Defanging a Paper Tiger: A Comment on the Supreme Court's Decision on Presidential Proclamation 1017

Ma. Venarisse V. Verga★

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> *The accretion of dangerous power does not come in a day. It does come, however, slowly from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.*
>
> \- *Justice Felix Frankfurter*[1]

I. INTRODUCTION

In Chief Justice Panganiban's essay entitled *Liberty and Prosperity*, he commented that "in cases involving liberty, the scales of justice should weigh heavily against government and in favor of the poor, the oppressed, the

★ '08 J.D., cand., Ateneo de Manila University School of Law; Member, Board of Editors, *Ateneo Law Journal*.

Cite as 51 Ateneo L.J. 240 (2006).

1. Youngstown Sheet and Tube Co. v. Sawyer (Steel Seizure Cases), 343 U.S. 579 (1952).

marginalized, and the weak."[2] This presupposes that courts may limit the exercise of state power particularly when such transgresses the realm of constitutional rights and liberties.

Two instances when rights and liberties become prone to transgression are during the President's exercise of emergency and military powers—both of which are recognized in history and jurisprudence. Nonetheless, it is difficult to avoid the abuse of prerogative powers carried out during these periods, given the vast authority conferred to the Head of State. As such, the other branches of the government are assigned roles by the Constitution to serve as limitations upon the executive. This however, as noted in the Emergency Power Cases,[3] does not weaken the President for such a system of check merely creates a "balanced power structure… where legal limits to arbitrary power and complete political responsibility of government to the governed"[4] exists.

Thus, jurisprudential history shows an active participation on the part of the Courts whenever the issue of the President's exercise of emergency or military powers is raised. So far, our Supreme Court has deemed it necessary to discuss the issues brought up in the case of *Sanlakas v. Executive Secretary*[5] and *Lacson v. Executive Secretary*,[6] both of which deal with the President's declaration of a state of rebellion. However, these two cases are not the last of its kind. A few months prior to the writing of this comment, President Gloria Macapagal-Arroyo issued Presidential Proclamation 1017 [7]

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2. Chief Justice Artemio V. Panganiban, *Liberty and Prosperity*, Feb. 15, 2006.

3. Youngstown Sheet and Tube Co. v. Sawyer (Steel Seizure Cases), 343 U.S. 579 (1952).

4. I*d*.

5. Sanlakas v. Executive Secretary, 421 SCRA 656 (2004).

6. Lacson v. Executive Secretary, 357 SCRA 756 (2001).

7. Presidential Proclamation No. 1017 (Feb. 24, 2006) partly reads:

> 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…whenever it becomes necessary… may call out (the) armed forces to prevent or suppress… rebellion…" 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

(hereinafter, P.P. 1017) and General Order No. 5[8] (hereinafter, G.O. No. 5) (also referred as Proclamations) in view of the alleged plots to destabilize the government.

From the moment of their issuance, these Proclamations were attacked by different sectors, including government officials, for their alleged detrimental effects on the constitutional rights of the citizens. Nonetheless, Dean Raul Pangalangan of the University of the Philippines College of Law referred to P.P. 1017 as merely a *paper tiger*—something that is outwardly powerful or dangerous, but inwardly weak or ineffectual.[9] To settle all qualms with regard to P.P. 1017 and G.O. No. 5, the Court deemed it necessary to rule on their constitutionality.

The decision of the Supreme Court holding Presidential Proclamation 1017 partly constitutional and G.O. No. 5 constitutional[10] is the focus of this comment.

> 12 of the Constitution do hereby declare a State of National Emergency.

8. General Order No. 5 (Feb. 24, 2006) partly 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.
>
> 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.

9. This phrase originated as a slogan that Mao Zedong's Chinese Communist State used against their opponents, particularly the US government. In his statement, Mao Zedong described the U.S. in the following words, "In appearance, it is very powerful, but in reality it is nothing to be afraid of, it is a *paper tiger*. Outwardly a tiger, but it is made of paper, unable to withstand the wind and the rain… U.S. is nothing but a *paper tiger*." MAO ZEDONG, U.S. IMPERIALISM IS A PAPER TIGER (1956), *available at* www.m-w.com/dictionary/paper%20tiger (last accessed June 2, 2006).

10. David, et al. v. Gloria Macapagal-Arroyo, et al., G.R. No. 171396, May 3, 2006. The facts of the case were uploaded in a website of which pagination this comment refers to. The facts were discussed from pages 3-16 of the decision. Copy of the uploaded decision is available at www.inq7.net/verbatim/pp1017_05032006.pdf (last accessed May 10, 2006).

