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## Filipino Consciousness of Civil and Political Rights

JOAQUIN G. BERNAS

It is customary for a priest to begin a sermon with a text, usually from Scripture. This is not a sermon. Nor do I intend to speak as a saintly priest, saintly though I may be, but as a profane lawyer. Hence, I can begin with a profane text.

My text is from an official document written in 1900 and popularly known as the Schurman Report. The long quotation reads thus: The more one studies the recent history of the Philippines and the more one strives by conversation and intercourse with the Filipinos to understand and appreciate their political aims and ideals, the more profound becomes one's conviction that what the people want, above every thing, is a guaranty of those fundamental human rights which Americans hold to be the natural and inalienable birthright of the individual but which under Spanish domination in the Philippines were shamefully invaded and ruthlessly trampled upon. Every scheme of government devised by the Filipinos is, in its primary intent, a means to secure that end . . . Philippine plans of reform all start from a concrete basis; they seek deliverance, sure and abiding, from wrongs and cruelties to which the people have hitherto been exposed. The magna charta they want, like that which the English barons wrested from King John, is the counterpart of very definite evils and abuses.<sup>1</sup>

At this stage of our cultural development I am sure we are large-minded enough both to overlook the tone of American chauvinism in the document and to sympathize with the Spaniards who are cast in the villain's role. The important thing is the kernel of truth which the document contains. The truth is this, that we as a people have a deep consciousness of civil and political rights, and that ours is a consciousness which dates back to our earliest history and which grew and took deep root because of wrongs and cruelties to which our people have been exposed.

1. U.S. Philippine Commission, *Report of the Philippine Commission to the President*, 4 vols. (Washington: Government Printing Office, 1900), 1:84-85.

To trace in detail the history of the development of that consciousness would be a task demanding numerous volumes. Hence, to keep this paper within reasonable length, it will be necessary to limit ourselves to certain key strands in that development, which can conveniently be divided into three simplified parts. First, what was it like when the Spaniards were our masters? Second, what happened when the Americans yielded to the inspiration to become our tutors? Third, what do we see when we look at ourselves in the mirror now that we are grown and emancipated? In other words, with apologies to a recent movie, *Ganoon sila noon, Paano tayo ngayon?*

#### *GANOON SILA NOON: UNDER SPAIN*

I deliberately begin with Spanish times because I do not feel competent to speak on pre-Spanish times. This much, however, can safely be said: although the words civil rights, political rights, due process, and other phrases familiar to us might not have been part of the vocabulary of the ancient *barangays* when they gathered along the banks of the Pasig or the shores of Mactan, neither Rajah Sulayman nor Lapu-Lapu could have offered the resistance which they gave to the wrongs and cruelties threatened by an invading force had not at least the seeds of our more sophisticated concepts been already operative deep in their warrior hearts.

After 1521, we enter into Spanish times. Again you will pardon me if I telescope and immediately jump to three centuries later, because I know very little of the sixteenth, seventeenth, eighteenth, and early nineteenth century Philippines. It is clear, however, that the second half of the nineteenth century was an exciting era of struggle for civil and political liberties.

In the second half of the nineteenth century, we had as yet no operative Philippine Constitution to speak of. There were guarantees of civil and political rights in the Spanish Constitution; but deliberately these guarantees were not extended to the Philippines. Thus this period was characterized by a resolute struggle to gain fundamental political and civil liberties from Spanish authorities and by a clearer conceptual articulation of Filipino aspirations. These aspirations were very basic and, like the terms of the English Magna Charta, were the counterparts of very definite civil and political wrongs that clamored for redress.

The development of these aspirations may be conveniently divided into two distinct although chronologically overlapping phases: the Propaganda Movement, which was peaceful, and the Secessionist Movement, which was violent.

The period of the Propaganda Movement extended roughly from the middle of the nineteenth century to 1892. This was a period of peaceful campaigning made by writers and journalists writing both in the Philippines and in European cities. Among the Filipinos who dominated the scene were Marcelo H. del Pilar, Graciano Lopez Jaena, Jose Rizal, and Mariano Ponce. Their principal medium, *La Solidaridad*, was a newspaper published fortnightly by Filipinos first in Barcelona, then in Madrid, although the most far-reaching effect was accomplished by the publication of Rizal's two political novels: *Noli me tângere* and *El Filibusterismo*. The original aim of the movement could be summed up in one word: "assimilation." What they demanded was not outright secession from Spain but the extension to Filipinos of those rights enjoyed by Spaniards under the Spanish Constitution.<sup>2</sup>

The demands were basic: the inviolability of both person and property, among others. Specifically, they called for an end to arbitrary action by officialdom, particularly by the much hated Guardia Civil, and an end to arbitrary detention and banishment of citizens. They demanded freedom of speech and of the press, freedom of association, and the right to petition the government for redress of grievances. They insisted on the right to liberty of conscience, freedom of worship, freedom to choose a profession, and the right to an opportunity for education. Finally, they clamored for an end to the abuses of religious orders.<sup>3</sup>

The Propaganda Movement was nourished by the hope, which proved to be an illusion, that Spain would listen and introduce effective reforms. Spain did not listen; hence, separationist flames were lit. The *Katipunan* was born on 7 July 1892. Its principal objective was to create an independent Filipino nation by armed revolution.

Five years after the birth of the *Katipunan*, a republican government was established in Biak-na-Bato and five months later the Constitution of Biak-na-Bato was unanimously adopted by the representatives of the revolution.

2. Cesar A. Majul, *The Political and Constitutional Ideas of the Philippine Revolution* (Quezon City: University of the Philippines, 1957), pp. 2-3.

3. *Ibid.*, pp. 44-48.

