



Institutional Reform Paper Series

ATENEO SCHOOL OF GOVERNMENT WITH SUPPORT OF
KONRAD-ADENAUER-STIFTUNG

EXTRAORDINARY MEASURES

Constitutional Powers in Times of Crisis

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EXECUTIVE SUMMARY

Over the past forty years, the country has experienced the exercise of emergency rule. President Marcos suspended the writ of habeas corpus and imposed martial law. The four successive presidencies that followed invoked emergency powers to address a gamut of crises and emergencies: as a response to the aftermath of the 1989 coup attempt during the Aquino administration; to address the power crisis during the Ramos administration; to deter crime during the Estrada administration; and with three major public disturbances occurred in a span of five years during her administration, President Arroyo imposed her commander-in-chief powers to call on the Armed Forces of the Philippines and the Philippine National Police to suppress and quell rebellion.

The martial law regime is a powerful reminder of the dangers of emergency powers. Owing greatly to its historical role in the Marcos era, the exercise of extraordinary powers, most especially the power to declare and impose martial law, is viewed with much dread and contestation, as it broadens the police power of the President. For instance, the exercise of commander-in-chief powers in the Arroyo administration adversely affected the nation as it conjured ghosts of the martial law regime. It prompted some observers to state that the strong-arm tactics are reminiscent of the Marcos dictatorship.

This paper analyzes the intricacies in the exercise of emergency rule by looking at its intended and unintended consequences. It seeks to illustrate the dangers of the haphazard employment of these extraordinary powers, even though constitutional, to solve problems that can be addressed by the plethora of powers already made available to the three branches of government by the present Constitution. It argues that emergency powers should be resorted to only as a last resort. In order to justify a departure from a normal state of affairs, other avenues must have been exhausted in order to meet the exigencies of the situation. This paper posits that the slippery slope of frequent recourse to emergency rule is the ever-present possibility that such will slide into a permanent and unconstitutional regime. If less ominous options conferred to the executive by the Constitution and the laws are sufficient to meet the perceived national emergency, then by all means they must be preferred.

INTRODUCTION

On November 29, 2007, Senator Trillanes and 30 Magdalo officers, on trial for the 2003 Oakwood Mutiny, walked out of the court room with their armed guards and civilian supporters, and marched through the streets of Makati City towards the luxurious Manila Peninsula Hotel. The mutineers called for the ouster of President Arroyo and appealed to the people to rise up to form a “New Edsa.” Apprised of the crisis, President Arroyo called an emergency Cabinet meeting. The Philippine National Police declared a red alert status over Metro Manila and surrounding provinces. At least three battalions of infantry were rushed to the scene to crush the rebellion. After hours of standoff, Senator Trillanes and his companions surrendered when an armored personnel carrier supported by an undetermined number of commandos in full battle gear barged into the lobby of the hotel and fired warning shots. Trillanes and his military and civilian supporters were arrested and detained. Journalists and media practitioners who were covering the takeover of the hotel were likewise arrested but later released after “processing.”

The day after, the PNP chief announced that the destabilization plot was still active since groups who took part in the rebellion were still unaccounted for. Anti-Arroyo rallyists took to the streets and demanded for President Arroyo to step down. Media groups protested the manhandling, detention and arrest of journalists. Also in its wake, countries issued travel advisories to their respective nationals to take precautionary measures for possible demonstrations and violent reactions to the crackdown of the aborted coup.

What if the crisis intensified rather than abated? If it was not crushed immediately but spiraled into a protracted struggle of wills? If a significant segment of the military with the support of the traditional anti-Arroyo forces, including the political opposition and the revolutionary left, mobilized to lend succor to Trillanes and his military supporters? Was emergency rule a justifiable option? If constitutional dictatorship were initiated, were the democratic forces in the country strong enough to prevent it from running amok, as in the days of the Marcos regime? The incident invites us to consider these unsettling scenarios.

The use of emergency powers almost always presents democratic constitutional governments with a paradox: how can such a government adequately provide for emergencies and yet retain its limited character?¹ Kathleen Sullivan, former dean of Stanford Law School, encapsulated it perfectly when she said that the theory of constitutionalism is inconsistent with an emergency exception.² And yet, all constitutional democracies must live with this irony to preserve its own existence.

Constitutions are primarily designed, not to achieve efficiency, but to create an intricate system of checks and balances among the branches of government.³ By and large, the design reflects a great distrust of government, most notably of the Executive branch, as regards its ability to exercise, in a responsible manner, powers entrusted to it. Nowhere is it truer than in the present 1987 Constitution, the pervading theme of which is to do away with all possibilities of strongman rule, no doubt a painful lesson of the Marcos dictatorship.

The problem arises then when an emergency occurs and the government is inevitably hampered by the deliberate pace of constitutional rule. Quick and decisive action by the responsible decision-makers sometimes requires the suspension of certain constitutional safeguards in order to meet the exigency at hand.⁴ Certainly, the President cannot be expected to wait for congressional deliberation before she can declare a state of war when it is staring at her in the face. This is the dilemma many constitutional governments face. As a result, most constitutions incorporate provisions and unique power arrangements to deal with emergencies. Under the present Philippine Constitution in particular, powers to deal with extraordinary circumstances are spread throughout the constitutional text.⁵

These *extraordinary powers*, however, can be considered, at best, a necessary evil. As it is almost universally regarded as an imperative that the total power of the State be parceled out among three mutually independent branches in a presidential system, and among the parliament and the judiciary in a parliamentary system, it is believed to be destructive of constitutionalism if any particular branch should have powers to the point that another branch cannot be an independent check to it. As James Madison wrote in the *Federalist No. 47*, a total disregard of the separation of powers is the very definition of tyranny. And while these extraordinary powers are essential to the continued functioning of a constitutional democracy, its nature requires that it be employed sparingly and even reluctantly.

Hence, one might think that such reservations would have entrenched, at the very least, an institutional hesitation towards the exercise of these powers, especially given the all-too-recent martial law history of the Philippines. Instead, we saw several incarnations of extraordinary powers

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to address a gamut of crises and emergencies in the four successive presidencies that followed after democracy was restored in 1987.

Emergency is an elastic concept that can include war, invasion, insurrection, economic depression, and natural disasters.⁶ The Executive branch, with its intelligence-gathering capacity and quick-response capabilities, is traditionally the repository of crisis government powers, and thus must be accorded the proper flexibility to respond to the situation. Consequently, the courts are generally averse to passing judgment upon what amounts to discretionary actions of the Executive. In an emergency, the concentration of governmental power and its expansion in the Executive greatly magnify the danger that unbridled powers would be used to the detriment of society and, eventually, to the destruction of the constitutional order.

This paper seeks to illustrate the dangers of the haphazard employment of these extraordinary powers, even though constitutional, to solve problems which can be addressed by the plethora of powers already made available to the three branches of government by the present Constitution.

Extraordinary powers are powers of last resort, and thus they straddle the fine line between constitutionalism and authoritarianism. Unnecessary exercise dilutes the significance of emergencies as a legal and justified pretext to what Clinton Rossiter, in his seminal work, has termed as a *constitutional dictatorship*. The Philippine experience shows us the inherent dangers in this practice, and the slippery slope to which it may lead us. Former U.S. Supreme Court Justice Robert Jackson stated it so aptly when he warned that emergency power tends to kindle emergencies.⁷

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I. MARCOS AND EMERGENCY RULE

On September 21, 1972, President Marcos issued Proclamation No. 1081, placing the entire country under martial law. The Proclamation had two lofty objectives: the first was to save the republic, and the second was to reform the social, economic and political institutions in the country.

The preamble of the proclamation explained that “there is throughout the land a state of anarchy and lawlessness, chaos and disorder, turmoil and destruction of a magnitude equivalent to an actual war between forces of our duly constituted government and the New People’s Army and their satellite organizations... and that public order and safety and security of the nation demand that immediate, swift, decisive and effective action be taken to protect and insure the peace, order and security of the country and its population and to maintain the authority of the government.” President Marcos also assured the public that the proclamation is not a military takeover, and that civilian government still functions.

