MARTIAL LAW: SCOPE, PROBLEMS AND PROPOSALS

BY FRANCISCO I. CHAVEZ*

A country can never cradle peace in its arms forever. Humane and principled leaders may come. But for each of this kind, there thrive ten times more vicious men, obssessed with wielding the scepter of power, contemptuous of the law and indifferent to liberty.

I. INTRODUCTION

The literature on the subject of martial law is still at sea. Confusion and divergent views characterize rather than limit and define martial law. The confusion lies to a great extent not only upon the absence of an accepted definition of the subject but more so upon the fact that the field of jurisprudence in the Philippines as far as martial law is concerned is still relatively barren. Prominent authorities, more often than not, contradict rather than complement each other in their dissertations on the nature, scope and limitations of martial law. There is a tendency among civilians to understand martial law as a body of rules and regulations governing the Armed Forces of the Philippines. Strictly, however, this view refers to military law. Military law in its generic sense, however, embraces martial law, military government and military law. Since it affects not merely the military but the civilian population as well, it is more deserving of the legal profession's concern. This is particularly true of martial law, which is the most complicated in nature and the least understood among the triple aspects of the exercise of military jurisdiction known to our laws at present.[1]

The term "martial law" is, as has been long observed by the legal profession, inaccurate and misleading, this despite the exposition on the subject by Chief Justice Chase in his dissenting opinion in the *Milligan* case. Some of the confusion, undoubtedly, is historical. The term originally applied to the discipline of the army and was administered in the court of the marshal and the constable.[2]

One of the reasons for the confusion which surrounds martial law is that historically the term has been used loosely and improperly by a great many judges and legal scholars.[3] Martial law has been confused with "military government" which is the rule imposed by

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* *Vice-Chairman*, Student Editorial Board, Philippine Law Journal.

1 Santos, *Martial Law in the Philippines*, 14 LAWYERS J. 506 (1949).

2 Anthony, *Martial Law in Hawaii*, 30 CALIF. L. REV. 371, 382 (1942) citing 1 HOLDSWORTH, A HISTORY OF ENGLISH LAW 573 (1922).

3 Comment, 42 SO. CALIF. L. REV. 546, 549 (1969) citing FAIRMAN, THE LAW OF MARTIAL RULE, 20-23.

a victorious army over an occupied country[4] and with "military law" which is the law by which the military governs its own affairs.[5] It must be distinguished from the use of the army as an aid to civil government for it is something more than mobilization of the armed forces. As a general rule, martial law is the use of military forces to perform the functions of civil government.

An objective assessment of world-wide and domestic conditions raises the probability of the imposition of martial law. So long as the threat of subversion imminently exists and the peace and order situation in the country worsens, the imposition of martial law looms over the heads of the citizenry like the proverbial sword of Damocles.

There is thus a need to restudy the major aspects of martial law as well as the legal problems concomitant thereto and propose proper remedies to the same.

Legal and Historical Bases

Martial law was, until 1916, unknown to our laws. Although it appears that the Spaniards were not entirely ignorant of this law, they did not resort to it during the entire period of their occupation of the country. The Spaniards preferred the simple expedient of using their military powers as conquerors in the suppression of insurgency and filibusterism. The various constitutions proposed and considered for adoption during the revolutionary period did not contain any provision with respect to martial law.[6] On the other hand, the Malolos Constitution contained some provisions which approximate the "state of siege" of most continental European countries rather than martial law. It provided that the guarantees secured under article 7 paragraph 11 and paragraphs 1 & 2 of article 20 cannot be suspended in the whole Republic or in any part thereof except temporarily and by virtue of a special law.[7] It was the Jones Law particularly section 21 thereof which introduced martial law into our jurisdiction when said law empowered the Governor-General "in case of rebellion, invasion or imminent danger thereof, when the public safety requires it, (to) suspend the privileges of the writ of habeas corpus or place the Islands or any part thereof under martial law."

Our present provision on martial law is lodged in the Constitution. A perusal of the provision would reveal that the declaration

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[4] *Ibid.*
[5] *Ibid.*
[6] Santos, *supra*, note 1 at 509, f.n. 7.
[7] *Ibid.* citing KALAW, THE MALOLOS CONSTITUTION, arts. 30 & 31, Tit. IV, 77-78.

of martial law is based upon the undefined law of necessity, corollary to the declaration contained in the Constitution that "the defense of the State is a prime duty of government x x x."[8] Thus, the Philippine Constitution provides that "The President shall be commander-in-chief of all armed forces of the Philippines and, whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion, insurrection, or rebellion. In case of invasion, insurrection, or rebellion or imminent danger thereof, when the public safety requires it, he may suspend the privileges of the writ of habeas corpus or place the Philippines or any part thereof under martial law."[9] That the framers of our present Constitution had foreseen adverse forces which would threaten the very existence and foundation upon which the State has been built and founded may be safely assumed.

