EXECUTIVE LEGISLATION: THE PHILIPPINE EXPERIENCE*

IRENE R. CORTES**

I. INTRODUCTORY

The classification of governmental functions under three main categories, namely, legislative, executive and judicial and their distribution among three different branches of government are common features of state constitutions.[1] The rule of separation of powers is observed in varying degrees, in some states more strictly than in others.

Philippine Constitutions adopted in 1899, 1935, 1943 (during the Japanese military occupation), and in 1973 recognized the trichotomy of governmental powers and provide for their separation by distributing them among three different departments. According to a well-known Filipino constitutionalist "the underlying reason of this principle is the assumption that arbitrary rule and abuse of authority would inevitably result from the concentration of the three powers of government in the same person, body of persons, or organ."[2]

The 1935 Constitution adhered more strictly to the separation of powers rule than the other two,[3] but not one of these constitutions made the separation absolute.

Experience has demonstrated that even when a separation of powers is constitutionally mandated, powers overlap and excep-

---

* Eleventh Albino Z. SyCip Lecture delivered on December 15, 1979 at the Bocobo Hall, University of the Philippines.

** *Professor of Law* and *former Dean*, University of the Philippines College of Law; *holder*, Albino Z. SyCip Professor of Law Chair.

1 Blaustein and Flanz, Constitutions of the Countries of the World, Oceana (1971).

2 11 SINCO, PHILIPPINE POLITICAL LAW 128 (1963).

3 Sec. 16 of Art. VI of the 1935 Constitution provided:

> "No Senator or Member of the House of Representatives may hold any other office or employment in the Government without forfeiting his seat, nor shall any Senator or Member of the House of Representatives, during the time for which he was elected, be appointed to any civil office which may have been created or the emoluments whereof shall have been increased while he was a Member of the Congress."

This foreclosed membership in the cabinet of any member of Congress. The Malolos Constitution and the 1973 Constitution provide for parliamentary government in which executive and legislative powers merge. A chief characteristic is that the Prime Minister and the members of the cabinet who exercise executive powers are from parliament.

tions come to be recognized because, (1) some powers do not clearly fall under a single category, (2) coordination, inter-dependence and mutual checks among the three departments are necessary, and (3) under certain circumstances a relaxation of the separation of powers rule is needed. Too inflexible an application could render government inoperative. Thus, the corollary rule of non-delegation of powers admits of explicit or implied exceptions.

In the Philippines, constitutions vest legislative or law-making powers in a legislature which at different periods in history has been unicameral or bicameral and been called "Assembly",[4] "Legislature",[5] "Congress",[6] "Batasang Pambansa".[7] Whatever their structure and by whatever name they are known, these law-making bodies share common characteristics. They are elected, representative and deliberative. Their law-making process is surrounded with specific safeguards constitutionally spelled out.

II. EXECUTIVE LEGISLATION, GENERALLY

A. *The Executive as Legislator*

Among the hats an executive wears under a government of the American presidential type (exemplified by the government established under the 1935 Constitution) is that of chief legislator. This is so because in practice his office initiates proposals for major legislation and all legislative measures have to be submitted to him before they can become law.

Apart from this participation in the legislative process, the 1935 Constitution authorized congress in express terms to delegate to the president the power to fix, within specified limits, tariff rates, import and export quotas, tonnage and wharfage dues subject to such limitations and restrictions which congress may impose.[8]

It likewise provided explicit authority for the delegation of emergency powers to the president.[9] This will be discussed fully.

B. *Delegated Powers to Legislate*

This study will not go into the executive's participation in the law-making process set forth in the constitution, nor deal with the tariff, import or export quota, tonnage and wharfage dues provision nor the subordinate rule-making nor ordinance function which

---

[4] National Assembly under the original constitution of 1935 and 1973 Constitution.
[5] Philippine Legislature, under the Philippine Bill of 1902.
[6] Congress of the Philippines under the 1935 Constitution as amended in 1940.
[7] *Interim* Batasang Pambansa under the 1976 amendments.
[8] Art. VI, sec. 22(2).
[9] CONST. (1935), art. VI, sec. 26.

lesser cogs in the governmental scheme may under certain conditions exercise.

The executive legislation to be considered is the exercise of the power to make law either under the emergency powers provision or pursuant to powers independently vested in the executive by the constitution.

Since the Malolos Constitution of 1899 hardly became operative[10] and the effect of the 1943 Constitution ceased upon reestablishment of the legitimate government, this study of executive legislation will be confined to the Philippine experience under the 1935 and 1973 Constitutions as amended in 1976.

III. EMERGENCY POWERS

The last section in the article of the 1935 Constitution establishing the legislative department provides:

> In times of war or other national emergency, the Congress may by law authorize the President for a limited period and subject to such restrictions as it may prescribe, to promulgate rules and regulations to carry out a declared national policy.[11]

The purpose, scope and limitations of the delegation appear to be clearly spelled out. However, subsequent events showed more far-reaching implications than a literal reading of the provisions revealed.

A. *Emergency Powers Acts*

Within five years from the adoption of that Constitution occasion for the grant of emergency powers to the President arose. The outbreak in 1939 of the Second World War in Europe disrupted Philippine trade and caused a national emergency. The National Assembly's response was to enact a series of five measures on September 30, 1939. Four of these were in specific areas of labor,[12] pub-

---

10 Finally adopted on November 29, 1898, the Malolos Constitution was not proclaimed by Aguinaldo until January 21, 1899. Two weeks later the Philippine-American war began. The Malolos Constitution was short-lived—no more than eighty days separated Aguinaldo's proclamation and the Treaty of Paris of April 11, 1899 when Spain ceded the Philippines to the United States.

Title II, Article 4 of this constitution declares a principle particularly relevant to the subject of this lecture. It reads:

> "The government of the Republic is popular, representative, alternative, and responsible, and is exercised by three distinct powers, called the legislative, the executive, and the judicial.
>
> "Two or more of the powers shall never be vested in one person or corporation; neither shall the legislative power be entrusted to a *single individual.*" (Underscoring mine).

11 CONST. (1935), art. VI, sec. 26.

12 Com. Act No. 494 (1939).

lic service and enterprise,[13] vessels and shipping,[14] and government expenditures and operations.[15]

The fifth measure[16] was a grant of emergency powers closely following the constitutional requirements. Thus: (1) it referred to a national emergency caused by the existence of the European War and its anticipated effects on the Philippines; (2) it declared the national policy namely, "to prevent, locally or generally, scarcity, monopolization, hoarding, injurious speculations, manipulations, private controls, and profiteering, affecting the supply, distribution, and movement of foods, clothing, fuel, . . .;" (3) it gave the President power to stockpile certain commodities, fix maximum prices, and "promulgate such rules and regulations as he may deem necessary in the public interest;" (4) the rules and regulations were given a limited period, i.e., until the date of adjournment of the next regular session of the National Assembly unless sooner revoked or the National Assembly shall provide otherwise; and (5) The President was required to report to the National Assembly within ten days of the next annual session any action taken under the law.

In the following year at the President's request the National Assembly adopted another act providing for broader powers, the measure stating that "the existence of war in many parts of the world has created a national emergency which makes it necessary to invest the President of the Philippines with *extraordinary powers*..."[17] Like the 1939 Acts the President was required to make a report within ten days from the opening of congress, and a time limit for the duration of his authority was prescribed.

The 1939 and 1940 grant of powers to the president was in response to the emergency caused by the European War, the scope of the powers given, expanding proportionately with the seriousness of the emergency. The peak was reached when the Pacific War began, and the Japanese Imperial Forces landed in various parts of the country and set out to take Manila.

The National Assembly meeting in special session adopted Commonwealth Act No. 671 on December 16, 1941 ". . . declaring a state of total emergency as result of war involving the Philippines and authorizing the President to promulgate rules and regulations to meet such emergency." This measure clothed the President with "extraordinary powers to meet the resulting emergency" enumerat-

[13] Com. Act No. 496 (1939).
[14] Com. Act No. 499 (1939).
[15] Com. Act No. 500 (1939).
[16] Com. Act No. 498 (1939).
[17] Com. Act No. 620 (1941).

ing *inter alia* the power to reorganize the government, to tax, to raise funds through bond issue and spend the proceeds thereof. In addition to the powers enumerated he was authorized "to exercise such other powers as he may deem necessary to enable the government to fulfill its responsibilities and to maintain and enforce its authority."

