JUDICIAL REVIEW AND NATIONAL EMERGENCY

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The history of man is replete with examples of the evils that result from the concentration of power in one person or one small group of persons. One does not have to go back as far back as Nero or Caligula to prove the point. Modern men have proven to be more efficient in this respect: Hitler, Mussolini and Stalin are prominent examples.

Liberal political theorists have through various ages proposed the adoption of institutional schemes to forestall the recurrence of tyranny. Among them was John Locke, who, in his second Treatise on Government proposed the separation of powers of the different departments of government and the complementary theory of checks and balances.[1] Although Locke was more concerned with the separation of the executive and legislative branches of government, his theory was subsequently extended to the courts.

When the American people won their independence from Britain, they predictably inscribed the Lockian principles in their Constitution.[2] The American Supreme Court was thereafter institutionalized as the third co-equal and coordinate branch of the government.

Judicial Review in the United States

In his governmental model, Locke regarded the legislative to be supreme.[3] It was not surprising therefore that when some sectors in the American polity exalted the judiciary as the "... impenetrable bulwark against every assumption of power in the Legislative or Executive",[4] some kind of power struggle occured.[5] A serious controversy developed when the Americans could not agree as to what branch of government as established in their constitution was entrusted with the checking and balan-

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[1]RUSSEL, A HISTORY OF WESTERN PHILOSOPHY 637-640 (1945).

[2]According to Corwin, "The theorist of the American Revolution *par excellence* was John Locke...", TWILIGHT OF THE SUPREME COURT 124 (1934). Also in his other book, Corwin said that Locke, together with Blackstone, "was extremely influential with the framers ..." of the American Constitution, COURT OVER CONSTITUTION 5 (1938).

[3]CORWIN, TWILIGHT OF THE SUPREME COURT 125 (1934); RUSSEL, A HISTORY OF WESTERN PHILOSOPHY 637 (1945).

[4]The words of James Madison when he advocated the Bill of Rights in the First Congress. Quoted by Frank, *Review and Basic Liberties*, in CAHN (ED.), SUPREME COURT AND LAW 131 (1954).

[5]CORWIN, *supra*, note 2 at 25, 35-73.

cing of the powers distributed among the three departments.[6] This is partly explained by the lack of clarity of the constitution on the matter.[7] Thus, some lodged such powers in the judiciary; others denied such claim and on the contrary, insisted that acts of Congress and the President were beyond judicial scrutiny. When the landmark opinion of Chief Justice Marshall came out in *Marbury v. Madison*,[8] the doctrine of judicial review officially had a debut. To be sure, the controversy did not end after Marshall lectured[9] to Madison that "(i)t is emphatically the province and duty of the judicial department to say what the law is"[10] and in case a law passed by Congress happened to be repugnant to the constitution it should be declared a nullity because "(t)his is of the very essence of judicial duty."[11] Since then, the doctrine has been a favorite battleground among American legal scholars. "That judicial review of legislative means is justified," says Gunther,[12] "is one of the most pervasive themes articulated in our constitutional jurisprudence." At any rate, one of those who travelled along the same channel with that of Chief Justice Marshall said of the Marbury decision: "Upon this rock the nation has been built."[13]

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[6]*Id.* at 35-73.

[7]The so called "supremacy clause" of the United States Constitution, which has been used as an argument in favor of judicial review reads: "This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in Constitution or Laws of any State to the contrary notwithstanding." Compare this with Article VIII, Section 2 of the 1935 Constitution (which is reproduced in Article X, Section 5(2) of the 1973 Constitution): "The Congress... may not deprive the Supreme Court... of its jurisdiction to review, revise, reverse, modify, or affirm on appeal, certiorari, or writ of error, as the law or the rules of court may provide, final judgments and decrees of inferior courts" in certain specified categories of cases, e.g., "(a)ll cases in which the constitutionality or validity of any treaty, law, ordinance, or executive order or regulation is in question."

[8]1 Cranch 137, 2 L.Ed. 60 (1803).

[9]See, *supra*, note 4, where Madison was clearly for judicial review. In the Marbury case, however, Madison took the opposite stand. Madison's apparent inconsistency on the subject, according to Corwin, "shows how far the highly qualified witness was from believing that the constitution had settled these question." CORWIN, *supra*, note 2 at 50.

"It is not to be lost sight of however that the opinion in *Marbury v. Madison*, in the words of Professor Corwin, bore the earmarks of a deliberate partisan coup." It must be viewed in the light of the then raging strife between the Federalists of which Marshall was one of the leaders before he became Chief Justice and from which he was never to be dissociated in belief if not in acts and the then Republicans under Jefferson and Madison. Marshall seized the occasion to lecture to Madison, then Secretary of State, as to the performance of his duties and by denying the power of the court to issue a writ of mandamus, to avoid placing the Supreme Court in the embarrassing position of having its writ disregarded by the Executive." FERNANDO, THE POWER OF JUDICIAL REVIEW 8 (1967).

[10]Marbury v. Madison, *supra*, note 8 at 177.

[11]*Id.* at 178.

[12]*The Supreme Court, 1971 Term*, 86 HARV. L.REV. 43 (1972).

[13]Burton, *The Cornerstone of Constitutional Law: The Extraordinary Case of Marbury v. Madison*, 36 A.B.A.J. 805, 882 (1950). Cited by Frank, *Review and Basic Liberties* in CAHN (ED.), SUPREME COURT AND SUPREME LAW 115 (1954).

Judicial Review in the Philippines

When the Filipino people made their Constitution in 1934, they did so under the dominating influence of the American legal thought; consequently, they patterned their Constitution after that of the United States. Unlike, however, the latter, the Philippine constitution of 1935 made it unmistakable that the judiciary was vested with the power to exercise judicial review. Article VIII, Section 2 of said Constitution provided that Congress may not deprive the Supreme Court of "its jurisdiction to review, revise, reverse, modify or affirm on appeal, certiorari, or writ of error, as the law or the rules of court may provide, final judgments and decrees of inferior courts" in certain specified categories of cases.[14] This provision was reenforced by Section 10 of the same article of the same constitution which provided that "(a)ll cases involving the constitutionality of a treaty or law shall be heard and decided by the Supreme Court *en banc,* and no treaty or law may be declared unconstitutional without the concurrence of two-thirds of all members of the Court."

Judicial Review in Lower Courts

That the power of judicial review was not confined to the Supreme Court but was extended to the lower courts was clear from Article VIII, Section 2. The "final judgments and decrees of inferior courts" relating to the specified categories of cases enumerated thereunder, *e.g.*, "all cases in which the constitutionality or validity of any treaty, law, ordinance, or executive order or regulation is in question", could not possibly be reviewed, revised, reversed, modified or affirmed "on appeal, certiorari, or writ of error" by the Supreme Court if the inferior courts could not exercise the power of judicial review in the first instance. Furthermore, Section 1 of the same article, provided that "(t)he judicial power shall be vested in one Supreme Court and in such inferior courts as may be established by law." Judicial review is a species of judicial power, and it is an unwarranted interpretation of the provision if it were taken to mean that judicial review was to be exercised only by the Supreme Court but not by the inferior courts.

The foregoing provisions of the 1935 Constitution are reproduced in Article X, Sections 1, 2(2) and 5(2) of the 1973 Constitution. Unlike in the United States where the doctrine of judicial review has been a highly controversial subject partly because of the lack of definitive constitutional provision on the matter,[15] in our jurisdiction the doctrine has become

[14]Compare the so-called "supremacy clause" of the United States Constitution. See, *supra*, note 7.