II. SCOPE

The imposition of martial law is an act of self-defense of the State, an act of self-preservation, based upon necessity. In the United States, the Supreme Court had occasion to consider that martial law is "founded on necessity and is inherent in government . . . Unless the right and power exist, peace and good order, security . . . government, itself . . . may be destroyed and obliterated . . . when the domination of the mob becomes so powerful that it cannot be stayed by the civil authorities."[10] Consequently, while the Constitution guarantees individual rights and liberties in such stereotyped phrases as "due process" and "equal protection of the laws" yet, that in cases of extreme conflict between such rights and the preservation of the State the former has to yield to the latter seems apparent from the above-quoted provisions of the Philippine Constitution. The particular constitutional provision under study reveals the bare essentials attending the imposition of martial law, to wit:

(1) There is actual invasion, insurrection or rebellion, or

(2) There is imminent danger of invasion, insurrection or rebellion, and

(3) Public safety (necessity) requires the imposition of martial law.

It is quite clear that on occasions of invasion, insurrection or rebellion, martial law is not declared as a matter of course. There is the additional condition that public safety requires it, thereby

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[8] CONST. art. II sec. 2.
[9] CONST. art. VII sec. 10(2).
[10] Moyer v. Peabody, 212 U.S. 78 83, 53 L. Ed. 410, 29 S. Ct. 238 (1909)

indicating the care, caution and objective deliberation as prior attendant considerations before martial law is declared. For the rule of martial law, after all, is the assumption and performance by the military of some or all the functions of government, as when civilian authorities are prevented by invasion, insurrection, rebellion or imminent danger thereof. The military therefore during the rule of martial law should be viewed as a mere agent or instrumentality of the civil government with the end of controlling disorder, disturbance or lawlessness among the civilian population and thereby restore peace and order. It is temporary governance of civil affairs by the military once the civil government is disrupted or unable to function, in whole or in part, with a view to restoring to the civil government its functions as soon as conditions permit. It is therefore a measure or method of preserving the government when the usual or normal methods to this end prove inadequate.[11]

According to the extent of its coverage, martial law may be classified into two, to wit: absolute and qualified. The first refers to a situation in which the military displaces the civil government and governs a particular territory according to the dictates of military necessity and the laws of war. This generally obtains in war during the occupation of enemy territory. In this situation, all powers of government may be exercised by the military — executive, legislative and judicial.[12] The second refers to a situation where the military has been called to aid the civil government in repressing civil disorders. This obtains in cases of insurrection, rioting or widespread violence and disorder. In this situation, the authority of the military is limited to exercising some functions of the civil government in the area or scene of disorder or conflict, particularly restoration and maintenance of the peace, regulation of activities affecting the peace and order situation, etc. There is a sharing by the military authority with the civil government to the extent necessary in dealing with the situation. The powers exercised by the military in such a situation are generally limited to those of the executive, including issuance of ordinances and other measures.[13]

Power Subject to Abuse

So wide is the latitude of discretion reposed upon the Executive in the determination of the existence of conditions necessary for the imposition of martial law that the tendency to wield that

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11 C.f. *supra*, note 3 citing Fairman at 23-25; DOWELL, MILITARY AID TO TO CIVIL POWER, 231-232.

12 Prize Cases, 2 Black 635, 17 L. Ed. 459 (1863); U.S. v. Diekelman, 92 U.S. 520, 23 L. Ed. 742, (1876)

13 Fairman, *Martial Rule and the Suppression of Insurrection*, 23 ILL. L. REV. 771 (1929); Ballantine, *Qualified Martial Law, A Legislative Proposal*, 14 MICH. L. REV. 102 (1915); Ballantine, *Martial Law*, 12 COLUM. L. REV. 529 (1912).

power arbitrarily and capriciously cannot be overlooked. Courts have long established the conclusiveness of the Executive's determination of the necessity for the imposition of martial law and in cases where such determination is legally and factually dubious, the Courts have never attempted to resolve the issue squarely but rather proceeded to rule on the invalidity of the measures taken in pursuance of martial law. Thus, the danger of abuse in the exercise of the power to declare martial law obtains not only in the Executive with whom the determination of the necessity is originally reposed but also upon the agencies through and by means of which *measures* of martial law may be executed. Since the basis of martial law is necessity, it is quite apparent that no iron-clad rule may be standardized and applied to all cases as to whether a measure or an act done supposedly as a measure of martial law is within the bounds of necessity. Thus, the maxims *"Quod alias non fuit licitum necessitas licitum facit"* (Necessity makes that lawful which otherwise would be unlawful) and *"Quod enim necessitas cogit, defendit"* (Necessity defends or justifies that which it compels) — ought to be given due consideration. However, not all acts done in the guise of the much-abused word "necessity" are justified or justifiable. For when acts done are patently beyond the bounds of necessity, with due regard to all obtaining circumstances, the Court will not be reluctant in pointing out the indefensibility of such acts. Utmost care should be taken in probing upon acts done supposedly as measures of martial law. For while martial law may be imposed to aid the civil government and restore and maintain peace and order, the human frailties of persons upon whom the execution of measures of martial law are incumbent, more often than not, defeat the purpose for which martial law had been imposed. In the name of martial law, lives had been whimsically taken away, liberty arbitrarily denied, property destroyed and illegally confiscated, women desecrated, newspaper circulation suppressed, press censored, objectionable faces deported, strikes outlawed, community curfewed, magistrates deposed, inhabitants punished by military commissions, non-union mines closed and production of oil restricted.[14] Following the attack on Pearl Harbor, in December 1941, the commanding general of the US army in Hawaii assumed the powers of a military governor, governed the territory by decrees and by General Order No. 3 of December 7, 1941, named the Chief Justice of the Supreme Court of Hawaii as chairman and law-member of the military commission and the acting US Attorney General as trial judge advo-

