NOTES FOR LECTURE*

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The first Constitution of the Philippines to which reference is made is the one drafted by the Constitutional Convention of 1934-35. It came into force and effect on November 15, 1935. The present Constitution dates from January 17, 1973 and was the work of the 1971-72 Constitutional Convention. The Philippines was under American sovereignty from the Treaty of Paris between Spain and the United States on December 10, 1898, ratified on April 11, 1899. As a result, however, of the Philippine Independence Act of 1934, provision was made for a Commonwealth of the Philippines, inaugurated on November 15, 1935. It was a transition stage from an unincorporated territory of the United States to that of an independent republic. The 1935 Constitution was by the express will of the Convention that drafted it, made applicable to both the Commonwealth and the Republic of the Philippines, which juridically came into being on July 4, 1946.

In a leading case, the first of its kind after the effectivity of the 1935 Constitution, Angara V. Electoral Commission, (63 Phil. 139 [1936]) the Philippine Supreme Court, through Justice Laurel, stated that the power of judicial review "is granted, if not expressly, by clear implication from Section 2 of Article VIII of our Constitution." (Ibid, 158) This Article did assume its existence and how it was to be exercised. Thus it stated that the Supreme Court was not to be deprived of its jurisdiction "to review, reverse, modify, or affirm on appeal, certiorari, or writ of error, final judgments and decrees in: * * * (1) All cases in which the constitutionality or validity of any treaty, law, ordinance, or executive order or regulation is in question." (Art. VIII, Section 2 of the 1935 Constitution of the Philippines) Then in a subsequent section, the number of votes required was provided for: "All cases involving the constitutionality of a treaty or law shall be heard and decided by the Sumpreme Court en banc, and no treaty or law may be declared unconstitutional without the concurrence of two-thirds of all the members of the Court." (Art. VIII, Section 10, Ibid) In the present Constitution, which as noted became effective in 1973, with a Supreme Court of fifteen

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members, four more than was formerly the case, there is this modification: "All cases involving the constitutionality of a treaty, executive agreement, or law shall be heard and decided by the Supreme Court *en banc,* and no treaty, executive agreement, or law may be declared unconstitutional without the concurrence of at least ten Members." (Art. X, Section 2, par. (2) of the present Constitution of the Philippines.)

A brief historical background is not amiss. At the time when the United States acquired the Philippines from Spain in 1899, one of the principles of constitutional law binding on the territorial government estabished by her in the Philippines was this principle of judicial review. It was natural for American lawyers, admitted to practice in the Philippines, to challenge the validity of statutes or executive orders, whenever the interests of their clients so demanded. For the Americans in the judiciary, constituting the majority in the Supreme Court, that was to be expected. It is to the credit of those early Filipino justices and judges, trained in the European tradition of public law, that they were equally cognizant of the power to pass on the constitutionality of such statutes and executive orders as part of their judicial function. Soon the Filipino lawyers vied with the American members of the bar in raising constitutional questions. The American practice therefore of appealing to courts, by means of lawsuits, decisions reached by either the executive or legislative branches of the government, became a part of the accepted constitional law doctrines in the Philippines early in the period of American sovereignty.

It suffices to state that before the adoption of the Constitution of the Philippines in 1935, the Philippine Supreme Court had anulled thirteen legislative acts. In seven of those cases, the decisions turned upon the powers to be exercised by courts of the Philippines under the organic acts. (Omo v. Insular Government, 11 Phil. 67 [1908]; Wigall v. Shuster, 11 Phil. 340 [1908]; Barrameda v. Moir, 25 Phil. 44 [1913]; McGirr v. Hamilton and Abreau, 30 Phil. 563 [1915]; Concepcion v. Paredes, 42 Phil. 599 [1921]; Agcaoili v. Sugitan, 48 Phil. 676 [1926]; Manila Electric Co. v. Pasay Transp. Co., 57 Phil. 600 [1932]) Property rights were safeguarded in four cases. (Casanovas v. Hord, 8 Phil. 125 [1907]; Compania Gral. de Tabacos v. Board of Public Utility, 34 Phil. 136 [1916]; US v. Ang Tang Ho, 43 Phil. 1 [1922]; People v. Pomar, 46 Phil. 440 [1924]) One case had serious political implications: the Supreme Court was asked to decide a conflict between the American Governor-General and the Filipino legislative leadership in the government, as to where the

power to appoint directors in government-owed or controlled corporations was vested. (Government of the Phil. Islands v. Springer, 50 Phil. 259 [1927]) Its decision had nationalistic overtones, all the Americans on the bench and one Filipino sustaining the claim of the Governor-General and the remaining Filipino members upholding the contention of the legislative leaders.

