Chapter 21

David v. Arroyo: Constitutionality of Proclaiming a State of National Emergency

The Court's Decision on this landmark case started with a paean to our people's liberty:

> "All powers need some restraint; practical adjustments rather than rigid formula are necessary.[1] Superior strength – the use of force – cannot make wrongs into rights. In this regard, the courts should be vigilant in safeguarding the constitutional rights of the citizens, specifically their liberty.
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> "Chief Justice Artemio V. Panganiban's philosophy of liberty is thus most relevant. He said: '**In cases involving liberty, the scales of justice should weigh heavily against government and in favor of the poor, the oppressed, the marginalized, the dispossessed and the weak**.' Laws and actions that restrict fundamental rights come to the courts 'with a heavy presumption against their constitutional validity.'"[2]

The Facts

On February 24, 2006, as the country celebrated the 20th Anniversary of EDSA People Power I, President Gloria Macapagal-Arroyo issued Presidential Proclamation No. 1017 (PP 1017) declaring a state of national emergency.[3] On the same day, she also issued General Order No. 5 (GO 5),[4] implementing the proclamation. A week later, after these seven Petitions had been filed before the Supreme Court, she lifted PP 1017 and declared that the national emergency had ceased to exist.[5]

The factual bases[6] of PP 1017 and GO 5, according to respondents, comprised

a conspiracy to unseat or assassinate President Arroyo. It was allegedly hatched by some military officers, leftist insurgents, and members of the political opposition. Respondents justified their moves by saying that the aim to oust or assassinate the President and to take over the reigns of government had posed a clear and present danger.

Following the issuance of PP 1017 and GO 5, the Office of the President announced the cancellation of all programs and activities related to the 20th anniversary celebration of EDSA People Power I and revoked the permits to hold rallies issued earlier by local governments. Presidential Chief of Staff Michael Defensor further announced that "*warrantless arrests and take-over of facilities, including media, can already be implemented*."[7]

Nevertheless, members of Kilusang Mayo Uno (KMU) and the National Federation of Labor Unions-Kilusang Mayo Uno (NAFLU-KMU) marched from various parts of Metro Manila towards the EDSA shrine in Mandaluyong. Several groups of protesters at various sites were violently dispersed by anti-riot police. Arrested without any warrant were Petitioner Randolf S. David, a University of the Philippines professor and newspaper columnist; and Ronald Llamas, president of party-list Akbayan.

Early in the morning on February 25, 2006, on the basis of PP 1017 and GO 5, operatives of the PNP Criminal Investigation and Detection Group (CIDG) raided the *Daily Tribune* offices in Manila and confiscated news stories, documents, pictures, and mock-ups of the Saturday issue. Police officers were stationed inside and outside the offices of the newspaper, as well as the premises of another pro-opposition paper, *Malaya*; and its sister publication, *Abante*.

The Issues

On March 7, 2006, the Court conducted Oral Argument on the following issues raised in the Petitions:

"A. PROCEDURAL:

1) Whether the issuance of PP 1021 renders the petitions moot and academic.

2) Whether petitioners in 171485 (Escudero *et al.*), G.R. Nos. 171400 (ALGI), 171483 (KMU *et al*.), 171489 (Cadiz *et al*.), and 171424 (Legarda) have legal standing.

"B. SUBSTANTIVE:

1) Whether the Supreme Court can review the factual bases of PP 1017.
2) Whether PP 1017 and G.O. No. 5 are unconstitutional.
   a. Facial Challenge
   b. Constitutional Basis
   c. As Applied Challenge"

The Court's Ruling

Mootness. In a Decision written by Justice Angelina Sandoval-Gutierrez, the Court, by a vote of 11-3-1,[8] held that President Arroyo's issuance of PP 1021 did not render the Petitions moot and academic. During the eight (8) days that PP 1017 was operative, police officers committed illegal acts in implementing it. Hence, there was a need to determine whether PP 1017 and GO 5 were constitutional and valid. The Court stressed that "**an unconstitutional act is not a law, it confers no rights, it imposes no duties, it affords no protection; it is in legal contemplation, inoperative**."[9]

Courts will decide cases, which may otherwise be moot and academic, if (1) there is a grave violation of the Constitution; (2) the situation is of exceptional

character, and the paramount public interest is involved; (3) the constitutional issue raised requires the formulation of controlling principles to guide the bench, the bar, and the public; and (4) the case is capable of repetition yet evading review.

All the foregoing exceptions were present in the case and justified the Courts assumption of jurisdiction over the Petitions. In addition, the Court took into consideration my Separate Opinion in *Sanlakas v. Executive Secretary*[10] "that an otherwise 'moot' case may still be decided '*provided the party raising it in a proper case has been and/or continues to be prejudiced or damaged as a direct result of its issuance.*'"

Legal Standing. Applying extant principles,[11] the Court ruled that the locus standi of Petitioners David, Llamas, Cacho-Olivares and the Tribune Publishing Co. Inc. was beyond any doubt. They had all alleged "direct injury" resulting from illegal arrests and unlawful searches committed by police operatives pursuant to PP 1017.

The Court also upheld the legal standing of the other petitioners on the ground that the subject of the Petitions was of **transcendental importance** to the nation. Indeed, the validity of PP 1017 and GO 5 was a judicial question of paramount importance to the Filipino people.

Incidentally, the Court regarded as improper the impleading of President Arroyo as a respondent. Settled is the doctrine that the President, during her tenure of office, may not be sued in *any* civil or criminal case.

The Court's Review
of the Factual Bases

In *Integrated Bar of the Philippines v. Zamora,*[12] the Court considered the President's "calling-out" power as a discretionary power solely vested in the Chief

Executive's wisdom. Nonetheless, it stressed that "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."

