AMENDMENT NO. 6 AND THE RULE OF LAW

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The election of members of the regular Batasang Pambansa[1] has brought forth many questions regarding the distribution of powers in government under the present constitutional set-up. Central among these is that on the exercise of legislative powers. During the period of martial law from 1972 until 1981, the President was vested with the power to issue decrees, orders and letters of instruction which formed part of the law of the land.[2] Even after the *interim* Batasang Pambansa was convened, the President still retained unlimited power to legislate.[3] However with the regular Batasang Pambansa already in existence, the prospect and the reality of two coexisting legislative bodies has placed the Philippine constitutional system into the throes of instability. The debate over the propriety or impropriety of presidential law-making existing side by side with the legislative powers of the Batasang Pambansa was heightened by the promulgation of two decrees which increased motor vehicle registration fees and travel taxes.[4]

At the heart of the controversy is Amendment No. 6, one of nine amendments to the Constitution ratified in 1976. It reads:

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

Various arguments, both legal and political, have been advanced for and against Amendment No. 6. For its defenders, the grant of legislative power to the President is necessary so that he may adequately respond to emergencies without resorting to the more drastic martial law. To its

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1 Under Art. VIII, sec. 5(1) of the Constitutiin, "The regular election of the Members of the Batasang Pambansa shall be held on the second Monday of May 1984 and every six years thereafter."

2 Under Amendment No. 5 (1976), "The incumbent President shall continue to exercise legislative powers until martial law shall have been lifted."

3 Under Amendment No. 3 (1976), "The incumbent President of the Philippines shall be the Prime Minister and he shall continue to exercise all his powers even after the *interim* Batasang Pambansa is organized and ready to discharge its functions, and likewise he shall continue to exercise his powers and prerogatives under the 1935 Constitution and the powers vested in the President and Prime Minister under this Constitution."

4 Presidential Decrees No. 1934 and 1935, respectively, dated June 11, 1984.

detractors, such a grant of power is contrary to the rule of law. Such is the thrust of a petition of the Integrated Bar of the Philippines seeking to annul several decrees on national security.[5] Not satisfied with just bringing the issue before the courts, the lawyers' association, as with other national organizations, has proposed the holding of a plebiscite to repeal the controversial amendment.

In the light of these developments, this paper will explore the substance of the argument that Amendment No. 6 is not in accordance with the rule of law.

THE RULE OF LAW

Definitions

The conception of the rule of law has, through history, been understood in various ways and in different contexts.[6] The classical formulation of the rule of law is stated thus:

> [By the rule of law] we mean ... that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary or discretionary powers of constraint.[7]

This definition by Dicey, as he himself later wrote, may be viewed from three different perspectives. First, it may be understood as the absolute supremacy or predominance of law as against arbitrary powers. In this sense, arbitrariness, prerogative, or even the exercise of wide discretionary powers on the part of the government is excluded. Thus, the ideal of a government of laws and not of men. Second, the rule of law may be viewed as the equality of every person, without exception, before the law. This perspective continues to thrive in the principle of equal protection of the laws. Lastly, as peculiar to the English experience, the rule of law is a recognition of the fact that the law of the constitution was not itself the source of the rights of individuals but only a codification of such rights.[8]

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[5] The challenged decrees are: Pres. Decree No. 1834, increasing the penalties for the crime of rebellion, sedition, and related crimes; Pres. Decree No. 1835, codifying the various laws on anti-subversion and increasing the penalties for membership in subversive organizations; Pres. Decree No. 1836, defining the conditions under which the President may issue orders of arrest or commitment orders during martial law or when the privilege of the writ of habeas corpus is suspended; and Pres. Decrees No. 1877 and 1877-A, providing for the issuance of a preventive detention action (PDA).

[6] Carag, *Malcolm and the Rule of Law: A Structured Recollection*, 56 PHIL. L. J. 169, 173-179 (1981).

[7] CHAMBLISS AND SEIDMAN, LAW, ORDER,AND POWER 77 (1971).

[8] DICEY, INTRODUCTION TO THE STUDY OF THE LAW AND THE CONSTITUTION 198-199 (1902).