Then came the period under the 1935 and the present Constitutions. The function of judicial review has continued to flourish. The Philippine Supreme Court has not been reluctant to perform such a delicate task. It has not gone out of its way to entertain constitutional questions, but it has shown no hesitancy to act on such matters in appropriate cases. Such an attitude is traceable to the valedictory address before the 1934 Constitutional Convention of its President, Claro M. Recto, who spoke of the trust reposed in the judiciary in these words: "It is one of the paradoxes of democracy that the people at times place more confidence in instrumentalities of the State other than those directly chosen by them for the exercise of their sovereignty." There was thus popular support for the Supreme Court ever being on the alert to assure compliance with constitutional commands. Whenever its jurisdiction is properly invoked then, it must discharge this function. It must inquire into alleged breaches of the fundamental law. It should, within the limits of the judicial power, assure that no infringement is allowed. That is implicit in the process of adjudication which consists of determining the facts and applying the law. To do so is to be true to its duty as the Constitution being supreme overrides the act of any governmental agency.

That is a postulate that goes back to the landmark American decision of Marbury v. Madison. (3 Cranch 137 [1803]) Judicial review is not an intrusion into the domain belonging to the political branches. The judiciary has to act thus to reach a decision in a case before it, wherein rights appropriate for judicial enforcement are sought to be vindicated. Nor does it approach constitutional questions with dogmatism or apodictic certainty. There is likewise the expectation that there would be a search for jural consistency and rational coherence. Once allowance is made that for all the care and circumspection, courts are manned by human beings fettered by fallibility, but nonetheless earnestly and sincerely striving to do right, the continuing public acceptance of its vigorous pursuit of the task of assuring fealty to the Constitution is easy to understand.

The stress and emphasis thus laid on the courts utilizing fully the device of judicial review as an institution for assuring the supremacy of the Constitution, as thus briefly characterized, has been

termed, in language that has gained currency, judicial activism. It manifests an alertness on the part of the judiciary to the probability that a constitutional infraction may be detected in the acts of the coordinate agencies of the government. The judiciary, to repeat, has to await for an appropriate case, as the exercise of such competence is based on its power to adjudicate. There must, however, be no reluctance to pass upon the question when properly raised. It is not only the readiness to pass upon cases that give rise to such issues but also the propensity to see to it in the decision rendered that there be full fidelity to what the Constitution ordains. So, it is submitted, judicial activism requires. For clarity of analysis, it seems appropriate to discuss the exercise of such power in terms of whether legislative or executive acts are concerned. There is the further distinction to be made between the exercise of legislative or constituent functions by a lawmaking body. Again with reference to the executive, it has happened three times under the present martial law regime that what was done by the incumbent President of the Philippines, twice in connection with the ratification of the present Constitution and only recently with the proposed amendments, that the Supreme Court had to inquire into its validity.

It would not be strictly accurate though to assert that judicial activism is invariably the norm followed. At times, the question raised is political to follow the traditional constitutional law terminology of the American type. As understood in this jurisdiction, it refers, as noted in the opinion of the then Justice, later Chief Justice, Roberto Concepcion speaking for the Supreme Court in Tanada v. Cuenco (103 Phil. 1051 [1957]) to "questions which under the Constitution are to be *decided by the people* in their sovereign capacity, or in regard to which full discretionary authority has been delegated to the legislature or executive branch of the Government.' It is concerned with issues dependent upon the *wisdom,* not legality of a political measure." (Ibid, 1067) If so, the principle of judicial self-restaint prevails. There must be respect and deference shown to what was decided in such other forum. It is not for the judiciary to interfere. Such a matter is outside its jurisdiction. Even on a matter concededly within its competence, it may avail itself of the techniques of avoidance, relying on compliance with certain standards to call into play the power of judicial review, thus enabling it to base its decision on a non-constitutional ground. (Cf. Ashwander v. Tennessee Valley Authority, 297 US 298) That is to manifest a realization by the Supreme Court of the delicate and awesome character of the function of judicial review. The cause of clarity will likewise

