THE PUBLIC ORDER ACT AND THE MORNING AFTER: CONSTITUTIONAL ISSUES

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Almost eight years after the imposition of martial rule, and just a little over four months prior to its lifting, there was signed into law, on September 12, 1980, a briefly-drafted Presidential Decree, numbered Seventeen Hundred and Thirty-Seven (1737). It is currently known as the Public Order Act of 1980.

This decree, as normally promulgated as all the other pieces of martial law legislation, may perhaps look just as normal and ordinary as the aforementioned laws. There is one difference, however; when the silent brevity of P.D. 1737 is contrasted with its sensitive scope, touching as it does upon basic rights and individual civil liberties, there is adequate reason for a second look.

I. P.D. 1737: LEGAL BASIS AND CONSTITUTIONAL IMPACT

A light scan of recent Philippine legal history would show that the sources upon which the issuance of P.D. 1737 could have been predicated are the power of legislation conceded to form part of the President's executive prerogative in times of martial rule which was given constitutional recognition in the 1976 Amendments, and the amendment numbered six in the latter which authorized emergency legislation under certain conditions.

A. P.D. 1737 and "Executive" Power under the 1976 Amendments

The sixth amendment submitted to and ratified by the Filipino people in 1976 states:[1] "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.*" (Italics supplied) P.D. 1737, on the other hand, states: "Whenever in the judgment of the President/Prime Minister there exists a grave emergency or a threat or imminence thereof,

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[1] The 1976 Amendments were ratified in a Referendum-Plebiscite held on October 16 and 17, 1976, and promulgated on October 27, 1976 by virtue of Proclamation No. 1595.

he may *issue such orders as he may deem necessary to meet the emergency*..."[2]

A first glance and a similarity between the first clauses of the two provisions is apt to trigger the impression that the latter is but a statutory application of the former and, conversely, that the former is a constitutional foundation for the latter. A more incisive comparison would, however, yield a certain discrepancy most suggestive of a contrary conclusion:

Although it would seem that the first clause of P.D. 1737 is but an innocent replication of the identical clause in the Amendment in the same capacity as a condition precedent, it is actually a smooth, subtle attempt to transpose the "emergency" standard as a basis for certain powers otherwise strictly available only on other grounds. In truth, what the 1976 Amendment ushered was *legislative* power with a uniquely executive character.

It vested with the President (Prime Minister) the legal capacity to prepare executive formulations which, upon the latter's issuance, it also directs to be *"part of the law of the land"*. What it created and granted was the *power to make law* independently of and apart from the President's authority as the Commander-in-Chief during the existence of martial rule.

Were P.D. 1737 to be construed as an implementation of the above power, an irreconcilable inconsistency would arise for the 1976 Amendment sanctions legislation only for the sole purpose of *meeting the exigency* therein made as a condition precedent, whereas P.D. 1737 creates a second authorization for a future emergency.

The conclusion, therefore, can only be that the issuance of P.D. 1737 was anchored upon the general merger of political powers in the Chief Executive under the Commander-in-Chief clause of the Constitution. Whether or not the issuance falls squarely within such powers is, however, another question altogether.

B. P.D. 1737 and the Commander-in-Chief Clause

Although the Commander-in-Chief clause itself nowhere makes a grant of any such power,[3] the Supreme Court has unequivocably upheld the validity of the exercise of legislative functions by the chief executive during the said period.[4] In addition to this, the Transitory Provisions of the 1973 Constitution provide that all such issuances shall be deemed part of the

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[2] Pres. Decree No. 1737 (1981). (italics supplied)

[3] CONST. (1935), art. IX, sec. 10, par. (2). Familiarly branded as the Commander-in-Chief clause, the section provides: "The President shall be commander-in-chief of all armed forces of the Philippines and, whenever it becomes necessary, may call out such armed forces to prevent or suppress lawless violence, invasion, insurrection or rebellion. In case of invasion, insurrection, or rebellion or imminent danger thereof, when the public safety requires it, he may suspend the privilege of the writ of habeas corpus, or place the Philippines or any part thereof under Martial Law."

[4] The Supreme Court, through Justice Makasiar, stated: "We affirm the proposition that as Commander-in-Chief and enforcer or administrator of martial law, the incum-

legal system regardless of the ratification of such Constitution or the lifting of martial law.[5]

In this purely strict sense, therefore, it may be said that the authority whereof P.D. 1737 purports to emanate proceeds directly from the Constitution and that P.D. 1737, therefore, has a constitutional source. There is room for the thought, however, that the syllogism is not quite perfect.

The Constitutional provision which empowered the President to impose martial law throughout the entire country declares: "The President shall be commander-in-chief of all armed forces of the Philippines and, whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion, insurrection, or rebellion. *In case of invasion, insurrection, or rebellion or imminent danger thereof; when the public safety requires it,* he may suspend the privilege of the writ of *habeas corpus,* or place the Philippines or any part thereof under martial law."[6]

The specific condition cited as the basis for the actual imposition thereof was the armed insurrection and rebellion obtaining as of September 21, 1972.[7] The objectives of such imposition were thereafter declared to be "to save the Republic and to reform society."[8] Indeed, with dispatch and without much ado, strategic measures were promulgated to meet the prevailing emergency, such as those which authorized preventive and punitive arrest and indefinite detention,[9] imposed curfew hours,[10] prohibited rallies, strikes,

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bent President of the Philippines 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 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 including highly developed countries." (Aquino v. Comelec, G.R. No. 40004, January 31, 1975, 62 SCRA 275 (1975).

[5]This view was sanctioned by the Supreme Court thus: "To dissipate all doubts as to the legality of such law-making authority of the President during the period of martial law, section three, paragraph two of article seventeen of the new Constitution expressly affirms that all the proclamations, orders, decrees, instructions and acts he promulgated, issued or did prior to the approval by the Constitutional Convention on November 30, 1972 and prior to the ratification by the people on January 17, 1973 of the new Constitution, are part of the law of the land, and shall remain valid, legal, binding and effective even after the lifting of martial law or the ratification of this Constitution, unless modified, revoked or superseded by subsequent proclamations, orders, decrees, instruction or other acts of the incumbent President, or unless expressly and specifically modified or repealed by the regular National Assembly." Aquino v. Comelec, *ibid.*

According to Justice Makasiar "... the entire paragraph of section 3, paragraph 2 is not a grant of authority to legislate, but a recognition of such power as already existing in favor of the incumbent President during the period of martial law."

[6] CONST. (1935), art. VII, sec. 10, par. (2). (italics supplied).

[7] Proc. No. 1081 (1972).

[8] Statement to the Nation of Pres. Ferdinand E. Marcos, September 23, 1971, 1 Vit. Leg. Doc. 1.

[9] Gen. Order No. 2-A (1972).

[10] Gen. Order No. 4 (1972).

and demonstrations,[11] prohibited, regulated, and punished the possession of firearms,[12] created military tribunals,[13] controlled the mass media and information channels,[14] public utilities,[15] industries,[16] transportation[17] and travel,[18] effectuated a total revamp of government personnel,[19] and those auxiliary to the implementation of the above, such as the order which increased the allowances and salaries of AFP personnel.[20]

On the other hand, some early measures were reformatory in character[21] rather than security-oriented. Thus, in the actual implementation of the Commander-in-Chief clause, a two-pronged approach to the mitigation, if not absolute eradication, of the armed rebellion and insurrection then prevailing was adopted; one towards the maintenance of national security and the restoration of peace and order through the overpowering of anti-government coalition forces, and the other towards the pursuit of changes in the country's social, economic, and political institutions.[22]

Yet, however comprehensive, however flexible may be the scope of the powers naturally attendant to the accomplishment of the above objectives, there is that singular limitation etched in the Commander-in-Chief clause to which the exercise thereof was subject, that is, that such powers are to be exercised only by virtue of and under martial law, and particularly to resolve the contingencies which necessitated the imposition of martial rule in the first place. The latter limitation is but a corollary of the basic premise, for the existence, nature and scope of the said powers depend upon the existence of the emergency which they purport to meet.[23]

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[11] Gen. Order No. 5 (1972).

[12] Gen. Order No. 7 (1972), Gen. Order No. 7-A (1972), and Pres. Decree No. 9 (1972).

[13] Gen. Order No. 8 (1972) and Gen. Order No. 12 (1972).

[14] L.O.I. No. 1 (1972), L.O.I. No. 18 (undated), L.O.I. No. 33 (1972), L.O.I No. 36 (1972).

[15] L.O.I. No. 2 (1972).

[16] L.O.I. No. 27 (1972).

[17] L.O.I. No. 3 (1972).

[18] L.O.I. No. 4 (1972).

[19] L.O.I. No. 11 (1972), Pres. Decree No. 1 (1972), L.O.I. No. 21 (1972).

[20] Gen. Order No. 10 (1972), and Gen. Order No. 11 (1972).

[21] Gen. Order No. 13 initiated a mandatory cleanliness drive; Pres. Decree No. 2 declared the entire country a land reform area; P.D. 27 declared the emancipation of the tenant from the bondage of the soil; P.D. 46 sought to lessen temptation and opportunity for graft and corruption; and G.O. No. 15 prohibited the ostentatious display of wealth in times of national economic crises.

[22] Marcos, *op. cit. supra,* note 8. The National Security Code also provides: "Sec. 2. Concept of National Security. — It is declared policy that the concept of national security shall be broadened to encompass national strength not only in the politico-military but also in the socio-economic sense, and that the defense establishment shall be reorganized to maximize its effectiveness for social and economic development against external aggression and internal subversion. . . ." Pres. Decree No. 1498 (1978). It may be noted that "reform" as an objective of martial rule was not officially expressed in Proc. No. 1081 (1972), nor in Gen. Order No. 1 (1972). It was, however, mandated in the President's Statement to the Nation and in subsequent legislations that proliferated throughout the martial law regime.

[23] As quoted by Justice (later Chief Justice) Fred Ruiz Castro from Weiner: "Martial law is the public law of necessity. Necessity calls it forth, necessity justifies

Accordingly, the power to legislate during the continuance of martial law may only be exercised, in consonance with the aforementioned two-pronged approach, to ward off *existing* destructive forces and to redesign *existing* social structures believed to be contributory to the social malaise. The specific mention in the Constitution of the occasions for the exercise of such powers[24] signifies beyond dispute the intention of the framers thereof to secure broad powers to the Chief Executive for the precise purpose of handling the emergencies thus specified, *not future emergencies, or emergencies not yet in existence.*[25] It is in this sense that P.D. 1737 does not seem to be within the spirit nor the intent of the Commander-in-Chief clause of the 1935 Constitution. P.D. 1737, in providing for broad executive powers not dissimilar to those authorized under martial law, seeks in effect to allow extraordinary powers to the President *in the event only of a grave emergency, or a threat or imminence thereof.*[26] The decree is therefore anticipatory; it does not purport to be a measure designed to directly resolve a current crisis, or to effect the restructuring of any extant institution. It is, in point of fact, an "emergency measure" not in response to the armed insurrection

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its existence, and necessity measures the extent and degree to which it may be employed." Separate opinion of Justice Castro in Aquino v. Ponce Enrile, G.R. No. 35546, September 17, 1974, 59 SCRA 183 (1974).

