THE STATE OF REBELLION AND THE RULE OF LAW

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About 500 years before the birth of Christ, Heraclitus of Ephesus in Asia Minor stated that the major problem of society is how to balance that degree of liberty without which law becomes tyranny with that degree of law without which liberty becomes license.[1]

Recent developments in our country are quite alarming. In the balancing process between liberty and the maintenance of order, the rule of law has been frenetically abandoned. Under Heraclitus' theory, liberty gave way to methods used only under tyrannical rule.

Last May 1, 2001, the sight of a ragtag multitude of poor people exercising their constitutional rights of expression, assembly, and petition led to a presidential declaration of a state of rebellion. Unfortunately, this declaration was without any factual or legal basis. Nowhere in the Constitution is there a provision governing the situation or condition of a "state of rebellion." There is a "state of martial law."[2] The provision, however, exists not as a grant of power nor a status calling for the exercise of power but as a limitation stating what the President may not do in times of actual invasion or rebellion. Any execution of the laws, preservation of public order, or suppression of violence from foreign or domestic enemies during a rebellion must be within the operation of the Constitution, the functioning of legislative assemblies, and the exercise of jurisdiction by civil courts.[3] This is what the Constitution requires.

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[1] VANDERBILT, THE DOCTRINE OF SEPARATION OF POWERS AND ITS PRESENT DAY SIGNIFICANCE 37.

[2] CONST. art. VII, sec. 18, par. 4.

[3] *See* definition of martial law during a "state of war" in the Prize cases, 2 Black 635, 17 L. Ed. 459 (1863); Ex Parte Milligan, 4 Wallace 2, 18 L. Ed. 281 (1866); and Duncan v. Kahanamoku, 327 U.S. 304, 90 L.Ed. 688 (1946) and during actual rebellion in Lansang v. Garcia, 42 SCRA 448 (1971); People v. Ferrer, 48 SCRA 382 (1972); People v. Ferrer, 56 SCRA 793 (1974); Aquino, Jr. v. Ponce Enrile, 59 SCRA 183 (1974); Aquino, Jr. v.

The Constitution provides for *actual* invasion or rebellion.[4] The declaration of a *state of rebellion* by the President, not specified in the Constitution, and the subsequent exercise of powers intended only for actual rebellion, have no legal justification. At the very least, they can probably be understood. The former incumbent, President Joseph E. Estrada, had just been ousted from office. A new president was recently installed not by national elections but by the "people power" gathering called EDSA II, followed by claims of constitutional succession challenged before the Supreme Court. The new administration was apparently still nervous and uncertain on the compelling force of its exercise of powers, the backing of military and police forces or its acceptance by the country as a whole. What is more difficult to comprehend is the use by the Supreme Court of a technique of avoidance and the disregard of a judicial power, which is specifically conferred by an amendment in the 1987 Constitution.[5]

Before proceeding with the implications of the suspension of the Bill of Rights during a so-called state of rebellion, some basic premises must first be discussed.

Foremost is the rule of law. The Constitution is the supreme law of the land; all acts of government must conform to its mandates and all government authority is subject to its limitations. In the landmark case of *Ex parte Milligan*,[6] the U.S. Supreme Court declared, "The Constitution (of the United States) is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."

Moreover, the Court stated that "no doctrine involving more pernicious consequences, was ever invented by the wit of man than that its provisions can be suspended during any of the great exigencies of government." The exigency referred to was the American Civil War. It was the gravest threat ever faced by the United States where hundreds of thousands of soldiers on each side fought fierce and deadly battles for four years before it became clear that the North would prevail over the South.

The same court ruled that the theory of necessity upon which the doctrine of suspension of liberty was based is false. The Court emphasized that within the bounds of the Constitution, the Government has all the powers necessary to

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Commission on Elections, 62 SCRA 275 (1975); Aquino, Jr. v. Military Commission No. 2, 63 SCRA 546 (1975).

[4] CONST. art. VII, sec. 18.

[5] CONST. art. VIII, sec. 1, par. 2.

[6] 4 Wallace 2 (1866), 71 U.S. 2, 18 L. Ed. 281.

preserve its existence. Such a doctrine of suspension leads to anarchy or despotism according to the court.

The Philippine Supreme Court waxed equally lyrical in *Araneta v. Dinglasan*[7] when it declared:

> Never in the history of the United States, the basic features of whose Constitution have been copied in ours, have the specific functions of the legislative branch of enacting laws been surrendered to another department...not even when that Republic was fighting a total war or when it was engaged in a life and death struggle to preserve the Union. The truth is that, under our concept of constitutional government, in times of extreme perils more than in normal circumstances, the various branches, executive, legislative, and judicial, given the ability to act, are called upon to perform the duties and discharge the functions committed to them respectively.[8]

Under Proclamation No. 38 dated May 1, 2001, President Gloria Macapagal Arroyo confirmed the existence of "an actual and on-going rebellion" but which she found as existing only in Metro Manila.

It is, however, clear that there was no rebellion in Metro Manila on the day of said proclamation. This declaration of a state of rebellion had no factual basis. Reference is hereby made to the decision penned by the late Chief Justice Roberto Concepcion in the case of *Teodosio Lansang v. Brigadier General Eduardo M. Garcia* and eight other petitions consolidated with it,[9] where the factual foundations for the existence of a state of rebellion are discussed in detail. *Lansang v. Garcia* found "no doubt about the existence of a sizeable group of men who have publicly risen in arms to overthrow the Government and have thus been and still are engaged in rebellion . . ."[10] Comparing *Lansang v. Garcia* with *Honasan v. De Villa*, and the similar cases filed by Panfilo Lacson, Miriam Defensor-Santiago and others, the former had clear factual bases for the existence of a state of rebellion which were absent in the latter cases.[11]

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[7] 84 Phil. 368 (1949).