As to how the Court may inquire into the President's exercise of power, the standard laid down in *Lansang v. Garcia*[13] was not correctness, but arbitrariness. The Court further ruled in *Integrated Bar of the Philippines* that the burden was upon the petitioner "to show that the President's decision is totally bereft of factual basis," not upon the Court to "undertake an independent investigation beyond the pleadings."

In the present case, petitioners failed to show that President Arroyo's exercise of the calling-out power through PP 1017 was factually baseless. The solicitor general's Consolidated Comment and Memorandum made a detailed narration of the events leading to the issuance of the proclamation.[14] Petitioners presented no contrary allegations; thus, the Court was convinced that the President was justified in issuing PP 1017.

Constitutionality of PP 1017

As a backdrop to the Court's disposition of the issue, the erudite *ponente,* Justice Gutierrez, wrote a brief exposition of the various political theories[15] relating to the power of the President in times of emergency. She concluded from the various approaches of political theorists that the ultimate aim was to solve one real problem: **allotting increasing areas of discretionary power to the Chief Executive, while ensuring that those powers would be exercised with a sense of political responsibility and under effective limitations and checks.**

Facial Challenge to PP 1017

Overbreadth. On petitioners' facial challenge of PP 1017, the Court held that a review of the issuance through the use of the overbreadth doctrine was uncalled for. *First*, that doctrine was an analytical tool developed for testing "on their faces" statutes in **free speech cases**. A plain reading of PP 1017 showed that it was not primarily directed to speech or even speech-related conduct. It was actually a call upon the AFP to prevent or suppress all forms of **lawless violence.**

Second, the facial invalidation of laws was considered a "**manifestly strong medicine**" to be used "**sparingly and only as a last resort**," and was "**generally disfavored.**"[16] A challenge using the overbreadth doctrine would require the Court to examine PP 1017 to pinpoint flaws or defects, not on the basis of its actual effect upon petitioners, but on the assumption or prediction that it might cause **others who are not before the Court** to refrain from exercising free speech or expression.

Third, in a facial challenge on the ground of overbreadth, a petitioner is required to establish that there can be no instance when the assailed law might be valid. Petitioners did not even attempt to show whether that situation existed.

Void for Vagueness. The Court held that a facial review on the ground of vagueness was likewise unwarranted. The "void for vagueness doctrine" holds that "a law is facially invalid if men of common intelligence must necessarily guess at its meaning and differ as to its application."[17] The petitioner must show that the statute is vague in all its possible applications. Again, petitioners did not attempt to show that PP 1017 was vague in all its applications, and that persons of common intelligence could understand its meaning and application.

Operative Portion of PP 1017

In establishing the constitutional basis of PP 1017, the *ponencia* divided the operative portion of PP 1017 into these three important provisions:

> ***First provision:***
>
> "[B]y virtue of the power vested upon me by Section 18, Artilce VII x x x [I] do hereby command the Armed Forces of the Philippines, to maintain law and order throughout the Philippines, prevent or suppress all forms of lawless violence as well any act of insurrection or rebellion"
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> ***Second provision:***
>
> "and to enforce obedience to all the laws and to all decrees, orders and regulations promulgated by me personally or upon my direction;"
>
> ***Third provision:***
>
> "as provided in Section 17, Article XII of the Constitution [I] do hereby declare a State of National Emergency."

First Provision:
Calling-Out Power

The first provision pertains to the President's calling-out power. In *Sanlakas v. Executive Secretary*,[18] the Court held that Section 18[19] of Article VII of the Constitution granted the President, as Commander-in-Chief, a "sequence" of graduated powers. From the most to the least benign, these were the calling-out power, the power to suspend the privilege of the writ of habeas corpus, and the power to declare martial law.

Citing *Integrated Bar of the Philippines v. Zamora*,[20] the Court ruled that the only criterion for the exercise of the calling-out power was "whenever it becomes necessary x x x to prevent or suppress lawless violence, invasion or rebellion."

Owing to the vast intelligence network of her office, the President was in the best position to determine the actual condition of the country.

Under the calling-out power, the President may summon the armed forces to aid her in suppressing **lawless violence, invasion and rebellion** through ordinary police action. But every act beyond the President's calling-out power is considered illegal or ultra vires.

There is a distinction between the authority to declare a "state of rebellion" and the authority to proclaim a state of national emergency. The first emanates from the President's powers as Chief Executive, as provided under Section 4,[21] Chapter 2, Book II of the Administrative Code of 1987. President Arroyo's declaration of a "state of rebellion" was merely an act declaring a status or condition of public moment or interest.

In declaring a state of national emergency, the President did not rely only on Section 18 of Article VII of the Constitution; but likewise on Section 17 of Article XII, a provision on the State's extraordinary power to take over any privately owned public utility or business affected with public interest. Certainly, PP 1017 called for the exercise of an **awesome power;** thus, it could not be deemed harmless, without legal significance, or not written, as in the case of *Sanlakas*.

Nonetheless, the Court stressed that PP 1017 was not a declaration of martial law. Hence, it could not be used to justify acts that could be done only under a valid declaration of martial law, such as (1) arrests and seizures without judicial warrants, (2) ban on public assemblies, (3) press censorship and takeover of news media and agencies, and (4) issuance of presidential decrees.

Second Provision:

Faithful Execution of Laws

The second provision pertained to the power of the President to ensure that the laws be faithfully executed, as provided in Section 17,[22] Article VII of the Constitution. The enabling clause, however, provides that the President may "enforce obedience to all the laws and **to all decrees**, orders and regulations promulgated by me personally or upon my direction."

