THE DECREE POWER AND THE 1981 AMENDMENTS: A RE-INTERPRETATION

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> Two or more of the [legislative, executive, and judicial] powers shall never be vested in one person or corporation; neither shall the legislative power be entrusted to a single individual.[1]

INTRODUCTION

Every study of the Constitution begins with the basic principle that the constitution is the fundamental and supreme law of the land. The validity of every act of government is judged on the basis of its conformity with or, the very least, its non-repugnancy to the constitution. The best way to put beyond legal question the exercise of a particular power by government is, therefore, to provide express constitutional sanction to the exercise of such power.

To obviate any legal challenge into the validity of a specific act of government, the constitution may be so drafted, or amended, as to expressly remove from the ambit of judicial review such act of government. Thus, to give Parliament the sole authority for determining the amount of compensation to be paid in the acquisition of private property authorized by law, the Indians amended their Constitution to provide:

> ... no such law [authorizing the acquisition of property] shall be called in question in any court on the ground that the amount so fixed or determined is not adequate or that the whole or any part of such amount is to be given otherwise than in cash.[2]

Likewise, to avoid the impediment of an existing constitutional restriction on the exercise of specific powers or privileges, amendments may be introduced to remove such restriction from the text of the constitution. In the infamous Parity Blackmail, the Americans conditioned the grant of rehabilitation aid and payment of war damages to the Philippines on the amendment of the Philippine Constitution so as to give equal rights to the Americans to exploit natural resources and operate public utilities in the Philippines.

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1 MALOLOS CONST. Title II, art. 4.

2 INDIA CONST. art. 31, as amended by the 25th Amendment.

But "tailoring" the constitution to secure to the dominant political forces the legal instrument for the attainment of their political objectives is fraught with dangerous implications. It may undermine the respect accorded to the constitution and erode its stability as the fundamental law. In Thailand, almost every successful *coup* leader sets aside the constitution promulgated by the leader he had deposed and puts up his own Constitution to govern the country. The Thais have had no less than 13 Constitutions in almost so many number of *coups* and counter *coups* since 1932.[3] This makes almost every Thai Constitution a personal charter of a particular regime under a *coup* leader.

Even in stable liberal democracies, the Constitution may be tampered with in the height of popular passion. The 18th Amendment to the Constitution of the United States was adopted as a result of the popular temperance movement in the early part of the twentieth century. The movement soon subsided and the Prohibition Amendment was swiftly repealed in 1933.

A constitution, especially if it is a codification by a constitutional convention, is usually conceived as an integrated instrument with every part fitting into a harmonious and coherent whole. Any "tailored" amendment will often disrupt this internal balance in an existing constitution. This is especially true because the "tailored" amendment usually seeks to provide the exercise of a specific power which hitherto does not exist, or hitherto was reposed in a specific organ of government. Or the amendment may seek to remove the obstacle in the form of limitations — express or implied — to the exercise of specific powers, which limitations may have been established precisely to achieve a desired balance among the different organs of government.

When the internal consistency and balance in a constitution is disrupted by the introduction of a "tailored" amendment, there is need for a new interpretation of its provisions in order to strike a new balance. A constitution which suffers from the serious malady of internal inconsistency can hardly serve its purpose as a fundamental law because one provision of the constitution will negate another of its provision.

Where one provision of the constitution commands the performance of a particular act and another provision of the same constitution prohibits the peformance of said act, both provisions cannot be given effect at the same time, for obvious reasons. One provision must give way to the other, or one provision may be made effective at one time while the other provision may take effect at some other time. These are some ways by which the conflicting provisions may be harmonized so as to achieve internal consistency with in a particular constitution. This vital function of interpreta-

[3] *See* MARUT BUNNAG, *Thailand* in 14 BLAUSTEIN & FLANZ (eds.) CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (1979).

tion or reinterpretation of the constitution is formally vested with the Judiciary.

It is in the light of these basic postulates that we look into the decree power clause in the 1976 Amendments and its status and role in the present Philippine constitutional system in the light of the 1981 Constitutional Amendments.

THE 1976 AMENDMENTS

In 1976 the martial law government in the Philippines was four years old. President Marcos' indefinite continuance of his martial law rule enjoyed constitutional sanction under the Transitory Provisions of the 1973 Constitution as interpreted by the Supreme Court.[4] Yet he was vexed by the fact that the Philippines was about the only state in the world without a national legislature. His own refusal to convene the *interim* National Assembly,[5] understandably because it was packed with some of the ablest and most outspoken critics and opponents of his martial law rule,[6] was the direct cause of his vexation.

How can an acceptable legislature be established under the circumstance? *Amend the Constitution!*

There was an important hitch to this simple solution. Under the 1973 Constitution, the *interim* National Assembly itself was vested with the constituent power of proposing amendments to the Constitution.[7] This legal obstacle was eliminated on October 12, 1976 when the Supreme Court held in *Sanidad v. COMELEC*[8] that:

> ... with the *interim* National Assembly not convened and only the Presidency 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.[9]

Without the constraints of a representative constituent assembly,[10] the temptation of having amendments tailored to secure the existing personal

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[4] *See* Aquino v. COMELEC, G.R. No. 40004, Jan. 31, 1975, 63 SCRA 546 (1975); Aquino v. Military Commission No. 2, G.R. No. 37364, May 9, 1975, 63 SCRA 546 (1975).

[5] The interim legislative body provided for under the Transitory Provisions (Article XVII) of the 1973 Constitution.

[6] The *interim* National Assembly was composed of "the incumbent President and Vice President ..., President of the [1971] Constitutional Convention, those Members of the Senate and the House of Representatives who shall express ... their option to serve therein, and those Delegates to the [1971] Constitutional Convention who have opted to serve therein by voting affirmatively for this Article [Transitory Provisions]." CONST. (1973), art. XVII, sec. 2.

[7] CONST. (1973), art. XVII, sec. 15. It would have been impolitic to call for a constitutional convention — the other available mode of proposing amendments — because it would require an election of delegates to the convention.

[8] G.R. No. 44640, Oct. 12, 1976, 73 SCRA 333 (1976).

[9] *Id.* at 368.

[10] President Marcos had to bargain with the Delegates to the 1971 Constitutional Convention before the vital changes which institutionalized his martial law

dominance of President Marcos in government was irresistible. Therefore, it was not unexpected that, while the purpose adduced for amending the Constitution was to replace the *interim* National Assembly with a more acceptable *interim* legislative body, the 1976 Amendments did not stop with the establishment of the *interim* Batasang Pambansa.[11] In addition, the incumbent President was expressly made both President and Prime Minister of the transition government.[12] It was further provided that he shall "continue to exercise legislative powers until martial law shall have been lifted."[13] Finally, to secure the exercise of extraordinary martial law power by the President without the burden of the odious connotation of the term "martial law", and to avoid the temporal limitations of the "invasion, insurrection, or rebellion, or imminent danger thereof, when public safety requires it" to which martial law is bound,[14] Amendment No. 6 was included in the 1976 Amendments.

Amendment No. 6 provides:

> 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.

SEPARATION OF POWERS V. DECREE POWERS: A HISTORICAL PERSPECTIVE

The exercise by the executive of powers legislative in character is not new in the Philippine constitutional scheme. Traditionally, it had come in the form of emergency powers of the executive. But being in derogation of the fundamental principle of separation of powers, the power of executive legislation have always been strictly circumscribed by specific constitutional limitations on its exercise.

Separation of powers was a basic feature of the Constitution of the First Philippine Republic[15] adopted by the Revolutionary Congress and promulgated by Gen. Emilio Aguinaldo on January 21, 1899. But as con-

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acts were carried into the Transitory Provisions of said Constitution. The 1976 Amendments did have the endorsement of the hastily organized Batasang Bayan — an advisory body created under Presidential Decree No. 985 (1976) composed of 19 Cabinet members, 9 officials with cabinet rank and 91 members of the Lupong Tagapagpaganap (executive committee) of the Katipunan ng Mga Sangguniang Bayan (federation of local government legislative bodies). Sanidad v. COMELEC, *supra* at 369.

[11] The *interim* Batasang Pambansa was composed of "the incumbent President ... representatives elected from the different regions ...., those ... elected by their respected sectors, and those chosen by the incumbent President from the Members of the Cabinet." 1976 Amendments, No. 1.

[12] 1976 Amendments, No. 3.

[13] 1976 Amendments, No. 5.

[14] CONST. (1973), art. IX, sec. 12.

[15] Popularly known as the Malolos Constitution.

ceived by Mabini[16] and the drafters of the Malolos Constitution, separation of powers was never intended to secure a system of checks and balances. It was rather a division of powers for specialization in governmental functions.[17] The legislature as the popular and representative organ of government was meant to dominate the executive and the judiciary.[18]

Mabini advocated a strong executive as a matter of necessity during the duration of the revolution, and later, the war against the Americans. Alluding to this he advised:

> The ship of State is threatened by great dangers and terrible tempests, and this circumstance, in my opinion, renders it advisable that the three powers be to a certain extent combined for the present in a single hand, so that she may be guided with the force necessary in order to avoid all reefs.[19]

But the *ilustrado*-dominated Congress was fearful of Gen. Aguinaldo because he had the support of the masses. It therefore insisted on an executive who was subordinate to the legislature. As a compromise, several Transitory Provisions were added to the Malolos Constitution before it was finally approved. One of the transitory provisions, Article 99, provides:

> ...during the time that the country may have to struggle for its independence, the government is authorized, while Congress is closed, to determine whatever questions and difficulties not provided for by laws, may arise from unforseen events, by means of decrees...