[8] *Id.* at 382-383.

[9] Lansang v. Garcia, G.R. No. L-33964; Arienda v. Secretary, G.R. No. L-33965; David v. Garcia, G.R. No. L-39993; Prudente v. Yan, G.R. No. L-39982; De Lara v. Garcia, G.R. No. L-34004; Rimando v. Garcia, G.R. No. L-34013; Rabago v. Garcia, G.R. No. L-34039; Oreta Jr. v. Garcia, G.R. No. L-34265; and Olivar v. Garcia, G.R. No. L-34339, 42 SCRA 448 (1971).

[10] *Id.* at 478.

[11] Lacson v. Perez, et al., G.R. No. 147780; Defensor-Santiago v. Reyes, G.R. No. 144781; Lumbao v. Perez, et al., G.R. No. 144799; Laban ng Demokratikong Pilipino v. Dept. of Justice, G.R. No. 147810, May 10, 2001; Honasan v. De Villa, G.R. No. 147818, May 10, 2001.

As stated in the dissenting opinion of Justice Sandoval-Gutierrez in the consolidated cases[12] challenging Proclamation No. 38 and General Order No. 1, the weapons used were rocks, sticks, and stones picked up along the way to Malacañang Palace. These are hardly the armaments used in a rebellion. There were no firearms, grenades, or mortars, not even bolos or bows and arrows. There was no organized group – no Politburo, no Kilusang Mayo Uno (KMU), no Moro Islamic Liberation Front (MILF), no hierarchy of the Roman Catholic Church, nor any other organization – to lead the so-called rebels. EDSA III, as it is colloquially called, was a spontaneous gathering of disillusioned and angry people without any vast movement of men and without a complex net of intrigues and plots. The good Justice stated that what happened near Malacañang on May 1, 2001 was merely a riot, a mob, or even a tumultuous uprising, but certainly not a rebellion.

Rebellion is a well-defined crime in the Revised Penal Code[13] and in decisions of the Supreme Court.

Under existing jurisprudence, the acts and utterances in relation to EDSA III of Senators Gregorio Honasan, Panfilo Lacson, Miriam Defensor-Santiago, Juan Ponce Enrile, Ernesto Maceda and other petitioners do not amount to rebellion. For one thing, the Senators were exercising their right to freedom of expression and speaking as members of the political opposition.

One has to go back to the 1920s and 1930s for cases on sedition but not rebellion for similar utterances. In *People vs. Perez*, the accused shouted at a small gathering, "Filipinos like myself should use bolos for cutting off (Governor General Leonard) Wood's head for having recommended a bad thing for the Filipinos, for he killed our independence."[14] Perez was convicted under the Treason and Sedition Act during the colonial period.

Evangelista v. Earnshaw,[15] *People v. Feleo*[16] and *People v. Nabong*[17] involved leaders of the Communist Party who were found guilty of speech with seditious intent and effect. Nabong stated that the Philippine Constabulary seized their flag and shot innocent women. He then declared that "we ought to be united to suppress that abuse. Overthrow the present government and establish our own

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[12] *Id.*

[13] Arts. 134, 134-a and 135.

[14] 45 Phil. 599 (1923).

[15] 57 Phil. 255 (1932).

[16] 57 Phil. 451 (1932).

[17] 57 Phil. 455 (1932). Other cases are People v. Capadocia, 57 Phil. 364 (1932); People v. Evangelista, 57 Phil. 354 (1934); and People v. Evangelista, 57 Phil. 372 (1932), 57 Phil. 456 (1932).

government, the government of the poor. Use your whips so that there may be marks on their sides."[18]

Nabong spoke at a necrological service for the deceased head of the Communist Party. Another speaker, Feleo, urged the audience at the necrological services to imitate the French soldiers who, instead of pointing their arms at the enemies, decided to shoot at their chiefs.

The 1930's Communist Party leaders were charged with sedition, not rebellion. Moreover, the speeches found seditious in 1923 and 1932 would be tolerated under the clear-and-present-danger doctrine of today. The clear-and-present-danger rule means "that the evil consequences of the comment or utterance must be 'extremely serious and the degree of imminence extremely high' before the utterance can be punished. The danger to be guarded against is the 'substantive evil' sought to be prevented."[19] Our country has gone through many anti-government speeches in the 70 years which followed. Actual taking up of arms and actual uprisings have happened. Entire municipalities have been captured and occupied by Hukbalahap or HMB, Moro National Liberation Front (MNLF), and MILF forces. From 1923 to 2001, there is not a single decision of the Supreme Court alluding that the tenor of the speeches and acts of Senator Honasan, fellow senators and companions would have amounted to rebellion.

Significantly, the May 10, 2001 decision of the Supreme Court in the state-of-rebellion petitions did not, and could not, find any factual basis to show that there was an actual rebellion. The Supreme Court did not mention a single fact or incident upon which a finding of rebellion could be based. The Court did not validate Proclamation No. 38 nor General Order No. 1. It, on the other hand, found that warrantless arrests were made. In fact, the Court enjoined further warrantless arrests. The petitions were denied because, on May 6, 2001, the President lifted her declaration of a state of rebellion. Hence, the petitions were simply declared moot and academic. There was no decision on the merits.

The Court bypassed the challenges to the state of rebellion. Victims of warrantless arrests were told that they had adequate remedies in the ordinary course of law. The Court did not go into the sufficiency of the basis for the exercise of military power, Proclamation No. 38 having been lifted.

