

A FRAMEWORK FOR ANALYZING THE LEGALITY OF COVID-19 EMERGENCY MEASURES*

*Paolo S. Tamase***

I. INTRODUCTION

Comparisons between the COVID-19 pandemic and the Great Depression often focus on the economic havoc wreaked by both. Early indicators such as unemployment numbers in developed countries¹ warn that the COVID-19-induced global contraction may be the most serious in almost a hundred years. Further, just as the Great Depression ushered in the era of big government and active federal spending in the United States² (and, by extension, the Philippines, its unincorporated territory), it is unlikely that COVID-19 will dissipate without permanently altering the global economic architecture.

Yet the Great Depression is also known for paradigm-shifting changes in legal systems, especially in the West. The utilization of administrative agencies, particularly in the US,³ was a keystone of the legal framework that enabled the New Deal.⁴ While that legal framework evolves to this day,⁵ a return to the strict separation of executive, legislative, and judicial powers in the early 1900s is now all but an ultraconservative pipe dream.

* Cite as Paolo Tamase, *A Framework for Analyzing the Legality of COVID-19 Emergency Measures*, 93 (Special Online Feature) PHIL. L.J. 198, [page cited] (2020).

** Lecturer, University of the Philippines College of Law; J.D., *cum laude* and class valedictorian, University of the Philippines (UP) College of Law (2016); B.S. Business Economics, *magna cum laude*, UP School of Economics (2012); Chair, PHILIPPINE LAW JOURNAL, Vol. 88.

¹ See, e.g. Nicolas Petrosky-Nadeau & Robert Valleta, *An Unemployment Crisis after the Onset of COVID-19*, Federal Reserve Bank of San Francisco Economic Letter 2020-12 (May 18, 2020).

² Although the effectiveness of the New Deal as a stimulus has been questioned in more recent studies, see Price Fishback, William Horraces & Shawn Kantor, *Did New Deal Grant Programs Stimulate Local Economies? A Study of Federal Grants and Retail Sales During the Great Depression*, 65(1) J. ECON. HIST. 36 (2005).

³ And, again by extension, the Philippines.

⁴ See, generally, *The Rise of the Welfare State and the Recognition of Economic, Social and Cultural Rights*, in PACIFICO AGABIN, MESTIZO: THE STORY OF THE PHILIPPINE LEGAL SYSTEM (2nd ed., 2016).

⁵ See *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. ____ (2020) (slip op.).

As for the COVID-19 pandemic, a similar legal revolution appears to be underway. The outbreak in the Philippines has resulted in a spate of government regulations, both national and local. But while bureaucratic complexity is the thread that runs through reams of American New Deal legislation,⁶ the common features of the Philippine COVID-19 emergency regulations (“COVID-19 Regulations”) are their rushed drafting, poor promulgation, ad hoc non-compliance with established legislative procedures, open-ended or discretionary effectivity clauses, ever-changing status, and unparalleled intrusions into private rights. The legacy these COVID-19 Regulations threaten to leave is one where law, no longer a reliable manager of expectations and collective aims, becomes useless to society.

At any other time, the COVID-19 Regulations would have spurred legal challenges.⁷ The lack thereof may be due to the time-limited nature of emergency measures: for instance, Republic Act No. 11469 or the Bayanihan to Heal as One Act (“Bayanihan Act”) expired less than three months after it was hastily enacted, pursuant to built-in constitutional safeguards.⁸ It may also be that the courts were physically closed⁹ in the first months of community transmission. Alternatively, there may be a popular recognition of the necessity of the COVID-19 Regulations, or a more existential fear of catching an unfamiliar deadly virus.

In any event, despite the palpable sense that the COVID-19 Regulations suffer from serious legal defects, they have not been challenged in court. Persistent doubts on their validity, taken with their selective

⁶ See Richard Stewart, *Evaluating the New Deal*, 22 HARV. J. L. & PUB. POL’Y 239 (1998).

⁷ But see *Constitutionality of Bayanihan law challenged before Supreme Court*, PHILSTAR.COM, July 2, 2020, available at <https://www.philstar.com/headlines/2020/06/02/2018225/constitutionality-bayanihan-law-challenged-supreme-court>

This petition, *Ibañez v. Cabinet Secretaries*, G.R. No. 252167, appears to have been dismissed by the Supreme Court “as it failed to show grave abuse of discretion committed by the respondents[.]” according to a Media Briefer dated July 1, 2020 issued by the Supreme Court’s Public Information Office.

⁸ The Government’s position is that the Bayanihan Act expired on June 25, 2020, pursuant to its three-month sunset clause, see Rep. Act No. 11469 [hereinafter “Bayanihan Act”] (2020), § 9. However, the Constitution clearly provides that for emergency powers granted under CONST. art. VI, § 23(2), “unless sooner withdrawn by resolution of the Congress, such powers shall cease upon the next adjournment thereof[.]” i.e. June 5, 2020. The said Constitutional provision was specifically invoked by the Bayanihan Act, § 4, which removes any doubt that the said law granted the President emergency powers.

⁹ Adm. Circ. No. 32-2020. Rising Cases of COVID-19 Infection.

enforcement,¹⁰ mean that the public's compliance with COVID-19 Regulations has been erratic and irregular. This confusion has morphed into a lack of consensus on the basic question of what rules people are even supposed to follow. All that society collectively knows is, at present, the law is what the implementer says it is.