The 1935 Constitution had been amended in 1940, one of the changes introduced being the re-establishment of a bicameral legislature. Elections had been held and the Congress of the Philippines replacing the National Assembly would have met in January 1942. But the invasion and military occupation prevented that Congress from convening. Under the emergency powers act of December 16, 1941 the President exercised sole legislative powers until he called a special session of Congress in June 1945. The act specified no time limit. It did provide that as soon as practicable upon the convening of the Congress, the President was to report thereto all the rules and regulations promulgated by him and that these rules were to be in force and effect until Congress of the Philippines provided otherwise.

B. *Exercise of Emergency Powers*

Four Presidents exercised the powers delegated: Quezon, from December 17, 1941 to June 1944. His last executive order issued in the Philippines created the City of Greater Manila on January 1, 1942. In the United States where the Commonwealth Government continued to operate, he issued fourteen other orders, the last dated June 20, 1944 in Saranac Lake.

Osmeña succeeded to the Presidency on August 1, 1944 upon Quezon's death. Osmeña's exercise of emergency powers was far-reaching and varied both from the geographic and substantive sense. He began with a re-organization of the executive departments of Government while in Washington, D.C.[18] He issued executive orders from the Government in the field as he returned to the Philippines with the American forces under MacArthur;[19] most of his executive orders were issued from Malacañang[20] but he also issued some from Washington, D.C.[21] when he went back on official mission. The subjects covered by the presidential acts included the ap-

[18] Ex. Order No. 15-W (1944).

[19] Ex. Order No. 21 (1944); Ex. Order No. 22 (1944); Ex. Order No. 23 (1944); Ex. Order No. 24 (1944); Ex Order No. 25 (1944); Ex. Order No. 26 (1944).

[20] Ex. Order No. 27 (1945); Ex. Order No. 28 (1945); Ex. Order No. 29 (1945); Ex. Order No. 30 (1945); Ex. Order No. 31 (1945); Ex. Order No. 32 (1945); Ex. Order No. 33 (1945); Ex. Order No. 34 (1945); Ex. Order No. 35 (1945); Ex. Order No. 36 (1945).

[21] Ex. Order No. 16-W (1944); Ex. Order No. 17-W (1944); Ex. Order No. 19-W (1944); Ex. Order No. 20-W (1944).

propriation of funds,[22] the fixing of prices,[23] reorganization of government,[24] the increase in the membership of the Supreme Court from 7 to 11,[25] abolishing the Court of Appeals,[26] the creation of a People's Court,[27] amendments to the Revised Penal Code,[28] and the Corporation Law.[29]

On August 14, 1945 Japan surrendered unconditionally and on April 23, 1946 a national election was held for the president, vice-president, senator and representatives. Osmeña lost and Roxas assumed office on May 8, 1946 to become the First President of the Republic. His first executive order as such dealt with the issuance of passports.[30] Other issuances covered exports,[31] ceiling prices,[32] rentals,[33] War Crimes Office,[34] etc.

The exercise of legislative powers by Presidents Quezon, Osmeña and Roxas were unquestioned because the war and the national emergency it brought about were accepted as justification for its exercise. When Roxas died after less than two years in office and President Quirino succeeded him on April 15, 1948, the war in the Pacific Theatre had terminated, Philippine Independence from the United States had been proclaimed and the Congress was meeting regularly. In June 1948 President Quirino signed a total of 118 House and 7 Senate bills. He vetoed 24 out of some 151 measures.[35] Political dissension began to create difficulties in executive-legislative relationship.

That year Quirino explicitly invoked the emergency powers act as basis for executive orders relating to sunken, beached or damaged vessels and their cargo lying in Philippine waters,[36] fixing the price of rice,[37] import of medical supplies,[38] export controls,[39] and import controls.[40]

The fourth session of the First Congress having failed to pass a general appropriations act for the Fiscal Year July 1, 1949 to

22 Ex. Order No. 19-W (1944).
23 Ex. Order No. 24 (1944); Ex. Order No. 26 (1944); Ex. Order No. 28 (1944).
24 Ex Order No. 15-W (1944).
25 Ex. Order No. 40 (1945).
26 Ex. Order No. 87 (1945).
27 Com. Act No. 682 (1945).
28 Ex. Order No. 44 (1945).
29 Ex. Order No. 90 (1946).
30 Ex. Order No. 1 (1946).
31 Ex. Order No. 3 (1946).
32 Ex. Order No. 66 (1947).
33 Ex. Order No. 62 (1947).
34 Ex. Order No. 68 (1947).
35 44 Off. Gaz. No. 6, 1783 (June, 1948).
36 Ex. Order No. 175 (1948).
37 Ex. Order No. 184 (1948).
38 Ex. Order No. 159 (1948).
39 Ex. Order No. 192 (1948).
40 Ex. Order No. 193 (1948).

June 30, 1950, President Quirino again invoked the emergency powers act and in a series of executive orders appropriated funds for the operation of the government,[41] to defray the expenses of the 1949 Elections,[42] additional funds for the operations of the government,[43] and other activities.[44]

C. *Emergency Powers Cases*

The validity of these executive orders was challenged in actions originally filed with the Supreme Court.

The First Emergency Powers Cases brought in 1949 consisted of five petitions[45] praying the Supreme Court to declared null and void Executive Order No. 62 regulating rentals, Executive Order No. 2225 appropriating funds for the operation of government and Executive Order No. 226 appropriating funds for the 1949 National Elections.

The Supreme Court, at first unable to reach the required majority, decided on motion for reconsideration that each of the executive order challenged was null and void "for having been issued after Act No. 671 had lapsed and/or after Congress has enacted legislation on the same subject."[46]

The decision in *Araneta v. Dinglasan* failed to settle the issue of whether the President's extraordinary powers under Commonwealth Act No. 671 had definitely ceased to exist. In 1952 Congress adopted a bill[47] repealing all emergency powers Acts. This the President vetoed. Later when devastating typhoons hit the country, about 70 members of that Congress formally petitioned the President to exercise his emergency powers for the purpose of releasing funds for public works projects. This was followed by a house resolution to the same effect. The President's promulgation of Executive Orders Nos. 545 and 546 on November 16, 1952 appropriating funds for public works and for relief sparked the Second Emergency Powers Case of 1952.[48]

In declaring these executive orders null and void, the Supreme Court said that the underlying reason for the delegation was the inability of the legislature to meet because or the emergency of its

---

41 Ex. Order No. 225 (1949).
42 Ex. Order No. 226 (1949).
43 Ex. Order No. 239 (1949).
44 Ex. Order No. 240 (1949).
45 Araneta v. Dinglasan, 84 Phil. 368 (1949); Araneta v. Angeles, 84 Phil. 368 (1949); Rodriguez contra El Tesorero de Filipinas, 84 Phil. 368 (1949); Guerrero v. Commissioner of Customs, 84 Phil. 368 (1949); and Barredo v. Commissioner of Elections, 84 Phil. 368 (1949).
46 Rodriguez v. Gella, 92 Phil. 603, 605 (1953).
47 House Bill No. 727.
48 *Supra,* note 46.

inability to cope, "so, as a remedy, the power and authority of legislation are vested temporarily in the hands of one man, the Chief Executive."[49]

In the second case the Court through Chief Justice Paras, rejected the proposition that the President should be allowed to exercise emergency powers for the sake of speed and expediency saying: "Deadlocks in the slowness of democratic processes must be preferred to concentration of powers in any one man or group of men . . . emergency iself cannot and should not create power."[50] Justice Padilla in a concurring opinion, intimated that the essentially legislative function of appropriating government funds may, however, be delegated to the President, "in times of war or other national emergency."[51]

As the Emergency Powers Cases demonstrate the provision lends itself to varying interpretations. A literal reading of the provision itself suggests that the power contemplated is no more than the ordinance or rule-making function to carry out a declared national policy. Justice Feria in discussing the scope of this power said that it was not intended to vest only administrative rule-making functions. He believed that the power contemplated is "purely legislative" leaving to the President the discretion to determine what the rules and regulations shall be and what acts are necessary to effectuate the so-called national policy.[52] It is submitted, however, that the provision itself does not authorize the surrender of legislative powers to the President.