[24] That is, invasion, insurrection, rebellion, or imminent danger thereof, when the public safety requires it.

[25] Justice Teehankee was of the same persuasion, thus: "While the Solicitor-General has cited the President's powers under martial law and under section three, paragraph two of the Transitory Provisions as vesting him with legislative powers, there is constitutional basis for the observation that his legislative and appropriation powers under martial law are confined to the law and necessity of preservation of the State which gave rise to its proclamation. . . .

Even from the declared Presidential objective of using martial law powers to institutionalize reforms and to remove the causes of rebellion, *such powers by their very nature and from the plain language of the Constitution are limited to such necessary measures as will safeguard the Republic and suppress the rebellion (or invasion) and measures directly connected with removing the root causes thereof,* such as the tenant emancipation proclamation." Concurring and dissenting opinion of Justice Teehankee in Aquino v. Comelec, *supra,* note 4. (italics supplied).

[26] P.D. 1737 provides in section two thereof: "Whenever in the judgment of the President/Prime Minister there exists a grave emergency or a threat or imminence thereof, he may issue such orders as he may deem necessary to meet the emergency including but not limited to preventive detention, prohibiting the wearing of certain uniforms and emblems, restraining or restricting the movement and other activities of persons or entities with a view to preventing them from acting in a manner prejudicial to the national security or the maintenance of public order, directing the closure of subversive publications or other media of mass communications, banning or regulating the holding of entertainment or exhibitions detrimental to the national interest, controlling admission to educational institutions whose operations are found prejudicial to the national security, or authorizing the taking of measures to prevent any damage to the viability of the economic system. The violation of orders, issued by the President/Prime Minister pursuant to this Decree, unless the acts are punishable with higher penalties under the Anti-Subversion Act, the Revised Penal Code or other existing laws, shall be punishable by imprisonment for not less than thirty (30) days but not exceeding one (1) year.

The President/Prime Minister may authorize the Minister of National Defense to issue, in accordance with such regulations as he may prescribe, search warrants for the seizure of any document or property subject of the offense or used or intended to be used as the means of committing the offense pursuant to this Section." Pres. Decree No. 1737 (1980).

and rebellion which ushered in Proclamation 1081 nor to the causes behind the same, but is one in contemplation of *future* emergencies which, according to the decree, need only be *grave*, without necessarily amounting to invasion, insurrection, or rebellion. Taken in this light, there is ample ground for the position, therefore, that P.D. 1737 falls outside the permissive ambit of the executive prerogatives allowed under martial law on the basis of the Commander-in-Chief clause.

C. P.D. 1737 as an Undue Delegation of Legislative Power

Perhaps easily the most distinctive feature of all martial law issuances is their constitutionally guaranteed validity and binding effect even after the lifting of martial law itself.[27] This, however, in no way imparts to them the status of a constitutional provision because the very same transitory provision authorizing such validity makes possible in the same breath modification or repeal thereof by the regular National Assembly.[28]

These issuances are thus statutory in character and, as such, are subject to the same constitutional limitations that are applicable to statutes enacted by the regular legislative organ of government.

P.D. 1737, when viewed as a statute, appears to be an authorization for the President to exercise emergency powers thereby vested in him as soon as the same are, in his discretion, called for in an occasion of grave emergency, or a threat or imminence thereof. More specifically, it empowers him to "issue such orders as he may deem necessary," and proceeds to enumerate some of the allowed discretionary steps.[29] The decree thus delegates to the President the power to legislate, and at the same time enforce, in his capacity as Chief Executive.

The inevitable query, arising in this situation, naturally pertains to the constitutionality of the said delegation. This doctrine of unconstitutional or undue delegation of legislative powers, or of judicial or executive powers, for that matter, has its roots in the ancient concept of separation of powers.[30]

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[27] Article XVII, section 3, paragraph 2 of the 1973 Constitution provides: "All proclamations, orders, decrees, instructions, and acts promulgated, issued, or done by the incumbent President shall be part of the law of the land, and shall remain valid, legal, binding, and effective even after the lifting of martial law or the ratification of this Constitution unless modified, revoked, or superseded by subsequent proclamations, orders, decrees, instructions, or unless expressly and explicitly modified or repealed by the regular National Assembly."

[28] A constitutional provision may be inserted, deleted or amended only either through a constitutional convention, or by the vote of at least three-fourths of all the members of the National Assembly, which shall be valid only when ratified by a majority of the votes cast in a plebiscite held not later than three months after the approval of such amendment or revision. CONST. (1973), art. XVI, sec. 1, par. (2).

[29] See note 26.

[30] The earliest shadows of the concept were weaved by the 17th-century English political philosopher John Locke in his "Two Treatises of Government" (1690) wherein, seeking to justify the necessity of a sovereign government for the survival of organized society, he delineated the characteristics of the envisioned political system, thus: "First, there wants an established, settled, known law, received and allowed by common

Early recognized by the Supreme Court as the integral philosophy behind the trichotomy of powers in our political system, it was but logical for its complementary variation, the non-delegation doctrine, to be also adopted in this jurisdiction.[31]

With reference to the legislative power in particular vis-a-vis the executive branch, the doctrine in essence provides that "[t]he *functions of legislation* may not be delegated by the legislature to the executive department or to any executive or administrative officer, board, or commissioner, except as such delegation may be expressly authorized by a constitutional provision, and the constitution affords the measures of the powers which may be granted..."[32]

What is proscribed by the doctrine, therefore, is the delegation of the *legislative power per se,* or the power to enact the law, or to state what the

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consent to be the standard of right and wrong, and the common measure to decide all controversies between them.... Secondly, in the state of nature there wants a known and indifferent judge, with authority to determine all differences according to the established law.... Thirdly, in the state of nature there often wants power to back and support the sentence when right, and to give it due execution."

The doctrine was further crystallized by Charles-Louis de Montesquieu in his work entitled "The Spirit of the Laws" (1748), wherein he espoused the desirability of the English practice in the following words: "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty: because apprehensions may arise, but the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

There would be an end of everything, were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals." EBENSTEIN, GREAT POLITICAL THINKERS, PLATO TO THE PRESENT (1969).

[31] An explicit discussion on the concept of separation of powers may be found in the 1936 case of Angara v. Electoral Commission, even as the Supreme Court had occasion to expound on the non-delegation doctrine as early as 1908 in the case of U.S. v. Barias. Angara v. Electoral Commission, 63 Phil. 139 (1936); U.S. v. Barias, 11 Phil. 327 (1908).

[32] 16 C.J.S. 348-349. Expressed through the Latin maxim *delegata potestas non potest delegari,* the doctrine is based on the ethical principle that such a delegated power constitutes not only a right but a duty to be performed by the delegate by the instrumentality of his own judgment acting immediately upon the matter of legislation and not through the intervening mind of another. U.S. v. Barias, *ibid.* Through express constitutional grant, however, exceptions to this doctrine obtain in this jurisdiction, thus: 1) Article VII, section 3 (2) of the 1973 Constitution recognized the validity of the Presidential exercise of legislative powers during the period of martial law, and assures the continual validity of all Presidential issuances during the same period, whereas the amendments thereto introduced in 1976 provide that the then (and now) incumbent President may legislate in cases of emergency or when he deems it necessary whenever the interim Batasang Pambansa or National Assembly fails to act; 2) Article XIV, section 15 also empowers the Prime Minister to enter into international treaties or agreements; 3) under Article VIII, section 15 of the same Constitution, the legislature is empowered to delegate to the Prime Minister the exercise of such powers as may be necessary to carry out a declared national policy in times of war or other national emergency; 4) Article VIII, section 17 (2) also authorizes the Prime Minister to fix tariff rates, import and export quotas, tonnage and wharfage dues, and other duties and imposts. (italics supplied)

law shall be. Where the delegation involves merely the authority to promulgate rules and regulations relating to the administration or enforcement, and not the making itself, of the law, the Supreme Court has uniformly upheld its validity.[33] Referred to as the principle of subordinate legislation,[34] this administrative rule-making authority is allowed in recognition of its indispensability in bureaucratic network-oriented societies such as ours.[35]

Some of its boundaries have been delineated by earlier cases,[36] but the guideline oft-repeated with facility to distinguish permissible from prohibited delegation has been expressed thus: "The true distinction is between the delegation of power to make the law, which necessarily involves discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."[37]

In the effort to further clarify the process of distinction, the Supreme Court has laid down the requisites to which the enactment should conform

[33] The following statutes have been declared by the Supreme Court as constituting valid delegation of legislative power: A statute authorizing the Collector of Customs to promulgate rules to govern local navigation, U.S. v. Barias, 11 Phil. 327 (1908); a statutory provision authorizing the Provincial Governor to direct the resettlement of non-Christians in unoccupied public lands to be selected by him, Rubi v. Provincial Board of Mindoro, 39 Phil. 660 (1919); a statute empowering the Public Service Commission to fix the sailing schedules of common carriers, Inchausti Steamship Co. v. Public Utility Commissioner, 44 Phil. 363 (1923); a statute empowering the Fiber Inspection Board, established by the Director of Agriculture, to provide rules for the inspection, grading, and baling of abaca and other fibers, Alegre v. Collector of Customs, 53 Phil. 394 (1929); a statute empowering the Public Service Commission to promulgate rules and regulations requiring common carriers to have possession of specified materials, Cebu Autobus Co. v. de Jesus, 56 Phil. 446 (1931); a statute authorizing the Insular Treasurer to issue and cancel certificates or permits for the sale of speculative securities, People v. Rosenthal and Osmeña, 68 Phil. 328 (1939); a statute empowering the Director of Public Works and Communications to issue rules and regulations to promote safe transit upon national roads and streets, Calalang v. Williams, 70 Phil. 726 (1940); a statute authorizing the Public Service Commission to promulgate rules and regulations governing the issuance of certificates of public convenience to public utilities, Pantranco v. PSC, 70 Phil. 221 (1940); a statute authorizing the creation by the President of a Control Committee to supervise government-owned and controlled corporations, Cervantes v. Auditor-General, 91 Phil. 359 (1952); a statute authorizing the Department of Education to establish minimum standards of adequate instruction to be made the basis for the government recognition of private schools, PACU v. Secretary of Education, 97 Phil. 806 (1955); a statute authorizing the President of the Monetary Board to subject to licensing, as part of their regulatory powers, all transactions in gold and foreign exchange, People v. Joliffe, 105 Phil. 677 (1959); a statute authorizing the promulgation of rules to implement the Reflector Law, Edu v. Ericta, G.R. No. 32096, October 24, 1970, 35 SCRA 481 (1970).