The Court ruled that President Arroyo could not issue **decrees** similar to those of former President Ferdinand Marcos under martial law. Her ordinance power was limited under Chapter 2, Book III of Executive Order No. 292 (the Administrative Code of 1987).[23] On the other hand, presidential decrees were laws that were of the same category and binding force as statutes, because they were issued in the exercise of the President's legislative power during the period of martial law under the 1973 Constitution. Under our present Constitution, legislative power specifically belongs to Congress.[24] Neither martial law nor a state of rebellion or of emergency could justify President Arroyo's exercise of legislative power through the issuance of decrees.

With respect to "laws," the President could order the military to enforce only laws pertinent to its duty **to suppress lawless violence,** but not civil laws, customs laws, and the like.

Third Provision:
State of National Emergency

No Takeover of Privately Owned Utilities. Section 17[25] of Article XII of the Constitution provides for the takeover or direction of the operation of any privately owned public utility or business affected with public interest. Section 23 of Article VI, however, limits the **exercise** of those acts thus:

> **"SEC. 23. (1)** The Congress, by a vote of two-thirds of both Houses in joint session assembled, voting separately, shall have the **sole power to declare the existence of a state of war**.
>
> "(2) In times of war or **other national emergency**, the Congress may, by law, authorize the President, for a limited period and subject to such restrictions as it may prescribe, to exercise powers necessary and proper to carry out a declared national policy. Unless sooner withdrawn by resolution of the Congress, such powers shall cease upon the next adjournment thereof." (Emphasis supplied.)

Clearly, the exercise of emergency powers, such as the takeover of any privately owned public utility or business affected with public interest, requires a delegation from Congress.

Section 17 of Article XII must be understood as an aspect of the emergency powers clause generally reposed upon Congress. Whether the President may exercise this power is dependent on whether Congress would delegate it to the Chief Executive through a law prescribing reasonable terms.

Emergency, as a generic term, connotes the existence of conditions suddenly intensifying existing danger to life or well-being beyond the degree that is accepted as normal. As contemplated in our Constitution, these conditions may include rebellion, economic crisis, pestilence or epidemic, typhoon, flood, or other similar catastrophe of nationwide proportions or effect.[26]

The Court emphasized that while the President alone could declare a state of national emergency without legislation, she had no power to take over a privately owned public utility or business affected with public interest. The Chief Executive could not decide whether exceptional circumstances existed that would warrant the takeover of private facilities affected with public interest. Neither could she determine when those exceptional circumstances had ceased.

Likewise, **without legislation**, the President had no power to determine what types of business affected with public interest should be taken over.

Void-as-Applied Doctrine

Finally, on the challenge that PP 1017 was void as applied,[27] the Court asked, "Does the illegal implementation of a law render it unconstitutional?"

Settled is the rule that courts are not at liberty to declare statutes invalid, although those statutes may have been abused and "misabused" or may have afforded an opportunity for abuse in the manner of application. PP 1017 was merely an invocation of the President's calling-out power. Its general purpose was to command the AFP to suppress all forms of lawless violence, invasion or rebellion. But nothing in it allowed the police, expressly or impliedly, to conduct an illegal arrest or to search or violate the citizens' constitutional rights.

Constitutionality of GO 5
and Acts of Terrorism

President Arroyo issued GO 5 to carry into effect the provisions of PP 1017. The order mandated the AFP and the PNP to carry out immediately the "**necessary and appropriate actions and measures to suppress and prevent acts of terrorism and lawless violence**."

The term "lawless violence" is unarguably extant in our statutes and Constitution. The term is invariably associated with "invasion, insurrection or rebellion." On the other hand, Congress has yet to enact a law defining and punishing "acts of terrorism." It must be remembered that an act can only be considered a

crime if there is a law defining it as such and imposing the corresponding penalty.

Since there is no law defining "acts of terrorism," President Arroyo alone, under GO 5, has the discretion to determine what acts constitute terrorism. Her judgment on this aspect is absolute, without restriction. Consequently, upon the invocation of GO 5, there can be indiscriminate arrests without warrant, incidents of breaking into offices and residences, takeover of media enterprises, and prohibition and dispersal of all assemblies and gatherings unfriendly to the administration. These acts go far beyond the calling-out power of the President. Certainly, they violate the due process clause of the Constitution. Thus, the Court declared that the "acts of terrorism" portion of GO 5 was unconstitutional.

Unconstitutional Actions

The warrantless arrest of Petitioner David cannot be justified. During the inquest for the charges against him (violation of Batas Pambansa Bilang 880[28] and inciting to sedition), all that the arresting officers could invoke was their observation that some rallyists were wearing t-shirts with the words "Oust Gloria Now" and their erroneous assumption that he was the leader of the rally.[29] Consequently, the inquest prosecutor ordered David's immediate release (after his seven-hour detention) on the ground of insufficiency of evidence. It was noted that he was not wearing the subject T-shirt and, even if he were, that fact would have been an insufficient basis for charging him with inciting to sedition. Further, it was not even known whether he was the leader of the rally.[30]

The Court likewise considered the dispersal and arrest of the members of KMU et al. unwarranted. Apparently, the dispersal was done merely on the basis of Malacañang's arbitrary directive canceling all permits previously issued by local governments. The wholesale cancellation of all permits to rally was a blatant

disregard of the principle that "freedom of assembly is not to be limited, much less denied, except on a showing of a *clear and present danger* of a substantive evil that the State has a right to prevent."[31] Tolerance is the rule and limitation is the exception. Only upon a showing that an assembly presents a clear and present danger may the State deny the citizens' right to exercise it, a fact that respondents utterly failed to show.

Moreover, under BP 880, the authority to regulate assemblies and rallies is lodged with local governments. They have the power to issue permits and to revoke those permits **after due notice and hearing**. In this case, petitioners were not even notified of, much less heard on, the revocation of their permits.[32] The absence of notice was a fatal defect.