However, Commonwealth Act No. 671 as previously stated went further and gave the President "such other powers as he may deem necessary to enable the Government to fulfill its responsibilities and to maintain and enforce its authority." Some of the more significant executive orders issued during the period like the abolition of the Court of Appeals, the reorganization of the Supreme Court and Courts of First Instance, the appropriation measures and the amendment of codes were legislative in character and could only fall within the general power conferred by the blanket clause of Commonthwealth Act No. 671. This appears to exceed the authority of the Legislature to delegate. But the validity of this Act was never passed upon. The Emergency Powers Cases skirted the constitutional issue and focused on the measures promulgated by the President. The legislature at the outbreak of World War II in the Pacific Region thus opened a vaster field of executive legislation than the emer-

[49] *Supra*, note 45 at 397-398.
[50] *Id.* at 612.
[51] *Id.* at 612-613.
[52] *Id.* at 442.

gency powers provision allowed, and the constitutionality of this legislative delegation was assumed.

President Quirino's evaluation of the executive's power in case of emergency brings out other options available to the executive under the 1935 Constitution. He said:

> The emergency powers given by Congress are limited, but emergency powers that are provided in the constitution are unlimited. In case of actual war, I don't need emergency power. All I have got to do is declare martial law and I have all the power that I need to defend the country against aggression.[53]

In fact President Quirino did not exhaust the possibilities open to the President, for the causes for declaration of martial law include situations not amounting to war. Two decades later President Marcos was to utilize the martial law powers.

Just as the scope of executive legislation delegated under the emergency powers clause of the Constitution is not readily apparent from its terms, neither is the magnitude of the cryptic martial law provision. The framers of the 1935 Constitution did not indicate exactly what that power comprehends. Its scope began to unfold in the course of the martial law administration.

IV. Executive Legislation under Martial Law

At this point the inquiry is directed to the exercise of executive legislation under martial law.

In a nationwide radio and television broadcast on the proclamation of martial law, President Marcos announced:

> It is my intention beginning tomorrow to issue all the orders which would attain reforms in our society.[54]

This was to include the proclamation of land reform over the Philippines, the reorganization of government, the new rules and conduct for the civil service, the removal of corrupt and inefficient public officials and their replacement and the breaking up of criminal syndicates.

The President invoking the powers vested in him by the Constitution as Commander-in-Chief of the Armed Forces issued General Order No. 1 stating *inter alia* that he:

> shall govern the nation and direct the operation of the *entire* Government, including all its agencies and instruumentalities in my

[53] Quirino, the Quirino Way, Collection of Speeches and Addresses of President Quirino 335 (1955).

[54] Statement of the President on the Proclamation of Martial Law in the Philippines, September 21, 1972. 1 Vital Documents on Proclamation No. 1081 15 (1972).

> capacity and shall exercise all the powers and prerogatives appurtenant and incident to my position as such Commander-in-Chief.[55]

In General Order No. 3 issued on the same day he directed all executive departments, bureaus, offices, agencies and instrumentalities of the Government including government-owned and controlled corporations as well as all local governments to carry on their functions according to existing law unless otherwise ordered by him or his authorized representatives.

In the same issuance he also addressed himself to the Judiciary ordering the courts to carry on, but taking out of their jurisdiction among other cases:

> (1) Those involving the validity, legality or constitutionality of Proclamation No. 1081, dated September 21, 1972 or any decree, order or acts issued, promulgated or performed by me or my duly designated representative pursuant thereto.
>
> (2) Those 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 my duly designated representative pursuant to Proclamation No. 1081, dated September 21, 1972.

It was thus made clear that the President as Commander- in-Chief was taking over legislative powers and removing from the judiciary the power to pass upon the measures promulgated.

On September 22, 1972 Congress of the Philippines had adjourned, its next regular session was on the fourth Monday of January of the ensuing year, but these events supervened: Martial Law was proclaimed and a New Constitution went into effect on January 17, 1973. Thus, was Congress of the Philippines disestablished.

The 1973 Constitution provides for a type of parliamentary government to replace the presidential government first introduced in the Philippines more than seventy years ago. During the transition from one type of government to another an *interim* National Assembly was to be convoked by the President, although no date for this was specified. Exercising his discretion and on a reading of the public will expressed in referenda,[56] the President refrained from calling the *interim* National Assembly. Instead, the Constitution was amended in 1976 and another *interim* legislature was established. In the interregnum the law-making power was exclusively in the President.

---

[55] Sept. 22, 1972, underscoring supplied.

[56] Referenda of January 1973, July 28, 1973, February 27, 1975.

The exercise of executive legislation under martial law, first under the 1935 Constitution, then under the 1973 Constitution, and finally under the 1976 amendments is a rich field of study.

A. *Under the 1935 Constitution*

Presidential issuances as these executive acts are referred to, are promulgated in the form of presidential decrees, general orders, letters of instructions, executive orders, proclamations, memoranda, or circulars. Although technical differences distinguish one type of issuance from another, in practice the distinctions have not always been observed. The definitions in the Revised Administrative Code of 1978[57] of the various acts of the President/Prime Minister in the exercise of ordinance power will hopefully clear some of the confusion produced by the use of one form of issuance instead of another to promulgate law or introduce an amendment. Thus, *executive orders* are defined as acts providing for rules of a general or permanent character in implementation or execution of constitutional or statutory powers; *administrative orders* are those issued in pursuance of his duties as administrative head; *proclamations* are those fixing a date or declaring a status or condition of public moment or interest, upon the existence of which the operation of a specific law or regulations is made to depend; *memorandum orders* are acts on matter of administrative details or of subordinate or temporary interest which only concern a particular officer or office of the government; *memorandum circulars*, relate to internal administration which the President/Prime Minister desires to bring to the attention of all or some of the ministries, agencies, bureaus or offices of government, for information or compliance; *general or special orders*, are acts and commands of the President/Prime Minister in his capacity as Commander-in-Chief; and *letters of instructions*, are acts of the President/Prime Minister directed to particular officials.

Not included is a definition of presidential decrees which are acts of the President in the exercise of legislative power as distinguished from the ordinance power covered in the codal provision.

Seven years after the proclamation of martial law, more than 1600 presidential decrees have been issued.[58] The subjects of legis-

---

57 Pres. Decree No. 1557 (1978), sec. 119.

58 The last Presidential Decree issued on the eve of the inaugural session of the *Interim* Batasang Pambansa on June 11, 1978 was No. 1603-A. After the Batasang Pambansa started to meet the President/Prime Minister continued to legislate pursuant to authority given under the 1976 amendments. Pres. Decree No. 1604 extending Franking Privilege to Members of the Batasang Pambansa was promulgated on July 21, 1978.

lation range the gamut of concerns a developing country with problems of mass poverty, dissidence and growth faces during the last quarter of the 20th century. Presidential decrees cover government reorganization, land reform, civil service, local government, taxation bond issue, business incentives, education, college entrance tests, banking, political offenders amnesty, tax amnesty, metric system, national artists, research centers, police, oil exploration, pollution, non-conventional energy, vital registration, human settlements, geothermal resources, tourism, mendicancy, the promulgation and revision of codes, and many others.

It is interesting to note that in the exercise of legislative power the President under martial law employs a variety of enacting clauses. Presidential Decree No. 1 was issued by the Commander-in-Chief of the Armed Forces pursuant to Proclamation No. 1081 and General Order No. 1. During the first weeks of martial law, this enacting clause was frequently used.[59] But as more decrees were promulgated the following enacting clause was increasingly used:[60]

> * * * I, Ferdinand E. Marcos, President of the Philippines, by virtue of the powers vested in me by the Constitution, as Commander-in-Chief of the Armed Forces of the Philippines, pursuant to Proclamation No. 1081 dated September 21, 1972, and General Order No. 1 dated September 22, 1972.