The General Orders issued pursuant to the policy of reform belied the seemingly benign nature of the proclamation. General Order No. 2, for instance, directed the Secretary of National Defense to arrest or cause the arrest and take into his custody the individuals named in the attached list and to hold them until otherwise ordered by the President. Political dissenters were the first victims of GO No. 2.

For the entire duration of the martial law period, several cases were filed before the Supreme Court challenging the actions of the President, to which the formidable political question defense was many times put up and upheld. In *Aquino v. Enrile*,⁸ a divided Court upheld the declaration of martial law. Half of the Court’s members embraced the political question doctrine, and ruled the declaration as non-justiciable.

This was likewise the import of the notorious decision in *Garcia-Padilla v. Enrile*.⁹ The petitioners were arrested and detained by the Philippine Constabulary by virtue of a Presidential Commitment Order (PCO). The Court considered the PCO as having the function of validating a person’s detention for any of the offenses covered in Proclamation No. 2045, which effectively suspended the privilege of the writ of habeas corpus. The issuance of the PCO by the President, therefore, was not subject to judicial inquiry. The decision observed that, in times of war or national emergency, the President must be given absolute control of the very life of the nation.

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The President, it said, is answerable only to his conscience, the people and God.¹⁰

As a direct consequence of this experience, the 1987 Constitution mandated the expanded jurisdiction of the Supreme Court. The Constitution made it a duty of the Court to rule whether or not there has been grave abuse of discretion on the part of any branch of government, and thus removed discretion to decline to exercise a judicial power of review.¹¹

II. EMERGENCY POWERS UNDER THE 1987 CONSTITUTION

The Marcos experience became a powerful reminder of an emergency regime run amok. As the framers of the new Constitution began the enormous task of drawing up a new fundamental document, “never again” rang every so often in everyone’s ears. A careful look at the rather lengthy Constitution shows it for what it was and is – largely a reaction to the excesses of martial law.

It was appropriate then that the framers gave special attention to the commander-in-chief powers of the President. Fr. Joaquin G. Bernas, a member of the Constitutional Commission, observed that:

The Commander-in-Chief provisions of the 1935 Constitution had enabled President Ferdinand Marcos to impose authoritarian rule on the Philippines from 1972 to 1986. Supreme Court decisions during that period upholding the actions taken by Mr. Marcos made authoritarian rule part of Philippine constitutional jurisprudence. The members of the Constitutional Commission, very much aware of these facts, went about reformulating the Commander-in-Chief powers with a view to dismantling what had been constructed during the authoritarian years. The new formula included revised grounds for the activation of emergency powers, the manner of activating them, the scope of the powers, and review of presidential action.¹²

Under the present Constitution, emergency powers, as it is widely used and understood, refer to the broad array of powers that is granted to the President or the Chief Executive beyond the usual powers associated with the office in order to address crises and extraordinary situations. As such, it is a legitimate deviation from constitutional norms in exceptional circumstances. It is often related to the power of the President to call out the armed forces to suppress lawless violence or rebellion, or even to declare martial rule.

Strictly speaking, there are three (3) kinds of emergency powers provided under the 1987 Constitution.

The first of these constitutional emergency powers is found in Article XII, Section 17 which states: *In times of national emergency when the public interest so requires the State may, during the emergency and under reasonable terms prescribed by it, temporarily take over or direct the operation of any privately owned public utility or business affected with public interest.*

President Corazon Aquino invoked this power when she issued Proclamation No. 503, declaring a state of emergency after the December 1989 coup attempt. President Arroyo also invoked this power in her Proclamation No. 1017 to declare a national emergency, but it omitted mention of any intent to take over or direct the operation of any utility or business, inviting concerns that it would be used later on as a pretext for government to take over private businesses, albeit temporarily. Fr. Joaquin Bernas noted that this provision is a remnant of martial law, and cited its ambiguity.¹³ He then posed the question of who is empowered to exercise it. The Supreme Court in *David v. Arroyo*¹⁴ answered this question categorically, distinguishing between the declaration of a state of national emergency and the exercise of emergency powers, thus:¹⁵

Let it be emphasized that while the President alone can declare a state of national emergency, however, without legislation, he has no power to take over privately-owned public utility or business affected with public interest. The President cannot decide whether exceptional circumstances exist warranting the takeover of privately-owned public utility or business affected with public interest. Nor can he determine when such exceptional circumstances have ceased. Likewise, without legislation, the President has no power to point out the types of businesses affected with public interest that should be taken over. In short, the President has no absolute authority to exercise all the powers of the State under Section 17, Article VII in the absence of an emergency powers act passed by Congress.

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The most important of these three powers is the power to declare and impose martial law. As it significantly broadens the police power of the President, it is viewed with much dread and consternation, owing greatly to its historical role in the Marcos dictatorship.

The second provision refers to the commander-in-chief powers of the President. Article VIII, section 18 authorizes the President to call on the Armed Forces to prevent or suppress lawless violence, impose martial law, or suspend the privilege of the writ of habeas corpus in case of invasion or rebellion. The provision presupposes that there is an imminent or ongoing threat to public order or national security. To address the threat, the President is provided “a platter of graduated powers”¹⁶ to deal with the situation in accordance to its severity.

The most benign of these powers is calling on the Armed Forces to prevent or suppress lawless violence. As a general rule, courts will not readily contradict its exercise. The rationale is given as thus:

The factual necessity of calling out the armed forces is not easily quantifiable and cannot be objectively established since matters considered for satisfying the same is a combination of several factors which are not always accessible to the courts...Certain pertinent information might be difficult to verify or wholly unavailable to the courts. In many instances, the evidence upon which the President might decide that there is a need to call out the armed forces may be of a nature not constituting technical proof. On the other hand, the President as Commander-in-Chief has a vast intelligence network to gather information, some of which may be classified as highly confidential or affecting the security of the state.¹⁷

Nevertheless, the exercise of this power is not immune from judicial scrutiny. In practice, however, this may not offer much comfort. All instances of exercises of such power by both Presidents Estrada and Arroyo were questioned before the Supreme Court, and in all those instances, the Supreme Court upheld the power of the President to call on the armed forces as she saw fit.

The next commander-in-chief power would be the suspension of the privilege of the writ of habeas corpus. The new built-in constitutional safeguard against this power is that any person arrested or detained during the suspension of the privilege shall be judicially charged within three days, or be otherwise released.

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In *Gumawa v. Espino*,¹⁸ the Marcos-era Supreme Court characterized the consequences of the declaration of martial law as follows:

1. That the proclamation of martial law automatically suspends the privilege of the writ of habeas corpus;
2. That the President of the Philippines as Commander in Chief and as enforcer or administrator of martial law can promulgate proclamations, orders and decrees during the period of martial law essential to the security and preservation of the Republic, to the defense of the political and social liberties of the people, and to the institution of reforms to prevent the resurgence of rebellion or insurrection or secession or the threat thereof as well as to meet the impact of a world recession, inflation or economic crisis which presently threatens all nations including highly developed countries...;
3. That the President of the Philippines as legislator during the period of martial law can legally create military commissions or courts martial to try not only members of the armed forces but also civilian offenders for specified offenses.