The above formulation of the rule of law was, and still is, the predominant conception. It was what primarily influenced the International Commission of Jurists in the "Act of Athens" characterization. The rule of law, as perceived by the jurists, required that:

> 1. The State is subject to the law.
> 2. The Government should respect the rights of the individual under the Rule of Law and provide effective means for their enforcement.
> 3. Judges should be guided by the Rule of Law, protect and enforce it without fear or favour and resist any encroachments by governments or political parties on their independence as judges.
> 4. Lawyers of the world should preserve the independence of their profession, assert the rights of the individual under the Rule of Law and insist that every accused is accorded a fair trial.[9]

Interpreting the "Act of Athens," Regala[10] pinpointed the important elements of the rule of law to be the separation of powers and checks and balances, objectivity in the law, limitations on the government in its relation to individuals, fair procedures in the application of law to the individual, and an independent judiciary and an independent bar. Summarizing his amplification, he observed that "the rule of law signifies a state of affairs in which legal barriers to government arbitrariness and legal safeguards for the protection of the individual must be observed."[11]

The Constitution

The rule of law is put into effect in the distribution of the powers of government. Thus, to maintain the rule of law, there is a distribution of the functions of rule-making, rule implementation, and adjudication of claims under the pre-established rules. The framework for this is usually found in the organic law where the functions are distributed and the powers essential to the exercise of these functions are delineated. This organic law is commonly called the Constitution.

According to Burin, "legally ... constitutionalism may be equated to the rule of law."[12] Thus, where there exists a constitution the rule of law is manifested. These manifestations, however, may not always be readily apparent. Such may not always be provided for in a constitution in an express manner. But there are constitutions which, though not expressly invoking the rule of law, do so indirectly through reference to elements of the rule of law. The Constitution of the Philippines is one such constitution.

> The Philippines is a republican state. Sovereignty resides in the people and all governmenat aluthority emanates from them.[13]

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[9] Carag, *supra*, note 6 at 178-179.
[10] REGALA, LAW AND DIPLOMACY IN A CHANGING WORLD 48 (1965).
[11] *Id.*, at 45.
[12] Burin, *The Theory of the Rule of Law and the Structure of the Constitutional State*, 15 AM. U. L. REV. 313 (1966).
[13] CONST., Art. II, sec. 1.

A republican state implies a representative democracy. Its essence is popular representation where there is a "choice of principal agents of government though elections" and "enactment of laws through these agents."[14]

Though no mention is made of the term "rule of law," still, the rule of law is the spirit behind the concept of the republican state. Fernandez lays the foundation for this, stating that "the concept of Rule of Law epitomizes republican government."[15] He further adds:

> The underlying idea is that the State and its government are creations of the people. Original power resides with the people, who by their collective will organize the State, establish its Government, and apportion its tasks and functions, and define its powers. The authority of the Government is derived from the people, and the Government is but their instrument in their quest for the common good and welfare.[16]

This sentiment was also a guiding light in the framing of the 1935 Constitution, where a similar provision can be found.[17] The framers of that earlier constitution were heavily influenced by American constitutional law wherein the Madisonian proposition of a government deriving all its powers directly or indirectly from the people is a key concept.[18]

An essential element of a republican state, and which has a direct bearing on the operationalization of the rule of law, is the doctrine of separation of powers. The roots of this doctrine can be traced to Montesquieu in his *L'Esprit des Lois* wherein he distinguished and segregated three types of governmental powers—"the legislative power, the power exercising matters within the law of nations (which he called the executive power), and the power exercising matters falling within the civil law (which he called the judicial power)."[19] His belief was that if any two, or all three, of the powers were held by any one person or body, there could be no liberty.[20]

The theory that the separation of powers, as conceptualized by Montesquieu, is indispensable to the rule of law has been part of American constitutional law, on which we heavily borrowed, since John Adams linked the two concepts in the Massachusetts Constitution of 1780.[21] The passage reads:

> In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and exe-

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14 FERNANDO, PHILIPPINE CONSTITUTIONAL LAW 44 (1984).
15 FERNANDEZ, PHILIPPINE CONSTITUTIONAL LAW 13 (1977).
16 *Ibid.*
17 CONST. (1935), Art. II, sec. 1.
18 ARUEGO, THE FRAMING OF THE PHILIPPINE CONSTITUTION 132 (1936).
19 MITCHELL, CONSTITUTIONAL LAW 31 (1964).
20 *Ibid.*
21 Burin, *supra*, note 12 at 318.