The decrees thus promulgated were then to be communicated to Congress or its Permanent Commission.

This was a deviation, justified by the actual state of emergency, from the fundamental principle expressed in the Malolos Constitution that:

> Two or more of the [legislative, executive, and judicial] powers shall never be vested in one person or corporation; neither shall the legislative power be entrusted to a single individual.[20]

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16 Apolinario Mabini, the foremost Thinker of the Philippine Revolution, expressed the political theory behind separation of powers in this wise: "Society should have a soul: authority. This authority needs an intellect to guide and direct it: the legislative power. It also needs a will that is active and will make it work: the executive. It needs, too, a conscience that judges and punishes what is bad: the judicial power. These powers should be independent of one another, in the sense that one should never encroach upon the functions of the other, but the last two should be subordinated to the first, in the same manner that both will and conscience are subordinate to the intellect." *La Trinidad Politica,* LA REVOLUCION FILIPINA, Vol. II, p. 69, *quoted in* MAJUL, THE POLITICAL AND CONSTITUTIONAL IDEAS OF THE PHILIPPINE REVOLUTION 174 (1967).

17 MAJUL, *supra* at 172-173.

18 *Id.* at 173-174.

19 Mabini's Memorandum to the Council of Government on Dec. 13, 1898. 3 TAYLOR, PHILIPPINE INSURGENT RECORD, Exhibit 320, *quoted in* MAJUL, *supra* at 166.

20 MALOLOS CONST. Title II, art. 4.

Except for the brief period when the American Military Governor exercised all State powers, the division of powers into executive, legislative, and judicial, each vested in separate organs was maintained by the Americans when they occupied the Philippines. The American concept of separation of powers with its corollary system of checks and balances was introduced in 1916 with the passage of the Philippine Autonomy Act, popularly known as the Jones Law, by the United States Congress.[21] Under that Organic Act, the Governor-General, the Philippine Legislature, and the Supreme Court were separate and independent branches of government. However, the American Governor-General as the symbol of American colonial control was vested with vast powers which enabled him to stand out as the dominant of the three branches of government.[22] One such power is the power to declare martial law.[23]

The Constitution of the Commonwealth (and later the Republic) of the Philippines adopted by the Filipino people in 1935 faithfully maintaining the American concept of separation of powers with the corollary checks and balances, established the Presidency, Congress,[24] and the Supreme Court as separate, independent, and co-equal organs of government. The martial law powers was vested in the President as Commander-in-Chief of all armed forces of the Philippines.[25]

The Constitution likewise provided that: "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."[26] Furthermore: "The Congress may by law authorize the President, subject to such limitations and restrictions as it may impose, to fix within specified limits, tariff rates, import or export quotas, and tonnage and wharfage dues."[27]

The system under the 1935 Constitution was maintained until September 21, 1972[28] when President Marcos declared martial law and assumed all powers of government, invoking his powers as Commander-in-Chief of

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21 V. V. MENDOZA, FROM MCKINLEY'S INSTRUCTIONS TO THE NEW CONSTITUTION: DOCUMENTS ON THE PHILIPPINE CONSTITUTIONAL SYSTEM 16 (1978).

22 *Id.* at 17.

23 Philippine Autonomy Act, Sec. 21 (b) "... [the Governor-General] may in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, ... place the [Philippine] Islands, or any part thereof, under martial law; Provided that whenever the Governor-General shall exercise this authority, he shall at once notify the President of the United States thereof, together with the attending facts and circumstances, and the President shall have the power to modify or vacate the action of the Governor General."

24 The unicameral National Assembly originally provided for under the 1935 Constitution was replaced by the bicameral Congress in an Amendment adopted on June 18, 1940.

25 CONST. (1935), art. VII, sec. 10 (2).

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

27 CONST. (1935), art. VI, sec. 22 (2).

28 The brief interlude of the puppet government under President Jose P. Laurel during the Japanese occupation of the Philippines is not included in the discussion.

all armed forces in the Philippines.[29] Meanwhile, the Constitutional Convention which was convened in 1971 to propose amendments to the 1935 Constitution finally came out with a draft Constitution on November 30, 1972. President Marcos proclaimed that this draft Constitution had been ratified and had come into effect on January 17, 1973.[30] Notwithstanding the highly questionable and anomalous circumstances under which said Constitution was submitted to the people for ratification, the Supreme Court did not offer any objection to the Executive declaration that said Constitution was in force and effect.[31]

The 1973 Constitution established a parliamentary form of government with a very powerful Prime Minister. Separation of powers was maintained by the actual distribution of executive, legislative, and judicial powers to three separate organs of government, namely: the Prime Minister and his Cabinet, the National Assembly, and the Supreme Court, respectively. But the 1973 Charter abandoned the American concept of separation of powers which requires that the three organs of government be independent from each other. The Chief Executive, the Prime Minister, was elected by the Members of the National Assembly from among themselves,[32] and they can dismiss him by electing a successor Prime Minister.[33] On the other hand, the Prime Minister had the power to dissolve the National Assembly and call for a general election.[34] These very mechanism for parliamentary interdependence and cooperation between the Executive and the Legislature also formed the basis of an effective system of checks and balances between these two political organs of government.

The 1973 Constitution retained the martial law powers vesting it with the Prime Minister.[35] Likewise maintained was the authority of the National Assembly, in times of war or other national emergency, to authorize the Prime Minister by law, for a limited period and subject to such restrictions as it may prescribe, to exercise powers necessary and proper to carry out a declared national policy.[36] The provision authorizing the delegation of power by the legislature to the executive to fix tariff rates, import or export quotas, and tonnage and wharfage dues was expanded to include "other duties or imposts."[37]

But the parliamentary form of government provided for under the 1973 Constitution was never implemented. A paragraph in the Transitory Provisions expressly recognized as "part of the law of the land", and, there-

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[29] Proc. No. 1081 (1972); Gen. Order No. 1 (1972).
[30] Proc. No. 1102 (1973).
[31] Javellana v. Executive Secretary, G.R. No. 36142, March 31, 1973, 50 SCRA 30 (1973).
[32] CONST. (1973), art. IX, sec. 3.
[33] CONST. (1973), art. VIII, sec. 13 (1).
[34] CONST. (1973), art. VIII, sec. 13 (2).
[35] CONST. (1973), art. IX, sec. 12.
[36] CONST. (1973), art. VIII, sec. 15.
[37] CONST. (1973), art. VIII, sec. 17 (2).

fore, "valid, legal, binding and effective" all proclamations, orders, decrees, instructions, and acts promulgated, issued or done by the incumbent President.[38] The declaration of martial law and all martial law acts of President Marcos was, therefore, given express constitutional sanction.

Notwithstanding that "part of the law of the land" clause giving constitutional recognition to the exercise by the President of all powers of government during martial law, it was the intent and spirit of the 1973 Constitution to preserve the separation of powers even during the transition period. The Transitory Provision, for this purpose, specifically provided for an *interim* National Assembly in which legislative powers was vested during the period of transition.[39]

Philippine constitutional history reveals a pattern of distribution of executive, legislative and judicial powers among the three separate organs of government. It also provides for well defined exceptions: the extraordinary powers of the executive during period of emergency and the delegated power to fix tariff and other duties and imposts. The second occasion for executive legislation is not productive of much controversy because its subject is confined to the narrow field of fixing "tariff rates, import and export quotas, tonnage and wharfage dues, and other duties or imposts." And here, the delegated power of the executive is only "within specified limits" set by law, and is further subject to "such limitations and restrictions" as the legislature may impose. The emergency powers of the executive is much more flexible and, therefore, a more fertile ground for controversies.

THE EMERGENCY POWERS

Mabini recognized the necessity of the fusion of the three powers of government in the executive during the duration of the revolution and war. This basic idea is more refined with Clinton Rossiter whose rationalization of constitutional dictatorships have been the main support of the Philippine Supreme Court decisions in the martial law cases. According to Rossiter:

> [t]he concentration of government power in a democracy faced [with] an emergency is [ ] corrective to the crisis inefficiencies inherent in the doctrine of the separation of powers. In most free states it has generally been regarded as imperative that the total power of the government be parceled out among three mutually independent branches — executive, legislative, and judiciary. It is believed to be destructive of constitutionalism, if any one branch should exercise any two or more types of power,... In normal times the separation of powers forms a distinct obstruction to arbitrary governmental action. By this same token, in abnormal times it may form an insurmountable barrier to a decisive emergency action in behalf of the state and its independent existence. There are moments in the life of any government when all powers must work together in unanimity of purpose and action, even if this means the temporary

[38] CONST. (1973), art. XVII, sec. 3 (2).
[39] CONST. (1973), art. XVIII, sec. 1; *See* Separate Opinion of Justice Muñoz Palma in Aquino v. COMELEC, *supra*, note 3 at 348.

> union of executive, legislative, and judicial power in the hands of one man. The more complete the separation of powers in a constitutional system, the more difficult and yet the more necessary will be their fusion in time of crisis. . . . The power of the state in crisis must not only be concentrated and expanded; it must also be freed from the normal system of constitutional and legal limitations.[40]

The rationale for the exercise of emergency powers is, therefore, *overwhelming necessity for the preservation of the State.* This rationale would apply to the exercise of martial law powers because the precondition for its exercise rests on specific dangers to the security of the State in the form of "invasion, insurrection, or rebellion, or imminent danger thereof, when public safety requires it."

