THE DILEMMA OF LEGITIMACY: A TWO-PHASE RESOLUTION

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INTRODUCTION

When in November of 1985, erstwhile Philippine President Ferdinand E. Marcos announced his willingness to subject himself to an election to be held before the constitutionally mandated time,[1] he unknowingly penned the concluding chapter of his twenty-year rule. Recorders of history will undoubtedly feast on the dramatic events that followed that fateful announcement: the candidacy and campaign of challenger Corazon C. Aquino, a February 7, 1986 election marred by massive fraud and terrorism, a unique Filipino revolution, and the ascendancy to power of the Republic's first female president.

It is common knowledge that Aquino's assumption of the presidency was not the product of constitutional processes, but was, instead, achieved in violation of the provisions of the Constitution. In particular, her proclamation as President of the Philippines despite a Batasang Pambansa resolution declaring the incumbent as the winner of the election constituted a direct repudiation of the authority of the legislative body to proclaim the elected President.[2]

Notwithstanding the unusual circumstances surrounding President Aquino's assumption of office, it is undeniable that, at the onset at least, she enjoyed tremendous popular support. The organization of her government following her installation met little resistance, and her control of the state was evidenced, *inter alia,* by the appointment of the Cabinet and other key officers of the administration, the resignation of the Marcos Cabinet officials, the revamp of the judiciary and the military.[3] The recognition of her government by the international community symbolized the global approval accorded her rule.

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1 The 1973 Constitution, as amended, provided for presidential elections to be held in 1987. CONST. (1973), Art. VII, Sec. 9.

2 CONST. (1973), Art. VII, Sec. 5.

3 See Phil. Daily Inquirer, March 5, 1986, p. 1, c. 1; Phil. Daily Inquirer, March 17, 1986, p. 12, c. 1; Phil. Daily Inquirer, March 18, 1986, p. 1, c. 7; Bulletin Today, April 4, 1986, p. 1, c. 4; Bulletin Today, March 4, 1986, p. 1, c. 1; Malaya, Oct. 18, 1986, p. 1, c. 1; Malaya, April 3, 1986, p. 1, c. 2; Malaya, April 30, 1986, p. 6, c. 1; Business Day, April 23, 1986, p. 1, c. 3; Business Day, April 23, 1986, p. 14, c. 1; Manila Times, April 2, 1986, p. 1, c. 5.

The consequences, however, of having defied the provisions of the constitution cannot be eradicated simply by popular support. Barely a month after her proclamation on February 25, 1986, the issue of the legal status of the government was apparently resolved by the promulgation of a "Provisional Constitution" by President Aquino on March 24, 1986. This "Freedom Constitution," so called, became the government's crutch against allegations of its questioned legitimacy.

The act, however, of a president "promulgating" a constitution is not sufficient basis for claiming legitimacy of government. In order to clarify the legal status of the government, it is necessary to apply principles of political and international law to the Philippine context, and determine whether the government is indeed *de jure,* as Aquino officials claim, or whether it is merely a government *de facto.*

DEBUNKING GOVERNMENT CONTENTIONS

A. *"We Are a Revolutionary Government"*

1) Opinions of experts

Three of the "Whereases" that precede the text of the Provisional Constitution[4] read as follows:

> "Whereas, the new government under President Corazon C. Aquino was installed through a direct exercise of the power of the Filipino people assisted by units of the New Armed Forces of the Philippines;
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> Whereas, the heroic action of the people was done in defiance of the provisions of the 1973 Constitution, as amended;
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> Wherefore, I, Corazon C. Aquino, President of the Philippines, by virtue of the powers vested in me by the sovereign mandate of the people, do hereby promulgate the following Provisional Constitution:"[5]

These statements summarize the current government's perceptions of their source of authority: sovereign mandate of the people. That this source is extra-constitutional has led to this description of the government as one which is "revolutionary."

Noted constitutionalist Joaquin Bernas, S.J., in discussing the revolutionary character of the government, stated that:

> "It (the government) is revolutionary in the sense that it came into existence in defiance of the existing legal processes. She did not win her victory through a protest lodged either before the Batasan or before a Presidential Electoral Tribunal. She won it through the extra-legal action taken by the people."[6]

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[4] Proc. No. 3 (1986).
[5] *Ibid.*
[6] J. BERNAS, PROCLAMATION NO. 3 WITH NOTES BY JOAQUIN BERNAS, S.J. 3 (1986).