The authorship of the Constitution of Biak-na-Bato is generally attributed to the lawyers Felix Ferrer and Isabelo Artacho. As a matter of fact, however, the document was almost a carbon copy of the Cuban Constitution of Jimaguayu.<sup>4</sup> The Constitution of Biak-na-Bato, however, contained four articles not found in the Cuban model. These articles are important because again they articulate Filipino aspirations for civil and political rights at that time. They read:

*Article XXII.* — Religious liberty, the right of association, the freedom of education, the freedom of the press, as well as the freedom in the exercise of all classes of professions, arts, trades, and industries are established.

*Article XXIII.* — Every Filipino shall have the right to direct petitions or present remonstrances of any import whatsoever, in person or through his representative, to the Council of Government of the Republic.

*Article XXIV.* — No person, whatever may be his nationality, shall be imprisoned or held except by virtue of an order issued by a competent court, provided that this shall not apply to crimes which concern the Revolution, the government or the Army.

*Article XXV.* — Neither can any individual be deprived of his property or his domicile, except by virtue of judgment passed by a court of competent authority.<sup>5</sup>

You are familiar with the fate of the Constitution of Biak-na-Bato. Within two months of its adoption, its life ended with the Pact of Biak-na-Bato, whereby in exchange for monetary indemnity for the Filipino men in arms and for promised reforms, the Filipino leaders agreed to cease fighting and guaranteed peace for at least three years. In addition, General Emilio Aguinaldo, who had at this time become the undisputed military leader after the death of the Katipunan's Andres Bonifacio, agreed to leave the Philippines together with other Filipino leaders. They left for Hong Kong, not exactly as tourists, on 27 December 1897.

Then the Americans came, not exactly as tourists either, as Aguinaldo and his men were soon to find out when they sailed back from Hong Kong. Whereupon Aguinaldo set himself up as President of a Revolutionary government. As part of a series of tactical moves to meet the American challenge, the revolutionary capital was transferred to Malolos, Bulacan, a town that lay beyond

4. Jaime C. de Veyra, "The Constitution of Biak-na-Bato," *Journal of the Philippine Historical Society* 1 (1941), cited in Majul, *Political and Constitutional Ideas*, p. 5, n. 6.

5. Teodoro Agoncillo, *Malolos: The Crisis of the Republic* (Quezon City: University of the Philippines, 1960), pp. 19–20.

the reach of Admiral Dewey's guns. And since the Filipinos by now were convinced that a government must have a Constitution, on 15 September 1898, at the church of Barasoain, in the town of Malolos, a Revolutionary Congress was inaugurated to formulate and promulgate a Constitution. In the solemn language of his inaugural address, Aguinaldo charged the Revolutionary Congress thus:

As the temple of the law is opened to us, I know well how the Filipino people, a sensible people par excellence, would flock to its doors.

Purged of its past errors by the oblivion of three centuries of ignominy, its heart opened to the most noble aspirations, and its soul exulting in the feeling of being free; delighted in its integrity, and inflexible as to its own weakness, here, at the Church of Barasoain, at one day a sanctuary of mystic prayers, now the august and imposing temple of the dogma of our independence, it comes to gather in the name of peace, that is perhaps drawing near, the votes of our thinkers and of our politicians, of the fighting defenders of the native soil and of the profound scholars of the Tagalog tongue, of inspired artists and powerful masters of finance, in order to write with these votes the immortal book of the "Philippine Constitution" as the highest expression of the national will.<sup>6</sup>

It was a gigantic challenge for the 43 lawyers, 18 physicians, 5 pharmacists, 7 businessmen, 4 agriculturists, 3 soldiers, 3 educators, 2 engineers, 2 painters and 1 priest that formed the Revolutionary Congress.

In the end, the draft which won the approval of the Committee and, subsequently, of the Revolutionary Congress, was Felipe Calderon's. It became the Malolos Constitution. By his own admission, Calderon based his plan on the constitutions of South American Republics,<sup>7</sup> particularly those relating to the organization of the government. But, as Malcolm notes, the provisions of Calderon's Bill of Rights were, "in the main, literal copies of articles of the Spanish Constitution."<sup>8</sup> This is clear from even a cursory comparison of the Malolos provisions with those of the Spanish Constitution of 1869. The Bill of Rights included freedom of religion; freedom from arbitrary arrests and imprisonment, supported by an equivalent of a right to a writ of *habeas corpus*;

6. Teodoro M. Kalaw, "The Constitutional Plan of the Philippine Revolution," *Philippine Law Journal* 1 (1914): 204, 209.

7. *Ibid.*, p. 473.

8. George A. Malcolm, *Constitutional Law of the Philippine Islands* (Manila: Lawyers Co-operative Publications, 1926), p. 117.

security of the domicile and of papers and effects against arbitrary searches and seizures; inviolability of correspondence; freedom to choose one's domicile; due process in criminal prosecutions; security of property, with the reservation of the government's right of eminent domain; prohibition of the collection of taxes not lawfully prescribed; free exercise of civil and political rights; freedom of expression; freedom of association; right of peaceful petition for the redress of grievances; free popular education; freedom to establish schools; guarantee against banishment; prohibition of trial under special laws; prohibition of the establishment of rights of primogeniture; prohibition of the entailment of property; prohibition of the acceptance of foreign honors, decorations, or titles of nobility, and of granting such honors by the Republic. In addition, Article 28 stated: "The enumeration of the rights granted in this title does not imply the prohibition of any others not expressly stated."<sup>9</sup> Thus, there was a suggestion that natural law was the source of these rights.<sup>10</sup>

Of the Bill of Rights provisions presented by Calderon, only his proposals on the Catholic religion were rejected. Calderon had proposed the following:

*Article 5.* The nation shall protect the cult and the ministers of the Roman Catholic Apostolic religion, which is the religion of the State, and shall not utilize its revenues for the support of any other cult.

