

CREATING POLITICAL QUESTIONS UNDER THE 1987 CONSTITUTION*

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ABSTRACT

The 1987 Constitution strengthened the Judiciary by putting limits on the use of the political question doctrine. Article VIII, Section 1 broadened the scope of judicial inquiry to include the determination of grave abuse of discretion by any branch or instrumentality of the government. The Supreme Court, however, has refused to exercise this power, deferred to the Chief Executive, and effectively created political questions where there should have been none.

This paper discusses three specific instances of such deference by the Court, demonstrating how this practice renders inert innovations introduced by our Constitution.

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I. INTRODUCTION	228
II. JUDICIAL POWER UNDER THE 1987 CONSTITUTION	229
III. POLITICAL QUESTIONS	231
IV. THE CASES	232
A. When the President Certifies to the Necessity of the Immediate Enactment of a Law	232
B. The State of the President's Health	234
C. The Exercise of Martial Law Powers	237
V. ANALYSIS.....	243
VI. CONCLUSION	244

I. INTRODUCTION

Judicial deference to the President makes a stronger Chief Executive and frustrates constitutional design.

To prevent Executive dominance, the 1987 Constitution strengthened the Judiciary by, among other things, putting limits on the use of the political question doctrine. It broadens the scope of judicial inquiry into areas which the Court, under previous constitutions, would have left to the political departments to decide.¹

“The political question doctrine is no longer the insurmountable obstacle to the exercise of judicial power or the impenetrable shield that protects executive and legislative actions from judicial inquiry or review.”² Recent Supreme Court decisions challenge this premise, however.

The Supreme Court has been consistently ruling in favor of the Executive Branch. To justify these decisions, the Court has decided not to address certain issues and, in effect, created new political questions. I address three instances when the Court has declined to enforce constitutional provisions. These are:

¹ *Marcos v. Manglapus* [hereinafter “*Marcos*”], G.R. No. 88211, 177 SCRA 668, 695, Sept. 15, 1989.

² *Oposa v. Factoran* [hereinafter “*Oposa*”], G.R. No. 101083, 810 SCRA 792, 809, July 30, 1993.

- a. Article VI, Section 26(2) on the President's certification to the necessity of the immediate enactment of a law to meet a public calamity or emergency;
- b. Article VII, Section 12 on whether the President shall inform the public on the state of the state of his health; and
- c. Article VII, Section 18, on the President's power to declare martial law.

In these cases, the Supreme Court refused to exercise judicial review, contrary to constitutional design, and has preserved and expanded the political question doctrine.

II. JUDICIAL POWER UNDER THE 1987 CONSTITUTION

The 1987 Constitution was adopted during the “Third Wave of Democratization,” a period of transition from nondemocratic to democratic regimes worldwide that peaked between 1974 and 1990.³ As part of this wave, the Philippines ended the authoritarian regime of Ferdinand E. Marcos, Sr. and created a democratic one.⁴ The democratic transition was completed when the 1987 Constitution was overwhelmingly approved, which “established democratic procedures and spelled out civil liberties.”⁵

³ See Samuel P. Huntington, *How Countries Democratize*, 124 POL. SCI. Q. 31, 31 (2009).

⁴ *Id.* at 40, 57. Between 1983–1986, the Philippines experienced declining national security, and with it, a serious loss of confidence in the leadership of Ferdinand E. Marcos, Sr. and intensified demands for a change of leadership. To bolster his claim to the presidency, Marcos, Sr. called for a “snap” presidential election in 1986. This, however, backfired when Corazon Aquino refused to accept Marcos, Sr.’s claim to electoral victory, culminating in Marcos, Sr. being forced into exile in the United States when key members of the Philippine Armed Forces broke with him, alongside the support of hundreds of thousands of civilians. See David G. Timberman, *Leadership Change and National Security in the Philippines: 1983-88*, 11 CONTEMP. SE. ASIA 186, 186 (1989).

⁵ “But continued armed challenges to the regime meant that democratic consolidation, defined as strong popular support for democratic institutions and the absence of major disloyal opposition to the regime, had not yet been achieved. While there is much evidence that Philippine democracy enjoyed popular legitimacy after the success of ‘people power,’ the ‘overthrow’ character of the Philippine transition made the establishment of elite consensus difficult.” Mark R. Thompson, *Off the Endangered List: Philippine Democratization in Comparative Perspective*, 28 COMP. POL. 179, 180 (1996).