Edgardo Angara postulated that a government "instituted by direct action of the people and in opposition to the authoritarian values and practices of the overthrown government can only be revolutionary."[7] The Aquino government having been established after the overthrow of an oppressive regime, it was covered by this description.

Neptali Gonzales, Justice Minister of the Aquino Cabinet, added this interesting theory: that "by its origin, by its nature and in essence," the new government was a revolutionary one. He cited the "circumstances under which the new government had been established" as ample justification for the 'revolutionary' label.[8]

From the opinions of these legal experts, it would appear that the mere act of ascending to power through non-constitutional means is indicative of the revolutionary character of the government. That the toppling of one regime is sufficient to earn for the new dispensation of title of "revolutionary."

2) *Revolution through violence*

It should be noted that the term "revolutionary," ordinarily means "pertaining to or connected with, characterized by, or of the nature of, a revolutionary."[9] In order, therefore, for the Philippine government to validly assert that it is "revolutionary," it must show itself to be connected with a revolution. And the term "revolution," when applied to a political context, has a distinct meaning.

In outlining the historical changes in the word "revolution," Perez Zagorin pointed to the enlargement of the scope of reference of the term after 1789. Thus:

> "For the purposes of this discussion, let it suffice to say that after 1789, *revolution* vastly enlarged its reference. The upheaval in France infused the term with a new potency and made it a call to action, a shibboleth, a mystique. Marxism in due course reinforced this significance. It became linked with ideas of progress and the conscious shaping of history. It began to signify the willed, deliberate effort to create a new society, a new humanity, and a new world. Nineteenth century thinkers, whether conservative, liberal, or socialist, were largely in accord in viewing revolution as a phenomenon of epochal change and innovation."[10]

Zagorin, after detailing differences in the meaning of the term, suggested that it would be preferable "to retain the well established word revo-

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[7] Address by U.P. President Edgardo Angara, Bishops-Businessmen's Conference, March 21, 1986, 27 U.P. GAZETTE 28, 29.

[8] In a press conference with members of the Justice and Court Reporters Association held on March 3, 1986, Justice Minister Neptali Gonzales sought to clarify issue concerning the legal status of the new government. See Bulletin Today, March 4, 1986, p. 1-2.

[9] Gitlow v. Kiely, 44 F. 2n 227, 233.

[10] Zagorin, Theories of Revolution in Contemporary Historigraphy, 88 POLITICAL SCIENCE QUARTERLY 23, 26 (1973).

lution in a clearly delimited context describing change which is characterized *by violence as a means and a specifiable range of goals as ends* (emphasis supplied)."[11]

The idea of revolution characterized by violence is well accepted in history and jurisprudence. In *Gitlow v. Kiely,* revolution was defined as "a complete overthrow of established government."[12] In *State v. Diamond,* the Supreme Court of New Mexico presented a several definitions of revolution, among them definitions of changes in governments achieved through violent means.[13]

If "change through violence" were to be used as the criterion for judgment, then the Philippine experience of February 1986 cannot properly be classified a "revolution." Precisely, it was the transition achieved through non-violent means that became the hallmark of the Aquino government.

3) *Radical Change: the principal requisite*

It can be argued that there is literature and jurisprudence to support the theory of a "non-violent revolution." In *State v. Diamond,* it was held that revolution cannot be limited to revolution by violence. Oppenheim, a leading authority in international law, recognized the possibility of a revolution "which will not involve bloodshed."[15]

Even conceding this expanded meaning, it still remains a principal characteristic of any revolution, whether violent or not, to involve *radical change.* Huntington defines revolution as *"a rapid, fundamental* and violent *domestic change* in the dominant values and myths of society, in its political institution, social structure, leadership, government activity and policies."[16] And A. J. Milne, in distinguishing between constitutional political action and revolutionary political action stated that:

> "Constitutional political action is political action within a legal framework and rests upon a moral commitment to uphold the authority of the law. Revolutionary political action acknowledges no such moral commitment. It is directed to *overthrowing the existing legal order and replacing it by something else* (emphasis supplied)."[17]

Was the existing legal order overthrown by the Aquino government? Professor Fernandez defines a legal order as follows:

> "A legal order is the authoritative code of a polity. Such code consists of all the rules found in the enactments of the organs of the polity. Where

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[11] *Id.,* at 27.