[15]See, *supra*, note 12.

the bedrock of our constitutional law and constitutionalism. Even before judicial review was expressly provided in 1935 Constitution, Filipino and American lawyers had already the habit of raising constitutional questions before the courts, which entertained them,[16] notwithstanding the fact that the organic acts did not provide for the exercise of the power.[17]

Constitution is Supreme Law

THE CONSTITUTION is the fundamental law of the state. "It provides for the organization of the essential departments of the government, determines and limits their powers, and prescribes guarantees to the basic rights of the individuals."[18] When the people, "who are deemed the source of all political powers,"[19] and who... "have an original right to establish for their future government, such principles, as in their opinion, shall most conduce to their own happiness..."[20] created the constitution, they established a government of limited powers. "The powers of legislature," for instance, "are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation(s) committed to writing, if these limits may at any time be passed by those intended to be restrained?"[21] Not only are the governmental powers distributed among the three branches, the people's basic rights are also expressly enumerated, rights which according to the covenant, none of the governmental branches can lawfully transgress. Should one branch, therefore, act beyond the sphere of its assigned constitutional authority, or violate any of the basic rights of a person guaranteed in the Constitution, what is the remedy of the people? As pointed out earlier, the judiciary has the duty to determine the question and afford relief.

> "...if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution disregarding the law; the court must determine which of these conflicting rules governs the case."[22]

Since the constitution is fundamental law, hence, supreme "...the constitution, and not such ordinary act, must govern the case to which they both apply."[23] The act is declared null and void.

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[16]FERNANDO, THE POWER OF JUDICIAL REVIEW 11-12 (1967).
[17]MALCOLM, THE COMMONWEALTH OF THE PHILIPPINES 178-181 (1936); GROSSHOLTZ, POLITICS IN THE PHILIPPINES 126 (1964).
[18]SINCO, PHILIPPINE POLITICAL LAW 66 (11th ed. 1962).
[19]*Id.*
[20]Marbury v. Madison, *supra*, note 8 at 176.
[21]*Id.*
[22]*Id.*, at 177-178.
[23]*Id.*, at 178.

Rationale for Judicial Review

But why should such a lofty function be vested in the judiciary? Did not the people have faith in the executive and legislative branches of government? Black says:

> We consider it a normal part, a vital part of the process by which law is applied to concrete cases, for judges to resolve these doubtful questions. It was a natural consequence of conceiving the constitution as law to assume that the uncertainties of the Constitution, like the uncertainties of law in general, were to be resolved by the courts, where the decision of cases regularly brought before the courts requires that the questions be decided.[24]
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> We entrusted the task of constitutional interpretation to the courts because we conceived of the constitution as law, and because it is the business of courts to resolve enterpretative problems arising in law. A law which is to be applied by a court, but is not to be interpreted by a court, is a solecism simply unknown to our conceptions of legality and the legal process.[25]

When Justice Laurel embarked on answering the question why our courts possess the power of judicial review, he did not spend time elucidating upon the "lowness" of our constitution. That our Constitution is fundamental law was his "inarticulate major premise."

> "Our Constitution ... has established a republican government intended to operate and function as a harmonious whole, under a system of checks and balances, and subject to specific limitations and restrictions provided in the said instrument. The Constitution sets forth in no uncertain language the restrictions and limitations upon governmental powers and agencies. If these restrictions and limitations are transcended it would be inconceivable if the Constitution had not provided for a mechanism by which to direct the course of government along constitutional channels, for then the distribution of powers would be mere verbiage, the bill of rights mere expressions of sentiment, and the principles of good government mere political apothegms. Certainly, the limitations and restrictions embodied in our Constitution are real as they should be in any living Constitution. In the United States where no express Constitutional grant is found in their constitution, the possession of this moderating power of the courts, not to speak of its historical origin and development there, has been set at rest by popular acquiescence for a period of more than one and a half centuries. In our case, this moderating power is granted, if not expressly, by clear implication from section 2 of article VIII of our Constitution."[26]

And Rostow[27] explains:

> The power of constitutional review, to be exercised by some part of the government is implicit in the conception of a written constitution delegating limited powers. A written constitution would promote discord rather

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[24]BLACK JR., THE PEOPLE AND THE COURT 14 (1960).

[25]*Id.*, at 15.

[26]Angara v. Electoral Commission, 63 Phil. 139, 157-158 (1936). Justice Laurel spoke for the Court.

[27]ROSTOW, THE SOVEREIGN PREROGATIVE 83 (1962).

> than order in society if there were no accepted authority to construe it, at the least in cases of conflicting action by different branches of government or of constitutionality unauthorized governmental action against individual. The limitation and operation of powers, if they are to survive, require a procedure of independent mediation and construction to reconcile the inevitable disputes over the boundaries of constitutional power which arise in the process of government.

Justice Laurel and Rostow look at judicial review as an indispensable mechanism in the republican scheme of government. Chief Justice Concepcion sees it from another perspective. He regards it not merely as a right, authority or power but as a duty. Speaking for the Supreme Court in *Tañada v. Cuenco*[28] when he was yet an Associate Justice, he said:

> In fact, whenever the conflicting claims of the parties to a litigation cannot be settled without inquiring into the validity of an act of Congress or of either House thereof, the courts have, not only jurisdiction to pass upon said issue, but also the duty to do so, which cannot be evaded without violating the fundamental law and paving the way to its eventual destruction.[29]

Again, in his separate opinion in *Javellana v. Executive Secretary*,[30] he speaks of judicial review as an "ineluctable obligation," thus —

> ... the judicial inquiry into such issue and the settlement thereof are the *main* functions of courts of justice under the Presidential form of government adopted in our 1935 Constitution, and the system of checks and balances one of its basic predicates. As a consequence, we have neither the authority nor the discretion to decline passing upon said issue, but are *under the ineluctable obligation* made particularly more exacting and peremptory by our oath, as members of the highest court of the land, to support and defend the constitution-to-settle it. This explains why in *Miller v. Johnson*[31] it was held that courts have a *duty*, rather than a *power*, to determine whether another branch of the government was kept within constitutional limit.[32]

The idea that judicial review is a duty to be fearlessly discharged by the courts, may be disagreeable to the other two governmental departments, especially the executive. It is, however, an immutable principle of a democratic polity having a government with limited powers.

In the *Javellana*[33] case, Chief Justice Concepcion again quoted from *In re McConaughy*,[34] the same passage which was quoted with approval many years back in *Tañada v. Cuenco*[35] to explain his position:

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[28]103 Phil. 1051 (1957).
[29]*Id.*, at 1061.
[30]G.R. No. L-36142, March 31, 1973, 50 SCRA 30 (1973).
[31]92 Ky. 589, 18 S.W. 522 (1892).
[32]*Supra*, note 30 at 87.
[33]*Id.*
[34]119 N.W. 408, 417 (1909).
[35]*Supra*, note 28.

> But every officer under a constitutional government must act according to law and subject to its restrictions, and every departure therefrom or disregard thereof must subject him to the restraining and controlling power of the people, acting through the agency of the judiciary; for it must be remembered that the people act through the courts, as well as through the executive or the Legislature. *One department is just as representative as the other*, and the judiciary is the department which is charged with the special duty of determining the limitations which the law places upon all official action.[36]

Judicial Review is not Judicial Supremacy

In theory, the three branches are equal, coordinate and independent. If one has the right, authority, power and even duty to declare that the act of another is a nullity because it goes outside the confines of its legitimate power, it becomes liable to the charge that it asserts a position of superiority over the other organs of government. As Liwag said,[37]

> "I dread to see the day when the Supreme Court would virtually run the affairs of government under the guise of judicial review, for then the court will cease to be the ultimate court of law and become a third "political agency" and therefore break away from the checks and balances of government to be *checks of cooperation and not of antagonism or mastery*. To be sure, the constitution never contemplated nor intended a Supreme Court that would virtually lord it over all. The penumbra of the Supreme Court which Justice Holmes speaks of in describing the powers of government should not cast a shadow which engulfs if not completely obliterates the constitutional sphere assigned to the other branches of government.