[14] Santos, *supra*, note 1 at 508 f.n. 36-45.

cate.[15] In the US case of *Sterling v. Constantine*,[16] the Governor of Texas attempted to enforce oil production quotas by declaring martial law in the oil fields. Here, the Governor sought to restrict oil production by a declaration of martial law in the area concerned although the conditions then obtaining did not call for the necessity of martial law. Consequently, the Supreme Court affirmed the order of the trial court granting injunction in favor of persons affected restraining the Governor from enforcing martial law.

Liability For Acts Done During Rule Of Martial Law

In theory and sometimes, in practice, the Filipino people believe and most probably uphold the principle that they have a government which adheres to the rule of law and not to the rule of men. Consequently, during times of martial law rule, the Executive, upon whom the determination of necessity for the imposition of martial has been expressly granted by the Constitution and the military which is the agency through and by means of which martial law may be enforced, do not possess and exercise unfettered or absolute power. They are, as they should be, under the law. Since necessity is the basis of martial law, all acts done in pursuance thereof will have to be gauged by such necessity. Such necessity limits not only the scope of the powers to be exercised but also the duration thereof. No constitutional right therefore may be violated, obstructed or impaired except when extreme necessity compels the action. Any act of the military beyond the bounds of such necessity would therefore be unjustified, uncalled-for and consequently illegal.

Pursuant to the undefined law of necessity therefore the military cannot unlawfully do acts with impunity under the protective mantle of the phrase "pursuant to measures of martial law." The military is subject to criminal as well as civil prosecution and, upon conviction, is liable for acts done during and after martial law.

However, since there's no standard barometer with which to measure the reasonable necessity upon which the defendant may have acted, the obtaining circumstances, among others, should largely be taken into account. The defendant is to be judged not according to the response of a magistrate who sits comfortably in his swivel chair. The Court must put itself in the position of the accused, in the light of facts and circumstances which has confronted the latter during moments of stress and strain. To this effect, the U.S. Sup-

[15] Fairman, *The Law of Martial Rule and The National Emergency* 55 HARV. L. REV. 1253 at 1283 (1942) as cited by Santos, *supra*, note 1 at 508.
[16] 287 U.S. 378, 53 S. Ct. 190, 77 L. Ed. 375 (1932).
[17] *Id.*, at 399-400.

reme Court in the case of *Sterling v. Constantine* speaking through Mr. Chief Justice Hughes said:

> "The nature of the power also necessarily implies that there is a permitted range of honest judgment as to the measure to be taken in meeting force with force, in suppressing violence and restoring order, for without such liberty to make immediate decisions, the power itself would be useless. Such measures concerned in good faith, *in the face of emergency and directly related to the quelling of the disorder or the prevention of its continuance*, fall within the discretion of the Executive in the exercise of his authority to maintain peace."[17] (Emphasis supplied)

It can readily be seen from the above-quoted pronouncement of the US Supreme Court that it is only when acts were done in "good faith" and "in the face of emergency and directly related to the quelling of the disorder or the preventing of its continuance," that the same may be defensible. Beyond these requisites, the case against the accused would be stronger. For it is clear that crimes against chastity cannot be said to have been done "in good faith" or "in the face of the emergency or directly related to the quelling of disorder." As to whether the acts done exceed the bounds of necessary and reasonable discretion is therefore a question of fact to be judicially determined. In undertaking this task, "the state of facts as they appeared to the officer at the time he acted, must govern the decision; for he must necessarily act upon the information of others as well as his own observation. And if, with such information as he had a right to rely upon, there is reasonable ground for believing that the peril is immediate and menacing, or the necessity urgent, he is justified in acting upon it; and the discovery afterwards that it was false or erroneous will not make him a trespasser. But it was not sufficient to show that he exercised an honest judgment . . . to promote the public service; he must show by proof the nature and character of the emergency, such as he had reasonable grounds to believe it to be . . . and the occasion such, according to the information upon which he acted, that private rights must for the time give way to the common and public good.[18] With peace and order restored and the civil government functioning under normal conditions, the military or persons to whom enforcement of measures of martial law had been delegated may be the subject of criminal and civil prosecution for private wrongs for their acts done beyond the reasonable necessity of the measures of martial law.

Limitations

The framers of our Constitution, men of foresight, expressly recognized the necessity of providing for martial law powers for the protection and preservation of the Philippines from domestic as well as foreign forces which threaten its security and existence.