However, no less than seven variations in these clauses can be noted, indicating that they issue from the: (1) President acting by virtue of constitutional powers as Commander-in-Chief, pursuant to Proclamation No. 1081 and General Order No. 1,[61] or (2) President, Commander-in-Chief pursuant to Proclamation No. 1081,[62] or (3) President, Commander-in-Chief,[63] or (4) Commander-in-Chief pursuant to Proclamation No. 1081 and General Order No. 1,[64] or (5) Commander-in-Chief pursuant to Proclamation No. 1081.[65] Late in 1973 the decrees began occasionally to issue from the (6) President, invoking neither the Commander-in-Chief provision nor the Martial Law Proclamation.[66] By 1974 this formulation of the enact-

---

[59] Pres. Decrees Nos. 1, 1-A, 1-B, 4, 5, 7, 9, 11, 12, 17, 19, 53, 54, 56, 58, 61, 64, 69 etc., promulgated in 1972.

[60] Pres. Decrees Nos. 2, 3, 6-A, 8, 10, 13, 14, 18, 20-30, 32, 34-36, 40-52, 55, 57, 60, 62, 63, 65-68, 70-72, 75-79, promulgated in 1972.

[61] *Id.*, note 60.

[62] Pres. Decrees Nos. 96, 100, 131, 178, 189, 206, 342, promulgated in 1973; and in 1974 Pres. Decrees Nos. 363, 437.

[63] Pres. Decree No. 86, promulgated in 1972; and in 1973 Pres. Decrees Nos. 134, 252.

[64] *Supra*, note 59.

[65] Pres. Decrees Nos. 78, 80, promulgated in 1972; and in 1973 Pres. Decrees Nos. 95, 169, 170, 199.

[66] Pres. Decrees Nos. 329, 354, 357, promulgated in 1973; and in 1974 Pres. Decrees No. 413, 414, 417, 419, 422, 423, 424, 426-A, 428, 429-A.

ing clause citing simply the President as law-making authority became the usual one although some decrees still employed other variations.

In the meantime the 1973 Constitution was adopted, and a new Martial Law Proclamation was issued.[67] The new Constitution confirmed and ratified all presidential issuances,[68] the Supreme Court had earlier upheld the President's power to legislate, and the amendments adopted in 1976 creating the *interim* Batasang Pambansa also directly confer on the President/Prime Minister power to legislate.[69] Since then presidential issuances uniformly employ the enacting clause:

> NOW, THEREFORE, I, FERDINAND E. MARCOS, President of the Philippines by virtue of the powers vested in me by the Constitution, do hereby order and decree:

But in rare instances a seventh variation appears, using "President and Prime Minister."[70]

Is there an explanation for the variety in this clause which serves to indicate the authority from which a law comes? In the early days of martial law it was important to stress that the decrees issued from the President who was exercising legislative powers as Commander-in-Chief pursuant to Proclamation No. 1081 and General Order No. 1. Then Congress had only adjourned and was expected to resume session. It does not, however, explain the different formulations even after the Supreme Court had held that under martial law the President had power to legislate or after the 1973 Constitution was adopted and subsequently amended giving explicit legislative power to the President.

The explanation could well be that the decrees are prepared by different technical drafting staffs. The enacting clauses could also convey subtle distinctions which need to be made because of the diversity of the subjects of legislation. But this is not discernible. For example, the Commander-in-Chief acting under Proclamation No. 1081 decreed rumor-mongering a punishable offense,[71] granted amnesty to dissidents,[72] required attending physicians treating injuries arising from violence to report thereon,[73] prescribed a schedule for burial expenses for the military,[74] etc. But in the same capacity he also decreed the reorganization of the Executive De-

---

[67] Proclamation No. 1104 (1973).
[68] Art. XVII, sec. 2.
[69] Amendments Nos. 5 and 6.
[70] Pres. Decrees Nos. 1614, 1634, promulgated in 1979.
[71] Pres. Decree No. 90, promulgated in 1973.
[72] Pres. Decree No. 95 (1973).
[73] Pres. Decree No. 169 (1973).
[74] Pres. Decree No. 199 (1973).

partment,[75] amended the Charter of the PNB,[76] ordered the cultivation of idle lands, marketing of livestock,[77] and the preservation, improvement and use of the Pasig River, and called a plebiscite.[78]

The Philippine experience in executive legislation was thus founded on the emergency powers and the martial law provisions of the 1935 Constitution. These provisions liberally construed gave scope to the President's law-making function. The delegated emergency powers became the basis for executive law-making affecting the judiciary, taxation, appropriations, amendment to the penal code, rentals, export and price controls. In the course of time the President exercised legislative powers even after the Congress had begun to function regularly.

Under martial law the Executive effectively replaced the Legislature for close to six years.

B. *Under the 1973 Constitution*

The 1973 Constitution as amended in 1976 gives added dimension to executive legislation. This Constitution while superseding that of 1935 retains and expands the provisions on delegation of powers. Under the 1973 Constitution no doubt can arise as to whether in case of national emergency the delegated power of what is necessary and proper to carry out a declared national policy includes the power to legislate.[79] In the same manner the power to fix tariff rates, import and export quotas or wharfage and tonnage dues has been broadened to include other duties or imposts.[80] The martial law provision is retained verbatim,[81] and to remove any doubts regarding the exercise of law-making power performed under its aegis, the transitory provisions confirm and ratify the presidential issuances made under martial law.[82]

---

[75] Pres. Decree No. 1 (1972).
[76] Pres. Decree No. 5 (1972).
[77] Pres. Decree No. 7 (1972).
[78] Pres. Decree No. 73 (1972).
[79] Art. VIII, sec. 15, provides:
"In times of war or other national emergency, the National Assembly may by law authorize the Prime Minister, for a limited period and subject to such restriction as it may prescribe, to exercise powers necessary and proper to carry out a declared national policy. Unless sooner withdrawn by resolution of the National Assembly, such power shall cease upon its next adjournment."
[80] Art. VIII, sec. 17(2) provides:
"The National Assembly may by law authorize the Prime Minister to fix within specified limits, and subject to such limitations and restrictions as it may impose, tariff rates, import and export quotas, tonnage and wharfage dues, and other duties or imposts.
[81] Art. IX, sec. 12.
[82] Art. XVII, sec. 3(2).

The extent of the President's power under martial law proclaimed pursuant to the 1935 Constitution was a focus of controversy in cases brought before the Supreme Court, starting with *Planas v. Commission on Elections.*[83]

It will be recalled that in General Order No. 1 and in the announcement of the proclamation of martial law the President had stated that he had taken over the operation of the entire government. In General Order No. 3 he had removed from thhe jurisdiction of the judiciary the power to pass upon the constitutionality of Proclamation No. 1081 as well as all the presidential decrees, general orders, letters of instructions and other issuances emanating from him as well as the validity of rules and regulations issued by duly designated authorities.

The Supreme Court, however, assumed jurisdiction over the plebiscite cases and others subsequently filed. In a 1978 decision Justice Barredo speaking for the Court, in reversing a lower court's order dismissing a case challenging the validity of a presidential decree, stated:

> * * * Respondent court's invocation of General Order No. 3 of September 21, 1972 is nothing short of an unwarranted abdication of judicial authority, which no judge duly imbued with the implications of the paramount principle of independence of the judiciary should ever think of doing. It is unfortunate indeed that respondent judge is apparently unaware that it is a matter of highly significant historical fact that this Court has always deemed General Order No. 3 including its amendment by General Order No. 3-A as practically inoperative even in the light of Proclamation No. 1081 of September 21, 1972 and Proclamation 1104 of January 17, 1973 placing the whole Philippines under martial law. While the members of the Court are not agreed on whether or not particular instances of attack against the validity of certain Presidential Decrees raise political questions which the judiciary would not interfere with, there is unanimity among Us in the view that it is for the Court rather than the Executive to determine whether or not We may take cognizance of any given case involving the validity of acts of the Executive Department purportedly under the authority of the martial law proclamations.[84]

Thus, the Supreme Court while recognizing the validity of executive legislation under "Constitutional Authoritarianism" asserted the power to pass upon the validity of the exercise of that power. That the decisions reached invariably support the validity of the challenged acts, can be the subject of another study and discussion session.