Cacho-Olivares et al. presented another facet of freedom of speech -- the freedom of the press. The search without a warrant of *The Daily Tribune* offices was illegal, because the act violated Rule 126 of the Rules of Court, which had laid down the steps in the conduct of a valid search and seizure.[33] Moreover, the search violated petitioners' freedom of the press. The search and seizure of materials for publication, the stationing of policemen in the vicinity of the *Tribune* offices, and the arrogant warning of government officials to media, were plain censorship.[34]

This Court cannot tolerate the blatant disregard of a constitutional right, even if the act involves the most defiant of our citizens. Freedom to comment on public affairs is essential to the vitality of a representative democracy. It is the duty of the courts to be watchful of the constitutional rights of the citizens and of any stealthy encroachments on those rights. The motto should always be *"Obsta principiis."*[35]

To capture the essence of the Decision, I am reproducing verbatim the Court's own summation:

"In sum, the lifting of PP 1017 through the issuance of PP 1021 – a supervening event – would have normally rendered this case moot and academic. However, while PP 1017 was still operative, illegal acts were committed allegedly in pursuance thereof. Besides, there is no guarantee that PP 1017, or one similar to it, may not again be issued. Already, there have been media reports on April 30, 2006 that allegedly PP 1017 would be reimposed "if the May 1 rallies" become "unruly and violent." Consequently, the transcendental issues raised by the parties should not be "evaded"; they must now be resolved to prevent future constitutional aberration.

"The Court finds and so holds that PP 1017 is constitutional insofar as it constitutes a call by the President for the AFP to prevent or suppress **lawless violence**. The proclamation is sustained by Section 18, Article VII of the Constitution and the relevant jurisprudence discussed earlier. However, PP 1070's extraneous provisions giving the President express or implied power (1) to issue decrees; (2) to direct the AFP to enforce obedience to **all laws** even those not related to lawless violence as well as **decrees** promulgated by the President; and (3) to impose standards on media or any form of prior restraint on the press, are *ultra vires* and **unconstitutional**. The Court also rules that under Section 17, Article XII of the Constitution, the President, in the absence of a legislation, cannot take over privately-owned public utility and private business affected with public interest.

"In the same vein, the Court finds G.O. No. 5 valid. It is an Order issued by the President – acting as Commander-in-Chief – addressed to subalterns in the AFP to carry out the provisions of PP 1017. Significantly, it also provides a valid standard – that the military and the police should take only the **"necessary and appropriate actions and measures to suppress and prevent acts of lawless violence."** But the words **"acts of terrorism"** found in G.O. No. 5 have not been legally defined and made punishable by Congress and should thus be deemed deleted from the said G.O. While "terrorism" has been denounced generally in media, no law has been enacted to guide the military, and eventually the courts, to determine the limits of the AFP's authority in carrying out this portion of G.O. No. 5.

"On the basis of the relevant and uncontested facts narrated earlier, it is also pristine clear that (1) the warrantless arrest of petitioners Randolf S. David and Ronald Llamas; (2) the dispersal of the rallies and warrantless arrest of the KMU and NAFLU-KMU members; (3) the imposition of standards on media or any prior restraint on the press; and (4) the warrantless search of the *Tribune* offices and the whimsical

seizures of some articles for publication and other materials, are not authorized by the Constitution, the law and jurisprudence. Not even by the valid provisions of PP 1017 and G.O. No. 5.

"Other than this declaration of invalidity, this Court cannot impose any civil, criminal, or administrative sanctions on the individual police officers concerned. They have not been individually identified and given their day in court. The civil complaints or causes of action and/or relevant criminal Information have not been presented before this Court.

"Elementary due process bars this Court from making any specific pronouncement of civil, criminal, or administrative liabilities.

"It is **well to remember that military power is a means to an end and substantive civil rights are ends in themselves. How to give the military the power it needs to protect the Republic without unnecessarily trampling individual rights is one of the eternal balancing tasks of a democratic state**. During emergency, governmental action may vary in breadth and intensity from normal times, yet they should not be arbitrary as to unduly restrain our people's liberty.

"Perhaps, the vital lesson that we must learn from the theorists who studied the various competing political philosophies is that, it is possible to grant government the authority to cope with crises without surrendering the two vital principles of constitutionalism: **the maintenance of legal limits to arbitrary power, and political responsibility of the government to the governed."**

The Separate Opinions

Concurring Opinion of the Chief Justice

My brief Concurring Opinion was, in the words of the *ponente*, Justice Gutierrez, "considered an integral part of this *ponencia*." I would like to reproduce it in toto, as follows:

"I was hoping until the last moment of our deliberations on these consolidated cases that the Court would be unanimous in its Decision. After all, during the last two weeks, it decided with one voice two equally contentious and nationally significant controversies involving Executive Order No. 464[36] and the so-called Calibrated Preemptive Response policy.[37]

"However, the distinguished Mr. Justice Dante O. Tinga's Dissenting Opinion has made that hope an impossibility. I now write, not only to express my full concurrence in the thorough and elegantly written *ponencia* of the esteemed Mme. Justice Angelina Sandoval-Gutierrez, but more urgently to express a little comment on Justice Tinga's Dissenting Opinion (DO).

"The Dissent dismisses all the Petitions, grants no reliefs to petitioners, and finds nothing wrong with PP 1017. It labels the PP a harmless pronouncement -- "an utter superfluity" -- and denounces the *ponencia* as an "immodest show of brawn" that "has imprudently placed the Court in the business of defanging paper tigers."

"Under this line of thinking, it would be perfectly legal for the President to reissue PP 1017 under its present language and nuance. I respectfully disagree.