Resort to a decision "not to decide or not to pass upon the issue" is foreclosed by the 1987 amendment to the Constitution. It states that "judicial power

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[18] People v. Nabong, 57 Phil. 455 (1932).

[19] Cabansag v. Fernandez, 102 Phil. 151 (1957).

includes the duty of the courts of justice...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 the Government."[20] Note that a decision is a duty.

The expanded definition of judicial power was impelled by the perception that during the martial law regime of President Ferdinand E. Marcos, the Supreme Court used the techniques of avoidance, especially the political question doctrine, to allow alleged unconstitutional acts to be legitimated by simply refusing to exercise its power of judicial review.

It may be rash to declare that the political question doctrine has been totally discarded.[21] For one thing, the convenient inclusion of the phrase "grave abuse of discretion" allows the Supreme Court to justify its non-interference in presidential or legislative acts when it decides not to interfere. Instead of resorting to the time-honored doctrine of political question, the Court can state that there is no grave abuse of discretion.

At any rate, on the extent of its power of review, the Court has categorically declared that:

> Even if the question were political in nature, it would still come within the Court's power of review under the expanded jurisdiction conferred upon it by Article VIII, Sec. 1 of the Constitution, which includes the authority to determine whether grave abuse of discretion amounting to excess or lack of jurisdiction has been committed by the government.[22]

Under the above ruling, a political question is within the power of judicial review. Nevertheless, even under the old concept of political question, there appears to be no ground in the state-of-rebellion cases, to invoke it as a method of avoidance.

The United States Supreme Court has stated that the political question doctrine is one of substance and not merely procedural. It is grounded on considerations which transcend all particular limitations. It is a rule basic to the federal system and fixes the Court's appropriate place within that structure.[23]

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[20] CONST. art. VIII, sec. 1, par. 2.

[21] For one, this author cannot conceive a situation where the Court would assume jurisdiction over a presidential decision to recognize the Peoples' Republic of China in Beijing as the legitimate government in lieu of the Republic of China based in Taiwan.

[22] Daza v. Singson, G.R. No. 86344, 180 SCRA 496 (1989).

[23] Rescue Army v. Municipal Court of the City of Los Angeles, 331 U.S. 549, 91 L.Ed. 1666 (1947).

After finding that warrantless arrests were made, the Philippine Court's decision not to pass upon the constitutional issue cannot be founded on the old doctrine of political question. The policy foundations of the doctrine are missing.

As stated by the American Court:

> The policy's ultimate foundations, some if not all of which also sustain the jurisdictional limitation, lie in all that goes to make up the unique place and character in our scheme of judicial review of governmental action for constitutionality. They are found in the delicacy of that function, particularly in view of possible consequences for others stemming also from constitutional roots; the comparative finality of those consequences; the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority; the necessity, if government is to function constitutionally, for each to keep within its power, including the courts; the inherent limitations of the judicial process, arising especially from its largely negative character and limited forces of enforcement; withal in the paramount importance of constitutional adjudication in our system.[24]

The decision not to pass upon the merits of a burning constitutional issue is precluded not only by the textural definition of judicial power but by traditional policy considerations stating when the Court may not venture into the political thicket.

In the state of rebellion cases, *Honasan v. De Villa, Lacson v. Perez, Defensor-Santiago v. Reyes, Lumbao v. Perez and Laban Ng Demokratikong Pilipino v. Department of Justice,*[25] no explanation was given as to whether there was an absence of grave abuse when the warrantless arrests and unreasonable searches were effected. No justification was given for the Court's avoidance of the basic constitutional issue. No policy considerations were given for the Court's implied reliance on the political question doctrine or for the use of moot-and-academic technique.

Moving on to the provisions of the Constitution, there is a so-called emergency powers clause,[26] which provides:

> In times of war or other national emergency, the Congress may, by law, authorize the President, for a limited period and subject to such restrictions as it may prescribe, to exercise powers necessary and proper to carry out a

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[24] *Id.* at 568-574.

[25] Lacson v. Perez, et al., G.R. No. 147780; Defensor-Santiago v. Reyes, G.R. No. 144781; Lumbao v. Perez, et al., G.R. No. 144799; Laban ng Demokratikong Pilipino v. Dept. of Justice, G.R. No. 147810, May 10, 2001; Honasan v. De Villa, G.R. No. 147818, May 10, 2001.

[26] CONST. art. VI, sec. 23, par. 2.

> declared national policy. Unless sooner withdrawn by resolution of the Congress, such powers shall cease upon the next adjournment thereof.

Proclamation No. 38 and General Order No. 1 (May 1, 2001) cannot be justified as resort to emergency powers. There was no war nor emergency, national in scope, not even in Metro Manila. Emergency powers are conferred by an act of Congress. In the declaration of a state of rebellion last May, Congress had no part. No national policy was declared.

If Proclamation No. 38 declaring a state of rebellion, and General Order No. 1 ordering warrantless arrests, are to have any constitutional foundations, it would have to be under the commander-in-chief clause of the Constitution which provides the following:

> The President shall be the 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, or rebellion. In case of invasion or rebellion, when the public safety requires it, he may for a period not exceeding sixty days suspend the privilege of the writ of habeas corpus or place the Philippines or any part thereof under martial law.[27]

The commander-in-chief clause contemplates three contingencies based on their nature or extent. They are: (1) lawless violence, (2) invasion, and (3) rebellion. Under the 1935 Constitution, it was not necessary to have an actual invasion or rebellion.[28] An "imminent danger thereof" was enough to justify the measures to be taken. However, this does not hold true anymore under the present Constitution. The Constitution presently provides that there has to be an actual invasion or rebellion. "Imminent danger" and "insurrection" have been stricken out as reasons for the exercise of the commander-in-chief powers. Last May 1, 2001, the President declared the existence of an actual and on-going rebellion notwithstanding its real absence, not even its imminence.