II. THE FACTS OF THE CASE

During the 20th year Anniversary of the EDSA People Power I, President Gloria Arroyo issued P.P. 1017 declaring a state of national emergency. On the same day, she issued G.O. No. 5 implementing P.P. 1017. Based on the facts presented by the respondents, the proximate cause behind P.P. 1017 and G.O. No. 5 was the alleged conspiracy among some military officers and insurgents of the New People's Army (NPA), together with some members of the political opposition, in a plot to unseat and assassinate the President to be able to take control of the reigns of the government. These plans were allegedly discovered when authorities got hold of a document, entitled *Oplan Hackle I* detailing plans of an attack and bombings of the Philippine Military Academy Alumni Homecoming in Baguio City.[11]

In addition, several incidents—such as the bombing of telecommunication towers and cell sites in Bulacan and Bataan, the recapture of Lt. San Juan who, according to authorities, had in his possession two (2) flash disk drives containing minutes of meetings between members of the Magdalo Groups, and the alleged campaigns among the ranks of the Philippine National Police (PNP) Special Action Force and soldiers of the AFP to deflect and join the mass rallies—were all linked to the plot to unseat the President.[12] These acts, which were not disputed by the petitioners, involved, according to the respondents, clear and present danger that could only be suppressed through the imposition of P.P. 1017 and G.O. No. 5.

By virtue of these proclamations, the police arrested (without warrant) several personalities, including petitioner Randolf David[13] and Congressman Crispin Beltran of the *Anakpawis* Party and Chairman of *Kilusang Mayo Uno* (KMU).[14] In addition, operatives of the Criminal Investigation and Detection Group (CIDG) of the PNP, raided the editorial and printing offices of the *Daily Tribune* and *Abante* newspapers.[15] Personalities such as *Bayan Muna* Representative Satur Ocampo, Teodoro Cariño, and Gabriela

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11. *David, et al.,* G.R. No. 171396 at 6 (citing Respondent's Comment dated Mar. 6, 2006).

12. *David, et al.*, G.R. No. 171396 at 8 (citing Minutes of the Intelligence Report and Security Group, Philippine Army, Annex "I" of Respondent's Consolidated Comment).

13. Alecks Pabico, *My Arrest was Providential – Randy David, at* http://www.pcij.org/blog/?p=653 (last accessed May 25, 2006).

14. Avigail Olarte, *Beltran Arrested, at* http://www.pcij.org/blog/?p=648 (last accessed May 10, 2006).

15. *Palace "Unaware" of Tribune, Abante Raids, at* http://www.abs-cbnnews.com/storypage.aspx?StoryId=30970 (last accessed May 15, 2006).

representative Liza Maza were able to elude arrest, but were later on placed together with Joel Virador and Rafael Mariano under house arrest. They were restricted within the House of Representatives grounds.[16]

On 3 March 2006, exactly seven (7) days after P.P. 1017 was issued, the President issued Presidential Proclamation 1021[17] declaring that the national emergency had ceased to exist.

In the interim, seven (7) petitions challenging the constitutionality of both P.P. 1017 and G.O. No. 5 were filed with the Supreme Court, three of which impleaded President Gloria Arroyo as respondent. The petitioners assailed the constitutionality of the Proclamations on the grounds that: (1) it encroached on the emergency powers of Congress;[18] (2) it was a subterfuge to avoid the constitutional requirements for the imposition of martial law;[19] (3) it violated the constitutional guarantees of freedom of the press, of speech and assembly;[20] (4) President Arroyo gravely abused her discretion in calling out the armed forces without clear and verifiable factual basis of the possibility of lawless violence and a showing that there is a necessity to do so;[21] and (5) it violated Section 4[22] of Article II, Sections 1[23], 2[24], and 4[25] of

16. *Joker says 1017 "atmosphere" still very much around, at* http://www.manilatimes.net/national/2006/mar/06/yehey/metro/20060306met5.html (last accessed May 10, 2006).

17. The Whereas clauses of Presidential Proclamation 1021 (Mar. 3, 2006) partly reads:

> NOW, Therefore, I, Gloria Macapagal-Arroyo, President of the Republic of the Philippines, by virtue of the powers vested in me by law, hereby declare that the state of national emergency has ceased to exist.

18. David, et al. v. Gloria Macapagal-Arroyo, et al., G.R. No. 171396, May 3, 2006, at 13.

19. *Id.;* Cadiz v. Hon. Secretary Ermita, G.R. No. 171400, May 3, 2006; Francis Joseph G. Escudero, et al. v. Hon. Secretary Ermita, G.R.No. 171485, May 3, 2006.