For their part, the framers of the 1987 Constitution addressed and expanded the definition of judicial power by providing:

SECTION 1. The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.

Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.⁶

The scope of this expanded power of judicial review was designed to also encompass the “power to enforce rights conferred by law and determine grave abuse of discretion by any government branch or instrumentality,” as it serves to “prevent courts from seeking refuge behind the political question doctrine and turning a blind eye to abuses committed by the other branches of government.”⁷

“The *expanded mode* [of judicial review] arose from the use and abuse of the political question doctrine during the martial law era under former President Ferdinand E. Marcos.”⁸ In safeguarding “the potency of the power of judicial review to curb grave abuse of discretion by any branch or instrumentality of the government,” this expanded mode of judicial review has “shaped the landscape of the Philippine judiciary.”⁹

The expanded definition of judicial power, embodied in the second paragraph of Article VIII, Section 1 of the Constitution, in effect allowed courts to “have greater prerogative to determine what it can do to prevent grave abuse of discretion,” having “narrowed the scope of the political question doctrine and enlarged that of judicial inquiry to include the courts’ power ‘to determine if any government branch or instrumentality has acted beyond the scope of its powers, such that there is grave abuse of

⁶ CONST. art. VIII, § 1.

⁷ *Sanota v. Bureau of Customs*, G.R. No. 199479, slip op. at 8, Apr. 3, 2024, *quoting* *GSIS Fam. Bank Emp. Union v. Villanueva*, 846 Phil. 30, 46–47 (2019).

⁸ *Macalintal v. Comm’n on Elections*, G.R. No. 263590, slip op. at 36–37, June 27, 2023. (Emphasis in the original.)

⁹ *Syjuco v. Abaya*, G.R. No. 215650, slip op. at 16, Mar. 28, 2023, *quoting* *Kilusang Mayo Uno v. Aquino*, 850 Phil. 1168, 1182 (2019).

discretion.”¹⁰ Put differently, judicial power now “includes the power to determine if the acts of other government branches are exercised within the bounds of the fundamental law.”¹¹ The Supreme Court is “tasked not only to allocate the constitutional limits of the powers granted to the coequal branches of the government but also to make sure that they exercise their powers within these limits.”¹² As a result, “the political question doctrine is no longer the insurmountable obstacle to the exercise of judicial power or the impenetrable shield that protects executive and legislative actions from judicial inquiry or review.”¹³

“[A] proper appreciation of the interplay between the political question doctrine and the Court's expanded jurisdiction under Article VIII, Section 1 of the Constitution”¹⁴ should be done in determining the validity of an argument that an issue before the Court is a political question.

III. POLITICAL QUESTIONS

Political questions are:

[T]hose questions which, under the Constitution, are to be *decided by the people* in their sovereign capacity, or in regard to which *full discretionary authority* has been delegated to the Legislature or executive branch of the Government. It is concerned with issues dependent upon the *wisdom*, not legality, of a particular measure.¹⁵

“They have two aspects: (1) those matters that are to be exercised by the people in their primary political capacity and (2) matters which have been specifically delegated to some other department or particular office of the government, with discretionary power to act.”¹⁶ As earlier intimated, the

¹⁰ Initiatives for Dialogue and Empowerment Through Alternative Legal Services, Inc. v. Senate, G.R. No. 184635, slip op. at 16, June 13, 2023, *citing* Marcos, 177 SCRA 668, 695; *quoting* *Kilusang Mayo Uno*, 850 Phil. at 1181–82; *quoting* Estrada v. Desierto, 406 Phil. 1, 43 (2001).

¹¹ Province of Sulu v. Medialdea, G.R. No. 242255, slip op. at 49, Sept. 9, 2024.

¹² *Id.*, *citing* Tañada v. Cuenco [hereinafter “*Cuenco*”], 103 Phil. 1051 (1957).

¹³ *Oposa*, 810 SCRA 792, 809.

¹⁴ Trillanes v. Medialdea, G.R. No. 241494, slip op. at 30, Apr. 3, 2024.

¹⁵ *Cuenco*, 103 Phil. at 1067, *citing* 16 C.J.S. Constitutional Law § 145 (1956). (Emphasis in the original. Citations removed.)