There are three contingencies and there are also three graded measures to suppress these emergency situations, depending on the extent of the problem. The first is to call out the armed forces to prevent or suppress the lawless violence, invasion, or rebellion. The second is to suspend the privilege of the writ of habeas corpus. And the third is to place the Philippines or any part thereof under martial law.

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[27] CONST. art. VII, sec. 18.

[28] CONST. (1935) art. VII, sec. 10, par. 2. The 1935 Constitution included "insurrection" as a contingency justifying the exercise of the power.

The commander-in-chief clause and the provision on emergency powers[29] complement each other and show how wide-ranging are the powers of the Presidency. As applied during World War II, the President becomes a constitutional dictator. The executive power, already grandiose, is embellished with additional provisions.

There is, therefore, all the more reason why the Court should have expressed its legal bases when it cut short the challenges to executive power in the state-of-rebellion cases.

It is apparent from the commander-in-chief clause that the President meets the degree of danger to national security with three graduated responses depending on the gravity of the emergency.

In the first instance, if there is lawless violence, invasion or rebellion, the President may call out the armed forces to stamp it out. The use of the phrase "whenever it becomes necessary" shows that the calling out of the armed forces can be done only in situations where normal police action can no longer handle the emergency. Could not the ragtag mob moving towards Malacañang in the state-of-rebellion cases, armed with nothing more lethal than rocks, sticks, and stones, have been controlled by the Philippine National Police? Was there a need to call out the armed forces? And in these cases, is the declaration of a state of rebellion and the suspension of Bill of Rights provisions even remotely warranted? This leads to a well-founded suspicion that the Court took the easy way out with no explanation because the presidential acts being challenged plainly had no constitutional justification, and the Court did not want to add to the anxieties of an uneasy presidency at the time.

Under the commander-in-chief clause, if an invasion or rebellion progresses beyond the state where it cannot be met by simply calling out the armed forces, the President may go one big step further and suspend the privilege of the writ of habeas corpus. Obviously, it is only in extremely critical situations that the ultimate presidential weapon—martial law—may be used.

No careless confusion in the use of graduated power by the President is contemplated. One kind of power may be exercised only when the situation calls for its exercise. It follows that the Supreme Court should strike down the use of martial law when the calling out of the armed forces is more than sufficient.

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[29] CONST. art. VI, sec. 23, par. 2.

The premise of the *Honasan* petition was that by issuing Proclamation No. 38 and General Order No. 1, the President exercised her martial law powers and effectively declared martial law in Metro Manila.

At this juncture, noticeable are the factual similarities of the events on May 1, 2001 and on September 21, 1972, when martial law was proclaimed and authoritarian rule prevailed for the next 14 years. Both involved the issuance of proclamations formally declaring existence of rebellion and the subsequent issuance of a general order, addressed to the Armed Forces of the Philippines, ordering it to quell and suppress the said rebellion. However, though the former dictator had the tact to identify his proclamation's number and even show the text thereof on national television, the present President's proclamation was delivered only through her spokesperson. This document evidencing such proclamation was never shown or even read during such announcement.

It is the theory of the *Honasan* petition that to formally declare a state of rebellion pursuant to section 18, article 7 of the Constitution amounts to an invocation, and marshalling, of an actual exercise of the extraordinary power to impose martial law granted to the president as commander-in-chief. Such a declaration by itself was an admission by the President that, in her opinion, the threat to the state is of such a grave and immediate nature that the inherent powers she currently exercised as the civilian Chief of State and as Commander-in-Chief of the Armed Forces of the Republic were insufficient and wanting.

The specific mention in the old Constitution of rebellion and insurrection along with invasion and imminent danger thereof, shows that the terms "rebellion" and "insurrection" were used therein in the sense of a state or condition of the nation, not in the concept of a statutory offense. This is illustrated in the case of *Garcia-Padilla v. Enrile*.[30] Such a similar declaration is an admission of the inadequacy of the strength of her ordinary powers as the Commander-in-Chief, forcing her to call upon the extraordinary powers to impose martial law.

A review of Proclamation No. 1081, the 1972 Martial Law Decree, reveals that then President Marcos used as his rationale his belief that his ordinary powers as Commander-in-Chief were inadequate and ineffective to contain the existing rebellion and that the formal declaration of a state of rebellion necessarily served as a warning on the utilization of the courses of action allowed by the Constitution.

The very nature of a Presidential Proclamation clearly shows that its promulgation lays down the legal and constitutional basis for subsequent acts

[30] G.R. No. L-61388, 121 SCRA 472 (1983).

covered by such proclamation. It is not a power descriptive in nature but rather an enabling power.

Under Section 7, Chapter 2, Book III of the Revised Administrative Code, a general or special order is issued in the President's capacity as Commander-in-Chief of the Armed Forces of the Philippines. However, General Order No. 1, dated May 1, 2001, also directed the Philippine National Police to suppress and quell the perceived rebellion.

The law is clear on the nature of the Philippine National Police. Republic Act No. 6975 states that its national scope and civilian character shall be paramount. No element of the police forces shall be military nor shall any position thereof be occupied by active members of the Armed Forces of the Philippines.[31]

A situation where civilian law enforcement and the entire national police force and adjunct agencies are made subject to military orders only occurs in a state of martial law.