Justice Laurel refused to see the matter in this light. He said in the *Angara* case:[38]

> ...when the judiciary mediates to allocate constitutional boundaries, it does not assert any superiority over the other departments; it does not in reality nullify or invalidate an act of the legislature but only asserts the solemn and sacred obligation assigned to it by the constitution to determine conflicting claims of authority under the constitution and to establish for the parties in an actual controversy the rights which that instrument secures guarantees to them.

In the same vein, Justice Labrador answered the charge of judicial supremacy in *Montes v. Civil Service Board of Appeals*,[39] thus:

> The obligation to a judicial review of a Presidential act arises from a failure to recognize the most important principle in our system of government, the separation of powers into three co-equal departments, the executive, the legislative and the judicial, each supreme within its own assigned

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[36]*Supra*, note 30 at 86.
[37]ABUEVA, FOUNDATION AND DYNAMICS OF FILIPINO GOVERNMENT AND POLITICS 365 (1969).
[38]*Supra*, note 26 at 158.
[39]101 Phil. 490 at 492-493 (1957).

> powers and duties. When a presidential act is challenged before the courts of justice, it is not to be implied therefrom that the executive is being made subject and subordinate to the courts. The legality of his acts are under judicial review, not because the executive is inferior to the courts, but because the law is above the chief executive himself, and the courts seek only to interpret, apply or implement it (the law).

Again, the Supreme Court in *Lansang v. Garcia*,[40] in asserting its "authority to inquire into the existence of the factual bases for the suspension of the privilege of the writ (of *habeas corpus*) in order to determine the sufficiency thereof"[41] was careful to add that "(i)n the exercise of such authority, the function of the Court is merely to *check* not *supplant* the Executive *or to ascertain merely whether he has gone* beyond the constitutional limits of his jurisdiction, *not to exercise the power vested in him or to determine the wisdom of his act.*"[42]

The words in *In re McConaughy*[43] quoted by Chief Justice Concepcion in the *Javellana*[44] case to buttress his position that judicial review is the court's "ineluctable obligation" ring the same tune. It was said there that the three organs of the government are equally representative *vis-a-vis* the people; however, "the judiciary is the department which is charged with the special duty of determining the limitations which the law places upon all official action." Liwag,[45] who dreaded "to see the day when the Supreme Court would virtually run the affairs of government under the guise of judicial review" gave an accurate portrayal of the so-called "judicial supremacy". He said,

> Judicial supremacy does not imply and much less mean the subordination of the executive to the judiciary. It does not envision a judiciary higher than, and superior to the other two coordinate and co-equal branches of the government in the manner of hierarchial system. But rather it means the power of judicial power, or authority to declare statutes and other government acts invalid when these are repugnant to the constitution. It is the power to interpret the law and not to reform the law through judicial amendment.[46]

Factors which limit the Exercise of Judicial Review

Justice Fernando,[47] citing *People v. Vera*[48] enumerates the requisites before the courts can exercise the function of judicial review: 1) the existence of an appropriate case; 2) an interest personal and substantial by

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[40]G.R. No. L-33964, December 11, 1971, 42 SCRA 448 (1971).
[41]*Id.*, at 473.
[42]*Id.*, at 480.
[43]*Supra*, note 34.
[44]*Supra*, note 30.
[45]*Supra*, note 37.
[46]*Id.*, at 365.
[47]FERNANDO, BILL OF RIGHTS 13 (1972).
[48]65 Phil. 56 (1937).

the party raising the constitutional question; 3) the plea that the function be exercised at the earliest opportunity; 4) the necessity that the Constitutional question be passed upon in order to decide the case. Thus, although at first glance it seems that judicial review is an all-pervasive power, in reality the political branches of the government possess a wide latitude for official actions beyond the reach of judicial review. As Black says,

> Courts do not decide questions of constitutionality except where these actually arise in real legal controversies between people who have something substantial at stake... What it means in effect is that the political have pretty complete leeway until the rights of real people get involved. Then and only then can a court enter the scene, because it is only then that any identifiable litigant has any rights which he can assert as a party in court. The shoe is eased only where it pinches.[49]

Justice Laurel echoed a similar idea: "... this power of judicial review is limited to actual cases and controversies to be exercised after full opportunity of argument by the parties, and limited further to the constitutional question raised or the very *lis mota* presented.[50] Moreover, "...the judiciary does not pass upon questions of wisdom, justice or expediency of legislation.[51] The authority is also limited in that:

> ... Courts accord the presumption of constitutionality to legislative enactments, not only because the legislature is presumed to abide by the constitution but also because the judiciary in the determination of actual cases must reflect the wisdom and justice of the people as expressed through their representative in the executive and legislative departments of the government.[52]

Finally, the power is circumscribed by the well-settled principle that "all reasonable doubts should be resolved in favor of the constitutionality of a statute" and therefore it will not be declared a nullity for violating the constitution "except in a clear case."[53] Since a statute, executive order, or ordinance is presumed to be constitutional, the burden of proving its unconstitutionality rests on the party assailing it.[54] On the whole, therefore, many governmental activities, "mighty and trivial, are so diffuse in their effects, and so uncertain as to their impact on particular people, that their constitutionality can never be tested in court."[55]

Political Questions as Limit on Judicial Review

The doctrine of political questions further narrows the power of judicial review. Corwin says, that "the doctrine of political questions signal-

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[49]BLACK, *supra*, note 24 at 28.
[50]*Supra*, note 26 at 158.
[51]*Id.*
[52]*Id.*, at 158-159.
[53]People v. Vera, *supra*, note 48.
[54]Ermita-Malate Motel Association v. City Mayor, G.R. No. L-24695, July 31, 1967, 20 SCRA 489 (1967).
[55]BLACK, *supra*, note 24 at 28.

izes an early concession by the court itself at the expense of the strict logic of judicial review."[56]

No approximately satisfactory definition of the term "political question" has been given. It has been applied to cases concerning the legitimacy of competing governments, the structure of governments, and the formal authenticity of governmental act.[57] The Court of Appeals of the District of Columbia defined it as such as has been "entrusted by the sovereign for decision to the so called political departments of government, as distinguished from questions which the sovereign has set to be decided by court."[58]

In *Javellana v. Executive Secretary*,[59] Chief Justice Concepcion stressed a similar idea. He quoted from *In re McConaughy*,[60] which was quoted with approval many years back in *Tañada v. Cuenco*:[61] "What is generally meant, when it is said that a question is political, and not judicial, is a matter which is to be exercised by the people in their primary political capacity, or that, it has been specifically delegated to some other department or particular office of the government with discretionary power act."[62] The Chief Justice continued in the *Javellana* case that "... in an attempt to describe the nature of a political question in terms, it was hoped, understandable to the laymen, we added that '... the term 'political question' connotes what it means in ordinary parlance, namely, a question of policy' in matters concerning the government of a state as a body politic."[63] The term, however, seems to be resistant to any attempt at streamlined linguistic formulation. The apparently neat exposition of what a political question is by Chief Justice Concepcion offers an illusion of completeness. As the Court of Appeals of the District of Columbia realized two months after it defined the term in *Sevilla v. Elizalde*.[64] "It would be difficult to draw a line between political and not political questions..."[65] After making no headway in formulating a comprehensive definition, the court finally resorted to the listing of ten major sub-categories of political questions.[66] This approach points out that the term "is

