercise, the Court must accept this judgment and respect the right of the witnesses not to be compelled to engage in it. By deciding thus, the Narvasa Court accepted half of the doctrine in *West Virginia State Board v. Barnette*,[29] which itself had reversed the *Gobitis* case[30] upon which the *Gerona* decision had relied. I say half of the *West Virginia* doctrine because, whereas the American Court declared a similar law unconstitutional, the Narvasa Court merely exempted the Jehovah's Witnesses from participating in flag ceremonies. Thus the Narvasa Court has left it to future Courts to make pronouncements on non-establishment issues that can be involved in conscientious objector cases that might arise in the future.

Ebralinag, moreover, was also treated as a freedom of speech issue. The Court said: ["The idea that one may be compelled to salute the flag, sing the national anthem, and recite the patriotic pledge, during a flag ceremony on pain of being dismissed from one's job or of being expelled from school, is alien to the conscience of the present generation of Filipinos who cut their teeth on the Bill of Rights which guarantees their right to free speech."][31]

Recall that Governor Roldan Dalman of Zamboanga del Norte displayed the Philippine flag red side up in protest against the Southern Philippines Couincil for Peace and Development. The action of Dalman did not sit well with government authorities bent on carving a niche for Misuari. We can only speculate on how the Narvasa Court might have dealt with it if Governor Dalman had been disciplined for his action?

The issue in *Ebralinag*, which involved a command to perform an act, must be distinguished from laws which inhibit action. *In Centeno v. Villalon-Pornillos*,[32] the Court ruled that solicitation of contributions in general may be regulated by general law for the protection of the public:

> [E]ven the exercise of religion may be regulated, at some slight inconvenience, in order that the State may protect its citizens from injury. Without doubt, a State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent. The State is likewise free to regulate the time and manner of solicitation generally, in the interest of public safety, peace, comfort or convenience.

[28] 219 SCRA 256 (1993).

[29] 319 U.S. 624 (1943).

[30] Minersville School District v. Gobitis, 310 U.S. 596 (1940).

[31] 219 SCRA 256, 270 (1993).

[32] 236 SCRA 197, 207 (1994).

This, however, was obiter, because the law in question did not prohibit solicitation for religious purposes but only solicitation of contributions for charitable or general welfare purposes. A concurring opinion, arguing from the 1957 case of *American Bible Society v. City of Manila*,[33] would consider the requirement of a permit for solicitation for religious purposes violative of the free exercise clause. Thus we have here another issue which the post-Narvasa Court may have to referee in the future.

The *American Bible Society* case also figured in *Tolentino v. Secretary of Finance*,[34] where the Philippine Bible Society had questioned the validity of the registration provisions of the Value Added Tax Law, R.A. No. 7716, as a prior restraint on religion. But the Court distinguished the earlier American Bible Society case thus:

> [I]n this case, the fee in §107, although a fixed amount (P1,000), is not imposed for the exercise of a privilege but only for the purpose of defraying part of the cost of registration. The registration requirement is a central feature of the VAT system. It is designed to provide a record of tax credits because any person who is subject to the payment of the VAT pays an input tax, even as he collects an output tax on sales made or services rendered. The registration fee is thus a mere administrative fee, one not imposed on the exercise of a privilege, much less a constitutional right.

The Court prefaced its discussion by saying that "as the U.S. Supreme Court unanimously held in *Jimmy Swaggart Ministries v. Board of Equalization*,[35] the Free Exercise of Religion Clause does not prohibit imposing a generally applicable sales and use tax on the sale of religious materials by a religious organization."[36] Analogy was made with treatment of newspapers. The Court said that cases "eschew any suggestion that 'owners of newspapers are immune from any form of ordinary taxation.'" Newspapers are subject to "generally applicable economic regulations without creating constitutional problems." But reference obviously is to publications which have the character of a business and not a purely apostolic operation.

Finally, as already mentioned, free exercise was also an issue in *Iglesia ni Kristo v. Court of Appeals*.[37] The Board of Review had prohibited the airing of petitioner's religious programs "for the reason that they [constituted] an attack against other religions and that they [were] indecent, contrary to law and good customs." Petitioners contended that the Board of Review should not review religious programs since such review would violate the free exercise clause. The Court replied with the traditional distinction between internal belief and external manifestation of belief.

> We thus reject petitioner's postulate that its religious program is per se beyond review by the respondent Board. Its public broadcast on TV of its religious program brings it out of the bosom of internal belief. Television is a medium that reaches even the eyes and ears of children. The Court

[33] 101 Phil. 386 (1957).

[34] 235 SCRA 630 (1994).

[35] 493 U.S. 378, 107 L. Ed.2d 796 (1990).

[36] 235 SCRA 630 (1994).

[37] G.R. No. 119673, July 26, 1996.

> iterates the rule that the exercise of religious freedom can be regulated by the State when it will bring about the clear and present danger of some substantive evil which the State is duty bound to prevent, i.e., serious detriment to the more overriding interest of public health, public morals, or public welfare. A laissez faire policy on the exercise of religion can be seductive to the liberal mind but history counsels the Court against its blind adoption as religion is and continues to be a volatile area of concern in our country today. Across the sea and in our shore, the bloodiest and bitterest wars fought by men were caused by irreconcilable religious differences. Our country is still not safe from the recurrence of this stultifying strife considering our warring religious beliefs and the fanaticism with which some of us cling and claw to these beliefs. Even now, we have yet to settle the near century old strife in Mindanao, the roots of which have been nourished by the mistrust and misunderstanding between our Christian and Muslim brothers and sisters. The bewildering rise of weird religious cults espousing violence as an article of faith also proves the wisdom of our rule rejecting a strict let alone policy on the exercise of religion. For sure, we shall continue to subject any act pinching the space for the free exercise of religion to a heightened scrutiny but we shall not leave its rational exercise to the irrationality of man. For when religion divides and its exercise destroys, the State should not stand still.

Having said that, however, the Court next invalidated the ban on the airing of the program reiterating the rule against prior restraint. The program contained mainly attacks on Catholic teaching. The Court said: "Deeply ensconced in our fundamental law is its hostility against all prior restraints on speech, including religious speech. Hence, any act that restrains speech is hobbled by the presumption of invalidity and should be greeted with furrowed brows." This was a repetition of the teaching of *Cantwell v. Connecticut*:[38]

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields, the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are prominent in church or state or even to false statements. But the people of this nation have ordained in the light of history that in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of democracy.
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> x x x

In x-rating the TV program of the petitioner, the respondents failed to apply the clear and present danger rule. In *American Bible Society v. City of Manila*, the Court held: "The constitutional guaranty of free exercise and enjoyment of religious profession and worship carries with it the right to disseminate religious information. Any restraint of such right can be justified like other restraints on freedom of expression on the ground that there is a clear and present danger of any substantive evil which the State has the right to prevent. . . ."

[38] 310 U.S. 296 (1940).

Now, however, the shoe is on the other foot. There is a weekly segment in the sitcom Bubble Gang which makes fun of the Iglesia program. That too will have to be immune from censorship.

So much for free exercise. The Narvasa Court also dealt with non-establishment but only as a peripheral issue in *Manosca v. Court of Appeals*.[39] The expropriation of the birthplace of Felix Y. Manalo, founder of Iglesia ni Kristo, for the purpose of preserving it as a historical landmark, was upheld as for "public use" under the broadened definition of public use. The non-establishment objection was answered by the argument that whatever benefits the adherents of Iglesia would reap would only be incidental to the public historical purpose. Thus the Court paid its debt to non-Catholic religions by balancing the favor to the Catholic Church first done in *Aglipay v. Ruiz*.[40]

D. Right to Privacy

I come now to the right to privacy which was affirmed in *Ople v. Torres*[41] Ople invalidated Administrative Order (A.O.) No. 308 entitled "Adoption of a National Computerized Identification Reference System" on two constitutional grounds: first, that it was a usurpation of legislative power and second, that it violated the right to privacy.

I am gratified that A. O. No. 308 was invalidated. I agree that it should be invalidated on the ground that it is a usurpation of legislative power. An administrative order can only implement policy; it cannot create policy that has serious implications on personal rights. A.O. No. 308 did precisely that.