This is an unacceptable outcome that threatens the rule of law and civil liberties, and strips the law of its predictive, stabilizing character. In this context, settling questions on the validity of the COVID-19 Regulations becomes essential to restoring and preserving the rule of law in the “new normal.” Unfortunately, the fleeting nature of an emergency means that Philippine courts have not adopted a robust test of validity for the grant and exercise of emergency powers. Hence, this Essay will propose a framework for analyzing the legality of emergency measures and their incidents.

In Part I, a brief background will be given on the concept of emergency powers and how they have been tested so far in Philippine courts. Guided by this context, Part II will outline a framework for testing the validity of emergency measures using COVID-19 Regulations as an illustration, whenever appropriate.

Because of daily developments and space constraints, it is simply not yet possible to proceed to an exhaustive analysis of the validity of the COVID-19 Regulations. This Essay therefore does not undertake to do that, although there is certainly an urgent need for a deeper examination.

II. PHILIPPINE EMERGENCY POWERS: ORIGINS AND PAST APPLICATIONS

Separation of powers and checks and balances are hallmarks of most liberal democracies. An offshoot, mostly, of the distrust of executive power, these principles are intended to preserve individual liberties. Still, serious threats to public safety may require swift executive action that “cannot, perhaps, wait for the deliberate pace of ordinary constitutional rule. [...] As a result, modern constitutions often have special provisions for dealing with emergency situations.”¹¹ This tension between individual freedoms and public

¹⁰ See, e.g. *Mehin Gascon, Group slams 'selective justice' for Sinas, 'mañanita' cops*, INQUIRER.NET, May 23, 2020, available at <https://newsinfo.inquirer.net/1279664/group-slams-selective-justice-for-sinas-mananita-cops>

¹¹ John Ferejohn & Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 INT'L J. CONST. L. 210, 210 (2014).

safety is crucial in the proper study of emergency clauses in modern constitutions.

As with its constitutional law, the Philippine law on emergency situations is American in origin.¹² While the First Republic's Malolos Constitution guaranteed fundamental rights,¹³ the said constitution was virtually unimplemented, with effective control over the Philippines efficiently transferred between Spain and the US.

Hence, it may be safe to say that the tension between personal liberty and public efficiency in the Philippines first appeared in the Organic Act of 1902 ("Organic Act").¹⁴ Through the Organic Act, the US Congress first legislated a bill of rights for the Philippines.¹⁵ All constitutions and constitutional equivalents thereafter would provide for the same list of personal freedoms guaranteed by the State. At the same time, the Organic Act and its successor, the Jones Law,¹⁶ both included provisions for the suspension of habeas corpus¹⁷ by the US President or the Governor-General in the event of an invasion, insurrection, or rebellion, or an imminent danger thereof, "when the public safety requires it."¹⁸ The Jones Law additionally granted the power to declare martial law.¹⁹

While the suspension of habeas corpus and the declaration of martial law are among the typical emergency powers reserved by modern constitutions,²⁰ a less-defined, non-traditional class of emergency powers first appeared in Article VI, Section 6 of the 1935 Constitution:

¹² See, generally, OWEN LYNCH, COLONIAL LEGACIES IN A FRAGILE REPUBLIC: PHILIPPINE LAND LAW AND STATE FORMATION (2011), for an erudite analysis of the American influence on the Philippine legal system.

¹³ CONST. OF MALOLOS (1898), art. 6-32.

¹⁴ 32 Stat. 691, Pub. Law 57-235 (1902) [hereinafter "Organic Act"]. Organic Act of 1902.

¹⁵ An alternative view is that such rights were guaranteed for the Philippines by President McKinley's April 7, 1900 Instructions to the Philippine Commission, at 9.

¹⁶ 39 Stat. 545, Pub. Law 64-240 (1916) [hereinafter "Jones Law"]. Jones Law of 1916.

¹⁷ For brevity, references to the suspension of habeas corpus in this Essay refer to the privilege of the writ.

¹⁸ See Organic Act, § 5; Jones Law, § 21(b).

¹⁹ Jones Law, § 21(b).

²⁰ See Ferejohn & Pasquino, *supra* note 11, at 210: "In cases of an urgent threat to the state or regime, constitutions sometimes permit the delegation of powers to a president, or to some other constitutional authority, to issue decrees, to censor information, and to suspend legal processes and rights." In the case of the US, the suspension of habeas corpus is provided in the US Constitution, U.S. CONST. art. I, § 9(2), while the Insurrection Act of 1807,

Section 16. In times of war or other national emergency, the National Assembly may by law authorize the President, for a limited period and subject to such restrictions as it may prescribe, to promulgate rules and regulations to carry out a declared national policy.²¹

The inclusion of this clause proved prophetic as it was soon invoked on December 16, 1941 in Commonwealth Act No. 671 (“Emergency Powers Act”),²² through which Congress delegated to the President power:

(a) to transfer the seat of the Government or any of its subdivisions, branches, departments, offices, agencies or instrumentalities; (b) to reorganize the Government of the Commonwealth including the determination of the order of precedence of the heads of the Executive Departments; (c) to create new subdivisions, branches, departments, offices, agencies or instrumentalities of government and to abolish any of those already existing; (d) to continue in force laws and appropriations which would lapse or otherwise become inoperative, and to modify or suspend the operation or application of those of an administrative character; (e) to impose new taxes or to increase, reduce, suspend, or abolish those in existence; (f) to raise funds through the issuance of bonds or otherwise, and to authorize the expenditure of the proceeds thereof; (g) to authorize the National, provincial, city or municipal governments to incur in overdrafts for purposes that he may approve; (h) to declare the suspension of the collection of credits or the payment of debts; and (i) to exercise such other powers as he may deem necessary to enable the Government to fulfill its responsibilities and to maintain and enforce its authority.