> cutive powers, or either of them; to the end it may be a government of laws and not of men.[22]

This doctrine of separation of powers and the corollary checks and balances are found both in the 1935 Constitution and the present Constitution. In the 1935 Constitution, it is provided that "the executive power shall be vested in a President of the Philippines;"[23] that "the legislative power shall be vested in a Congress of the Philippines which shall consist of a Senate and a House of Representatives;"[24] and that "the judicial power shall be vested in one Supreme Court and in such inferior courts as may be established by law."[25] The present Constitution initially provided for a parliamentary set-up when it was ratified in 1973. However, with its amendment in 1981, it has, as declared by the Supreme Court, reverted to the presidential system of government.[26] Thus, said the court, "the adoption of certain aspects of a parliamentary system in the amended Constitution does not alter its essentially presidential character."[27] Hence, the present Constitution provides that "the President shall be the head of State and the chief executive of the Republic of the Philippines;"[28] that "the Legislative power shall be vested in a Batasang Pambansa;"[29] and that "the Judicial power shall be vested in one Supreme Court and in such inferior courts as may be established by law."[30]

The present Constitution, by expressly providing for the exercise of distinct powers by the three branches of government has maintained the separation of powers. There can be no mistaking the words of the charter, this inspite of views to the contrary held by some legal scholars.[31] The rationale for the separation of powers, that "arbitrary rule and abuse of authority would incidentally result from the concentration of the three powers in the same person, body of persons, or organ,"[32] must still be held applicable to the present Constitution. To depart from it would be to disregard the wordings of the Constitution and the logic behind them.

EMERGENCY POWERS

The rule of law, though premised on the prevention of arbitrariness, does not, however, exclude the exercise by one person or body of persons of two or all three powers of government during an emergency,[33] this con-

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22 *Ibid.*
23 CONST. (1935), Art. VII, sec. 1.
24 CONST. (1935) Art. VI, sec. 1.
25 CONST. (1935), Art. VIII, sec. 1.
26 Free Telephone Workers Union v. Minister of Labor and Employment, G.R. No. 58184, Oct. 30, 1981, 108 SCRA 757, 763-764.
27 *Id.*, at 763.
28 CONST., Art. VII, sec. 1.
29 CONST., Art. VIII, sec. 1.
30 CONST., Art. X, sec. 1.
31 *See* comments of Dean Bacuñgan and Solicitor General Mendoza in BACUÑGAN, THE POWERS OF THE PHILIPPINE PRESIDENT (1983).
32 SINCO, PHILIPPINE POLITICAL LAW 128 (1962).
33 Carag, *supra*, note 6 at 176.

centration of powers being necessary precisely to preserve the rule of law. The State, if it is to weather the crisis, must do away with cumbersome processes for a period coterminous and in a manner commensurate with the emergency.

Emergency powers are not of recent vintage. According to Fuller, "political philosophers have long recognized the need to grant the executive vast, almost dictatorial, emergency powers to ensure survival of the State."[34] Rousseau and Locke, the foremost exponents of the social contract theory upon which modern-day constitutionalism is rooted, foresaw the danger to the existence of the State if in times of crisis, the executive is not granted flexible powers to counteract the crisis. Locke even went to the extent of justifying executive action in contravention of established law, all in the name of the self-preservation of the State.[35]

This extraordinary exercise of power by the executive was further developed by Rossiter in his theory of "constitutional dictatorship."[36] Understandably, he has been quoted extensively by the Supreme Court in justifying the exercise of concentrated powers by President Marcos during the period of martial law. According to Rossiter, the system of government of a democratic and constitutional state is developed to function under normal, peaceful conditions and therefore is inept to the exigencies of a national crisis. Thus, in times of crisis the system of government must be altered to a degree necessary to meet the crisis and restore normal conditions. The crises which a democratic state may expect to meet are war, rebellion, and economic depression. Rossiter warns that these alterations and the consequent concentration of powers should only be for the purpose of preserving the independence of the State, maintaining the existing constitutional order, and defending the political and social liberties of the people.[37] The crisis must not be used as an excuse for permanently altering the constitutional system or perpetuating the executive's hold on power, otherwise the dictatorship will cease to have a constitutional basis.