[56]CORWIN, TWILIGHT OF THE SUPREME COURT 111 (1934).
[57]BLACK, *supra*, note 24 at 28-29.
[58]Frank, *Political Questions*, in CAHN (ED.), SUPREME COURT AND SUPREME LAW 36 (1954), citing Sevilla v. Elizalde, 112 F. 2d 29, 32 (1940).
[59]*Supra*, note 30.
[60]*Supra*, note 34.
[61]*Supra*, note 28.
[62]*Supra*, note 30 at 85.
[63]*Id.*, at 86.
[64]112 F. 2d 29 (1940).
[65]Z. & F. Assets Realization Corporation v. Hull, 114 F. 2d 464, 468 (1940), cited by Frank, *supra*, note 58.
[66]They are: recognition of foreign governments and republican form of government issues; conditions of peace or war, the beginning and end of war; whether aliens shall be excluded or expelled; government title to or jurisdiction over territory; status of Indian tribes; enforcement of treaties (in some respect only); existence of treaties; and constitutional powers of representatives of foreign nations. Frank, *supra*, note 58 at 36-37.

a legal category more amenable to description by infinite itemization than by generalization."[67]

Pragmatic View of the Political Question Doctrine

Post[68] approaches the problem from another angle. He treats "political questions as a category of judicial thought process."[69] He is concerned with what "happens when a jurist labels a particular problem a 'political question', and why he does so . . ."[70] In his view, " . . . when a court labels a particular problem a 'political question' (the magic word) . . . the court is instantly relieved of all control over the problem; the question, so far as it concerns the particular case, is removed from the jurisdiction of the court and, ordinarily, no matter how the political departments decide the question, the court will abide by that decision."[71] It is a court's way of disclaiming "all jurisdiction and authority over the question" and accepting "the decision of the political departments . . ."[72] If the court "found it better to limit its jurisdiction, to restrict its power of review, it was not because of the doctrine of the separation of powers"[73] or because of a lack of rules[74] or because of the purpose of protecting the area of issues reserved for decision to the people themselves.[75] The inhibition was made "because of expediency"[76] like the need of a quick and and single policy[77] (*e.g.* foreign affairs), judicial incompetence[78] and avoidance of unmanageable situations.[79] As regards the last one "(c)ourts are, in many respects, the weakest division of government, dependent for their effectiveness upon the acquiescence of other branches and upon popular support."[80] Because of this they "are understandably reluctant to give orders which either will not be imposed or are practically unenforceable, and on occasion may be hesitant to precipitate situations which may outrage the popular attitude."[81]

Frank[82] sees some veracity of Post's way of looking at political questions. He says,

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[67]*Id.*, at 36.
[68]POST, THE SUPREME COURT AND POLITICAL QUESTIONS (1936).
[69]*Id.*, at 14.
[70]*Id.*
[71]*Id.*, at 11.
[72]*Id.*, at 124.
[73]*Id.*, at 130.
[74]*Id.*
[75]Frank, *supra*, note 58 at 37.
[76]POST, *supra*, note 68 at 130.
[77]Frank, *supra*, *note* 58 at 38.
[78]*Id.*, at 39.
[79]*Id.*
[80]*Id.*
[81]*Id.*
[82]*Id.*

> Professor Post,[83] is very persuasive in his thesis that the status of the Indian tribes became a political question because John Marshall realized that Andrew Jackson and the State of Georgia had no intention of letting the judiciary solve the problems of the Cherokees.[84] If the Illinois Supreme Court had not decided that the doctrine of political questions precluded it from issuing mandamus to the state legislature requiring it to redistrict the State, that court might have been in an awkward position of committing an entire legislature to jail.[85] Perhaps, Justice Frankfurter was moved by related considerations of judicial prestige when he said in *Colegrove v. Green*,[86] that the court had traditionally held also of from immediate and active relations with party contests. The Supreme Court might have invited armed conflict if it had decided the merits in *Luther v. Borden*.[87]

Post prognosticated: "In fact, many questions, now deemed justiciable by the Supreme Court, may at some future date be considered political questions because of the 'felt necessity' to realized anticipated consequences."[88]

The Philippine Supreme Court, true to its tradition of judicial activism, has had until recently, little use of the doctrine of political question. Judicial activism reached its acme in *Lansang v. Garcia*,[89] which overruled two precedents.[90] It took a sudden nosedive in *Javellana v. Executive Secretary*.[91]

Stabilizing Role of the Supreme Court

A political observer says that "(o)ne of the most radical features of colonial rule in Southeast Asia was the introduction of the concept of rule of law supported by independent judiciary."[92] In the Philippines, this has been "fairly well accepted."[93] A Filipino lawyer, after postulating that the Supreme Court is "the indestructible citadel of the people's rights, the solid bulwark of their liberties, the hallowed repository of their accumulated beliefs and collective faiths in this supremacy of the Rule of Law," said that "(e)very time the Supreme Court, the highest tribunal of the land, speaks, the nation listens."[94]

Against this background, one author was able to speak of "... the great faith that Filipinos put in the wisdom and impartiality of the Sup-

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[83]*Supra*, note 68 at 112 *et. seq.*
[84]Cherokee Nation v. Georgia, 5 Pet. 1, 8 L.Ed. 25 (1831).
[85]Fergus v. Marks, 321 Ill. 510, 152 N.E. 557 (1926).
[86]328 U.S. 549, 66 S.Ct. 1198, 90 L.Ed. 1432 (1946).
[87]7 How. 1, 12 L.Ed. 581 (1849).
[88]*Supra*, note 68 at 130.
[89]*Supra*, note 40.
[90]Barcelona v. Baker, 5 Phil. 87 (1905); Castañeda v. Montenegro, 91 Phil. 882 (1952).
[91]*Supra*, note 30.
[92]Lucien Pye, *Politics of Southeast Asia* in ALMOND & COLEMAN (ED.), THE POLITICS OF DEVELOPING AREAS 147 (1960).
[93]*Id.*, at 139.
[94]BATACAN, THE SUPREME COURT IN PHILIPPINE HISTORY 5 (1972).

reme Court,"[95] and another commented that "the Supreme Court is the most respected body of the Philippines,"[96] and that "a justice of the Supreme Court is ranked among the highest in prestige and respect."[97] In his very revealing study of our Supreme Court, Samonte,[98] after noting that our Supreme Court "decides a much larger number of cases annually than its American counterpart," said that this is "indicative of an increasingly greater reliance on the Supreme Court as the nation's 'most legitimizing institution' to settle myriad issues and controversies in a developing country."[99] At the same time, he said, "there appears to be a long term trend towards an institutional sublimation of dissent within the highest tribunal."[100] Perceiving a similar attitude, Wurfel observed that the —

> great respect for the court in the Philippines is also manifest in the tendency of the minority party to take essentially political questions to the Supreme Court for resolution. When no mutually satisfactory compromise can be arranged, only the arbitration of the highest court is acceptable. The Philippine Supreme Court has usually been willing to decide on political questions, framed in legal terms to a much greater extent than its American prototype.[101]

Grossholtz joined him by saying that the "Supreme Court is the most important of the formal structures for adjudicating disputes between informal and formal aspects of the political system and between the requirement of problem solving and the constitution."[102] The central role of the court "... is seen in the constant references of legislators and executives to the constitutionality of the legislation they are attacking or defending."[103] Complementing this observation, Cortes, in her survey of cases in 1966 in constitutional law found that "the pre-occupation has been with the exercise of powers particularly by the executive and legislative organs of government and the cases challenging their acts have pronounced political undertones."[104]

The prestige enjoyed by and the esteem accorded the Supreme Court have been the chief factors in keeping intact Philippine constitutional structure. Amidst the ravages of power politics the Court has not hesitated to define the limits of governmental power and checking obvious incursions beyond them. For this reason, a political observer has said that the "tradition of the courts, may be one of the most important factors in en-