---

[83] G.R. No. L-35925, January 22, 1973, 49 SCRA 105 (1973).

[84] Lina v. Purisima, G.R. No. L-39380, April 14, 1978, 82 SCRA 345, 351 (1978).

In the plebiscite cases[85] filed in December 1972, the petitioners sought to enjoin the respondents Commission on Elections, the Treasurer of the Philippines, the Auditor General, and the Director of Printing from implementing Presidential Decree No. 73 submitting the proposed Constitution to a plebiscite and appropriating funds for the purpose. One of the grounds relied upon was that the decree was void because the calling of the plebiscite and setting of guidelines for holding it, the prescription of the ballots and questions to be answered by the voters and the appropriation of funds for the purpose are lodged by the Constitution exclusively in *Congress*. This case was, however, dismissed because while the case was being heard in the Supreme Court, it became moot when the President issued on January 17, 1973 Proclamation No. 1102 declaring that the proposed Constitution had been ratified by the vote of an overwhelming majority (95%) of the members of the barangays.

On January 20, 1973 Josue Javellana filed the first of five cases contesting the validity of Proclamation No. 1102. The ratification cases decided together in *Javellana v. Executive Secretary*[86] raised among others the issue of whether an extraordinary majority vote (2/3 or eight under the 1935 Constitution and ten under the 1973) was required to nullify a presidential proclamation. Mr. Chief Justice Concepcion writing for the Supreme Court was of the view that the extraordinary 2/3 majority was required only to declare a "Treaty or Law" unconstitutional and citing *Araneta v. Dinglasan*,[87] pointed out that the 2/3 vote requirement "was made to apply to treaty and law, because, in these cases, the participation of the two other departments of the government—the executive and legislative is present, which circumstance is absent in the case of rules, regulations and executive orders." He further opined that the dictum applies with equal force to executive proclamations, which are mainly informative and declaratory in character, hence the same number of votes needed to invalidate an executive order, rule or regulation, namely, six votes (under the 1935 Constitution) would suffice.[88] The main challenge of the Javellana case was directed at restraining the respondents from enforcing the new Constitution on the ground that it was not validly ratified. The petitions were likewise dismissed.

---

[85] Planas v. Commission on Elections filed on December 7, 1972, G.R. No. L-35925 and eight others filed within ten days of each other. *Supra*, note 83.

[86] G.R. No. L-36142, March 31, 1973, 50 SCRA 30 (1973).

[87] 84 Phil. 368, 431, 437-438 (1949).

[88] Since a Presidential Decree is an exercise of legislative power as Supreme Court decisions have established and Amendments 5 and 6 explicitly provide, under the constitution a vote of 10 would be required to declare it unconstitutional. Quaere: Will the same vote be required as to all other presidential issuances?

With this decision as Justice Antonio Barredo said in the Planas case the 1935 Constitution, *pro tanto,* passed into history.

The 1973 Constitution not only retains and expands the delegation of powers provisions, incorporates verbatim the martial law provision, but also ratifies the acts promulgated by the President under martial law, reinforcing further the exercise of executive legislation. Its far-reaching scope is evident in the following transitory provision:[89]

> All proclamations, orders, decrees, instructions, and acts promulgated, issued, or done by the incumbent President shall be part of the law of the land, and shall remain valid, binding, and effective even after lifting of matrial law or the ratification of this Constitution, unless modified, revoked or superseded by subsequent proclamations, orders, decrees, instructions or other acts and explicitly modified and repealed by the regular National Assembly.

In ratifying the 1973 Constitution the barangays placed their imprimatur not only on the text of seventeen articles of the 1973 Constitution but on the presidential issuances which had as of that date been issued and others which were yet to be issued.

Whether this means that the issuances as "part of the law of the land" are of the same category as a constitutional mandate, was inquired into in the petitions for habeas corpus instituted for the release of Benigno S. Aquino and other political detainees.[90] Justice Cecilia Muñoz-Palma held the view that Section 3(2) of the transitory provisions did not foreclose inquiry into the validity of all decrees, orders and acts of the incumbent President. The effect of that provision is to invest on them "the imprimatur of a law but not a constitutional mandate." Like any other law or statute enacted by the legislative branch of the government they are subject to judicial review for "to claim the contrary would be incongruous to say the least for while acts of the regular National Assembly which is the permanent repository of legislative power under the Constitution are subject to judicial review, the acts of its temporary substitute, that is, the incumbent President, performed during the transitory period are not."

Mr. Justice Barredo, in the same case noted that the Solicitor General cited without elaborating on the provisions of General Orders Nos. 3 and 3-A taking out of the court's jurisdiction cases involving the validity, legality or constitutionality of Proclamation

---

89 Art. XVII, sec. 3(2).

90 In the matter of the Petition for Habeas Corpus of Benigno S. Aquino, et al. v. Ponce Enrile, G.R. No. L-35546, September 17, 1974 and its eight companion cases, 59 SCRA 183 (1974).

No. 1081 and the presidential issuances promulgated under martial law powers. He took this to mean that the "simplistic tenor" of the Solicitor General's defense must have been due to the well known fact that by the President's own acts publicized here and abroad, General Orders Nos. 3 and 3-A "are no longer operative insofar as they divest the Judiciary of jurisdiction to pass on the validity, legality or constitutionality of his acts under the aegis of martial law" and it was upon his instruction issued as early as September 24, 1972 that the Solicitor General submitted his return and answer to writs issued by the Supreme Court. In Justice Barredo's view "acts" of the President modifying or revoking previous issuances need not be as "express or explicit as in the case of the National Assembly. In other words when it comes to acts of the President, mere demonstrated inconsistency of his posterior acts with earlier ones would be enough for implied modification or revocation to be effective, even if no statement is made by him to such effect."[91] Mr. Justice Barredo did not elaborate on whether the term Acts is to be understood as subject to the rule of *ejusdem generis* or to be taken in a broad sense to mean any act whatever.

In *Aquino v. Commission on Elections*[92] the petitioners sought the nullification of a presidential proclamation calling a referendum for February 27, 1975, presidential decrees appropriating funds therefor, specifying the referendum questions and providing for other matters relative to the referendum. The right of President Marcos to continue in office after the expiration of his elective term on December 30, 1973 and his authority to issue the proclamation and presidential decrees in question were challenged. The Supreme Court through Mr. Justice Makasiar cited the 1973 Constitution on the "incumbent President," and affirmed that as Commander-in-Chief and enforcer or administrator of martial law, President Marcos as incumbent President of the Philippines "can promulgate proclamations, orders and decrees during the period of Martial Law." To dissipate all doubts as to the legality of such law-making authority the new Constitution explicitly provided that his issuances shall be part of the law of the land, not as a grant of authority to legislate, but a recognition of such power as already existing in favor of the incumbent President during the period of Martial Law.[93]

But the 1973 Constitution likewise created during the period of transition an *interim* National Assembly vested with the same powers as the regular National Assembly subject to certain ex-

[91] *Id.* at 375-376.
[92] G.R. No. L-40004, January 31, 1975, 62 SCRA 275 (1975).
[93] *Id.* at 298.

ceptions.[94] The *interim* National Assembly came into legal existence upon ratification of the 1973 Constitution. However, as the Supreme Court later on held the President had the discretion to determine when the *interim* National Assembly was to be convened. According to Mr. Justice Makasiar the pertinent constitutional provisions make it "patent that the President is given the discretion as to when he shall convene the *interim* National Assembly after determining whether the conditions warrant the same.[95]

The referendum of January 17, 1973 which yielded the view that the convening of the *interim* National Assembly be postponed for at least seven years from the approval of the Constitution was cited as basis for postponing the calling of the *interim* Assembly. Mr. Chief Justice Castro opined[96] that the transitory provisions "constitute an unmistakable warrant for the 'incumbent President' * * * to legislate (until, at the very earliest, the *interim* National Assembly shall have been convoked)." This was never done. Instead, the Constitution was amended in 1976.

The restrictive and liberal interpretations of the power of the President to legislate under martial law are reflected in views of members of the Supreme Court.