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[18] Santos, *supra*, note 1 at 513.

However, martial law, though expressly recognized in the Constitution is left undefined. The commendable practical effect of this cannot be overemphasized. This is so because, as has repeatedly been pointed out, martial law is based upon necessity. Jurisprudence on the subject of martial reveals that most "definitions" are merely descriptions, tentative, rather than definitive. Besides, martial law must be responsive to public necessities which cannot be foreseen in advance.

Martial law is not without limitations. Since it is founded upon necessity, it is the same necessity which limits the exercise and extent of such power. A case to case approach must be adopted for what may be accepted as necessary under one set of facts may not be acceptable as such under the same set of facts in another context. Aside from this apparent limitation, measures taken pursuant to martial law may be judicially reviewed. The US Supreme Court in *Sterling v. Constantine*,[19] holding that while the declaration of necessity is conclusive, the *measures* employed are reviewable, said:

> "It does not follow from the fact that the Executive has this range of discretion, deemed to be a necessary incident to this power to suppress disorder, that every sort of action the Governor may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat. The contrary is well established. What are the limits of military discretion and whether or not they have been overstepped in a particular case, are *judicial questions.*"

That the civil authorities remain supreme and the military does not supervene, except where the civil authority has been overthrown, or is inadequate for public safety and order[20] is an apparent limitation upon martial law rule. Another factor operating as a check upon the acts of the military during martial law is the rule, supported by the greater weight of authority, that the military are criminally and civilly liable for acts performed during martial law and that the law does not cover with its seemingly licentious protection unjustified and illegal acts.

III. PROBLEMS

DOES MARTIAL LAW SUSPEND THE COURTS, OR MUST THE COURTS BE SUSPENDED BEFORE MARTIAL LAW MAY BE PROCLAIMED?

The Constitution[21] provides that "x x x In case of invasion, insurrection or rebellion or imminent danger thereof, when the public safety requires it, he (President) may suspend the privilege of the writ of *habeas corpus* or place the Philippines or any part

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[19] *Supra*, note 17.
[20] Santos, *supra*, note 1 at 514.
[21] Art. VII, sec. 10 (2).

thereof under martial law. The above-quoted provisions contemplate varied situations for the imposition of martial law, to wit: the degree of violence, invasion, insurrection or rebellion may be such as to actually cause the closure of courts as when they are prevented from hearing and determining cases; the degree of violence, invasion, insurrection or rebellion may be such that, while it causes disruption in the public order and inconvenience upon the courts, the functions of the courts could still be discharged; there may be no actual violence, invasion, insurrection or rebellion but there is imminent danger of its occurrence.

With due regard to the varied situations which may necessitate the imposition of martial law, it is hereby submitted that martial law cannot be proclaimed and imposed when civil authorities and judicial courts are still open and capable of discharging their respective functions. Martial law is so unfettered in scope, being based on necessity, and so far-reaching in effect that constitutional rights often yield to acts done under the indeterminate phrases "for the public welfare and safety" and "for the preservation and security of the State." But the commander-in-chief of the armed forces or the district military commanders cannot summarily suspend or violate civil rights according to his will. For as Justice Davis speaking in *Ex Parte Milligan*[22] said:

> "Martial law, established on such a basis, destroys every guarantee to the constitution and effectively renders the military independent of and superior to civil power . . . Martial law cannot arise from a threatened invasion. The necessity must be *Actual and Present*: the invasion real, such as *Effectually Closes the Courts and Deposes the Civil Administration.*"[23] (Emphasis supplied).

The court went further and expounded on the superiority of the civil over the military authorities. Thus:

> "If, in foreign invasion or civil war, the courts are *actually closed* and it is impossible to administer criminal justice according to law, then, on the theater of military operations, where war really prevails, there is a necessity to furnish a substitute for civil authorities, thus over-thrown to preserve the safety of the army and sovereignty. x x x *Martial rule can never exist where the courts are open and in the proper and obstructed exercise of their jurisdiction.*"[24] (Emphasis supplied)

The statement of the US Supreme Court in the case of *Duncan v. Kahanamoku*[25] that

> "the phrase 'martial law' x x x while intended to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the island against actual or threatened invasion was not intended to authorize the supplementing of courts by military tribunals."[26].

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22 4 Wall. 2, 18 L. Ed. 281, (1866).
23 *Id.*, at 124, 127.
24 *Ibid.*
25 327 U.S. 304, 315 (1946); 66 S. Ct. 606, 90 L. Ed. 688 (1946).
26 *Id.* at 324.

erased doubts on whether the Executive, upon declaration of martial law, could exercise the powers vested upon the two other branches of government. The *Duncan* case involving two civilians, White and Duncan, arose during the rule of martial law in Hawaii which immediately followed the attack on Pearl Harbor on December 7, 1941. White, a stockbroker not in any way connected with the army, was charged with embezzling stocks belonging to another civilian. Duncan, a civilian shipfitter was arrested for having engaged in a brawl with two armed marine sentries at the yard of Pearl Harbor. Both White and Duncan were tried, convicted and committed to prison by military tribunals — this despite the fact that conditions in that island had improved and civil courts, while yet not allowed to exercise criminal jurisdiction were nonetheless allowed to dispose of some non-jury cases. The significant issue in this case revolved around the source of power of the Governor of Hawaii in his proclamation suspending the writ of habeas corpus and placing the territory under martial law — the Hawaiian Organic Act. Upon close scrutiny by the Court of said act, it appeared that the US Congress did not define and limit the scope or the extent to which the armed forces may be used. In ordering the release of Duncan and White, the Court said:

> "Courts and their procedural safeguards are indispensable to our system of Government. They were set up by our founders to protect the liberties they valued. Our system of government clearly is the antithesis of total military rule and the founders of this country x x x x were opposed to government that place in the hands of one man the power to make interpret and enforce the laws."
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> For as this Court has said before:
> x x x x the military should always be kept in subjection to the laws of the country to which it belongs and that he is no friend to the Republic who advocates the contrary. The established principle of every free people is that the law shall alone govern; and to it the military must always yield'."[27]

Thus the *Duncan* case, while not meeting squarely the issue on the extent of Executive's powers during martial law, nevertheless, exemplified the "open-court rule" i.e. that as long as civil courts are open and capable of discharging its functions, the creation of military tribunals and the supplementing by the latter of the functions of the former cannot be justified. As far as "imminent danger" of invasion, insurrection or rebellion is concerned, the danger must not only be imminent but must also be publicly felt and apparent; the invasion real such as *effectually* closes the courts[28] and the courts must be wholly incompetent to avert the threatened danger or to

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[27] *Id.* at 322, 323 citing Dow v. Johnson, 100 U.S. 158, 159; 25 L. Ed. 632 (1880).

[28] *Supra*, note 22 at 124-127.

punish with adequate promptitude and certainty, the guilty conspirators.[29]

IS THE PRESIDENTIAL DETERMINATION OF NECESSITY FOR THE DECLARATION OF MARTIAL LAW CONCLUSIVE OR JUDICIALLY REVIEWABLE?

The President as commander-in-chief of the Armed Forces of the Philippines possesses powers so broad as to virtually make him a dictator. Under the Constitutional powers he possesses, the President, without declaring martial law, may "call such armed forces to prevent or suppress lawless violence, invasion, insurrection or rebellion,"[30] or he may in imminent danger thereof suspend the privilege of the writ of habeas corpus or place the Philippines or any part thereof under martial law. A corollary issue would however arise, i.e. are measures taken pursuant to martial law judicially reviewable?

In cases of actual invasion, insurrection or rebellion, there seems to be no difficulty nor objection on the conclusiveness of the President's determination of the necessity for the declaration of martial law. The perplexing query however comes in his determination of the imminence of invasion or insurrection or rebellion. Just what barometer, the President may utilize to draw lines in the degree or character of circumstances obtaining as to whether the same is immediate, far-fetched, remote or proximate to the imminence rests solely upon his judgment, will or whim. An unscrupulous President would find relative ease in putting the entire nation under his control. He has but to declare that there is imminent danger of invasion, insurrection or rebellion, the existence of which necessitates the imposition of martial law. If by mere executive fiat, the existence of necessity for the declaration of martial law is conclusive and binding upon all including the courts, where then lies such magniloquent platitudes as "the rule of law not the rule of men", "separation of powers" "sovereignty resides" in the people"? Such an arrangement is not only repugnant to the constitutional safeguards over civil liberties but is likewise utterly obnoxious to the basic tenets of democracy upon which this society, as it is often claimed, was built and founded.

It is hereby submitted that the Presidential determination of the existence of necessity for imposition of martial law be subject to judicial review. This proposition is pronouncedly put into the

[29] *Supra*, note 22 at 140-141.
[30] *Supra*, note 21.

fore upon a perusal of leading cases on martial law in the United States. In *Ex Parte Milligan*,[31] which arose during the civil war in the U.S., a citizen of Indiana was arrested, prosecuted and convicted by a military commission created pursuant to a declaration of martial law. In Milligan's petition for a writ of habeas corpus, the US Supreme Court took into consideration the facts that Milligan had never been a resident of any rebel state and that at the time of his trial, courts in Indiana were open and functioning. Thus the court said:

> "If, in foreign invasion or actual war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then in the theater of active military operations, where war really prevails, there is a necessity to furnish a substitute for civil authorities thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course."[32]

The *Milligan* case impliedly established the principle that the question of necessity for martial law is judicially reviewable and assertively emphasized the open-court rule. A later case however which seemed to have modified if not muddled the clarity of the Milligan ruling is the case of *Moyer v. Peabody*.[33] This case reached the US Supreme Court in a subsequent action for damages filed by Moyer against the Governor of Colorado. It appeared that the Governor had declared a court to be in a state of insurrection, had called out troops to put down the trouble and had ordered that the plaintiff should be arrested as a leader of the outbreak, and should be detained until he could be discharged with safety, and that then he should be delivered to the civil authorities, to be dealt with according to law.[34] In absolving the Governor from civil liability for damages filed by Moyer for his imprisonment, the Court speaking through Mr. Justice Holmes said:

> "It is admitted, as it must be that the Governor's declaration that a state of insurrection existed is *Conclusive of that Fact*. . . . So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had no reasonable ground for his belief . . . . Public danger warrants the substitution of executive process for judicial process."[35] (Emphasis supplied)

A contrary view is hereby humbly submitted. The necessity for

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[31] *Supra*, note 22.
[32] *Id.* at 127.
[33] *Supra*, note. 10
[34] *Id.* at 82, 83
[35] *Id.* at 83-85.

the imposition of martial law does not exist by and because of mere Presidential declaration to that effect. The Presidential declaration is no bastion of infallibility that creates or assumes a non-existing fact. On the other hand, the necessity for the imposition of martial law exists because the facts so warrant it — the presidential declaration being merely viewed as a formality. The practicability of this rule cannot be overemphasized if viewed in the light of the broad scope of the powers of the President as commander-in-chief of the armed forces. On this view, a particular case is in point. In the case of *Sterling v. Constantine*,[36] the Governor of Texas, who sought to restrict production of oil in certain areas by imposing martial law in the oil fields under normal and peaceful conditions was enjoined by a three-judge court and the Supreme Court on appeal from enforcing the same. There was, as the district court found, no actual uprising, no interference with civil authorities or courts, no evidence of violence attempted or even threatened.[37] The Court, through Mr. Justice Hughes, said:

> *"It Does Not Follow From the Fact that the Executive has the Range of Discretion* deemed to be a necessary incident of his power to suppress disorder, *That Every Sort of Action the Governor May Take* no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, *Is Conclusively Supported by Mere Executive Fiat."*[38] (Emphasis supplied)

BECAUSE:

> "If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor and not the Constitution of the United States, would be the supreme law of the land x x x x Under our system of government such a conclusion is obviously untenable. There is no avenue of escape from the paramount authority of the Federal Constitution.[39]

The ruling in this case indicates the ambivalence of the court in facing an issue squarely presented for its determination. Thus, while the court on one hand wanted to reaffirm the *Milligan* rule that the judiciary has the power to review declarations of martial law, it failed to do so categorically. On the other hand, it based its decision upon the rule that while the declaration of necessity is conclusive, the measures employed are reviewable, probably taking into account the *Moyer* case.[40] When the court in this case ruled that measures taken pursuant to martial law are subject to judicial review, it did not settle any controversy. For the fact remains that measures taken incident to a grant of power can only be justi-

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[36] *Supra*, note 16.
[37] *Supra*, note 15 at 1268.
[38] *Supra*, note 16 at 400-01.
[39] *Id.* at 397.
[40] *Supra*, note 10.

fied if it is within the bounds of such power granted. As to whether or not it is within such power generally granted is a judicial fact. To this there can be no dispute. What the court overlooked is a situation when measures were taken pursuant to martial law due to "necessity", the existence of which however is reasonably doubtful. The court could not just by mere judicial gymnastics review measures taken without passing upon the existence of the necessity. If this rule were strictly adhered to, the situation when measures taken pursuant to martial law were declared invalid without passing upon the existence of necessity — upon which said measures were supposedly based — is not far-fetched. This would only tend to spoil an unscrupulous Executive who, due to this rule, could practically put the entire nation in the grip of terror and tension with impunity.[41]

If martial law were declared without there being a necessity in fact for its declaration, the declaration becomes ineffectual for it does not satisfy the existence of the conditions justifying its imposition. Consequently, all measures taken pursuant to the imposition of martial law based upon a false necessity would be not only ineffectual but likewise invalid. No valid or legal act can spring from an invalid or illegal source. But these are facts upon which the judiciary may make inquiry in a proper case. This being so, the court has to pass not only upon measures taken pursuant to martial law but more so upon the existence of facts bearing out the necessity. From all these, it may be said that the court has gone only as far as ruling that *measures* pursuant to martial

[41] "Occasionally the governor declares 'martial law' as a trump card in some contest with political rivals." (55 HARV. L. REV. at 1276-77) In 1935 Governor Johnson of South Carolina tried to get rid of the highway commissioners by declaring them to be insurgents — only to be restrained by the state Supreme Court. (Hearon v. Calus, 178 S.C. 381, 183 S.E. 13 [1936]). Governor Quinn of Rhode Island seeking to tap the strength of an opponent who was also proprietor of the Narragansett Race Track, established "martial law" over the track (*See* Professor Chafee's sprightly pamphlet, STATE HOUSE VERSUS PENT HOUSE [1937]. When Senator Huey Long was at war with Major Walmsby for control of the New Orleans police board, Governor Allen, acting from the Senator's hotel suite, obligingly called the troops and instituted an extraordinary regime which he described by the alliterative title of "partial martial law" (Aug. 6. 1934, N.Y. Times, p. 2 col. 6) In 1939, Governor Rivers of Georgia proclaimed "martial law" around the highway department's building as a device for excluding the chairman whom he had already been enjoined for removing, and later expanded his proclamation to protect his military agents from punishment for their contempt — all of which was brought to naught by the state supreme court (Patten v. Miller, 190 Ga. 105, 123, 152, 8 S.E. (2d) 757, 775, 786 (1940) and Federal district courts (Miller v. Rivers, 31 F. Supp. 540 M.D. Ga., 1940), rev'd, 112 F. (Ad) 439 (C.C.A. 5th, 1940) reversed as moot after the governor had bowed to state decision). There are other cases, in which the courts refused to sanction martial law because there was no real invasion, insurrection, riot and the troops were actually called into service for ulterior purposes. (King, *The Legality of Martial Law in Hawaii*, 30 CALIF. L. REV. 599, 622, 623 (1942) cf. 81-88).