[34] Subordinate legislation has been described as involving either or both of the following, *viz.*: the determination of matters of detail in pursuance of a legislative enactment (6 R.C.L., 177-179), or the "power to determine facts and conditions, or the happening of contingencies, on which the operation of a statute is, by its terms, made to depend." (16 C.J.S. 353-354). In the latter case, what is left to the administrative official is not the legislative determination of what public policy demands, but simply the ascertainment of what the facts of the case require to be done according to the terms of the law by which he is governed." (WILLOUGHBY, THE CONSTITUTION OF THE UNITED STATES (2nd ed., 1937).

[35] Pantranco v. PSC, 70 Phil. 221 (1940).

[36] *See* Lovina v. Moreno, G.R. No. L-17821, November 29, 1963, 9 SCRA 557 (1963); Alegre v. Collector of Customs, 53 Phil. 394 (1929).

[37] Cruz v. Youngberg, 56 Phil. 234 (1931).

for it to constitute a valid delegation, *viz.*: a) the law should be complete in itself, setting forth the *policy* to be executed; and b) it must fix a *standard*, the limits of which are sufficiently determinate or determinable, to which the delegate must conform in the performance of his functions.[38] The breadth of both policy and standard, of course, are sometimes left to unmanageable inexactitudes[39] but which, nevertheless, stand up to the rigor of the law.

Does P.D. 1737?

The decree in question definitely provides the occasion for the exercise of the powers it confers, *viz.*, "[W]henever in the judgment of the President/Prime Minister there exists a grave emergency or a threat or imminence thereof. . .," and the standard to which the exercise of the powers must conform, i.e., "[S]uch orders as he may deem necessary to meet the emergency." The occasion is not the same as legislative policy, however. The former is a mere condition precedent to the exercise of a vested power whereas the latter is the constitutional fount whenceforth the vested power springs.

The policies embodied in the said decree are only those that attach to specific clauses therein[40] but there is no expression of a single integrative policy governing its entirety. A contrast with other emergency enactments shows that this singular absence is not an accident characteristic of martial law issuanecs.[41] It is rather more of a peculiarity which makes of P.D. 1737

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[38] Pelaez v. Auditor-General, G.R. No. 23825, December 24, 1965, 15 SCRA 569 (1965). (italics supplied)

[39] The following policies and/or standards have been deemed sufficient to render the enabling statute a valid delegation of legislative power: the policy of resettlement of non-Christian inhabitants upon order of the provincial governor "when such course is deemed necessary in the interest of law and order", subject to the prior approval of the Department Head, Rubi v. Provincial Board of Mindoro, 39 Phil. 660 (1919); the policy of protecting the public against speculative schemes and fraudulent sales of stock in the implementation of which the Insular Treasurer is authorized to issue permits to such entities only as have "complied with the provisions of the Act" and to cancel the same "whenever in his judgment it is in the public interest", People v. Rosenthal and Osmeña, 68 Phil. 328 (1939); the policy of authorizing the President to effect reforms and changes in government-owned and controlled corporations for the purpose of promoting "simplicity, economy and efficiency" in their operation, Cervantes v. Auditor-General, 91 Phil. 359 (1952); the policy whereby the Secretary of Public Instruction was to "maintain a general standard of efficiency in all private schools and colleges in the Philippines so that the same will furnish adequate instruction to the public", PACU v. Secretary, 97 Phil. 806 (1955).

[40] P.D. 1737 provides that the President/Prime Minister may issue orders, *inter alia*, restraining or restricting the movement and other activities of persons or entities *with a view to preventing them from acting in a manner prejudicial to the national security or the maintenance of public order*, banning or regulating the holding of entertainment or exhibitions *detrimental to the national interest*, controlling admissions to educational institutions whose operations are found *prejudicial to the national security*, or authorizing the taking of measures *to prevent any damage to the viability of the economic system*. (italics supplied)

[41] Even during the early years of martial rule, executive issuances delegating rule-making power designated appropriate policies and standards, thus: L.O.I. No. 3 (1972) authorizes the Secretary of National Defense to devise "reasonable measures to control the movement of non-military foreign-owned and foreign-regulated aircraft and watercrafts of whatever make in order to prevent their use for purposes which are inimical to the national interest or which will lend aid and comfort to the aforesaid

a constitutional maverick, running against the grain of traditional jurisprudence on the matter.[42]

A possible alternative, of course, would be to construe each power therein granted as a separable clause the validity of which would depend upon the presence or absence of a policy or standard limiting the same. Such a construction would then permit of partial validity, to the extent of and only with respect to such powers as are so limited.[43] But the self-defeating nature of the argument immediately becomes manifest when it is considered that the very spirit of the decree mandates the President's prerogative to *"issue such orders as he may deem necessary."* To opt for the construction favoring partial validity would be in effect to nullify the fundamental grant itself. The only possible inference, then, is that the language of the law affords no room for partial validity.

Although, as has been observed, flexibility and leniency more than tight rigidity[44] characterize the standards demanded of statutes in response to the complexities of modern life,[45] this is nevertheless not equivalent to

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conspirators and their supporters"; L.O.I. No. 9 (1972) also authorizes the latter to devise measures to prevent the entry into the Philippines of jackpot machines "in order to safeguard the morality of (our) society, particularly the youth, against the eroding influence of the operators of these devices"; Gen. Order No. 9, September 28, 1972, also orders the Secretary of National Defense to promulgate guidelines/regulations to ensure that, in the course of the implementation of orders pursuant to Proc. No. 1081, no abuse is committed upon the person and/or property of any foreigner visiting lawfully in the country"; Pres. Decree No. 6-A (1972) authorized the National Board of Education to formulate education objectives and policies consistent with a general policy expressly declared in section 2 thereof, and to provide policy guidelines in the administration of the programs therein outlined; Pres. Decree No. 21 (1972) authorized the National Labor Relations Commission to promulgate rules and regulations in accordance with specified objectives and the general policy of promoting industrial peace, maximizing productivity and securing social justice; Pres. Decree No. 43 (1972), providing for the accelerated development of the fishing industry, also states both a general policy for the entire decree and specific policies and standards to guide the exercise of rule-making powers by the Fishing Industry Development Council and the other government agencies comprising the same; Pres. Decree No. 48 (1972) authorized the Philippine Council for Agricultural Research to promulgate policies and guidelines within the scope of well-defined powers and functions.

[42] As the Supreme Court declared: "Indeed, without a statutory declaration of policy, the delegate would in effect, make or formulate such policy, which is the essence of every law; and, without the aforementioned standard, there would be no means to determine, with reasonable certainty, whether the delegate has acted within or beyond the scope of his authority. Hence, he could thereby arrogate upon himself the power, not only to make the law, but, also — and this is worse — to unmake it, by adopting measures inconsistent with the end sought to be attained by Congress, thus nullifying the principle of the separation of powers and the system of checks and balances and, consequently, undermining the very foundation of our Republican system." Pelaez v. Auditor-General, *supra*, note 38.

[43] If this view were adopted, only the following powers, with their corresponding limitations, could then be said to be in substantial compliance with the doctrine of non-delegation, *viz.*: "restraining or restricting the movement and other activities of persons and entities with a view to preventing them from acting in a manner prejudicial to the national security or the maintenance of the public order"; "banning or regulating the holding of entertainment or exhibitions detrimental to the national interest"; and "controlling admission to educational institutions whose operations are found prejudicial to the national security".

[44] See note 39.

[45] Pantranco v. PSC, *supra*, note 35.

a total want of standards. A comparative study of the statutes above referred to, as well as other similar ones, would show that blanket terminologies are comfortably used as standards precisely when the nature of the subject matter regulated already implies sufficient limitation or condition upon the powers supposed to affect the same[46] and only where the law is in itself already complete. Contrary situations have merited declarations of unconstitutionality on the basis of undue delegation.[47]

What gives to P.D. 1737 a most delicate twist is the fact that the powers delegated therein involve the regulation not merely of property rights but also of basic personal liberties and cherished constitutional freedoms.[48]

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[46] *See* note 39.

[47] Thus, in the case of Pelaez v. Auditor-General, *supra,* note 38, the Supreme Court held that the use of the standards "public welfare" and "public interest" in the cases of Calalang v. Williams and People v. Rosenthal does not constitute such precedent as to make the standard "as the public welfare may require" sufficient to validate the delegation to the President of a power definitely legislative in character. In the words of the Court: "Both cases involved grants to administrative agencies of powers related to the exercise of their administrative functions, calling for the determination of questions of fact. Such is not the nature of the power dealt with in section 68 . . . the creation of municipalities is not an administrative function, but one which is essentially and *eminently legislative* in character. The question whether or not 'public interest' demands the exercise of such power is *not* one of *fact.* It is *'purely* a *legislative* question'." (italics supplied).

An American landmark decision, cited by the Supreme Court in the same case, seems to apply with equal vigor to the issues at bar. The controversy therein related to the validity of section 3 of the National Industrial Recovery Act which authorized the President to approve "codes of fair competition" submitted to him by one or more trade or industrial associations or corporations which "imposed no inequitable restrictions on admission to membership therein and are truly representative"; provided that such codes are not designed to "promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy" (of the Act).

In holding the statute to be an unconstitutional delegation, the Federal Supreme Court declared: "Section 3 of the Recovery Act is without precedent. It supplies no standards for any trade, industry or activity. *It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedures.* Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, section 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion described in section 1. In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the Preisdent in approving or prescribing codes, and thus enacting laws for the government of trade and industry . . . , is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power." A.L.A. Schechter Poultry Corp. v. U.S., 295 U.S. 495, 97 ALR 947, 55 S. Ct. 837, 79 L. Ed. 1570 (1935). (Italics supplied).