The minority view expressed by Mr. Justice Teehankee concedes to the President that power but qualifies it by saying that "his legislative and appropriation powers under martial law are confined to the law of necessity of preservation of the state which gave rise to its proclamations (including appropriations for operations of the government and its agencies and instrumentalities)."[97]

Mr. Justice Barredo's view is that the transitory provisions recognize legislative power in the incumbent President its scope being co-extensive with "what might be needed, primarily according to his judgment, to achieve the ends of his martial law proclamation, * * * the known broad objective of Proclamation No. 1081 is not only to contain or suppress the rebellion but also to reform our society and recognize and restructure our government and its institutions as the indispensable means of preventing the resurgence of the causes of the rebellion, * * *."[98]

In the process of effecting the 1976 amendment unsuspected facets of presidential legislative authority were brought out.

---

[94] Art. XVII, sec. 1.
[95] *Supra,* note 92 at 302.
[96] *Id.* at 306.
[97] *Id.* at 316-317.
[98] *Id.* at 326.

The amending process both in the 1935[99] and in the 1973 Constitutions involve participation of the legislature, either by initiating and itself proposing the amendments or by calling a constitutional convention to formulate the proposals. The 1973 Constitution introduced another alternative, namely, by presenting to the people the question of whether a convention should be convoked.[100] During the transition still another option is provided, which is, that upon call by the Prime Minister the *interim* Assembly by majority vote may propose amendment.[101] In each of the different methods, however, intervention of the legislature is necessary.

But in 1976 no legislative body was operating. The *interim* National Assembly, though legally in existence was not there in fact. The President's power to legislate having been upheld by the Supreme Court and ratified and confirmed by the 1973 Constitution, legislation by the executive progressed from not too certain foundations at the proclamation of martial law, to firmer bases as a result of decisions of the Supreme Court and to even more solid foundation through explicit provisions of the 1973 Constitution.

Since under both the 1935 and 1973 Constitutions the legislature could transform itself to a constituent body and propose amendments or call a convention for the purpose, could the President do likewise?

In the *Sanidad v. Commission on Elections*[102] and its companion cases, the Supreme Court upheld the power of the President to propose amendments to the Constitution and to submit them to the people for ratification. According to Mr. Justice Martin, "if the President has been legitimately discharging the legislative functions of the *interim* Assembly, there is no reason why

---

[99] Art. XV (1935), as amended, provides:

"The Congress in joint session assembled, by a vote of three-fourths of all the Members of the Senate and of the House of Representatives voting separately, may propose amendments to this Constitution or call a convention for that purpose. Such amendments shall be valid as part of this Constitution when approved by a majority of the votes cast at an election at which the amendments are submitted to the people for their ratification."

[100] Art. XVI (1973) provides:

"Section 1. (1) Any amendment to, or revision of, this Constitution may be proposed by the National Assembly upon a vote of three-fourths of all its Members, or by constitutional convention.

"(2) The National Assembly may, by a vote of two-thirds of all its Members, call a constitutional convention or, by a majority vote of all its Members, submit the question of calling such a convention to the electorate in an election.

"Sec. 2. Any amendment to, or revision of, this Constitution shall be valid when ratified by a majority of the vote cast in a plebiscite which shall be held not later than three months after the approval of such amendment or revision."

[101] Art. XVII, sec. 15.

[102] G.R. No. L-44640, October 12, 1976, 73 SCRA 333 (1976).

he cannot validly discharge the function of that assembly to propose amendments to the Constitution," which, to quote him "is but *adjunct*, although peculiar to its gross legislative power * * * with the *interim* National Assembly not convened and only the President and the Supreme Court in operation, the urges of absolute necessity render it imperative upon the President to act as agent for and in behalf of the people to propose amendments to the Constitution * * * in these parlous times, that presidential initiative to reduce to concrete forms the constant voices of the people reigns supreme. After all, constituent assemblies or constitutional conventions, like the President now, are mere agents of the people."[103]

Mr. Chief Justice Castro considering the question "unprecedented both here and elsewhere", referred to two *distinctly preceptible stages* in the transition from the old system under the 1935 Constitution.[104] The first stage comprised the period from the effectivity of the Constitution, January 17, 1973 to the time the *interim* National Assembly is convened. The second stage embraces the period from the date the *interim* National Assembly is convened to the date the government described in the main text of the 1973 Constitution is inaugurated. He said that neither of the two sets of provisions embodied in the 1973 Constitution on the amendatory process, applies to the first stage. According to him there was a constitutional *hiatus*. Referring to the conventional wisdom that conceptually the constituent power is not to be confused with legislative power, he also added that it would not altogether be unassailable to say that because the law-making authority at the first stage of transition is firmly recognized as being lodged in the President, the constituent power is logically in his hands. Instead, he cited *Gonzales v. Commission on Elections*[105] where the high court held that the power to amend the Constitution or to propose amendments thereto "is part of the inherent powers of the *people*." Reviewing the facts leading to the proposals for amendment, which as Justice Martin pointed out was not a unilateral act but proceeded from the demands of the Pambansang Katipunan ng mga Barangay, the Pambansang Katipunan ng mga Kabataang Barangay, the Lupong Tagapagpaganap of the Katipunan ng mga Sangguniang and finally the Batasang Bayan, the President merely acted as their spokesman in proposing the amendments.

Mr. Justice Fernando, now Chief Justice, unable to accept the view of the majority in this case expressed the doubts he entertained regarding the power of the President to propose amend-

[103] *Id.* at 368-369.
[104] *Id.* at 379-383.
[105] G.R. No. L-28196, November 9, 1967, 21 SCRA 774 (1967).

ments. He did not, however, register a dissent because according to him "there may be indeed in this far-from-quiescent and static period a need for amendments. I do not feel confident therefore that a negative vote on my part would be warranted."[106]

Mr. Justice Teehankee dissented on the ground that neither the 1935 nor the 1973 Constitution grants the incumbent President power to propose amendments.

Mr. Justice Barredo who in his concurring opinion described the part he played leading to the submission of the proposed amendments to the constitution, expressed the view that nothing in the procedure of amendment contained in the presidential decree was inconsistent with the fundamental principles of constitutionalism, and that the decree conformed admirably with the underlying tenet of our government—the sovereignty and plenary power of the people.

To the view expressed that the *interim* National Assembly authorized under the transitory provision upon call by the Prime Minister to propose amendments to the constitution should have been convened, Justices Barredo, Makasiar and Martin responded by referring to the referendum of January 17, 1973 where the people expressed the wish not to call the *interim* National Assembly for at least seven years.

Justice Concepcion opined that the authority to amend the constitution was removed from the *interim* National Assembly and transferred to the seat of sovereignty itself and the President when he proposed the amendments did not exercise his martial law legislative powers but acted as an instrument to carry out the will of the people.

Justice Cecilia Muñoz-Palma, dissenting said that "when the people have opted to govern themselves under the mantle of a *written constitution, each and every citizen from the highest to the lowliest, has the sacred duty to respect and obey the charter they have so ordained.*"[107]

The Supreme Court dismissed the petitions in the Sanidad and its companion cases on October 12, 1976. The amendments proposed by the President were ratified four days later. Two of the amendments explicitly vested law-making powers in the President/Prime Minister.

---

[106] *Supra,* note 102 at 399.
[107] *Id.* at 455.

C. *1976 Constitution*

The Government as it now operates is governed primarily by the 1976 amendments. Three of those amendments have direct bearing on the subject under inquiry.

The second sentence of Amendment No. 3 reads:

> The incumbent President of the Philippines shall be the Prime Minister and he shall continue to exercise all his powers even after the *interim* Batasang Pambansa is organized and ready to discharge its functions, and likewise he shall continue to exercise his powers and prerogatives under the 1935 Constitution and the powers vested in the President and the Prime Minister under this Constitution.

Hence, the provisions on delegation of powers previously discussed as well as the legislative powers pertaining to thhe Commander-in-Chief under martial law continue.

Two other amendments directly and clearly vest the powers of executive legislation.

Amendment 5 confers legislative power temporarily by providing:

> The incumbent President shall continue to exercise legislative powers until martial law shall have been lifted.