The concentration of powers and its exercise by a single person or body must thus be limited by the extent, scope, and duration of the crisis itself. This, Rossiter emphasizes when he lays down the criteria for the propriety of a constitutional dictatorship, namely: (1) that no general regime or particular institution of constitutional dictatorship should be initiated unless necessary for the protection of the State and its constitutional order; (2) that the decision to institute a constitutional dictatorship should not lie in the hands of the person or body that would constitute the dictator; (3) that the government should not initiate a constitutional dictatorship without making specific conditions for its termination;

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[34] *Note, The National Emergency Dilemma: Balancing the Executive's Crisis Powers with the Need for Accountability*, 52 SO. CAL. L. REV. 1453, 1473 (1979).

[35] *Id.*, at 1474.

[36] ROSSITER, CONSTITUTIONAL DICTATORSHIP (1948).

[37] *Id.*, at 5-7.

(4) that the emergency powers must be used, and adjustments in the organization of the government must be effected, according to constitutional and legal requirements; (5) that a dictatorial institution should be adopted, or a right violated, or a regular procedure altered, only when absolutely necessary to overcome the particular crisis; (6) that the measures adopted in pursuance of a constitutional dictatorship should never be permanent in character and effect; (7) that the person to carry out the dictatorship should be representative of the segment of the citizenry interested in the defense of the existing constitutional order; (8) that ultimate responsibility for actions taken under the constitutional dictatorship should be maintained; (9) that the decision to terminate the dictatorship should be vested in persons other than the dictator; (10) that the dictatorship should not extend beyond the crisis for which it was instituted; and (11) that the termination of the crisis must be followed by a return to the polititál and governmental set-up existing prior to the institution of the constitutional dictatorship.[38] Strict adherence to these criteria is essential so that the exercise of emergency powers will not lay the foundation for the establishment of a permanent emergency regime where the constitutional structure is dismantled and an authoritarian system under a new governmental set-up is institutionalized.

The Supreme Court, in applying Rossiter's theory of constitutional dictatorship against challenges to the President's exercise of emergency powers, apparently ignored the limitations prescribed by Rossiter. It has also broadened the extent of the exercise of emergency powers in a manner that unduly stretches the scope of the national crisis which would necessitate its exercise. It stated:

> We affirm the proposition that as Commander-in-Chief and enforcer or administrator of martial law, the incumbent 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 worldwide recession, inflation or economic crisis which presently threatens all nations including highly developed countries.* (underscoring supplied)[39]

This kind of reasoning presents dangerous consequences since it may well lay the foundation for the institutionalization of a permanent emergency regime. This interpretation by the Suppreme Court negates the criteria set by Rossiter for the invocation of powers within the bounds of the rule of law.

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[38] *Id.*, at 298-306.

[39] Aquino, Jr. v. Commission on Elections, G.R. No. L-40004, Jan. 31, 1975, 62 SCRA 275, 298.

AMENDMENT NO. 6

Under the present Constitution, the President, in times of emergency, is the person upon whom the prerogative of exercising concentrated powers is vested. In times of war or other national emergency, he may be authorized by the Batasang Pambansa 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.[40] The Congress, under the 1935 Constitution, was also given the power to delegate legislative power to the President in such a situation.[41] It must be emphasized that the power of the President to legislate under this provision is in the nature of delegated power. It does not confer original power upon the President. His original power to take the necessary measures during an emergency is granted by the commander-in-chief clause, which states:

> 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.[42]

The President was given the same power under the 1935 Constitution.[43] In the exercise of this power, the President is afforded three choices. He may call out the armed forces, he may suspend the privilege of the writ of habeas corpus, or he may declare martial law, depending upon the gravity of the crisis. The constitution itself provides for the specific situations when any of these courses of action may be taken, thus setting the standards by which the President's actions may be reviewed.

An innovation to the traditional exercise of emergency powers was introduced in 1976 when the Constitution, ratified in 1973, was amended. The sixth of the 1976 amendments 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.