Pursuant to the declaration of a "state of rebellion" in the National Capital Region, the executive branch of the government has arrogated unto itself a portion of the power of the judiciary, or that of determining probable cause for the issuance of a warrant of arrest. A review of the phraseology of the "whereas" clauses of the Proclamation and the General Order clearly shows such assumption of judicial power by its general conclusion on the existence of probable cause.

The arrests made pursuant to the declaration of the President of a "state of rebellion" were directed against persons who made speeches in front of the pro-Estrada crowd gathered at the EDSA Shrine. Furthermore, police authorities prohibited the holding of rallies and meetings in designated areas in the metropolis. This government action has a chilling effect on the exercise of free speech and assembly. As of today, civil society has a false sense of security because of the repressive tactics of the government exhibited in the state-of-rebellion cases. One should learn from history that this calm atmosphere may be but a prelude to greater repression of civil liberties.

Honasan's contention in his petition is this: the constitutional safeguards established around the emergency power of the President were ignored and, by mere semantics, she has avoided the duties and responsibilities imposed by the Charter on the exercise of her martial law powers.

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[31] Rep. Act No. 6975 (1991), sec. 2.

In his dissenting opinion in the state of rebellion cases, Justice Santiago M. Kapunan pointed to the decision in *Integrated Bar of the Philippines v. Zamora*[32] where the Supreme Court ruled:

> [T]he distinction (between the calling out power, on the one hand, and the power to suspend the privilege of the writ of *habeas corpus* and to declare martial law, on the other) places the calling out power in a different category from the power to declare martial law and the power to suspend the privilege of the writ of *habeas corpus*, otherwise, the framers of the Constitution would have simply lumped together the three powers and provided for their revocation and review without any qualification. *Expressio unius est exclusio alterius.*
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> The reason for the difference in the treatment of the aforementioned powers highlights the intent to grant the President the widest leeway and broadest discretion in using the "calling out" power because it is considered as the lesser and more benign power compared to the power to suspend the privilege of the writ of *habeas corpus* and the power to impose martial law, both of which involve the curtailment and suppression of certain basic civil rights and individual freedoms, and thus necessitating affirmation by Congress and, in appropriate cases, review by this Court.[32-A]

The lesser and more benign "calling-out" power was already being exercised fully on May 1, 2001. No formal proclamation of martial law or suspension of the writ of habeas corpus was declared. Only the Armed Forces of the Philippines (AFP) and the Philippine National Police (PNP) were called out. Justice Kapunan, however, observed that on May 1, 2001, it was ironic that the more benign power of calling-out the armed forces became a heavier burden on civil liberties than the more drastic remedies of martial law and suspension of the privilege of the writ of habeas corpus.

The safeguards under the more drastic remedies are given as follows:[33]

(1) The period for martial law or suspension is limited to a period not exceeding sixty days;
(2) The President is mandated to submit a report to Congress within forty-eight hours from the proclamation or suspension;
(3) The proclamation or suspension is subject to review by Congress, which may revoke such proclamation or suspension. If Congress is not in session, it shall convene in 24 hours without need for call; and

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[32] G.R. No. 141284, Aug. 15, 2000, 338 SCRA 81.
[32-A] 338 SCRA 81, 108-110.
[33] CONST. art. VII, sec. 18.

(4) The sufficiency of the factual basis thereof or its extension is subject to review by the Supreme Court in an appropriate proceeding.

To the above, we may note the other safeguards of the Constitution. A state of martial law does not suspend the operation of the Constitution. It does not supplant the functioning of civil courts or legislative assemblies. It does not confer jurisdiction on military courts and agencies over civilians in places where civil courts are able to function. And it does not automatically suspend the privilege of the writ of habeas corpus. Suspension has to be expressly proclaimed.[34]

The Constitution also provides that persons must first be charged in court for rebellion before the suspension of the privilege of the writ may apply to them. The arrested person must be judicially charged in court within three days otherwise, he must be released.[35]

The contingency of "invasion" has never been raised in the Philippines. No court cases involving the suspension of civil liberties were filed or could be filed when Japan invaded the Philippines. However, the Constitution provides that the suspension of the privilege of the writ is basically for offenses inherent or directly connected with invasion.[36]

In the state-of-rebellion petitions,[37] the Supreme Court ruled that after the issuance of Proclamation No. 38 and General Order No. 1, there were warrantless arrests. The Court stated: "Warrantless arrests of several alleged leaders and promoters of the 'rebellion' were thereafter effected. Aggrieved by the warrantless arrests, and the declaration of a 'state of rebellion', which allegedly gave a semblance of legality to the arrests, the following four related petitions were filed before the Court."

In the joint comments filed by the respondents, they stated that it was "already the declared intention of the Justice Department and police authorities to obtain regular warrants of arrests from the courts . . . preliminary investigations will henceforth be conducted."

It is clear from the joint comments of the respondents that what they had was only an "intention" to secure warrants of arrest. This was an after-thought made after petitions had been filed and the Supreme Court was already looking into the

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[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] Lacson v. Perez, et al., G.R. No. 147780; Defensor-Santiago v. Reyes, G.R. No. 144781; Lumbao v. Perez, et al., G.R. No. 144799; Laban ng Demokratikong Pilipino v. Dept. of Justice, G.R. No. 147810, May 10, 2001; Honasan v. De Villa, G.R. No. 147818, May 10, 2001.

matter. Major newspapers published the respondents' remarks that rebellion charges would be filed only after the petitioners had surrendered.

The truth is that Senator Juan Ponce Enrile was arrested without warrant at four o'clock of that afternoon following the proclamation at his residence. Ambassador Ernesto Maceda was arrested the following day, also without any warrant. Senator Honasan and General Lacson were ordered arrested, without the formality of warrants of arrest, but could not be apprehended.