*Article 6.* Any other cult may be exercised privately, provided that it is not against morality and good customs, and does not endanger the security of the State.

*Article 7.* The acquisition and discharge of all duties and official functions of the Republic, as well as the exercise of all civil and political rights, are independent of the religion of the Filipino citizens.

Substantially, these were borrowings from the Spanish Constitutions of 1869 and 1876. They were rejected by a margin of only one vote. Instead, after a lively debate, the following was approved:

*Article 5.* The State recognizes the freedom and equality of religious worships, as well as the separation of the church and the State.

The feeling was strong, however, that the enforcement of this provision could alienate the influential Filipino clergy. Hence, a "temporary article" was adopted. It read:

9. Teodoro Kalaw, ed., *Planes Constitucionales para Filipinas* (Manila: Bureau of Printing, 1934), pp. 73-76.

10. Majul, *Political and Constitutional Ideas*, p. 179.

*Article 100.* The execution of article 5, title 3 is hereby suspended until the meeting of the constituent assembly.

In the meantime, the municipalities of those places which require the spiritual services of any Filipino priest shall provide for his necessary support.<sup>11</sup>

The Malolos Constitution went into effect in January 1899, about two months before the ratification of the Treaty of Paris transferring sovereignty over the Islands to the United States. Within a month after the promulgation of the Constitution, war with the United States began. Thereafter, for about ten months, the Republic survived; but even before its army had been disbanded into different guerrilla units, its capital was constantly on the move, and its territory grew smaller and smaller. Hence, as Kalaw notes, the Malolos Constitution "was hardly ever in force; in fact it may be said that it had never been in force."

General Aguinaldo was captured by American forces on 23 March 1901. A week later, on 1 April he took the oath of allegiance to the United States. On 19 April in a public manifesto, he called upon his men who were still in arms to accept the peace. Thus the First Philippine Republic and its Constitution receded into history.

Clearly, however, there had by then developed an articulated Filipino consciousness of civil and political rights. In the words of the First Philippine Commission headed by Jacob Gould Schurman, what the Filipino people wanted above all was a "guaranty of those fundamental human rights which Americans hold to be the natural and inalienable birthright of the individual."<sup>12</sup>

#### *GANOON SILA NOON: UNDER THE AMERICANS*

The Americans gave us documentary guarantees of civil and political rights. These guarantees were very much like those which the Filipinos themselves had already embodied in the Malolos Constitution which the Americans themselves had succeeded in dismantling. The first was the Bill of Rights found in President McKinley's response to the Schurman Report. We find this Bill of Rights in the Instruction of 7 April 1900 to the Second Philippine Commission headed by William Howard Taft.<sup>13</sup> This same Bill of

11. A detailed account of the debates may be found in Majul, *Political and Constitutional Ideas*, pp. 137-47; and in Agoncillo, *Malolos*, pp. 296-304.

12. U.S. Philippine Commission, *Report*, 1:84-85.

13. 1 Public Laws (of the Philippines) 1 xiii.

Rights was reenacted in the Philippine Bill of 1902,<sup>14</sup> and later in the Philippine Autonomy Act of 1916, popularly known as the Jones Law.<sup>15</sup> In 1935, when the Filipinos were finally allowed by the Americans to draft their own Constitution, they produced a Bill of Rights almost literally reflecting the earlier American documents.<sup>16</sup>

The official position taken by the Americans was that these principles were not taken from Spanish law, much less from an indigenous Philippine body of law, but rather from the American Constitution. Hence, the prescription was that they should be developed along American lines.<sup>17</sup>

The Philippine judiciary faithfully followed the American prescription. Filipinos trained in American law and American lawyers practicing in the Philippines as well as American judges presiding over Philippine district courts assured such fidelity. The Philippine Supreme Court itself, for some time, was predominantly American. The number of Filipino justices in the Supreme Court was kept at a minority. Moreover, although it has been insinuated that, had there been a greater number of Filipinos in the Supreme Court, the course of judicial decisions would have been different, even a cursory analysis of Philippine decisions during that period will show that the line of judicial dissensions did not run along racial lines.<sup>18</sup> Finally, as further assurance that American constitutional jurisprudence should prevail, the United States Supreme Court had jurisdiction by certiorari over final judgments of the Philippine Supreme Court where constitutionality was involved.<sup>19</sup> Thus, after about a quarter century of American rule, an American student of Philippine constitutional law could say, "As a matter of fact, at the present moment, Philippine constitutional history is but an eddy in American constitutional history."<sup>20</sup>

Briefly, therefore, what I consider the American period of the development of civil and political rights extends from 1900 to the establishment of the second Philippine Republic on 4 July 1946.

14. 1 Public Laws 1056.

15. 11 Public Laws 237.

16. Article III, 1935 Philippine Constitution.

17. *Kepner v. U.S.*, 11 Phil. 669, 692 (1904).

18. Conrado Benitez, "The Supreme Court of the Philippines," *Philippine Law Journal* 2 (1915): 1, 3. This assessment also applies to the period until 1936 when the last American in the Supreme Court retired.

19. Section 27, Philippine Autonomy Act.

20. Malcolm, *Constitutional Law*, p. 132.

This is not to deny that even today American thinking continues to influence Philippine constitutional jurisprudence. This influence, according to Justice Fernando, is unavoidable and most welcome, but, according to Justice Barredo, inordinate and excessive.

This is not the time to enter into an analysis of the tension between the thinking of Fernando and that of Barredo, interesting though the topic may be both politically and jurisprudentially. Nor can we now enter into an analysis of the full range of development during the period from 1900 to 1946. Allow me therefore to select some highlights.