[12] 44, F.2d, as cited in 46 CJS 1086.

[13] "Revolution" Century Dictionary. State v. Diamond, 202 p. 988, 991.

[14] 202, p. 988, 991.

[15] L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE, Sec. 73b (Lauterpacht 8th ed. 1955).

[16] ZACORIN, *op. cit.,* note 10 at 27.

[17] Milne, *Philosophy and Political Action: The Case of Civil Rights,* 21 POLITICAL STUDIES 453, 463 (1973).

> the state operates under a written constitution, its organs may be readily determined from a reading of its provisions. Once such organs are ascertained, it becomes an easy matter to locate their enactments. The rules in such enactments, along with those in the constitution, comprise the legal order of that constitutional state."[18]

Clearly then, the overhaul of a legal order implies the abrogation of statutes and the existing constitution.

There is no question that the body of laws represented by statutes continues to be in effect — what is the subject of current debates is whether there was a repudiation of the constitution. The mere fact that the Aquino administration assumed power through non-constitutional means does not imply immediate abrogation of the fundamental law. Indeed, in the same legal article, Fernandez had occasion to say that

> "The efficacy of a legal order must be distinguished from the question of its existence. So long as a legal order is operative or functioning, it exists, although its efficacy may be very low."[19]

A constitution's efficacy then may be very low — but this does not translate into its non-existence.

A legal order, moreover, is concerned with structures rather than individuals, concepts rather than specific implementation. It should be emphasized at this point that there is a marked difference between the *structures of government,* and the *personalities in government.* The structures in a constitutional system refer to the government organization provided for in the Constitution, while the personalities refer to the power-holders, the individuals occupying the positions in government.

In determining whether a particular legal order still exists or not, what is essential is *not* the change *in personalities,* but the change in the *structures of government.* According to Fernandez, the personalities can cause the extinction of a legal order when the situation is that "power-holders *not corresponding to the political organs described in the legal order* are now exercising functions of government, and that such power-holders did not attain power in accordance with the norms of legitimacy."[20]

Within this context, the events of February cannot be said to have involved a "revolution," since only a *change of personalities* ensued, but *NOT* a change, or an overthrow, of a legal order. Note, for example, the retention of the offices of the executive branch, of the judiciary, the military, constitutional commissions, and local governments. The fact that the power-holders correspond to the organs of government would seem to indicate that

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[18] Fernandez, *Law and Polity: Towards a Systems Concept of Legal Validity,* 46 PHIL. L. J. 390-391, (1971).

[19] *Id.,* at 422.

[20] *Id.*

the legal order still exists, and that the "revolutionary political action" described by Milne did not take place.

It can be countered, however, that the abolition of the Batasang Pambansa represented a radical change, since it involved the destruction of a major branch of government. When analyzed in historical perspective, the abolition of the Batasang Pambansa, though significant, could hardly be labelled "radical."

The 1973 Constitution, as amended, provides that:

> Sec. 5. (1) 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. (emphasis supplied)"

and:

> Sec. 6. "The Batasang Pambansa shall convene once every year on the *fourth Monday of July* for its regular session, * * * * (emphasis supplied)."[21]

It is interesting to note that at the time of its abolition, the regular Batasang Pambansa was *not even a two year old legislative body*. Prior to that, the country had an interim Batasang Pambansa — a *transitional legislature* — which exercised legislative powers concurrently with the President.

One could argue that in fact no radical change took place, since the country was only gradually beginning to return to a democratic form of government with a regular legislature when Aquino took over the reins of government. Viewed strictly from the standpoint of government structures, it can even be asserted that rather than changing the form of government, there was even a *continuation of the old form* — a government which vested legislative powers in the executive — only with different personalities. It was, ironically, no less than retired Supreme Court Justice Jose B.L. Reyes, a strong supporter of the Aquino Administration, who interposed this idea when he, according to Agbayani, reportedly said of the new government: "We have been living under a dictatorship for the past twenty years. What is a little while longer?"[22]

4) *Summary*

Given the discussion above, there can be no basis for labeling the present government as "revolutionary" for the following reasons:

> (i) It did not come to power through violent means;
> (ii) There was no overthrow of the existing legal order, as evidenced by the absence of radical change in the laws or the structures of government.