The Constitution provides:[38]

> Sec. 2. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures of whatever nature and for any purpose shall be inviolable, and no search warrant or warrant of arrest shall issue except upon probable cause to be determined personally 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 guarantee against unreasonable searches and seizures is the essence of constitutionalism. It spells the difference between the rule of law and the rule of whim or caprice. The guaranteed security against warrantless arrests and arbitrary intrusions by the military or police is basic to a free society.

Justice Kapunan, in the state-of-rebellion cases, cited a separate opinion in an American case,[39] which stated that "among deprivation of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government." The Justice added that the human personality deteriorates, dignity and self-reliance disappear, where there is unheralded search and seizure.

The petitioners in these instant cases are senators or former senators of the Republic. Their spirits may not have been crushed but there was some terror in their hearts for themselves, their families and more importantly for their countrymen.

In his Urgent Motion for Partial Reconsideration, Senator Honasan pleaded:

> It is this power of judicial review that petitioner prays the High Court, in all urgency and humility, to exercise and not to abdicate. Without any categorical

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[38] Art. III, sec. 2.

[39] Brinegar v. United States, 339 U.S. 2084 (1949) (Jackson, J., dissenting opinion).

> declaration from the Honorable Court on the weighty question before it, petitioner, in all candor and honesty, fears for the future.
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> In an age where public perception can be shaped through various media of information and events can easily be staged, as Marcos did to justify his declaration of martial law, what is to prevent another President from repeating history? The framers of our Constitution, with admirable foresight, leavened by painful experience, have sought to preclude history's Sisyphean tendencies by expressly mandating that the highest court of the land shall have the power to delve into and rule on the sufficiency of the factual basis for the exercise by the President of his extraordinary powers granted under the Constitution.[40]

Senator Honasan's Urgent Motion to Resolve Prayer for Temporary Restraining Order and/or Preliminary Injunction stated:

> 6. With the peculiar and highly alarming position taken by the Executive Branch of government, wherein a person can be subject to warrantless arrest based on media declarations made by the authorities, sans filing of the requisite charges even if the government itself admits possession of the requisite evidence to charge such a person with a capital offense of a continuing nature, any citizen can now be charged, through the media, of an offense of a continuing nature and then arrested without a warrant. Unless, of course, the government intends to disregard and invalidate the Constitutional precept of equal protection of the laws by adopting a landmark *pro hac vice* approach to petitioner's case.
>
> > 6.1. Equally troubling are the enforcement implications of such a doctrine. With this chilling doctrine, reminiscent of the Marcos years, the government can now invade, sans the requisite warrants, the privacy of the abode of any Juan dela Cruz, in the guise of apprehending the petitioner. A person can now be arrested, even while engaging in his private moments, without any foreknowledge of any charge against him, just because the government, in a secret decree or instruction, has declared, or even suspects, him of engaging in rebellious activity.[41]

The President of the Philippines has never been constrained like President Abraham Lincoln to scrounge for constitutional foundations to shore up his actions in an emergency. The present President is given all the powers she needs by the crisis provisions of the Constitution. Moreover, she can always cite the use of power by Lincoln, Wilson, and Roosevelt as precedents during genuine emergencies in the United States. But even when crisis powers are used for purposes different from that for which they were intended, the President should always point to a plausible constitutional basis for the use of power.

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[40] G.R. No. 147818, at 5.

[41] *Id.* at 4.

In the emergency powers cases, President Manuel L. Quezon was given legal authority by Congress to legislate upon the start of the Japanese invasion.[42] There is no question that war powers were needed. The necessity was patent plus the fact that the Japanese occupation was so speedily accomplished that no court challenge to the grant of powers was conceivable. However, when the emergency powers were used for purposes not related to the waging of war, the Supreme Court struck them down.

After the surrender of the Japanese imperial forces to the allied countries, President Elpidio Quirino continued to legislate. He enacted an appropriation law for the operation of the government in fiscal year 1949-1950. He issued an export-import control order. He was exercising legislative powers concurrently with Congress.

In *Araneta v. Dinglasan*,[43] the Supreme Court ruled that when Congress met in regular session on May 25, 1946, the emergency powers statute, Commonwealth Act No. 671, became inoperative. Because an uncooperative Congress failed to enact appropriation measures for public works and aid to victims of calamities, President Quirino was forced to continue the exercise of emergency powers never intended to extend beyond World War II. When Congress passed an act formally terminating emergency powers, the President vetoed it and it never became law.

The Court, in *Rodriguez v. Gella*,[44] explained at length why this exercise of World War II powers could not be validated. It squarely passed upon the issues.

There was a severe shortage of rice in 1962. To purchase rice, a statutory requirement provided that a certification of a rice shortage had to be obtained from the National Economic Council. For various reasons, President Diosdado Macapagal could not secure the required authority. He decided to use the powers of the President under international law. Macapagal entered into executive agreements with governments of foreign countries to buy rice. To further strengthen the exercise of executive power, he also used the commander-in-chief clause to buy rice ostensibly for the armed forces. It did not matter that the thousands of tons of rice purchased would have lasted the armed forces for over a century.

The Court in *Gonzales v. Hechanova*,[45] struck down the unconstitutional exercise of power. It did not use any technique of avoidance. By the time, the Court got around to rendering a decision, rice had already been shipped to the Philippines.

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[42] Com. Act No. 671 (1941).
[43] 84 Phil. 468 (1949).
[44] 92 Phil. 603 (1953).
[45] G.R. No. L-21897, 9 SCRA 230 (1963).

There was no way whereby the illegally purchased rice could be ordered returned. The country needed rice badly. The Court did not issue any moot and academic decision. It still decided the case squarely on its merits.