10 U.S.C. §§ 251-255, at present, authorizes the deployment of the US military for the purpose of suppressing a domestic insurrection.

²¹ It is worth noting that despite the silence of the Organic Act and the Jones Law, legislative acts promulgated under those basic frameworks did contemplate non-traditional emergency powers. For instance, Act No. 1150 (1904), § 8 empowered the “Civil Governor to issue an executive order declaring that the city [of Manila] is threatened with an epidemic and vesting the Board of Health with emergency powers[.]” Such powers include the enactment of emergency health ordinances and the appointment of emergency employees. It appears the validity of this law was not questioned before the Supreme Court. *See also* Act No. 1487 (1906), § 17.

It is also unclear whether these powers were invoked during the 1918 Influenza pandemic, since “there is a dearth of serious, in-depth study of the pandemic as it impacted the Philippines.” Francis Gealogo, *The Philippines in the World of the Influenza Pandemic of 1918-1919*, 57(2) PHIL. STUD. 261, 261 (2009).

²² An Act Declaring a State of Total Emergency as a Result of War Involving the Philippines and Authorizing the President to Promulgate Rules and Regulations to Meet Such Emergency.

The power delegated to the President by the Emergency Powers Act was patently legislative but was clearly premised on the existence of World War II.²³ Perhaps owing to the uncertainties of war, it was also not explicitly time-limited. Hence, the Court in *Shigenori Kuroda v. Jalandoni*²⁴ recognized that a presidential decree on the creation of military tribunals was valid “executive legislation” even if it was issued on July 29, 1947, or well after the Pacific Theater folded up. A sole dissent protested that it was never the intention of Congress to “extend the delegation beyond the emergency created by the war.”²⁵

The limits of this legislative delegation were again tested in *Araneta v. Dinglasan*,²⁶ which concerned the validity of executive orders that regulated residential rentals, controlled the export of shoes, and provided appropriations for national elections—all issued by the President under the Emergency Powers Act. When the petitioners questioned the continued effectivity of the Emergency Powers Act after the war, they had to contend with its lack of a sunset clause. Nevertheless, the Court inferred that the legislature intended the law to be “inoperative when Congress met in regular session on May 25, 1946.” Since the said executive orders were all issued beyond that date, the Court found them to be promulgated without authority. Curiously, the Court seemed to have overlooked its decision in *Shigenori Kuroda*, even if the latter was decided only five months before.

Incidentally, *Araneta* also shows how the President appreciated the potential of the Emergency Powers Act as an authorization for economic executive legislation, even if Congress wrote the law in politically neutral language and with an explicit wartime context.²⁷ As for the Court, it invalidated these executive orders not because they exceeded the subject matter of the delegated power, but only because they were issued when such power had already expired.

In *Rodriguez v. Gella*,²⁸ the Court further held that there was no need for an express repeal of the Emergency Powers Act, since imposing the requirement would subject that emergency measure’s continued effectivity to the will of the President, through his veto power.

²³ Com. Act No. 671 [hereinafter “Emergency Powers Act”] (1941), § 1.

²⁴ G.R. No. L-2662, 83 Phil. 171, Mar. 26, 1949.

²⁵ *Id.* (Perfecto, J., *dissenting*).

²⁶ G.R. No. L-2044, 84 Phil. 368, Aug. 26, 1949.

²⁷ Emergency Powers Act, § 1.

²⁸ G.R. No. L-6266, 92 Phil. 603 (1953).

The 1935 Constitution was eventually supplanted by the 1973 Constitution, which provided for a substantially similar emergency powers clause. Apparently in light of the jurisprudence produced by the Emergency Powers Act, the 1973 Constitution also included a safeguard that “[u]nless sooner withdrawn by resolution of the National Assembly, such powers shall cease upon its next adjournment.”²⁹ Moreover, the 1973 Constitution provided an additional power to takeover public utilities during a national emergency:

Section 7. In times of national emergency when the public interest so requires, the State may temporarily take over or direct the operation of any privately owned public utility or business affected with public interest.³⁰

When the 1987 Constitution was promulgated, it included provisions similar to the twin emergency clauses in the 1973 Constitution. Today, the emergency powers clause³¹ and the takeover clause³² thus respectively state:

Section 23. [...]

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

* * *

Section 17. In times of national emergency, when the public interest so requires, the State may, during the emergency and under reasonable terms prescribed by it, temporarily take over or direct the operation of any privately-owned public utility or business affected with public interest.