I believe, in fact, that A.O. No. 308 was a product of frustration. For some time the executive department had thought that there was a crying need for a national ID system. Unfortunately, however, bills for that purpose filed in the Batasan and later in 1988, 1990 and 1992 in Congress did not get anywhere. In the memorable language of Amendment No. 6, Congress failed or was unable to act adequately on the matter. Hence, in a style reminiscent of the already discarded Amendment No. 6, President Ramos issued the Administrative Order. Plainly, however, it was a usurpation of legislative power.

The Administrative Order, however, was also invalidated on the ground that it violated the right to privacy. I, however, would tend to agree with the separate opinions which say that judgment on the matter of privacy rights should await the form of a national identity system which Congress might enact. But I do not regret that the ponencia had an extended disquisition on the dangers of biometrics. It will also be useful should the proposed tax amnesty measure, with its compulsory requirement of reporting all assets, should go to the Court — as I anticipate it will.

[39] 252 SCRA 412 (1996).

[40] 64 Phil 201 (1937).

[41] G.R. No. 127685, July 23, 1998.

Whether through legislation or through executive action, computerization of personal data in the various agencies of government is bound to happen. Computerization is the wave of the future and the benefits that can come from it are enormous. I don't know of any body who advocates that government destroy its computers. The ponencia itself acknowledges that biometrics can be very useful. What decision makers, both executive and legislative, should do now, as we begin to construct the government information structure, is to study the experience of other countries and learn from them how they meet the threats to human rights that can come from computerized personal information. The valuable contribution of the ponencia in *Ople v. Torres* is that it sets down in great detail the dangers that can come from biometrics — especially in a society where distrust of government is a deeply ingrained conviction.

Literature on the subject has identified at least three threats that can come from government use of computerized personal data. First is invasion of privacy. The traditional notion of privacy is tied to physical space. But computer information is not confined to physical space. Moreover, privacy traditionally refers to intimate personal matters. Fluid digital data, however, makes no distinction between what is merely personal information in a general sense and what is sensitive intimate information. Both are accessible through computers without the knowledge of the subject.

Another threat is referred to in literature as bureaucratic injustice. Justice requires not only that decisions be cost-efficient and accurate but also that they respect the dignity of the subjects. Dignity is preserved when the process makes it possible for subjects to understand the reasons behind decisions about them.

A third threat is to personal autonomy. Administrative decisions based on computerized personal data can inhibit a subject's capacity for personal assessment and participation in decisions on social and political matters that affect him.

These enumerated threats are the concerns of what in other countries is developing as Data Protection Law. Such law is premised on the assumption that no person has an absolute right to control his individual data. A person's individual right must be balanced against the state's duty not only to control crime and assure security but also to distribute benefits and services accurately and efficiently.

The object of data protection law, however, is not just protection of data. The more important object is the protection of persons about whom data are gathered, examined, shared and made the basis of administrative decisions. The developing law on the subject reflects three elements that are required: transparency, limited procedural and substantive rights, and an independent data protection "ombudsman." Those planning to work on legislation on the subject well be well advised to study carefully the ponencia in Ople. What is fundamentally wrong about A.O. No. 308 which places the responsibility of creating an information system in the hands of bureaucrats alone is that, even if these have the expertise, they do not have the authority to provide the necessary safeguards. Providing for rules of transparency in the system as well as procedural and substantive rights for subjects can only be done through legislation.

II. CONSTITUTIONALISM IN THE CRIMINAL PROCESS

A. Search and Seizure

I come now to a consideration of the criminal process. Constitutionalism in the criminal process covers a wide range of topics. In dealing with such topics, the Narvasa Court has performed the task not only of preserving traditional teaching on the subject but also of keeping pace with new developments brought about by both the influence of American jurisprudence and by new provisions that have been introduced in the 1987 Constitution.

Among the perennial topics in criminal litigation is the search and seizure clause. Most of the cases taken up by the Narvasa Court on this subject were routine applications of long established doctrine. But there have been a number of novel issues and some clarification of old issues. These include the seat of the authority to issue warrants, basis for the determination of probable cause, probable cause in seizure of movie or television tapes, and warrantless searches and seizures.

The fundamental principle, rejected by the 1973 Constitution, is that only a judge may issue a search warrant or a warrant of arrest. This principle has been restored by the 1987 Constitution. Thus once again the Commission on Immigration may not issue warrants of arrest except for the purpose of carrying out a deportation order that has already become final.[42] Similarly the Presidential Commission on Good Government (PCGG) may not. But the PCGG may issue a sequestration order provided that it is supported by prima facie evidence.[43]

The existence of probable cause, moreover, must, in the language of the Constitution, "be determined personally by the judge after examination under oath of the complainant and the witnesses he may produce." This language has raised the question whether the judge in every case must personally examine the witness. But on the basis of the sentence construction it can be seen that the adverb "personally" modifies the verb "determined." It cannot modify the noun "examination" first because it is set apart from the noun and second because grammatically an adverb does not modify a noun. Thus it is now firmly established that a judge can leave examination of witnesses to a prosecutor. But a note of caution has been added: "By itself, the Prosecutor's certification of probable cause is ineffectual. It is the report, the affidavits, the transcripts of stenographic notes (if any), and all other supporting documents behind the Prosecutor's certification which are material in assisting the Judge to make his determination."[44]

On the matter of video tapes, an early decision gave the impression that in every instance of an application for a search warrant for contraband video tapes, the production of the master tapes of copyrighted films from which copies are alleged to

[42] Board of Commissioners v. de la Rosa, 197 SCRA 853, 879 (1991).

[43] Republic v. Sandiganbayan, 255 SCRA 438.

[44] People v. Inting, 187 SCRA 788, 792; Lim v. Felix, 194 SCRA 292, (1991); Roberts, Jr. v. Court of Appeals, 254 SCRA 307.

have been made was essential. "The court," the decision said, "cannot presume that duplicate or copied tapes were necessarily reproduced from the tapes that [the complainant] owns."[45] This was a source of joy not only for video tape rental companies but also for video tape lovers. But the joy was short-lived since a later ruling read the earlier decision as merely setting down a guidepost for determining probable cause where there is doubt as to the true nexus between the original and the copy.[46] The ruling was also an occasion for reiterating that what is required for warrants is only probable cause and not proof beyond reasonable doubt.

Finally, warrantless searches and warrantless arrests. On this subject, it is easy enough to enunciate principles. The actual application of the principles, however, can occasion controversies because application depends very much on an evaluation of circumstances which are often enough characterized by ambivalence. But there have been clear illustrative cases.

It is established for instance that moving vehicles may be searched without warrant when in the judgment of searching officers there is probable cause that the vehicle is involved in illegal activity. The reason is clear enough: if the police officer must first go to court to obtain a warrant, the vehicle will not be there when he comes back. This has application not only to rolling stock but also to water vehicles.[47] The requirements are that there must be both probable cause and an element of urgency.

Probable cause is usually obtained from confidential reports or from surveillance.[48] Thus, where motorists have not given evidence of suspicious behavior nor had the searching officers received any confidential information, the warrantless search is not justified. [I shall not discuss check-points, even if they are interesting, because the decisions on checkpoints took place before the time frame of this study.]

On warrantless arrests let me just take up two cases. First, *Malacat v. Court of Appeals*,[49] a "stop and frisk" case. A "stop and frisk" according to the Court serves two legitimate interests: (1) the general interest of effective crime prevention and detection, which permits a police officer, under appropriate circumstances and in an appropriate manner, to approach a person for purposes of investigating possible criminal behavior even without probable cause; and (2) the more pressing interest of safety and self-preservation which allows the police officer to take steps to assure himself that the person with whom he deals is not armed with a deadly weapon that could unexpectedly and fatally be used against the police officer. *Terry v. Ohio*[50] de-

[45] 20th Century Fox Films v. Court of Appeals, 164 SCRA 655; Columbia Pictures, Inc. v. Court of Appeals, 237 SCRA 367.

[46] Columbia Pictures v. CA, 261 SCRA 144.

[47] See Hizon v. Court of Appeals, 265 SCRA 517, as regards warrantless seizure of vessels breaching fishery laws.

[48] Mustang Lumber, Inc. v. Court of Appeals, 257 SCRA 517.