¹⁶ Integrated Bar of the Philippines v. Zamora, G.R. No. 141284, 338 SCRA 81, 122, Aug. 15, 2000 (Puno, J., *concurring*), *citing id.*

1987 Constitution has narrowed the reach of the political question doctrine “to a great degree” when it expanded the power of judicial review.¹⁷

“The concept of a political question, however, never precludes judicial review when the act of a constitutional organ infringes upon a fundamental individual or collective right.”¹⁸ “Where there is a serious allegation that *the Legislature* acted beyond the scope of its powers and did enact a law which contravenes the Constitution, it not only becomes a right, but a duty for this Court to declare the law unconstitutional.”¹⁹ “By the same token, when an act *of the President* [...] is seriously alleged to have infringed the Constitution and the laws, [...] settling the dispute becomes the duty and the responsibility of the courts.”²⁰

IV. THE CASES

A. When the President Certifies to the Necessity of the Immediate Enactment of a Law

The Constitution allows Congress to rush legislation only if there is a public calamity or emergency to justify it. In such cases, the President certifies the necessity of the immediate enactment of the law. The Constitution provides:

SECTION 26. (1) Every bill passed by the Congress shall embrace only one subject which shall be expressed in the title thereof.

(2) No bill passed by either House shall become a law unless it has passed three readings on separate days, and printed copies thereof in its final form have been distributed to its Members three days before its passage, except when the President certifies to the necessity of its immediate enactment to meet a public calamity or

¹⁷ *Falcis v. Civ. Registrar Gen.*, 861 Phil. 388, 436–37 (2019).

¹⁸ *Diocese of Bacolod v. Comm’n on Elections*, 751 Phil. 301, 338 (2015).

¹⁹ *Province of Sulu*, slip op. at 49, *citing* *Tatad v. Sec’y of the Dep’t of Energy*, G.R. No. 124360, 281 SCRA 330, 347, Nov. 5, 1997. (Emphasis supplied). “Where an action of the legislative branch is seriously alleged to have infringed the Constitution, it becomes not only the right but in fact the duty of the judiciary to settle the dispute. “The question thus posed is judicial rather than political. The duty (to adjudicate) remains to assure that the supremacy of the Constitution is upheld.” Once a ‘controversy as to the application or interpretation of a constitutional provision is raised before this Court [...], it becomes a legal issue which the Court is bound by constitutional mandate to decide.” *See id.*, *quoting* *Tañada v. Angara*, G.R. No. 118295, 272 SCRA 18, 47, May 2, 1997.

²⁰ *Pimentel v. Aguirre*, G.R. No. 132988, 336 SCRA 201, 223, July 19, 2000.

emergency. Upon the last reading of a bill, no amendment thereto shall be allowed, and the vote thereon shall be taken immediately thereafter, and the *yeas* and *nays* entered in the Journal.²¹

The Supreme Court is reluctant to side with petitioners in cases where there is an alleged violation of Article VI, Section 26(2) of the Constitution. As early as 1994, the Court has deferred to Congress' response to the President's certification as a basis for dismissing these challenges. In *Tolentino v. Secretary of Finance*,²² the Court pointed to the Senate's acquiescence to restrain itself from reviewing the President's action:

It is noteworthy that no member of the Senate saw fit to controvert the reality of the factual basis of the certification. To the contrary, by passing S. No. 1630 on second and third readings on March 24, 1994, the Senate accepted the President's certification. Should such certification be now reviewed by this Court, especially when no evidence has been shown that, because S. No. 1630 was taken up on second and third readings on the same day, the members of the Senate were deprived of the time needed for the study of a vital piece of legislation?²³

This deference was also evident in *Abas Kida v. Senate of the Philippines*,²⁴ where the Supreme Court held that:

The House of Representatives and the Senate — in the exercise of their legislative discretion — gave full recognition to the President's certification and promptly enacted RA No. 10153. Under the circumstances, nothing short of grave abuse of discretion on the part of the two houses of Congress can justify our intrusion under our power of judicial review.

The petitioners, however, failed to provide us with any cause or justification for this course of action. Hence, while the judicial department and this Court are not bound by the acceptance of the President's certification by both the House of Representatives and the Senate, prudent exercise of our powers and respect due our co-equal branches of government in matters committed to them by the Constitution, caution a stay of the judicial hand.²⁵

²¹ CONST. art. VI, § 26.