law are not conclusive but are subject to judicial review. If the court can strike the tail, why not the head?

The ruling of the US Supreme Court in *Martin v. Mott*[42]

> "that the authority to decide whether the exigency has arisen, belong exclusively to the President and that his decision is conclusive upon all other persons"[43]

strong and categorical as it is, fails however to settle the question at hand. For, taken in the light of the facts, circumstances and system of laws then obtaining, it is apparent that the court used a different approach. First, the *Mott* case involved a militiaman who had been convicted of failing to respond to a call made under the Act of 1795 to serve during the war of 1812. Second, the US Constitution declares that Congress shall have the power "to provide for calling forth militia x x x" and pursuant to this authority, the Act of 1795 has provided that whether the US shall be invaded, or be in imminent danger of invasion x x x it shall be lawful for the President of the United States to call forth such number of the militia of the state or states most convenient to the place of danger, or scene of action, as he may judge necessary to repeal such invasion."[44] Of course, it is quite elementary that where Congress has authorized a public officer to take some specified legislative action when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of facts calling for that action is not subject to review.[45] But the core of disagreement with these rulings is the fact that in the *Mott* case, there was a delegation of legislative power to the President as shown by provisions of Act of 1795. On the other hand, as far as the Philippine Constitution is concerned, no such delegation is necessary for the President exercises the power to determine the existence of necessity through the imposition of martial law as commander-in-chief of the Armed Forces of the Philippines and not because Congress has so authorized him.

The same is true in the Philippine case of *Baker v. Barcelon*[46] where the Philippine Commission merely delegated its power to the Governor General, through sec. 5 of Act of Congress of July 1, 1902, to suspend the privilege of the writ of habeas corpus when-

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[42] 12 Wheat. 19, 6 L. Ed. 537, (1827).
[43] *Id.* at 29.
[44] *Ibid.*
[45] U.S. v. Bush & Co., 310 U.S. 371, 380; 60 S. Ct. 944, 84 L. Ed. 1259 (1940).
[46] 5 Phil. 87 (1905).

ever during such period the necessity for such suspension shall exist. In this case, the court through Mr. Justice Johnson, holding that when the President or the Governor-General with the approval of the Philippine Commission declares that a state of rebellion, insurrection or invasion exists, this declaration or conclusion is conclusive against the judicial department of the government, said that if it were otherwise,

> "x x x then the courts may effectually tie the hands of the executive, whose special duty it is to enforce the laws and maintain order, until the invaders have actually accomplished their purpose"[47]

BUT the court however, when faced by the contention that the legislative and executive branches of government might reach a wrong conclusion or might, through a desire to oppress and harass the people, declare that a state of rebellion, invasion, insurrection, existed x x x when actually and in fact no such conditions did exist, timidly said:

> "We cannot assume that the legislative and executive branches will act or take any action based upon such motives.[48]

This pronouncement of the court borders upon the theoretical but overlooks human frailty and vagaries which so often befog reason and the visions of men. Court records and cases of "bogus" declarations of martial law support this.[49]

It is the very essence of the rule of law that the executive's *ipse dixit* is not of itself conclusive of the necessity. When a governor proclaims what may be notoriously false and proceeds to take measures which only an actual extremity would justify, it is exorbitant to claim that he has uncontrolled discretion to implement his declaration. A considerable number of decisions in state and in inferior federal courts, which went upon the theory that the governor had a free hand, may now be practically ignored.[50]

Proclamations of martial law should be "regarded as the statement of an existing fact rather than the legal creation of a fact."[51] If this were so, the President therefore cannot by mere executive proclamation create a non-existent fact. If he does, a reasonable leeway should be accorded the courts to pass upon it. Congress "cannot authorize the executive to establish by conclusive proclamation the very thing which, upon familiar principle, would have

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[47] *Id.* at 94.
[48] *Id.* at 95.
[49] See f.n. 41, *supra*.
[50] *Supra*, note 37 at 1272-1273.
[51] SANTOS, MARTIAL LAW, NATURE PRINCIPLES AND ADMINISTRATION 49 (1970) citing WIENER, A PRACTICAL MANUAL OF MARTIAL LAW, 21 (1940).

been the subject of judicial scrutiny."[52] Martial law is customarily proclaimed but a proclamation is not the operative fact which establishes it. Thus, an officer may proclaim martial law until his adjutant's mimeograph runs out of ink; but without exigency there is no martial law.[53]

To the contention that to subject the Presidential determination of necessity for the imposition of martial law to judicial review would be to practically tie the hands of the commander-in-chief to take such measures to preserve and protect the State, the following considerations may well be taken into account:

(1) In cases of actual invasion, insurrection or rebellion, the Presidential proclamation of martial law is but a mere formal statement of a fact or facts of the existence of which the public and, it is not presumptuous to proceed, the Court may well have been apprised. In cases of actual invasion, insurrection or rebellion, large-scale or otherwise, which effectually closes the courts, who may still question the conclusiveness of the Presidential declaration of martial law? The facts speak for themselves.