By explicitly providing for the takeover of privately-owned public utilities or businesses affected with public interest, the 1973 and 1987 Constitutions confirmed the non-traditional, economic aspect of emergency powers. This non-military potential was set in motion in 1989 through Republic Act No. 6826 (“Aquino Emergency Act”), which granted the

²⁹ CONST. (1973), art. VIII, § 15.

³⁰ Art. XIV, § 7.

³¹ CONST. art. VI, § 23(2).

³² Art. XII, § 17.

President emergency powers to, among others, “optimize the efforts [...] to carry out the difficult task of economic reconstruction” following a series of coups that “set back the economic program of the Government.”³³ Thus, this grant specifically empowered the President to prohibit hoarding, temporarily take over public utilities, ensure the availability of credit, and decrease expenditures of the executive branch, among others.³⁴ While the delegation in the Aquino Emergency Act was narrower than that in the Emergency Powers Act, it also explicitly vested the President with economic powers that were beyond traditional emergency powers.

In 1993, Congress passed Republic Act No. 7648 or the Electric Power Crisis Act of 1993 (“Electric Power Crisis Act”). While this law is often considered by the press to have granted “emergency powers,”³⁵ the Electric Power Crisis Act did not actually invoke Article VI, Section 23(2) of the Constitution, unlike the Aquino Emergency Act and the Emergency Powers Act.³⁶ Further, the Electric Power Crisis Act does not actually delegate any legislative power to the President. The power to enter into negotiated contracts,³⁷ which was ostensibly delegated by the said law, is actually executive in nature.³⁸ The power to set rates within a range³⁹ is quasi-legislative or quasi-judicial in character, depending on the scope of its application.⁴⁰ And the power to abolish or create offices,⁴¹ while legislative in character, is settled as delegable.⁴²

In the meantime, the emergency clauses of the 1987 Constitution would be tested only in the 2006 case of *David v. Macapagal-Arroyo*.⁴³ In *David*, the Court clarified that the takeover clause⁴⁴ is an aspect of the (main)

³³ Rep. Act No. 6826 [hereinafter “Aquino Emergency Act’] (1989), § 2.

³⁴ § 3.

³⁵ See Ernesto Maceda, *Emergency powers proposed, in Search for Truth*, PHILSTAR.COM, Jan. 14, 2014, available at <https://www.philstar.com/opinion/2014/01/14/1278577/emergency-powers-proposed>

³⁶ As to the equivalent provision, see CONST. (1935), art. VI, § 6.

³⁷ Rep. Act No. 7648 [hereinafter “Electric Power Crisis Act’] (1993), § 3.

³⁸ “The power to contract in behalf of the State is clearly an executive function, as opposed to legislative or judicial.” *La Bugal-B’laan Tribal Ass’n, Inc. v. Ramos*, G.R. No. 127882, 445 SCRA 1, 442, Dec. 1, 2004 (Tinga, J., concurring).

³⁹ Electric Power Crisis Act, § 4.

⁴⁰ *Vigan Electric Light Co., Inc. v. Public Service Comm’n*, G.R. No. 19850, 10 SCRA 46, Jan. 30, 1964.

⁴¹ Electric Power Crisis Act, § 5.

⁴² *Kapisanan ng mga Kawani ng Energy Regulatory Bd. v. Barin*, G.R. No. 150974, 526 SCRA 1, June 29, 2007.

⁴³ Hereinafter “David,” G.R. No. 171396, 489 SCRA 160, May 3, 2006.

⁴⁴ CONST. art. XII, § 17.

emergency powers clause,⁴⁵ and therefore also requires a delegation from Congress.⁴⁶ *David* also enumerated four conditions for the grant of emergency powers to the President, i.e. “(1) there must be a war or other emergency; (2) the delegation must be for a limited period only; (3) the delegation must be subject to such restrictions as the Congress may prescribe; and (4) the emergency powers must be exercised to carry out a national policy declared by Congress.”⁴⁷ As there was no delegation from Congress, the Court clarified that Proclamation No. 1017 (series of 2006) “does not authorize the President to take over privately-owned public utility or business affected with public interest without prior legislation.”⁴⁸

Congress itself would not delegate emergency powers to the executive for thirty years, or until the enactment of the Bayanihan Act on March 24, 2020. Despite the past two instances where Congress delegated emergency powers to the President and several Supreme Court decisions on the matter, there exists no robust test for the validity of such delegation and, more broadly, its implementation and incidents. The next part will propose a framework for analyzing such questions.

III. A PROPOSED LEGAL FRAMEWORK FOR ASSESSING THE VALIDITY OF EMERGENCY MEASURES

The premise for the analysis is that while the Executive ought to be equipped with sufficient authority to quickly act on an emergency, he should not be allowed to address it in a manner that would result in the systematic repression of civil liberties, the abrogation of the constitutional order, and the irremediable deterioration of the rule of law. In line with this, doubts on the validity of emergency powers must be resolved in favor of their reservation with the legislature. This is not only consistent with the general rule on the separation of powers,⁴⁹ but also with the presupposition that Congress can exercise its legislative functions alongside the delegation.⁵⁰

⁴⁵ Art. VI, § 23(2).

⁴⁶ *David*, 489 SCRA 160, 250-251.

⁴⁷ *Id.*

⁴⁸ *Id.* at 275.