²² G.R. No. 115455, 630 SCRA 631, Aug. 25, 1994.

²³ *Id.* at 666.

²⁴ 675 Phil 316 (2011).

²⁵ *Id.* at 352.

Abas Kida is a study in judicial confusion. With due respect, it is not the abuse of discretion on the part of the two Houses of Congress that is in issue, but the abuse of discretion on the part of the President.

The Supreme Court cited the one reason it will review the President's certification—"grave abuse of discretion." But the Court will act only if Congress does not dispute the President's certification to the necessity of the immediate enactment of a law. In *Calleja v. Executive Secretary*,²⁶ the Court explained:

In this case, President Rodrigo R. Duterte, through a letter dated June 1, 2020, certified the necessity for the immediate enactment of HB No. 6875 "to address the urgent need to strengthen the law on anti-terrorism and effectively contain the menace of terrorist acts for the preservation of national security and the promotion of general welfare.

* * *

In the absence of any grave abuse of discretion, the determination of the President that terrorism is an emergency, in order to certify a bill as urgent, which Congress has not seen fit to controvert and has, in fact, accepted such certification as valid similar to the finding in *Tolentino*, is something which the Court should not disturb. Additionally, the Court recognizes the pressing need for the country to enact more effective counter-measures against terrorism and terrorism financing, the lack of which has been repeatedly flagged by international evaluation groups to which the Philippines belong.²⁷

Tolentino is intact. The validity of the President's certification is now determined by Congress such that Congress' acceptance of the certification preempts the Court's judicial review powers. The Court has made this issue a political question because Congress' acceptance of the President's certification "is something which the Court should not disturb."²⁸

B. The State of the President's Health

In an appearance before the media, President Rodrigo Duterte made "rambling, divisive" statements that failed to reassure the public that his

²⁶ 918-B Phil. 1 (2021).

²⁷ *Id.* at 270–71.

²⁸ *Id.* at 271.

government was handling the pandemic.²⁹ These ramblings have been reimagined as a poem:³⁰

THE KIT

by Rodrigo Roa Duterte

Can be distributed To different health centers, But at this time, kung kulang They can be brought To a testing station, to RITM.	Mga gago ang tao no'n— <i>Tamang tama lang.</i>
<i>Kokonti lang kasi, e.</i>	Tapos, 'yung Spanish flu, Right before the wars.
The kit Is the kit.	<i>Kawawa 'yung mga tao—</i>
<i>Meron namang lumalabas pa.</i>	Pero mas kawawa 'Yung sa Middle East, The so-called Roman Empire.
I think that, Sabi ko nga—	You have read the inquisition.
In every epoch Maybe meron nang una: Bubonic plague.	<i>Kung may birthmark ka—</i> You are a witch And you are burned At stake.

Figure 1. “The Kit’ by Rodrigo Roa Duterte.”

Alarmed by the President’s incoherence, lawyer Dino De Leon sought to compel the Office of the President to disclose information regarding the President’s health citing Article VII, Section 12 of the Constitution:

SECTION 12. In case of serious illness of the President, the public shall be informed of the state of his health. The Members of the Cabinet in charge of national security and foreign relations

²⁹ Julie M. Aurelio, *That ‘fucking country’ briefing: Did Duterte manage to assure Pinoys?*, INQUIRER.NET, Mar. 11, 2020, at <https://newsinfo.inquirer.net/1239675/that-fucking-country-briefing-did-duterte-manage-to-assure-pinoys>.

³⁰ Rolando B. Tolentino, *The Kit*, FACEBOOK (Mar. 10, 2020), at <https://www.facebook.com/rolandobtolentino/photos/a.294362934279034/1066795873702399/>, cited by Jeline Malasig, *The Kit: Duterte’s ramblings at COVID-19 press conference are now creative poems*, INTERAKSYON, Mar. 10, 2020, at <https://interaksyon.philstar.com/politics-issues/2020/03/10/163897/the-kit-duterte-ramblings-at-covid-19-press-conference-are-now-creative-poems/>.

and the Chief of Staff of the Armed Forces of the Philippines, shall not be denied access to the President during such illness.³¹

By way of a petition for *mandamus*, petitioner sought to:

(1) compel respondents to disclose all the medical and psychological/psychiatric examination results, health bulletins, and other health records of the President ever since he assumed the Presidency; and (2) compel the President to undergo additional confirmatory medical and psychological/ psychiatric examinations, which shall be publicly disclosed in order to ensure the accuracy of the health records to be released. Petitioner anchors his alleged right to be informed on the basis of Section 12, Article VII and Section 7, Article III, in relation to Section 28, Article II, of the 1987 Constitution (Constitution).³²

The Supreme Court, without bothering to require the President to respond via comment, dismissed the case less than a month after it was filed. It held:

Petitioner seeks to avail himself of the writ of *mandamus*, but he himself cited the deliberations of the Constitutional Commission on Section 12, Article VII wherein the proponent thereof, Commissioner Blas F. Ople, stated that: “*We are called upon to be more trusting with respect to the Office of the President that they will know what appropriate means to take in order to release this information to the public in satisfaction of the public’s right to know of the presidency.*” It was also further expressed in the deliberations that “*the state of health or analysis as to the actual condition of the President should be left to the President and his doctor*” and that “*the burden [is left] to the Office of the President to choose the appropriate means of releasing information to the public.*”³³

The Supreme Court’s reading of the Records was selective. An examination of the Records of the Constitutional Commission, however, will show the framers identified a right of the people to know the health of the President. The Records also show that there was a duty on the part of the

³¹ CONST. art. VII, § 12.

³² De Leon v. Duterte, G.R. No. 252118, May 8, 2020. (Emphasis in the original, citations omitted.)

³³ *Id.*

President to inform the public of the state of his or her health.³⁴ What was discretionary was the manner of providing the information to the public.³⁵

C. The Exercise of Martial Law Powers

The clearest examples of how the Supreme Court shirks from its duty to exercise judicial review involves the imposition of martial law. The 1987 Constitution installed several safeguards to ensure checks on the President's exercise of emergency powers. The Constitution provides:

SECTION 18. The President shall be the 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 or rebellion. In case of invasion or rebellion, when the public safety requires it, he may, for a period not exceeding sixty days, suspend the privilege of the writ of *habeas corpus* or place the Philippines or any part thereof under martial law. Within forty-eight hours from the proclamation of martial law or the suspension of the privilege of the writ of *habeas corpus*, the President shall submit a report in person or in writing to the Congress. The Congress, voting jointly, by a vote of at least a majority of all its Members in regular or special session, may revoke such proclamation or suspension, which revocation shall not be set aside by the President. Upon the initiative of the President, the Congress may, in the same manner, extend such proclamation or suspension for a period to be determined by the Congress, if the invasion or rebellion shall persist and public safety requires it.

The Congress, if not in session, shall, within twenty-four hours following such proclamation or suspension, convene in accordance with its rules without any need of a call.

The Supreme Court may review, in an appropriate proceeding filed by any citizen, the sufficiency of the factual basis of the proclamation of martial law or the suspension of the privilege of

³⁴ “Note that the records of the constitutional convention or commission are not binding on the courts. The proceedings of the convention are less conclusive of the proper construction of the instrument than are legislative proceedings of the proper construction of a statute, since in the latter case it is the intent of the legislature we seek, while in the former we are endeavoring to arrive at the intent of the people through the discussions and deliberations of their representatives.” Dante Gatmaytan, *#NasaanAng Pangulo: A De Leon v. Duterte Dissent*, 46 J. INTEG. BAR PHIL. J. 49, 76 (2021); see 2 RECORD CONST. COMM’N 429, 457–460 (July 30, 1986).

³⁵ For a complete examination of this case, see *id.*

the writ or the extension thereof, and must promulgate its decision thereon within thirty days from its filing.

A state of martial law does not suspend the operation of the Constitution, nor supplant the functioning of the civil courts or legislative assemblies, nor authorize the conferment of jurisdiction on military courts and agencies over civilians where civil courts are able to function, nor automatically suspend the privilege of the writ.

The suspension of the privilege of the writ shall apply only to persons judicially charged for rebellion or offenses inherent in or directly connected with the invasion.