(2) It is in cases of imminent danger of invasion, insurrection or rebellion where the difficulty lies. The imminence must be such that although the courts are not effectually closed, yet, due to the imminence of the danger, magistrates cannot or will not perform their functions based upon the higher law of self-preservation. The courts must be wholly incompetent to avert the threatened danger or to punish with adequate promptitude and certainty the guilty conspirators.[54] Again the imminence of such danger may be shown by surrounding facts such as preventive evacuation of inhabitants imminent danger in the lives of magistrates in going to and from their respective salas — which in the last analysis are judicial facts.

(3) The Supreme Court, in *Barcelon v. Baker* said:

> "If the investigation and findings of the President x x x x are not conclusive and final as against the judicial department x x x then every officer whose DUTY it is to maintain order and protect the lives and property of the people may refuse to act and apply to the judicial department x x x for another investigation and conclusion concerning the same conditions x x x."[55] (Emphasis supplied)

BUT THIS IS NOT SO. First, the court admits it is a DUTY of the officer to maintain order and protect lives and property.

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[52] Barrett & Ferenz, *Peacetime Martial Law in Guam*, 48 CALIF. L. REV. 1 (1960) citing FAIRMAN, *Law Martial Rule*, 55 HARV. L. REV. 1253 1272 (1942).

[53] Alley, *Litigious Aftermath of Martial Law*, 15 OKLA. L. REV. 17, 18 (1962).

[54] *Supra*, note 22 at 140-141.

[55] *Supra*, note 46 at 93.

Second, said officer or any member of the armed forces is governed not by Presidential declaration of necessity for imposition of martial law, being only one of the many phases of army activities, but by CA No. 408 (56 — footnote) particularly section 2 thereof which enumerates the person subject to military law. An officer therefore who refuses to act, in the situation contemplated above, would be guilty of the violation of said Article of War (CA 408). This is enough sanction and safeguard.

From all the foregoing discussion, one balancing consideration may be made: Whatever setback the submitted proposition may have upon the President's duty and equal power as Commander-in-chief to preserve and protect the State may be counterbalanced by the equal benefits and protection of individuals' rights in whom, after all, sovereignty resides.

IV. PROPOSALS

With the Constitutional Convention near at hand, it may be of help to weigh and consider the following proposals, some of which may have likewise been espoused by others as far as the Presidential powers to declare martial law is concerned.

(1) Since the President is empowered to place the Philipines or any part thereof under martial law, he must be required to define, limit or describe in said declaration the actual combat area or its likelihood in cases of imminence thereof with the power to promulgate such rules and regulations only in furtherance of military efforts. Such rules and regulations shall have the force and effect of law but shall in no case be deemed to suspend the operation of ordinances, statutes and the Constitution within said area unless so authorized by Congress.

(2) If civil courts be open in actual combat zones, all civilians shall be tried by said courts. Otherwise, they can be tried by military tribunals for the creation of which the President shall have been previously authorized by Congress.

(3) Martial law should not be declared by the President alone. There must be a concurrence of three-fourths vote of Congress if the latter be in session. If Congress be not in session, it shall be with the concurrence of the Supreme Court.

(4) The scope of the powers of the military, in cases when

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56 An Act For Making Further And More Effectual Provision for the National Defense by Establishing a System of Military Justice For Persons Subject to Military Law.

martial law shall have been declared shall only be in furtherance of military efforts and always only in aid of the civil authorities for the restoration or maintenance of peace and order.[57]

(5) The duration of martial law shall be limited by the proclamation — setting said period of time as an objective for the military to restore peace and order. Any further extension shall be with concurrence of either Congress or the Supreme Court as the case may be as in proposal (3).

(6) Authorize Congress to pass acts of indemnity for the protection of members and officers of the armed forces who had participated in the military efforts during the rule of martial law. (An Act or decree absolving a public officer or other person who has used doubtful powers or usurped an authority not belonging to him from the technical legal penalties and liabilities therefor or from making good losses incurred thereby.)[58] But this shall not, however, be taken as a blanket exemption from civil and criminal liabilities of all acts done by the members of the military. In proper cases, the court has to decide on whether or not the act or acts were done in furtherance of martial law or military efforts.

[57] The Manila Times, September 30, 1970, p. 1.
[58] 1 BOWERS' LAW DICTIONARY 177 (Rawle's Revision).