The next amendment imposes no time limitation on the President/Prime Minister's power to legislate. The provision reads:

> Whenever in the judgment of the President/Prime Minister there exists a grave emergency or a threat or imminence thereof, or whenever the *interim* Batasang Pambansa or the regular National Assembly fails or is unable to act adequately on any matter for any reason that in his judgment requires immediate action, he may, in order to meet the exigency, issue the necessary decrees, orders or letters of instructions, which shall form part of the law of the land.

While an attempt is made in the first clause to limit the occasion for executive legislation to the existence of a grave national emergency, in the second, the basis for exercising the power is comprehensive. The effect is not only to make the executive a second law-making body, but also the superior one in relation to both the *interim* Batasang Pambansa and the regular National Assembly. It is left for him to judge when the Batasang Pambansa or the regular National Assembly has failed or been unable to act adequately on any matter which in his judgment requires immediate attention.

The *interim* Batasang Pambansa convened on June 12, 1978. Since then it has enacted measures, including the general appropria-

tion laws, numerous local bills, tax measures, a law on bouncing checks, on the metric system, rentals, the registration of foreign agents, energy tax on electric power consumption, and a number of measures changing names of political subdivisions, schools, hospitals. Some of these measures amend presidential decrees.

Since the *interim* Batasang Pambansa under the 1976 amendments shall have the same powers and functions as the *interim* National Assembly and the regular National Assembly, except the power to concur in treaty-making and the President/Prime Minister is explicitly given the power to legislate under the conditions prescribed, two legislatures have been created and both operate as such. After June 12, 1979 at least fifty presidential decrees have been issued.[108] Considering the other powers concentrated in the hands of the President/Prime Minister, there can be no doubt as to which legislature has superior authority. While Batasang Bills have to be submitted to the President and are subject to his veto, Presidential Decrees require no Batasang action.

V. THE PHILIPPINE EXPERIENCE IN EXECUTIVE LEGISLATION

The grant to the President at the outbreak of World War II of extraordinary powers was brought about by necessity. The emergence of a total war prevented the legislature from meeting at all because of invasion and enemy occupation. The Commonwealth Government went into exile and what functions there were to be performed were carried on by one man, the President. The subjects for legislation by the Government-in-exile as the fate of the country hung on a balance, were few. But with the reestablishment of the government on Philippine soil and as the task of rehabilitation began, the President had to make full use of the delegated powers in appropriating funds, reorganizing the government including the judiciary from the highest court down, and providing for the multifarious problems the country faced until the Congress could be convened. However, even after the Congress began to operate, the President continued to legislate and it took more than five years and two Supreme Court decisions to write finis to this chapter in executive legislation. The experience demonstrated that power even when delegated once fully exercised is relinquished with reluctance.

The framers of the 1973 Constitution made sure that the problems arising from the delegation of emergency powers would not recur, but in doing so broadened the powers that may be exercised.

---

[108] Data obtained from the Office of the President, Malacañang.

Executive legislation under martial law and the developments affecting it are still unfolding. Brought into operation by direct act of the executive and not through delegation by the legislature, the exercise of this power has so expanded that it dominates the field of law-making. In the seven years since martial law and the President's assumption of the operations of the Government the exclusive power to legislate was his for more than five years. With the establishment of the Batasang Pambansa he has acted as a second legislature.

This study makes no attempt to content-analyze the output of this legislative activity. Significant measures have been promulgated by executive action, including the decrees adopting and approving the Integrated Reorganization Plan which according to the enabling act had to be accepted or rejected *in toto*.[109] Agrarian Reform and the Emancipation of Tillers of the Soil, Urban Reform, Mass Housing, Offshore Banking, Barangay Justice, codes including the Code of Muslim Customary Laws, the Child and Youth Welfare Code, the Revised Administrative Code, to mention a few.

An idea of the frequency of the exercise of the power can be obtained from the following figures obtained as of December 12, 1979:[110]

Presidential Decrees (1682 counting those numbered as -A or -B)	1,653
Letters of Instructions	965
General Orders	63
Letters of Implementation	106
Executive Orders	572
Administrative Orders	443
Proclamations, from #1081	850
Memorandum Orders	678
Memorandum Circulars	1,176

[109] Rep. Act No. 5435 (1968), sec. 4, provides:

"The Commission shall submit an integrated reorganization plan to the President not later than December 31, 1969, and the President shall, within forty days after the opening of the next regular session, submit the same to Congress with or without modification, together with a declaration that such reorganization is necessary to accomplish the purposes of Section One hereof. *No reorganization plan shall become effective unless expressly approved by Congress which must either accept or reject it in toto.* (Underscoring supplied).

"Upon approval of the reorganization plan or plans by Congress, the President shall forthwith implement the same by issuing the necessary executive order or orders subject to the limits of the Appropriation Act for the fiscal year during which the implementation is effected."

[110] The invaluable assistance of Mrs. Milagros Santos-Ong and Mr. Antonio Santos of the U.P. College of Law Library and of Professor Samilo Barlongay in obtaining these data is gratefully acknowledged.

These far exceed the output of Congress of the Philippines during the seven-year period immediately before martial law, which consisted of 2,380 statutes of which less than 200 are of permanent and general character.[111]

A useful purpose may be served if executive legislation is viewed from the vantage point of the theories and principles underlying the Philippine constitutional system.

That "The Philippines is a Republican State. Sovereignty resides in the people and all government authority emanates from them"[112] is basic in the political creed of the Filipino people. It is the first principle declared in both the 1935 and 1973 Constitutions[113] and the Supreme Court has relied on that principle in the landmark cases decided after martial law.

An essential feature of the constitutional government of this Republican State is the vesting of law-making power in an elective, representative, and deliberative assembly and the extreme care taken to provide substantive as well as procedural guidelines for the exercise of this power.

It can be conceded that some requirements in law-making prescribed by the Constitution can be complied with by the executive. Thus, a presidential decree can as easily observe the rule that a bill shall embrace only one subject which shall be expressed in the title,[114] as well as substantive limitations of the powers of taxation and appropriation.[115] But there are requirements and processes which only a deliberative body can satisfy, namely, those that are intended for the thorough discussion of proposed measures[116] and the placing on official record of the proceedings of the deliberations to the end that the representatives of the people can be heard and their wishes considered.[117]

The Chambers of the legislature are national forums where issues of national importance can be ventilated and discussed. So important is the participation of people's representatives in this forum that the Constitution clothes them with certain immunities. Thus a member of the Assembly is privileged from arrest during his attendance at its sessions, and in going to and returning from

---

[111] See TRINIDAD, PHILIPPINE PERMANENT AND GENERAL STATUTES, 4 v., UP Law Center (1971).

[112] CONST., Art. II.

[113] CONST., Art. II, sec. 1 (1935).

[114] CONST. (1935), art. VI, sec. 21(1); CONST., art. VIII, sec. 19(1).

[115] CONST. (1935), art. VI, secs. 22(1) & (3); 23; CONST., art. VIII, secs. 17(1) & (3), 18.

[116] CONST. (1935), art. VI, secs. 20(1), 21(2); CONST., art. VIII, sec. 19(2).

[117] CONST. (1935), art. VI, secs. 10(4), 20(1);CONST., art. VIII, secs. 7(4), 8(2).

the same except for offenses punishable with more than six years imprisonment, and for any speech or debate in the Assembly or in any committee thereof, a member shall not be questioned or made liable in any other place.[118]

While pressure groups may try to influence decisions of the legislature, it is normally more difficult to lobby for the approval of measures discussed and debated in open session, through several stages of deliberation by some two hundred members and a final submission to a separate branch of government than it would be in a summary action involving but one official.

Furthermore, the deliberations and debates on proposed measures are on record, and available for those who may want to know what the rationale was for the adoption of a statute and its particular provisions.

Positive law is rarely ever so clear on its face as to dispense with the need for interpretation. When doubts as to the meaning of provisions of law arise, legislative journals are invaluable extrinsic aids for construction.