Significantly, all these pronouncements have been categorically rejected by the present Constitution. The powers to suspend the privilege of the writ and the power to impose martial law are kept in check at various stages by a constitutional time limit, and review and possible nullification¹⁹ by Congress or revocation by the Supreme Court.²⁰ It is noteworthy to mention that this is the only instance in the Constitution when the two Houses of Congress vote jointly, effectively discarding its bicameral nature, in order to facilitate the override of the suspension of the writ or of the imposition of martial law.²¹

Lastly, Article VI, Section 23 (2) refers to what may be termed as the emergency powers proper of the President. These are the powers granted to the President by Congress, in times of war or other national emergency. The powers can be as broad or as limited as Congress would provide, but only for a limited period of time. These can be all the powers necessary and

proper to carry out a declared national policy, and unless sooner withdrawn by a resolution of Congress, such powers shall cease upon the next adjournment of Congress. In *Araneta v. Dinglasan*,²² the Supreme Court explained the time limitation in the following manner:

The words ‘limited period’ as used in the Constitution are beyond question intended to mean restrictive in duration. Emergency, in order to justify the delegation of emergency powers, must be temporary or it can not be said to be an emergency.²³

This provision was the premise of the emergency powers given to President Aquino through Republic Act 6826 in the wake of the 1989 *coup d’etat*, and the powers given to President Ramos through Republic Act 7648 to address the burgeoning power crisis in 1993.

III. EXTRAORDINARY POWERS IN ACTION

A. Aquino Administration

Not long after Corazon Aquino was installed as President by the first People Power revolution, her presidency was severely tested by several attempts to overthrow her government. The most serious was the bloody December 1, 1989 coup attempt by hundreds of renegade soldiers; it left several dead, hundreds wounded, government buildings bombed, and the fledgling economy damaged almost irreparably. On December 7, 1989, President Aquino issued Proclamation No. 503 declaring a state of emergency, and invoked Article XII, Section 17 of the Constitution which empowers the government to take over any privately owned public utility or business affected with a public interest.²⁴ The reason given for the proclamation was the senseless loss of lives, destruction of properties, and serious social and economic damage brought about by the aborted coup.²⁵

Congress later followed suit and enacted Republic Act No. 6846, pursuant to Article VI, Section 23 (2) of the Constitution, and this gave the President broad emergency powers for six months to address the crisis and enable economic reconstruction. The powers are enumerated as follows:

1. Protect people from hoarding, profiteering, injurious speculations, price manipulation, product deception, cartels, etc. of food, clothing, medicines, office and school supplies, fuel, fertilizers, etc. whether imported or manufactured locally
2. Purchase any articles or commodities mentioned for storage, sale or distribution
3. Fix maximum ceiling prices of articles or commodities mentioned
4. Regulate fees charged by establishments in connection with production, milling, storage and distribution of articles or commodities mentioned
5. Seize and confiscate hoarded foodstuffs and commodities, provided goods wrongfully seized shall be subject to payment of just compensation
6. Call upon and designate recognized NGOs and peoples organizations, and LGUs to assist government
7. Temporarily take over or direct the operation of any privately owned public utility or business affected with public interest that violates the declared national policy
8. Liberalize importation and grant incentives for manufacture, assembly, reconditioning or importation of vehicles or vessels for public transport
9. Ensure availability of credit to productive sectors, including lowering effective lending rates of interest and reserve requirements of lending institutions
10. Stagger work hours and adopt flexible work schedules for government workers and when necessary workers in the private sector
11. Conserve and regulate distribution and use of power, fuel, energy
12. Issue orders for recovery and accounting of all firearms, explosives and military equipage
13. Undertake such other measures as may be reasonable and necessary

With such a broad grant, President Aquino issued more than twenty National Emergency Memorandum Orders (NEMOs) which dealt with maintaining price controls,²⁶ confiscating loose firearms,²⁷ taking over private airstrips,²⁸ managing the budget deficit,²⁹ temporary take-over of

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certain cement plants to cover the acute cement shortage situation³⁰ and bus companies,³¹ witness protection programs³² and one NEMO even increased postage costs.³³ Only two of these NEMOs dealt directly with the rebellion.

Her proposal to extend these powers, however, beyond the June 8, 1990 expiration period was met with stiff opposition from Congress.³⁴ Ranking leaders lamented how the emergency powers were not fully used,³⁵ while some sectors in the media noted the president's reluctance to maximize the powers given to her with no attempt at innovation to cut through the red tape.³⁶ They also questioned the basis for the proposed extension, to which then-Defense Secretary Fidel V. Ramos replied that the continuing emergency stems from the continuing coup plotting by some elements of the Reform the Armed Forces Movement (RAM), the group responsible for the December 1989 coup attempt.³⁷

B. Ramos Administration

In the latter part of the Aquino administration and well into the early years of the Ramos presidency, the country was experiencing daily power outages of up to eight hours.³⁸ The World Bank estimated the losses at around \$600-\$800 million a year, affecting mostly small and medium-sized enterprises. The power crisis was brought about by insufficient generating power and increased demands for electricity, and was made worse when the 625-megawatt Bataan Nuclear Power Plant was not allowed to operate for safety and environmental reasons.³⁹ Old power plants broke down one after another.

President Ramos turned to Congress to grant him emergency powers in order to address the crisis, pursuant to Section 23, Article VI of the Constitution. There was widespread opposition to the bill, sparking fears of abuse and imminent martial law. After much wrangling with both the Senate and the House - at one point, the President even accused members of Congress with obstructionism and aggravating the people's sufferings⁴⁰ - his initial request of eleven (11) powers was whittled down to four (4) in the signed act, with a limited duration of one year.

Republic Act No. 7648 or the Electric Power Crisis Act of 1993 gave the President the power to 1) enter into negotiated contracts for the construction, repair, rehabilitation, improvement or maintenance of power plants, projects and facilities,⁴¹ 2) fix the rate of return on rate base of the National Power Corporation to not more than twelve percent,⁴² and 3) to reorganize the National Power Corporation in order

to make it more effective,⁴³ innovative, and responsive to the power crisis. It also allotted ten percent of the annual aggregate gross income of PAGCOR to the National Power Corporation as subsidy.⁴⁴

In the main, the law enabled the President to “fast-track” the approval of contracts with Independent Power Producers (IPPs) to supply power requirements and avoid the usually tedious process of bidding out government projects.

To entice the private sector investors, the Ramos administration granted them handsome guarantees for their profits, fuel needs, equity guarantees, and foreign exchange guarantees.⁴⁵ In a span of one year, several IPP contracts were signed by the Ramos government at the cost of about \$7.3 billion.⁴⁶ Many faulted the President for entering into the allegedly extremely lopsided contracts,⁴⁷ and some had alleged that the contracts were tainted by cronyism and corruption.⁴⁸ Ramos, however, defended his actions, saying:

We would still be in darkness up to now had we not made the judgment calls at that time, because it takes six to seven years to put up a major power plant of maybe 50 megawatts. Where are the power plants that we are using right now? They are still the same ones put up during my administration.⁴⁹

It, however, seemed apparent that the primary power made available by the statute to the President—the loosening of institutional safeguards in order to expedite the approval of power projects—is at best a misguided solution. During the Senate deliberations, the Senators were in agreement that the recurring blackouts are going to be solved even without the proposed law as the fast-track projects start to go online, and that the point of the bill is to accelerate the construction of new baseload plants as a long-term solution to address the power shortage.⁵⁰ In the following exchange, it is clear that the true intent of the bill is not to be a direct response to the crisis, but to enable capacity-building for the near future, which may have been best addressed by the regular deliberative process, without the attendant pressure of the panic-stricken period.

Senator Tañada: ... Sa ngayon, gusto ko lang linawin kung ano ba talaga ang tinutukoy ng substitute bill na ito. Ang tinutukoy ba nito ay ang present energy crisis that we are now experiencing, itong mahahabang brownouts na nararanasan natin araw-araw o kung iyong krsis na nakikita nating maaring maganap kung hindi tayo magsasagawa at magpapatibay ng mga konkretong hakbang upang matugunan iyan?

It is clear that the true intent of the bill is not to be a direct response to the crisis, but to enable capacity-building for the near future, which may have been best addressed by the regular deliberative process, without the attendant pressure of the panic-stricken period.

(Translation: Senator Tañada: I just want to clarify what the substitute bill is referring to. Does this refer to the present energy crisis we are presently experiencing, i.e. the prolonged daily brownouts, or to some other crisis that may occur if we do not take concrete measures to address the problem?)