⁴⁹ *See* *Echegaray v. Sec’y of Justice* [hereinafter “*Echegaray*”], G.R. No. 132601, 297 SCRA 754, 784, Oct. 12, 1998.

⁵⁰ *See* II RECORD CONST. COMM’N 88 (July 22, 1986). “MR. NOLLEDO. With respect to [...] authorizing the legislature by law to grant the President powers necessary and proper to carry out a declared national policy in times of war or other national emergency, may I ask about the extent of these powers? Do these powers include the right to legislate?”

It is also in this context that the test in *David* is, by itself, regrettably insufficient. *David* merely parses the text of the emergency powers clause. Although the text of the clause is certainly a valuable, objective starting point, the *David* test does not take into account other safeguards that are built into the Constitution or have developed over time.

The proposed framework contemplates not only the validity of the main legislative delegation (Parts A and B), e.g. the Bayanihan Act, but also its incidents (Part C), such as the powers specifically delegated by Congress and subordinate legislation decreed by the President. While illustrations here will focus on the COVID-19 Regulations, the proposed framework may be adopted in other instances when the Constitution's emergency clauses are invoked.

A. Formal Tests

1. *Was the Emergency Powers Clause Properly Invoked?*

The analysis of the validity of an emergency measure must begin with whether the emergency power clause was invoked in the first place. The implications of a proper invocation relate to the power that can be granted by the measure, and the requisites for its passage. On one hand, this clause exceptionally enables Congress to delegate its legislative power (i.e. the authority to make, alter, or repeal laws⁵¹), as opposed to quasi-legislative power (i.e. the rule-making authority that is, at all times, subject to the law it implements⁵²). On the other hand, the grant of emergency powers is subject to additional constitutional requirements that are inapplicable to regular legislation.

At first glance, this test may appear to be dispensable. After all, the Emergency Powers Act in 1941, the Aquino Emergency Act in 1989, and the

“MR. DAVIDE. [...] In the draft Articles on the Executive, one of the effects of a proclamation of martial law is that the legislature and any other legislative body are not supplanted, meaning, they continue their functions and the exercise of their authority. So, necessarily, it would follow that under Section 21, we presuppose a situation where the National Assembly can continue to exercise its functions. Logically then, the areas over which the National Assembly may delegate to the President certain authority must be very limited to meet the exigency of the emergency.”

⁵¹ *Review Center Ass'n of the Phil. v. Ermita*, G.R. No. 180046, 586 SCRA 428, 450, Apr. 2, 2009.

⁵² *See Smart Communications, Inc. v. Nat'l Telecomm. Comm'n*, G.R. No. 151908, 408 SCRA 678, Aug. 12, 2003.

Bayanihan Act in 2020 all categorically invoked the emergency powers clause.⁵³ But, a closer look shows the value of this formal test. As earlier noted, the Electric Power Crisis Act was silent as to whether Congress was invoking the emergency powers clause or simply legislating in the regular course. This raises questions on the discretion that should have been given to the Executive under the Electric Power Crisis Act: was its discretion broader and closer to a legislative discretion, or was it bound to simply implement the law?

To be clear, there is no constitutional requirement for the invocation to be explicit. However, considering the exceptional nature of this particular delegation, it must at least be clear from the text of the enabling statute that Congress was indeed invoking its authority under the emergency powers clause. If there is doubt that Congress is surrendering the exclusivity of its legislative powers through an emergency measure, the law in question must be construed as regular legislation, since the grant of emergency powers derogates from the general rule that power delegated (by the people, to Congress) cannot be further delegated.⁵⁴

2. *Was the Emergency Measure Duly Enacted?*

Under the Enrolled Bill Doctrine, the signing of a legislative bill by the Speaker of the House and the President of the Senate and the certification by the secretaries of both houses of Congress are conclusive of its due enactment.⁵⁵ While the Court has consistently taken a deferential approach on these matters,⁵⁶ it has also recognized that there are exceptional situations where the Enrolled Bill Doctrine may not apply.⁵⁷ Most prominently, in *Astorga v. Villegas*,⁵⁸ the Court looked past the enrolled bill and into the congressional journal when the Senate President withdrew his signature, claiming that the bill presented to the Chief Executive was different from that approved on the legislative floor.

The Enrolled Bill Doctrine is itself worth revisiting since, under expanded judicial power,⁵⁹ “whether or not laws passed by Congress comply with the requirements of the Constitution pose questions that [the] Court

⁵³ Emergency Powers Act, § 2; Aquino Emergency Act, § 3; Bayanihan Act, § 4.

⁵⁴ See *Echegaray*, 297 SCRA 754, 784.

⁵⁵ *Arroyo v. De Venecia*, G.R. No. 127255, 277 SCRA 268, 295, Aug. 14, 1997.

⁵⁶ *Council of Teachers & Staff of Colleges & Universities of the Phil., v. Sec’y of Education*, G.R. No. 216930, Oct. 9, 2018.

⁵⁷ See *id.*

⁵⁸ G.R. No. 23475, 56 SCRA 714, Apr. 30, 1974.

⁵⁹ CONST. art. VIII, § 1.

alone can decide.”⁶⁰ But specifically in the case of the emergency powers clause, compliance with constitutional requirements such as quorum,⁶¹ the rider clause,⁶² and three readings⁶³ is essential and justiciable. All these seek to ensure that a bill was intelligently considered and duly deliberated by Congress.⁶⁴ If these requirements apply to regular bills, more so should they apply to emergency measures through which the Legislature essentially strips the exclusivity of its lawmaking power.