[49] Macalat v. Court of Appeals,283 SCRA 159, 177.

[50] Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L.ed.2d 889 [1968].

fined "stop and frisk" as a "limited protective search of outer clothing for weapons." I would emphasize "for weapons," because self-protection of police officers is what justifies the rule. Terry also held that while probable cause is not required to conduct a "stop and frisk," mere suspicion or a hunch would nevertheless fail to validate a "stop and frisk." A genuine reason must exist, in light of the police officer's experience and surrounding conditions to warrant the belief that the person frisked had weapons concealed about him. Where these are not satisfied, the fruit of the resulting warrantless seizure is inadmissible. The search in Malacat was declared unlawful.

The more intriguing case is the en banc decision of *People v. Montilla*.[51] Briefly, the circumstances were as follows: According to the policemen, the day before the arrest, at around 2:00 p.m., an informer told them that a drug courier (whom the informer could recognize by face) would be arriving the next day with marijuana. When the alleged courier arrived, the informant pinpointed him. Upon being searched after alighting from a vehicle, he was found with 28 kilos of marijuana bricks in a traveling bag and a carton box.

The accused contended that the warrantless search was illegal because as early as 2:00 p.m. the previous day, the policemen had already been tipped off and could have obtained a warrant, but did not. The Court answered that, even assuming that the policemen had not been pressed for time, this was beside the point for, under the circumstances, the information relayed was too sketchy to obtain a warrant. While there was indication that the informant knew the courier, the records did not reveal that the informant knew him by name. Thus probable cause for the police came only when the informant pinpointed him.

What then justified the warrantless search? It could not have been the exception for moving vehicles because the accused had already alighted from the moving vehicle. It will be recalled that in *People v. Lo Ho Wing*,[52] the police allowed the accused, upon arrival at the Ninoy Aquino International Airport (NAIA), to first board a taxi before apprehending him. Lo Ho Wing was then in a moving vehicle when arrested. In this case, however, appellant Montilla was firmly planted on the ground when searched.

Was it then a case of in flagrante delicto? In in flagrante searches the valid arrest precedes the search. Here the search preceded the arrest. But the Court nevertheless said that there had been an in flagrante arrest. In the explanation, the judicial language becomes fuzzy. The Court says: "On the other hand, the apprehending officer must have been spurred by probable cause in effecting an arrest which could be classified as one in cadence with the instances of permissible in flagrante arrests. The conventional view is that probable cause, while largely a relative term the determination of which must be resolved according to the facts of each case, is understood as having reference to such facts and circumstances which could lead a reasonable, discreet and prudent man to believe and conclude as to the commission

[51] People v. Montilla, 285 SCRA 703.

[52] People v. Lo Ho Wing, 193 SCRA 122.

of an offense, and that the objects sought in connection with the offense are in the place sought to be searched."

The problem with such language, however, is that in in flagrante arrests what is needed, as I understand decisions on the subject, is not probable cause but actual knowledge. But the Court adds: "If the courts are to be of understanding assistance to our law enforcers, it is necessary to adopt a realistic appreciation of the physical and tactical problems of the latter, instead of critically viewing them from the clinical environment of judicial chambers."

Having said this, the en banc Court proceeded to embark on a statement which might well be a the new doctrine on in flagrante arrests. It goes on to say:

Parenthetically, it is time to observe that the evidentiary measure for the propriety of filing criminal charges and, correlatively, for effecting a warrantless arrest, has been reduced and liberalized. In the past, our statutory rules and jurisprudence required prima facie evidence, which was of a higher degree or quantum, and was even used with dubiety as equivalent to "probable cause." Yet, even in the American jurisdiction from which we derived the term and its concept, probable cause is understood to merely mean a reasonable ground for belief in the existence of facts warranting the proceedings complained of, or an apparent state of facts found to exist upon reasonable inquiry which would induce a reasonably intelligent and prudent man to believe that the accused person had committed the crime.

Felicitously, those problems were clarified, at least on the issue under discussion, by the 1985 amendments to the Rules of Court, i.e., Rule 112, §1 was re-worded, thus the quantum of evidence in preliminary investigation was evidence which would suffice to engender a well founded belief as to the fact of the commission of a crime and the respondent's probable guilt thereof. It has the same meaning as the related phraseology used in other parts of the same Rule, i.e., that the investigating fiscal "finds cause to hold respondent for trial" or where "probable cause exists." (Rule 112, §4, pars. 1 and 4) It should, therefore, be in that sense, wherein the right to effect a warrantless arrest should be considered as legally authorized.

This reasoning had the concurrence of eight Justices, while four expressed reservations. I submit that this is not the end of this issue. It is possible that the concurring justices had in mind the saving grace of waiver. As the ponencia itself had it: "After all, the right against unreasonable searches may be waived, expressly or impliedly. Thus, while it has been held that the silence of the accused during a warrantless search should not be taken to mean consent to the search but as a demonstration of that person's regard for the supremacy of the law, appellant's case is different for, here, he spontaneously performed affirmative acts of volition by himself opening the bag without being forced nor intimidated, which acts should properly be construed as a clear waiver of his right."

That, I suggest, saved the day, and a revised doctrine on in flagrante arrests did not ensue.

B. Section 12 Rights

One topic that has received extensive attention is what has come out as the Philippine version of the Miranda doctrine. A key issue in the application of the

Miranda rule is the determination of the point when the Miranda rights begin to become available. The accepted rule, under the 1973 Constitution, following Escobedo and Miranda, was, from the start, that the rule covered only situations where the person was already in custody. For this reason Escobedo had referred to them as rights "under custodial investigation."[53] Significantly, however, the pre-EDSA Court, in *Galman v. Pamaran*,[54] departed from this rule. The Court sustained the contention of General Ver that the provision covered even persons not yet in custody but already under investigation because the 1973 text did not speak of "custodial" investigation. It spoke only of persons under investigation.

The text of the 1987 Constitution has preserved the phrase "person under investigation" without the word "custodial." But the discussions on the floor of the 1986 Constitutional Commission manifest an intent, in the light of experiences during martial law, to expand the coverage of the right to situations when a person is not yet in custody but is already a focus of police attention. Jurisprudence under the 1987 Constitution, however, has consistently held, following Escobedo, the stricter view, that the rights begin to be available only when the person is already in custody. This is emphasized by the Narvasa Court in *People v. Marra*:[55]

Custodial investigation involves any questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. It is only after the investigation ceases to be a general inquiry into an unsolved crime and begins to focus on a particular suspect, the suspect is taken into custody, and the police carries out a process of interrogations that lends itself to eliciting incriminating statements that the rule begins to operate.

In a later case but obiter in *People v. Maqueda*,[56] there was an approving advertence to the view in the Constitutional Commission that the rights are available even to one who is not yet in custody. My understanding, however, is that now there is no intramural conflict in the Court on this subject and the strict view prevails.

Subsumed under this must be the question whether a person placed in a police line-up comes under the Miranda rule and is thus entitled to counsel. The rule on this, first enunciated en banc in *Gamboa v. Judge Cruz*,[57] was premised on the principle that "The right to counsel attaches upon the start of an investigation, i.e., when the investigating officer starts to ask questions to elicit information and/or confessions or admissions from the respondent/accused." The Court said that this is normally not the situation in a police line-up but that "the moment there is a move or even an urge of said investigators to elicit admissions or confessions or even plain information which may appear innocent or innocuous at the time, from said sus-

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[53] People v. Caguioa, 95 SCRA 2, 9.

[54] Galman v. Pamaran, 138 SCRA 294, 319.

[55] 236 SCRA 565, 573.

[56] People v. Maqueda, 242 SCRA 565, 587.

[57] Gamboa v. Judge Cruz, 162 SCRA 642, 648, 651.

pect, he should then and there be assisted by counsel, unless he waives the right; but the waiver shall be made in writing and in the presence of counsel."

It is significant that in this case the petitioner was already in police custody when placed in a line-up. Nevertheless, there was no affirmance of the Section 12 right to counsel. There was a contrary assertion by a division in *People v. Macam*,[58] which said that the police line up is a critical stage in the investigation and thus entitles a person in custody to counsel. But the statement was obiter because the prosecution did not make use of the line-up results. Moreover, Macam is belied by other cases[59] loyal to Gamboa.