Senator Lina: Ginoong Pangulo, inamin po ng Secretary ng Department of Energy na iyong mga hakbang o measures na ating pinag-uusapan ngayon ay talagang makakatulong in the long term. Because even if we enter into negotiated contracts doon sa natitirang baseload plants, iyong gestation period nito ay matagal. Nasa sa atin kung iiklian natin iyong gestation period... ⁵¹

(Translation: Senator Lina: Mr. President, the Secretary of the Department of Energy has admitted that the measures taken up in our discussions will be beneficial in the long term. Because even if we enter into negotiated contracts on the remaining baseload plants, the gestation period will still take some time. The shortening of this gestation period will really depend on us. . . .

Senator Tañada's explanation of his vote against the proposed bill which eventually became RA 7648 sums it up thus:

... There are only four remaining power plant projects yet to be awarded and bid out, Mr. President. They are the 440-MW Leyte geothermal power plant, the 900-MW coal-fired power plant in Sual, Pangasinan, the 600-MW coal-fired power plant in Masinloc and the 200-MW coal-fired power plant in Mindanao or a total of 2,140 MW. This completes the administration's total power plant projects for the years 1993-1998.

In light of all these, Mr. President, the conclusion to be reached, therefore is that the present bill is not needed for the solution of the current brownouts or blackouts. This bill addresses the problem of putting in place the baseload plants for the coming years 1995-1996 to replace the more expensive diesel fired turbines set up by the fast-track projects.

It is on this basis, Mr. President, that I am voting against this measure. Our people should be informed that the fast-track projects are already in place and that we do not need this bill or any additional powers to be granted to the president because he has already enough powers under existing laws, which, if he only had the political will, he could use to further effectively address the problem.⁵²

C. Estrada Presidency

Estrada's short tenure in office was not without its share of emergency powers in action. In 2000, an alarming increase in violent crimes in the capital region led the President to order the deployment of 500 Marines to conduct joint visibility patrols alongside the members of the Philippine National Police for the purpose of crime prevention.⁵³ The President reasoned that the augmentation from the military is necessary to heighten police visibility in the metropolis, invoking his commander-in-chief powers under Article VII, Section 18 of the Constitution. Those who opposed this move asserted that the specific character of military discipline and the Marines' brand of combat training were inappropriate to the requisites of civilian peacekeeping.⁵⁴ There were also fears that the mere presence of soldiers might create a martial law climate.

Consequently, the Integrated Bar of the Philippines filed a petition before the Supreme Court to nullify the presidential order on the ground of lack of factual basis.⁵⁵ According to the IBP, no emergency exists that would justify the need for calling the military to assist the police force. The IBP contended that no lawless violence, invasion or rebellion existed to warrant the calling of the Marines.

The Court denied the petition in *IBP v. Zamora*,⁵⁶ stating that there is a clear textual commitment under the Constitution to give the President full discretionary power to call out the armed forces and to determine the necessity for the exercise of such power.

D. Arroyo Presidency

That the Arroyo presidency was extraordinarily installed by a popular uprising that forced a sitting president to resign seemed to be a foreboding of things to come. No less than three major public disturbances occurred in a span of five years, the most recent of which resulted in the now infamous Proclamation No. 1017, with all the allusions to its more ominous predecessor Proclamation No. 1081, which imposed martial law.

The first instance was on May 1, 2001, during the Labor Day celebrations. Thousands of supporters of deposed President Joseph Estrada gathered on EDSA and later on attempted to break into Malacañang. As the Supreme Court recounted in *Lacson v. Perez*:⁵⁷

President Macapagal-Arroyo, faced by an "angry and violent mob armed with explosives, firearms, bladed weapons, clubs, stones and other deadly weapons" assaulting and attempting to

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A declaration of a state of invasion, rebellion, or lawless violence is necessary not for the exercise of the presidential power to call out the armed forces but for the exercise of the two other martial law powers, namely, the power to suspend the privilege of the writ of habeas corpus and the power to declare martial law.

break into Malacañang, issued Proclamation No. 38 declaring that there was a state of rebellion in the National Capital Region. She likewise issued General Order No. 1 directing the Armed Forces of the Philippines and the Philippine National Police to suppress the rebellion in the National Capital Region. Warrantless arrests of several alleged leaders and promoters of the “rebellion” were thereafter effected.

The Proclamation invoked Section 18, Article VII of the Constitution calling upon the Armed Forces and the Philippine National Police to suppress and quell the rebellion. The declaration was later on labeled as a constitutional oddity. The issuances were questioned before the Supreme Court, stating that these had no basis in fact and in law. The Court however, dismissed the petitions, on the ground that the issues have become moot since the Proclamation was already lifted before the Court could decide on the cases.

The second time was during the so-called Oakwood Mutiny on July 27, 2003. Bewailing the endemic corruption in the military, several hundred disgruntled junior officers stormed into the posh Oakwood hotel in the heart of the country’s financial district and demanded the resignation of the President, among other officials. After several hours of standoff, the President issued Proclamation No. 427, which declared a state of rebellion and invoked her commander-in-chief powers to call on the Armed Forces and the Philippine National Police to suppress and quell the ongoing rebellion.

The Proclamation was again questioned before the Supreme Court. This time, however, the Court laid down certain guidelines in anticipation of similar questions in the future. In *Sanlakas v. Executive Secretary*,⁵⁸ the Court held that the Constitution does not prohibit the President from declaring a state of rebellion and that, to call out the armed forces, such declaration is a superfluity. More importantly, it firmly established the doctrine first laid down in *IBP v. Zamora* that reasons of (1) actual invasion or rebellion and (2) public safety justify the exercise of the power to call out the armed forces. A declaration of a state of invasion, rebellion, or lawless violence is necessary not for the exercise of the presidential power to call out the armed forces but for the exercise of the two other martial law powers, namely, the power to suspend the privilege of the writ of habeas corpus and the power to declare martial law. In fact, the only criterion for calling out the armed forces is for the President to deem it necessary to prevent violence or rebellion. The ruling certainly gave the President a lot of leeway when it comes to the exercise of power over the armed forces.

More recently, the President invoked the calling out power once again and issued Proclamation No. 1017 on February 24, 2006, the 20th

anniversary of the EDSA People Power I event. Citing a tactical alliance of the right and left to overthrow the government, the Proclamation declared a State of Emergency, and yet again called upon the Armed Forces and the Philippine National Police to prevent and suppress acts of terrorism and lawless violence, pursuant to the President's constitutional commander-in-chief powers.

The Supreme Court again upheld the President's exercise of the calling-out power in *David v. Arroyo*, stating that the petitioners were not able to show that the President was bereft of any factual basis when she made the issuance. The Court asserted its constitutional role as final arbiter when it pronounced that, while the calling-out power is by and large a discretionary power solely vested on the President's wisdom, "this does not prevent an examination of whether such power was exercised within permissible constitutional limits or whether it was exercised in a manner constituting grave abuse of discretion,"⁵⁹ yet again affirming the doctrine laid down in *IBP*.

Nevertheless, it must be noted that these Proclamations, while seemingly innocuous as mere descriptions of an ongoing event, have all at one time or another caused jitters in the business community,⁶⁰ sowed confusion among the citizenry,⁶¹ became sources upon which foreign governments issued travel advisories to its citizens⁶² and more often than not, became legal cover for overeager authorities to effect warrantless arrests.⁶³

The Anti-Terrorism Act of 2007

On March 6, 2007, President Arroyo signed into law "AN ACT TO SECURE THE STATE AND PROTECT OUR PEOPLE FROM TERRORISM," also known as the "Human Security Act of 2007." It was passed to extirpate the evil of terrorism. However, some sectors have claimed that the enactment of the law has brought a "chilling effect" because of its draconian provisions that sanction guilt by association, eavesdropping, break-ins, arrest and seizures without warrant, detention beyond periods mandated by law and the Constitution, and other tools that jeopardize the rights of mere suspects. The definition under the Anti-Terrorism Act of the new crime of "terrorism" is also being questioned as vague and violative of the requirements of due process, which mandates notice of what specific act or omission is punished by law. In his speech, "The Old Struggle for Human Rights, New Problems Posed by Security," Chief Justice Reynato S. Puno⁶⁴ warned against the dangers of a mindless, knee-jerk reaction to extirpate the evil:

The definition under the Anti-Terrorism Act of the new crime of "terrorism" is also being questioned as vague and violative of the requirements of due process, which mandates notice of what specific act or omission is punished by law.