The rationale would also apply to the exercise of emergency powers delegated by the legislature, with one important distinction, and added limitation — the consent of the legislature to the exercise of emergency powers is expressly given. In fact the executive would be acting merely as an agent of the legislature when he exercises the delegated powers, and is, therefore, subject to whatever limitation as may be prescribed by the legislature.

DECREE POWER UNDER AMENDMENT NO. 6 AND OTHER EMERGENCY POWERS: DISTINCTIONS

The decree power under Amendment No. 6 can be distinguished from the martial law powers[41] and the delegated emergency powers[42] with respect to their precondition, nature, and duration.

Precondition

Martial law may be declared only "in case of invasion, insurrection, or rebellion, or imminent danger thereof, when the public safety requires it." The exercise of martial law powers is, therefore, narrowly confined to specific national security dangers. This strict limitation is proper because of the nature of martial law powers which experience have shown to be essentially derogatory to fundamental principles, structures and safeguards in the constitutional system.

In the case of delegated emergency powers the Constitution specifically mentions war as a sufficient basis therefor. It may be declared or undeclared war.[43] What constitutes "other emergency" which would also

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[40] ROSSITER, CONSTITUTIONAL DICTATORSHIP 288-290 (1948); *Quoted in* Sanidad v. COMELEC, *supra*, note 7 at 365-366.

[41] CONST., art. VII, sec. 9; CONST. (1973), art. IX, sec. 12; CONST. (1935), art. VII, sec. 10, par. (2).

[42] CONST., art. VIII, sec. 15; CONST. (1973), art. VIII, sec. 15; CONST. (1935), art. VI, sec. 25.

[43] FERNANDO, THE CONSTITUTION OF THE PHILIPPINES 238 (1977).

justify the delegation is left to the discretion of the legislature. Certainly, cases of "[ ], insurrection, rebellion, or imminent danger thereof, when public safety requires it" can qualify as "other emergency". Those circumstances can justify the declaration of martial law during which, by interpretation of the Supreme Court, all powers of government can be exercised by the executive. Since delegated emergency powers is subject to limitations prescribed by the legislature as to the duration and manner of its exercise, it follows that martial law powers is greater and more extensive than the delegated emergency powers. Therefore, whatever emergency may justify the exercise of the former will be sufficient to justify the latter.

Chief Justice Fernando is of the view that economic depression could be a direct threat to a nation's continued and constitutional existence and it may reach a gracity amounting to a war or rebellion.[44] To him, economic depression constitutes another emergency sufficient to justify the delegation of emergency powers to the executive. Again, this is an echo of Rossiter who identified war, rebellion, and economic depression as crises which would justify a governmental resort to dictatorial institutions and powers.[45] This also brings to mind the Supreme Court's expansion of the scope of martial law power to include "the institution of reforms to prevent the resurgence of rebellion or insurrection or secession or the threat thereof as well as to meet the impact of a worldwide recession, inflation or economic crisis which presently threatens all nations."[46]

In *Rodriguez v. Gella*,[47] the Supreme Court implied that the emergency powers may likewise be delegated in case of natural calamities such as typhoons, earthquakes, volcanic eruptions, etc. One important qualification established in that case is that the statute delegating the emergency power must specify such emergency. And a statute delegating emergency powers to the President in times of war cannot be invoked by the President to exercise emergency powers necessary to cope with the emergency brought about by natural calamities after the war has ended.

The narrow national security limitation on martial law powers does not apply to the decree power under Amendment No. 6 because said amendment only speaks of "grave emergency or a threat or imminence thereof." In this respect, it is similar to the other causes sufficient to justify the delegation of emergency powers, i.e., the open-ended "other emergency." But there is an important distinction. Whereas it is the legislature that determines what constitutes "other emergency" which would justify it to delegate the emergency power to the executive, in case of the decree power under Amendment No. 6, it is the President himself — the same executive who will exercise the decree power — who determines the existence of

44 *Ibid.*
45 ROSSITER, *op. cit. supra* at 6.
46 Aquino v. COMELEC, *supra*, note 3 at 298.
47 92 Phil. 603 (1953).

"grave emergency or imminence thereof" that will justify the exercise of the power.

The exercise of decree power is not even limited to cases involving grave emergency or imminence thereof because it may be invoked "whenever the [Batasang Pambansa] fails or is unable to act adequately on any matter for any reason that in [the President (Prime Minister's)] judgment requires immediate action." Again, what matters require immediate action and what constitutes failure or inability of the Batasan to act adequately is left to the discretion of the President (Prime Minister).[48]

Nature

The Constitution does not define what constitutes martial law powers, but by executive construction upheld by the Supreme Court, it includes the power to legislate as well as judicial powers. The Supreme Court has affirmed "the proposition that as Commander-in-Chief, and enforcer or administrator of martial law, [the President] can promulgate proclamations, orders and decrees during the period of Martial Law essential to the security and preservation of the Republic, to the defense of the political and social liberties of the people and to the institution or reforms to prevent the resurgence of rebellion or insurrection or secession or the threat thereof as well as to meet the impact of a worldwide recession, inflation or economic crisis. . . ."[49] This interpretation has greatly expanded the scope of martial law powers.

The President's exercise of judicial powers during martial law was likewise affirmed by the Supreme Court. In *Aquino v. Military Commission No. 2*,[50] the Court held that military tribunals created on orders of the President to try certain specified cases which he had removed by decree from the jurisdiction of regular courts were validly constituted. These military tribunals were instrumentalities of the Executive and did not form part of the judicial system.[51] Nevertheless, the Court held that these military tribunals had jurisdiction to hear cases against civilians, even while civil courts were open and exercising their regular functions.

The Supreme Court even conceded the exercise of constituent powers to the President.[52] Martial law powers is, therefore, vast and practically unlimited. It must be noted, however, that this expansive interpretation may be because of the express constitutional sanction accorded to the President's exercise of extraordinary powers in the Transitory Provisions of the 1973

[48] Tolentino, *The Effect of the 1976 Amendments on the Legislative Process: The Batasang Pambansa*, in 1976 AMENDMENTS AND THE NEW CONSTITUTION 55, 62 (1978).

[49] Aquino v. COMELEC, *supra*, note 3 at 298.

[50] G.R. No. 37364, May 9, 1975, 63 SCRA 546 (1975).

[51] Dissenting Opinion of Justice Claudio Teehankee in Aquino v. Military Commission No. 2, *supra*, note 3 at 619.

[52] *See* Sanidad v. COMELEC, *supra*, note 7.

Constitution and in Amendment No. 5 of the 1976 Amendments. These were read by the Supreme Court as virtual licenses for the President to legislate without limitation as to the subject and nature of the resulting legislations.

In the case of delegated emergency powers, the executive is authorized "to exercise powers necessary and proper to carry out a declared national policy." This change in phraseology introduced in the 1973 Constitution from the original phrase: "to promulgate rules and regulations to carry out a declared national policy" is a recognition that the emergency powers which the executive may deem necessary to exercise during the duration of the emergency (or grant of delegated power, whichever is shorter) is not mere administrative rulemaking but includes legislative power. In fact, the Presidents who exercised emergency powers delegated in 1939 to 1940 actually issued acts which were essentially legislative in character.[53]

The delegated emergency power may be limited or comprehensive depending upon the statute in which the delegation was made, or in other legislative act which prescribes the condition and restrictions to the exercise of delegated emergency powers. Does it include the exercise of judicial powers? Actual exercise of such delegated emergency powers by four Presidents[54] did not include the exercise of judicial power. It is submitted that such emergency powers delegated cannot include judicial power because the principal, the legislature, does not have judicial power and therefore, cannot delegate an authority which it does not possess in the first place.

Amendment No. 6 provides that the President (Prime Minister) may in order "to meet the exigency" which gave rise to the necessity for exercise of emergency powers "issue the necessary decrees, orders, or letters of instructions, which *shall form part of the law of the land.*" The legislative character of these decrees, orders or letters of instructions cannot be denied. But this decree power is not a license for the exercise of plenary power. In case of "grave emergency or a threat or imminence thereof", he can only exercise such legislative power necessary "to meet the exigency."[55] In case of the failure or inability of the Batasan to act adequately on any matter that requires immediate action, the President (Prime Minister) may legislate only on the particular matter that requires immediate action.[56]

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[53] The subjects covered by the Presidential acts included the appropriation of funds, fixing of prices, reorganization of government, the increase in the membership of the Supreme Court, abolition of the Court of Appeals, creation of a peoples court, amendments to penal laws and the corporation law. *See* Cortes, *Executive Legislation: the Philippine Experience,* 55 PHIL. L. J. 1, 6 (1980).

[54] President Manuel L. Quezon and President Sergio Osmeña, Sr., from 1939 to 1944 and from 1944 to 1946, respectively, of the Commonwealth. President Manuel Roxas and President Elpidio Quirino, from 1946 to 1948 and from 1948 to 1952, respectively, of the Republic. *See* Cortes, *supra* at 3-9.

[55] Tolentino, *op. cit, supra,* note 48 at 63.

[56] *Id.* at 62.