In the case of *Legaspi v. Minister of Finance*[44] where the validity of a decree[45] issued pursuant to Amendment No. 6 was in issue, the Supreme

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40 CONST., Art. VIII, sec. 15.
41 CONST., (1935), Art. VI, sec. 26.
42 CONST., Art. VII, sec. 9.
43 CONST., (1935), Art. VII, sec. 10(2).
44 Legaspi v. Minister of Finance, G.R. No. L-58289, July 24, 1982, 115 SCRA 418.
45 Pres. Decree No. 1840, granting a tax amnesty.

Court had an opportunity to discuss its nature. Speaking through Justice Antonio Barredo, who also happens to be one of the drafters of Amendment No. 6,[46] it said:

> We have said earlier that the Constitution has four built-in measures to cope with crises and emergencies. To reiterate, they are: (a) emergency powers expressly delegated by the Batasan; (b) call of the armed forces, who otherwise are supposed to be in the barracks; (c) suspension of the privilege of the writ of habeas corpus; and (d) martial law. Of these four, the people dislike martial law most and would, if possible, do away with it in the Constitution. And the President who first conceived of what is now Amendment No. 6 knew this. Thus, Our understanding of the development of events and attitudes that led to the adoption of Amendment No. 6 is that in addition to the four measures authorized in the body of the charter, this amendment is supposed to be a fifth one purportedly designed to make it practically unnecessary to proclaim martial law, except in instances of actual surface warfare or rebellious activities or very sophisticated subversive actions that cannot be adequately met without martial law itself. Very evidently, the purpose of Amendment No. 6 is that the Philippines be henceforth spared of martial law unless manifest extreme situations should ever demand it.[47]

From this discussion it is clear that the power granted by Amendment No. 6 is by nature an emergency power. It is one among five measures in the Constitution which the President may avail of in times of crisis. It is also an original power which the President may exercise without any authority from the Batasang Pambansa. And according to the Supreme Court it may even be exercised when the Batasan is in session.[48]

Breaking down Amendment No. 6 into its component parts, it is readily seen that the power given is the power to legislate, i.e., the power to "issue necessary decrees, orders, or letters of instructions which shall form part of the law of the land." This power is to be exercised in only two instances, namely, (a) when in the judgement of the President "there exists a grave emergency or a threat or imminence thereof" and (b) "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."[49] The issuance of the decrees, orders, or letters of instructions must be "in order to meet the exigency."

The attempt to delimit the decree-making power of the President is, however, negated by the words "in the judgment of the President" and

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[46] Coronel, *The Unfolding Drama Called Amendment No. 6*, PHILIPPINE PANORAMA, Sept. 9, 1984, p. 6. Justice Barredo was not the only member of the judiciary who participated in the drafting of Amendment No. 6. The late Chief Justice Fred Ruiz Castro and Justcie Vicente Abad Santos (then Justice Minister) were among the members of the drafting committee.

[47] Legaspi v. Minister of Finance, 115 SCRA at 438.

[48] *Id.*, at 435.

[49] *Ibid.*

"in his judgment." Providing for the conditions for the exercise of presidential decree-making power but at the same time leaving the determination of the existence of these conditions entirely to the judgment of the President leaves little as a safeguard against any abuse of the power granted. The President is, therefore, the sole judge of whether a case for the exercise of his decree-making power exists. "The determination as to what is a 'grave emergency or a threat or imminence thereof,' or as to whether it exists, or when the Batasan fails or is unable to 'act adequately' or what matter requires 'immediate action,' is vested exclusively in him," writes Tolentino.[50] Because of this, doubts have been expressed on the amenability of the President's determination of an emergency, or an inability or failure of the Batasan to act, to judicial review. Cruz is of the opinion that

> [t]he cause and the duration of the exercise of emergency powers by the "President (Prime Minister)" are to be determined only by him in the exercise of his own judgment. Even the Supreme Court apparently cannot inquire into the factual basis of his ascertainment of the existence of the justification for their exercise, as the same is to be made "in his judgment." This is to be reached by him through the application of his own wisdom and discretion and will be in the nature of a political question which the courts cannot review.[51]