The point is that emergency powers should be resorted to only as a last resort. History is replete with examples that show past exercises of emergency powers to be generally shortcut governance at best, and dangerously alarmist at worst.

To put constitutional cosmetics to the military-police muscular efforts, lawmakers usually enact laws using security of the state to justify the diminution of human rights by allowing arrests without warrants; surveillance of suspects; interception and recording of communications; seizure or freezing of bank deposits, assets and records of suspects. They also redefine terrorism as a crime against humanity and the redefinition is broadly drawn to constrict and shrink further the zone of individual rights.

The trauma and paranoia generated by martial law are being exhumed by the Human Security Act of 2007. Civil liberties, which the nation has fought long and hard to regain, seem once again threatened. In the same speech on terrorism, Chief Justice Puno reflected: “If there is any lesson that we can derive from the history of human rights, it is none other than these rights cannot be obliterated by bombs but neither can they be preserved by bullets alone. Terrorism is a military-police problem but its ultimate solution lies beyond the guns of our armed forces.”

Strictly speaking, the Anti-Terrorism Act of 2007 does not involve the exercise of extraordinary powers of the President. However, it poses similar issues as the employment of such powers.

IV. POWERS OF LAST RESORT: SOME GUIDELINES TO AVOID THE SLIPPERY SLOPE

Former U.S. Supreme Court Justice Louis Brandeis said it best: “experience teaches us to be most on our guard to protect liberty when the government’s purposes are beneficent.”⁶⁵ The point is that emergency powers should be resorted to only as a last resort. History is replete with examples that show past exercises of emergency powers to be generally shortcut governance at best, and dangerously alarmist at worst. In fact, emergency powers have been proposed and considered all too readily in the past to address a gamut of issues aside from those discussed above. During the Ramos presidency, for example, emergency powers were likewise proposed and granted to the President to solve the water crisis.⁶⁶ Later on, in the Estrada administration, it was proffered as a solution to spur development in Mindanao, after an all-out war policy ravaged economic growth in the region.⁶⁷ The powers would include the ability of the

president to enter into negotiated contracts, suspend issuances of temporary restraining orders on government projects, and declare a strike moratorium. In the same vein, emergency powers were likewise considered to address the nation's fiscal crisis⁶⁸ and to prevent the Severe Acute Respiratory Syndrome (SARS) epidemic from spreading.⁶⁹

The emergency powers were deemed a panacea of sorts, a legal basis to bypass all pertinent laws which are viewed as obstacles to efficient implementation of policies. For instance, during the power crisis period, Senator Agapito Aquino admitted having advised President Ramos to use his emergency powers to push the completion of power projects which have been delayed by complaints over environmental safety and court injunctions. The solution proffered then was to do away with safeguards such as securing an environmental compliance certificate and to prohibit the issuance of TROs with regard to government projects.

Senator Biazon captured the nonchalant attitude of decision-makers towards emergency powers when he was quoted as saying: "First, we must define what constitutes a fiscal crisis. If we are able to define it, we will be able to pick out the law or laws we may need to suspend."⁷⁰ And yet, every specter of emergency rule since 1987 was met with opposition amid fears of abuse and a return to the dark days of dictatorship.

An emergency presupposes a disruption in the ordinary course of things. In order to justify a departure from a normal state of affairs, and consequently undermine the constitutional structure in a legitimate manner, other avenues must have been exhausted in order to meet the exigencies of the situation. The premise is that, during an emergency, the people cannot hold the government to the strict constitutional constraints that otherwise bind it.

A declaration of emergency, therefore, is not a mere superfluity inasmuch as it invokes certain consequences. It usually precedes any use of emergency measures to restore order, and it creates an atmosphere of urgency, even of panic. Even if the declaration is made merely to acknowledge the state of affairs at a given time, it can be said that the constitutional bonds are somewhat loosened since the notion of *raison d'etat*⁷¹ comes into play, and the people are at a heightened awareness of the possible consequences that such a declaration usually forebodes.

Several weeks after President Arroyo lifted Proclamation No. 1017, a bill was filed with the House of Representatives seeking to curb the exercise of presidential emergency powers.⁷² The bill reiterated the limitations imposed by the Constitution, and essentially requires congressional review of any attempt by the President to take over any business pursuant to Article

XII, Section 17. While the bill did not elaborate much, it is certainly a call for standards whenever the “lesser power” of calling out the military is involved, since the nature of the power does not lend itself easily to judicial scrutiny, absent any patent lack of factual basis.

The slippery slope of frequent recourse to an emergency regime is the ever-present possibility that such regime will become permanent and unconstitutional. In his work *Constitutional Dictatorship*, Clinton Rossiter posits the following guidelines by which a constitutional dictatorship may be instituted.

1. No general regime or particular institution of constitutional dictatorship should be initiated unless it is necessary or even indispensable to the preservation of the state and its constitutional order.

The President may invoke her powers as commander-in-chief of the armed forces only in cases of extreme necessity, *i.e.* when the preservation of the State and civil order is at stake. Where emergency power is administered by the authority as a subterfuge to suppress legitimate grievances and/or perpetuate itself in power, by skirting constitutional limitations, then it falls within the prohibition of the Constitution. Considering that the factual determination of the necessity of the exercise of emergency powers is, at the first instance, principally a function of the executive’s discretion and wisdom, although may later be subject to judicial review, it is imperative that the motive behind its imposition is, not tainted with an evil eye, but is cast with a pure intention and firm belief to save the nation from an impending or an ongoing crisis.

2. The decision to institute a constitutional dictatorship should never be in the hands of the man or men who will constitute the dictator.

To prevent a reprise of the Marcos experience, the 1987 Constitution instituted measures that will rein in any attempt by the executive to appropriate for herself powers beyond those granted by the Constitution. Thus, although the executive may, in her sound judgment, declare martial law, Congress is vested with the power of revocation and the same cannot be overridden by the executive. In the same vein, the factual basis for the declaration of martial law or the imposition of other forms of emergency power is subject to judicial review in consonance with the

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expanded certiorari jurisdiction of the courts. This constitutional set-up is more in keeping with the principle of checks and balance to avoid over-concentration of power in the hands of one man or one institution. What should be avoided at all costs, however, is a situation where one man is not only given the unlimited discretion when to declare emergency rule but also when to put an end to it.

3. No government should initiate a constitutional dictatorship without making a specific provision for its termination.

Under the present Constitution, the declaration of martial law is subject to the following congressional and judicial safeguards, thus -

- a. No congressional concurrence required, but Congress has power of revocation through majority vote of all members of Congress voting jointly, and revocation cannot be set aside by the President;
- b. Subject to judicial review; decision must be promulgated within 30 days from filing;
- c. If Congress is in session, President required to submit a report to Congress in person or in writing within 48 hours from declaration;
- d. If Congress is not in session, all members required to convene without need of call within 24 hours from declaration.

4. All uses of emergency powers and all readjustments in the organization of the government should be effected in pursuit of constitutional or legal requirements.

The ascendancy of the Marcos regime is a classic example of how a determined president can steamroll constitutional and legal limitations to gain unlimited power. At the end of his second term, President Marcos, because of constitutional proscription, could no longer run for another term. Through manipulation of the 1971 Constitutional Convention composed of some 200 delegates, Marcos bastardized the 1973 Constitution and allowed himself to stay in power. Marcos delayed the convening of the *Batasang Pambansa* (parliament) by several years and introduced amendments to the 1973 Constitution approved in a sham

plebiscite that enabled him to continue exercising legislative powers even after the *Interim Batasan* (Legislature) was constituted in 1978. Marcos' authoritarian rule emasculated the powers of the *Batasan* and subverted all other democratic institutions, including the military and judiciary, especially through the infamous Amendment no. 6 (the residual law-making power of the dictator through the issuance of decrees).