As to the Bayanihan Act, there are legitimate questions as to whether the House of Representatives, in particular, could have passed the emergency measure, considering a physical quorum was absent from the Special Session. Further, any assertion that there was a quorum, with 279 of the 299 members participating via teleconference,⁶⁵ rests on shaky ground as this would have required the House to meet, again with a quorum and prior to or at the beginning of the Special Session, for the revision of its internal rules.⁶⁶ Normally, the Enrolled Bill Doctrine would bar this analysis. Nevertheless, it would be difficult for the courts to close their eyes to the highly irregular passage of the Bayanihan Act because the entire session was webcasted, televised, and broadcasted on radio.

3. Is the Delegation Limited to the President?

The emergency powers clause textually limits the delegation of powers to the President.⁶⁷ While it is conceivable that particular deputies or subordinates of the President may be given specific authorities by the emergency measure, such powers cannot be legislative in character. Otherwise, the President’s alter ego and subordinate will have the power to

⁶⁰ *Miranda v. Aguirre*, G.R. No. 133064, 314 SCRA 603, 609, Sept. 16, 1999.

⁶¹ CONST. art. VI, § 16(2).

⁶² Art. VI, § 26(1). Also known as the “one subject, one title” clause.

⁶³ Art. VI, § 26(2).

⁶⁴ *See, e.g.* *Cawaling v. Comm’n on Elections*, G.R. No. 146319, 368 SCRA 453, Oct. 26, 2001 (on the rationale for the one subject, one title clause).

⁶⁵ Filane Mikee Cervantes, *Congress tackles Covid-19 emergency measures in special session*, PHIL. NEWS AGENCY, Mar. 23, 2020, at <https://www.pna.gov.ph/articles/1097456>. As of this last date, the House of Representatives has not yet made the record and journal of the Special Session available online.

⁶⁶ “Each House may determine the rules of its proceedings[.]” CONST. art. VI, § 16(3). However, this is premised on the existence of a quorum, since the immediately preceding sub-paragraph makes it clear that a “majority of each House shall constitute a quorum to do business[.]” *See* CONST. art. VI, § 16(2). It would be difficult to argue that Congress is presumed to be acting with a continuing quorum since the Bayanihan Act was passed not in the First Regular Session but in a Special Session. As a separate session, quorum should have been determined anew.

⁶⁷ *See* CONST. art. VI, § 23(2).

pass decrees which, as law, the President would be constitutionally required to faithfully execute.⁶⁸ In turn, this would be violative of the President's power of control over the Executive department.⁶⁹

At this point, it should be emphasized that the Constitution does not contemplate a delegation by Congress of emergency powers to local government units ("LGUs"). In *Homeowners' Association of the Philippines, Inc. v. The Municipal Board of the City of Manila*,⁷⁰ the Court dealt with a municipal corporation that passed an ordinance (a) declaring a state of emergency in the matter of housing accommodations for the poor and (b) regulating residential rentals. By upholding the lower court's nullification of the ordinance on the ground that its period was not reasonably defined, the Court sidestepped the issue of whether such a declaration was even within the power of the municipal corporation. Notwithstanding this demurrer, the 1973 and 1987 Constitutions did not textualize any potential grant of such emergency powers to local governments.

Because emergency powers cannot be delegated to LGUs, Section 4(g)⁷¹ of the Bayanihan Act cannot be read as directly allowing community quarantines via local executive orders. The authorization for such quarantine powers must therefore be based on the Local Government Code, which vests it on local legislative councils (except the Sangguniang Barangay).⁷²

B. Tests of Substantive Validity

1. Does the Emergency Measure Comply with the David Test?

The four "conditions" for the delegation of emergency powers to the President, enumerated in *David*, are substantive tests based on the text of the emergency powers clause. Hence, for such a delegation to be valid, "(1) there must be a war or other emergency; (2) it must be for a limited period only; (3) it must be subject to such restrictions as the Congress may prescribe; and (4) the emergency powers must be exercised to carry out a national policy

⁶⁸ CONST. art. VI, § 17.

⁶⁹ Art. VI, § 17.

⁷⁰ G.R. No. L-23979, 24 SCRA 856, Aug. 30, 1968.

⁷¹ Under Section 4(g), the President is authorized to "[e]nsure that all Local Government Units (LGUs) are acting within the letter and spirit of all the rules, regulations and directives issued by the National Government pursuant to the [Bayanihan] Act [and] are implementing standards of Community Quarantine consistent with what the National Government has laid down for the subject area[.]"