Tolentino, who is also of the same view, adds further that "later decisions of the Supreme Court on the suspension of the privilege of the writ of habeas corpus and the declaration of martial law,[52] will not apply, because the amendment uses only the 'judgment' of the President (Prime Minister) as the measure for determining the facts on which the action is based."[53]

Compounding the problem is the vagueness of the terminology of Amendment No. 6. The term "grave emergency or a threat or imminence thereof", which describes the first situation when the decree-making power may be exercised, is so broad that just about any form of emergency may be covered therein, whatever its nature and extent. The significance of this can be appreciated if such term is compared with "war or other national emergency" as a condition for the delegation of legislative power to the President by the Batasang Pambansa,[54] "lawless violence, invasion, insurrection, or rebellion" as justification for calling out the armed forces,[55]

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[50] Tolentino, *The Effects of the 1976 Amendments on the Legislative Process*, in 1976 AMENDMENTS AND THE NEW CONSTITUTION 55, 62 (1978).

[51] CRUZ, PHILIPPINE POLITICAL LAW 94-95 (1980).

[52] Tolentino was referring to the cases of Lansang v. Garcia, G.R. No. 33964, Dec. 11, 1971, 42 SCRA 448 and Aquino v. Ponce Enrile, G.R. No. L-35546, Sept. 17, 1974, 59 SCRA 183, where the Supreme Court ruled that it may inquire into whether or not the President acted arbitrarily in suspending the privilege of the writ of habeas corpus (Lansang) and in declaring martial law (Aquino).

[53] Tolentino, *supra*, note 50.

[54] CONST., Art. VIII, sec. 15.

[55] CONST., Art. VII, sec. 9.

and "invasion, insurrection, or rebellion, or imminent danger thereof" as grounds for the suspension of the privilege of the writ of habeas corpus and the declaration of martial law.[56] The laxity of the conditions under Amendment No. 6 and the strictness of those under the commander-in-chief clause is difficult to reconcile with the Supreme Court's observation that the exercise of legislative powers under the amendment is subordinate in relation to the declaration of martial law. It appears that greater and more extensive powers are granted under the amendment.

The other condition for the exercise of decree-making power is no less sweeping. Neither is it clear. Just what is meant by "fails or is unable to act adequately on any matter for any reason that . . . requires immediate action" is not certain. In order not to preempt the Batasan, Tolentino advances the proposition that the decree-making power, to be exercised when the Batasan is in operation and there is no martial law nor a grave emergency, must be reserved, conditional, and limited. It must be conditioned on the failure or inability of the Batasan to act quickly and adequately. The ensuing decree must be limited to the legislation being considered by the Batasan. Finally, its exercise cannot precede the Batasan deliberations on the proposed law.[57] This, however, has yet to be put into practice. The President has, in most cases, preempted the Batasan in enacting important legislation.

The binding effect of decrees issued to meet the exigency is also important to consider. The decrees "form part of the law of the land" and remain effective even beyond the life of the emergency they were supposed to adequately meet. The decrees issued pursuant to Amendment No. 6 do not lose their binding effect when the emergency ceases or when the Batasan regains its ability to act adequately.

Because of the facility of executive legislation, there being no need to resort to a cumbersome procedure similar to that in the Batasan, the over-all effect of Amendment No. 6 is not only to make the President a second legislative body but also to make him superior to the Batasan.[58] Doubts may thus be validly raised as to whether Amendment No. 6 provides for a mere emergency measure, as the Supreme Court believes, or confers plenary power to legislate to the President.

AMENDMENT NO. 6 AND THE RULE OF LAW

As stated earlier, the concept of rule of law epitomizes republican government. An essential feature of a republican government is the "vesting of the law-making power in an elective, representative, and deliberative

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[56] *Ibid.*

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

[58] Cortes, *Executive Legislation: The Philippine Experience*, 55 PHIL. L. J. 1, 23 (1980).

assembly and the extreme care taken to provide substantive as well as procedural guidelines for the exercise of the power."[59] This, to adhere to the constitutional precept that "sovereignty resides in the people and all governmental authority emanates from them."[60] The people, through their elected representatives, make laws that will guide their actions.