be served if the discussion proceeds chronologically by referring to the leading Supreme Court decisions from the aforecited Angara decision, People v. Vera, (65 Phil. 56) promulgated in 1937, with the opinion likewise coming from Justice Laurel up to and including Sanidad v. Commission on Elections, (L-44640, Guzman v. Commission on Elections, L-44714 were decided jointly with Sanidad) that came out only on October 12, 1976, with the nine of ten members of the Supreme Court, headed by Chief Justice Fred Ruiz Castro, expressing their views. In between those times, other cases of importance with opinions from former Chief Justice Concepcion, like Justice Laurel, an eminent constitutionalist, will be cited.

To go back to Angara, truly a landmark decision, the question raised was whether a resolution of the National Asembly, the then unicameral legislative body of the Commonwealth of the Philippines under the 1935 Constitution, confirming the election of petitioner as an assemblyman as no protest was filed against him by December 3, 1935, could stand as against a contrary resolution of respondent Electoral Commission, as an independent Constitutional body entrusted with deciding electoral contests involving election, returns and qualifications of the members of the National Assembly, fixing the last date as of December 8, 1935. As the protest against petitioner Angara came after December 3 but before December 8, he instituted a suit for prohibition to restrain respondent Commission from proceeding further. He contended that the question raised was political rather than judicial. The Supreme Court through Justice Laurel ruled otherwise. He stated: "As any human production, our Constitution is of course lacking perfection and perfectibility, but as much as it was within the power of our people, acting through their delegates to so provide, that instrument which is the expression of their sovereignty, however limited, has established a republican government intended to operate and function as a harmonious whole, under a system of checks and balances, and subject to specific limitations and restrictions provided in the said instrument. The Constitution sets forth in no uncertain language the restrictions and limitations upon governmental powers and agencies. If these restrictions and limitations are transcended it would be inconceivable if the Constitution had not provided for a mechanism by which to direct the course of government along constitutional channels, for then the distribution of powers could be mere verbiage, the bill of rights mere expressions of sentiment, and the principles of good government mere political apothegms. Certainly, the limitations and restrictions embodied in our Constitution are real as they should

be in any living constitution. In the United States where no express constitutional grant is found in their constitution, the possession of this moderating power of the courts, jot to speak of its historical origin and development there, has been set at rest by popular acquiescence for a period of more than one and a half centuries. In our case, this moderating power is granted, if not expressly, by clear implication from section 2 of article VIII of our Constitution." (Ibid, 157-158)

Thus did the Court reject the contention that it was devoid of jurisdiction. As it was in the United States with Marbury, so here in the Philippines with Angara, the course of vigorous judicial response to assertions that acts of a coordinate branch should be nullified if found to transgress the fundamental law was set. Nor can any doubt be entertained that such a norm to be followed by the Supreme Court is in keeping with the belief widely held of the need for an agency, enjoying popular confidence and possessing the requisite skill to interpret the Constitution. It would then be a betrayal of faith if it fails to live up to such an exacting responsibility. Angara likewise marks the first occasion after the 1935 Constitution where the Philippine Supreme Court held invalid an act of a legislative body, the challenged resolution being deemed contrary to and inconsistent with the Constitutional mandate that the then respondent Electoral Commission was the sole agency to determine all contests relating to the elections, returns and qualifications of its members. (Ibid, 182-184). Thus did Justice Laurel blaze the trail of judicial activism.

Thus was the pattern set in the early years of the Commonwealth before World War II, the Philippine Supreme Court at that time being under the then Chief Justice Ramon Avancena. There has been since then conformity to such an approach with the few exceptions where the question raised was essentially political, once when the question involved was the amending process, (Cf. Mabanag v. Lopez Vito) thrice when the rights asserted arose from membership in Congress, (Cf. Vera v. Avelino, 77 Phil. 192 [1946]; Calili v. Francisco, 88 Phil. 654 [1951]; Osmena v. Pendatun, 109 Phil. 863 [1960] and once when the then Philippine President suspended the privilege of the writ of habeas corpus. (Cf. Montenegro v. Castaneda, 91 Phil. 882 [1952]) While there were several Filipino jurists of note who spoke for the Tribunal in later years, the subsequent Chief Justices being Manuel Moran, Ricardo Paras, Cesar Bengzon, Roberto Concepcion and Querube Makalintal, the late Chief Justice Castro, it was the then Justice, later Chief Justice Concepcion, who had the most

say in furthering judicial activism. The jurist associated most often with the political question approach is retired Chief Justice Cesar Bengzon.