⁷² LOC. GOV. CODE, §§ 447(a)(5)(xii), 458(a)(5)(xii) & 468(a)(4)(v).

declared by Congress.”⁷³ While the Court takes a deferential stance towards the political determination of an emergency, it has also reasserted the latter’s justiciability.⁷⁴ However, the Court has declared that the “standard laid down is not correctness but arbitrariness,” that is, “totally bereft of factual basis.”⁷⁵

Notwithstanding the test in *David*, two clarifications must be made. *First*, despite the lack of qualification in *David*, the emergency must be national in scope pursuant to the text of the Constitution itself. Thus, emergency powers cannot be granted for local or regional issues. This is in contrast to the President’s commander-in-chief powers, which may be exercised in particular, specially affected vicinities.⁷⁶ *Second*, the fourth condition in *David* requires that Congress itself declares a national policy. This was illustrated in *David*, where the Court explained that the power of the President to declare a state of national emergency—that is, its factual existence—is separate from and not a substitute for the power of Congress to declare a national policy further to an emergency.⁷⁷ It is for this apparent reason that the Bayanihan Act takes pains to spell out what comprises the COVID-19 emergency,⁷⁸ albeit leaving a catch-all for an “urgent need [...] to promote and protect the collective interests of all Filipinos in these challenge times.”

2. *Is the Delegation Limited to Legislative Powers?*

Although the emergency powers clause is textually silent as to the authority that Congress may specifically delegate, the grant of powers “necessary and proper to carry out a declared national policy” must refer to legislative powers, considering the legislative branch’s primary function as the policy-making agent of the State.⁷⁹

Obviously, an emergency measure cannot grant judicial powers to the Executive because Congress cannot give what it does not have. However, this restriction also means that Congress may not delegate its powers that are not strictly legislative in nature. Consequently, even if they may improve the efficiency of executive power during an emergency, the delegation of emergency powers to the President may not include Congress’ prerogatives

⁷³ *David*, 489 SCRA 160, 250-251.

⁷⁴ *See Lagman v. Medialdea* [hereinafter “Lagman”], G.R. No. 231658, 829 SCRA 1, July 4, 2017.

⁷⁵ *David*, 489 SCRA 160, 228.

⁷⁶ *See Lagman*, 829 SCRA 1.

⁷⁷ *David*, 489 SCRA 160, 250-251.

⁷⁸ Bayanihan Act, § 3.

⁷⁹ *See Villanueva v. Canlas*, G.R. No. L-529, 77 Phil. 381, 384 (1946).

to approve appointments,⁸⁰ declare the existence of a state of war,⁸¹ review the exercise of the commander-in-chief powers,⁸² and consent to treaties,⁸³ among others. Notably, these congressional prerogatives are not legislative in nature—they do not involve the power to make, alter, or repeal laws—but are weights in a delicate system of checks and balances. It is not difficult to see how the complete abrogation of that system in the name of public exigencies will open the floodgates to abuse.

C. As to Incidents

1. *Is the Delegated Legislative Power Exercised by the President Himself?*

Because of the textual limitations of the emergency powers clause, as discussed above, the validity of the *exercise* of the delegated legislative power should be primarily tested by confirming that the executive legislation is issued by the President himself or under his express direction. While the doctrine of Qualified Political Agency provides that the acts of the President's alter egos are also his acts unless they are reprobated,⁸⁴ it may be a stretch to insist that this doctrine applies to the exceptional delegation of legislative powers during a national emergency.

Excepting the emergency delegation from this doctrine is justified by the latter's rationale and application in jurisprudence, that is, the presidential type of government and the President's implementation of the law as the single executive.⁸⁵ In contrast, the exercise of the emergency delegation by a secretary would not be a simple implementation of the law (i.e. an executive function, which includes *quasi*-legislative functions) but the making, amendment, or repeal of a law itself (i.e. a delegated legislative function).

It also has historical basis: as illustrated in *Araneta*, all of the executive legislation questioned were executive orders, i.e. issued by the President himself or under his express authority.

Requiring the President himself to exercise the delegated legislative power would also be consistent with the idea that the emergency delegation is not meant to abrogate the Constitutional order. Allowing Qualified Political

⁸⁰ CONST. art. VI, § 18.

⁸¹ Art. VI, § 23(1).

⁸² Art. VII, § 18.

⁸³ Art. VII, § 21.

⁸⁴ *See, generally*, Villena v. Sec'y of the Interior, 67 Phil. 451 (1939).

⁸⁵ *See* Tecson v. Salas, G.R. No. 27524, 34 SCRA 275, July 31, 1970.

Agency to apply in this case would result in as many congresses as there are secretaries. With every administrative order possibly acquiring the character of legislation, applying the doctrine would also give rise to systemic uncertainty, if not chaos. Hence, not only must the President himself exercise the delegated legislative power, but he must invoke it *expressly* whenever issuing the executive legislation.

2. Does the Delegation Derogate from Other Constitutional Standards Unrelated to the Grant of Legislative Power?

That emergency situations do not suspend the operation of the Constitution is patent from the text of the fundamental law⁸⁶ and confirmed by the deliberations of the Constitutional Commission.⁸⁷ Hence, the Bill of Rights remains intact notwithstanding the grant of emergency powers to the President.

Yet the larger implication of this standard is that other constitutional prerogatives are likewise left undisturbed by emergency measures. For instance, local autonomy remains intact regardless of a public emergency. Therefore, emergency measures cannot grant the President the power of control over local governments. In this regard, even if the Bayanihan Act empowers the President to “[e]nsure that all Local Government Units (LGUs) are acting within the letter and spirit of all the rules, regulations and directives issued by the National Government[.]”⁸⁸ he still exercises only general supervision over local governments.⁸⁹ He remains barred by the Constitution from supplanting or invalidating⁹⁰ the decisions of local officials, or directly taking over their functions.