5. No dictatorial institution should be adopted, no right invaded, no regular procedure altered any more than is absolutely necessary for the conquest of the particular crisis.

Recourse to extraordinary powers, like martial law, is constitutionally viable only when such is absolutely necessary. It is an instrument of last recourse. Its invocation may not be subject to the whim, fickle-mindedness and impetuosity of the executive; otherwise, the State will be held hostage by his discretion.

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Proclamation No 1017 was an overkill. This edict was a knee-jerk reaction to what the government perceived as threats to the State. It was proclaimed on the ground that a tactical alliance between leftist and the rightist elements had been hatched to topple down the government. The edicts called upon the military and the police to immediately carry out measures "to suppress and prevent acts of terrorism and lawless violence" and to temporarily take over or direct the operations of privately owned publicly utilities or businesses imbued with public interest.

In upholding the constitutionality of the declaration, the Supreme Court stated that, while the President necessarily exercises a discretionary power solely vested in her wisdom, such a declaration does not authorize the President to take over any privately-owned public utility or business affected with public interest without prior legislation. The question is: Did the President misjudge the circumstances that would justify the issuance of the decree and permit the authorities to conduct warrantless arrests, dispersals of Anti-Arroyo protest rallies and the "surveillance" of a publication? Was the threat palpable as to constitute a clear and present

danger to the preservation of the State and its constitutional order? In the heels of unrelenting charges of corruption and rabid dissent to the Arroyo government, the necessity of the presidential proclamation was dubious and, at best, debatable. The event was a typical clash between the guaranteed freedom of the citizens under the Constitution and the right of the State supposedly to self-preservation.

Another case in point is Proclamation No. 503 by President Aquino. Again, the emergency powers wielded by the President, purportedly to repair the economic and social damage wrought by the coups, yielded, more than anything else, charges of corruption against the so-called *Kamag-anak, Inc.* and other close associates of the administration. These emergency powers, notwithstanding, President Aquino had to contend with coup attempts throughout her term, and this put to question the effectiveness of resorting to such powers.

6. The measures adopted in the prosecution of a constitutional dictatorship should never be permanent in character or effect.

Amendment no. 6 of the 1973 Constitution was an unabashed attempt by a dictator to institutionalize one-man rule. The termination of the effectivity of this amendment, which granted President Marcos concurrent legislative power with the Legislature, was solely dependent on the President's discretion. Hence, even after the lifting of martial law, President Marcos could issue decrees "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...in order to meet the exigency." Amendment No. 6, as worded, lent a stamp of permanency on the dictatorial powers of President Marcos.

7. The dictatorship should be carried on by persons representative of every part of the citizenry interested in the defense of the existing constitutional order.

Public participation in governance is of paramount importance. The antidote to dictatorship is obvious – greater democracy. The more

democracy is threatened, the greater should the people's participation be in the democratic processes to counterbalance and resist the urges of absolutism.

8. Ultimate responsibility should be maintained for every action taken under a constitutional dictatorship.

In *Angara v. Electoral Commission*,⁷³ Justice Laurel noted that the principle of checks and balances is meant “to secure coordination in the workings of the various departments of the government.” Equilibrium must be maintained where the three great branches of the government are supreme within their respective spheres of jurisdiction and are disallowed from trampling on each other. Moreover, the Constitution must provide for provisions that strike down violations of constitutional standards and procedures and bring into account those guilty of such violations. Accountability and responsibility should be institutionalized, and mechanisms that enforce them must be strengthened to deter abuse of power.

9. The decision to terminate a constitutional dictatorship, like the decision to institute one, should never be in the hands of the man or men who constitute the dictator.

Human nature as it is, the power to terminate dictatorial powers must not be placed in the hands of those who wield the powers of a dictator. The constitution and the laws should provide for adequate standards and procedure for the revocation of the state of emergency regime. The sufficiency of the factual basis for the imposition of martial law or the existence of a national emergency warranting the delegation of extraordinary powers to the President must likewise be subject to judicial review since its exercise is recklessly fraught with perilous opportunities for abuse.

10. No constitutional dictatorship should extend beyond the termination of the crisis for which it was instituted.

The exercise of extraordinary power is co-terminus with the crisis; its exercise cannot outlive its usefulness. Thus, the constitutional dictator must be willing and ready, if need be compelled through constitutional means, to comply with the legal and constitutional restrictions providing for its revocation and the eventual return to a state of normalcy.

11. The termination of the crisis must be followed by as complete a return as possible to the political and governmental conditions existing prior to the initiation of the constitutional dictatorship.

When the crisis has subsided, it is essential that the political institutions, specifically the legislature, the presidency and the courts, are in place, capable and ready to perform their constitutionally mandated functions within a democratic set-up. It is therefore important that the institutions are strong and resilient to survive the threats and crisis, and are able to readjust to the changes wrought by the occurrence of the abnormal conditions and to learn from the experiences of the past.

V. INTENDED AND UNINTENDED CONSEQUENCES OF EMERGENCY RULE

Marcos' Martial Law

The Marcos dictatorial regime in the Philippines started on September 21, 1972 with the imposition of martial law. Proclamation 1081 was issued by Marcos “to extirpate the roots of subversion” amidst an upswing of urban social unrest and burgeoning Communist insurrection. Its apologists pointed to the maintenance of peace and order and economic progress, while its critics denounced it as an authoritarian regime characterized by profligacy, nepotism, repression, and human rights abuses. There is a growing consensus, however, that the martial law period (1972-86) definitively destroyed democratic practices, aggravated social unrest, politicized the military and the civil service, and institutionalized corruption, which severely damaged the economy.

The series of coup attempts that punctuated the early years of the Aquino administration spurred the former President to issue Proclamation

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503. Despite the passage by Congress of R.A. 6826 granting her emergency powers to fast track economic reconstruction, the Aquino administration was besieged from all sides throughout its term. The country was seriously divided. A fractious and politicized army sought to retain its privileges under the Marcos dictatorship; the democratic left accused the President of favoring relatives and friends thus forming a new cabal of cronies, and allegations of corruption involving relatives were rife; the far right, including the Marcos Loyalists, accused her of being naïve and a “plain housewife.” The business sector was in jitters; recrimination between pro-administration and anti-administration forces was intense; intramural squabbles within the administration were an all-too-common occurrence. While former President Aquino may be credited for initiating reforms that restored democracy, the vast extraordinary powers at her disposal made little headway in uniting the nation and improving the moribund economy.

Ramos Presidency: Contending with the Power Crisis

President Ramos exercised emergency powers under the Emergency Power Crisis Act (R.A. 7648) which was passed to fast-track the approval of generation projects needed to end the country’s power crisis. To lure more private investors for the power generation industry, the Philippine Government offered generous incentives and risk-sharing arrangements favorable to the private investors, but onerous and grossly disadvantageous to the government and ultimately to the Filipino taxpayers. For example, the government agreed to shoulder all the project risks by introducing provisions in the contracts that guarantee the IPP’s profitability over a span of 15 to 25 years whether or not the plant operates. Thus, for instance, NAPOCOR assumed market, fuel supply, and foreign exchange risks, with the government providing a performance undertaking on behalf of the public utility.⁷⁴

These power deals also spawned allegations of corruption. According to a PCIJ report, President Ramos personally pushed for the speedy approval of some of the most expensive power deals and justified signing more contracts despite warnings from within the government and the World Bank that an impending oversupply of electricity could push up prices.⁷⁵ Among the deals tied with the IPP contracts were lucrative side contracts such as legal, technical and financial consultancies that were allegedly awarded to individuals and companies close to the former President. Even as the power crisis was solved, the Ramos government continued to enter into IPP contracts in order to “provide for the future.”