Two opinions of Chief Justice Concepcion carried the Philippines further in the path of judicial activism. In the first, Gonzales v. Commission on Elections, (L-28196, November 9, 1967, 21 SCRA 774. The companion cases decided on the same occasion is entitled Philippine Constitution Assqciation v. Commission on Elections.) petitioner Gonzales filed the suit for prohibition as taxpayer and voter not only for himself but on behalf of all the citizens to restrain respondent Commission on Elections from further enforcing a Philippine statute (Republic Act No. 4913 [1967]) amending the provisions in the Constitution to provide for an increase in the membership in the House of Representatives and another provision therein authorizing Senators and Members of such House to become delegates to the proposed Constitutional Convention without forfeiting their respective seats. (Article VI, Section 16 of the 1935 Constitution provides: "No Senator or Member of the House of Representatives, during the time for which he was elected, be appointed to any civil office which may have been created or the emoluments whereof shall have been increased while he was a Member of the Congress.") He contended that as the enactment suffered from constitutional infirmity, the proposed plebiscite for the ratification of such constitutional amendments should not be held. As was to be expected, the first objection raised was lack of jurisdiction, it being alleged that the question raised was political rather than judicial. The Supreme Court rejected such a contention. As set forth in the opinion of Chief Justice Concepcion, speaking for a unanimous Court: "As early as Angara v. Electoral Commission, this Court – speaking through one of the leading members of the Constitutional Convention and a respected professor of Constitutional Law, Dr. Jose P. Laurel – declared that 'the judicial department is the only constitutional organ which can be called upon to determine the proper allocation of powers between the several departments and among the integral or constituent units thereof.' [Then came] Suanes v. Chief Accountant of the Senate, Avelino v. Cuenco, Tanada v. Cuenco, and Macias v. Commission on Elections. In the first, we held that the officers and employees of the Senate Electoral Tribunal are under its supervision and control, not that of the Senate President, as claimed by the latter; in the second, this Court proceeded to determine the number of Senators necessary for a *quorum* in the Senate; in the third, we nullified the election, with Senators belonging to the party having the largest

number of votes in said chamber, purporting to act on behalf of the party having the second largest number of votes therein, of two (2) Senators belonging to the first party, as members, for the second party, of the Senate Electoral Tribunal; and in the fourth, we declared unconstitutional an act of Congress purporting to apportion the representative districts for the House of Representatives, upon the ground that the apportionment had not been made as may be possible according to the number of inhabitants of each province. Thus we rejected the theory, advanced in these four (4) cases, that the issues therein raised were political questions the determination of which is beyond judicial review." (21 SCRA 774, 785-786. Mabanag v. Lopez Vito is reported in 78 Phil. 1 [1947]; Suanes v. Chief Accountant in 81 Phil. 818 [1948]; Avelino v. Cuenco in 83 Phil. 17 [1949]; Tanada v. Cuenco in 103 Phil. 1051 [1957]; Macias v. Commission on Elections, 113 Phil. 1 [1961]). Further on this point: "In short, the issue whether or not a Resolution of Congress – acting as a constituent assembly – violates the Constitution essentially justiciable, not political, and, hence, subject to judicial review, and, to the extent that this view may be inconsistent with the stand taken in Mabanag v. Lopez Vito, the latter should be deemed modified accordingly. The Members of the Court are unanimous on this point." (Ibid, 787)

The other equally notable decision penned by Chief Justice Concepcion on this matter is Lansang v. Garcia, (L-33964, December 11, 1971, 42 SCRA 448. The opinion in this case likewise disposed of eight other petitions for habeas corpus.) a petition for habeas corpus. The President of the Philippines, on August 21, 1971, suspended the privilege of the writ of habeas corpus for persons presently detained as well as others who would be similarly detained "for the crime of insurrection and rebellion and such other crimes and offenses committed by them in furtherance of or on the occasion thereof, or incident thereto or in connection therewith." (Proclamation No. 889). Such a power is granted him under the 1935 Constitution in cases of invasion, insurrection and rebellion or imminent danger thereof when public safety requires. (According to Article VII, Section 10, par. 2 of the 1935 Constitution: "The President shall be commander-in-chief of all armed forces of the Philippines, and, whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion, insurrection, or rebellion. In case of invasion, insurrection, or rebellion, or imminent danger thereof, when the public safety requires it, he may suspend the privileges of the writ of habeas corpus, or place the