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[21] CONST. (1973), Art. VIII.

[22] Agbayani, *Some Questions on Proclamation No. 3*, Bulletin Today, April 4, 1986, p. 7, c. 1.

At best, the term "revolutionary" when applied to contemporary Philippine history is a word of art: it describes the miracle of having toppled an impregnable twenty-year regime.

B. *"We Are a De Jure Government"*

1) *International recognition as a sign of legitimacy*

The more conservative branch of government, the judiciary, has refrained from characterizing the government as revolutionary, and has instead proclaimed it a *de jure* government. Thus, in a recent case,[23] the Supreme Court stressed that:

> "And the people have made the judgment; they have accepted the government of President Corazon C. Aquino which is in effective control of the entire country and that it is not merely a de facto government but is in fact and law a *de jure* government. Moreover, the community of nations has recognized the legitimacy of the present government."

Although this writer agrees with the statement that the government is *de jure,* the Court's reasons for so stating are hardly meritorious. Specifically, the idea that the recognition by the community of nations is a sign of the legitimacy of the government is of little value.

This perception that international recognition lends legitimacy to government is a view shared by a number of government personalities. Both Bernas[24] and Gonzales[25] cite the recognition extended to the Aquino government as a defense against criticisms that the government is *de facto* and not *de jure.*

2) *Distinction between international recognition and legal status of government*

It should be emphasized that international recognition is not synonymous to legitimacy, and the express recognition by the community of nations is not sufficient to pronounce a government *de jure.*

The terms *'de jure'* and *'de facto'* are used in both constitutional law and international law, with different meanings. In the constitutional law sense, "a *'de jure* government' is synonymous with 'legitimate' or 'constitutional' government, while a *'de facto government'* is equivalent to an 'actual' or "usurping government."[26] In international law, however, these terms refer to *recognition,* rather than the actual legal status of the government. A government is recognized as *de jure* when it is exercising "unrivalled control

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[23] Lawyers League for a Better Philippines v. President Corazon C. Aquino, et al., G.R. No. 73748, May 22, 1986. See also In Re Bermudez, G.R. No. 76180, Oct. 24, 1986.

[24] J. BERNAS, *op. cit.,* note 6 at 5.

[25] See note 8, *supra.*

[26] CHEN, THE INTERNATIONAL LAW OF RECOGNITION 270-272 as cited in 1 WHITEMAN, DIGEST OF INTERNATIONAL LAW, Sec. 47 (1963).

over the whole of the territory of a State," although said government may not necessarily be regarded as the sovereign of the territory.[27]

The difference in meaning has, understandably, caused some confusion, and a compromise phraseology has been proposed, to wit:

> "While the terms *'de facto* recognition' and *'de jure* recognition' are frequently employed, the expressions 'recognition of a *de facto* government,' situation, etc., and 'recognition of a *de jure* government', etc., are preferable."[28]

The distinction between a *de jure* government in the constitutional law sense (one which is legitimate), and a *de jure* government in the international law sense (one recognized as exercising unrivalled control over the territory) is best illustrated by a statement of former U.S. Secretary of State Dulles, when he described American foreign policy:

> "President Monroe, in his famous message to Congress, denounced the expansionist and despotic system of Czarist Russia and its allies. But he said that it would nevertheless be our policy 'to consider the government *de facto* as the *legitimate* (and therefore *de jure*) government for us." (emphasis supplied)[29]

It is clear, therefore, from the foregoing, that a government may be *de facto* in the constitutional law sense, and still enjoy *de jure* recognition by the community of nations. *The grant of international recognition is not a grant of constitutional legitimacy.*

A GOVERNMENT DE FACTO?

A. *The Concept of a De Facto Government*

Assuming that the official versions of the legal status of the government are erroneous, it would appear that the only other reasonable alternative is to consider the present administration as a *de facto* government, one that "exists upon a basis of fact, partly or entirely, because it is organized not in accordance with but in defiance of the existing legal processes of the state."[30]

The difficulty of ascertaining the status of a government that assumes power outside of the regular constitutional processes had led to the formulation of a test for determining the existence of a *de facto* government. This two-fold test can be capsulized into: *effective control and popular acquiescence.*

Fenwick, in his *International Law,* defined the test as follows:

> "A *de facto* government is understood to be one in actual control of the governmental machinery of the state and exercising its authority without

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27 *Id.*
28 2 WHITEMAN, DIGEST OF INTERNATIONAL LAW, Sec. 1, (1963).
29 *Id.*
30 V. SINCO, PHILIPPINE POLITICAL LAW 12 (11th ed., 1962).