I shall speak on Filipino consciousness (1) of the right of property; (2) of freedom of expression and of assembly and petition; and (3) of freedom from arbitrary searches and arrests. I choose these subjects because they are current topics of reflection and dissension. I shall speak as a lawyer, or, more precisely, as a student of current thought as reflected principally but not exclusively in the thinking of the Supreme Court.

#### RIGHT OF PROPERTY

First, the right of property. American constitutionalism reached the Philippines at a time when *laissez-faire* was accepted by American jurisprudence almost as a constitutional prescription. In spite of this, however, from the very beginning the Supreme Court gave generous latitude to legislation designed to promote public health, public safety, or public welfare, even when these legislations with the right to property.

There was one decision, however, which clearly reflected a *laissez-faire* mentality: *People v. Pomar*.<sup>21</sup> At issue in *Pomar* was freedom of contract. The case dealt with a statute prescribing a thirty day vacation with pay both before and after confinement arising from pregnancy. The Court said: "The rule in this jurisdiction is, that the contracting parties may establish any agreements, terms, and conditions they may deem advisable, provided they are not contrary to law, morals or public policy." Relying chiefly on American decisions, the Philippine Supreme Court struck down the statute as an invasion of freedom of contract.<sup>22</sup> Citing American

21. 46 Phil. 440 (1924).

22. *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); *Adair v. U.S.*, 208 U.S. 161, 174 (1908); *Coppage v. Kansas*, 236 U.S. 1, 14 (1915); *Mugler v. Kansas*, 123 U.S. 623 (1887).

authority, the Court said that "the right to contract about one's own affairs is a part of the liberty of the individual guaranteed by this [due process] clause."<sup>23</sup> The Court also approved the principle of "equality of right." "In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract, which no government can legally justify in a free land."<sup>24</sup> Police power, the Court conceded, is an expanding power; but it "cannot grow faster than the fundamental law of the state . . . If the people desire to have the police power extended and applied to conditions and things prohibited by the organic law, they must first amend that law."<sup>25</sup>

When the *Pomar* decision came up for criticism in the constitutional convention of 1935, Delegate Laurel contended that the *Pomar* decision could no longer stand because of the "social provisions" of the draft 1935 constitution.<sup>26</sup> What were these social provisions?

The principal provision was the fifth declaration of principle in Article II: "The promotion of social justice to insure the well-being and economic security of all the people should be the concern of the State." In the course of the convention, principally through the advocacy of Delegate Locsin, the idea of social justice was developed to mean:

justice to the common tao, the "little man" so-called. It means justice to him, his wife, and children in relation to their employers in the factories, in the farms, in the mines, and in other employments. It means justice to him in the education of his children in the schools, in his dealings with the different offices of government, including the courts of justice.<sup>27</sup>

In other words, what the declaration of principles advocated was nothing less than the idea echoed in the slogan used by many a candidate for the 1971 Convention: Those who have less in life should have more in law.

This same principle or slogan also underlies the Philippine policy on land reform. This was explicit in Section 4, Article XIII of the

23. 46 Phil. at 449.

24. Id. at 452.

25. Id. at 455-56.

26. Vicente J. Francisco, ed., *Journal of the [1935] Constitutional Convention*, 4 vols. (Manila: East Publishing Co., 1961-1964), 3: 1073.

27. Jose M. Aruego, *The Framing of the Philippine Constitution*, 2 vols. (Manila: University Publishing Co., 1937), 1:147.

1935 Constitution: "Congress may authorize, upon payment of just compensation, the expropriation of lands to be subdivided into small lots and conveyed at cost to individuals." Further refinement of this principle, however, did not come until after the American period which I propose to discuss later on.

FREEDOM OF SPEECH, PRESS, AND ASSEMBLY  
AND PETITION

Let us now discuss the development of the concepts of freedom of expression and of assembly and petition. I would like to focus on freedom of expression and freedom of assembly and petition in so far as they clash with the demands of national security and peace and order.

The Americans had to deal with this conflict of values in dealing with various Filipino movements. The line of cases involving seditious utterances begins with the leading case of *People v. Perez*,<sup>28</sup> typically a decision of a nervous colonial government disturbed by the unrest of the natives. The case arose at the time when there was great dissatisfaction with the administration of Governor General Wood. In a political discussion in a *municipio* in Sorsogon, Perez had made this remark: "And the Filipinos like myself must use *bolos* for cutting off Wood's head for having recommended a bad thing for the Philippines."<sup>29</sup> Prosecuted for seditious speech, Perez was convicted. "Criticism," Justice Malcolm said for the Court, "no matter how severe, on the Executive, the Legislature, and the Judiciary, is within the range of liberty of speech, unless the intention and effect be seditious."<sup>30</sup> Such apparently, in the judgment of the Court, were the intention and effect of Perez' remarks. Malcolm found in them "a seditious tendency . . . which could easily produce disaffection among the people and a state of feeling incompatible with a disposition to remain loyal to the Government and obedient to the laws."<sup>31</sup> Actually, the character of the threatened extermination of Wood was more humorous than real, but the Court did not appreciate the humor of it. "While our sense of humor is not entirely blunted," Malcolm wrote, "we nevertheless entertain the conviction that the

28. 45 Phil. 599 (1923).

29. *Id.* at 605.