[48] Even as regards regulation of property rights, where personal liberty is at risk due to penal provisions, the Supreme Court has been strict with the requirements of due delegation. Thus, in the case of U.S. v. Ang Tang Ho, 43 Phil. 1, the controverted statute authorized the Governor-General, upon his own proclamation, to "promulgate, with the consent of the Council of State, temporary rules and emergency measures for carrying out the purposes" of the Act, "whenever, for any cause, conditions arise resulting in an extraordinary rise in the price of palay, rice or corn. . . ." At the same time, the statute provided penalties for violation of any provisions thereof or of the rules or regulations promulgated by the Governor. In holding the Act to be an unconstitutional delegation, the Supreme Court noted: "In other words, the Legislature left it to the sole discretion of the Governor-General to say what was and what was not "any cause" for enforcing the act, and what was and what was not "an extraordinary rise in the price of palay, rice or corn", and under certain undefined conditions to fix

The caution with which delegations of this nature are treated may be seen in the fact that the 1935 Constitution provided for only one instance in which the same may be granted, that is, in times of war or other national emergency.[49] And even in this case, the fundamental law delineated the conditions governing the same. Thus, section 26 of Article VI provides: "In times of war or other national emergency, the Congress may by law authorize the President, *for a limited period, and subject to such restrictions as it may prescribe,* to promulgate rules and regulations to carry out a declared national policy."[50]

Other than by direct constitutional provision, all other avenues by which restrictions may be imposed on civil liberties and individual human rights have been utilized solely by means of legislative enactments.[51] Any possible delegation to the Executive branch has been ruled to include only the power of moderation, not absolute control.[52] The real significance behind the differences in the powers granted under section 26 and the Commander-in-chief clause, in respect of occasion, scope, and flexibility,

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the price at which the rice was to be sold, without regard to grade or quality, also to say whether or not the law should be enforced, a proclamation should be issued, if so, when, and whether how long it should be enforced, and when the law should be suspended. The Legislature did not specify or define what was "any cause", or what was "an extraordinary rise in the price of rice, palay or corn". Neither did it specify or define the conditions upon which the proclamation should be issued. In the absence of the proclamation no crime was committed. The alleged sale was made a crime, if at all, because the Governor-General issued the proclamation. . . ."

[49] CONST. (1935), art. VI, sec. 26. The power has been enlarged, however, in the 1973 Constitution, specifically in article VII, section 15 thereof.

[50] Article VIII, section 15 of the 1973 Constitution, on the other hand, provides that: "In times of war or other national emergency, the National Assembly may by law authorize the Prime Minister, for a limited period and subject to such restrictions as it may prescribe, to exercise powers necessary and proper to carry out a declared national policy. Unless sooner withdrawn by resolution of the National Assembly, such powers shall cease upon its next adjournment." (italics supplied).

[51] Thus, regulation of the freedom of speech is provided for in Book Two of the Revised Penal Code under the following titles: Title One on Crimes Against National Security and the Law of Nations, Title Three on Crimes Against Public Order, specifically Chapter One thereof entitled "Rebellion, Sedition and Disloyalty", and Chapter Five on "Public Disorders", Title Six on Crimes Against Public Morals, specifically Chapter Two thereof entitled "Offenses Against Decency and Good Customs", Title Nine on Crimes Against Personal Liberty and Security, specifically Chapter Three thereof entitled "Discovery and Revelation of Secrets, and Title Thirteen on Crimes Against Honor, specifically Chapter One thereof entitled "Libel" and Chapter Two entitled "Incriminatory Machinations". The freedom to assemble and associate, on the other hand, is governed under the following Titles in Book Two of the same Code: Title Three on Crimes Against Public Order, specifically Chapter Three thereof entitled Public Disorders, and Title Ten on Crimes Against Property, specifically Chapter Two thereof entitled "Brigandage". Both freedoms of speech and of association and assembly were regulated by R.A. 1700, which was superseded by P.D. 885, and other miscellaneous laws such as R.A. 4480.

[52] Thus, in the case of Primicias v. Fugoso, 80 Phil. 71 (1948), where the ordinance required a permit from the mayor for the holding of a parade or procession, the Supreme Court held: "The ordinance must be construed to mean that it *does not confer upon the mayor the power to refuse* to grant the permit, but only the discretion, in issuing the permit, to determine or specify the streets or public places where the parade or procession may pass or the meeting may be held." (italics supplied).

lies in the respective purposes thereof.[53] But insofar as both embrace delegation of the powers to legislate, no reason appears for the adoption of a separate set of constitutional standards. In the one it is the Congress which delegates; in the other, the President. But where the latter does so in his emergency legislative capacity, the former acts as the original repository. The distinction therefore is at most *pro forma*. The *raison d'être* is the same. Both constitutional provisions contemplate an emergency serious enough to merit both the risk and the advantage attendant to the fusion of legislative and executive powers in a single political organ.

A little comparison would seem to make it appear that P.D. 1737 is a blend at the statutory level of both sections 26 and the Commander-in-Chief clause, modifying the former by removing the requisite of prior legislation and requiring "a grave emergency or a threat or imminence thereof" in lieu of "war or other national emergency," and preserving the blanket authority in the latter by enabling the President (Prime Minister) to "issue such orders as he may deem necessary to meet the emergency...," even in the absence of invasion, insurrection, rebellion, or imminent danger thereof, when the public safety so requires.

The result, clearly, is the expansion of emergency executive powers and the facilitation of the enforceability thereof beyond the original intendment of the constitutional grant. That this result was effected by virtue of an emergency issuance partaking of the nature of a mere statute, rather than by a formal constitutional amendment, is what colors to a disturbing degree the validity of the delegation effected in P.D. 1737. Thoughts in this direction are further stimulated by a recall of the sixth provision in the 1976 Amendments to the 1973 Constitution. It 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." The nature of the powers granted, the character of the occasion upon which they are to arise, and the President's power to determine and declare the existence of such occasion are essentially the same in both the latter and in P.D. 1737. The only departure effecting a fundamental alteration, nay, changing the basic conceptual fabric, can be found in the deletion of the condition relating to the inability of the legislative body to act. The constitutional intent is emaciated even as the executive department gains freer rein. Whereas, however, the 1976 provision drew its legitimate vitality from the sovereign body itself by virtue of the ratification

[53] Considering the occasions clarifying the latter provision, it seems evident that it was meant to be resorted to as an extreme measure, and was framed in the belief that it is necessitated by the gravity of the contingency.

thereof,[54] P.D. 1737 was derived solely from the legislative representative of the same sovereign body. Hence, the requisites of due delegation.

D. P.D. 1737 and Due Process

A statute, in order to satisfy the requisites of constitutional due process, must, first, not be contrary to law, and, second, be so constructed as to adequately apprise the persons subject thereto or affected thereby of its declarations or requirements.[55] The first is a requisite of substantive due process; the second, of procedural due process.

An examination of P.D. 1737 in relation to the first requisite as defined, would require, besides the analysis made under the non-delegation doctrine, evaluation of each illustrative clause therein. But even before these are separately analyzed, an overview of the general language of the statute would show less than strict adherence to another equally important aspect of substantive due process.

It has been recognized that even where the legislature had the right to prohibit or proscribe certain conduct, or to require the performance of certain acts, the language used in the regulatory enactment must be circumscribed with such clarity and in such manner as to encompass only the proper objects and subjects thereof. A statute not so drawn runs the risk of being struck down as unconstitutionally void by reason of vagueness.[56] This doctrine, although made to be subsumed under the clear and present danger rule, was invoked by the Supreme Court in the case of *Gonzales v. Comelec*.[57] The statute in this case sought to regulate the freedoms of speech, association, and assembly by proscribing "election campaigns" or "partisan political activity" for a certain period of time preceding elections. In spite of clauses therein attempting to describe in detail conduct falling within the abovementioned activities, the Supreme Court held: "More specifically, in terms of the permissible scope of legislation that otherwise could be justified under the clear and present danger doctrine, it is the considered opinion of the majority, though lacking the necessary vote for an adjudication of invalidity, that the challenged statute could have been more narrowly

[54] The 1976 Amendments were ratified by the citizenry in the Referendum-Plebiscite held on October 16-17, 1976 and proclaimed in full force and effect as of October 17, 1976 under Proclamation No. 1595.

[55] The issue in procedural due process is not whether the Legislature has a right to prohibit the conduct at all, as it is conceded that it has, but whether it so expressed the prohibition that the prospective defendant and the court which would try him can understand the statute; in substantive due process, the issue is whether the Legislature had a right to prohibit the conduct at all. Collings, Jr., *Unconstitutional Uncertainty — An Appraisal*, 40 CORNELL L.Q., 197 (1967).

[56] *Id.*, at 196-197. The author classifies cases involving unconstitutionally vague statutes into two: a) where the statutory language is so obscure that it failed to give adequate warning to those subject to its prohibitions as well as to provide proper standards for adjudication, in which case it infringes upon procedural due process, and b) where the statutory language is so broad and sweeping that it prohibits conduct protected by the Constitution, in which case it is violative of substantive due process.

[57] G.R. No. L-27833, April 18, 1969, 27 SCRA 835.

drawn and the practices prohibited more precisely delineated to satisfy the constitutional requirements as to a valid limitation under the clear and present danger doctrine." And, expressing the rule as a general dictum, it further held: "It is a well-established principle that stricter standards of permissible statutory vagueness may be applied to a statute having inhibitory effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." The statute presently in dispute mainly provides that the President/Prime Minister may issue *such orders as he may deem necessary,* whenever *in his own judgment* there exists a *grave emergency or a threat or imminence thereof.*[58] For all practical purposes, the various clauses succeeding this first part of section 2 of P.D. 1737 serve merely as examples of the orders which the President/Prime Minister is authorized to issue, because the said clauses are preceded by the phrase "including, but not limited to." There is, on the other hand, no explicit statutory prescription of what factual elements are necessary to justify executive determination as to the existence, or otherwise, of a grave emergency, or a threat or imminence thereof. Neither are the latter conditions defined. Though it be conceded that the designations President/Prime Minister would suffice to indicate the then (and now) incumbent President as the official referred to, following the ruling in the case of *Aquino v. Comelec,*[59] this obviously is not enough.

The condition of a "grave emergency, or a threat or imminence thereof," for instance, is at once susceptible of connotations so varied as to make it short of being meaningfully exact. "Grave emergency" could be taken to mean an economic disaster, or an industrial disturbance, or even an exceptionally unruly political mass action, as a threat or imminence thereof. It could even be made to include a worker's strike, or a secessionist tendency, whether regional or nation-wide, inasmuch as the law sets no precluding boundaries. Upon the other hand, the impact of the phrase "as he may deem necessary," qualifying the nature of the orders which the President is empowered to issue, may be more fully appreciated upon a consideration of the powers embodied in the illustrative clauses. Briefly, they may be summarized into three kinds: a) that involving intellectual liberty;[60] b) that involving personal liberty;[61] and c) that involving property.[62]

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[58] See note 26.

[59] *Supra,* note 4.