What all this amounts to is that the Section 12 rights are activated when two elements concur: police custody and investigation. Thus, investigation by the Court Administrator does not come under Section 12 because there is no "police custody."[60] Thus too spontaneous statements even when made before police officers are not covered by Section 12 because they do not come out in an investigation.[61]

Among the most important Section 12 rights is the right to counsel. In this respect the Philippine rule has elaborated on *Miranda* and *Escobedo*. Section 12 says that the right is to "competent counsel preferably of one's choice." In this matter the Court has set high standards for compliance. For instance, the Court has demanded that counsel be present during the entire period of investigation. In a 1990 case, where an extrajudicial confession had been made in the absence of counsel but where at the closing stage of the interrogation counsel arrived and had the opportunity to read the statement and discuss it with the client, the Court allowed admission of the evidence. The Court ruled that there had been substantial compliance.[62] This, however, was corrected in *People v. Lucero*,[63] and a similar case, *People v. Rous*,[64] where in the middle of the investigation the lawyer had left to attend a wake, came back when the accused had already signed his statement and affirmed that he did it voluntarily. The Court ruled that the right to counsel was a right to effective counsel from the first moment of questioning and all throughout. Moreover, the counsel must be independent. Thus, a lawyer supplied by the National Bureau of Investigation (NBI)

[58] People v. Macam, 238 SCRA 306, 314.

[59] People v. Dimaano, 209 SCRA 819; People v. Hatton, 210 SCRA 1; People v. Santos, 221 SCRA 715; People v. Frago, 232 SCRA 653. See however People v. Alshaika, 261 SCRA 637, 645, where the Courts Third Division declared that it would not hesitate to invalidate inherently suggestive lineups on ground of due process, especially when conducted in the absence of counsel.

[60] Court Administrator v. Sumilang, 271 SCRA 316.

[61] People v. Andan, 269 SCRA 95.

[62] Estacio v. Sandiganbayan, 183 SCRA 12, 18-19.

[63] People v. Lucero, 244 SCRA 425. See also People v. de Jesus, 213 SCRA 345; People v. Bandula, 232 SCRA 566; and People v. Paule, 261 SCRA 649.

[64] People v. Rous, 242 SCRA 742.

who was also an applicant for admission to the NBI would have dubious independence at best.[65]

The protective mantle of Section 12 covers both "confessions" and "admissions." The text of the Constitution itself indicates this. The difference between a confession and an admission is found in Rule 130 of the Rules of Court. An admission is the "act, declaration or omission of party as to a relevant fact" (Rule 130, Section 26), whereas a confession is the "declaration of an accused acknowledging his guilt of the offense charged, or of any offense necessarily included therein." (Rule 130, Section 33).

Confessions or admissions covered by the provision, however, need not be explicit; they can be merely implicit in any evidence that is communicative in nature. Thus, the signature of an accused on a receipt for seized property[66] or marijuana cigarettes where the accused wrote his name is not admissible.[67] However, being stripped of clothes or photographed is neither an admission nor a confession.[68] It is merely exhibition.

The right to counsel, like the other Section 12 rights, may be waived. But the Constitution now requires that the waiver be made in writing and with the assistance of counsel. For a while there was some confusion about the date when this rule became applicable. A Narvasa Court ruling has cleared this up. Under the 1973 Constitution, it was only a judge-made rule which started with *Morales v. Enrile Jr.*,[69] which was promulgated on April 26, 1983. This is the starting point of the rule and, following the doctrine in *Magtoto v. Manguera*,[70] it is not a retroactive rule.[71]

Finally, when does the applicability of Section 12 rights end? The criminal process includes a series of steps: the investigation prior to the filing of charges, the preliminary examination and investigation after charges are filed, and the period of trial. The Miranda rights or the Section 12(1) rights were conceived for the first of these three phases, that is, when the inquiry is under the control of police officers. It is in this situation that the psychological if not physical atmosphere of custodial investigations, in the absence of proper safeguards, is inherently coercive.[72] Outside of this situation, Section 12(1) no longer applies. But Sections 14 and 17 come into play. For this reason Section 12(1) does not apply to persons under preliminary investigation or already charged in court for a crime for these are already under

[65] People v. Januario, 267 SCRA 608.

[66] People v. de Guzman, 194 SCRA 601; People v. de las Marinas, 196 SCRA 504; People v. Bandin, 226 SCRA 299.

[67] People v. Enriquez, Jr., 204 SCRA 674.

[68] People v. Paynor, 264 SCRA 615, 627.

[69] Morales v. Enrile, 121 SCRA 538.

[70] Magtoto v. Manguera, 63 SCRA 4, 12 (1975).

[71] Filoteo v. Sandiganbayan, 263 SCRA, 222, 258-260.

[72] Miranda v. Arizona, 384 U.S. 436, 448-58 (1966).

supervision of a court.[73] It is for this reason that an extrajudicial confession sworn to before a judge even without assistance of counsel enjoys the mark of voluntariness.[74] Conceivably, however, even after charges are filed, the police might still attempt to extract confessions or admissions from the accused outside of judicial supervision. In such situation, Section 12(1) would still apply. But outside of such situation, the applicable provisions are Section 14 and Section 17.

C. Death Penalty

I come now to what I consider the most important decision of the Supreme Court on constitutionalism and the criminal process. I refer to the Court's total legitimation of R.A. No. 7659 which restored the death penalty.

The 1987 Constitution did away with the imposition of the death penalty. But the abolition was not absolute. It said that the death penalty could not be imposed "unless for compelling reasons involving heinous crimes, the Congress hereafter provides for it." Congress did provide for it through R.A. No. 7659 — and with a vengeance.

My first observation on this is that, although it is Congress that restores the death penalty, in the ultimate analysis, it is not Congress that imposes the death penalty. Judges make the ultimate decision. For that reason, there is a mandatory review of the death penalty by the Supreme Court.

It has been my view that the constitutional law on the death penalty today is not the same as what it was before the 1987 Constitution. Under the old regime, if a person was convicted of a capital offense whose commission was accompanied by an aggravating circumstance not balanced by a mitigating circumstance, the judge had no other choice but to impose the highest penalty. That was what the law said. It is not as simple as that any more. It is my view that the new Constitution has made a big difference.

The new Constitution says that the death penalty may be imposed only "for compelling reasons involving heinous crimes." What this means is that the crime as concretely committed must be heinous, that is, characterized by utter depravity, and there must be "compelling reasons" for putting the concrete offender to death; that is, the criminal's death must be demanded by necessity.

It is true that Congress has enumerated the crimes which it considers "heinous" and which in its judgment present "compelling reasons" for putting the offender to death. But legislative definitions are not always conclusive on the courts. For instance, when a law calls an office "primarily confidential," courts do not accept such categorization without inquiry into whether indeed the office is primarily confidential. Legislative definitions which depend on factual situations need verification especially if rights of the highest order are at stake. The right to life is such right.

[73] People v. Ayson, 175 SCRA 216, 232.

[74] People v. Pamon, 217 SCRA 501; People v. Baello, 224 SCRA 218; People v. Parajinog, 203 SCRA 673.

Jurisprudence puts it this way. There is a distinction between "legislative facts" and "judicial facts."[75] Legislative facts are data which give to a legislative body reasonable ground for enacting a law intended to respond to such factual findings. By necessity, the legislative response can only be a general one because legislatures cannot possibly be expected to be thinking of all possible varieties of situations calling for a response. Under such generality, for a court to impose death, the court must be able to point to "judicial facts" which establish a link between the offense as committed and the reality which the penal law envisions as deserving of the highest penalty. Hence, while the law might consider an act in the abstract as "heinous," the actual offense committed may not be so at all. The law might have one definition for a crime; but the actual manner in which the crime is committed may vary depending on the accompanying circumstances. The judge cannot afford to be so cavalier as to simply say in detached judgment: "The law calls it heinous; it must be heinous. Amen."