Can the executive exercise judicial power under Amendment No. 6? It is submitted that he cannot because it is a basic principle in our constitutional system that judicial power is vested only in the Supreme Court and in such inferior courts as may be established by law.[57] The reasoning in *Aquino v. Military Commission No.2*[58] cannot be applied because that case was decided in the context of martial law and the ratificatory nature of the "part of the law of the land" clause in the Transitory Provisions.

Duration

The extraordinary martial law powers of the executive is coterminous with the duration of martial law. Since martial law itself is predicated on the existence of "invasion, insurrection, or rebellion, or imminent danger thereof, when the public safety requires it," martial law cannot validly exist when these national security problems have ceased to exist, or have ceased to pose any danger to the public safety.

But the Supreme Court was divided on the question of whether the existence of conditions claimed to justify the exercise of the power to declare martial law is subject to judicial inquiry. In *Aquino v. Ponce Enrile*,[59] five justices[60] of the Supreme Court expressed the view that the question was political and, therefore, its determination was beyond the jurisdiction of the Court. Four Justices[61] held that the constitutional sufficiency of the declaration may be inquired into by the Court to determine whether the President acted arbitrarily or not. Another Justice[62] was of the view that the Court should abstain from interfering with the executive proclamation of martial law, because it deals with national security, for which the responsibility is vested by the Charter in the executive alone. But the Court should act when its abstention from action would result in manifest and palpable transgression of the Constitution proven by facts of judicial notice. The question of whether the Court can review the validity of the executive proclamation of martial law, or of an executive determination of the continuance of martial law, therefore, remains open.

In the case of delegated emergency powers, the Constitution is clear that said delegation is "for a limited period" and "unless sooner withdrawn by resolution of the [legislature], such powers shall cease upon its next adjournment." This specific provision was the result of the lesson learned from the Emergency Powers Cases[63] of the 1950's. As late as 1952, more than seven years after the surrender of Japan, the President continued to invoke Commonwealth Act No. 671 which delegated emergency powers to the President in 1941, to issue Executive Orders in the nature of legis-

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57 CONST., art. X, sec. 1.
58 *Supra*, note 50.
59 G.R. No. 35546, Sept. 17, 1974, 59 SCRA 183 (1974).
60 Justices Makasiar, Antonio, Esguerra, Fernandez and Aquino.
61 Justices Castro, Fernando, Teehankee and Muñoz Palma.
62 Justice Barredo.
63 Araneta v. Dinglasan, 84 Phil. 368 (1949); Rodriguez v. Gella, 92 Phil. 603 (1953).

lations. The Supreme Court struck down as void those Executive Orders "for having been issued after Commonwealth Act No. 671 had lapsed and/or after Congress has enacted legislation on the same subject."[64] The 1973 Constitution adopted the Supreme Court ruling that the delegation of emergency powers by the legislature to the executive must be for a limited period, and it may be withdrawn by the legislature without the consent of the executive.[65]

THE 1981 AMENDMENTS

After nearly nine years and four months of martial law rule, and after incorporating and institutionalizing the essential features of his martial law government via the Transitory Provisions of the 1973 Constitution and its 1976 Amendments,[66] President Marcos proclaimed the formal lifting of martial law on January 17, 1981.[67] The emergency was officially over. The Crisis Government became simply the transition government. The position and power of the President (Prime Minister) in government was secure. But the "tailoring" of the Constitution did not cease.

The secure position of the President (Prime Minister) was true only during the transition period. And it was felt that the transition period has dragged on for quite some time. When the regular government under the 1973 Constitution becomes operative, the control of the National Assembly may cause some problem, and this Assembly has the potent power to remove the Prime Minister.

Then there was the constant threat of criminal and civil suits against martial law officials for acts done during the period of martial law which may have caused injuries and damage to persons and property.

Another constitutional amendment was necessary. So it was done.

But the changes actually made were not simple amendments. It was a revision of the entire structure and relationship of the two political organs of government.[68] Executive power was transferred to the hitherto nominal President.[69] He has control of the Ministries,[70] and is the Commander-in-Chief of the armed forces.[71] He appoints the top officials of the govern-

[64] Rodriguez v. Gella, *supra* at 605.

[65] *Id.* at 606-607.

[66] *See* Tan, *The Philippines after the Lifting of Martial Law: A Lingering Authoritarianism* 55 PHIL. L. J. 418 (1980).

[67] Proc. No. 2045 (1981).

[68] *See* Pangalangan, *The 1981 Amendments: The Presidency in the Wake of a Constitutional Mutation,* 56 PHIL. L. J. 225 (1981) and Caballes, *A Reassessment of the Presidency in the light of the 1981 Amendments,* 56 PHIL. L. J. 252 (1981).

[69] CONST., art. VII, sec. 1, Under the 1973 Constitution the President was merely a symbolic head of state and the real executive was the Prime Minister. But as adverted to above, this system was never implemented because President Marcos became both President and Prime Minister under the 1976 Amendments.

[70] CONST., art. VII, sec. 8.

[71] CONST., art. VII, sec. 9.

ment,[72] including the members of the Cabinet,[73] and designates the members of the Executive Committee.[74] The President also nominates the Prime Minister and may remove him and any other member of the Cabinet or Executive Committee at will.[75] He also formulates the guidelines of national policy,[76] exercises the veto power on legislations,[77] and may dissolve the Batasang Pambansa on advise of the Prime Minister and call for an election.[78]

Because the President is elected by direct vote of the people for a fixed term of six years[79] and enjoys immunity from suit,[80] he is virtually untouchable during his term of office, except through the cumbersome impeachment process.[81]

The once powerful prime Minister was relegated to the position of Chief Administrator exercising supervision over all Ministries.[82] Although he is the Head of the Cabinet and also of the Executive Committee,[83] these bodies are under the effective control of the President.

The Amendments created an Executive Committee, the members of which is designated by the President, which shall assist the President in the exercise of his powers and functions and in the performance of his duties.[84] In case of permanent disability, death, removal or resignation of the President, the Executive Committee shall exercise the powers and discharge the duties of the President until a new President is elected.[85]

SIGNIFICANCE OF THE 1981 AMENDMENTS

Creation of a Powerful But Irresponsible President

The separation of powers through actual distribution of executive, legislative, and judicial powers to the three organs of government: the Presidency, the Batasang Pambansa, and the Supreme Court was maintained. This actual separation of powers is not affected by the presence of the Cabinet and of the Executive Committee. The Executive Committee is a purely executive organ to assist the President, notwithstanding the fact that half of its members are also Members of the Batasan. On the other hand, the Cabinet serves as the implementing arm of the government, and the

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[72] CONST., art. VII, sec. 10.
[73] CONST., art. IX, sec. 1.
[74] CONST., art. IX, sec. 3.
[75] CONST., art. IX, sec. 4.
[76] CONST., art. VII, sec. 13.
[77] CONST., art. VIII, sec. 20.
[78] CONST., art. VIII, sec. 13 (2).
[79] CONST., art. VII, sec. 3.
[80] CONST., art. VII, sec. 15.
[81] CONST., art. XIII, sec. 2.
[82] CONST., art. IX, sec. 10.
[83] CONST., art. IX, sec. 1, sec. 3.
[84] CONST., art. IX, sec. 3.
[85] CONST., art. VII, sec. 7, sec. 4.

link between the President and the Batasan. Members of the Cabinet may be appointed by the President as Members of the Batasan, and majority of them must be Regional Assemblymen from the Batasan,[86] but they are under the effective control of the President.

This arrangement allows coordination between the President and the Batasan similar to that under the 1973 Constitution. With a very important distinction: the real Executive, the President, maintains his control over the Batasan through his control of the Cabinet and the program of government, his veto power, and his power to dissolve the Batasan. On the other hand, the Batasan has no corresponding power over the President, except the cumbersome power of impeachment.

Since the President is elected directly by the people and has a fixed term of six years, he is virtually unchecked and unaccountable, therefore, irresponsible during his term of office. The system of checks and balances has been removed leaving the President to dominate the Batasan. Hopefully, the Supreme Court will maintain its independence from the Presidency. The institutional framework for such judicial independence has not been touched by the 1981 Amendments.

But the doctrine of separation of powers, sans the American concept of checks and balances, is still present in the sense that the Executive — the President with the assistance of the Executive Committee and the Cabinet — *cannot by himself* exercise legislative power. And the Batasan, though some of its members shares in the executive and administrative function as Members of the Executive Committee and the Cabinet, *cannot by itself* exercise executive power.

Termination of the Transition Period

With the approval of the 1981 Amendments on April 7, 1981[87] and the election on June 16, 1981 of the President established under said Amendments the transition period from the 1935 Constitution to the New Constitution, as amended came to a close.[88] President Marcos who won in that election now exercises his powers and performs his duties as the regular President provided for under the main body of the New Constitution, as amended, and not under the Transitory Provisions (Article XVII) thereof. When he nominated Cesar Virata as Prime Minister, President Marcos did so by virtue of his power under Article IX, Section 1 of the Amended Constitution. When the Batasan elected Virata as Prime Minister, it did so pursuant to its powers under the same provision in the main body of the Constitution.

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[86] CONST., art. IX, sec. 1.
[87] Proc. No. 2077 (1981).
[88] Assemblyman Tolentino explaining his vote, Transcript of the Batasang Pambansa sitting as a Constituent Assembly, Feb. 27, 1981, pp. 108, 111. Hereinafter referred to as BP-CA Transcript.