> substantial opposition. It is said to possess the quality of 'stability', taken in a broad sense."[31]

Hougton cited these tests, as well as international recognition, as the chief tests applied to ascertain whether a particular government possessed a *de facto* character. Thus:

> "The chief tests which have been applied or at least mentioned by tribunals and commissions as having been considered are:
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> '1. Actual possession of supreme power by the government in the district or state over which its jurisdiction extends;
> '2. The acceptance or acknowledgement of its authority by the mass of people, as evidenced by their general acquiescence in and rendering habitual obedience to its authority; and
> '3. The recognition of the government as *de facto*, or *de jure*, by foreign Governments.' "[32]

B. *The Problem of Stability*

Superficially, the Aquino government can be classified as *de facto* according to the test above mentioned. It did, after all, enjoy tremendous popular support, and its control of government was discussed in another section of this paper. If the criteria, then, were *control and acquiescence*, there is no doubt that, at the onset, the Aquino government was *de facto*.

The catch, however, lies in the retention of that status over a period of time, and both Fenwick and Houghton speak of the requirement of *permanence or stability* as essential to the *de facto* character of a government. Fenwick stresses "the quality of stability," and Houghton described the people "rendering habitual obedience" to the government's authority.

Oppenheim, in an earlier work, had occasion to elaborate on this requisite stability:

> "A Government which enjoys the habitual obedience of the bulk of the population with a *reasonable expectancy of permanence* can be said to represent the State in question and as such to be entitled recognition."[33]

While it is acceptable to describe the Aquino government as *initially de facto*, its questionable ability to maintain stability effectively cracks the *de facto* facade. The spirally tension and unrest that currently grips the country in the face of bombings, kidnapping cases and murder, as well as the deepening conflict among officials in government have seriously threatened the Government's capacity to maintain control and stability.

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[31] C. FENWICK, INTERNATIONAL LAW 159-160 (3rd ed., 1948).

[32] Houghton, *The Responsibility of the State for the Acts and Obligations of General De Facto Governments — Impartance of Recognition*, 6 IND. L. J. 422, 423 (1931).

[33] L. OPPENHEIM, *op. cit.*, note 15 at 131.

The government's inability to keep the country stable implies that, using the standard of *permanence,* the Aquino government cannot claim a *de facto* legal status. The dilemma is heightened with the passage of time.

THE DILEMMA OF LEGITIMACY: A TWO-PHASE RESOLUTION

A. *The Problem*

It would appear from the discussion above that the Aquino government cannot, by any principle of constitutional and international law, be properly classified either as *de jure* or *de facto.* That it is not *de jure* is obvious from the circumstances accompanying its assumption into power, and that it is not *de facto* is clear from its inability to settle down and achieve a semblance of permanence.

What is definite, however, is that the government was *de facto* at the onset — and upon this fact a resolution to the issue can be built.

B. *The Theory*

The legal status dilemma can be resolved by the simple procedure of dividing the government's present term into two phases; the period from *Proclamation to Promulgation of the Provisional Constitution,* and the period *After Promulgation to the Present.*

It is submitted that during the first phase, the Aquino government was a *de facto* government, but the act of Promulgation transformed it into a constitutional government, but one *under the 1973 Constitution as amended, and not under the Provisional Constitution.*

C. *The First Phase: Proclamation to the Promulgation of the Provisional Constitution*

1) *Does the 1973 Constitution still exist?*

The test for determining the *de facto* character of a government was presented in the preceding section, and given the standards of control and acquiescence, the Aquino government could be classified *de facto,* at least in that first month from February 25, 1986 to March 24, 1986.

As previously mentioned, the assumption of power by a *de facto* government in contravention of the provisions of the constitution does not imply *automatic abrogation* of the same. A more theoretically sound proposition would be that at the time a *de facto* government assumes power, the constitution it defied is *merely suspended, but continues to exist.*

Logically, the terms *de jure* and *de facto* cannot be divorced from each other, one is always viewed in relation to the other. A *de facto* government

is one which is not *de jure,* and vice versa. A *de jure* government adheres to the constitution, a *de facto* government defies it.