In *People v. Echagaray,*[76] which upheld the validity of R.A. No. 7659 as well as the imposition of death on the accused, there is a valuable disquisition on the meaning of heinousness:

> The evil of a crime may take various forms. There are crimes that are, by their very nature, despicable, either because life was callously taken or the victim is treated like an animal and utterly dehumanized as to completely disrupt the normal course of his or her growth as a human being. The right of a person is not only to live but to live a quality life, and this means that the rest of society is obligated to respect his or her individual personality, integrity and the sanctity of his or her own physical body, and the value he or she puts in his or her own spiritual, psychological, material and social preferences and needs. Seen in this light, the capital crimes of kidnapping and serious illegal detention for ransom resulting in the death of the victim or the victim is raped, tortured, or subjected to dehumanizing acts; destructive arson resulting in death and drug offenses involving minors or resulting in the death of the victim in the case of other crimes; as well as murder, rape, parricide, infanticide, kidnapping and serious illegal detention where the victim is detained for more than three days or serious physical injuries were inflicted on the victim or threats to kill him were made or the victim is a minor, robbery with homicide, rape or intentional mutilation, destructive arson, and carnapping where the owner, driver or occupant of the carnapped vehicle are killed or raped, which are penalized by reclusion perpetua to death, are clearly heinous by their nature.

It is difficult to disagree with what it says. Then the Court goes on to say:

> We have no doubt, therefore, that insofar as the element of heinousness is concerned, R. A. No. 7659 has correctly identified crimes warranting mandatory penalty of death. As to the other crimes in R.A. No. 7659 punished by reclusion perpetua to death, they are admittedly no less abominable than those mandatorily

[75] People v. Ferrer, 48 SCRA 382, 409.

[76] People v. Echegaray, 267 SCRA 682, 721-2, 722-3 and 725.

> penalized by death. The proper time to determine heinousness in contemplation of law is when, on automatic review, we are called to pass on a death sentence involving crimes punishable by reclusion perpetua to death under R.A. 7659, with the trial court meting out the death sentence in exercise of judicial discretion. This is not to say, however, that the aggravating circumstances under the Revised Penal Code need be additionally alleged as establishing heinousness of the crime for the trial court to validly impose the death penalty in the crimes under R.A. No. 7659 which are punished with the flexible penalty of reclusion perpetua to death.

I find myself in agreement with the Court with regard to offenses where the death penalty is not mandatory. With respect to the mandatory death penalty, however, I find it difficult to reconcile Echagaray with the text of the Constitution. The Court admits that the crimes for which death is not mandatory "are admittedly no less abominable than those mandatorily penalized by death." But in regard to these Congress has preserved judicial discretion. Should not Congress rather preserve judicial discretion with respect to all capital crimes? When the Constitution prescribes mandatory review of death sentences, the review must include an examination whether in fact the crime as committed was heinous. Congress may not deprive the Court of this right. The power given by the Constitution to the Court is total. The Court may even take up matters not raised on appeal. The power of the Court may not be chipped away by Congress by dictating to the Court a single mandatory penalty of death.

How about the matter of "compelling reasons"? Even if the offense committed is in fact heinous, there is still the added question of whether putting the criminal to death is compelled by necessity. The Constitution says that death may be imposed only for "compelling reasons."

On this point the Court says:

> Article III, Section 19(1)of the Constitution simply states that Congress, for compelling reasons involving heinous crimes, may re-impose the death penalty. Nothing in said provision imposes a requirement that for a death penalty bill to be valid, a positive manifestation in the form of a higher incidence of crime should first be perceived and statistically proven following the suspension of the death penalty. Neither does the said provision require that the death penalty be resorted to as a last recourse when all other criminal reforms have failed to abate criminality in society. It is immaterial and irrelevant that R.A. No. 7659 cites that there has been an "alarming upsurge of such crimes," for the same was never intended by said law to be the yardstick to determine the existence of compelling reasons involving heinous crimes. Fittingly, thus what R.A. 7659 states is that "Congress, in the interest of justice, public order and rule of law, and the need to rationalize and harmonize the penal sanctions for heinous crimes, finds compelling reasons to impose the death penalty for said crimes."

My own thinking on this is that the matter of "compelling reasons" is a policy question which is a matter for Congress to decide. There are no standards easily discoverable by the Court on this subject. Hence, provided the crime is truly heinous as found in a concrete case, it is legitimate for the Court to accept the conclusion of Congress that there are compelling reasons for imposing the death penalty.

In this connection I had on another occasion quoted the view of Pope John Paul II in his encyclical Evangelium Vitae (Gospel of Life). The Pope places the death penalty in the context of the right of self-defense. Society has a right of self-defense. The death penalty may be imposed if it is compellingly necessary to put an individual to death for the protection of society. This, the Holy Father says, would be very rare. He says: "It is clear that, for this purpose to be achieved, the nature and extent of the punishment must be carefully evaluated and decided upon, and ought not go to the extreme of executing the offender except in cases of absolute necessity: in other words, when it would not be possible otherwise to defend society."

Thus the Pope recognizes that there can be compelling reasons for imposing the death penalty. But as he describes it, the instances would be very rare. Hence I would join the call of Senate President Fernan for an examination of the death penalty law whose tone seems to see the death penalty as the remedy for every conceivable evil. The next thing you know someone will ask for the death penalty for those who use Viagra.

Finally, is the death penalty cruel and unusual punishment? The manner of carrying it out can be cruel and unusual. Thus, for instance, in Furman v. Georgia,[77] the arbitrariness of the manner in which the death penalty was imposed was found to be unacceptable. States later adjusted to the Furman decision and succeeded in formulating an acceptable procedure. For me, the fact that the Constitution allows its imposition is conclusive that by itself the penalty of death is not constitutionally cruel and unusual.

III. CONSTITUTION OF GOVERNMENT

A. Constitutionalism and the Legislative Process

The substance of our legislative process today, as with much of our constitutional system, is a transplant from the Federal Constitution of the United States. We have made innovations; but the American substance is very much present. The Narvasa Court has had on a number of occasions found it necessary to wrestle with issues not only of legislative substance but also of legislative procedure.

In Northern Securities Co. v. United States,[78] the great Justice Holmes said that "Great cases like hard cases make bad law." This was also used to describe the

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[77] Furman v. Georgia 408 U.S. 238 (1972). *See* however Echegaray v. Secretary of Justice, et al., G.R. No.132601, October 12, 1998, as regards the death penalty statute of the Philippines.

[78] Northern Securities Co. v. United States, 193 U.S. 197, 400-1 (1904). The maxim, it would appear, is 19 (1854).

Supreme Court decision in Javellana v. Executive Secretary [79] which announced the effectivity of the 1973 Constitution. It is tempting to compare the splintering of the Supreme Court opinion on the VAT law in Tolentino v. Secretary of Finance [80] with the division in Javellana. But whatever critics might say about the majority opinion in Tolentino, one thing it cannot be accused of is unclarity. The opinion is luminously clear and commentators will know exactly what to agree or disagree with.

The longest time is spent by the opinion on procedural issues: the origination of the bill, the certification of the bill and the consequences of certification, the actions taken by the conference committee, the "enrolled bill" rule, and the completeness of the title of the bill. Some old doctrines are repeated and others proposed for the first time. Much of what is said in the decision is bound to stay with Philippine jurisprudence for a long, long time.

A good place to start is the origination clause. The constitutional rule is that revenue bills must originate exclusively from the House of Representatives.[81] What this means, according to the decision, is simply that the House alone can initiate the passage of a revenue bill. If the House does not initiate one, no revenue law will be passed. But once the House has approved a revenue bill and passed it on to the Senate, the Senate can completely overhaul it — by amendment of parts or by amendment by substitution — and come out with one completely different from what the House approved. In fact, it does not matter whether the Senate already anticipated a bill from the House and formulated one to take the place of whatever the House might send. Textually, as the opinion says, it is the "bill" which must exclusively originate from the House; but the "law" itself, which is the product of the total legislative process, originates not just from the House, but from both Senate and House, because ours is a bicameral system where one House is not superior to the other. This, to my mind, is a very valuable distinction.

The reason for the rule that revenue bills must originate from the House of Representatives is that, since taxation touches the daily life of people very intimately, the initial decision whether new taxes should be laid upon the shoulders of people should be made by that part of Congress which presumably is closer to the people. The House of Representatives is that body. It is, however, important to emphasize that, having initiated the move to lay additional burdens on the people and having passed its work on for concurrence to the Senate, the House is not thereby freed from the responsibility of protecting the people from unreasonable burdens the Senate might decide to add. In Tolentino the House simply accepted what the Senate had to offer.