30. *Id.*

31. *Id.*

courts should be the first to stamp out the embers of insurrection. The fugitive flame of disloyalty, lighted by an irresponsible individual, must be dealt with firmly before it endangers the general peace."<sup>32</sup>

The Court continued to be without a sense of humor in its attitude to sedition throughout the colonial period. Even in 1932, the Court was still unsmiling in *Evangelista v. Earnshaw*.<sup>33</sup> Crisanto Evangelista, a Communist leader, had requested permission to hold a meeting in Plaza Moriones in Manila. The meeting was to be followed by a parade and the delivery to the Governor-General of a message from labor. Tomas Earnshaw, the city Mayor, refused permission and prohibited all Communist meetings. In upholding the Mayor's refusal, the Court said:

[I]t must be considered that the respondent mayor, whose sworn duty it is "to see that nothing should occur which would tend to provoke or excite the people to disturb the peace of the community or the safety or order of the Government did only the right thing under the circumstances."<sup>34</sup>

Instead of being condemned or criticized, the respondent mayor should be praised and commended for having taken a prompt, courageous, and firm stand towards the said Communist Party of the Philippines before the latter could do more damage by its revolutionary propaganda, and by the seditious speeches and utterances of its members.

Then the Court cited with approval the following quotation from *People v. Perez*:

[W]hen the intention and effect of the act is seditious the constitutional guaranties of freedom of speech and press and of assembly and petition must yield to punitive measures designed to maintain the prestige of constituted authority, the supremacy of the constitution and the laws, and the existence of the State.<sup>35</sup>

The *Evangelista* case was decided by a Supreme Court consisting of four Americans and five Filipinos. Very much like the *Perez* case, it still reflected a colonial power's nervousness when faced by restless natives. However, I do not believe that the decision would have been different had the Court been one hundred percent

32. *Id.* at 607.

33. 57 Phil. 255 (1932). See also the other cases that followed *Perez*: *People v. Feleo*, 57 Phil. 451 (1932); *People v. Evangelista*, 57 Phil. 354 (1932); *People v. Nabong*, 57 Phil. 453 (1932); *People v. Feleo*, 58 Phil. 573 (1933).

34. 57 Phil. at 260-1.

35. 45 Phil. at 605.

Filipino. The decision simply reflected the condition of the Filipino juristic mind at that time, a juristic mind formed, as Barredo would say, from reading too many American books. The change on this cast of the Filipino mind came later, after independence, but again the change that came about was also the result of reading American books.

#### FREEDOM FROM ARBITRARY SEARCHES AND ARRESTS

One lofty purpose of the protection against unreasonable searches and seizures — and, perhaps, the most important in the eyes of the Filipino just freed from the Spanish regime — was clearly set out in an early decision of the Supreme Court:

The inviolability of the home is one of the most fundamental of all the individual rights declared and recognized in the political codes of civilized nations. No one can enter into the home of another without the consent of its owners or occupants.

The privacy of the home — the place of abode, the place where a man with his family may dwell in peace and enjoy the companionship of his wife and children unmolested by anyone, even the king, except in rare cases — has always been regarded by civilized nations as one of the most sacred personal rights to which men are entitled. Both the common and the civil law guaranteed to man the right of absolute protection to the privacy of his home. The king was powerful; he was clothed with majesty; his will was the law; but, with few exceptions, the humblest citizen or subject might shut the door of his humble cottage in the face of the monarch and defend his intrusion into that privacy which was regarded as sacred as any of the kingly prerogatives. The poorest and most humble citizen or subject may, in his cottage, no matter how frail or humble it is, bid defiance to all the powers of the state; the wind, the storm and the sunshine alike may enter through its weather-beaten parts, but the king may not enter against its owner's will; none of his forces dare to cross the threshold of even the humblest tenement without its owner's consent.

"A man's home is his castle," has become a maxim among the civilized peoples of the earth. His protection therein has become a matter of constitutional protection in England, America, and Spain, as well as in other countries.<sup>36</sup>

The principal protection against unreasonable searches and seizures is the requirement of a warrant — an order in writing,

36. U.S. v. Arceo, 3 Phil. 381, 384 (1904).

issued in the name of the people of the Philippines, signed by a judge or justice of the peace, and directed to a peace officer, commanding him to arrest a person or search for personal property and bring it before the court. Article III, section 1 (3) of the 1935 Constitution prescribed that "no warrants shall issue but upon probable cause, to be determined by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched, and the persons or things to be seized."

The constitutional protection of the person against arbitrary arrests is also found in the search and seizure clause: "The right of the people to be secure in their persons . . . against unreasonable . . . seizures shall not be violated." Thus, the requisites for a valid search warrant are also applicable to a warrant of arrest.

The technicalities that surround the constitutional law on search warrants and warrants of arrest form a veritable thicket and this is not the occasion for hacking our way through the jurisprudential jungle brush. Let me just touch on one question: Who may issue a search warrant or warrant of arrest? This is important because of the "hounds of war" that have proliferated in our days, "hounds" whose official classification is currently spelled ASSO (Arrest, Search, and Seizure Order).

The 1935 Constitution was clear on this: only a judge may issue a warrant, only a judge may authorize a search or an arrest. This is significant because it is a departure from American constitutional law. In other words, in 1935, while we were at the threshold of our independence, our representatives were willing to entrust the sanctity of our homes and the sacredness of our persons only to a judge and to no one else. The reason for this was that in the minds of our representatives only a judge would have the requisite neutrality and detachment needed in the often competitive enterprise of ferreting out crime.

Briefly, then, at the end of the American period, (1) the Filipino concept of property right had evolved from one of individualism to one more aware of the social obligations attached to ownership; (2) the official position regarding freedom of expression and of assembly and petition, especially as these tended to clash with the interest in national security and peace and order, remained that of a nervous and humorless colonial bureaucrat distrustful of restless natives; (3) the Filipinos concluded, contrary to American practice,

that they could not entrust the sanctity of their homes and the sacredness of their person to an executive officer, be he civilian or military or king or queen, but only to a judge.