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[95] Wurfel, *The Philippines, in* KAHN (ED.), GOVERNMENT AND POLITICS OF SOUTHEAST ASIA 737 (1964).
[96] GROSSHOLTZ, *supra*, note 17.
[97] *Id.*
[98] The Philippine Supreme Court (1967).
[99] *Id.*, at 38-39.
[100] *Id.*, at 39.
[101] Wurfel, *supra*, note 95.
[102] Grossholtz, *supra*, note 17.
[103] *Id.*
[104] Cortes, *Political Law*, 42 PHIL. L. J. 1 (1967).

couraging stable political development..."[105] A well known journalist put the position of the Court in these words:

> Without its asking to be, the Supreme Court, a non-political body, became the strongest and most effective opposition in the country. It is the virtue and sophistication of our republican form of government, that no single branch of government can hope to become too pwerful and assume dictatorial powers. If Congress fails to curb its own excesses, the opposition party will chastise it; if both Congress and the opposition are too feeble to fiscalize their powers there still is the Supreme Court. If the Supreme Court also fails, our constitutional system breaks down.[106]

Litigants have accepted the role of the judiciary as the final and authoritative arbiter of disputes and have likewise accepted its determinations. Thus Kauper could say that "... the experience in the Philippines demonstrates the great value of having an independent judiciary as an institutional device for curbing the executive power and otherwise maintaining the integrity of the constitutional system."[107]

The Supreme Court has therefore functioned as a stabilizing force for the peaceful development of Philippine society.

Legitimizing or Validating Function of the Supreme Court

The key role of the Supreme Court in "maintaining the integrity of the constitutional system" is a necessary consequence of the legitimizing or validating effect of the Court's decisions. An act of the executive, for instance, is challenged before the highest tribunal because its authoritative character is questionable or because its constitutional foundation is flimsy or doubtful. When the Supreme Court upholds the validity of the act, it gains the imprint of constitutionality and becomes legally unassailable. This gives the executive the authority to harness governmental resources to execute unimpeded its programs and policies.

The Invalidating Function

The Supreme Court does not only validate governmental acts; it also invalidates them. These two aspects of its power comprise the essence of judicial review, which "... is the greatest single source of Supreme Court's prestige."[108] The legitimizing effect of the Supreme Court's decisions would be ineffectual if the power to invalidate is not conceded, or its withdrawn, or its existence is not palpably felt.

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[105]Pye, *supra*, note 92.

[106]Rama, *The Supreme Court in Action*, in ABUEVA (ED.), FOUNDATION AND DYNAMICS OF FILIPINO GOVERNMENT AND POLITICS 364 (1969).

[107]"Foreword" by Kauper in CORTES, THE PRESIDENCY, x-xi (1966).

[108]Frank, *Review and Basic Liberties*, in CAHN (ED.), SUPREME COURT AND SUPREME LAW 109, 115 (1954).

> The power to validate is the power to invalidate. If the Court were deprived by any means, of its real and practical power to set bounds to governmental actions or even of public confidence that the Court itself regards this as its duty and will discharge it in a proper case, then it must certainly cease to perform its central function of unlocking the energies of government by stamping governmental actions as legitimate. If the Court would not seriously ponder the questions of constitutionality presented to it and declare the challenged statute unconstitutional if it believed it to be so, then its usefulness as a legitimizing institution would be gone.[109]

Judicial Review During National Emergency

Through its power of judicial review, the Supreme Court checks governmental actions that transcend the constitutional limits. It thus acts as defender of the peoples rights during normal times. Is this role abrogated or diminished during times of national emergency? Or does it continue to exist with heightened importance because the emergency opens the door for the exercise of official acts of doubtful constitutionality? Does its legitimizing role continue to assure the integrity of the constitutional structure? If such function were conceded, to what extent may it be exercised? Would the exercise of the power not unduly hamper government capability to meet the forces that have brought about the emergency in the first place, and undermine government efforts to reestablish normalcy?

Emergency Powers under the Constitution

The 1935 Constitution had three provisions dealing with national emergency. Article VI, Section 26, provided that "(i)n times of war or national emergency, the Congress may by law authorize the President... to promulgate rules and regulations to carry out a declared national policy." The emergency powers granted under this provision were in the nature of a legislative delegation of powers.[110] The other two provisions were found in the Bill of Rights[111] and Article VII. Section 1(14) of the former provided for the conditions[112] for the suspension of the privilege of the writ of *habeas corpus* by the President. Section 10(2) of Article VII repeated the conditions for the suspension of the privilege but added another ground — "imminent danger thereof." It also provided for the declaration of martial law: "In case of invasion, insurrection, or rebellion, or imminent danger thereof, when public safety requires it, he (the President) may .. place the Philippines or any part thereof under martial law." Corresponding provisions in the 1973 Constitution are found in Article VIII, Section 15, Section 15 of the Bill of Rights and Section 12

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[109]BLACK, *supra*, note 24 at 52.
[110]MALCOLM & LAUREL, PHILIPPINE CONSTITUTIONAL LAW 94 (1936).
[111]Art. III.
[112]In cases of invasion, insurrection, or rebellion, when public safety requires it.

of Article IX. While in the 1935 Constitution there was an apparent repugnancy as regards the suspension of the privilege of the writ of *habeas corpus* between the Bill of Rights and Article VII because of the absence in the former and the presence in the latter of the words "imminent danger thereof", in the 1973 Constitution the repugnance is eliminated by making "imminent danger thereof", a ground under the Bill of Rights[113] and Article IX.

Basis of Emergency Powers

The constitutional provisions on national emergency which give the chief executive extraordinary or emergency powers are a recognition of the right of the state to preserve itself, a right that precedes all others. Thus, a law aimed to counter subversion is valid. "That the government has a right to protect itself against subversion is a proposition too plain to require elaboration. Self-preservation is the 'ultimate value', of society. It surpasses and transcends every other value, if a society cannot protect its very structure from armed internal attack ... no subordinate value can be protected' ".[114] The "(o)verthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech."[115] The government cannot stand idly by while opposing forces are working for its destruction. As aptly stated in the *Dennis* case: "We reject any principle of governmental helplessness in the face of preparation for revolution, which principle, carried to its logical conclusion, must lead to anarchy."[116] In *Ex Parte Milligan*,[117] the right of the state to protect itself was also recognized.

> . . . although Milligan's trial and conviction by a military commission was illegal, yet if guilty of the crimes imputed to him, and his guilt had been established by an established court and impartial jury, he deserved severe punishment. Open resistance to the measure deemed necessary to subdue a great rebellion by those who enjoy the protection of government, and have not the excuse even of prejudice of section to plead in their favor, is wicked; but that resistance become an enormous crime when it assumes the form of secret political organization, armed to oppose the law, and seeks by stealthy means to introduce the enemies of the country into peaceful communities, there to light the torch of civil war, and thus overthrow the power of the United States; conspiracies like this, at such juncture, are extremely perilous, and those concerned in them dangerous enemies to their country, and should receive the heaviest penalties of the law as an example to deter others from a similar conduct.[118]

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[113]Art. IV.

[114]People v. Ferrer, G.R. No. L-32613-14, December 27, 1972, 48 SCRA 382, 410 (1972).

[115]Dennis v. U.S., 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1951).

[116]*Id.*, at 501.

[117]4 Wall. 2, 107, 18 L.Ed. 281 (1866).

[118]*Id.*, at 130.