"Let us face it. Even Justice Tinga concedes that under PP 1017, the police – 'to some minds' – 'may have flirted with power.' With due respect, this is a masterful understatement. PP 1017 may be a paper tiger, but -- to borrow the colorful words of an erstwhile Asian leader -- it has nuclear teeth that must indeed be defanged.

"Some of those who drafted PP 1017 may be testing the outer limits of presidential prerogatives and the perseverance of this Court in safeguarding the people's constitutionally enshrined liberty. They are playing with fire, and unless prudently restrained, they may one day wittingly or unwittingly burn down the country. History will never forget, much less forgive, this Court if it allows such misadventure and refuses to strike down abuse at its inception. Worse, our people will surely condemn the misuse of legal *hocus pocus* to justify this trifling with constitutional sanctities.

"And even for those who deeply care for the President, it is timely and wise for this Court to set down the parameters of power and to make known, politely but firmly, its dogged determination to perform its constitutional duty at all times and against all

odds. Perhaps this country would never have had to experience the wrenching pain of dictatorship; and a past President would not have fallen into the precipice of authoritarianism, if the Supreme Court then had the moral courage to remind him steadfastly of his mortality and the inevitable historical damnation of despots and tyrants. Let not this Court fall into that same rut."

Concurring Opinion
of J. Santiago

Justice Consuelo Ynares-Santiago shared the majority view that PP 1017 and GO 5 were both partly unconstitutional. PP 1017 was no more than the exercise by the President, as the Commander-in-Chief of all armed forces of the Philippines, of her "calling out" power under Section 18, Article VII of the Constitution. This power, however, did not authorize her to direct the armed forces or the police to enforce laws not related to lawless violence, invasion or rebellion. Having been vested by the Constitution in the legislature, that power did not allow her to promulgate decrees with a force and effect similar or equal to laws.

Neither was the calling out power a license to conduct searches and seizures or arrests without warrant, except in cases provided in the Rules of Court. It was not a sanction to impose any form of prior restraint on the freedom of the press or expression, to curtail the freedom to assemble peaceably, or to frustrate fundamental constitutional rights.

Misplaced was the direct reference to Section 17, Article XII of the Constitution, as the constitutional basis for the declaration of a state of national emergency. The provision, which is found under the article on National Economy and Patrimony, presupposes that "national emergency" is economic, not political, in nature.

Moreover, the provision refers to the temporary takeover by the State of any privately owned public utility or business affected with public interest in times of national emergency, subject to "reasonable terms" that only Congress may prescribe. The President cannot arrogate unto herself, without congressional authorization, the power to take over or direct the operation of any privately owned public utility or business affected with public interest. To do so would constitute an *ultra vires* act.

GO 5 is unconstitutional insofar as it mandates the armed forces and the national police "to prevent and suppress acts of terrorism and lawless violence in the country." No law has been enacted by Congress defining *terrorism* or determining which acts are punishable as such. The lack of a clear definition of what constitutes it has led law enforcement officers to guess at its meaning and differ as to its application. This uncertainty has given rise to unrestrained violations of the fundamental guarantees of freedom of peaceable assembly and freedom of the press.

Government action to stifle constitutional liberties cannot be preemptive in meeting any and all perceived or potential threats to the life of the nation. To warrant proper action to be taken by the government, those threats must be actual, or at least gravely imminent or constitutive of a clear and present danger of a substantive evil. In a democracy, constitutional liberties must always be accorded supreme importance in the conduct of daily life. At the heart of these liberties lies the freedom of speech and thought – not merely in the propagation of ideas we love, but, more important, in the advocacy of ideas we may oftentimes loathe.

Dissent of J. Tinga, Joined by
Justices Corona and Velasco

According to Justice Dante O. Tinga, the Court, in taking cognizance of the Petitions, had imprudently placed itself in the business of defanging paper tigers. It

had supposedly made an immodest show of brawn at the expense of a fundamental but sophisticated understanding of the extent and limits of the powers and prerogatives of the executive as well as of the judicial branch.

His Dissent proceeded essentially from *Sanlakas v. Executive Secretary,*[38] which he had written for the Court. At issue in that case was Presidential Proclamation No. 427 (PP 427), which had declared a "state of rebellion" in 2003. The Court concluded that the proclamation, while constitutional, should be regarded as "an utter superfluity" that "only gives notice to the nation that such a state exists and that the armed forces may be called to prevent or suppress it." Being "devoid of any legal significance," it could not "diminish or violate constitutionally protected rights." Justice Tinga opined that the same conclusions should be reached as to the proclamation under consideration.

Involved in PP 1017 is the exercise by the President of the "calling-out" power under the Commander-in-Chief clause of the Constitution. But to the extent that it also directs the police -- which is civilian in character -- "to suppress all forms of lawless violence," this provision is also sourced from the power of the President as Chief Executive under Section 1, Article VII; and from the power of executive control under Section 17 of the same article.

PP 1017 is unlike PP 1081, which placed the entire Philippines under martial law. While both PP Nos. 1081 and 1017 expressly invoke the "calling-out" power, their contexts are wildly disparate in the light of PP 1081's accompanying declaration of martial law.

Unlike our present Constitution, the 1935 Constitution under which PP 1081 was issued left no intervening safeguards that tempered or limited the declaration of martial law. PP 1081 had intended a wholesale suspension of civil liberties in a

manner that PP 1017 did not even ponder. The earlier proclamation had authorized the detention of persons for a plethora of crimes not only directly related to rebellion or lawless violence, but also those "against national security" or "public order." To the ones who suffered or who stood by those oppressed under that proclamation, it would be a rank insult even to suggest that the innocuous PP 1017 is of equivalent import.