[60] Under section 2 of P.D. 1737, the President may issue orders "restraining or restricting the movement and other activities of persons or entities with a view to preventing them from acting in a manner prejudicial to the national security or the maintenance of public order, directing the closure of subversive publications or other media of mass communications, banning or regulating the holding of entertainment or exhibitions detrimental to the national interest, (and) controlling admission to educational institutions whose operations are found prejudicial to the national interest.

[61] *Ibid.* The said section also provides that the President may order the *preventive detention* of persons, without qualification.

[62] *Ibid.* Said section 2 further empowers the President/Prime Minister to issue orders "authorizing the taking of measures to prevent any damage to the viability of the economic system."

Construed together, the impression communicated is no other than that the three liberties just mentioned are subject and open to the possibility of regulation without the benefit of accompanying limitations thereon nor the judgment of a constitutional entity independent of the enforcing arm of government. Put another way, the statutory language of P.D. 1737 is so broad and sweeping that it permits of executive control to an extent constrictive of conduct protected by the constitution. A certain leading American case involved a similar situation.[63] The statute there invoked made it criminal to possess with intent to sell a publication "principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime." The Federal Supreme Court held the statute unconstitutional on the ground of vagueness. Declared Justice Reed: "It is settled that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment..."

Turning now to the powers illustrated in P.D. 1737, it may be seen that the fundamental right most greatly affected is the individual's freedom of expression. This right is one emblazoned in the legal system of all modern democracies because it is the very instrument for the attainment of popular control of government.[64] Thus, not only is it held inviolable under the Bill of Rights;[65] it is also given strict protection under our penal system.[66] Though restrictions thereon are also provided for by law, the scope and nature of the prohibition and the exact liability of the offender are set forth with caution.[67]

Indeed, the Supreme Court has categorically upheld the preferred position of the freedoms of speech, assembly, and association in the hier-

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[63] Winters v. New York, 333 U.S. 507 (1948), 68 S. Ct. 665.

[64] There are, in modern democracies, three principal methods of popular control of government: a) popular influence through public opinion; b) change of leadership through elections; and c) accountability through removal and prosecution for wrongdoing. Gonzales v. Comelec, *supra*, note 57.

[65] Article IV of both 1935 and 1973 Constitutions provides: "Section 6: The right to form associations or societies for purposes not contrary to law shall not be abridged"; Section 8: No law shall be passed abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and petition the Government for redress of grievances."

[66] The freedoms of speech, association, and assembly are safeguarded by the imposition of penalties upon those who, without legal ground, violate the same, under Book Two of the Revised Penal Code, specifically Title Two thereof entitled Crimes Against the Fundamental Laws of the State, and Title Three entitled Crimes Against Public Order.

[67] Acts not protected, on the other hand, are defined and penalized under Title Three of the same Code on "Crimes Against Public Order". Abuses of the freedom of speech, on the other hand, are defined and penalized under Title Thirteen on "Crimes Against Honor", in Chapter One thereof entitled "Libel" and Chapter Two entitled "Incriminatory Machinations". R.A. 1700, as amended by P.D. 885, outlaws "subversive organizations" as defined therein and penalizes knowing membership.

archy of civil liberties.[68] The general rule embodying the judicial stance in this jurisdiction, together with the exception thereto, has been stated thus:

> At the very least, free speech and free press may be identified with the liberty to discuss publicly and truthfully any matter of public interest without censorship or punishment. There is to be then no previous restraint on the communication of views or subsequent liability whether in libel suits, prosecution for sedition, or action for damages, or contempt proceedings, unless there be a clear and present danger of substantive evil that Congress has a right to prevent.[69]

The other exception is found in the dangerous tendency doctrine,[70] but true to its aforesaid avowal, our Supreme Court has adopted the more stringent "clear and present danger doctrine."

First enunciated by Justice Holmes, the doctrine states: "The question in every case is whether the words used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evil that the Congress has a right to prevent."[71] There must then exist not merely a possibility, or even a great chance; the law requires that the danger be both actual and real in order to justify impingements upon constitutional rights. Absent this danger, no previous controls may be imposed.

With regard particularly to P.D. 1737, it is possible for the same to be wholly construed as a mere authorization or statutory grant, and then to assert that its effects as a source should be weighed apart from its effects when enforced; that the decree *per se* does not infringe upon due process, any violation still remaining to be seen upon final implementation thereof.

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[68] Gonzales v. Comelec, *supra*, note 57. The Supreme Court also cited Murdock v. Pennsylvania, 319 U.S. 105, 87 L. Ed. 1292 (1943), Prince v. Commonwealth of Massachussetts, 321 U.S. 158, 88 L. Ed. 645, 64 S. Ct. 438 (1944), and Marsh v. Alabama, 326 U.S. 501, 90 L. Ed. 430 (1946).

[69] Gonzales v. Comelec, *supra*, note 57. The general rule and the exception have been said to apply also to the freedoms of association and assembly. FERNANDO, CONSTITUTION OF THE PHILIPPINES 632-633, 636-637 (1977).

[70] The doctrine states: "If the words uttered create a dangerous tendency which the state has a right to prevent, then such words are punishable." *Ibid.*

Another gauge to determine permissible restrictions on the freedom of speech is the balancing-of-interests test, invoked by Justice Castro in his concurring opinion in Massachussetts, 321 U.S. 158, 88 L. Ed. 645, 64 S. Ct. 438 (1944), and Marsh v. Ferrer, G.R. Nos. L-32613-14, December 27, 1972, 48 SCRA 382 (1972).

[71] Schenck v. U.S. 249 U.S. 47, 39 S. Ct. 247 (1919). This doctrine has been invoked in the cases of Primicias v. Fugoso, 80 Phil. 71 (1948), American Bible Society v. City of Manila, 101 Phil. 386 (1957), Cabansag v. Fernandez, 102 Phil. 152 (1957), Vera v. Arca, G.R. No. L-25721, May 26, 1969, 28 SCRA 351 (1969), Navarro v. Villegas, G.R. No. L-31687, February 26, 1970, 31 SCRA 731 (1970), Imbong v. Comelec, G.R. No. L-32432, September 11, 1970, 35 SCRA 28 (1970), Badoy v. Comelec, G.R. No. L-32546, October 17, 1970, 35 SCRA 285 (1970), People v. Ferrer, G.R. Nos. L-32613-14, December 27, 1972, 48 SCRA 381 (1972), and Phil. Blooming Mills Employees Association v. Phil. Blooming Mills Co., G.R. No. L-31195, June 5, 1973, 51 SCRA 189 (1973).

Justice (now Chief Justice) Enrique Fernando has also stated: "To assure, however, that no more restriction is imposed than is unavoidable under the circumstances, the clear and present danger principle must be operative." Fernando, *supra*, note 69 at 600.

The issue then is whether the averment sufficiently purges P.D. 1737 of the character of a prior restraint.

The mass of judicial interpretation respecting most of our constitutional precepts is largely derived from American jurisprudence as this is the main source of our constitutional heritage. Thus, it is almost entirely from U.S. Federal cases that our judicial branch has sought enlightenment as to what constitutes prior restraint. In the case of *Near v. Minnesota,*[72] the statute in issue classified as a nuisance any "obscene, lewd, lascivious" or "malicious, scandalous, and defamatory" newspaper, magazine, or other periodical, and provided that its publication could, after proper hearing, be permanently enjoined. The newspaper the publication of which was sought to be enjoined had been publishing articles to the effect that a Jewish gangster was in control of gambling, bootlegging, and racketeering in Minneapolis, and that law-enforcing officers and agencies were not energetically performing their duties. The Federal Supreme Court held that the statute infringed upon the liberty of the press. It further stated: "Public officers, whose character and conduct remain open to debate and public discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain newspapers and periodicals."

Then in the case of *New York Times v. U.S.,*[73] which was jointly decided with the case of *U.S. v. The Washington Post Company,* the U.S. government filed a suit to enjoin publication by the New York Times of the contents of a classified study entitled "History of the U.S. Decision-Making Process on Vietnam Policy." Again, the Federal Supreme Court held that the government failed to show justification for the imposition of a prior restraint on expression. In *Lovell v. Griffin,*[74] an ordinance which prohibited the distribution, either by hand or otherwise, of circulars, leaflets, handbills, and the like, without a permit from the City Mayor, was struck down as void on its face. The same fate was met, in another case,[75] by an ordinance which prohibited the canvassing, soliciting, or distribution of circulars or other matters without a written permission from the Chief of Police.

A similar holding may be seen in the Philippine case of *Sotto v. Ruiz,*[76] wherein our own Supreme Court ruled that the authority of the Director of Posts under a certain statute to exclude from the mails any written or printed matter and photographs of an obscene, lewd, or other character specified by the statute ought to be exercised in such a manner as not to interfere with the freedom of the press.

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[72] 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931).
[73] 403 U.S. 713, 91 S. Ct. 2140, 29 L. Ed. 922 (1971).
[74] 303 U.S. 444, 58 S. Ct. 666, 82 L. Ed. 949 (1938).
[75] Schneider v. Irvington, 308 U.S. 147, 60 S. Ct. 146 (1939).
[76] 41 Phil. 468 (1921).

The unifying strand linking the various decisions together consists in the philosophy behind the doctrine of prior restraint, expressed by the U.S. Supreme Court in the case of *Thornhill v. Alabama*[77] thus:

> Proof of an abuse of power (in the particular case) has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas. (*Schneider v. State*, 308 U.S. 147, 162-165, 60 S.C. 146, 151-152; *Lovell v. Griffin*, 303 U.S. 444, 451) the cases... indicate that the rule is not based upon any assumption that application for the license would be refused or result in the imposition of other unlawful regulations. Rather *it derives from an appreciation of the character of the evil inherent in a licensing system*.... It is not merely the sporadic abuse of power by the censor but the *pervasive threat inherent in its very existence* that constitutes the danger to freedom of discussion. (italics supplied)

It is not so much the manner of the actual implementation, therefore, as the fact that there is opportunity for abuse that constitutes the essence of the objection to prior restraint. Thin is the dividing line between the power to license and the licensing itself. But both powers have been lodged, *except in the face of a clear and present danger*, beyond the constitutional competence whether of the Executive or the Legislature. The licensing powers granted in P.D. 1737 emerge "[W]henever in the judgment of the President/Prime Minister there exists a grave emergency *or a threat or imminence thereof*..."[78] Certainly there would be no infirmity if the dangerous tendency doctrine were relied upon; judicial mandate, however, has consistently opted otherwise.

The foregoing observations, it may be noted, have applicability only in times of normal political climes, for the organic charter itself carves out the exception — that the privilege of the writ of *habeas corpus* may be suspended, or martial law declared, in the event of an "invasion, insurrection, rebellion, or *in case of imminent danger thereof, when the public safety requires it.*"[79]

The intention certainly behind the last clause is to dispense with the requirement of a clear and present danger for the availment of either of the above remedies. The eventualities prepared for are imagined to be so crucial that an "imminent danger" of the specified emergencies is conceded to be enough ground for the invocation of emergency powers.