The other important procedural issues resolved by the Supreme Court were: (1) the requirement that the three "readings" be held on three separate calendar days; (2) the required factual basis for presidential certification of a bill; and (3) the consequences of such certification. The treatment of these issues is a first in Philippine jurisprudence.

[79] Javellana v. Executive Secretary, 50 SCRA 30.

[80] *Supra* note 3.

[81] PHIL. CONST. Art. VI, §24.

The constitutional rule is that no bill becomes a law "unless it has passed three readings on separate days, and printed copies thereof in its final form have been distributed to its members three days before its passage." What lies behind this rule is sad experience. The 1934 Constitutional Convention noted the tendency of legislators, on the last day of the legislative year when legislators were eager to go home, to rush bills through and to insert matters which would not otherwise stand scrutiny in leisurely debate. The idea of the 1934 change was to force legislators to count one to ten before making a final plunge of approval.

It is not disputed that the second and third readings of Senate Bill (S.B.) No. 1630 were held on the same day, March 24, 1994. In justifying this action the Court quoted Article VI, Section 26(2) on certified bills. However, the quotation made by the Court was truncated. It said that the three readings on separate days were required "except when the President certifies to the necessity of its immediate enactment, etc." The "etc." is in the quotation. The "etc." was made to stand for "to meet a public calamity or emergency." This phrase was not in the 1935 Constitution. But having clouded this crucial phrase under "etc.", the decision then went on to justify the departure from the rule on three readings by citing a 1968 example decided under the 1935 Constitution. However, under the 1935 Constitution there was no need to cite any emergency or calamity but only the decision of the President. Under the 1987 Constitution there is. What the calamity or emergency was in relation to the VAT Law we were not told.

I suppose this was one of those founts of presidential joy referred to by President Ramos when he said in a speech that the VAT decision was an act of "judicial statesmanship," however you might understand that phrase. It probably means that judicial statesmanship can take the form of judicial preterition of constitutional rules which can impede executive and legislative action.

The Court next dealt with the scope of the power of the bicameral conference committee. The conference committee is a tool of a bicameral Congress. It is not a constitutional body. It is a creation of Congress. Its function is to propose to Congress ways of reconciling conflicting provisions found in the Senate version and in the House version of a bill. It thus performs a necessary function in a bicameral system. However, since it has merely delegated authority from Congress, it should not do what Congress cannot do. But in effect the decision allows the conference committee to do otherwise.

In great detail, a dissenting opinion laid out the completely new provisions inserted through the instrumentality of the conference committee. These were provisions found neither in the bill approved by the Senate nor in that approved by the House. Moreover, the process of insertion was accomplished by the conference committee in "executive session" — while no one was allowed to peep in.

The majority's answer was that American practice allows insertion of new materials, provided they are "germane" to the bill's subject. Likewise the majority said American practice allows meetings in executive session.

What I find missing here is any attempt to show how the American practice, based on the American constitutional text, can be compatible with elements in the Philippine text not found in the American counterpart. There are as a matter of fact

significant differences in the degree of freedom American legislators have. The only rule that binds the Federal Congress is that it may formulate its own rules of procedure. For this reason, the Federal Congress is master of its own procedures.

It is different with the Philippine Congress. Our Congress indeed is also authorized to formulate its own rules of procedure — but within limits not found in American law. For instance, there is the "three readings on separate days" rule. Another important rule is that no amendments may be introduced by either house during third reading. These limitations were introduced by the 1935 and 1973 Constitutions and confirmed by the 1987 Constitution as a defense against the inventiveness of the stealthy and the surreptitious. In effect, the "no-amendment" rule is dismantled by the Court's embrace of the practice of the American Congress and its conference committees.

As to the secret meeting of the conference committee, the Court justified it thus: "Nor is there anything unusual or extraordinary about the fact that the conference committee met in executive sessions. Often the only way to reach agreement on conflicting provisions is to meet behind closed doors, with only the conferees present. Otherwise, no compromise is likely to be made." I submit that this argument is fine for a board of trustees wanting to protect the interests of majority stockholders. In the matter of behavior of public officials, however, the Constitution has different standards. It commands "a policy of full public disclosure of all its transactions involving public interest." Moreover, the Bill of Rights guarantees the right of all citizens to information on matters of public concern.

In the end, however, the final cure that was adopted was the "enrolled bill" theory to the loud lament of the minority. But one dissenting view is worth quoting: "In sum, I submit that in imposing on this Court the duty to annul acts of government committed with grave abuse of discretion, the new Constitution transformed this Court from passivity to activism. This transformation, dictated by our distinct experience as a nation, is not merely evolutionary but revolutionary. Under the 1935 and 1973 Constitutions, this Court approached constitutional violations by initially determining what it cannot do; under the 1987 Constitution, there is a shift in stress — this Court is mandated to approach constitutional violations not by finding out what it should not do but what it must do. The Court must discharge this solemn duty by not resuscitating a past that petrifies the present."

B. Separation of Powers

At this point it may be opportune to see what transpired in the Narvasa Court in the matter of separation of powers. There is now in the Constitution a built-in temptation to breach the separation. I refer to Article VIII, Section 1 which says that judicial power includes the power "to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of government." This is the source of the judicial activism referred to in the passage I have just quoted. In the face of this temptation, the Court must be careful not to follow what the lady in Oscar Wilde's play said when she remarked that she could resist everything except temptation.

In an early decision, the post-EDSA Court already narrowed the scope of this power by a strict definition of grave abuse of discretion. The Court said in *Sinon v. Civil Service Commission*:[82]

> By grave abuse of discretion is meant such capricious and whimsical exercise of judgment as is equivalent to lack of jurisdiction. The abuse of discretion must be patent and gross as to amount to an evasion of positive duty or a virtual refusal to perform a duty enjoined by law, or to act at all in contemplation of law, as where the power is exercised in an arbitrary and despotic manner by reason of passion or hostility.

But that does not settle matters. One still has to ask whether there are instances when the Court must tolerate grave abuse of discretion. The problem comes up whenever the concept of "political questions" rears its head. In other words, has Article VIII, Section 1 done away with political questions? Already the late Chief Justice Roberto Concepcion who authored this innovation said in sponsoring it that the new provision did not do away with real political questions. Which brings us to asking what real political questions are.

The classic statement on political questions is found in *Baker v. Carr* [83] when it says:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

The various kinds of political questions mentioned here may be divided into two groups. One group, consisting of three, I would call real political questions: (1) where there is "a textually demonstrable constitutional commitment of the issue to a political department;" (2) or where there is "a lack of judicially discoverable and manageable standards for resolving it;" and (3) where there is "the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion."

The second group I would call prudential political questions or what might be called inter-departmental courtesy: where there is "the impossibility of a court's

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[82] Sinon v. Civil Service Commission, 215 SCRA 410, 416-417.

[83] Baker v. Carr, 369 U.S. 186, 217 (1962).

undertaking independent resolution without expressing lack of the respect due co-ordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." In my view, the new provision found in Article VIII, Section 1 does not apply to the first group; but it definitely applies to the second group where abuse of discretion can take place. I believe that *Arroyo v. de Venecia*[84] supports this view.

At issue in *Arroyo* was whether the Court could intervene in a case where the House of Representatives was said to have disregarded its own rule. The Court said that it could not because the matter of formulating rules and implementing those rules have been textually conferred by the Constitution on Congress itself. Hence, provided that no violation of a constitutional provision or injury to private rights is involved, the Court is without authority to intervene.

The theoretical anchor for this view is found in the nature of judicial power. The additional sentence in Article VIII, Section 1 is recognized as part of judicial power. But judicial power can operate only under the "case and controversy requirement" and therefore under the requirement of justiciable controversy. If the matter is not justiciable, either because the Constitution has textually excluded the Court from it, or because there are no judicially discoverable standards, or because the question is one of policy, then Article VIII, Section 1 has no application. In other words, the Supreme Court is not mandated to solve all possible government ills.