There is one seeming similarity, though, in the language of both proclamations: a command to the armed forces "to enforce obedience to all the laws and to all decrees, orders and regulations by [the President]." The Chief Executive currently has no power to issue decrees, much less has PP 1017 sought to restore that power. The Marcos decrees, however, still remain valid, unless specifically stricken down or repealed by subsequent enactments. Thus, when the President calls upon the armed forces to enforce the laws, the subsisting presidential decrees are included in the equation.

The particular passage in PP 1017 separates by a comma the phrases "to all the laws and to all decrees" and "orders and regulations promulgated by me." Inherently, the laws and decrees issued by President Marcos, as well as the issuances of President Aquino -- both in the exercise of their legislative powers -- belong to the same class and are superior to "orders and regulations." The use of the conjunction ***and*** denotes a joinder or union "relating the one to the other."[39] The word establishes an association between laws and decrees distinct from orders and regulations.

The qualifying phrase "promulgated by me" refers only to orders and regulations. Otherwise, PP 1017 would be ridiculous, in the sense that the obedience to be enforced would relate only to laws "promulgated" by President Arroyo. "Laws and decrees" relate also to other laws enacted by past sovereigns. Again, the fact that "laws and decrees" are grouped separately from "orders and regulations" signifies that the President has not arrogated unto herself the power to issue decrees.

PP 1017 strikes a balance between the Constitution, the "calling-out" power, and the inherent function of the Presidency as defender of the democratic Constitution. The declaration asserts the primacy of the democratic order and of civilian control over the armed forces, yet respects the people's constitutional and statutory guarantees.

Justice Tinga, however, agreed with the majority that there was a distinction between the power of the President to declare a state of emergency; and the exercise of emergency powers under Section 17 of Article XII. According to him, this provision referred to the twofold power of the State to declare a national emergency and to take over public utilities or businesses impressed with public interest.

Reference to Section 17 of Article XII, in relation to the power to declare a state of national emergency, is ultimately superfluous. A different situation would have obtained if PP 1017 were invoked in the actual takeover of a utility or business. But, on its face and as applied, the proclamation did not involve the actual takeover of any utility or enterprise. Thus, any discussion relating to the power of the State under Section 17, Article XII, would be *obiter dictum*.

Nonetheless, as a general rule, the President may exercise the powers under Section 17, Article XII, only upon congressional approval. But it appears constitutionally permissible to recognize exceptions, like extreme situations. Obtaining congressional authority would be impossible or inexpedient, considering the emergency. In extreme situations, the President may exercise the said authority, subject to judicial review.

Terrorism has a widely accepted meaning that encompasses many acts already punishable by our general penal laws. There are also several United Nations (UN) and

multilateral conventions on terrorism,[40] as well as declarations of the UN General Assembly denouncing and seeking to combat it.[41]

Even without an operative law specifically defining the term, the President already has a sufficient mandate to order the armed forces to combat acts of terrorism, such as rebellion, coup d'etat, murder, homicide, arson, physical injuries, grave threats, and the like, which are already punishable in our extant penal laws. As long as those acts encompass only those that are already punishable under our laws, the reference is not constitutionally infirm.

Justice Tinga agreed that PP 1017 did not expand the grounds for arrests, searches and seizures without warrant; or for the dispersal of rallies. The proclamation could not be invoked before any court to assert the validity of those unauthorized actions. He, however, disagreed with the majority in indirectly adjudicating the injuries inflicted on David et al. as illegal. He believed that the adjudication had been done with undue haste, through an improper legal avenue, without the appropriate trial of facts, and without even impleading the particular officers who had effected the arrests, searches and seizures. Deciding non-justiciable issues and prejudging cases and controversies without a proper trial on the merits diminished the potency of the Court's constitutional power in favor of rhetorical statements that afforded no quantifiable relief.

PP 1017 and GO 5 might have warranted circumspect scrutiny from those interested in and tasked with preserving civil liberties. Nonetheless, the plain fact remained that, under legal contemplation, each of those issuances was valid on its face and, if applied according to its letter, should not result in any constitutional or statutory breach.

Thus, Justice Tinga ended with this reminder: "It is for the poet and the politician to pen beautiful paeans to the people's rights and liberties, it is for the Court

to provide for viable legal means to enforce and safeguard these rights and liberties. When the passions of these times die down, and sober retrospect accedes, the decision of this Court in these cases will be looked upon as an extended advisory opinion."

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[1] Justice Tom C. Clark (Lecturer), *Law and Disorder* XIX THE FRANKLIN MEMORIAL LECTURES 29 (1971).

[2] Chief Justice Artemio V. Panganiban, *Liberty and Prosperity,* February 15, 2006.

[3] "**WHEREAS**, over these past months, elements in the **political opposition have conspired with authoritarians of the extreme Left represented by the NDF-CPP-NPA and the extreme Right, represented by military adventurists – the historical enemies of the democratic Philippine State** – who are now in a tactical alliance and engaged in a concerted and systematic conspiracy, over a broad front, to bring down the duly constituted Government elected in May 2004;

"WHEREAS, these conspirators have repeatedly tried to bring down the President;

"WHEREAS, **the claims of these elements have been recklessly magnified by certain segments of the national media;**

"WHEREAS, this series of actions is hurting the Philippine State – by obstructing governance including **hindering the growth of the economy and sabotaging the people's confidence in government and their faith in the future of this country**;

"WHEREAS, these **actions are adversely affecting the economy;**

"WHEREAS, **these activities give totalitarian forces of both the extreme Left and extreme Right the opening to intensify their avowed aims to bring down the democratic Philippine State**;

"WHEREAS, Article 2, Section 4 of the our Constitution makes the defense and preservation of the democratic institutions and the State the primary duty of Government;