### *PAANO TAYO NGAYON?* INDEPENDENT PHILIPPINES

What happened when we finally gained independence? Let me just pursue the three topics I discussed under the American period: the right of property, freedom of expression and of assembly and petition, and freedom from arbitrary arrests and searches.

#### RIGHT OF PROPERTY

On the right of property, let me concentrate on land reform in so far as it clashes with the right to property. We have seen that the 1935 Constitution attempted to socialize land ownership by allowing the expropriation of lands for subdivision and resale.

The constitutional provision on the expropriation of land for resale has been the subject of thorough litigation. The first phase of this litigation history, 1949 to 1969, reveals that both legislators and judges have shown a history of reluctance to tamper with the traditional manner and size of land holdings. Thus the constitutional doctrine that emerged was that expropriation under the Constitution must be for public use. Hence, to allow the expropriation of private land for subdivision and resale to private owners, the size of the land expropriated, the large number of people benefited, and the extent of the social and economic reform by the expropriation, must be such as to clothe the action with the character of public interest and public use. Such requirement, a sharply divided Court said, is satisfied when the lands expropriated are "large estates, trusts in perpetuity, and land that embraces a whole town or city."<sup>37</sup> The fact alone that the tenants and occupants of the land had by themselves and their ancestors been occupying and cultivating the land for many years was found insufficient justification for the expropriation.

In his dissenting opinion Justice J. B. L. Reyes attempted to show that the constitutional provision was an answer to a wrong

37. *Guido v. Rural Progress Administration*, 84 Phil. 847 (1949); *Republic v. Baylosis*, 96 Phil. 461 (1955).

of ancient vintage that still cried for redress in the form of allowing tenants to own the land they tilled. Reyes appealed to the words of the symbolic *Cabesang Tales* in Rizal's *El Filibusterismo*:

Podeis hacer lo que querais, señor Gobernador, yo soy un ignorante y no tengo fuerzas. Pero he cultivado esos campos, mi mujer y mi hija han muerto ayudándome a limpiarlos, y no los he de ceder sino a que el que pueda hacer por ellos mas de lo que he hecho yo. Que los riegue primero con su sangre y que entierre en ellos a su esposa y su hija.<sup>38</sup>

Reyes argued that the "Constitution considered the small individual land tenure to be so important to the maintenance of peace and order and to the promotion of progress and the general welfare that it not only provided for the expropriation and subdivision of lands but also opened the way for the limitation of private land holdings [Article XIII, Section 3, 1935]."<sup>39</sup>

On the eve of the birth of the 1973 Constitution, *J. M. Tuason and Co., Inc. v. Land Tenure Administration* revived the neglected dissent of Justice J. B. L. Reyes and rejected the "undue stress on property rights" found in Justice Montemayor's argument in the earlier case.<sup>40</sup> Emphasis was now placed on the fact that the Constitution speaks of "lands" and not of "landed estates." The "area test" was rejected in favor of the state's "quest for social, justice and peace."<sup>41</sup> Justice Barredo, in fact, in his concurring opinion espoused a broader power for Congress: "I take it that the constitutional provision itself declares the public objective, purpose or use of the expropriation contemplated, which is the amelioration of the long standing socio-agrarian conditions endangering the very ideology on which our government and way of life rest, hence, it should follow that as long as a congressional legislation declares that condemnation of a particular land is for the specific purpose stated in the Constitution, it is not for the judiciary to enquire as to whether or not the taking of such land is for public use."<sup>42</sup>

Under the 1973 Constitution, what is now the controlling doctrine? I submit that the opinion set out in *J. M. Tuason* should

38. You can do what you wish, Governor; I am an uneducated man, and I have no resources. But I have tilled these fields; my wife and daughter died helping me to clear them; and I am not going to yield them to anyone unless he can do more for them than I have done. Let him first water them with his own blood and bury in them his wife and daughter.

39. 96 Phil. at 504.

40. 31 SCRA 413 (18 February 1973).

41. Id. at 427-8, quoting from the dissent of J. B. L. Reyes in *Baylosis*.

42. Id. at 442-3.

now be the controlling doctrine. The insistence of the older line of decisions in making the size of the land to be expropriated the controlling factor for legitimating expropriation for resale can no longer be justified in the light of new provisions found in the 1973 Constitution. In relation to Article II, Section 6, the power of eminent domain must be recognized as the most effective instrument to "equitably diffuse property ownership" and in relation to Article XIV, Section 12, the power of eminent domain can most effectively serve to "implement an agrarian reform program aimed at emancipating the tenant from the bondage of the soil." And the problem of inequitable distribution of land in the Philippines today does not consist merely in the existence of single tracts of land that, to paraphrase old decisions, embrace whole towns or cities and belong to one owner. The problem also consists in extensive land holdings by single owners, although these land holdings may not be all in one piece. This latter type of extensive land holdings comes within the ambit of the 1973 Constitution. There are now very few, if indeed there still are, any single-owner land holdings that embrace whole towns and cities.

If you ask me whether the land reform program of President Marcos and his other "assaults" on private property have constitutional foundation, my answer is clearly "Yes". The 1935 Constitution had a social concept of private property: that social concept is etched more clearly in the 1973 Constitution. Whether, however, the President's concrete approach to the problem will achieve the objectives of the Constitution, I am not now prepared to answer.

#### FREEDOM OF EXPRESSION AND OF ASSEMBLY AND PETITION

What of freedom of expression and of assembly and petition after Independence? We have seen that when the American period ended, the principle followed was that speech was punishable if it tended to create a feeling of disloyalty to the government or if it tended to suggest disobedience to the laws. Mere tendency towards causing disturbance was enough to make speech or assembly punishable. Constitutionalists call this the "dangerous tendency rule."