Philippines or any part thereof under martial law." Under the present Constitution, the power belongs to the Prime Minister as provided in Article IX, Section 12.) Respondent Garcia, the Chief of the Philippine Constabulary, challenged the jurisdiction of the court on the ground that the question raised by the suspension is political. Such a contention was firmly rejected, the Supreme Court being unanimous on the matter. Chief Justice Concepcion, in his landmark opinion, explained why the suspension could be inquired into as it raises a justiciable rather than a political question. Thus: "The Presidential Proclamation under consideration declares that there has been and there is actually a state of rebellion and that 'public safety requires that immediate and effective action be taken in order to maintain peace and order, secure the safety of the people and preserve the authority of the State.' Are these findings conclusive upon the Court? Respondents maintain that they are, upon the authority of Barcelon v. Baker and Montenegro v. Castaneda. Upon the other hand, petitioners press the negative view and urge a reexamination of the position taken in said two (2) cases, as well as a reversal thereof." (42 SCRA 448, 471. Barcelon v. Baker is reported in 5 Phil. 87 (1905) and Montenegro v. Castaneda in 91 Phil. 882 [1952]) He then continued: "The weight of Barcelon v. Baker, as a precedent, is diluted by two (2) factors, namely: (a) it relied heavily upon Martin v. Mott involving the U.S. President's power to *call out the militia,* which – he being the commander-in-chief of all the armed forces – may be exercised to suppress or prevent any lawless violence, even without invasion, insurrection or rebellion, or imminent danger thereof, and is, accordingly, much broader than his authority to suspend the privilege of the writ of *habeas corpus,* jeopardizing as the latter does individual liberty; and (b) the privilege had been suspended by the American Governor-General, whose act, as representative of the *Sovereign,* affecting the freedom of its *subjects,* can hardly be equated with that of the President of the Philippines dealing with the freedom of the Filipino people, *in whom sovereignty resides,* and *from whom all government authority emanates.* The pertinent ruling in the Montenegro case was based mainly upon the Barcelon case, and, hence, cannot have more weight than the same.

Chief Justice Concepcion took pains to explain why the Supreme Court could not refuse to act on the matter: "Indeed, the grant of power to suspend the privilege is neither absolute nor unqualified. The authority conferred by the Constitution, both under the Bill of Rights and under the Executive Department, is limited and conditional. The precept in the Bill of Rights establishes a general rule,

as well as an exception thereto. What is more, it postulates the former in the *negative,* evidently to stress its importance, by providing that '(t)he privilege of the writ of *habeas corpus* shall *not* be suspended * * *.' It is only by way of *exception* that it permits the suspension of the privilege 'in cases of invasion, insurrection, or rebellion' — or, under Art. VII of the Constitution, imminent danger thereof' — 'when the public safety requires it, in any of which events the same may be suspended wherever during such period the necessity for such suspension shall exist.' Far from being full and plenary, the authority to suspend the privilege of the writ is thus circumscribed, confined and restricted, not only by the prescribed setting or the conditions essential to its existence, but, also, as regards the time when and the place where it may be exercised. These factors and the aforementioned setting or conditions mark, establish and define the extent, the confines and the limits of said power, beyond which it does not exist. And, like the limitations and restrictions imposed by the Fundamental Law upon the legislative department, adherence thereto and compliance therewith may, within proper bounds, be inquired into by courts of justice. Otherwise, the explicit constitutional provisions thereon would be meaningless. Surely, the framers of our Constitution could not have intended to engage in such a wasteful exercise in futility." (Ibid, 473-474)