"WHEREAS, the activities above-described, their consequences, ramifications and collateral effects constitute a **clear and present danger** to the safety and the integrity of the Philippine State and of the Filipino people;

"NOW, THEREFORE, I, Gloria Macapagal-Arroyo, President of the Republic of the Philippines and Commander-in-Chief of the Armed Forces of the Philippines, by virtue of the powers vested upon me by Section 18, Article 7 of the Philippine Constitution which states that: "The President x x x whenever it becomes necessary, x x x may call out (the) armed forces to prevent or suppress x x x rebellion x x x," and in my capacity as their Commander-in-Chief, **do hereby command the Armed Forces of the Philippines, to maintain law and order throughout the Philippines, prevent or suppress all forms of lawless violence as well as any act of insurrection or rebellion and to enforce obedience to all the laws and to all decrees, orders and regulations promulgated by me personally or upon my direction**; and **as provided in Section 17, Article 12 of the Constitution do hereby declare a State of National Emergency."**

[4] The resolutory clause of GO 5 reads:

"NOW, THEREFORE, I GLORIA MACAPAGAL-ARROYO, by virtue of the powers vested in me under the Constitution as President of the Republic of the Philippines, and Commander-in-Chief of the Republic of the Philippines, and pursuant to Proclamation No. 1017 dated February

24, 2006, do hereby call upon the Armed Forces of the Philippines (AFP) and the Philippine National Police (PNP), to prevent and suppress acts of terrorism and lawless violence in the country;

"I hereby direct the Chief of Staff of the AFP and the Chief of the PNP, as well as the officers and men of the AFP and PNP, **to immediately carry out the necessary and appropriate actions and measures to suppress and prevent acts of terrorism and lawless violence.**"

[5] Proclamation No. 1021, issued on March 3, 2006.

[6] "On January 17, 2006, Captain Nathaniel Rabonza and First Lieutenants Sonny Sarmiento, Lawrence San Juan and Patricio Bumidang, members of the Magdalo Group indicted in the Oakwood mutiny, escaped their detention cell in Fort Bonifacio, Taguig City. In a public statement, they vowed to remain defiant and to elude arrest at all costs. They called upon the people to '*show and proclaim our displeasure at the sham regime. Let us demonstrate our disgust, not only by going to the streets in protest, but also by wearing red bands on our left arms.*'

"On February 17, 2006, the authorities got hold of a document entitled '*Oplan Hackle I*' which detailed plans for bombings and attacks during the Philippine Military Academy Alumni Homecoming in Baguio City. The plot was to assassinate selected targets including some cabinet members and President Arroyo herself. x x x. The next day, at the height of the celebration, a bomb was found and detonated at the PMA parade ground.

"On February 21, 2006, Lt. San Juan was recaptured in a communist safehouse in Batangas province. Found in his possession were two (2) flash disks containing minutes of the meetings between members of the Magdalo Group and the National People's Army (NPA), x x x, and copies of subversive documents. Prior to his arrest, Lt. San Juan announced through DZRH that the '*Magdalo's D-Day would be on February 24, 2006, the 20th Anniversary of Edsa I.*'

"On February 23, 2006, PNP Chief Arturo Lomibao intercepted information that members of the PNP- Special Action Force were planning to defect. x x x.

"On the same day, at the house of former Congressman Peping Cojuangco, President Cory Aquino's brother, businessmen and mid-level government officials plotted moves to bring down the Arroyo administration. Nelly Sindayen of TIME Magazine reported that Pastor Saycon, longtime Arroyo critic, called a U.S. government official about his group's plans if President Arroyo is ousted. Saycon also phoned a man code-named Delta. Saycon identified him as B/Gen. Danilo Lim, Commander of the Army's elite Scout Ranger. Lim said '*it was all systems go for the planned movement against Arroyo.*'

"B/Gen. Danilo Lim and Brigade Commander Col. Ariel Querubin confided to Gen. Generoso Senga, Chief of Staff of the Armed Forces of the Philippines (AFP), that a huge number of soldiers would join the rallies to provide a critical mass and armed component to the Anti-Arroyo protests to be held on February 24, 2005. x x x.

"Earlier, the CPP-NPA called for intensification of political and revolutionary work within the military and the police establishments in order to forge alliances with its members and key officials. NPA spokesman Gregorio 'Ka Roger' Rosal declared: '*The Communist Party and revolutionary movement and the entire people look forward to the possibility in the coming year of accomplishing its immediate task of bringing down the Arroyo regime; of rendering it to weaken and unable to rule that it will not take much longer to end it.*'

"On the other hand, Cesar Renerio, spokesman for the National Democratic Front (NDF) at North Central Mindanao, publicly announced: '*Anti-Arroyo groups within the military and police are growing rapidly, hastened by the economic difficulties suffered by the families of AFP officers and enlisted personnel who undertake counter-insurgency operations in the field.*' He claimed that with

the forces of the national democratic movement, the anti-Arroyo conservative political parties, coalitions, plus the groups that have been reinforcing since June 2005, it is probable that the President's ouster is nearing its concluding stage in the first half of 2006.

"Respondents further claimed that the bombing of telecommunication towers and cell sites in Bulacan and Bataan was also considered as additional factual basis for the issuance of PP 1017 and G.O. No. 5. So is the raid of an army outpost in Benguet resulting in the death of three (3) soldiers. And also the directive of the Communist Party of the Philippines ordering its front organizations to join 5,000 Metro Manila radicals and 25,000 more from the provinces in mass protests." (Decision, pp. 8-11).

[7] Petition in GR No. 171396, p. 5.