Necessity Justifies Declaration of Martial Law

A declaration of martial law enables the chief executive to exercise broad emergency powers. The declaration indicates an assertion by the executive that the very life of the state is at stake because the only justification for martial law is necessity. As Weiner[119] states, "Martial law is the public law of necessity. Necessity calls it forth, necessity justifies its existence, and necessity measures the extent and degree to which it may be employed." Apparently baffled by numerous and divergent definitions of martial law, Justice Castro was led to say, "So even if we quarrel about definitions and the aspects of martial law, let us not forget that the focus of all definitions of martial law is on one basic essential, and that is necessity."[120] According to him,

> Martial law is founded upon the principle that the state has a right to protect itself against those who would destroy it, and has therefore been liked to the right of individual to self-defense. It is invoked as extreme measure, and rests upon the principle that every state has the power of self-preservation, a power inherent in all states, because neither society nor the state would exist without it.[121]

Sir Frederich Pollock[122] said the same thing:

> I conceive it is the better opinion that the law born and nurtured in times when war within the realm was a very possible, is not without recourse in the face of rebels and public enemies; that a right arising from and commensurate with the necessity is a part, though an extra ordinary part, of the common law; that, though commonly and properly put in action by persons having executive authority, is not in itself military or official, but is an extension of the King's duty to preserve the peace, and of all citizens to aid in preserving it... It would be strange if private self defense, even to extremity in certain cases, were justifiable, and the law and the public peace themselves were legally defenseless against enemies within the jurisdiction.[123]

Under the 1935 Constitution, the President, in case of invasion, insurrection, or rebellion or imminent danger thereof, had three courses of action open to him to contain any of the extraordinary circumstances; *viz,* 1) to call out the armed forces[124] to suppress the enemies of peace, 2) to suspend the privilege of the writ of *habeas corpus*[125] to make the arrest and apprehension of subversive elements easier and more effective,

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[119]WEINER, A PRACTICAL MANUAL OF MARTIAL LAW 16 (1940) as cited by Castro, *The Legal Basis of Military Tribunals, in* U.P.L.C. ADMINISTRATION OF JUSTICE BY THE MILITARY 7 (1974).

[120]*Id.*, at 3.

[121]*Id.*, at 8.

[122]POLLOCK, THE EXPANSION OF THE COMMON LAW 105-106 (1904).

[123]*Id.*, quoted by SANTOS, MARTIAL LAW 34 (1972).

[124]Art. VI, sec. 10(2), first sentence.

[125]Art. VI, sec. 10(2), second sentence, first clause.

or 3) to place the Philippines or any part thereof under martial law.[126] The incumbent chief executive took the first course of action by committing almost 50% of the entire armed forces of the country to suppress rebellion and insurrection[127] which were recognized to have been in existence by the Supreme Court in *Lansang v. Garcia*.[128] This proved ineffective. The second course of action was taken by the suspension of the writ of *habeas corpus* from August 21, 1971 up to January 11, 1972. Neither did this produce the desired effect. The forces working for the downfall of the government and the destruction of the constitution continued to gain ominous momentum as shown by many circumstances, the most menacing of them being that "(the New People's Army, ... the military arm of the radical left, has increased its total strength from an estimated 6,500 (composed of 560 regulars, 1,500 combat support and 4,400 service support) as of January 1, 1972 to about 7,900 (composed of 1,028 regulars, 1,800 combat support and 5,025 service support) as of July 31, 1972, showing a marked increase in its regular troops of over 100% in such a short period of six months."[129] Consequently, the incumbent chief executive declared martial law on September 21, 1972 because ". . . the rebellion and armed action undertaken by these lawless elements of the communist and other armed aggrupations organized to overthrow the Republic of the Philippines by armed violence and force have assumed the magnitude of an actual state of war against our people and Republic of the Philippines."[130] The armed forces of the Philippines was directed to maintain law and order throughout the Philippines, prevent or suppress all forms of lawless violence as well as any act of insurrection or rebellion and to enforce obedience to all the law and decrees, orders and regulations promulgated by the President or upon his direction.

Concept of Martial Law

May the chief executive place the entire country under martial law even if only some parts of it are the scene of actual hostilities? At this point, it is of much help to decipher the linguistic obscurity of the term "martial law".

The muddled understanding of the term "martial law",[131] results in many and divergent statements about it.[132] An attempt to clarify the concept was made by Chief Justice Chase of the United States Supreme

[126]Art. VI, sec. 10(2), second sentence, second clause.
[127]Proc. No. 1081, dated Sept. 21, 1972, 68 O.G. 7624 (Sept. 25, 1972).
[128]*Supra*, note 40.
[129]*Supra*, note 127.
[130]Proc. No. 1081, dated Sept. 21, 1972, 68 O.G. 7624 (Sept. 25, 1972).
[131]The obscurity of the term is not only limited to its nature. It becomes even worse confounded in matters relative to its exercise, its administration, etc., SANTOS, MARTIAL LAW 9-14 (1972).
[132]"There are as many definitions of martial law as there are people defining it." Castro, *supra*, note 119 at 1.

Court in his dissenting opinion in *Ex Parte Milligan*.[133] In said case, the Chief Justice distinguished three types of military jurisdiction: military jurisdiction in relation to matrial law, military government and military law. Military jurisdiction in relation to the term "military law" is that exercised by a government "in execution of the branch of its municipal law which regulates its military establishment. This refers to the statutes which provide the rules of conduct and discipline of members of the armed forces. Military jurisdiction in relation to "military government" refers to that "exercised by a belligerent occupying an enemy's territory. An example of this was that established by the Japanese occupation from 1942 to 1945. Military jurisdiction in relation to the term "martial law" is that "exercised in time of rebellion or civil war by a government temporarily governing the civil population of a locality through its military forces, without authority of written law but as necessity may require."[134] For the present purpose, what interests us is the last type of military jurisdiction, martial law proper. Military jurisdiction in relation to military government is out of the picture because our country is not under the government of victorious invaders or successful rebels.

When does Necessity Exist?

At this juncture it is important to remember that the fundamental justification or basis of martial law is necessity.[135] But since "necessity" is only a word indicating a condition, what is that condition or state of things or circumstances that warrants the declaration of martial law? It must be recalled at this point that the state has the unquestioned, primordial right to maintain, protect and defend its being and existence.[136] At what stage of danger must the state be in to justify the labelling of the national condition a "necessity"?

Common sense dictates that the state does not have to wait for that point when it has neither power nor will to resist or repel the enemy. On the other hand, the clear-and-present-danger test employed in determining the validity of any restriction on free speech falls far short of the necessity contemplated. *Ex Parte Milligan*[137] is enlightening. "Martial law", according to the case, "cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as

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[133]*Supra*, note 117. In 1945 case of Duncan v. Kahanamoku, 327 U.S. 304, 66 S.Ct. 606, 90 L.Ed. 688 (1946), the Supreme Court of the United States could not still make up its mind as to what martial law is. The Court in said case was content in stating that "The Common Law authorities and commentators afford no clue as to what martial law is."

[134]Castro, *supra*, note 119.

[135]*Supra*, notes 119 & 123.

[136]*Supra*, notes 114-117.

[137]*Supra*, note 117.

effectually closes the courts and deposes the civil administration."[138] Elucidating further the case stated:

> . . . there are occasions when martial rule can be properly applied. 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 theatre of actual military operations, where war really prevails, there is necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of army and society; and as no power is left but the military, its is allowed to govern by martial rule until the laws can have their course... Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war.[139]

The perimeter of actual military operations, the areas of actual hostilities, determine the existence and define the area of necessity: it is said that laws cease to speak when bullets fly. It is within this context that the Duke of Wellington stated that martial law "is nothing more nor less than the will of the general."[140] Martial law based on this view of necessity " . . . becomes indistinguishable from military government."[141]

Necessity under the Philippine Constitution

This concept of necessity, however, does not seem to be the one contemplated under our constitution for it includes imminent danger of invasion, insurrection or rebellion when public safety requires as a ground for the declaration of martial law.[142] When is danger of invasion, rebellion or insurrection imminent? When does public safety require the declaration of martial law? The answers to these questions depend upon the appreciation of existing facts and circumstances. Even the definition made by the 1972 Constitutional Convention of "public safety" as "the security of civilian lives, liberty and property against the activities of invaders, insurrectionists and rebels"[143] offers little help, if at all, for it only answers the question what public safety is and not when public safety requires the declaration of martial law.