It is true that presidential decrees are usually introduced by a preamble stating the reasons for the enactment. This serves a useful purpose, but as law students learn from the start a preamble is not part of the purview of a measure, and neither confers a right nor imposes an obligation. While the preamble gives an idea of the motives behind the enactment it does not indicate the intention of the framers as to the specific provisions.

The want of participation in the discussions by representatives of the various interests affected, results in frequent changes. Exemplifying this are the Labor Code,[119] the National Internal Revenue Code[120] and other measures.[121]

Another problem arises from lack of precision in the appropriate use of one form of issuance as against another. A presidential decree is equivalent to a statute enacted by the legislature, and is thus superior to implementing rules issued as executive orders or letter of instructions. But, it is not unheard of for an executive

---

118 CONST., art. VIII, sec. 9.

119 Pres. Decree No. 442 (1974) as amended by Pres. Decrees Nos. 570-A (1974), 626 (1974), 643 (1975), 823 (1975), 849 (1975), 850 (1975), 865-A (1975), 891 (1975), 1367 (1978), 1368 (1978), 1391 (1978), 1412 (1978), and Batas Pambansa 32 (1979).

120 Pres. Decree No. 1158 (1977), as amended by Pres. Decrees Nos. 1254 (1977), 1255 (1977), 1299 (1978), 1351 (1978), 1353 (1978) 1355-1359 (1978), 1393 (1978), 1456 (1978), 1457 (1978), 1469 (1978), and 1540 (1978).

121 Pres. Decree No. 1 (1972), as amended by Pres. Decree No. 1-A (1972) and Pres. Decree No. 1-B (1972); Pres. Decree No. 12 (1972) as amended by Pres. Decree Nos. 12-A to 12-B (1972); Pres. Decree No. 16 (1972) as amended by Pres. Decree No. 16-A; Pres. Decree No. 111 (1973) as amended by Pres. Decree No. 111-A (1973); Pres. Decree No. 1158 (1977) as amended by Pres. Decree No. 1158-A (1977).

order to amend or repeal a presidential decree[122] or a letter of instructions to amend an executive order, or lay down a rule of law.

This makes it difficult to keep up with changes in the law, can cause surprise and prejudice the interests of those affected. When one takes into account the fact that executive legislation is not accompanied by the publicity attending proposals for legislation which are subjected to public hearings before they are debated and discussed in legislative sessions, the concern over executive legislation is understandable. Revision projects and public discussions on them including those of the Law Center are unofficial activities *vis-a-vis* the legislative process and do not satisfy this need. Summary procedure, lack of public discussion, and frequent changes contribute to instability in the law. The flurry of codification which even now is taking place,[123] is an attempt at introducing a measure of stability and certainty.

VI. ASSESSMENT AND EVALUATION

Thirty-eight years have passed since the grant of extraordinary powers to the President under Commonwealth Act No. 671. The full record of how these powers were exercised is in. The necessity of the grant can be appreciated even better against the background of conflicts which threaten once again to plunge the world in a third and more horrible holocaust, some danger spots being uncomfortably close to home. Judging the performance of the Presidents who exercised the power pursuant to delegation under the act, all four including President Quirino acted with restraint ever aware that the legislative power pertained to another department of the government, and their exercise of it rested on delegated authoirty.

Philippine constitutions despite changes in governmental structure recognize the principle of separation of powers and make the legislature the repository of the power to make laws. However, they incorporate provisions for executive legislation either by authorizing its delegation or by directly conferring authority. Philippine Presidents have legislated under both these constitutional bases, either in place of or concurrently with the legislature.

Where law-making by the executive is delegated there can be no doubt that the authority of the principal, in this case the legislature, is superior to that of the agent. The emergency powers cases

---

122 The Philippine Center for Advanced Studies was created by Presidential Decree No. 342 (1973) and abolished by Executive Order No. 543 (1979). It is to be noted that the reorganization powers cited as basis for the Executive Order refers to the Reorganization of Government, normally the executive department, and a state university does not fall within that category.

123 Including those undertaken by the University of the Philippines Law Center.

made this clear. But where the executive's law-making authority is given directly by the constitution the situation changes.

The constitutional grant under the second category may be explicit or implied. The power to legislate not being explicitly conferred in the martial law provision it was left to the Supreme Court to determine in the cases brought before it whether law-making accompanied martial law powers. In the Planas case Justice Barredo expressed the view that the presidential decrees submitting the proposed constitution in a plebiscite for ratification and the appropriation of funds for the purpose were issued pursuant to powers delegated by the constitutional convention. Of course, that depended on whether the convention itself had these powers to begin with. Subsequently the court held that the President under martial law has power to legislate, although there was disagreement in the court as to the scope of that power. With that established, another step was taken when the 1976 amendments were drafted and submitted for ratification. One view advanced is that the President's constituent power is an "adjunct" to the "gross legislative power." The other view held by other members of the Supreme Court is that in proposing the amendments, the President was acting as an "instrument" of the people.

Thus, legislative power according to these views can be exercised by the executive through delegation from the legislature itself, from the constitutional convention or from the sovereign people. The 1976 amendments cut through elaborate rationalization by explicitly vesting through amendments 5 and 6 power in the President/Prime Minister to legislate.

Executive legislation having become part of the Philippine legal experience through the war years and the martial law regime, what can be said about it? Compared with law-making by the elective representatives of the people what advantages and disadvantages can be discerned in the process?

On the positive side it can be said of executive legislation that:

1. It is more speedy and responsive. By its very nature a deliberative body composed of some 200 members requires time to reach a decision by majority vote. In case of emergency when the need is urgent and action must be forthcoming, executive legislation would be more effective.

2. It is less expensive. One man promulgating a measure would spend less of the public revenue than a whole assembly bound by complex procedures deliberating and adopting a law.

3. Responsibility for legislation is clearly pinpointed.

4. Flexibility is introduced.

5. Optimum use can be made of expertise and the active involvement of the bureaucracy which will implement the measures.

6. Unity in policy making and its execution may be more easily achieved.

The disadvantages of executive legislation are:

1. The public discussion of proposed measures by the people and their chosen representatives is dispensed with.

2. The lack of publicity in the proceeding leading to the adoption of measures causes surprise and uncertainty.

3. Summary process in the adoption of laws and frequency in amendment erode legal stability.

4. Pressure groups can more easily push their interests.

5. It defeats the purpose of representative government and is inconsistent with the policy of popular participation.

6. Absence of recorded proceedings takes away a valuable aid in the construction and application of laws.

7. The withholding from general circulation of some presidential issuances create an atmosphere of insecurity.

8. It is law-making by one man. The best and most durable of leaders must one day depart the scene and leave a hiatus not easily filled.

VII. CONCLUSION

Philippine constitutionalism is founded on the principle of popular representation. The people in the constitution of 1935 and 1973 made the legislature not only the repository of law-making power but imposed on it the responsibility for implementing through legislation the basic policies enunciated. Grant to the executive of the power to legislate, is the exception, not the rule.

For the government to pursue and approximate the ideal of securing the blessings of democracy, it is essential that the limits and purposes of the constitutional grant to the executive to legislate be fully understood. It is intended to be temporary, not permanent; to aid and not supplant the legislature.

The 1976 amendments, however, depart from the moorings of constitutional government established in 1935 and 1973. What is more, amendment 6 places no time limit on the authority of the President/Prime Minister to legislate in place of the Batasang Pam-

bansa or the regular National Assembly in the situations contemplated.

The mischief introduced by amendment 6 could have been minimized if its duration were placed within a specified time frame. This has not been done.

Expansive interpretation of the constitution and judicial imprimatur on deviations from conventional rules of constitutional law have contributed to the magnitude that executive legislation has attained. The oft-cited justification offered is that the sovereign people having spoken, the letter of the constitution should not defeat their will. This brushes aside a time-honored principle that having adopted a written constitution, the people bind themselves to respect its limitations.

It is time to find our constitutional bearings. Two legislatures simultaneously operating under the same constitution and over identical areas of legislation could not have been intended. Nor is a transition period meant to be permanent. It is but a means of arriving at desired objectives which in the field of legislation is to make operative the parliamentarism envisioned in the 1973 Constitution. There is therefore need to restore fully the legislative function to the agency of government to which it appropriately belongs.