When independence came, we continued with our favorite pastime, election rallies, and Plaza Miranda remained the center

stage. In 1948 the Liberal Party won the much disputed elections. The defeated parties asked the Mayor of Manila for a permit to hold a rally in Plaza Miranda to protest against the alleged fraud committed by the Liberal Party. The Mayor refused the permit arguing that it would tend "to undermine the faith and confidence of the people in their government, and in the duly constituted authorities."<sup>43</sup> This time the Supreme Court did not agree. It said: "To justify suppression of free speech there must be reasonable ground to believe that serious evil will result if free speech is practiced. There must be reasonable ground that the danger apprehended is imminent. There must be reasonable ground to believe that the danger apprehended is a serious one."<sup>44</sup>

Some writers already see in this decision a rejection of the "dangerous tendency rule" and an adoption of the more liberal "clear and present danger rule." The "clear and present danger rule" had been earlier enunciated by Justice Holmes thus: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."<sup>45</sup> Or, as Justice Learned Hand more pithily put it: "In each case [courts] must ask whether the gravity of the 'evil', discounted by its improbability, justified such invasion of free speech as is necessary to avoid the danger."<sup>46</sup> The Philippine Supreme Court explicitly adopted this rule in 1957 when it said: "Any restraint [of freedom of expression] can only be justified . . . on the grounds that there is a clear and present danger of a substantive evil which the State has the right to prevent."<sup>47</sup>

More in point, however, was a decision of the Supreme Court promulgated in 1951 on a seditious libel charge made at the height of the Hukbalahap threat.<sup>48</sup> The case was about a gentleman from Bohol named Espuelas who had no great love for President Roxas. Espuelas had his picture taken making it appear that he was hanging lifeless at the end of a piece of rope suspended from the limb of a tree. He was in fact very much alive and safely standing on a barrel.

43. *Primicias v. Fugoso*, 80 Phil. 71, 87 (1948).

44. *Id.*, quoting from Justice Brandeis in *Whitney v. California*, 274 U.S. 357 (1927).

45. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

46. Quoted in *Dennis v. United States*, 341 U.S. 494, 509 (1951).

47. *American Bible Society v. City of Manila*, 101 Phil. 386, 388-9 (1957).

48. *Espuelas v. People*, 90 Phil. 524 (1951).

He then had this picture published in several newspapers together with a letter to his wife saying that he had taken his own life because he could no longer bear the slings and arrows of the outrageous Roxas administration.

Espuelas eventually had to come down from his barrel perch to face a charge of inciting to sedition. He was convicted. The Supreme Court, humorless and unsmiling, solemnly declared:

The letter is a scurrilous libel against the Government. It calls our government one of crooks and dishonest persons (dirty) infested with Nazis and Fascists, i.e., dictators.

And the communication reveals a tendency to produce disaffection or a feeling incompatible with the disposition to remain loyal to the government.<sup>49</sup>

The decision was not unanimous. Justice Tuason, dissenting, said: "The witnesses for the government themselves, some of whom were Constabulary officers stationed at Tagbilaran, stated that upon reading the article and seeing the author's picture they just laughed it off, 'thinking that this fellow must be crazy.'"<sup>50</sup>

In 1922, Justice Malcolm had already said: "No longer is there a Minister of the Crown or a person in authority of such exalted position that the citizen must speak of him only with bated breath."<sup>51</sup> And again: "The crime of *lèse majesté* disappeared in the Philippines with the ratification of the Treaty of Paris."<sup>52</sup> But even by 1951, the year of the Espuelas decision, the mood of monarchy had not yet died.

In 1964, however, the Communist threat was fairly under control. One can feel this in the more relaxed mood of the Supreme Court in *People v. Hernandez* when it said:

We next consider the question as to whether the fact that Hernandez delivered speeches of propaganda in favor of Communism and in favor of rebellion can be considered as a criminal act of conspiracy to commit rebellion as defined in the law. In this respect, the mere fact of his giving and rendering speeches favoring Communism would not make him guilty of conspiracy, because there was no evidence that the hearers of his speeches of propaganda then and there agreed to rise up in arms for the purpose of obtaining the overthrow of the democratic government as envisaged by the principles of Communism.<sup>53</sup>

49. *Id.* at 527, citing the colonial decision of *U.S. v. Dorr*, 2 Phil. 332 (1903).

50. 90 Phil. at 536.

51. *People v. Perfecto*, 43 Phil. 887, 900 (1922).

52. *Id.* at 902.

53. 11 SCRA 223, 243 (30 May 1964).

By 1972, the Court had apparently learned how to live with the Communist threat. Thus, while it upheld the validity of the 1957 Anti-Subversion Law, it warned: "In conclusion, even as we uphold the validity of the Anti-Subversion Act, we cannot overemphasize the need for prudence and circumspection in its enforcement, operating as it does in the sensitive area of freedom of expression and belief."<sup>54</sup>

It is significant that the Anti-Subversion Act itself is premised, in the words of Congress, on the fact that the "continued existence and activities of the Communist Party of the Philippines [constituted] a clear, present, and grave danger to the security of the Philippines."<sup>55</sup> But the Supreme Court itself in 1972 warned that the continued threat of the Communist Party and similar organizations was something not to be presumed but rather to be proved in every instance of prosecution.<sup>56</sup>

It can thus be said that by 1972, when Martial Law was proclaimed, the dangerous tendency rule had already been rejected in favor of the clear and present danger rule. It can also be said that the rejection of the dangerous tendency rule in favor of the clear and present danger rule was largely due to the reading of American books reflecting the mind of Justices Holmes and Brandeis.