But this concession, precisely, is an exception to the rule, and is operative only as to the categorical enumerations, the rationale behind being naturally the immediacy with which defensive and counter-offensive postures should be taken to preserve the legal and social order. This is the one occasion when the Constitution itself sanctions unilateral action even

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[77] 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940).
[78] Italics supplied.
[79] See note 3. (italics supplied)

upon the basis of unilateral determination as to the existence or non-existence of but an "imminent danger."[80] *The Constitution sanctions no other.*

The second basic freedom which the said decree touches upon involves personal liberty.[81] The term has been defined to mean more than non-confinement in jails. "It includes the right to enjoy one's life uninterruptedly and uninterfered with, so long as the rights of others are not violated in a way that will not evidence probable cause of such violation."[82] It has been said to include the liberty to contract, to earn one's livelihood, to pursue any lawful trade or calling, the free use of one's property, and the right to privacy.[83] In terms of its rank in the so-called hierarchy of civil liberties,[84] it reigns no less equally than the freedom of expression which forms the bedrock in turn of intellectual liberty.

This is so for personal liberty is both a concomitant of and a condition precedent to the enjoyment of these freedoms. Both personal and intellectual liberty inspire, so to speak, the ether of life in a democracy. In the same manner then that the Constitution and the penal system assure the protection of the latter, there are also set forth therein a multitude of safeguards for the former.[85] Both substantive and procedural checks outline in detail the preliminary basis, the initial quantum of evidence, the permissible dura-

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[80] The Supreme Court, in Aquino v. Ponce Enrile, *supra,* note 23, confirmed the proposition that in the President lay the discretion to *initially* decide whether or not the circumstances obtaining require the imposition of martial law.

[81] P.D. 1737 empowers the President/Prime Minister to issue orders relating to preventive detention, restraining or restricting the movement and other activities of persons or entities with a view to preventing them from acting in a manner prejudicial to the national security or the maintenance of public order, controlling admission to educational institutions whose operations are found prejudicial to the national security, and authorizing the Minister of National Defense to issue, in accordance with such regulations as he may prescribe, search warrants for the seizure of any document or property subject of the offense, or used or intended to be used as the means of committing the offense.

[82] U.S. v. Kaplan, D.C. Ga., 286 F. 963 (1923).

[83] FERNANDO, *supra,* note 69 at 585.

[84] See note 68

[85] Under the Bill of Rights, sec. IV, both the 1935 and the 1973 Constitutions substantially provide for the following: under section one, the right against deprivation of life, liberty and property without due process of law; under section three, the right against unreasonable search and seizure; under section four, the right to privacy of communication and correspondence; under section five, the liberty of abode and travel; under section fifteen, the right to the privilege of the writ of habeas corpus; under section sixteen, the right to a speedy disposition of cases; under section seventeen, eighteen, nineteen, twenty, and twenty-one, the right to criminal due process.

The Revised Penal Code, on the other hand, provides safeguards under Title Two, Chapter One, in Article 124 thereof entitled "Arbitrary Detention", in Article 125 entitled "Delay in the Delivery of Detained Persons to the Proper Judicial Authorities", and in Article 127 entitled "Expulsion", and Article 126 entitled "Delaying Release". Section two of the same Chapter protects the right to privacy under Article 128, "Violation of Domicile", Article 29 — "Search Warrants Maliciously Obtained and Abuse in the Service of Those Legally Obtained", and Article 130 — "Searching Domicile Without Witnesses". The same right is protected in Title Nine, section two, Chapter Two entitled "Trespass to Dwelling", and in Chapter Three entitled "Discovery and Revelation of Secrets". Title Nine thereof also penalizes offenses against personal liberty under section one entitled "Crimes against Liberty", under section two entitled "Kidnapping of Minors", and under section three entitled "Slavery and Servitude".

tion, the manner, the agencies, and the remedies for a valid arrest and detention under the criminal law. Thus, under the rules of court, an arrest may be made only under three situations: one, by any person upon the order of a judge in whose presence an offense is being committed;[86] two, by either a peace officer or a private person, of one who is actually committing or is about to commit an offense in the latter's presence, or who is reasonably believed to be responsible for an offense which has been committed, or an escaped prisoner, whether pending or after conviction;[87] and three, by an officer upon a warrant of arrest.[88]

A warrant of arrest, on the other hand, may only be issued after probable cause has been determined to exist by a judge, or other responsible officer designated by law, by virtue of a preliminary examination under oath or affirmation of the complainant and his witnesses, if any.[89] The only other public officer authorized to issue the said warrant after the respective examination is the municipal mayor, but he may do so only in the temporary absence of the municipal judge and when examination cannot be delayed without prejudice to the interest of justice.[90]

And except where a preliminary examination had been already conducted in the aforesaid manner, no information for an offense cognizable by the Court of First Instance, that is, those punishable by a fine of more than ₱200 or imprisonment for more than six months, is allowed to be filed by a state prosecutor or his assistant unless several steps be first complied with. Briefly, the law requires that anyone seeking the aid of criminal process which could result in the deprivation of the personal liberty of another should present a written statement made under oath and the documents supporting his claim, together with sworn statements of any witnesses he may wish to present. This would constitute the initial basis upon which the investigating officer would determine whether or not there is *probable cause* to conduct a preliminary investigation. Absent such a finding, he is mandated by law to *dismiss* the complaint. In the event that he finds probable cause, he is bound to issue a subpoena to the respondent, notifying him of the complaint and requiring him to submit sworn counter-affidavits. The purpose of the law clearly is to give the party charged at least an opportunity to rebut, at the earliest stage, the claims of the complainant. Should he waive this right, the complainant is not prejudiced in any way because the investigation shall continue. On the basis of the documents thus submitted the officer decides whether or not a *prima facie* case exists sufficient to justify the filing of an information and thus the grinding of the

[86] RULES OF COURT, rule 113, sec. 5.
[87] RULES OF COURT, rule 113, sec. 5.
[88] RULES OF COURT, rule 112, sec. 6.
[89] CONST., art. IV, sec. 3; RULES OF COURT, rule 112, sec. 6.
[90] RULES OF COURT, rule 112, sec. 3. In such case, he is required by law to make a report of the examination to the municipal judge immediately upon the return of the latter.

judicial machinery. The meticulous process is even further qualified in the case of an investigation by an assistant fiscal or state prosecutor, whose decision is subject to review and could be reversed by the provincial or city fiscal or Chief State Prosecutor. The latter's resolution in turn is amenable to reversal by the Secretary of Justice.[91] The message cannot be overemphasized. So valued is this democratic ideal and considered so elementary to human dignity, that its loss is considered to be a penalty in itself. Deprivation thereof beyond a certain degree, or in respect of certain individuals, or under certain conditions, could spell death to the offender.[92] Detention of even just a little beyond the period of time designated by law could merit the detaining officer a penalty of imprisonment for four months and a day, at the least.[93] And twenty years at the most, should the extended or arbitrary detention have exceeded six months.[94] Thus, ensconced in the fundamental law itself, keeping vigil over this right, is a guarantee, come to be known as the very symbol of liberty and very aptly called the "freedom writ."[95] The genesis and the concept of the privilege of the writ have been summed up in an American case as follows: "... ever since the *magna carta* man's greatest right — personal liberty — has been guaranteed, and the procedures of the *habeas corpus* Act of 1679 gave to every Englishman a prompt and effective remedy for testing the legality of his imprisonment.... Over the centuries it has been the common law world's 'freedom writ' by whose orderly processes the production of a prisoner in court may be required and the legality of the grounds for his incarceration inquired into, failing which the prisoner is set free."[96] The privilege is allowed to be suspended only in the case of invasion, insurrection, or rebellion, *and* such suspension is required by public safety.[97] And even then, it is not the writ itself, but the privilege to avail of its benefits, that is

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91 Pres. Decree No. 911 (1976).

92 Kidnapping and serious illegal detention is penalized with *reclusion perpetua* to death under Article 267 of the Revised Penal Code. Death is the single penalty where the kidnapping or detention was for the purpose of extortion, regardless of duration, presence or absence of physical injuries, or who was affected, or the status of the victim.

93 Art. 125 of the Revised Penal Code requires that should a person be arrested without the benefit of a warrant he should be delivered to the proper judicial authorities, i.e., judicial process must have been initiated through the filing of the proper information, within six, nine, and eighteen hours, for offenses punishable by light, correctional and afflictive penalties, respectively. Violation of the provision is punished in accordance with Article 124, which provides that should the detention, without lawful ground, not exceed three days, the public officer or employee shall suffer *arresto mayor* in its maximum period to *prision correccional* in its minimum period.

94 Article 124, Revised Penal Code, provides that the punishment for detention exceeding six months shall be *reclusion temporal.*

95 Both section 14, article IV of the 1935 Constitution and section 15, article IV of the 1973 Constitution provide in essence that there shall be no suspension of the privilege of the writ of *habeas corpus* except in cases of invasion, insurrection, or rebellion, or in case of imminent danger thereof, when such suspension is required by public safety.

96 Bowen v. Johnston, 306 U.S. 19, 83 L. Ed. 455, 59 S. Ct. 442 (1939).

97 CONST. (1935), article IV, sec. 14; CONST., art. IV, sec. 15.

suspended in said cases.[98] That this inviolable respect accorded the writ holds sway even during martial law has been reiterated in various rulings of the High Tribunal. In the words of then Justice (now Chief Justice) Enrique Fernando: "A regime of Martial Rule does not for me go so far as to amount to an automatic denial of the right to this great writ of liberty, even as to such persons as may be detained because of their actual or presumed connection with an insurrection, rebellion, or invasion. For one thing, the validity of the declaration of Martial Law may itself be tested by resort to this remedy."[99] Invocation of the writ on such occasion, however, does not connote an automatic release from detention.

Once the writ has been invoked, inquiry is directed to the cause of detention, and it is then that the fate of the detainee is hung on the balance. Should his petition have been grounded on issues covered by the suspension of the writ, whether by virtue or independently of martial law, or by an emergency presidential issuance requiring such detention, then the inevitable consequence would be his continued incarceration.