20. *See generally*, *David, et al.*, G.R. No. 171396; *Escudero, et al.,* G.R.No. 171485; Kilusang Mayo Uno v. Gloria Macapagal-Arroyo, G.R. No. 171483, May 3, 2006; Legarda v. Gloria Macapagal-Arroyo, G.R. No. 171489, May 3, 2006.

21. *See generally,* Cadiz, G.R. No. 171400 (May 3, 2006); *Escudero, et al.,* G.R. No. 171485.

22. The prime duty of the Government is to serve and protect the people. The government may call upon the people to defend the State and, in the fulfillment thereof, all citizens may be required, under conditions provided by law, to render personal military or civil service.

Article III and Section 23[26] of Article VI, and Section 17 of Article XII of the Constitution.[27]

III. The Issues

The Supreme Court discussed the procedural and substantive issues. As to the procedural issues, the Court determined: (1) whether or not the issuance of P.P. 1021 rendered the petitions moot and academic; and (2) whether or not the petitioners Joseph Francis Escudero, Alternative Law Groups, *Kilusang Mayo Uno,* et al., Jose Anselmo Cadiz and Loren Legarda had legal standing. Assuming that the procedural requirements were complied with, the Court discussed: (1) whether or not the Supreme Court could review the factual bases of P.P. 1017 and (2) whether P.P. 1017 and G.O. No. 5 were unconstitutional. In discussing the second substantive issue, the Court took into consideration whether or not the Proclamations were void for (1) being facially challenged, (2) lacking constitutional basis and (3) its illegal implementation (applied challenge). The Court emphasized that the failure to raise the violations of human rights of Rep. Beltran, Satur Ocampo, *et al.* left the Court without a choice but to leave such issues untouched.

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23. No person shall be deprived of life, liberty, or property without due process of law nor shall any person be denied the equal protection of the laws.

24. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures of whatever nature and for any purpose shall be inviolable, and no search warrant or warrant of arrest shall issue except upon probable cause to be determined personally by the judge after examination under oath or affirmation of the complaint and the witnesses he may produce, and particularly describing the place to be searched and the persons or things to be seized.

25. No law shall be passed abridging the freedom of speech, or expression, or of the press, or the right of the people peaceably to assemble and petition the Government for redress and grievances.

26. (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 a resolution of the Congress, such powers shall cease upon the next adjournment thereof.

27. *See generally* Kilusang Mayo Uno v. Gloria Macapagal-Arroyo, G.R. No. 171483, May 3, 2006.

IV. THE RULING

Voting 11-3,[28] the Supreme Court partly granted the petition ruling that P.P. 1017 was constitutional insofar as it constituted a call by the President on the AFP to prevent lawless violence. All other decrees and provisions of P.P. 1017 commanding the AFP to enforce laws that were not related to lawless violence were declared unconstitutional. The Court further ruled that the provisions of P.P. 1017 which declared a national emergency under Section 17, Article XII of the Constitution were valid. However, such a declaration "does not authorize the President to take over privately-owned public utility or business affected with public interest without prior legislation."[29]

With regard to G.O. No. 5, the Court held that such Order was Constitutional insofar as it provided a standard (for example whatever is necessary and appropriate actions and measures to suppress and prevent acts of lawless violence) by which P.P. 1017 were to be implemented. However, the Court, reasoned that *acts of terrorism* had not yet been defined and made punishable by the legislature, and declared portions of G.O. No. 5, which dealt with terroristic activities, unconstitutional.

A. On the Procedural Issues

1. Mootness of the Issue

Respondents maintain that the case at bar lacks two of the requisites[30] for judicial review namely—

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28. Those voting to partly grant the petitions were Justice Sandoval-Gutierrez (*ponente*), Justice Panganiban, Justice Quisumbing, Justice Ynares-Santiago, Justice Carpio, Justice Austria-Martinez, Justice Carpio-Morales, Justice Callejo, Sr., Justice Azcuna, Justice Chico-Nazario and Justice Garcia. Justice Tinga's dissenting opinion was joined by Justice Corona and Justice Velasco.

29. David, et al. v. Gloria Macapagal-Arroyo, et al., G.R. No. 171396, May 3, 2006, at 59.

30. The requisites for judicial review are the following:

    1) Existence of actual case or controversy (*See* Pacu v. Secretary of Education, 97 Phil 806, 810 (1995)).