The President, the Prime Minister and the Cabinet, the Executive Committee, and the Batasan are now exercising their powers and performing their duties and functions under the provisions of the main body, not the Transitory Provisions, of the New Constitution as amended by the 1981 Amendments. The present Batasang Pambansa is no longer an *interim* legislature. It now exercises *all* powers of the Batasang Pambansa under the New Constitution, as amended. The restrictions on its powers with respect to the election of the Prime Minister[89] and the giving of its concurrence to treaties[90] imposed by the 1976 Amendments have been removed by the 1981 Amendments.

The present Philippine Government is, therefore, a regular government under the New Constitution, as amended in 1981, and is no longer a transition government because complete transition from the form of government under the old Constitution to one under the New Constitution, as amended, has been achieved.

WHERE DOES THE DECREE POWER FIT IN?

The 1981 Amendments vested the legislative power in the Batasang Pambansa. It is a principle in constitutional law that the legislative body possess plenary powers for all purposes of civil government.[91] The separation of powers doctrine likewise prohibits executive legislation, except under recognized exceptions during a state of martial law or under the legislative delegation of emergency powers or rulemaking authority. These factors collide head-on with the grant of decree power to the President (Prime Minister) under the Amendment No. 6 of the 1976 Amendments.

What is the effect of the 1981 Amendments on the decree power clause under the 1976 Amendments?

THE GOVERNMENT VIEW

The Solicitor-General, as lawyer of the government, will argue that the decree power clause under the 1976 Amendments is fully operative and is not affected by the adoption of the 1981 Amendments. There are strong arguments to support this view.

Intent of Amendment No. 6: to escape the limitations on the martial law powers

Amendment No. 6 was obviously adopted to operate after the lifting of martial law. This conclusion is based on the following factors: The exercise of legislative power by the President during martial law was

89 1976 Amendments, No. 3.
90 1976 Amendments, No. 2.
91 Occeña v. COMELEC, G.R. No. 52265, Jan. 28, 1980, 95 SCRA 755, 759 (1980).

already secured by the "part of the law of the land" clause[92] in the Transitory Provisions of the 1973 Constitution, as interpreted by the Supreme Court.[93] Furthermore, Amendment No. 5 expressly provides for the exercise of legislative power by the President during the duration of martial law. To say, therefore, that Amendent No. 6 was limited to the same situation already covered by the Transitory Provisions and Amendment No. 5 would be absurd because it will render Amendment No. 6 superfluous and inutile.

Amendment No. 6 states: "Whenever . . . there exists a grave emergency or a threat or imminence thereof. . ." There is an implied presupposition that grave emergency or threat or imminence thereof does not normally exists, and the power provided therein is to be exercised only when those contingencies arise. Obviously, the situation would not refer to the period of martial law because the mere existence of a state of martial law presumes the continuing existence of invasion, insurrection or rebellion, or imminent danger thereof, and public safety is endangered.

Amendment No. 6 was therefore adopted specifically to grant the President (Prime Minister) with extraordinary powers after martial law is lifted.

Efficacy of Amendment No. 6 Not Limited to the Transition Period

Amendment No. 6 was likewise meant to operate beyond the transition period. The Amendment itself in providing the situations under which it would operate postulates the existence of an *interim* Batasang Pambansa or the regular National Assembly. Under the 1973 Constitution, as amended in 1976, the *interim* Batasang Pambansa exists as the *interim* legislature during the period of transition from the presidential form of government under the 1935 Constitution to the parliamentary system under the 1973 Constitution. On the other hand, the regular National Assembly was the regular legislature which will operate after the transition is completed. The efficacy of Amendment No. 6 is therefore not limited to the transition period. According to Chief Justice Roberto Concepcion, the text of the 1976 Amendment "strongly suggests that the legislative power of the 'President (Prime Minister),' under [Number] 6 of the amendments, shall exist, not only during the transition, but also, after its conclusion, even if martial law shall have been lifted."[94]

The fact that the 1981 Amendment terminated the transition period is, therefore, immaterial insofar as the continued efficacy of Amendment No. 6 is concerned.

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[92] CONST., art. XVII, sec. 3 (2).

[93] *See* Aquino v. COMELEC, *supra*, note 3; Aquino v. Ponce Enrile, *supra*, note 59.

[94] Concepcion, *The Integrated Bar of the Philippines and the Road to Normalcy*, 6 J. INTEG. BAR PHIL. 303, 305 (1978).

Amendment No. 6 is Consistent with the Constitutional Plan Under the 1981 Amendments

The 1981 Amendments discarded the traditional doctrine of checks and balances in favor of a powerful and irresponsible President. The grant of decree power to the President is consistent with this scheme. That the Legislature was meant to be subordinate to the President is obvious from the distribution of powers and structural reformulation under the 1981 Amendments.

The grant of decree power under Amendment No. 6 exercisable by the President cannot be said to be inconsistent with the constitutional balance between the Executive and the Legislature for the simple reason that no such constitutional balance exists under the 1981 Amendments. The constitutional plan under the 1981 Amendments is not a balance between the Executive and the Legislature. It is the supremacy of the Executive over the Legislature.

The Filipino people having expressed their overwhelming approval for this constitutional plan by their adoption of the 1981 Amendments, it is futile to harp back on the traditional system of separation of powers and its corollary checks and balances. Notwithstanding their value in the past, these principles have been discarded by the Filipino people in favor of the present Executive supremacy.

Proceedings of the Constituent Assembly and Contemporaneous Construction

That the 1981 Amendments was not intended to abrogate Amendment No. 6, but was precisely meant to leave the decree power of the President intact was clearly expressed in the records of the Batasang Pambansa sitting as a Constituent Assembly which proposed the 1981 Amendments. It is well settled that in aid of the construction of a constitutional provision which is doubtful or ambiguous resort may be had to the history of the proceedings in the constituent assembly to ascertain the intent of the framers.[95]

A resolution to expressly repeal the power of the President (Prime Minister) under Amendment No. 6[96] was proposed in the Batasan sitting as a Constituent Assembly. But said proposed resolution never passed the

[95] 70 A.L.R. 5, 11. *Also* J.M. Tuason & Co. Inc. v. Land Tenure Administration, G.R. No. 21064, Feb. 18, 1970, 31 SCRA 413, 423 (1970).

[96] Introduced by Assemblymen Canoy, Bacalso, Legaspi, Cabangbang, and Laurel. The Resolution was entitled: "Resolution urging the *Interim* Batasang Pambansa to propose the abrogation of Amendment No. 5 and No. 6 of the October 1976 Amendments to the 1973 Constitution for the Purpose of removing the legislative powers of the President (Prime Minister) and vesting the same exclusively in the *interim* Batasang Pambansa or the regular National Assembly as representatives of the people." BP-CA No. 2.

Special Committee on Constitutional Amendment. The BP-CA Resolution No. 104 which became the 1981 Amendment on the structure of government[97] did not contain any reference to Amendment No. 6. By its refusal to adopt said proposed resolution to expressly repeal Amendment No. 6, the Batasan had expressed, *a contrario,* its intent to retain said Amendment No. 6.

During the interpellation of sponsors of BP-CA Resolution No. 140, Assemblyman Perez stated categorically that there is no repeal of Amendment No. 6 by the proposed amendments.[98] In fact, in order to make sure that Amendment No. 6 will still be available to the President contemplated under these Amendments, the original proposed provision on residual powers which provides: "Any and all powers, functions and duties vested in the incumbent President/Prime Minister if not otherwise provided in this Constitution shall be vested in the President" was modified such that the term "President/Prime Minister" was changed to "President".[99] The purpose, according to Perez, was only to obviate a future technicality because Amendment No. 6 uses the words "President/Prime Minister."[100] Perez also took pain to point out that the residual powers provision of the 1981 Amendments will merely make available to the President the same powers he already exercise under Amendment No. 6. It will not add and neither will it detract any power.[101]

Even Assemblymen opposed to the 1981 Amendments interpret the Amendments to mean that there is no repeal of Amendment No. 6.[102] In fact one of the arguments adduced against the adoption of the 1981 Amendments during the plebiscite campaign was the fact that said Amendments did not repeal the decree power of the President under Amendment No. 6.[103] Respected constitutionalists in the academe also concede the decree power to the President under Amendment No. 6, notwithstanding the 1981 Amendments.[104]

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[97] Two other Amendments adopted on April 7, 1981 concern provisions on elections and political parties, and grant of rights to former Filipinos to acquire residential lots.

[98] BP-CA Transcript, Feb. 24, 1981, p. 76.

[99] BP-CA Transcript, Feb. 24, 1981, p. 77.

[100] *Ibid.*

[101] BP-CA Transcript, Feb. 24, 1981, p. 78.

[102] Speech En Contra of Assemblyman Hilario Davide, BP-CA Transcript, Feb. 25, 1981, p. 24.

[103] Arguments for rejection submitted by Ambrosio Padilla in COMELEC *Primer on the Plebiscite of the Proposed Constitutional Amendments to be held on April 7, 1981.*

[104] *See* P.V. Fernandez, *Position Paper on the Proposed Constitutional Amendments in the April 7, 1981 Plebiscite,* and Romero, *The Dynamics of the Relationship Between the Legislative and the Executive under the Proposed Constitutional Amendments* in 1981 CONSTITUTIONAL AMENDMENTS, 26, 30-31 and 1, 11-12, respectively, (1981).