During the suspension of the privilege of the writ, any person thus arrested or detained shall be judicially charged within three days, otherwise he shall be released.³⁶

The Philippine experience under martial law was expectedly unpleasant. “The country suffered 14 years of martial law under former dictator Ferdinand Marcos [...]. During those years, opponents of Marcos were subjected to numerous human right violations, including imprisonment, forced disappearances, and torture. Extrajudicial killings carried out by Marcos’ secret police were also common.”³⁷

The Supreme Court explained the impact of martial law this way:

Our martial law experience bore strange unwanted fruits, and we have yet to finish weeding out its bitter crop. While the restoration of freedom and the fundamental structures and processes of democracy have been much lauded, according to a significant number, the changes, however, have not sufficiently healed the colossal damage wrought under the oppressive conditions of the martial law period. The cries of justice for the tortured, the murdered, and the *desaparecidos* arouse outrage and sympathy in the hearts of the fair-minded, yet the dispensation of the appropriate relief due them cannot be extended through the same caprice or whim that characterized the ill-wind of martial rule. The damage done was not merely personal but institutional, and the proper

³⁶ CONST. art. VII, § 18.

³⁷ Jason Hanna & Euan McKirdy, *Philippines: Duterte declares martial law in Mindanao amid clashes*, CNN WORLD, May 24, 2017, at <https://edition.cnn.com/2017/05/23/asia/philippines-mindanao-clashes-martial-law/index.html>.

rebuke to the iniquitous past has to involve the award of reparations due within the confines of the restored rule of law.³⁸

The framers of the 1987 Constitution endeavored to limit the President's exercise of the martial law and suspension powers, and to establish safeguards to protect civil liberties. The Supreme Court summarized these limits in one case:

- (a) The President may declare martial law or suspend of the privilege of the writ of the privilege of *habeas corpus* only when there is an invasion or rebellion and public safety requires such declaration or suspension.
- (b) The President's proclamation or suspension shall be for a period not exceeding 60 days.
- (c) Within 48 hours from the proclamation or suspension, the President must submit a Report in person or in writing to Congress.
- (d) The Congress, voting jointly and by a vote of at least a majority of all its Members, can revoke the proclamation or suspension.
- (e) The President cannot set aside the Congress' revocation of his proclamation or suspension.
- (f) The President cannot, by himself, extend his proclamation or suspension. He should ask the Congress' approval.
- (g) Upon such initiative or request from the President, the Congress, voting jointly and by a vote of at least a majority of all its Members, can extend the proclamation or suspension for such period as it may determine.
- (h) The extension of the proclamation or suspension shall only be approved when the invasion or rebellion persists and public safety requires it.
- (i) The Supreme Court may review the sufficiency of the factual basis of the proclamation or suspension, or the extension thereof, in an appropriate proceeding filed by any citizen.
- (j) The Supreme Court must promulgate its decision within 30 days from the filing of the appropriate proceeding.

³⁸ *Mijares v. Rañada*, 495 Phil. 372, 375 (2005). (Emphasis in the original.)

- (k) Martial law does not suspend the operation of the Constitution.

Accordingly, the Bill of Rights remains effective under a state of martial law. Its implementers must adhere to the principle that civilian authority is supreme over the military and the armed forces is the protector of the people. They must also abide by the State's policy to value the dignity of every human person and guarantee full respect for human rights.

- (l) Martial law does not supplant the functioning of the civil courts or legislative assemblies, nor authorize the conferment of jurisdiction on military courts and agencies over civilians where civil courts are able to function.
- (m) The suspension of the privilege of the writ applies only to persons judicially charged for rebellion or offenses inherent in or directly connected with invasion.
- (n) Finally, during the suspension of the privilege of the writ, any person thus arrested or detained should be judicially charged within three days, otherwise he should be released.³⁹

The imposition of martial law in Mindanao during the Duterte administration provided an opportunity to test the new restrictions in the 1987 Constitution. The Supreme Court's decisions, however, disappoint. I discussed these cases elsewhere⁴⁰ but I highlight those portions that show the extent of deference that the Supreme Court extends to the President. In the end, the checks on the imposition of martial law are meaningless.

One issue decided the legal basis for the declaration of martial law. The Court held that it should not "expect absolute correctness of the facts stated in the proclamation and in the written Report" from the President, given the urgency of the situation, consequent obstruction with the process of the President's decision-making, and virtual necessity of the President to be on the ground, which would "only place the President in peril" and "defeat the very purpose of the grant of emergency powers [...], that is, to 'immediately put an end to the root cause of the emergency.'"⁴¹

³⁹ *Lagman v. Pimentel*, 825 Phil. 112, 238–39 (2018).