In this light, while I would agree that the petition in *Santiago v. Guingona*[85] should be dismissed, as in fact the Court dismissed it last Wednesday, I submit that the majority opinion said more than it should have said. In my view, having said that the matter was for Congress alone to decide, the Court should have stopped there. In the Baker v. Carr scheme, the matter was a "real political question" about which the Court should only have said it had no jurisdiction. Instead, however, the Court also said that there had been no grave abuse of discretion. It seems to me that implicit in that statement is the assertion that the Court had authority to find grave abuse of discretion. And if it had found abuse, what then? Could it have ordered the ouster of Guingona?

C. Separation of Powers and Economic Policy

Separation of powers has also become involved in the continuing effort of the government to develop the national economy within the context of the nationalistic provisions of the 1987 Constitution. In this regard, I consider two cases significant: *Manila Prince Hotel v. GSIS*[86] and *Tañada v. Angara*.[87] I shall consider these two in tandem because of the policy implications which they together seem to transmit.

[84] Arroyo v. De Venecia, 277 SCRA 268.

[85] Santiago v. Guingona, G.R. No. 134577, November 18, 1998.

[86] Manila Prince Hotel v. GSIS, 267 SCRA 408.

[87] Tanada v. Angara, 272 SCRA 18.

In Manila Prince the issue was whether the controlling shares of Manila Hotel could be legitimately sold to a Malaysian corporation when a Filipino corporation, Manila Prince, was qualified and willing to buy the shares. Manila Prince anchored its right to buy the shares on two arguments: first, that the second paragraph of Article XII, Section 10 said: "In the grant of rights, privileges, and concessions covering the national economy and patrimony, the State shall give preference to qualified Filipinos;" and second, that Manila Hotel had become part of the national patrimony which should be kept in the hands of Filipinos.

Manila Prince won. It is not clear from the decision, however, what doctrine it established. The decision did say that Manila Hotel had "become a landmark — a living testimonial of Philippine heritage." But the decision did not say that for that reason the Manila Hotel had become subject to special proprietary restrictions such that its ownership must be reserved for Filipinos. In fact, in a later decision, *Army Navy Club v. Court of Appeals*,[88] the Court said that the power to classify a piece of property into a historical landmark subject to special restrictions had been given by law to the Director of the National Museum. Manila Hotel had not been so classified.

In the end, however, reliance was on the second paragraph of Section 10, Article XII which commands preference for qualified Filipinos. The Court said that this is "a mandatory, positive command which is complete in itself and which needs no further guidelines or implementing laws or rules for its enforcement. From its very words the provision does not require any legislation to put it in operation. It is per se judicially enforceable." Under such reading of the Constitution, therefore, the sale of Manila Hotel by the government to a foreign corporation would amount to grave abuse of discretion amounting to lack of jurisdiction.

This decision must be seen together with Ta-ada v. Angara involving the Senate ratification of the General Agreement on Tariffs and Trade (GATT). One argument raised against the treaty was that, contrary to the "Filipino First" policy of Section 10, Article XII, the treaty placed foreigners and Filipinos on the same footing. The treaty, however, was upheld. But what of Manila Prince which had said that Article XII, Section 10 was mandatory and self-executing? Here the reasoning becomes fuzzy. The Court distinguished the two cases by saying that the provision was mandatory and enforceable "only in regard to 'the grant of rights, privileges and concessions covering national economy and patrimony' and not to every aspect of trade and commerce." The suggestion is that there are some aspects of trade and commerce which do not form part of the national economy! For what reason we are not told. Then the Court continues: "The issue here is not whether this paragraph of Section 10 of Article XII is self-executing or not." That, after all, had been settled in Manila Prince. But the Court continued: "Rather, the issue is whether, as a rule, there are enough balancing provisions in the Constitution to allow the Senate to ratify the Philippine concurrence in the WTO Agreement. And we hold that there are." In other words, the Senate may play around with a mandatory provision through a balancing of values. My suspicion is that this is the Court's polite way of distancing itself from the divided decision in Manila Prince.

[88] Army and Navy Club v. Court of Appeals, 271 SCRA 36, 48.

While we are on this subject, let me just say that I anticipate that the post-Narvasa Court will be called upon to deal with another looming Filipinization problem. Should Cathay Pacific gain 40% of Philippine Air Lines, can it be given managerial authority? The Constitution says that management and executive positions should be reserved for Filipinos. Will Cathay be allowed to use Filipino "dummies"?

D. *Jus standi*

Very much related to separation of powers is the matter of *jus standi*. The contribution of the Narvasa Court to this requirement consists in the tightening of the rule on standing.

The rule is that a person has "standing" to challenge the validity of a governmental act only if he has "a personal and substantial interest in the case such that he has sustained, or will sustain, direct injury as a result of its enforcement." This is the strict view of standing as enunciated by Justice Laurel in *People v. Vera*.[89] Thus in *Joya v. PCGG*,[90] also decided by the Narvasa Court, art lovers seeking to enjoin the auction sale of European artworks and silverware, part of the objects recovered by the government after the ouster of President Marcos, on the ground that these formed part of the Filipino cultural heritage were deemed without standing to sue because they neither owned the properties involved nor had they been purchased with public funds.

Within a brief span of less than two years, however, the rule underwent liberalization and reversal of that liberalization. The liberalization may be seen to have started with *Oposa v. Factoran, Jr.*[91] which affirmed the standing of minors, represented by their parents, to challenge the validity of logging concessions on the basis of the concept of inter-generational responsibility for and right to a balanced and healthful ecology guaranteed by Article II, Section 16. This was followed by *Kilosbayan v. Guingona, Jr.*[92] which affirmed by a close vote of 7 to 6 the right of petitioners to challenge the validity of the lotto contract of the Philippine Charity Sweepstakes on the argument that the case was of transcendental importance. The Court recited a long list of recent cases following what it called a liberal policy of allowing suits. It said in part:

The preliminary issue on the locus standi of the petitioners should, indeed, be resolved in their favor. A party's standing before this Court is a procedural technicality which it may, in the exercise of its discretion, set aside in view of the importance of the issues raised. In the landmark Emergency Powers Cases, the Court brushed aside this technicality because "the transcendental importance to the public of these cases demands that they be settled promptly and definitely, brushing aside, if we must, technicalities of procedure. (*Avelino vs. Cuenco*, G.R. No. L-2821)." Insofar as

[89] People v. Vera, 65 Phil. 56, 89 (1937); Macasiano v. National Housing Authority, 224 SCRA 236.

[90] Joya v. PCGG, 225 SCRA 568.

[91] Oposa v. Factoran, 224 SCRA 792.

[92] Kilosbayan v. Guingona, 232 SCRA 110.

taxpayers' suits are concerned, this Court had declared that it "is not devoid of discretion as to whether or not it should be entertained," or that it "enjoys an open discretion to entertain the same or not."

The reversal of this liberalization trend, if you can call it a trend, came with the second Kilosbayan case. Coming barely fourteen months after the first and still about the authority of the Philippines Charity Sweepstakes to operate lotto, the Court reversed 8-5 in *Kilosbayan v. Morato*.[93]

The second *Kilosbayan* case did not see standing as merely a procedural matter. It saw jus standi as a substantive rule which not only assures concrete adverseness which can sharpen the presentation of issues but also as a rule which involves considerations of policy related to judicial self-restraint. In justification of its departure from the first *Kilosbayan* case, the Court said:

> Stare decisis is usually the wise policy. But in this case, concern for stability in decisional law does not call for adherence to what has recently been laid down as the rule. The previous ruling sustaining petitioners' intervention may itself be considered a departure from settled rulings on "real parties in interest" because no constitutional issues were actually involved. Just five years before that ruling this Court had denied standing to a party who, in questioning the validity of another form of lottery, claimed the right to sue in the capacity of taxpayer, citizen and member of the Bar. (*Valmonte v. Philippine Charity Sweepstakes*, G.R. No. 78716, Sept. 22, 1987) Only recently this Court held that members of Congress have standing to question the validity of presidential veto on the ground that, if true, the illegality of the veto would impair their prerogative as members of Congress. Conversely if the complaint is not grounded on the impairment of the powers of Congress, legislators do not have standing to question the validity of any law or official action. (*Philippine Constitution Association v Enriquez*, 235 SCRA 506 [1994]).