What is the *present* doctrine under Martial Law? Presumably, it should be the more liberal clear and present danger rule which was in effect in 1972. However, the Supreme Court has been reading American books again, notably Clinton Rossiter's *Constitutional Dictatorship*, and I would not be surprised if there should be a return to the 1923 doctrine of *People v. Perez*.<sup>57</sup> The Perez doctrine is the present military line as seen, for instance, in the "Charge Sheet" against the more than 200 respondents being presently investigated in a military Pelota Court in Davao.

#### FREEDOM FROM UNREASONABLE SEARCHES AND SEIZURES

We now come to freedom from unreasonable searches and seizures. After Independence, the trend was toward liberalization of

54. *People v. Ferrer*, 48 SCRA 382, 413 (27 December 1972).

55. Explanatory Note, R.A. 1700 (1957).

56. *People v. Ferrer*, 48 SCRA at 415-6.

57. See *Sanidad, Jr. v. Commission on Elections*, L-44640, 12 October 1976.

the rule. The liberalization was against the state and in favor of the accused.<sup>58</sup> And the Court was unswerving in its insistence that only a judge could issue a search warrant or warrant of arrest. Even warrants issued by authority of the President in deportation cases were invalidated.<sup>59</sup> The insistence on this rule reached even to the point of scrupulosity.<sup>60</sup>

I am not much of a spiritual director but I understand that scrupulosity sometimes needs radical treatment. Radical treatment was administered by the wise men of the 1971 Constitutional Convention who prescribed that a search warrant or warrant of arrest may be authorized [not only] "by the judge, [but also by] such other officer as may be authorized by law."<sup>61</sup>

This in effect is a return to the American rule which was rejected in 1935. Note, however, that not any officer may issue a warrant of arrest or a search warrant. Two requisites are required by the Constitution: first, he must be a responsible officer, and second, he must be authorized by law. A responsible officer, I submit, is one who is competent and neutral, that is, one whose role is not prosecutorial. Fair play demands that the arbiter of human rights be impartial and neutral. I gather this much from American books which I also read.<sup>62</sup> The interesting question, however, is this: Has any such responsible officer, other than judges, been authorized by law to issue warrants? In a decision promulgated on 18 June 1976, the Supreme Court said that until then no law or presidential decree had been enacted or promulgated vesting such authority in any particular "responsible officer."<sup>63</sup> Thus, as far as the Supreme Court is concerned, only judges are authorized now to issue warrants. I find this decision of the Court a little difficult to believe, because last December, during the search of the office of *The Communicator*, the ASSO that was shown to me was not signed by a judge. I am sure others have had similar experiences.

58. For instance, the exclusionary rule was adopted, first, in *Stonehill v. Diokno*, L-19550, 19 June 1967, and later in Section 4(2), Article IV, of the 1973 Constitution.

59. E.g., *Qua Chee Gan v. Deportation Board*, 9 SCRA 27 (30 September 1963).

60. *Bache & Co. v. Ruiz*, 37 SCRA 823 (27 February 1971).

61. Article IV, Section 3, 1973 Philippine Constitution.

62. *Johnson v. United States*, 333 U.S. 10, 14 (1948); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Shadwick v. City of Tampa*, 40 LW 4758 (1971).

63. *Collector of Customs v. Villaluz*, L-34038, 18 June 1976.

## CONCLUSION

Thus, *ganoon sila noon, ganito naman tayo ngayon*. One might ask, where lies the difference, if any, between then and now, between yesterday and today?

In Robert Bolt's play, *A Man for All Seasons*, there is a scene between Thomas More and his daughter Margaret where Margaret tries to convince her father to take the oath and thus obtain release from jail. Finally, in exasperation, Margaret exclaims, "But in reason, father, have you not done all that you could possibly do?" And More calmly answers, "In the end, Margaret, it is not reason that matters, but love."

If there is any difference between yesterday and today, the difference might lie not in the realm of reason but perhaps in the realm of the heart, whose reason reason does not always understand.

You look at the various phases of our history. I think we can say that during the late Spanish period Filipino intellectualism flourished. But it was not an intellectualism that was without a heart; rather, it was intellectualism at the service of the heart, of a heart gripped by a passion for liberation.

You look at the American phase of our history. For all the American benevolence that we experienced and in spite of the fact that we owed to the Americans the sharpening of our concepts of political and civil liberties, as long as a foreign flag flew over our land, our intellectual processes continued to be channeled through and warmed by the heart.

We learned our lessons well and heartily during the American phase. That is what the Japanese conqueror found in 1941-1945. The lament of the Japanese conqueror was that America had scattered the energies of the Filipinos by excessive encouragement of individual rights until the Filipinos would do "nothing but stand on their right."<sup>64</sup>

Then came Independence, and rehabilitation, and economic progress, fast cars, and stereo music. Most of us learned to take our liberties for granted. Our hearts turned to other loves. Our hearts needed a reawakening.

The period of youth activism that culminated in the eventful document of 21 September 1972, should have jolted us out of

64. Theodore Friend, *Between Two Empires: The Ordeal of the Philippines, 1929-1946* (New Haven: Yale University Press, 1965), pp. 231-32.

what looked like apathy and should have reawakened and re-directed our hearts. But I think that even now most of us are still in a stage of groping confusedness. I would like to make one final observation.

The heart responds to symbols. In Spanish times, the symbol that ignited emotion was the Guardia Civil. In American times, the symbol was a foreign flag flying over our land. During the Japanese occupation, it was the *Kempetai*. Today what can be that symbol? I make no suggestion. But in order to put warmth to our consciousness of civil and political liberties, we might do well to focus on some symbol that will inject an added dose of "reason of the heart" which cold rationality does not always understand.