There can be no abdication of the legislative power in a republican government, save in times of national emergency when such power may be vested in a single person or body either by a delegation by the regular legislature or by a grant of original powers premised on the occurence of certain factual situations. This vesting of emergency powers in the executive is not by itself incompatible with the rule of law. Precisely, the avowed purpose for such exercise of power is to uphold the rule of law and preserve the State. But then, the exercise of powers so great has its limits. Its exercise is restricted by the nature of the crisis sought to be met. It is only a temporary measure. Hence, any action done or any institution established pursuant thereto should not have any efficacy beyond the crisis period. It must not be a foundation for the permanent alteration of the constitutional structure which it seeks to preserve.

Such is not the case with Amendment No. 6. The grant of decree-making power collides head-on with the doctrine of separation of powers, the very instrument for the operationalization of the rule of law in a republican state.[61] Because of the binding effect of the decrees issued under the amendment even beyond the emergency situation sough to be adequately met, the distribution of powers provided in the Constitution is upset. There is, in effect, two regular legislative bodies. One body, the Batasang Pambansa, having to undergo a very tedious process before a law is enacted, and the other, the President, legislating almost at will, given the laxity of the conditions for the exercise of his law-making power. What makes the situation even more onerous is that it can give rise to the chaotic situation "of both the President and the Legislature exercising legislative power at the same time and at cross-purposes."[62] Thus, the suggestion that the Batasan should assign an official to keep track of every decree issued by the President so that it can keep abreast of recent developments in the law is no laughing matter.

The set-up where the executive is authorized to make laws with binding effect even beyond the emergency is tantamount to institutionalizing executive legislation as the rule rather than the exception. Hence, it may be argued that for purposes of practicality and economy, law-making by the President is advantageous. This, however, loses sight of the inherent

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[59] *Id*,. at 26.
[60] CONST., Art. II, sec. 1.
[61] Tan, *The Decree Power and the 1981 Amendments: A Reinterpretation*, 56 PHIL. L. J. 491, 507 (1981).
[62] CRUZ, *supra*, noet 51 at 94.

"disadvantages" of executive legislation, which according to Cortes are: (1) that public discussion is dispensed with; (2) that the lack of publicity of the proceedings causes surprise and uncertainty; (3) that the summary process erodes legal stability; (4) that pressure groups may influence legislation more easily; (5) that it defeats the purpose of representative government and is inconsistent with the principle of popular participation; (6) that because of the absence of recorded proceedings, statutory construction and interpretation is deprived of a valuable aid; (7) that the non-circulation of decrees give rise to insecurity; and (8) that it is still law-making by one man.[63] All these disadvantages can be summed up into one basic flaw of executive legislation—that it contravenes the basic principle of the theory of the rule of law that in order to exact obedience to the law it is essential that the law be an expression of the will of the people. A law that will come as a suprise to both the people and their elected representatives hardly qualifies as an expression of their will.

As the grant of power under Amendment No. 6 now stands, fealty to the rule of law is lacking. The effect of the amendment is to grant plenary legislative power to the President, not simply emergency powers to be exercised under stringent conditions. The conditions laid down by Amendment No. 6, because of the vagueness of the terms, hardly provide for any limitations on the decree-making power conferred therein.

If we are to preserve the rule of law under the constitutional framework, the decree-making power of the President must be limited in terms so specific as to qualify it into an emergency power, as it should really be. The term "grave emergency or a threat or imminence thereof" should be reformed so as to specify the nature of the emergency wherein the President may exercise his power under the amendment. The extent of the emergency, i.e., whether it need be an emergency affecting the whole nation, only some regions, or only a specific locality, should also be preset. What is meant by the Batasan failing or being unable to act should also be qualified so that the President will not be able to preempt Batasan legislation. And most importantly, decrees issued pursuant to the amendment should be of limited effect. They cannot be allowed to be effective beyond the period of emergency.

But perhaps the best solution the problem of two concurrent legislative bodies is to eliminate one. A repeal of Amendment No. 6 will restore the supremacy of the Batasang Pambansa in the field of law-making and full adherence to the mandate of the Constitution that "the Legislative power shall be vested in a Batasang Pambansa" will be achieved. It is time to restore order to our Constitution.

[63] Cortes, *supra* note 58 at 30.