The reversal arrested the departure of Philippine jurisprudence from the purist view of locus standi found in American jurisprudence. Eight justices chose to follow the view that locus standi, broader than the rule on "real party in interest," can be used only when constitutional issues are involved in the litigation. Whereas *Oposa* and the first *Kilosbayan* considered issues arising from the Declaration of Principles constitutional issue enough for purposes of "standing," the second *Kilosbayan* case said that they were not because they were merely guidelines for congressional action, guidelines which, until given flesh by legislation, were not sources of constitutional rights. An exception was *Oposa*, however, because it was based on Section 16 which explicitly confers a "right."

[93] Kilosbayan v. Morato, 246 SCRA 540, affirmed on reconsideration. This result was already anticipated by the ponente in Tatad v. Garcia, Jr., 243 SCRA 436.

III. CONSTITUTION OF SOVEREIGNTY

A. Local Autonomy

There are two subjects I would like to take up under the heading "Constitution of Sovereignty." These are local autonomy and constitutional amendment.

Sovereignty, of course, belongs to the people. But the people delegate the ordinary exercise of the powers of sovereignty to the government. Under a federal system, these powers are shared between the national government and the local government. But under a unitary system such as ours, these powers are exercised almost exclusively by the national government. There is, however, under our Constitution an attempt to give to local governments a mandated share of these powers through the provisions on local autonomy. The Narvasa Court, in my judgment, has not succeeded in evolving a progressive meaning of local autonomy.

The meaning of local autonomy for local government under the 1987 Constitution was lowered down to the level of autonomy under the 1935 Constitution by Magtajas v. Pryce Properties,[94] a 1994 decision. In Magtajas, the government of Cagayan de Oro City contended that, under its authority to prohibit gambling, the city could prevent the Philippine Games and Amusement Board (PAGCOR) from operating a casino in the city. PAGCOR, however, had authority under P.D. No. 1869 to centralize and regulate all games of chance under the territorial jurisdiction of the Philippines. In ruling that Cagayan de Oro City could not curtail PAGCOR's authority, the Court, quoting from an early American state decision, in no uncertain terms said:

Municipal corporations owe their origin to, and derive their powers and rights wholly from the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. As it may destroy, it may abridge and control. Unless there is some constitutional limitation on the right, the legislature might, by a single act, and if we can suppose it capable of so great a folly and so great a wrong, sweep from existence all of the municipal corporations in the State, the corporation could not prevent it. We know of no concerned. They are, so to phrase it, the mere tenants at will of the legislature. (Clinton v. Cedar Rapids, etc. Railroad Co., 24 Iowa 455.)

The Court did recognize the presence of autonomy provisions in the Constitution; but it preferred to emphasize congressional control over local governments. It said:

This basic relationship between the national legislature and the local government units has not been enfeebled by the new provisions in the Constitution strengthening the policy of local autonomy. Without meaning to detract from that policy, we here confirm that Congress retains control of the local government units although in significantly reduced degree now than under our previous Constitutions. The power to create still includes the power to destroy. The power to grant still includes the power to withhold or recall. True, there are certain notable innovations in the Constitution, like the direct conferment on the local government units of the power to tax, which cannot now be withdrawn by mere statute. By and large, however, the national legislature is still the principal of the local government units, which cannot defy its will or modify or violate it.

[94] Magtajas v. Pryce, 234 SCRA 255.

I would submit that even under a regime of congressional control, it is possible to accommodate meaningful local autonomy. On the concrete subject of gambling, for instance, I can see how local governments may not allow what the national government prohibits. But it would be more reflective of local autonomy if local governments, applying contemporary local community standards, were allowed to prohibit what the national government does not command but merely allows. This is what Cagayan de Oro City was trying to do. Certain types of gambling may indeed not be harmful for the generality of the population; but local governments should be allowed to make judgments applicable to peculiar local conditions. That would give meaning to autonomy.

Another local autonomy decision was Laguna Lake Development Authority v. Court of Appeals.[95] Here the Supreme Court denied to the municipalities around Laguna Lake the power to authorize the construction or dismantling of fishpens, fish enclosures, fish corrals and the like in Laguna Lake. The municipalities claimed the authority under general provisions of the 1991 Local Government Code, specifically Section 149. The Laguna Lake Development Authority (LLDA), however, claimed power under R.A. No. 4850 as amended by P.D. No. 813. Applying principles of statutory construction, the Court ruled that the specific power of the LLDA must prevail over the general power of local governments. Moreover, the Court pointed out that the power given by the Local Government Code to local governments was a revenue generating power and not a regulatory power. Hence, the Court, while denying regulatory authority to the municipalities, recognized their authority to impose fees for purposes of generating revenue. Indeed, generating revenues cannot be denied to local governments because this is now granted not just by statute but by the Constitution itself.

B. Popular Sovereignty

I would like to conclude this survey with a discussion of the Narvasa Court's view on popular sovereignty as applied to constitutional amendments. Popular sovereignty was at the heart of the controversy over PIRMA.[96]

Popular sovereignty is bandied about as justification for initiative to amend the Constitution. Properly understood, it is a correct justification; initiative and referendum are about popular sovereignty. But popular sovereignty also includes the power of self-limitation. It is like national sovereignty over territory. A nation can, without surrender of sovereignty, yield partial control over territory. This is what the nation did with Subic and Clark.

[95] 231 SCRA 292 (1994).

[96] Santiago v. Commission on Election, 270 SCRA 106.

It is the same with initiative and referendum. When the people, in the exercise of their sovereignty, decided to expand the ways of amending the Constitution by adding a third method, they, in the exercise of the same sovereignty, imposed limits on the when and how of the exercise of the power. They agreed that they would not exercise the power during the first five years of the Constitution nor oftener than once every five years. They covenanted that initiative could only be upon the petition of twelve percent of all registered voters of which every legislative district must be represented by at least three percent of the registered voters therein. Finally they agreed to wait until after Congress passes a law implementing the novel constitutional provision.

This is the import of the Supreme Court decision: the people must stay within the limits they have imposed upon themselves.

Much was made of the fact that the debates in Congress manifested an intent to authorize amendment of the Constitution through initiative and referendum. But, as the saying goes, the road to hell is paved with good intentions. Intentions not carried out do not do any good to intended beneficiaries. Legal commands do not come into existence by mere wishing. Legal commands come into existence, at least in our jurisdiction, when written in understandable language and approved and signed by those who have authority to approve and sign. This, in the decision of the Court, Congress failed to do.

This is the import of the Court's long disquisition. Congress was expected to formulate the implementing rules. But, instead, Congress merely repeated the constitutional provision. It did not provide for the rules needed to implement the provision.

Congress was not meant merely to turn on the switch and announce "Let initiative and referendum roll!" Congress was expected to indicate how the rolling should go. Instead, however, Congress expected the Commission on Elections to do what Congress, and Congress alone, was authorized to do.

The principle of non-delegability of delegated power, recalled by the Court, applies even to ordinary life. If you delegate someone to be your investment manager, such manager many not pass off the delegated authority to somebody else.

Of course, Congress may eventually pass a law laying down the rules for initiative and referendum to amend the Constitution. Congress should. It is a constitutionally imposed duty more important than engaging in prolonged and dramatic congressional investigations. Once this duty is acted upon, then the constitutional provision will become operative as authorized by the sovereign people. And only then.

This, however, does not necessarily mean that any initiative and referendum to change or remove term limits will roll. Another limitation yet has been imposed by the people on themselves: initiative and referendum can be used only for amendments and very definitely not for revision.

Is the lifting of term limits for national and local elected officials a mere amendment or already a revision? The Supreme Court said that it will cross that bridge

when it gets there. For now, the question is academic, not real. It is not the function of the Court to engage in academic exercises. It can only judge actual cases.

Having successfully dealt with the PIRMA issue, the Court I suspect will once again be confronted with another sovereignty issue. The implementation of the party list provisions of the Constitution was left by the Constitution to Congress to implement. The Party List Law prescribed the manner in which the fifty seats for party-list representatives are to be filled. On the basis of the mathematical formula contained in the law passed by Congress, not all the fifty seats could be filled. Ignoring the Party List Law, however, a division of the Commission on Elections decided to fill all the party-list seats. What will the Court say about this? This perhaps is a problem reserved now for the post-Narvasa Court.