The tradition set in the emergency powers case and in *Gonzales v. Hechanova*[46] was not followed in the state-of-rebellion cases being examined. The necessity for a decision on the merits was especially compelling in the months which followed EDSA II.

In the petitions for habeas corpus, prohibition, injunction and mandamus filed only months ago, the petitioners stated that at no point since the post-Marcos history has the role of the judiciary been more crucial.

This brings us to the "moot and academic" ruling of the Supreme Court.

The power of judicial review has been classified by some legal scholars into three general categories: first is the checking or umpire function; second is the legitimating or validating function; and third is the symbolic or educational function.[47]

The checking or umpire function is the traditional concern of judicial review. The Court interprets the constitutional division of powers among the various departments of the government. It "reads the constitutional map and allocates constitutional authority among the major structures of government."[48] It also draws the boundaries of fundamental rights or liberties where government power cannot intrude.

The legitimating or validating function serves to firm up popular support for controversial government action. In a society which adheres to the rule of law, all public acts must be legal and valid. It is the Court which declares them legal. The Court passes upon a statute or a presidential act and announces it as legitimate and, therefore, it should be acceptable to the people. It is the role of the Court to show those who are subjected to exertions of unpopular government power that the exercise of that particular power was not unreasonable, in truth constitutionally just, necessary, and proper.

The symbolic function is educational or informative in nature. It is not enough for the Court under its checking function to nullify intrusions of state

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[46] *Id.*

[47] For a summary of the functions and for citations of other works on these functions, *see* Florentino Feliciano, *On the Functions of Judicial Review and the Doctrine of Political Question*, 39 PHIL. L. J. 444 (1964).

[48] *Id.*

authority into areas reserved for the individual. It must also formulate the guiding and controlling precept, doctrine, or rule.

For instance, as the Court sheds light upon the different freedoms in the Bill of Rights, it pronounces to all concerned the scope and meaning of these fundamental values of the community. As a rule, the Court is not supposed to decide moot and academic cases. In the exercise of its symbolic function, it has, however, decided cases and promulgated decisions it was not supposed to render.

When the Court declined to pass upon the substantive merits of the state-of-rebellion cases, it may have unwittingly legitimated, at least for the time being, the exercise of military power by the President under circumstances where its exercise cannot be justified. However, the decision leaves an empty feeling behind. The people have been deprived of enlightenment on the extent of presidential powers. How can the President exercise martial law powers and suspend the application of the unreasonable searches and seizures provision when there is neither invasion nor rebellion in the limited confines of Metro Manila?

The moot-and-academic decision of the Supreme Court in the state-of-rebellion cases may have been technically correct but, with all due respect, it is unwise and inexpedient. To prevent future warrantless arrests where there is no rebellion or other crimes against public order, it would have done an immeasurable good for the country if the petitions were decided on their merits.

The challenge to executive power in *Salonga v. Cruz-Paño, et al.*[49] became moot and academic when upon instructions of President Marcos, Senator Jovito Salonga was excluded by the Minister of Justice from the information charging him as a leader in bombing incidents connected with subversive activities. If criminal charges have been withdrawn, there is no more reason to continue with a challenge to the use of the iron arm of the law to harass and oppress the accused.

The Court deliberated on whether it should dismiss the *Salonga* petition for having become moot or decide it squarely on the merits. It decided to pass upon the merits. It stated that the Court has a symbolic function to educate bench and bar on the extent of protection given by constitutional guarantees. Furthermore, the Supreme Court stated that it has the duty to formulate guiding and controlling principles and doctrines even in moot and academic cases. The Court added that "it has the symbolic function of educating bench and bar on the extent of protection

[49] G.R. No. 59524, 134 SCRA 438 (1985).

given by constitutional guarantees."[50] There was a dissenting view but the Court strongly ruled against the use of the moot and academic doctrine.

There are other cases where the Court passed upon the merits of moot and academic cases. In *Dela Camara v. Enage*,[51] the accused had the right to bail. When the trial court required a bail bond of ₱1,195,200.00 for his release, there could be no doubt that the poor laborer could not exercise his right to bail. While his case was pending, he decided to flee from confinement. Under the rules, he forfeited his application to be released on bail.[52] In other words, his petition became moot and academic. This did not deter the Court from rendering a lengthy decision on excessive bail. It ruled that "where the right to bail exists, it should not be rendered nugatory by requiring a sum that is excessive. So the Constitution commands. It is understandable why. If there were no such prohibition, the right to bail becomes meaningless. It would have been more forthright if no mention of such guarantee were found in the fundamental law."[53]

In *Gonzales v. Marcos*,[54] the creation of the Cultural Center of the Philippines through the President's executive order was challenged as an *ultra vires* exercise of legislative power. Only Congress could create public offices or provide for their creation.[55] The case technically became moot upon the proclamation of martial law by President Marcos.

In *Aquino v. Commission on Elections*,[56] the Court in the meantime ruled that under martial law, the President could exercise legislative power in the absence of a legislature. The incumbent President could also exercise the same power under the 1973 Constitution.[57] President Marcos, therefore, issued a presidential decree establishing the Cultural Center. The *Gonzales* petition challenging his exercise of legislative powers before martial law and prior to the transitory provisions of the new Constitution became moot. This did not however preclude the Court from rendering a decision on the merits of the case.

In *Aquino, Jr. v. Ponce Enrile*,[58] habeas corpus petitions were filed questioning the unreasonable, search, seizure, and detention of 27 petitioners charged with

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[50] *Id.* at 463.

[51] G.R. No. 32951-2, 41 SCRA 1 (1971).