The Court Cannot Inquire Into the President's Exercise of Decree Power

Under Amendment No. 6, the President shall be the sole judge in determining whether a case for his exercise of decree power exist.[105] The determination as to what is a "grave emergency or a threat or imminence thereof," or as to whether or not it exist, or what constitutes the Batasan's failure or inadequacy to act, or what matter "requires immediate action", are all vested in the President exclusively.[106]

The sufficiency of the factual basis for his determination cannot be inquired into by the Judiciary. The Courts cannot substitute their *judgment* for his.[107] The rule established by the Court in *Lansang v. Garcia,*[108] that the proper test for the validity of an act of the Executive is not whether the act is *correct,* but whether or not he acted *arbitrarily* is not applicable because Amendment No. 6 used only the "judgment" of the President as the measure for determining the facts on which his action is based.[109]

It should be noted that the Court failed to come up with an authoritative rule on whether or not the Court can inquire into the validity of the martial law proclamation. There is room for the argument that since Amendment No. 6 expressly vests the power of determining the existence of exigencies which would justify his exercise of emergency powers; and the same Amendment requires only the "judgment" of the President, the validity of the exercise of such power involves a political question and is, therefore, beyond the jurisdiction of the Court.

THE OPPOSING VIEWS

Views on this matter opposed to that of the government may be divided into two on the basis of whether or not they would concede to the efficacy of Amendment No. 6. The first one may be denominated as the restrictive view and the other as the absolute view.

RESTRICTIVE VIEW

The first contrary view would grant the efficacy of the decree power clause even after the adoption of the 1981 Amendments but would strictly circumscribe its operation. According to this view, the only basis of the exercise of decree power by the President, in the absence of a specific valid delegation from the legislature, is the existence of a state of emergency which necessitated the imposition of martial law. Since the emergency had ceased — this is the only constitutional reason for the lifting of martial law — such extraordinary decree power also *ipso facto* ceased to exist.

105 Tolentino, *op. cit. supra,* note 48, at 62.
106 *Ibid.*
107 *Ibid.*
108 G.R. No. 33964, Dec. 11, 1971, 42 SCRA 448 (1971).
109 Tolentino, *supra* at 62.

As a general rule, therefore, the President lost the power to legislate by decree the moment martial law was lifted. Since Amendment No. 6 presents an exception to this general rule, it must be strictly construed.

Grant of Power is Conditional and Limited: Subject to Judicial Review

The President may invoke his decree power under Amendment No. 6, but only if the conditions provided for therein that "there exists a grave emergency or a threat or imminence thereof" are present. Furthermore, the decrees, orders, or instructions that he can issue must be necessary "to meet the exigency". His judgment regarding the existence of such conditions can be reviewed by the Court. The principles adduced by the Court in *Lansang v. Garcia*[111] can be adopted to support this stand. Although the *Lansang* case involved the power of the President to suspend the privilege of the writ of *habeas corpus,* the principles which formed the basis of the Court's decision are of general import and are actually fundamental under the Philippine constitutional system.

One basic principle is: when a grant of power is limited and conditional, the limitations and conditions for the exercise of said power must be adhered to and complied with. Said limitations and conditions establish and define the confines and the limits of said power, beyond which it does not exist. Adherence thereto and compliance therewith may, within proper bounds, be inquired into by the Courts of Justice. Otherwise, the explicit constitutional provisions thereon would be meaningless.[112]

The "judgment" of the President with respect to the existence of grave emergency or a threat or imminence thereof cannot be arbitrary. The test of validity of acts of the Executive under these circumstances would be whether he acted arbitrarily or not. Although the Court was divided and never arrived at a definite rule as to the applicability of the test of arbitrariness on the power of the President to declare martial law, it may be said that the view of Justices Castro, Fernando, Teehankee and Muñoz Palma in *Aquino v. Ponce Enrile*[113] that the principles laid down on the *Lansang* case is applicable to the proclamation of martial law is the better view. Following this argument, it would be absurd to hold that the exercise of a lesser power under Amendment No. 6 cannot be reviewed by the Court. The decree power under Amendment No. 6 is a lesser power because it can be invoked only after martial law has been lifted. During the period when martial law was in effect, said decree power was subsumed under the broader martial law powers.

Even in the absence of emergency, the President can still exercise the decree power under Amendment No. 6 because it likewise provides that

110 Aquino v. Ponce Enrile, *supra,* note 59 at 62.
111 *Supra,* note 108.
112 *See* Lansang v. Garcia, *supra.*
113 *Supra,* note 59.

"whenever the *interim* Batasang Pambansa . . . 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, order or letters of instructions." But this decree power, according to Assemblyman Tolentino, is a reserved, conditional and limited authority.[114] *"Conditional* because it depends on the failure or inability of the Batasang Pambansa to ack quickly and adequately. *Limited,* because the ensuing decree, order or instruction must refer to the legislation being considered by the Batasan. *Reserved,* because its exercise cannot precede the start of deliberations by the Batasang Pambansa on the proposed law."[115] If these conditions and limitations are not satisfied or adhered to, and there is no declaration of a state of emergency, any exercise of the decree power by the President will be unconstitutional and void.

Decrees Issued Are Subject to Judicial Review

In addition to the power to review the validity of the exercise of decree power by the President, the Court may also inquire into the validity of the decrees issued pursuant to the exercise of said power. Although Amendment No. 6 provides that the resulting decrees, orders or letters of instruction "shall form part of the law of the land" they are not thereby placed beyond judicial review. At most they have the status of laws and just like any other law, they are subject to the standards and limitations provided for under the Constitution. The Bill of Rights remains an important limitation on any decree. Substantive due process can be invoked to challenge acts of the President.[116] This basic constitutional law principle applies to acts of the President in the exercise of decree power under Amendment No. 6.

Thus, any decree, order, or instruction depriving a person of his life, liberty, or property without due process can be struck down as unconstitutional and void. Likewise, the right against unreasonable searches, seizures and arrest cannot be violated. The President cannot exercise the decree power in a manner that will abridge the fundamental freedom of speech, or of the press, or the right of the people peaceably to assemble and petition the government for redress of grievances. All these, and other rights guaranteed by the Constitution, are intact and cannot be violated by any decree, orders or instructions of the President. Any decree, order, or instruction issued by the President in derogation of such fundamental and constitutional rights is void.

Decrees Subject to Repeal by the Batasan

Since the decrees, orders or instructions issued by the President under Amendment No. 6 are at most considered laws and have the effect of

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[114] Tolentino, *Significance of the 1976 Constitutional Amendments,* 5 J. INTEG. BAR PHIL. 44, 53 (1977).

[115] *Ibid.*

[116] FERNANDO, *op. cit. supra,* note 43 at 530.

statutes, the Batasan, in the exercise of its plenary legislative power, can modify or repeal any of these decrees, orders or instructions. Of course, the Batasan has to hurdle the formidable obstacle of a Presidential veto. But if the Batasan maintains a mind and will of its own, it should be able to limit the executive encroachment of its legislative domain through the effective use of its power to modify or repeal decrees. After all a presidential veto can be overriden by two-thirds vote of all members of the Batasan.[117] Although a stiff requirement, and almost an impossibility under the present state of affairs where the President actually dominates the Batasan, the power to modify or repeal remain as a constitutional alternative for a besieged Batasan.

ABSOLUTE VIEW

The second view opposed to that of the government is denominated as the absolute view because it maintains that Amendment No. 6 has become inoperative following the adoption of the 1981 Amendments.

Office of the President (Prime Minister) Became Functus Officio

The decree power under Amendment No. 6 was conferred specifically on the President (Prime Minister), NOT on the President, NOR on the Prime Minister, as separate constitutional offices. This extraordinary dual office of the President (Prime Minister) was created under Amendment No. 3 which provides: "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 [1973] Constitution."

Under the 1973 Constitution, the Office of the President and the Office of the Prime Minister were separate, independent and incompatible offices. The President was the symbolic head of state,[118] while the Prime Minister was the Chief Executive and the head of the Government.[119] Upon taking his oath of office, the President ceased to be a Member of the National Assembly and of any political party, and was ineligible to hold any other elective office during his term.[120] On the other hand, the Prime Minister as the head of government must, of necessity, remain a Member of the National Assembly and of the political party or coalition that elected him to office.

These two separate, independent and incompatible offices were merged into an extraordinary Office of the President (Prime Minister) under the

117 CONST., art. VIII, sec. 20 (1).
118 CONST. (1973), art. VII, sec. 1.
119 CONST. (1973), art. IX, sec. 1.
120 CONST. (1973), art. VII, sec. 2.

1976 Amendments. This extraordinary officer exercised the following powers: (1) power of the incumbent President during martial law; (2) powers and prerogatives of the President under the 1935 Constitution; (3) powers vested in the President under the 1973 Constitution; and (4) powers vested in the Prime Minister under the 1973 Constitution.

When the 1981 Amendments was adopted and implemented with the election of Mr. Marcos as President under its provisions, the Office of the President (Prime Minister) ceased to exist. Under the 1981 Amendments, the Office of the President vested with broad powers is a separate, and incompatible office from the Office of the Prime Minister. The President is the head of state and Chief Executive,[121] and is elected directly by the people for a 6-year term. While the Prime Minister only heads the Cabinet and the Executive Committee,[122] and is nominated by the President and elected by the Batasan,[123] and he may be removed by the President at will.[124]

Since the office upon which the power was vested had ceased to exist, the decree power also became *functus officio*. It cannot be invoked by any other constitutional official.