The continuum runs from actual existence of hostilities to normal conditions of peace. At what point along this continuum is the government justified in calling a particular condition a necessity so as to warrant a declaration of martial law? If, for instance, province X is the scene of actual hostilities between government forces and rebels, can

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[138]*Id.*, at 127.
[139]*Id.*, cited by SANTOS, MARTIAL LAW 10 (1972).
[140]Cited by SANTOS, MARTIAL LAW 10 (1972.
[141]3 WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 1597 (1929).
[142]Art. VII, sec. 10(2), second sentence, 1935 CONST. The corresponding provision in the 1973 Constitution is Art. IX, sec. 12, second sentence.
[143]The pertinent minutes of the Convention on November 25, 1972 is appended as Annex "X", U.P.L.C. ADMINISTRATION OF JUSTICE BY THE MILITARY 168 (1974).

necessity be imputed to adjacent provinces where civil institutions continue to operate more or less normally? Granting the answer to be the affirmative, does necessity also attach to provinces relatively far from those where actual hostilities occur?

Scope of Necessity

It is of course naive to say that because the hostilities concentrate in province X, therefore it is an isolated incident, that is, it is not an integral part of a design national in scope to overthrow the government. Even though the processes of government might be normally operating in other parts of the country, the rebels might have an underground network operating within the areas beyond the scene of hostilities doing acts inimical to the interest of the state such as propaganda aimed at undermining the people's respect for and confidence upon the duly constituted authorities. Outside the area of hostilities, the rebels may be forming the nuclei of armed groups preparatory to direct confrontation with government forces. Sabotage may also be inflicted upon key government institutions important industrial establishments as part of the over-all campaign to destroy the State. In all these acts, and many more, designed against the integrity of the state, cannot the necessity of the situation be read? Taken together with the actual hostilities in some parts of the country, do they not compel the reading of nation-wide necessity?

Chief Executive Determines the Existence of Necessity

The prerogatives of determining the question is lodged by the constitution in the chief executive,[144] although the Supreme Court said that such prerogative is not absolute because the Court may inquire into the factual basis of such determination.[145] Since the matter of necessity is a question of appreciation of facts and circumstances, the chief executive is free to exercise his own judgment as to when necessity exists. If in his judgment, necessity pervades the entire country although only some parts of it are the actual scenes of hostilities, then, he may place the whole country under martial law.

Legal Effects of Declaration of Necessity

The entire country was placed under martial law after a finding that "the rebellion and armed action undertaken by these lawless elements of the communist and other lawless aggrupations organized to overthrow the Republic of the Philippines by armed violence and force have assumed

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[144]CONST. (1935), Art. VII, sec. 10(2); CONST. (1973), Art, IX, sec. 12.
[145]*Supra*, note 40.

the magnitude of an actual state of war against our people and the Republic of the Philippines."[146] Our Supreme Court put its imprimatur upon this judgment when it said in *Lansang v. Garcia*:[147] "We entertain, therefore, no doubts about the existence of a sizeable group of men who have publicly risen in arms to overthrow the government and have thus been and are still engaged in rebellion against the Government of the Philippines." If necessity could be stamped on this pronouncement, it would appear that necessity justified the declaration of martial law all over the country. Necessity so understood could then be given similar effects as the necessity which arises within the perimeter of actual military operations. Since in the latter case martial law, in the words of the Duke of Wellington, "is nothing more or less than the will of the General," the incumbent chief executive as Commander-in-Chief of the armed forces of the Philippines would appear to have some claim to assume legislative powers.

Position of the Judiciary after Declaration of Martial Law

General Order No. 1[148] states that the incumbent chief executive "shall govern the nation and direct the operation of the entire Government." Congress thereby became unnecessary in the new governmental scheme. Although the same observation may be made as regards the judiciary, it was made clear in General Order No. 3[149] that "the judiciary shall continue to function in accordance with its present organization and personnel, and shall try and decide in accordance with existing laws all criminal and civil cases," except the cases enumerated therein. A close reading of General Order No. 3, however, reveals the decision of the incumbent chief executive to make the martial law regime beyond the reach of judicial power. Of the cases which said General Order announced as beyond civil court jurisdiction, the most significant were "(t)hose involving the validity, legality or constitutionality of any degree, order or acts issued, promulgated or performed by me or by my duly designated representative pursuant to Proclamation No. 1081. . ." and "(t)hose involving the validity, legality or constitutionality of any rules, orders or acts issued, promulgated, or performed by public servants pursuant to decrees, orders, rules and regulations issued and promulgated by me or by duly designated representative pursuant to Proclamation No. 1081..."

On the basis of these two exceptions, it is clear that those arrested even for non-security crimes such as tax evasion, carnapping, smuggling, bribery, and violation of the Dangerous Drugs Act of 1972,[150] were to be

[146]Proc. No. 1081, dated Sept. 21, 1972, 68 O.G. 7624 (Sept. 25, 1972).
[147]*Supra*, note 40.
[148]Dated September 22, 1972, 68 O.G. 7777 (Oct. 2, 1972).
[149]Dated September 22, 1972, 68 O.G. 7779 (Oct. 2, 1972).
[150]General Order No. 2-A, dated September 26, 1972, 68 O.G. 7785 (Oct. 2, 1972).

". . . kept under detention until otherwise ordered released by me or by my duly designated representative,"[151] thus rendering unavailable the privilege of the writ of *habeas corpus*. Those detained for crimes ". . . as a consequence of any violation of any decree, order or regulation promulgated by me personally or promulgated upon my direction..." were likewise to be kept in detention until order released.[152]

This turn of events imperilled the constitutional system. For, the position taken appeared to be inconsistent with the principles laid down in the cases *Ex Parte Milligan*[153] and *Duncan v. Kahanamoku*[154] landmark cases on the definition of governmental powers and people's rights during martial law.

But the Supreme Court asserted jurisdiction to entertain challenges to government actions alleged to be in violation of the constitution and unduly restrictive of the peoples secured rights. Justice Barredo, in a speech before the American Bar Association, stated that the Supreme Court, to emphasize its determination to preserve the constitutional rights of the citizen, entertained a good number of applications for the issuance of writs of **habeas corpus**, and required the military "to explain the detention of some people," barely three days after the promulgation of General Order No. 3. The chief executive, for his part instead of citing the members of the highest tribunal to account for violation of General Order No. 3, submitted to its jurisdiction. "In yielding to the Supreme Court, the President explained publicly that notwithstanding his authority to resist production before the Supreme Court of the bodies of the numerous detained prisoners involved, he restrained himself from pursuing that course, in order to disabuse the minds of those who entertained the idea that he was going to exercise the powers of an absolute dictator under martial law."[155]

Position of Supreme Court in the New Governmental Scheme

The position of the Supreme Court in the new governmental scheme was emphasized and made clear in *Planas v. Comelec.*[156] In this case, the incumbent Chief Executive issued Presidential Decree No. 73 on November 30, 1972 submitting the proposed constitution approved by the 1972 constitutional convention on November 29, 1972 to the people for ratification or rejection, appropriating funds therefor and setting the plebiscite

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[151]Proc. No. 1081, dated September 22, 1972, 68 O.G. 7624 (Sept. 25, 1972).
[152]*Id.*
[153]*Supra*, note 117.
[154]*Supra*, note 133.
[155]David, *Administration of Justice by the Military: Its Virtues and Faults*, U.P.L.C. ADMINISTRATION OF JUSTICE BY THE MILITARY 150, 151 (1974) citing Bulletin Today, August 22, 1974.
[156]G.R. No. L-35925, January 22, 1973, 49 SCRA 105 (1973).

on January 15, 1973. The petitioners sought to nullify said decree on the grounds that the powers exercised therein were lodged exclusively in Congress and that there was no proper submission of the proposed constitution to the people for lack of time and the absence of freedom of speech, press and assembly. The respondents through the Solicitor General contended that questions raised on said petition were political in character, and hence, beyond the ambit of the court's authority to determine.