[52] REVISED RULES OF CRIMINAL PROCEDURE, Rule 114, sec. 21.

[53] Dela Camara v. Enage, *supra* note 51, at 8. The Court referred to Stack v. Boyle, 342 U.S. 1 (1951), also on excessive bail.

[54] G.R. No. L-31685, 65 SCRA 624 (1975).

[55] FLOYD MECHEM, PUBLIC OFFICE AND PUBLIC OFFICERS, sec. 1; State v. Hawkins, 357 Pac. 411, 53 A.L.R. 583.

[56] G.R. No. L-40004, 62 SCRA 275 (1975).

[57] CONST. (1973) art. XVII, sec. 3, par. 2.

[58] G.R. No. L-35546, 59 SCRA 183 (1974).

murder, subversion, and illegal possession of firearms. The use of martial law powers including trial of civilians by military courts was challenged. While the petition was pending, 26 petitioners were released from confinement. The habeas corpus cases became moot and academic as to them. Only Senator Benigno Aquino Jr. remained under detention. The habeas corpus case he filed had also become moot when criminal charges were filed against him. He was already detained under authority of law. The Court still promulgated a decision which is one of the longest decisions in the Reports.

There are cases less momentous and not as far reaching as the state-of-rebellion petitions of 2001 where the Supreme Court went into the merits of moot and academic cases. *Philippine Association of Colleges and Universities v. Secretary of Education*[59] was filed by petitioner universities who all had permits to operate educational institutions and not one suffered any injury or wrong from the statute. Not one of the petitioners had any standing to sue. Yet, they still challenged the constitutionality of Act No. 2706 requiring prior permits before a school could operate. The Court decided the case on its merits and explained at length why Act No. 2706 was a valid legislation.

In *Osmena v. Pendatun*,[60] a member of the Congress was suspended from office by the House of Representatives for disorderly behavior. He had delivered a privilege speech charging the President with serious offenses he could not prove. He was immune from criminal prosecution for libel or slander under the legislative privilege communications doctrine but not from the disciplinary powers of the House. His colleagues wanted to please the President and suspended him for a period lasting beyond his term of office.

The case in *Osmeña v. Pendatun*[61] had become moot and academic because Congress had already adjourned. There was nothing more to challenge or prohibit but the Court still decided on the merits of the case.

There are many other cases wherein the Court decided to go into the issues because it was best for public policy and numerous persons were affected. More recent cases may be mentioned, one of them decided only last September 18, 2000.

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[59] 97 Phil. 806 (1955).

[60] 109 Phil. 863 (1960).

[61] *Id. See also* Tropical Homes v. National Housing Authority, G.R. No. L-48672, 152 SCRA 540 (1987) and Tolentino v. Secretary of Finance, G.R. No. 115455, 235 SCRA 630 (1994).

The decision in *Salva v. Makalintal*[62] reiterates the ruling in *Alunan III v. Mirasol*[63] and *Viola v. Alunan III*,[64] where the Supreme Court ruled that:

> (C)ourts will decide a question otherwise moot and academic if it is capable of repetition, yet evading review. For the question whether the COMELEC can validly vest in the DILG the control and supervision of SK elections is likely to arise in connection with every SK election and yet the question may not be decided before the date of such elections.

The principle in *Salva v. Makalintal* applies more strongly in the state-of-rebellion cases. The President could always declare a state of rebellion and then use methods applicable only under martial law without proclaiming martial law. The proclamation can be lifted after the leaders have been arrested and the crowd has dispersed, only for the leaders to be released with the lifting of the proclamation.

The Court may have deemed it impolitic to examine the acts of the President and declare them invalid. After all, when the state of rebellion was lifted, it must have been because she realized that she, the President, was given erroneous advice or militaristic recommendations by her advisers. Still, resort to the same modus operandi can be repeated in the future. While challenges are pending before the Court, the state-of-rebellion would be lifted. But the damage has been done. Constitutional guarantees have been disregarded.

The issues in the petitions discussed are vital in their significance. Was there a rebellion at EDSA III? Were the unreasonable searches and seizures and the warrantless arrests justified? To what extent should freedom of speech and freedom of assembly in the petitions of the impoverished masses and in the only modes for redress of grievances available to them be allowed and protected?

One can only hope that what happened to the petitioners in these cases will not be repeated and that the Supreme Court shall always lend its mighty voice in the protection of essential liberties.

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[62] G.R. No. 132603, Sept. 18, 2000, the Court citing Southern Pac. Terminal v. ICC, 219 U.S. 498 (1911); Moore v. Ogilvy, 394 U.S. 814 (1969); and Dunn v. Blumstein, 405 U.S. 330 (1972) as precedent decisions of the U.S. Supreme Court.

[63] G.R. No. 108399, 276 SCRA 501 (1997).

[64] G.R. No. 115844, 277 SCRA 409 (1997).

ABSTRACT:

TRADITION, CONTESTATION AND DEMOCRATIZATION: LAW AND THE CHALLENGE OF PHILIPPINE "FOLK DEMOCRACY"

In this article, Professor Dante Gatmaytan analyses the democratization of Philippine politics. From the *datus* who wielded political and economic power over their local chiefdoms during pre-colonial times, to the elite-dominated democracy introduced by Spain and the United States, he shows that the incorporation of the Filipino's alliance-building practices to the electoral processes institutionalized by our colonizers has resulted in what is presently described as a dysfunctional Philippine-style democracy.

Nevertheless, he points out that Filipinos introduced two innovations in Philippine law designed to democratize electoral processes: local sectoral representation in local legislative councils and the party-list system. Both these innovations are designed to skew elections in favor of groups that are historically left out of politics and public office.