Decree Power Not Covered By Residual Powers Clause

The 1981 Amendments provides that "[a]ll powers vested in the President of the Philippines under the 1935 Constitution and the laws of the land which are not herein [the Constitution] provided for or conferred upon any official shall be deemed and are hereby vested in the President unless the Batasang Pambansa provides otherwise."[125] The decree powers under Amendment No. 6 is clearly not included in this grant of residual powers of the President.

By its own terms, this provision covers only powers vested in the President "under the 1935 Constitution" and under "the laws of the land" which are not provided for or conferred upon any official under the New Constitution, as amended. The decree power is *not* one of those powers vested in the President of the Philippines under the 1935 Constitution. In fact, the 1935 Constitution was no longer operative when the 1976 Amendments were adopted. By its failure to include within its terms the powers vested in the President (Prime Minister) under the 1976 Amendments, upon whom the decree power was vested, the residual powers clause cannot be read to include the decree power.

Powers vested in the President under "the laws of the land" refers to powers granted by ordinary legislation or by decrees, as distinguished from those powers directly granted by the Constitution. That is why the provision

121 CONST., art. VII, sec. 1.
122 CONST., art. IX, sec. 1 & 3.
123 CONST., art. IX, sec. 1.
124 CONST., art. IX, sec. 4.
125 CONST., art. VII, sec. 16.

contains the qualification "unless the Batasang Pambansa provides otherwise." Since the Batasan exercises plenary legislative powers, it can amend or repeal any and all legislations and laws, including decrees which have the force of law, which assign specific powers to the President or any other officials. But certainly the powers vested in the President under "the laws of the land" cannot include the decree power of the President (Prime Minister) because the decree power is essentially derogatory to the established constitutional order and requires an express constitutional grant for its exercise.

The original residual powers clause contained in the proposed draft of the 1981 Amendments (BP-CA Resolution No. 104) provides: "Any and all powers, functions and duties vested in the incumbent President/Prime Minister if not otherwise provided in this Constitution, shall be vested in the President."[126] Under this provision it was clear that the decree power would be granted to the President.

But, in the words of the sponsor, "[t]o obviate a future technicality" and "in order to be sure that Amendment No. 6 will still be available to the President contemplated under these [1981] Amendments" the words "President/Prime Minister" in the draft was changed to "President".[127] This change resulted in a situation which it precisely sought to avoid. As noted above, the decree power under Amendment No. 6 was expressly conferred on the President (Prime Minister). It was *not* granted to the President, nor to the Prime Minister. The change of the words "President/Prime Minister" to simply "President" therefore had the effect of removing the decree power from the scope of the residual powers granted to the President under the 1981 Amendments.

To further confound the matter, the general phraseology of the original draft of the residual powers clause was changed by making express reference to powers vested in the President "under the 1935 Constitution and the laws of the land." By expressly referring to the powers under the 1935 Constitution, said provision excluded as a necessary implication the powers granted under the 1973 Constitution and under the 1976 Amendments. *Expresio unius est exclusio alterius.*[128] As discussed above, the general phrase powers under "the laws of the land" refers only to statutory powers or powers conferred by laws, as distinguished from those conferred by the Constitution, and is, therefore, inapplicable to the decree power under Amendment No. 6.

While the sponsors of the 1981 Amendments had intended to retain the decree power of the President (Prime Minister) with the President

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126 BP-CA Transcript, Feb. 24, 1981, p. 77.

127 Answer of Minister Perez to the Interpellation by Assemblyman Legaspi, BP-CA Transcript, Feb. 24, 1981, p. 77.

128 The express mention of one thing implies the exclusion of all others. That which is expressed puts an end to that which is implied.

under the 1981 Amendments, the residual powers clause which was actually approved by the people in the plebiscite *did not reflect said intention* and, in fact, expressed a clear idea that the powers of the President (Prime Minister) under the 1976 Amendments were not included in the residual powers granted to the President under the 1981 Amendments.

Resort To The Proceedings in the Constituent Assembly Not Applicable Nor Controlling

It is a fundamental rule in interpretation and construction of the constitution that no resort to the proceedings of a constitutional convention can be had where the language of the constitution is too plain and unambiguous to permit resort to such outside aid.[129] Where the language of a provision is clear, and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended, and in such cases legislative history may not be used to support a construction that adds to or takes from, the significance of the words employed.[130]

Since the residual powers provision of the 1981 Amendments is clear and unambiguous, it would be an error to resort to the proceedings of the Batasan sitting as a Constituent Assembly to force into the plain provision of the Constitution the intent to grant the decree power to the President.

Furthermore:

> Constitutional debates are not the most trustworthy aids, even where they are relevant under the rule relating to the construction of language of constitutional provisions which is doubtful, since such debates do not necessarily represent the views of the majority of the convention, and less certainly reflect those of the people whose votes adopted the Constitution, but who did not hear the debates.[131]

A Constitution derives its authority not from the act of the convention in framing it, but from that of the people in ratifying it, so that the intent of the latter is the real question in arriving at its proper construction.[132]

The argument that the understanding of the people in ratifying a constitution may reflect, in some degree at least, the interpretation of those who framed it [133] loses force when we consider the fact that the provision, as submitted to the people, not only failed to express the intent of the

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[129] Resort to Constitutional or Legislative Debates, Committee Reports, Journals, etc. as Aid in Construction of Constitution or Statute. 70 A.L.R. 5.

[130] United Staes v. Missouri, P.R. CO. 278 US 269, 73 L. ed. 322, 49 S. Ct. 13 (1929). Cited in 70 A.L.R. 17-18. The case concerns the construction of a statute but this fundamental rule of statutory construction is applicable to the construction of constitutions. *See* 70 A.L.R. 11. *passim.*

[131] State ex. rel. Heinberger v. University of Missouri, 268 Mo 598, 188 S.W. 128 (1916), cited in 70 A.L.R. 5, 32.

[132] 70 A.L.R. 5, 34.

[133] *Ibid.*

framers to include the decree power in the residual powers of the President but in fact expressed the clear idea to the contrary.

Decree Power Operative Only During Transition Period

The 1976 Amendments, in so far as they relate to the "incumbent President" and to the establishment of the *interim* Batasang Pambansa obviously modify only the Transitory Provisions and not the main body of the 1973 Constitution. Their operation, therefore, cannot go beyond the transition period.[134] It follows that the decree power granted to the President (Prime Minister) under Amendment No. 6 ceased to be operative with the termination of the transition period.

The extraordinary dual office of the President (Prime Minister) was not meant to exist beyond the transition period. Discussing the problem in 1976, Assemblyman Tolentino said the mere reference to the "regular National Assembly" in Amendment No. 6 cannot be considered as continuing the merger of President and Prime Minister after the regular National Assembly has been organized. "To do so would be abolishing by mere implication the fundamental powers of the regular National Assembly to elect a President and a Prime Minister and to remove them pursuant to the Constitution. This would radically change the very system of government by a very dubious implication." [135] Tolentino concluded that the reference to the "regular National Assembly" in Amendment No. 6 may have been a drafting error.[136]

Decree Power is Repugnant to the Constitutional Order

The distribution of executive, legislative, and judicial powers among the three separate organs of government is a fundamental postulate in the Philippine constitutional system since the establishment of the First Philippine Republic in 1898. To the basic rule that two or more powers of government cannot be vested in one organ of government, a very limited and clearly circumscribed exceptions are provided, the more important ones of which are the emergency powers of the Executive. But the decree power goes beyond the limitations and checks on the traditional emergency powers. It actually amounts to the creation of a second legislature in the person of the President, which is of course derogatory to the vesting of the legislative power in the Batasan.

In fact to allow the exercise of the decree power by the President under the 1981 Amendment would make said President the more effective legislature. This is because aside from his control of the Batasan and, therefore, legislation of the Batasan, he can decree into law any acts which for any reason will not pass the Batasan, or will not be coursed through

[134] Tolentino, *op. cit. supra,* note 114 at 50.
[135] *Id.* at 49.
[136] *Id.* at 50.

the Batasan. The Batasan would be virtually impotent against such exercise of decree power.

It cannot be denied that the 1981 Amendments were intended to establish a powerful President who can dominate the Legislature. But nowhere in the 1981 Amendments is it expressed that said President can exercise decree or legislative power by himself independently of the Batasan. Any conclusion which is repugnant to the doctrine of separation of powers in the Philippine constitutional setting cannot be upheld unless there is a clear and convincing expression of such fundamental change, as reflected in the plain text of the Constitution. The people who approved the amendments to the Constitution cannot be presumed to have adopted the intent of the framers if such intent was not reflected in the text of the Constitution as submitted to them for ratification. Even doubts, if any, must be resolved in favor of maintaining the traditional constitutional system characterized by separation of powers.

The separation of powers principle being invoked here is not the American version which calls for the balancing of three independent, co-equal and coordinate organs of government. As noted in the review of Philippine constitutional history, separation of powers in the Philippine context does not necessarily call for three coordinate, co-equal and independent organs of government. Recall the Malolos Constitution where the Legislature was meant to dominate both the Executive and the Judiciary. Recall also the parliamentary system established under the 1973 Constitution where the Executive was elected by the Legislature and can be dismissed by it, but said Executive in turn had the power to dissolve the Legislature.