⁴⁰ See Dante Gatmaytan, *Duterte, Judicial Deference, and Democratic Decay in the Philippines*, 28 ZEITSCHRIFT FÜR POLITIKWISSENSCHAFT 553 (2018).

⁴¹ *Lagman v. Medialdea*, 812 Phil. 179, 294 (2017). The petitioners therein later filed separate Motions for Reconsideration questioning the "sufficiency of the factual bases of Proclamation No. 216 and the parameters used in determining the sufficiency of the factual bases." As the "[p]etitioners, however, failed to present any substantial argument to convince us to reconsider our July 4, 2017 Decision," the Motions for Reconsideration were

In the next case, the Supreme Court held that “Congress is not constitutionally mandated to convene in joint session except to vote jointly to revoke the President’s declaration or suspension.”⁴²

On the issue of whether there are limits to the extension of proclamation of martial law, the Supreme Court held that:

[T]he only limitations to the exercise of the congressional authority to extend such proclamation or suspension are that the extension should be upon the President’s initiative; that it should be grounded on the persistence of the invasion or rebellion and the demands of public safety; and that it is subject to the Court’s review of the sufficiency of its factual basis upon the petition of any citizen.⁴³

Reviewing the factual bases for the extension of the proclamation of martial law, the Court found that: (a) invasion or rebellion persisted in Mindanao; and (b) public safety was endangered by it and required the extension. There being sufficient factual bases, the Court declared the extension as constitutional.⁴⁴

By the time the Court decided the case of *Lagman v. Medialdea*⁴⁵ in 2019, it all but wrote itself out as a constitutional check. Here are excerpts:

[T]he Court need not make an independent determination of the factual basis for the proclamation or extension of martial law and the suspension of the privilege of the writ of *habeas corpus*. The Court is not a fact-finding body required to make a determination of the correctness of the factual basis for the declaration or extension of martial law and suspension of the writ of *habeas corpus*. It would be impossible for the Court to go on the ground to conduct an independent investigation or factual inquiry, since it is not equipped with resources comparable to that of the Commander-in-Chief to ably and properly assess the ground conditions.

denied with finality by the Court for mootness and lack of merit. *Lagman v. Medialdea*, 822 Phil. 181, 187, 194 (2017).

⁴² *Padilla v. Congress*, 814 Phil. 344, 380 (2017).

⁴³ *Lagman v. Pimentel*, 825 Phil. at 203.

⁴⁴ *Id.* at 210–33, 252 (2018).

⁴⁵ 847 Phil. 317 (2019). This second *Lagman v. Medialdea* case concerns the third extension of the declaration of martial law by President Duterte over the island of Mindanao, from January 1, 2019 to December 31, 2019.

Thus, in determining the sufficiency of the factual basis for the extension of martial law, the Court needs only to assess and evaluate the written reports of the government agencies tasked in enforcing and implementing martial law in Mindanao.

* * *

The Court need not delve into the accuracy of the reports upon which the President's decision is based, or the correctness of his decision to declare martial law or suspend the writ, for this an executive function. The threshold or level (degree) of sufficiency is, after all, an executive call. The President, who is running the government and to whom the executive power is vested, is the one tasked or mandated to assess and make the judgment call which was not exercised arbitrarily.⁴⁶

The Supreme Court went on to devalue its own review powers, saying it is inferior to legislative review:

In finding sufficiency of the factual bases for the third extension, the Court has to give due regard to the military and police reports which are not palpably false, contrived and untrue; consider the full complement or totality of the submitted, and not make a piecemeal or individual appreciation of the facts and the incidents reported. The President's decision to extend the declaration and the suspension of the Writ, when it goes through the review of the Legislative branch, must be accorded a weightier and more consequential basis. Under these circumstances, the President's decision or judgment call is affirmed by the representatives of the People.⁴⁷

In its conclusion, the Court simplified the approach to judicial review of emergency powers once more, granting the Chief Executive the widest leeway in the exercise of the Commander-in-Chief power:

The Constitutional safeguards found in Section 18, Article VII does not demand that a city be first taken over or get killed and billions of properties go up in smoke before the President may be justified to use his options under Section 18. What the Constitution asks is only that there be actual rebellion, an existing rebellion in the territory where Martial rule is to be imposed. The

⁴⁶ *Id.* at 384–86.