In disposing of the issue whether the highest tribunal had authority to pass upon the validity of Presidential Decree No. 73, the court was unanimous in ruling the issue a justiciable one. "Indeed," said the Court through Chief Justice Concepcion, "the contested decree purports to have the force and effect of a legislation, so that the issue on the validity is manifestly a justiciable one, on the authority, not only of a long list of cases in which court has passed upon the constitutionality of the statutes and/or acts of the Executive, but, also, of no less than that of subdivision (1) of Section 2, Article VIII of the 1935 Constitution, which expressly provides for authority of this court to review cases involving said issue."[157]

It may be noted that in this case the Solicitor General did not invoke General Order No. 3[158] prohibiting the Supreme Court from assuming jurisdiction of any case involving the validity, legality or constitutionality of any presidential decree.

Steering Through Scylla and Charybdis

The preservation of the integrity of the constitutional system will largely depend upon the manner the Supreme Court conceives and performs its functions in relation to the exercise of executive power under martial law. Unmitigated judicial activism may precipitate a direct confrontation between the two departments of government now operating and bring about unprecedented constitutional crisis. Judicial timidity on the other hand may convey to the people the impression that the judiciary has ceased to be an effective instrument for the protection of their civil rights. Either extreme will doubtless work to undermine the constitutional order.

Is there a middle ground which the Court can tread with the view to preserve the constitutional order? An inquiry into the fundamental premises underlying the principle of judicial review will be instructive.

When the Supreme Court entertained petitions for the issuance of the writ of *habeas corpus* shortly after the declaration of martial law and when it asserted jurisdiction to consider the validity of a presidential

[157]*Id.*, at 125-126.
[158]Dated September 22, 1972, 68 O.G. 7779 (Oct. 2, 1972).

decree in *Planas v. Comelec*,[159] despite General Order No. 3[160] the court in effect sent a message to the chief executive that not all of the latter's acts were beyond the reach of judicial power. Both instances displayed the court's position of self-assertion. The memory of *Lansang v Garcia*,[161] which waived the banner of judicial activism in a new area of constitutional law, may have made a retreat from activism impossible. The court's actions definitely asserted a far more active role for the court in the new governmental scheme than what was intended in General Order No. 3.[162] The submission of the incumbent chief executive of some of his acts which were initially declared to be outside the court's jurisdiction cannot be taken to mean that he is prepared to submit himself to the judgment of the court especially in policy matters. Wisdom therefore dictates that the Court should be judicious and prudent in asserting its power to review and annul acts taken by the executive department of government. On the other hand, it must not be timid in protecting and upholding the people's rights against clear and patent violations. As McCloskey says, the Court —

> must allow government some leeway to act either wisely or foolishly, yet must not become so acquiescent that the concept of constitutional limit is revealed as an illusion. This requires judges who possess what a great poet called "negative capability" — who can resist the natural human tendency to push an idea to what seems its logical extreme to have done with half-measures and uncertainties. It requires judges who can practice the arts of discrimination without losing the light of reason and getting lost in a welter of *ad hoc*, pragmatic judgments.[163]

The American Supreme Court is in point:

> Neither, however, should history be ignored in determining how judicial control should be exercised and when it should be brought to bear. Surely the record teaches that no useful purpose is served when the judges seek all the hottest political cauldrons of the moment and dive into the middle of them. Nor is there much to be said for the idea that a judicial policy of flat and uncompromising negation will holt a truly dominant political impulse. The Court's greatest successes have been achieved when it has operated near the margins rather than in the center of political controversy, when it has nudged gently tugged the nation, instead of trying to rule it.[164]

Judicial Review and the Rule of Law

Judicial review has been seen as the concrete, observable representation of the rational concepts of the Rule of Law and government of laws and not of men. Its function is "...that of ritual symbolization of a

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[159]*Supra*, note 156.
[160]Dated September 22, 1972, 68 O.G. 7779 (Oct. 2, 1972).
[161]*Supra*, note 40.
[162]Dated September 22, 1972, 68 O.G. 7779 (Oct. 2, 1972).
[163]McCLOSKEY, THE AMERICAN SUPREME COURT 230 (1960).
[164]*Id.*, at 229.

gread idea" that "...no man or organization of men is ever outside the law — outside its protection or outside *its* limitation."[165] The men who are entrusted with the government of society are forbidden by the covenant constituting the civil government to act arbitrarily. They have to conduct themselves according to the law: Their acts must ultimately be based on the law, which is their only source of authority. This must be so because "government of laws and not of men" means "...that laws and not men shall govern."[166]

It has been stated that the idea of "government of laws and not of men" is a naive formula because there "is no law in the world without men, for men must always interpret and mold and apply the law."[167] However, although there "is no law without men," "there is law *with* men and *through* men, and men can live together under that kind of law."[168] The ideal therefore, is a "government of law through men, and not of men without law."[169] In the ultimate analysis this means nothing more than that "when power, exercised by an official or by a government organ, is challenged, legal authority therefor derived from some existing law must be shown, and that no valid law can exist save that which is recognized as such by the courts."[170] In the words of Corwin, "...government of laws in our constitutional law and theory is government subject to judicial disallowance."[171]

National Experience Shapes Rule of Law

But the "rule of law" and "government of laws and not of men," which ultimately boil down to the same thing, *i.e.*, an antithesis to arbitrariness manifested in governmental acts done in disregard to what society agree to be the law, obviously presupposes the existence of law. The law in turn presupposes group living. It is clear therefore that the law is the product of the unique experiences of a people: it is the synthesis of the peculiarities, mores, customs and diverse social, cultural, political and economic elements. Consequently, the experiences of a people can never find a replica in those of another. Hence, the law of one nation-state differs to a greater or less degree from that of another. The specific contents of rule of law, therefore, vary with each nation-state. "The felt necessities of the time, the prevalent moral and political theories, institution of public policy..."[172] differ from one country to another and

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[165]BLACK, *supra*, note 24 at 32.
[166]1 WILLOUGHBY, *supra*, note 141 at 1.
[167]BLACK, *supra*, note 24 at 32.
[168]*Id.*
[169]*Id.*
[170]1 WILLOUGHBY, supra, note 141 at 1.
[171]CORWIN, *supra*, note 56 at 147.
[172]HOLMES, THE COMMON LAW 1 (1818), quoted by Abad Santos, *The Role of the Judiciary in Policy Formulation*, 41 PHIL. L. J. 567, 569 (1966).

thus give unique shape to the concept of the rule of law in each jurisdiction.

There is something to commend therefore, to the proposition that adopting classical Anglo-American constitutional law principles lock, stock and barrel does not show wisdom in discrimination. It does not require any effort to demonstrate that the Philippines is not on the same plane with the United States and Great Britain socially, economically and politically. To apply unqualifiedly the constitutional law principles developed and molded by the unique national experience of the latter two countries is to compel the Filipinos to conduct themselves artificially in accordance with Anglo-American experience. If the Americans have radically veered from the political practice of the British by developing the instrument of judicial review which is a source of a continuing marvel among the latter and the peoples of continental Europe, the Filipinos in the light of their peculiar needs and experiences may be warranted in giving new form to the concept of judicial review. It is against this background that the Supreme Court must re-assess its role during the national emergency.