The essence of separation of powers in the Philippine constitutional context is that two or more powers of government shall never be vested in one organ of government. Thus, the Executive *cannot by himself* exercise legislative power, and the Legislature *cannot by itself* exercise executive power. Although one branch of government may dominate the other if constitutional mechanisms which would permit such are present.

The existence of mechanisms for interdependence which would allow one organ of government to dominate the other will derogate from the American concept of checks and balances. *But it will not detract from the inherent value of separation of powers.* Checks and balances is not the only function of separation of powers. For that matter, separation of powers is not the only means by which checks and balances can be achieved. If one organ of government can dominate the other, obviously no balancing of powers can be achieved. But it does not mean that the power of the dominant organ will be unlimited. *Separation of powers is precisely an important limitation in itself.* It provides the outer limit to the scope of action of the dominant organ beyond which it cannot go.

With the separation of powers, the executive may execute the law but it cannot make the law. Likewise, the legislature may make the law but it is for the judiciary to apply the law, and so forth. Even if the executive can dominate the legislature, its power is limited by the fact that only the legislature can make laws and if the executive wants a measure to be enacted into law, it has to go through the legislature. If the executive cannot convince the majority in the legislature, his desired measure cannot become law. That is the minimum negative limitation on the power of the dominant executive under the separation of powers scheme.

Whether that is an effective limitation or not would depend upon the integrity and will of the individual members of the legislature and that of the legislative body as a whole. If we grant the fair assumption that the members of the legislature elected by their constittuencies would be as patriotic as the executive elected by the people at large. Then it will not be difficult to conclude that separation of powers will serve as an important limitation beyond which the awesome executive power and prerogative cannot go beyond.

It is not here for us to echo the arguments for the establishment of a strong and purposeful government by strengthening one organ of government at the expense of the other organs. Nor is it necessary here to discuss the merit of having the executive or the legislature as the dominant political organs. What is important is an emphasis of the point that whichever organ of government is singled out by the sovereign people and invested with vast powers so as to bring about a strong unified government, the power of such dominant organ of government will never be unlimited so long as the separation of powers is maintained, and the individual officials elected or appointed to their respective offices maintain their integrity and will.

In a republican state, the legislature is the representative organ of the people. It is the political organ through which the sovereign people express their will. The other representative political organ under the 1981 Amendments is the President. In case of conflict between these two political organs, it is logical that the people, from whom both organs derive their mandate, should decide which view, that of the legislature or that of the executive, should prevail. To enable the people to decide the conflict on fundamental issues between these two political organs, the system of dissolution of the legislature and calling for a general election[137] was adopted. This mechanism is effective in a parliamentary system where the executive is elected by the legislature, because the political party or coalition who wins the election can elect the executive in accordance with the fresh mandate from the people.

[137] CONST., art. VIII, sec. 13 (2).

Under the 1981 Amendments, this mechanism for popular intervention will not be as effective because the President is elected directly by the people for a fixed term of six years. Supposing a conflict on fundamental issues arose between the President and the Batasan, the President will likely dissolve the Batasan and call for a general election. If the people supports the President they will elect the candidates who belongs to the political party of the President or those who support him on the issue. The newly elected Members of the Batasan would, therefore, be committed to adopt the view of the President on that issue.

But supposing the people repudiates the stand of the President in the ballot boxes. The most logical thing for the President to do is to respect the will of the people and adopt the view of the majority. If the President refuses to abandon his repudiated stand and defies the voice of the people, under the 1981 Amendments, the Batasan backed up by a fresh mandate from the people can at least prevent the President from imposing his view by the simple expedience of refusing to pass the necessary enacting legislation.

This minimum negative check would be eliminated if the President is conceded the decree power, because, then the President can render inutile the legislative opposition by simply enacting the necessary decree to effectuate his stand. This he can do even if his stand was repudiated by the people in the preceding election. This will negate the function of the constitutional mechanism for popular intervention. Surely, the sovereign people did not intend such an absurd result when they approved the 1981 Amendments.

THE CONSTITUTIONAL ARBITER

There are, therefore, at least three views, three different manners of interpretation concerning the relation of Amendment No. 6 *vis-a-vis* the rest of the Constitution in the light of the 1981 Amendments. The power and duty of deciding which of these views or interpretations should prevail or should serve as the basis of a new internal balance within the Philippine constitutional system belongs to the Court.

In the martial law cases, the Supreme Court invariably upheld the exercise of extraordinary powers by the President. Those decisions were predicated on the overwhelming necessity for the executive exercise of those extraordinary powers, as perceived by the Court or taken on faith from the declaration of such necessity by the President. The Court was also faced with a *fait accompli* in the form of the tailored "part of the law of the land" clause inserted into the Transitory Provisions of the 1973 Constitution. In the absence of martial law and under the system of government as operationalized under the 1981 Amendments, these factors will not be present to hinder the discretion of the Court.

In the absence of martial law, no degree of emergency can conceivably arise which would endanger the State such that immediate necessary action could not wait for the Batasan. After all the Batasan may be convened on a special session by the President if such is necessary.[138] And the lengthy legislative process can be cut short if the necessity for the immediate enactment of a bill is certified to by the Prime Minister.[139]

The real problem of the President is actually in convincing a majority of the Batasan Members on the necessity of an emergency measure so as to assure its swift approval in the legislative body. Honest differences in opinion will abound here. But it is safe to assume that if the facts are not enough to convince a majority of the Batasan Members as to the existence of an emergency or the necessity of an emergency measure, such emergency or the necessity for such emergency measure does not probably exist, or it is not probably serious enough to warrant the adoption of the emergency measure.

The decision of the Batasan here should be given equal weight to that of the President. After all the President does not have the monopoly of patriotism. And the Batasan is as much a representative of the sovereign people as the President. Furthermore, under the Philippine constitutional tradition, the Batasan is an essential organ of the government and cannot be ignored.[140]

THE WILL TO DECREE

President Marcos invoked Amendment No. 6 on September 19, 1981 when he issued Presidential Decree No. 1840, granting full amnesty on untaxed income or wealth earned in the Philippines or abroad between 1974 and 1980, upon payment of certain amount of taxes.[141] It was the first decree issued since the formal lifting of martial law last January 17, 1981, and the first one invoking the authority under Amendment No. 6. Thirteen days later, he issued a second decree restoring the coconut levy fixed at 50 pesos per 100 kilos.[142]

There was no state of emergency nor threat nor imminence thereof. The President was invoking the second ground under Amendment No. 6, i.e., "whenever the *interim* Batasang Pambansa ... fails or is unable to act adequately on any matter for any reason that in his judgment requires immediate action." He justified the issuance of the decree calling it an "urgent and necessary" measure and the Batasan was not in session and will not resume session until November 9.[143]

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138 CONST., art. VIII, sec. 6.
139 CONST., art. VIII, sec. 19 (2).
140 The five year period under martial law during which the Legislature was prevented from convening presents a very unusual exception.
141 Sunday Express, Sept. 20, 1981, p. 1, col. 3-5.
142 Bulletin Today, October 3, 1981, p. 1, col. 6.
143 *Ibid.*

If the tax amnesty measure was "urgent and necessary" why was it not submitted to the Batasan before the body adjourned? The Batasan could have extended its session to act on that measure. The same argument holds for the decree which restored the coconut levy.

Even by the standard under the restrictive view, conceding the decree power to the President, the issuance of Presidential Decree No. 1840 and 1841 would be unconstitutional and void, because the conditions which would give rise to the decree power are absent. Here the Batasan did not fail and was not unable to act adequately on the matter. The Batasan was simply not given an opportunity to act on the matter. The supposedly "urgent and necessary" matters were never brought to its attention.

The decree power is no longer an alternative stand-by power. It had been utilized and, judging from the nature and subject of the first two "test" decrees and the reaction to their issuances, the decree power will be used with only the President's own "judgment" as the only limitation, *unless* the constitutionally established restrictions are brought to bear upon him.

CONCLUSION

Amendment No. 6 was submitted to the people, without the benefit of deliberation by a constituent assembly, as a part of a package of 9 amendments described as necessary "to end the crisis and restore normal times." Obviously designed to institutionalize "constitutional authoritarianism" as conceived by President Marcos, it had the effect of perpetuating martial law without the odious connotation accompanying the term.

Since the *raison d'être* for martial law restrictions had ceased to exist, as manifested by the lifting of martial law, purely martial law practices and institutions must go. Now that the nation had taken the trouble of establishing an entirely new system of government with the adoption of the 1981 Amendments, the Court should adopt a critical attitude towards any act or view which would be derogatory to constitutional scheme established under the Constitution as amended by the 1981 Amendments.

If this critical attitude is adopted by the Court, it will not be difficult to reject the government view discussed above regarding the efficacy of the decree power under Amendment No. 6. The absolute view would be the most logical view and one which is compatible with the constitutional plan under the 1981 Amendments, and consistent with the pattern established through Philippine constitutional history.

The decree power under Amendment No. 6 became *functus officio* upon the adoption of the 1981 Amendments. Such decree power is not included among the residual powers granted to the President. To concede such power to the President is repugnant to the fundamental principle of separation of powers. The conclusion is inescapable that the President cannot exercise the decree power and any exercise of such power by him is unconstitutional and void.