When it assumed power, the Aquino government was *de facto,* and therefore was one which defied a constitution. This idea alone admits the existence of the constitution, for without a fundamental law, there would be no defiance to speak of.

A *de facto* government, in order to remain as such must sustain *a continued defiance of an existing constitution,* for abrogation would render the government *de jure* once it has established its own laws, and gained recognition for the same. Precisely, it is this concept of sustained defiance that distinguishes the *de facto* government from a *de jure* one.

The theoretical justification for the continued effectivity of the 1973 Constitution is in fact accepted by the present administration, as can be inferred from the pronouncements — or silence — of the Aquino government. The Provisional Constitution, for example, does not categorically declare the 1973 Constitution without any effect. Justice Minister Neptali Gonazles, though bluntly asked if the government recognized the 1973 Constitution, answered the question with a vague "Our theory is that we exist independently of it."[34] Nor does the Judiciary deny the existence of the 1973 Constitution, despite the fact that in at least two cases[35] it could have made such a declaration as the "final arbiter of the Constitution."

The silence of the Supreme Court on this matter of the continued existence of the 1973 Constitution is revealing, particularly in view of the dissenting opinion of then Associate Justice, now Chief Justice Teehankee in the case of *Mitra, et al. v. COMELEC.*

> "Unless the Javellana ruling is overturned by this Court itself and the passage and attrition of time show the futility of expecting such a contingency, the *1973 Constitution stands as the supreme law of the land,* by which the validity and constitutionality of official acts is tested (emphasis supplied)."[36]

2) *The Status of the 1973 Constitution*

If the 1973 Constitution continued to exist upon Aquino's assumption to the presidency, then it is not unreasonable to postulate that since the Government acted independently of its provisions, then the Constitution could be considered as a *suspended law.*

Before attempting to explain this theory, it is necessary to differentiate kinds of *de facto* governments, and to ferret out possible analogies applicable to the present dispensation.

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[34] See note 8, *supra.*
[35] See note 23, *supra.*
[36] G.R. No. L-56503, April 4, 1981.

Co Kim Cham v. Valdez Tan Keh enumerates three kinds of *de facto* government:

> "There are several kinds of *de facto* governments. The first, or government *de facto* in a proper legal sense, is that government that gets possession and control of, or usurps, by force or by the voice of the majority, the rightful legal government and maintains itself against the will of the latter, such as the government of England under the Commonwealth, first by Parliament and later by Cromwell as Protector. The second is that which is established and maintain by military forces who invade and occupy a territory of the enemy in the course of war, and which is denominated a government of paramount force, as the cases of Castine, in Maine, which was reduced to British possession in the war of 1812, and of Tampico, Mexico, occupied during the war with Mexico, by the troops of the United States. And the third is that established as an independent government of the Southern Confederacy in revolt against the Union during the war of secession."[37]

The Aquino government can be categorized as a *de facto* government of the first kind, for it is neither an invading military force nor a ceding state.

In his work, *Philippine Political Law*,[38] Justice Isagani Cruz, citing *Peralta v. Director of Prison*,[39] discussed the effects of a *de facto* government of the second kind.

> "There being no change, of sovereignty during a belligerent occupation, the political laws of the occupied territory are merely *suspended*, subject to revival under the *jus postliminium* upon the end of the occupation. The non-political laws are deemed continued unless changed by the belligerent occupant since they are intended to govern the relations of individuals as among themselves and are not generally affected by changes in regimes or rulers."

Does a *de facto* government of the first kind also retain its sovereignty, and therefore only a suspension, and not an abrogation, of political laws takes place?

In discussing the concept of international recognition, Oppenheim distinguished the creation of a new state from a mere change in government. Thus:

> "Recognition of a new State must not be confused with recognition of a new Head of Government of an old State * * * * *If a foreign State refuses to recognize a new Head or a change in the form of the Government of an old State, the latter does not thereby lose its recognition as an International Person,* although no official intercourse is henceforth possible between the two States as long as recognition is not given either expressly or tacitly.' (emphasis supplied)[40]

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[37] 75 Phil. 113, 122.
[38] I. CRUZ, PHILIPPINE POLITICAL LAW 36 (1983).
[39] 75 Phil. 285.
[40] L. OPPENHEIM, *op. cit.*, note 15 at 129.