⁴⁷ *Id.* at 386.

declaration should not be arbitrary or whimsical, but its basis should not also be so accurate that there is no room for changes or correction. Considering the volatility of conflict, situations may change at the blink of an eye. And the Executive is burdened with such responsibility to act decisively.⁴⁸

“The presidential declaration of martial law on 23 May and the two further extensions received strong legislative support in both houses of Congress. The Supreme Court’s strong majority ruling in favour of the first declaration provides a very permissive precedent on the presidential prerogative to declare martial law.”⁴⁹ “In the report of Duterte to the Philippine Congress, he justified the declaration of martial law by arguing that Mindanao has been a ‘hotbed of violent extremism.’”⁵⁰

That last sentence alone captures the problem with the martial law cases. In the end, the Court gave the other branches of government the widest possible berth. The text of the Constitution mattered less than the majority’s view of the Executive’s power.

V. ANALYSIS

The innovations introduced by the 1987 Constitution to curb reliance on the political question doctrine have been to some extent rendered inert. We recall that the expanded certiorari powers were introduced precisely to expand judicial power so that it may determine whether the political branches of government acted with grave abuse of discretion. The cases discussed here, however, show that the Supreme Court, despite this innovation and despite additional safeguards that check the powers of the President, is reluctant to assume the more powerful role crafted for it by the Constitution.

These findings are consistent with other studies that show that high courts of former colonies do not check, but rather implement, the policies of the Executive Branch of government.⁵¹ I have also argued that judicial

⁴⁸ *Id.* at 407.

⁴⁹ Malcolm Cook, *The Philippines in 2017: Turbulent Consolidation*, in SE. ASIAN AFF. 275 (Malcolm Cook & Daljit Singh eds., 2018).

⁵⁰ Dennis Quilala, *Narratives and Counter-narratives: Responding to Political Violence in the Philippines*, in SE. ASIAN AFF. 288 (Malcolm Cook & Daljit Singh eds., 2018).

⁵¹ Dante Gatmaytan, *The Philippines’ Authoritarian Constitution*, 95 PHIL. L.J. 529, 539 (2022), citing Weitseng Chen, *Same Bed, Different Dreams: Constitutionalism and Legality in Asian*

deference may be a reflection or echo of the pre-conquest practice of deferring to executive power.

I speculate that the Court will sustain this docility as a form of self-defense or self-preservation. The Justices are vulnerable to impeachment and petitions for *quo warranto*.⁵² A becoming modesty seems the proper approach.

VI. CONCLUSION

Constitution-writing, even when done at the height of the Third Wave of democracy, cannot guarantee judicial independence. In the case of the Philippines, framers of the 1987 Constitution consciously designed a stronger judiciary to prevent the Executive from intimidating it. Yet even without martial law, the Supreme Court is willing to step back and allow the President the widest leeway.

The political question doctrine is alive and well. While the Supreme Court was able to assert review in many cases,⁵³ it applied the doctrine even in cases where there are clear constitutional checks.

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Hybrid Regimes, in *THE GLOBAL SOUTH AND COMP. CONST. LAW* 250, 257–59 (Philipp Dann, Michael Riegner, & Maxim Bönnemann eds., 2020).

⁵² See, e.g., *Republic v. Sereno*, 831 Phil. 271 (2018).

⁵³ See, e.g., *Fabian v. Desierto*, G.R. No. 129742, 470 SCRA 471, 493, Sept. 16, 1998. “Section 27 of Republic Act No. 6770 (Ombudsman Act of 1989), together with Section 7, Rule III of Administrative Order No. 07 (Rules of Procedure of the Office of the Ombudsman), and any other provision of law or issuance implementing the aforesaid Act and insofar as they provide for appeals in administrative disciplinary cases from the Office of the Ombudsman to the Supreme Court, are hereby declared invalid and of no further force and effect.” (Emphasis omitted.) See also *Carpio-Morales v. Ct. of Appeals*, 772 Phil. 672 (2015), where the second paragraph of Section 14 of Republic Act No. 6770 was declared unconstitutional.