[8] The Court's Decision was written by Justice Angelina Sandoval-Gutierrez and concurred in by Chief Justice Artemio V. Panganiban; and Justices Leonardo A. Quisumbing, Consuelo Ynares-Santiago, Antonio T. Carpio, Ma. Alicia Austria-Martinez, Conchita Carpio Morales, Romeo J. Callejo Sr., Adolfo S. Azcuna, Minita V. Chico-Nazario, and Cancio C. Garcia. Dissenting were Justices Dante O. Tinga, Renato C. Corona, and Presbitero J. Velasco Jr. Justice Reynato S. Puno was on leave.

[9] I. CRUZ, PHILIPPINE POLITICAL LAW 268 (2002); citing *Norton v. Shelby*, 118 US 425.

10 GR No. 159085, 421 SCRA 656, February 3, 2004.

[11] "Taxpayers, voters, concerned citizens, and legislators may be accorded the standing to sue, provided that the following requirements are met:

"1. The case must involve constitutional issues.

"2. For **taxpayers**, there must be a claim of illegal disbursement of public funds, or that the tax measure is unconstitutional.

"3. For **voters**, there must be a showing of obvious interest in the validity of the election law in question.

"4. For **concerned citizens**, there must be a showing that the issues raised are of transcendental importance and must be settled early.

"5. For **legislators**, there must be a claim that the official action complained of infringes upon their prerogatives as legislators." Decision, p. 25.

[12] GR No. 141284, August 15, 2000, 392 SCRA 618, 619.

[13] No. L-33964, December 11, 1971, 42 SCRA 448, 481-482.

[14] See footnote 4.

[15] From John Locke to Jean-Jacques Rousseau, John Stuart Mill, Nicollo Machiavelli to contemporary political theorists. Decision, pp. 33-39.

[16] *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

[17] *Ermita-Malate Hotel and Motel Operators Association v. City Mayor of Manila*, No. L-24693, July 31, 1967, 20 SCRA 849.

[18] GR No. 159085, February 3, 2004, 421 SCRA 656, in which the Court sustained President Arroyo's declaration of a "state of rebellion" pursuant to her calling-out power.

[19] "Sec. 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."

[20] Supra.

[21] "SEC. 4. – Proclamations. – Acts of the President fixing a date or declaring a status or condition of public moment or interest, upon the existence of which the operation of a specific law or regulation is made to depend, shall be promulgated in proclamations which shall have the force of an executive order."

[22] "**SEC. 17**. The President shall have control of all the executive departments, bureaus, and offices. **He** shall ensure that the laws be faithfully executed."

[23] The President may issue only executive orders, administrative orders, proclamations, memorandum orders, memorandum circulars, and general or special orders.

[24] CONSTITUTION, Art. VI, Sec.1.

[25] "**Sec. 17.** 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."

[26] I. CRUZ, PHILIPPINE POLITICAL LAW 95 (1998). Record of the Constitutional Commission, Vol. III, pp. 266-267.

[27] Of the seven (7) petitions, three (3) indicated "direct injury" -- in **GR No. 171396**, petitioners David and Llamas alleged that on February 24, 2006, they were arrested without warrants on their way to EDSA to celebrate the 20th Anniversary of People Power I; in **GR No. 171409**, petitioners Cacho-Olivares and *Tribune* Publishing Co., Inc. claimed that on February 25, 2006, the CIDG operatives "raided and ransacked without warrant" their office; and in **GR No. 171483**, petitioners KMU and NAFLU-KMU *et al.* alleged that their members were dispersed when they went to EDSA and later, to Ayala Avenue, also to celebrate the 20th Anniversary of People Power I. In all these incidents, the police cited PP 1017 as basis of their action. Decision, p. 59.

[28] An Act Ensuring the Free Exercise by the People of their Right Peaceably to Assemble and Petition the Government for Other Purposes.

[29] Annex "A" of the Memorandum in GR No. 171396, pp. 271-273.

[30] Id.

[31] *Reyes v. Bagatsing*, No. L-65366, November 9, 1983, 125 SCRA 553, 561.

[32] "**Section 5.** *Application requirements* - All applications for a permit shall comply with the following guidelines:

x x x x x x x x x

"(c) If the mayor is of the view that there is imminent and grave danger of a substantive evil warranting the **denial** or **modification** of the permit, he shall immediately inform the applicant who must be heard on the matter."

[33] "**Section 4** requires that a **search warrant** be issued upon probable cause in connection with one specific offence to be determined personally by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce. **Section 8** mandates that the search of a house,

room, or any other premise be made **in the presence of the lawful occupant** thereof or any member of his family or in the absence of the latter, in the presence of two (2) witnesses of sufficient age and discretion residing in the same locality. And **Section 9** states that the warrant must direct that it be served in the **daytime**, unless the property is on the person or in the place ordered to be searched, in which case a direction may be inserted that it be served at any time of the day or night."

[34] Incidentally, during the oral arguments, the Solicitor General admitted that the search of the offices of the *Tribune* and the seizure of its materials for publication and other papers were illegal and inadmissible "for any purpose." *See* Decision, pp. 71-73.

[35] *Boyd v. United States*, 116 U.S. 616 (1886).

[36] *Senate v. Ermita,* GR No. 169777, April 20, 2006.

[37] *Bayan v. Ermita,* GR No. 169838, April 25, 2006.

[38] GR Nos. 159085, 159103, 159185, 159196, 421 SCRA 656, February 3, 2004.

[39] Supra.

[40] To name a few, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973); International Convention for the Suppression of Terrorist Bombings (1997); International Convention for the Suppression of the Financing of Terrorism (1999); the International Convention for the Suppression of Acts of Nuclear Terrorism (2005). See "United Nations Treaty Collection – Conventions on Terrorism," http://untreaty.un.org/English/Terrorism.asp (visited, 30 April 2006).

[41] See e.g. Resolution No. 49/60, adopted by the United Nations General Assembly on February 17, 1995.