    2) Petitioners must raise a question of constitutionality (*See* People v. Vera, 65 Phil. 58 (1937)).

    3) Which constitutional question must be raised at the earliest opportunity (*See Id.*)

1. existence of an actual case or controversy, and
2. that the petitioners must raise the question of constitutionality

Both were lacking primarily due to the fact that the President already lifted P.P. 1017 through P.P. 1021, thereby rendering the case moot and academic. The Court, citing the case of *Province of Batangas v. Romulo,*[31] defined a moot and academic case as one that "ceases to present a judiciable controversy by virtue of supervening events so that a declaration thereon would be of no practical use or value."[32] Such is the reason why such cases are usually dismissed "on the ground of mootness."[33]

It must be noted however that the principle on mootness is not an all-encompassing rule which does not accept exceptions. As a matter of fact, a long line of decisions would provide exceptions such as:

1. when there is a grave violation of the Constitution;
2. when the situation involves paramount public interest;
3. when the constitutional issue raised requires formulation of controlling principles to guide the bench, the bar and the public; and
4. the case is capable of repetition yet evading review.[34]

The Court asserted that these exceptions were present in the case at bar. Commenting that in view of the fact that the acts complained of are capable of being repeated, a judicial review from the Supreme Court was justified.

2. Locus Standi

Discussing procedural issues, Justice Angelina Sandoval-Gutierrez, writing for the majority, ruled on the acceptability of the standing of the petitioners.[35] In the case of petitioners Randolph David, the opposition Congressmen, Cacho-Olivares and Tribune Publishing Co. Inc., all of

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4) The decision of the constitutional question must be necessary to the determination of the case itself (*See* Sotto v. Commission on Elections, 76 Phil. 516 (1946)).

31. Province of Batangas v. Romulo, 429 SCRA 736 (2004).

32. *David, et al.,* G.R. No. 171396 at 18 (citing Province of Batangas v. Romulo, 426 SCRA 736 (2004); Banco Filipino Savings and Mortgage Bank v. Tuazon Jr., 425 SCRA 129 (2004); Vda. De Dabao v. CA, 426 SCRA 91 (2004) and Paloma v. CA 415 SCRA 590 (2003)).

33. *David, et al.,* G.R. No. 171396 at 18 (citing Lacson v. Perez, 357 SCRA 756 (2001)).

34. *Id.* at 19.

35. *Id.* at 27.

which suffered direct injury, the Court held that their standing were beyond doubt in view of the rule that "every action must be prosecuted or defended in the name of the real party in interests,"[36] defined by the Rules of Court as the "party who stands to be benefited or injured by the judgment in the suit or the party entitled to the avails of the suit."[37] The Court also upheld the standing of the Alternative Law Groups (ALG) given the long decisions of the Court holding that when the issue concerns a public right, the fact that the petitioner is a citizen and has interest in the execution of the laws is enough to bequeath one with *locus standi*.[38] With regard to Petitioner Cadiz, *et al.*, who are national officers of the Integrated Bar of the Philippines (IBP) and Loren Legarda, who sued as a former Senator of the Republic of the Philippines, both of which argued that there is a transcendental cause which is reason enough to recognize their legal standing to sue, the *ponencia* noted the Court may relax the standing requirements and allow the suit to prosper despite the lack of direct injury to the parties seeking judicial review.[39]

On the other hand, Justice Sandoval-Gutierrez held that it was not proper to implead President Macapagal-Arroyo as respondent given the principle that the President may not be sued, whether in a civil or criminal case, during her tenure of office or incumbency.[40] Citing the case of *Soliven v. Judge Makasiar*,[41] the Court held that:

> [T]he rationale for the grant to the President of the privilege of immunity from suit is to assure the exercise of Presidential duties and functions free from any hindrance or distraction, considering that being the Chief

36. 1997 Rules of Civil Procedure, Rule 3, § 2.
37. *Id.*
38. *See* Philconsa v. Enriquez, 235 SCRA 506 (1994) and Basco v. Philippine Amusement and Gaming Corporation, 197 SCRA 52 (1991). *See also* Tañada v. Tuvera, 136 SCRA 27 (1985). In the latter the court held that where the question is one of public duty and the enforcement of a public right, the people are the real party in interest, and it is sufficient that the petitioner is a citizen interested in the execution of the law.
39. *See* Bagong Alyansang Makabayan v. Zamora, 342 SCRA 449 (2000). *See also* Osmeña v. COMELEC, 199 SCRA 750 (1991) (where the court held that "in cases which, due to their 'transcendental importance' to the public, it is expected that they be settled promptly and definitely, brushing aside technicalities of procedures.").
40. *See* In Re: Saturnino Bermudez, 145 SCRA 160 (1986).
41. Soliven v. Judge Makasiar, 167 SCRA 393, 399 (1988).