The standard to be followed by the Supreme Court to assure that the constitutional limitations on the power to suspend the privilege of the writ was then set forth in his opinion: "In the exercise of such authority, the function of the Court is merely to *check* — not to *supplant* — the Executive, *or to ascertain merely whether he has gone beyond* the constitutional limits of his jurisdiction, *not to exercise the power vested in him* or to determine the wisdom of his act. To be sure, the power of the Court to determine the validity of the contested proclamation is far from being identical to, or even comparable with, its power over ordinary civil or criminal cases elevated thereto by ordinary appeal from inferior courts, in which cases the appellate court has *all* of the the powers of the court of origin. Under the principle of separation of powers and the system of checks and balances, the judicial authority to review decisions of administrative bodies or agencies is much more limited, as regards findings of fact made in said decisions. Under the English law, the reviewing court determines *only* whether there is some *evidentiary* basis for the contested administrative finding: no quantitative examination of the supporting evidence is undertaken. The administrative finding can be interfered with *only* if there is *no* evidence whatsoever in support

thereof, and said finding is, accordingly, arbitrary, capricious and obviously unauthorized." (Ibid, 480) Under that test, the Supreme Court unanimously sustained the suspension.

There is relevance to a brief inquiry on judicial activism insofar as it concerns cases related to development. In the First International Conference of Appellate Magistrates held in Manila in January, 1977, President Marcos stated: "In such an effort at change, the executive and legislative will must clearly lead the way in writing laws that will trigger the process of development, but the task of making them operate in society inevitably passes into the hands of the judicial system." (Ferdinand E. Marcos on Law, Development and Human Rights, 5 (1978).

Such an approach becomes even more exigent when the philosophy of the Philippine Development Plan as envisioned by him is taken into account. Allow me to quote a portion of his message on September 21, 1977, when he issued Presidential Decree No. 1200 approving and adopting the Philippine Development Plan for 1972 to 1982. He emphasized: "At the heart of the Plans is the concern for social justice. The preparation of these social and economic development plans has been guided by one objective. 'No Filipino will be without sustenance.' " (Marcos, The Philippine Development Plan, 2)

Let me make clear what at times amounts to a misconception of judicial review. It is not identified solely with the nullification of legislative or executive acts vitiated by constitutional infirmity. That was referred to by Professor Black as the checking work of judicial review. (Cf. Black Jr., The People of the Court, 87 [1960] He spoke of it as a "negative function," although it "can itself be of high value." (Ibid, 87) The other aspect of judicial review he spoke of as the "affirmative function" described by him as a "means of validating governmental action against constitutional doubt." (Black, *op. cit.*, 87) That for him is the legitimating work of judicial review.

It is not disregard but precisely to affirm the supremacy of the Constitution when either the executive or legislative departments seeks to what had been done, if forthcoming, conduces to its acceptance and support in a regime where the rule of law holds sway. This assumption of jurisdiction precisely to settle doubts in the constitutionality of governmental acts is likely to prove more beneficial to developing nations where the government, to solve the problem of mass poverty and to assure more decent living conditions for the economically underprivileged, is called upon to undertake massive projects and to enact a greater number of regulatory measures.

Where property rights are adversely affected, the Court in the exercise of the power of judicial review is called upon to settle such a controversy. Under the Constitution, more specifically the social justice provision, (Cf. According to Article II, Section 6 of the Constitution: "The State shall promote social justice to ensure the dignity, welfare, and security of all the people. Towards this end, the State shall regulate the acquisition, ownership, use, enjoyment, and disposition of private property and equitably diffuse property ownership and profits.") All doubts must be resolved against an undue insistence on the claims of property.

With the thrust on development intended to assure a life of dignity for all, especially the poorest and the humblest among us, and with the enactment and implementation of measures to assure that social justice becomes a living reality and thereby bring about that Compassionate Society as often emphasized by the First Lady, it is my submission that as far as social and economic rights are concerned, the Supreme Court would be true to its function if it would be less prone to exercise the checking or negative aspect of judicial review.

Where, however, civil and political rights are concerned, the ringing affirmations of Justice Malcolm in defense of the cherished concepts of intellectual freedom should always command obeisance. As was categorically declared in a lecture, it is my firm conviction that the existence of martial law did not cause the suspension of any constitutional right, except that of the privilege of the writ of habeas corpus, not the writ ifself, which is always available. (Fernando, Constitutional Rights During Martial Rule in Mendoza, ed., The Supreme Court Under the New Constitution, 115, 121 (1977) As a matter of fact, eighty-four habeas corpus petitions were filed with the Court *en banc* during this period, with only a minimal number still undecided, partly because the pleadings had not been completed.