Estrada and the Deployment of Marines

While the Supreme Court in *IBP v. Zamora*⁷⁶ ruled that former President Estrada did not commit grave abuse of discretion in calling out the marines to aid the PNP in visibility patrols around the Metropolis, it cautioned that the ruling did not prevent an examination, whenever such power was exercised, whether it was exercised within permissible constitutional limits or in a manner constituting grave abuse of discretion.

As always, the exercise by the President of extraordinary powers, whether to actively suppress a rebellion or lawless violence or simply to deploy marines to augment the police force in conducting visibility patrols to deter crimes, as in this case, invariably caused jitters and confusion among the populace and dampened investor confidence in the fragile economy.

Arroyo Administration - A Presidency in Tumult

The three different occasions that President Arroyo invoked her commander-in-chief powers have adversely affected the nation in more ways than one. **First**, the president's hard-line political stance, through a quick resort to emergency powers, has further eroded the people's trust in her which in the first place has never been ideal amidst questions on the legitimacy of her presidency and allegations of corruption. The better part of her remaining years in office, therefore, will likely be devoted to parrying dissent and regaining the trust of a large segment of the population. **Second**, the dispersal of rallies, warrantless arrests and seizure, media raids and/or surveillance invariably raised grave concerns about the preservation of fundamental liberties. Some of her actions have conjured ghosts of the martial law regime, and prompted some observers to state that these strong-arm tactics are reminiscent of the Marcos dictatorship. The mistrust towards the present administration is reinforced by its human rights record, which has been validated by various international and local human rights watchdogs. For instance, the numerous extra-judicial killings happening around the country prompted Freedom House, a private democracy survey firm based in New York, USA, to downgrade the status of the country to "partly free." The international monitoring agency also found credible the allegation of government "intimidation" of members of opposition parties.⁷⁷ **Finally**, the proclamations of state of emergency and rebellion have dented investor confidence in the economy. For instance, the stock market declined by 1.53% or by 32.23 points while the peso depreciated by 28 cents on jitters over fresh military adventurism when

The mistrust towards the present administration is reinforced by its human rights record, which has been validated by various international and local human rights watchdogs.

the President declared the State of National emergency on February 24, 2006.⁷⁸ Although the economy has since then rebounded, the negative response by the market to emergency declarations gave an impression of political instability.

CONCLUSION

Authoritarian regimes have proven that it is easier for the autocrat to grab power than to exercise it with restraint and wisdom. Dictatorial power, untrammelled by legal and institutional strictures, is simply too alluring for the autocrat so that experience shows that a transition to a better political climate can be had, mostly, after a violent counter-revolt or social upheaval. In the end, the dictator is consumed by the political Frankenstein that he has created, causing social, economic and political instability in his wake. Owing to fear of this absolutism, emergency regimes are greeted with suspicion and paranoia. Emergency powers give the president broad constitutional authority to use military force in response to threats to national security. As Rossiter puts it, constitutional dictatorship or, in contemporary terms, an emergency regime, is always a dangerous thing. A declaration of martial law or the passage of an enabling act is a step that must always be feared and sometimes bitterly resisted, for it is at once an admission of the incapacity of democratic institutions to defend the order within which they function and a conscious employment of powers and methods long ago outlawed as destructive of constitutional government.⁷⁹

Emergency powers are instituted precisely to allow the executive to wage a most efficacious defense of the nation in times of crisis, without being unduly straitjacketed by structural and bureaucratic restraints. By establishing this framework, the Constitution expected that the process would be far more flexible, and capable of quicker, more decisive action, than the legislative process.

However, the framers of the Constitution, while recognizing the need to provide for such powers, also acknowledge the dangers that it entails. Constitutional safeguards, not the least of which is the instrument of judicial scrutiny, are in place to check against abuse. If this is so, why the uneasiness and even bitter resistance that follow the trails of emergency rule? It is because, as the Supreme Court said in *David v. Arroyo*, “the power is by and large a discretionary power solely vested on the President’s wisdom.” The President is given a lot of leeway when it comes to the exercise of such power. What level of conflict demarcates the choice between ordinary police action and resort to emergency rule? What degree of punitive State action is necessary to address the emergency without exposing civil liberties to unwarranted perils? Sadly, the answer to these questions depends largely on this wide presidential discretion; for which reason, emergency rule becomes fraught with opportunities for abuse and thus a gateway to constitutional shortcuts. Once emergency rule is declared, the constitutional bonds are loosened, and this could create a window of opportunity for unrestricted power.

In sum, emergency powers should only be invoked as a last resort. If less ominous options conferred to the executive by the Constitution and the laws are sufficient to meet the perceived national emergency, then by all means they must be preferred. Indeed, the slippery slope of frequent recourse to emergency rule is the ever-present possibility that such will slide into a permanent and unconstitutional regime.

ENDNOTES

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² Kathleen Sullivan, “*Do we have an emergency constitution?*”, Remarks given at a meeting of the American Academy, Stanford University, November 23, 2004, <http://www.amacad.org/publications/bulletin/winter2006/sullivan.pdf>

³ Joaquin G. Bernas, SJ, *Once More Emergency Powers, A LIVING CONSTITUTION: THE TROUBLED ARROYO PRESIDENCY*, 168, 170 (2007).

⁴ John Malcolm Smith, *POWERS OF THE PRESIDENT DURING CRISES*, 4 (1960) (“Ordinary processes of democratic and constitutional government do not suffice to protect the state in time of emergency and must surrender to a modified authoritarian regime”).

⁵ *See* Arts. VI, Sec. 23 (2), VII, Sec. 18, XII, Sec. 17, and XII, Sec. 18, PHIL. CONST.

⁶ Oren Gross, *LAW IN TIMES OF CRISIS*, 5 (2006).

⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Jackson J., concurring).

⁸ 59 SCRA 183 (1973).

⁹ 121 SCRA 472 (1983).

¹⁰ *Id.* At 500-501.

¹¹ Art. VIII, Sec. 1, PHIL. CONST.

¹² Joaquin G. Bernas SJ, *INTENT OF THE 1986 CONSTITUTION WRITERS*, 456 (1995).

¹³ Joaquin G. Bernas, SJ, *The Takeover Provision, A LIVING CONSTITUTION: THE TROUBLED ARROYO PRESIDENCY*, 184-187 (2007). [Hereinafter, Bernas Arroyo]

¹⁴ G.R. No. 171396, May 3, 2006.

¹⁵ *Id.*

¹⁶ Bernas Arroyo, *supra* note 13 at 164-165.

¹⁷ *Id.* At 174 (2007); *See* David v. Arroyo, G.R. No. 171396, May 3, 2006.

¹⁸ 96 SCRA 403, 403-407 (1980)

¹⁹ Art. VII, Sec. 18, PHIL CONST.

²⁰ Art. VII, Sec. 18, PHIL CONST.

²¹ Art. VII, Sec. 18, PHIL CONST.

²² 84 PHIL. 368, 432, August 26, 1949.

²³ *Id.*

²⁴ *Aquino declares state of emergency*, MALAYA, December 7, 1989, at 1.

²⁵ *Id.*, at 7.

²⁶ E.O. No. 383: Directing Emergency Measures to Prevent Excessive Increases in the Prices of Certain Prime Commodities in the National Capital Region

²⁷ National Emergency Memorandum Orders 4 and 6

²⁸ National Emergency Memorandum Order 1: Directing the Air Transportation Office to Temporary Take-Over or Direction of the Operations of all Private air transportation landing fields and facilities to determine those which supported rebel soldiers during the coup attempt

²⁹ National Emergency Memorandum Order 24, *See 12 belt-tightening measures adopted*, PHILIPPINE STAR, May 20, 1990, at 1.