The net effects of such suspension, *in a proper case,* is a freezing of all the devices and remedies ordinarily provided by law for the protection or redemption, even if temporary, of personal liberty. Thus, the *imperative* requisites of a valid arrest are inapplicable, for even were the arrest defective under normal procedural standards, such defect cannot be raised as the very right to do so is suspended.[100] The right to bail, with respect to certain offenses, becomes wholly inoperative[101] and the right to trial is transformed into a mere concession.[102] The life of the detainee is in a virtual straight-

[98] As Chief Justice Fernando has explained: "The suspension of this privilege does not suspend the issuance of the writ itself. The order to produce the body issues as a matter of course. On the return made, the officer or person detaining may ask the court not to continue proceeding any further as the privilege of the writ as to that particular petitioner has been suspended. Unlike in cases then where the writ is in full force and effect, the court may be precluded in the event of its being suspended from determining whether or not such decision is valid. The suspension though should not be understood as meaning that a wrongful arrest or imprisonment is legalized. It only deprives the individual detained of this speedy means of obtaining his liberty." FERNANDO, *op. cit., supra,* note 69 at 306.

[99] Fernando, *The Writ of Liberty under Martial Law: Malcolm on Habeas Corpus Revisited,* 50 PHIL. L.J. 306-307 (1975).

[100] Thus, the theoretical right to be presumed innocent until proven guilty, and therefore, the right not to be punished till then, is also suspended to an equivalent extent.

[101] Bail is available only, by implication from the wording of the law, after the proper information or complaint has been filed, because the condition thereof is that the "*defendant* shall answer the *complaint or information* in the court in which it is filed or to which it may transferred for trial, and after conviction . . . that he will surrender himself in execution of such judgment as the appellate court may render, or that, in case the cause is to be tried anew or remanded for a new trial, he will appear in the court to which it may be remanded and submit himself to the orders and processes thereof." RULES OF COURT, rule 114, sec. 2. Bail, as a matter of fact, is available as a matter of right only after conviction by a municipal court but before conviction in the Court of First Instance; after conviction, the availment thereof becomes a matter of judicial discretion. It is not available at all where the offense is capital and the evidence of guilt is strong. RULES OF COURT, rule 114, sec. 3, 4 and 6.

[102] The creation of military tribunals to take cognizance of cases affected by the

jacket, and there is a *de facto* deprivation of the freedom to make a living, in the place of his convenience through an occupation of his choice. The liberty to contract is effectively circumscribed, and the future gradually shapes as a faceless uncertainty as the duration of detention is discovered to be unfixed.

Again, it must be remembered that these awesome consequences are justified and permitted to assume their vastest proportions only *in the event and by reason of* the purported invasion, insurrection, or rebellion that is actually gripping the nation, the corresponding courses of action being necessitated by public safety.

The foregoing considerations unavoidably breed skepticism towards a situation which would allow the very same restrictions, to the same immense extent, but on an equally reduced basis and with piteously nebulous safeguards.

The absence in P.D. 1737 of any indication whatsoever as to the meaning of preventive detention casts the first cloud. To arrive at a struggling definition, one can at most only draw a comparison of the phrase with existing similar concepts and formulate inferences from a sprinkling of judicial quotes. Thus, it can be said that preventive detention is a phenomenon quite apart and distinct from the remedy of preventive imprisonment as this concept is explained under the law. The penal code, in two separate articles, makes mention of the terms "preventive imprisonment" and "arrest and temporary detention of accused persons."[103]

"Arrest and temporary detention" is explained as a measure of prevention or safety which *accused persons* undergo but not as a penalty because they are not imposed as a result of judicial proceedings.[104] "Preventive imprisonment," on the other hand, is said to be undergone by the *accused* when the offense charged is non-bailable, or even if bailable the latter cannot post bail.[105] Despite the difference in the language used, it is quite obvious that the two articles mentioned refer to the same idea — that of imprisonment of a person against whom an accusation has been levelled in proper form, through an information duly filed by the state with a court having jurisdiction of the case.[106] Is "preventive detention" then, as used in P.D. 1737, equivalent to "preventive imprisonment?" The most recent application of the term in this jurisdiction seems to indicate a negative answer. The idea of preventive detention has been used to define arrest and consequent deprivation of liberty pursuant to issuances promulgated during

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proclamation of martial law was ordered purely by the grace of and in the exercise of lone discretion by the President through Gen. Order No. 8, September 27, 1972.

103 REV. PENAL CODE, articles 29 and 24, respectively.

104 REYES, THE REVISED PENAL CODE, 573 (1977).

105 *Ibid.*, at 587.

106 This is conclusively implied by the consistent use by the two articles of the term "accused".

martial law.[107] In his concurring opinion in *Aquino v. Ponce Enrile,* Justice Castro stated: "[G]iven then the validity of the proclamation of martial law, the arrest and detention of those reasonably believed to be engaged in the disorder or in fomenting it is well nigh beyond questioning. Negate the power to make such arrest and detention, and martial law would be 'mere parade, and rather encourage attack than repel it.' "[108] Further light is shed by his quotation from another American case: "His arrest and detention in such circumstances are merely to *prevent* him from taking part or aiding in a continuation of the conditions which the governor, in the discharge of his official duties and in the exercise of the authority conferred by law, is endeavoring to suppress."[109]

No controversy would have been spawned at all and no petitions for *habeas corpus* would have been filed upon the arrest and detention of persons pursuant to martial law orders had such arrests been in compliance with ordinary criminal procedure. Thus, inferentially, such arrests and detentions had been made either with warrants issued, not by the judiciary, but by the executive or the military as the latter's implementing arm, or without warrants and without a subsequent delivery to the judicial authorities. The logical conclusion then is that "preventive detention," based on both political context and judicial pronouncement, is used in P.D. 1737 to mean deprivation of liberty by means of executive fiat and according to executive regulations, not judicial determination in accordance with normal legislation. As such, preventive detention could assume various forms. It could mean imprisonment in the local or national penitentiary, or incarceration in a prison camp, or just localization of locomotion in a more convenient way such as house arrest. And then again, it could even be interpreted to encompass exile. Such is the versatility of its undefined nature, which is matched only by the nature of its cause. Unfortunately, this versatility does not end with this multi-faceted capacity. The real spectre lies in its equation with the contemporary connotation of the term as has been previously discussed, for this would naturally mean the evaporation into thin air of all the substantive and procedural rights appurtenant to the criminal process in exactly the same manner as in a case of martial law. Except that in the present case, of course, there is no martial law, nor a case of suspension of the privilege of the writ; there is only a "grave emergency, or an imminent danger thereof."

The final feature of preventive detention is but a penumbra of this spectre. For should the equation prove to be accurate, detention not only could be "preventive"... it could also be indefinite.

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[107] See Gen. Order No. 19, which authorizes the Secretary of National Defense to arrest or cause the arrest of persons involved in the subversive conspiracy whether for "preventive detention or subsequent prosecution".

[108] *Supra,* note 23. The phrase quoted was taken from Luther v. Borden, 7 How. 1, 12 L. Ed. 581 (1849).

[109] The quotation is from Moyer v. Peabody, 35 Colo. 159, 85 Pac. 190 (1904).

The second provision in P.D. 1737 touching on personal liberty is not as expansively blank as the first. The power vested therein of restraining or restricting the movement and other activities of persons or entities is qualified by the succeeding clause "with a view to *preventing* them from acting in a manner prejudicial to the *national security or the maintenance of public order.*" (Itailcs supplied) Does the qualifying clause truly qualify? Under the Revised Penal Code, no definition of the term "national security" is provided but a vague conception is derived from the nature of the acts which the law has designated as constituting crimes against it. Thus, the term would seem to mean, under the Code, the integrity and stability of government and the defense thereof *in times only of war* and when the principal source of threat is foreign.[110] The National Security Code, on the other hand, expressly delineates the concept in an entirely different sense. National security under the latter law is made to encompass national strength *"not only in the politico-military but also in the socio-economic sense."*[111] Section two thereof further provides: "It is likewise the policy of the state to promote a stable and enduring economy and bring about optimum use of all appropriate agencies of the Government to stamp out and counteract smuggling, tax evasion and other finance schemes and activities that undermine the *national interest and security.*" (Italics supplied) The same dilemma is encountered in relation to the term "public order." If the penal code is again used as a point of reference, it will be discovered that the offenses therein denominated to be "Crimes Against Public Order" have the common characteristic of having, as their direct targets, either the government or its duly constituted agents, legal processes, or public tranquility.[112] The general description of an illegal association, furthermore, is broad enough to include, theoretically, a subversive organization as defined in Presidential Decree No. 885. If the latter entity is thus deemed an "illegal association" within the meaning of the penal code, then, by analogy, it could also be considered as an offense against public order.

The point of significance, of course, is not in the solution of the foregoing riddles *per se;* it is in the fact that there are riddles at all.

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110 This can be gathered from the fact that treason and espionage are considered crimes against national security, whereas rebellion and sedition are deemed only as crimes against public order. A former Associate Justice of the Supreme Court thus commented:"While rebellion may constitute the treason of levying war, yet it is to be punished as rebellion and not as treason. There may be a state of rebellion not amounting to war. The correct view seems to be that, if the levying of war was in collaboration with a foreign enemy, it should be punished as treason and not as rebellion. If the levying of war is merely a civil uprising, without any intention of helping an external enemy, it should be treated as mere rebellion". AQUINO, THE REVISED PENAL CODE 777-778 (1976).

111 See note 22. (italics supplied)

112 Crimes Against Public Order may be found under Title Three, Book Two of the Revised Penal Code. They consist of rebellion, sedition and disloyalty, crimes against popular representation, illegal assemblies and associations, assaults upon and resistance and disobedience to persons in authority and their agents, public disorders, evasion of service of sentence, and commission of another crime during service of penalty imposed for another previous offense.

A statute which seeks to regulate some phase of human activity is always born of a legislative policy and accompanied with appropriate guidelines, identifying the subjects of regulation, mapping out its boundaries, and in case of delegation of the power to create subordinate legislation, standards reasonably intelligible to which the delegate might adhere. These requirements make up the irreducible minimum in the absence of which the statute could successfully be challenged as being void on account of vagueness, or on the basis of overbreadth, or as an undue delegation of legislative power, or as a prior restraint, or as infringing, in general, upon basic constitutional freedoms.

Forsooth, these considerations become all the more indispensable where the law purports not only to regulate, but in fact to *restrict*, both *movement* and *activity* of persons, whether natural or juridical. And specially because the regulation and restriction are subject to an ambiguously measured extent, it would not at all be an exaggeration to state that such a law is tantamount to a virtual license to monitor and control the behavior of the polity. Surely, the temporary direction of individual lives becomes at certain times inevitable. The will of the state is substituted for that of the constituent to ward off further perils to both. But certainly, too, such state control cannot be totally unbridled for ultimately sovereignty is supposed to reside not in the state but in the citizenry. To permit of an ill-defined discretion in the ascertainment of whether or not there is a grave emergency, or a threat or an imminent danger thereof, or of the necessity for its further continuance, or in the determination of the particular nature, extent, and manner of restriction upon the personal choices of the people, would be to sanction the possibility of irreversible error without a whit of assurance as to an opportunity for correction.