⁸⁶ There is no provision in the Constitution allowing its suspension. *See also* CONST. art. VII, § 18. Even in the case of the suspension of the privilege of the writ of habeas corpus, the same is textually provided and conditioned.

⁸⁷ *See Echegaray*, 297 SCRA 754.

⁸⁸ Bayanihan Act, § 4(g).

⁸⁹ Art. X, § 4.

⁹⁰ “The power of supervision involves oversight of a subordinate to ensure that the rules are followed. On the other hand, the power of control is broader as it involves laying down the actual rules to be followed. If the rules are not followed, the power of control allows the controlling officer to order that the act be done or undone, or even to supplant the subordinate’s act with his or her own act.” *Office of the Ombudsman v. Fetalvero, Jr.*, G.R. No. 211450, July 23, 2018.

3. Does the Takeover of Businesses Comply with Additional Constitutional Safeguards?

While *David* makes it clear that the takeover clause⁹¹ is an aspect of the emergency powers clause,⁹² its separate inclusion in the Constitution means that the former is subject to additional safeguards. From the text of the takeover clause, the questions that may be raised are: (1) Was the takeover clause properly invoked, i.e. by the declaration of a national emergency? (2) Is the takeover required by the public interest? (3) Is the takeover temporary and limited to the emergency? (4) Is the enterprise a proper subject of the takeover clause, i.e. a privately-owned public utility or a business affected with the public interest? (5) Did Congress provide for reasonable terms for the temporary takeover?

4. Does Executive Legislation Reach Beyond the Public Emergency and its Incidents?

Considering the limited purpose for the grant of emergency powers, an executive legislation that explicitly claims to be effective even after the emergency has passed is of doubtful validity. But if the executive legislation is itself silent, may it continue to be in force even when the enabling emergency measure has expired?

This question was effectively raised in *Jabalde v. Philippine National Bank*,⁹³ which concerned the applicability of Executive Order No. 49 (series of 1945, “EO No. 49”), issued under the Emergency Powers Act. EO No. 49 provided that “[a]ll deposits made with banking institutions during enemy occupation, and all deposit liabilities incurred by banking the [sic] same period are declared null and void, except as provided in this section.” In essence, EO No. 49 was applied against the appellant when the lower court held that his wartime deposits were not reimbursable.

Before the Supreme Court, the appellant claimed that EO No. 49 should not be applied to him because he filed the complaint (for reimbursement) in 1956, or several years after the Emergency Powers Act had expired in 1946. The Court ruled against him, stating that EO No. 49 was “clearly intended for permanent application and its operation was not limited to the period of emergency.”

⁹¹ CONST. art. XII, § 17.

⁹² Art. VI, § 23(2).

⁹³ G.R. No. L-18401, 117 Phil. 792, Apr. 27, 1963.

Jabalde shows that it is possible for executive legislation to have effects well beyond the expiration of the delegated emergency powers. This seems contrary to the principle that legislative delegation is limited in time and does not exist beyond the emergency. While the dictum in *Jabalde* is unfortunate, it may be interpreted to mean that when EO No. 49 was issued on June 6, 1945, it had a permanent effect on wartime deposits, which had been rendered null and void. When EO No. 49 became *functus officio* upon the expiry of the Emergency Powers Act, the deposits it nullified could no longer be restored.

This narrow reading of *Jabalde* is necessary to stymie any abuses arising from the grant of emergency powers. In the particular case of the Bayanihan Act and the COVID-19 emergency, Congress was able to meet and legislate on plenary matters upon the resumption of the regular session—a phenomenon that was not possible for the National Assembly during the Japanese occupation from 1942 to 1945. Hence, the COVID-19 Regulations under the Bayanihan Act should not survive the expiration of their enabling law, although any permanent effects thereof are *functus officio* and, for reasons of stability, should not be disturbed.

IV. CONCLUSION

A review of the origins and historical application of emergency powers in the Philippines shows that there has not been a robust test for the validity of emergency measures and their incidents. While the proposed framework is detailed and extensive, its goal is not to straitjacket the Executive and make emergency powers impossibly difficult to delegate. Instead, the objective of the proposed framework is to balance, on one hand, the need for swift action to end an emergency and, on the other hand, the imperative to preserve the constitutional system and the rule of law. “Always, the guiding principle should be: Break the crisis and save the existing constitutional order, but, do not break the crisis and also break the constitutional order.”⁹⁴

The Bayanihan Act has expired without a successful legal challenge. Yet as courts begin to reopen, there is a pressing need to audit the many legal issues that have arisen during the first leg of the (ongoing) public health emergency. In particular, it is imperative to examine the COVID-19 Regulations which, notwithstanding the expiry of the Bayanihan Act, the Executive may still feel entitled to enforce. That audit should lead to greater vigilance from the legal community: without an end to the pandemic in sight, particularly for the Philippines, the inevitable reinvocation of the emergency

⁹⁴ Raymundo Armovit, *Emergency Powers*, 29 PHIL. L.J. 666, 724 (1954).

clause powers must be met with legal scrutiny. Otherwise, the disintegration of checks and balances will be the COVID-19 pandemic's legal legacy.

- o0o -