³⁰ National Emergency Memorandum Order 18: Directing the Temporary Take-Over or Direction of the Operations of Continental Cement Corp.; *See* Memorandum Order No. 270: Directing the Secretary of Trade and Industry to Ensure Adequate Supply of Cement for the Small and Medium-End Users

³¹ Memorandum Order No. 267: Directing the Temporary Take-Over or Direction of the Operations of JD Transit Inc. and DM Consortium, Inc.; Memorandum Order No. 270: Directing the Temporary Take-Over of the Operations of Manila Central Lines (MCL) Bus Co.

³² National Emergency Memorandum Order 26: Institutionalizing a system of rewards and incentives, including protection for informers and witnesses against rebels and criminals

³³ National Emergency Memorandum Order 23: Authorizing the Postal Service Office to increase amount allowed for Postal money order

³⁴ *Senators cool to extension plan for emergency powers*, PHILIPPINE STAR, April 16, 1990, at 1-2.; *Congress cannot abdicate constitutional duty*, MALAYA, May 3, 1990, at 1, 7.

³⁵ *Emergency Powers Not Fully Used*, MALAYA, April 18, 1990, at 1.

³⁶ *Editorial*, MALAYA, April 19, 1990

³⁷ *Cabinet seeks extension of emergency powers*, MALAYA, May 17, 1990, at 1.

³⁸ *Lazaro eats crow, says 8-hour brownouts to stay*, MALAYA, March 18, 1993, at 1.

³⁹ See Benjamin Austria, Development of the Energy Industry in the Philippines, <http://209.225.62.100/Documents/Conference/CAREC/Energy/chap11.pdf>

⁴⁰ *FVR charges solons with obstructionism*, MALAYA, March 30, 1993, p.1.

⁴¹ R.A. No. 7648, Sec.3.

⁴² R.A. No. 7648, Sec.4.

⁴³ R.A. No. 7648, Sec.5.

⁴⁴ R.A. No. 7648, Sec.6.

⁴⁵ See Luz Rimban and Sheila Pesayco, *Trail of Power Mess Leads to Ramos*, August 5-8, 2002, at <http://www.pcij.org/stories/print/ramos.htm>; *IPP Contracts: The Power Crisis Solution that never was*, MANILA BULLETIN, April 22, 2002 at B9.

⁴⁶ Senate of the Philippines, Report on the Public Hearing Conducted by the Committee on Energy Regarding Updates on the Implementation of the EPIRA, September 15, 2004 at http://72.14.253.104/search?q=cache:0pVMefXFUf8J:www.senate.gov.ph/13th_congress/spot_reports/ENERGY-%2520SEPT%252015.pdf+Ramos,+IPP&hl=en&ct=clnk&cd=6

⁴⁷ Neal Cruz, *Twas emergency powers that bankrupted NAPOCOR*, PHILIPPINE DAILY INQUIRER, July 28, 2000 at 8.

⁴⁸ *Supra* note 45.

⁴⁹ *Old foes, Ramos, Miriam, Square off in Senate probe*, MANILA TIMES, August 4, 2006, at http://www.manilatimes.net/national/2006/aug/04/yehey/top_stories/20060804top5.html.

⁵⁰ Interpellations, RECORD OF THE SENATE, Vol. IV, No. 77-A, p. 274

⁵¹ *Id.*

⁵² Explanation of Votes, RECORD OF THE SENATE, Vol. IV, No. 77-A, p.336, April 1, 1993

⁵³ *Marines Deployment Legal, Palace Maintains*, Press Release, Office of the President, January 25, 2000, at <http://www.pia.ops.gov.ph/press/pr2k0125.htm>.

⁵⁴ Randy David, *Marines at the Malls?*, PHILIPPINE DAILY INQUIRER, January 16, 2000, at 7; *See Marines not fit for police jobs, says Gringo*, PHILIPPINE DAILY INQUIRER, January 17, 2000, at 1.

⁵⁵ G.R. No. 141284. August 15, 2000.

⁵⁶ *Id.*

⁵⁷ G.R. No. 147780. May 10, 2001.

⁵⁸ G.R. No. 159085. February 3, 2004.

⁵⁹ *Id.*

⁶⁰ *Stocks fall on coup fears*, SUNSTAR, February 24, 2006 at [http://www.sunstar.com.ph/static/net/2006/02/24/stocks.fall.on.coup.fears.state.of.emergency.\(1.55.p.m.\).html](http://www.sunstar.com.ph/static/net/2006/02/24/stocks.fall.on.coup.fears.state.of.emergency.(1.55.p.m.).html)

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⁶² *Emergency Powers Temporary, says Palace*, MANILA STANDARD TODAY, February 24, 2006, at 1.

⁶³ *Arrests without warrant may be done under emergency*, SUNSTAR, February 24, 2006 at [http://www.sunstar.com.ph/static/net/2006/02/24/arrests.without.warrant.may.be.done.under.emergency.state.palace.\(2.07.p.m.\).html](http://www.sunstar.com.ph/static/net/2006/02/24/arrests.without.warrant.may.be.done.under.emergency.state.palace.(2.07.p.m.).html); See *David v. Arroyo*, G.R. No. 171396, May 3, 2006.

⁶⁴ Speech during the conferment of the honorary degree of Doctor of Laws by the University of the East April 18, 2007.

⁶⁵ *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (dissenting opinion).

⁶⁶ Republic Act No. 8041, Water Crisis Act

⁶⁷ *Emergency Powers for Erap sought*, PHILIPPINE DAILY INQUIRER, July 5, 2000, at 1.

⁶⁸ *Emergency Powers bid backed, bucked*, PHILIPPINE DAILY INQUIRER, August 25, 2004, at A8.

⁶⁹ *No state of emergency yet but RP should prepare for worst case scenario on SARS*, April 28, 2003 at <http://www.gov.ph/news/printerfriendly.asp?i=2887>

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⁷¹ The juridical concept of the emergency is thus connected with the notion of *raison d'état*, identified as the doctrine that whatever is required to insure the survival of the state must be done by the individuals responsible for it, no matter how repugnant such an act may be to them in their private capacity as decent and moral men.

⁷² *Bill to curb GMA powers introduced*, MANILA TIMES, March 10, 2006, at A3.

⁷³ 63 Phil. 139 (1936).

⁷⁴ *Id.*

⁷⁵ Appeared in the Article: *Trial of Power Mess Leads to Ramos*, by Luz Rimban and Shiela Samonte-Pesay Co, PCIJ 5-8 AUGUST, 2002.

⁷⁶ *Supra Note*

⁷⁷ Alecks P. Pabico “State of freedom declined in the Philippines in 2005 — Freedom House” Daily PCIJ, December 21, 2005, <http://www.pcij.org/blog/?p=548>

⁷⁸ Analyst Viewpoint, Summary: Philippines: Impact of Current Political Developments on Offshore Outsourcing Industry, Intelligent Transformation, March 6, 2006.

⁷⁹ Clinton Rossiter, CONSTITUTIONAL DICTATORSHIP, 294 (2002)

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In 1996, the Ateneo de Manila University formed the School of Government (ASoG) to provide an institutional vehicle for the development of public servants and as a forum for dialogue and partnership among the government, the private, the non-government organization and people's organization sectors.

As a professional school for public service, the ASoG creates an environment that fosters the development of new ideas, concepts and methods. Focusing on results, it facilitates a learning process where theory and practice are joined, and where wisdom of the classroom interacts with the world of policy decision and action.

The School draws from the intellectual resources of the various academic units of the University as well as from its many years of social apostolate and interaction with the country's decision-makers and basic sectors of society.



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KAS activities include political education, grants for research and scholarships for gifted students. The main aims of the international work are: training political and social leaders; introducing democratic institutions and processes; encouraging political and social elites to focus on development in their actions; promoting international political dialogue; and the worldwide exchange of information and experience.

KAS has been active in the Philippines since the 1960s. The main activities of KAS in the Philippines have focused on Social Market Economy, institutional and political reforms and peace and development in Mindanao.