The same line of thought is taken by Lawrence:

> "The continuity of a state is not affected by changes in the form of its government or alterations, whether by gain or loss, in the area of its territory. * * * * Other powers almost recognize a new form of government in an old-established state, in order that they may continue to do business with it. If they refuse such recognition, no official intercourse is possible till such time as they change their policy. But the state-person remains throughout."[41]

The implication of the continuity of statehood is the retention of sovereignty, since sovereignty is an essential feature of the state. From this it can be inferred that a change of government even through non-constitutional means does not result in a loss of sovereignty.

Sovereignty then was not lost by the assumption to power of the Aquino government. Applying by analogy the concept forwarded by Justice Cruz, the retention of sovereignty implied that political laws, among them the Constitution, were not abrogated, but merely *suspended.*

D) *The Second Phase: After Promulgation to the Present*

1) *Legal Effect of the Provisional Constitution Promulgation*

Granting that the 1973 Constitution continued to exist even after the proclamation of President Aquino, what was the effect of the promulgation of a Provisional Constitution? Was the country placed in a ridiculous situation of being under *two* fundamental laws?

It is submitted that the act of promulgating a Provisional Constitution produced the dual effect of reviving and amending the 1973 Constitution.

2) *The Status of the Provisional Constitution*

Although Professor Sinco recognizes that popular ratification is not an absolute requirement for a valid Constitution, he does however point out that:

> "In the Philippines, on the other hand, the theory of the constitution as the direct expression of the popular will has become a part of the socio-political creed of the people through a process of indoctrination in the principles of American jurisprudence. Hence, popular ratification of any document intended to serve as a constitution is practically a part of our articles of faith in the sphere of law and politics."[42]

The fact, therefore, that the Provisional Constitution was promulgated without the direct ratification of the people augurs against its being called a Constitution.

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[41] T. LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW 88 (1923).
[42] V. SINCO, *op. cit.*, note 30 at 51.

Moreover, the "provisional" character of this Charter contravenes the requirement of permanency of the fundamental law. Weaver, in particular, stressed the function of a constitution as follows:

> "These are (a) to establish permanently the basis of a governmental system, and (b) to provide for the public welfare through an undefined and expanding future."[43]

Theoretically, then, there is no basis for labelling Proclamation No. 3 a "constitution," since it lacks certain essential requisites for a valid fundamental law.

3) *Proclamation No. 3: An Instrument for Revival and Amendment*

As noted earlier, Justice Cruz spoke of a suspension and *revival* of political laws by a belligerent force.[44] By analogy, revival of a suspended constitution by a *de facto* government of the first kind is possible.

The power of a *de facto* government to revive, repudiate, or even amend a constitution is intrinsic in its *de facto character.* As a government existing in defiance of a constitution, it is one with undefined — and therefore unlimited — powers. Minister Gonzales correctly assessed the powers of the government when he declared:

> "We can adopt a new constitution or law, yet we can choose what laws and what provisions of the constitution to enforce and recognize."[45]

In promulgating Proclamation No. 3, President Aquino expressly revived the suspended 1973 Constitution, and amended it accordingly. Her authority to do so stemmed from the *de facto* character of her rule.

The idea of revival is supported by the fact that of the original seventeen articles of the 1973 Constitution, five have been unconditionally adopted, and eight have been conditionally adopted "insofar as they are not inconsistent with the provisions of the Proclamation." Four articles are deemed suspended by the proclamation.[46]

The adoption of whole articles of the 1973 Constitution indicates a revival of the said provisions. Understandably, the articles on the legislature were amended to eradicate the constitutional dilemma that plagued the Aquino government at the beginning.

CONCLUSION: A DE JURE GOVERNMENT UNDER THE 1973 CONSTITUTION AS AMENDED

In promulgating Proclamation No. 3, the Aquino government effectively legitimized its status by placing itself within the framework of a Constitution which it amended by virtue of its *de facto* government powers.

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[43] S. WEAVER, CONSTITUTIONAL LAW 2 (1946).
[44] See note 38, *supra.*
[45] See note 8, *supra.*
[46] See Proc. No. 3, Art. I, Secs 1-3.

The revival and amendment of the 1973 Constitution assured the erstwhile *de facto* government of a right to the title "constitutional government" defensible as *de jure* by any standard of constitutional or international law.