The same observations as to the seeming inadequacy of both basis and standards hold true with respect to the regulation of the right to privacy. An integral element of both personal and intellectual liberty, this right is accorded protection in the fundamental law through the proscription of unreasonable search and seizure and the assurance of inviolability of the privacy of correspondence and communication.[113] Both the Constitution and the Rules of Court set forth cautionary requisites for the allowance of any intrusion into private sanctuaries. No search nor seizure may legally be effected unless a warrant therefore be first secured, and no such warrant may be issued, whether by a judge or other officer authorized by law, unless he shall at first have ascertained personally[114] the existence of probable cause through an examination under oath or affirmation of the complainant and his witnesses, if any.[115] The requirement of a search warrant has been held to satisfy the injunction against unreasonableness;[116] there

[113] CONST. (1935), art. IV, sec. 3 and 5; CONST., art. IV, sec. 3 and 4.
[114] RULES OF COURT, rule 126, sec. 4.
[115] CONST. (1935 and 1973), art. IV, sec. 3; RULES OF COURT, rule 126, sec. 3.
[116] Pasion v. Locsin, 65 Phil. 689, 693 (1938).

are situations, however, when the injunction is not violated even in the absence of the same. When the subject has voluntarily consented to the search, for instance,[117] or the search is incident to an arrest,[118] or when the search is carried out to implement the provisions of the Tariff and Customs Code,[119] or the things seized are illegal in themselves,[120] a search may freely be made without need of the authority of a warrant.

But apart from these instances, the law and the courts have always bent towards strict compliance with requisites.

Probable cause, for example, has been construed to mean only "such facts and circumstances *antecedent to the issuance of a warrant* sufficient in themselves to induce a *cautious* man to rely upon them and act in pursuance thereof."[121] And in order that an affidavit may be sufficient basis in the determination of probable cause, it ought to contain only facts and circumstances within the personal knowledge of the affiant. Thus, "the true test of the sufficiency of such affidavit is whether it had been drawn in such a manner that perjury could be charged based thereon, and the affiant be held liable for whatever damages may be caused."[122] Then, to insure the genuineness of the claim, a warrant is considered valid only for ten days from its issuance.[123] Thereafter, the party seeking to enforce it would have to establish probable cause all over again to be able to secure another one.

The Rules of Court furthermore provide, as an added tinge of respect for privacy, first, that warrants ought generally to be served during daytime, unless it be specifically stated that the property to be seized is on the person or in the place ordered to be searched, in which case only may a direction be inserted therein that it be served anytime,[124] and second, that should the search be of a house, room or other premise, it should be conducted only in the presence of at least one competent witness, who is a resident of the neighborhood.[125] The rights of the owner are protected on the other hand by the requirement of a detailed receipt of the property seized and the prompt delivery of such property, together with an inventory thereof, to the issuing court.[126]

But the most important feature of a search warrant, in order not to be violative of due process, is that it may issue only for one specific offense and be enforceable only as to such place to be searched and such persons

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117 People v. Malasugui, 63 Phil. 221 (1936).

118 Alvero v. Dizon, 76 Phil. 637 (1946), People v. Veloso, 48 Phil. 169 (1925), Villanueva v. Querubin, G.R. No. L-26177, December 27, 1972, 48 SCRA 345 (1972).

119 Papa v. Mago, G.R. No. L-27360, February 28, 1968, 22 SCRA 857 (1968).

120 Uy Kheytin v. Villareal, 42 Phil. 886 (1920).

121 People v. Sy Juco, 64 Phil. 667 (1937), Alvarez v. CFI, 64 Phil. 33 (1937), U.S. v. Addison, 28 Phil. 566 (1914).

122 Fernando, *supra*, note 69 at 656.

123 RULES OF COURT, rule 126, sec. 9.

124 RULES OF COURT, rule 126, sec. 8.

126 RULES OF COURT, rule 126, sec. 10 and 11.

or things to be seized as have been particularly described prior to its issuance.[127] In this is embodied the guarantee against general warrants which legalize indiscriminate interference and allow foraging in disguise.

To completely discourage such foul practice, the Supreme Court ruled to be inadmissible for any purpose in any proceeding whatever gain may be reaped therefrom.[128]

Even where letters, tapes, or other means of communication and correspondence, have been legally seized, discovery and revelation of the contents thereof for any purpose other than as specified by the court issuing the warrant is constitutionally forbidden, unless a previous court order be procured, or public safety and order so require.[129]

In contrast to these procedural barriers, P.D. 1737 makes mention of only one clarificatory limitation, that is, the document or property to be seized should either be the subject of an offense, or used or intended to be used as the means of committing the offense.[130] All other ramifications on the law would depend on the regulations which the President/Prime Minister may prescribe.[131] As in the case of preventive detention, therefore, search and seizure under P.D. 1737 is not at all unlike the prerogative of the Chief Executive under martial law. This, as a matter of fact, is also the character and depth of the last of the strategic powers illustratively enumerated in the said decree, which authorizes measures "to prevent any damage to the viability of the economic system." The right to strike, the right to engage in business subject to existing laws, the right to devote one's property to such lawful uses as may be desired, the right to enter into contracts not contrary to law, public morals, good customs, or public policy, the right to pursue the profession, trade, calling, or vocation to which one considers himself inclined — these are only some aspects of man's basic right to property the dimensions of which could change in accordance with the context into which they may be brought by virtue of this last mentioned power. The President may thereby formulate not only the *guidelines* of national policy but in fact the *policy itself*.

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127 CONST. (1973), art. IV, sec. 3; RULES OF COURT, rule 126, sec. 3.

128 The Supreme Court sternly admonished against the practice in the following words: "To uphold the validity of the warrants in question would be to wipe out completely one of the most fundamental rights guaranteed in our constitution, for it would place the sanctity of the domicile and the privacy of communication and correspondence at the mercy of the whims, caprice or passion of peace officers. This is precisely the evil sought to be remedied by the constitutional provision above-quoted — to outlaw the so-called general warrants. It is not difficult to imagine what would happen, in times of keen political strife, when the party in power feels that the minority is likely to wrest it, even though by legal means." Stonehill v. Diokno, G.R. No. L-19550, June 19, 1967, 20 SCRA 383 (1967).

129 CONST., art. IV, sec. 4, par. (1).

130 Pres. Decree No. 1737 (1980).

131 Pres. Decree No. 1737 (1980).

III. FINAL OBSERVATIONS

What P.D. 1737 accomplishes therefore is the substitution of speedy, unilateral Executive action in the resolution of crises for the comparatively laborious two-step process of prior legislation and subsequent execution. With the absence of prior guidelines, absolute discretion as to the necessity, content, duration, subjects, and manner of application of emergency measures is lodged with the Chief Executive, unmarred by both bureaucratic and popular checks and hampered only by the possibility of second thoughts. Whether or not this short-circuiting of traditional constitutional procedure, rooted in the very essence of a republican democracy, is an act of wisdom, and visions of a "grave emergency" substantial justification for such puissant political management, is not at all the lingering question, for the kernel of every constitutional controversy always is whether or not the official action is a legitimate application of powers legitimate in origin. Though it has been said that self-preservation is the "ultimate value"[132] of society, yet it cannot be also denied that alterations in the allocation and use of political power which strike at the very heart of the system itself should come to pass because of, and not despite, the will of the constituency. Indeed, "[T]he two fundamental correlative elements of constitutionalism for which all lovers of liberty must yet fight are the *legal limits* to arbitrary power and a *complete political responsibility* of government to the governed."[133] P.D. 1737, in addition to falling short of the first, effectuates the second in reverse as one of its ending clauses state: [T]he incumbent President/ Prime Minister, any Cabinet Member or any other public officer shall not be held responsible or liable in any civil, criminal or *other proceeding* for any act or order issued or performed while in office pursuant to the provisions of this Act."[134] It is significant to note that the 1981 Amendments to the 1973 Constitution provide only for "immunity from *suit*" in favor of the President and all other persons who may have performed official acts pursuant to his specific orders. Thus, the terms of the immunity allowed in P.D. 1737 are even broader than those in the constitutional grant because they cover any "other proceeding" which could be taken to include administrative cases and even impeachment proceedings.

The former, moreover, could not have been based on the latter because P.D. 1737 was issued way back in September of 1980 while the latter Amendments came to being only in April of 1981.[135] But the real incongruity lies in the fact that the 1973 Constitution stoutly proclaims that

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[132] The superlative was justified by the U.S. Supreme Court in a certain case this way: "Self-preservation is the 'ultimate' value of society. It surpasses and transcends every other value, 'for if a society cannot protect its very structure from armed internal attack,... no subordinate value can be protected." Dennis v. U.S., 341 U.S. 494; People v. Ferrer, G.R. Nos. L-32613-14, December 27, 1972, 48 SCRA 382 (1972).

[133] SMITH & COTTER, POWERS OF THE PRESIDENT DURING CRISIS 180 (1940).

[134] Pres. Decree No. 1737 (1980). (italics supplied).

[135] Proc. No. 2077 (1981).

"[P]ublic office is a public trust. Public officers and employees shall serve with the highest degree of responsibility, integrity, loyalty, and efficiency, and *shall remain accountable to the people.*"[136]

Given all the foregoing characteristics of P.D. 1737, with the myriad of imaginable consequences it could wreak, not excluding a panoply of possible restrictions on basic civil liberties, it definitely appears that all the more reason there is for the law to provide for some method of holding political representatives responsible for excesses big or small, intentional or otherwise. In no way should the defensive legal apparatus be built as to render it invulnerable to popular prophylaxis. No matter its severity, an emergency is *still but an emergency*. Thus, it has been said that: "[E]mergency powers bears to government the same general relationship of morphine to man. *Used properly in a democratic state it never supplants the constitution and the statutes but is restorative in nature. Used improperly it becomes the very essence of tyranny.*"[137]

Corrosive social forces must be filtered through the prism of popular dictates. Whatever evil there is to be combatted should be overcome always within bounds, lest the hand that weeds out the grass not recognize the good from the wild.

For

> It could well be said
> that a country,
> preserved at the sacrifice
> of all the cardinal principles of liberty,
> is not worth
> the cost of preservation.
>
> —JUSTICE DAVIS[138]

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136 CONST., art. XIII, sec. 1. (italics supplied).
137 SMITH & COTTER, *supra*, note 133 at p. v, foreword. (italics supplied).
138 *Ex Parte* Milligan, 4 Wall. 2, 18 L.Ed. 281 (1866).