> Executive of the Government is a job that aside from requiring all the office-holder's time, also demands undivided attention. [42]

Moreover, it was held by the majority that "it will degrade the dignity of the high office of the President, the Head of State, if he can be dragged into court litigations while serving as such,"[43] therefore, a suit pertaining to the exercise of the President's power is not proper as respondent to the case at bar.

B. On the Substantive Issues

1. Review of Factual Bases

It was the contention of respondents that the Proclamations were without factual basis which led them to the question whether it was really necessary for the President to issue P.P. 1017. The Court presented a two pronged resolution to this issue. On one hand, it said that a review of factual bases of the President's proclamation cannot be made, primarily because such would be a violation of the principle of separation of powers—that the authority to decide whether an exigency had arisen belonged to the President and his decision is final and conclusive on the courts.[44] On the opposite view, as in the case of *Lansang v. Garcia,*[45] such a review can be seen in light of the power of the court to check on the acts of the other two branches of the Government in order to determine the constitutional sufficiency of such acts.[46] To support the latter view, the Court further cited the case of *Lansang v. Garcia* which held:

> [I]n a system of checks and balances, 'under which the President is supreme… only if and when he acts within the sphere allotted to him by the Basic Law… the authority to determine whether or not he has so acted is vested in the Judicial department, which in this respect, is, in turn, constitutionally supreme.[47]

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42. *Id.* at 393.

43. David, et al. v. Gloria Macapagal-Arroyo, et al., G.R. No. 171396, May 3, 2006, at 28.

44. *See* Barcelon v. Baker, 417 SCRA 87 (2005); Montenegro v. Castañeda, 91 Phil 882 (1952).

45. Lansang v. Garcia, 42 SCRA 473 (1971).

46. *Id.* at 448.

47. *Id.* at 481.

Lansang was further strengthened by the case of *Integrated Bar of the Philippines v. Zamora*[48] when the Court held that:

> When the President calls the armed forces to prevent or suppress lawless violence, invasion or rebellion, he necessarily exercises a discretionary power solely vested in his wisdom. This is clear from the intent of the framers and from the text of the constitution itself. The court, thus, cannot be called upon to overrule the President's wisdom or substitute its own. However this does not prevent the examination of whether such power was exercised within permissible constitutional limits or whether it was exercised in a manner constituting grave abuse of discretion.

These decisions are based on the constitutional provision which defines judicial power as the power not only to "settle actual controversies involving rights which are legally demandable and enforceable," [49] but also "to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the government."[50] This, according to the Supreme Court

> [r]epresents a broadening of judicial power to enable the courts of justice to review what was before a forbidden territory, to wit, the discretion of the political departments of the government… It speaks of judicial prerogative not only in terms of power but also of duty.[51]

Having laid down the principle that the Court may review factual bases of the President's exercise of power, the Court went on to say that the standard that must be used in such a review is not based on the correctness, but rather, on the arbitrariness of the act.[52] Therefore, the petitioners have the burden to show that the actions of the President are totally bereft of factual basis.

In the case at bar, the Court noted that the petitioners failed to show that President Arroyo's exercise of the *calling out power* was totally bereft of factual basis, thereby, the Court cannot undertake an independent investigation. Absent contrary allegations from the petitioners, the Court

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48. Integrated Bar of the Philippines v. Zamora, 338 SCRA 81, 107 (2000).

49. PHIL. CONST. art. VIII, § 1.

50. PHIL. CONST. art. VIII, § 1.

51. David, et al. v. Gloria Macapagal-Arroyo, et al., G.R. No. 171396, May 3, 2006, at 30 (citing AGBAYANI CRUZ, PHILIPPINE POLITICAL LAW 247 (2002 ed.) and Santiago v. Guingona, Jr., 298 SCRA 756 (1998)).

52. *David, et al.,* G.R. No. 171396, at 30 (citing Santiago v. Guingona, Jr., 298 SCRA 756 (1998)).

held that it was "convinced that the President was justified in issuing P.P. 1017."[53]

2. Constitutionality of P.P. 1017 and G.O. No. 5

The Court then discussed the constitutionality of the Proclamations on three facets—the facial infirmity of the proclamations, their lack of constitutional basis, and lastly, based on the illegal acts committed by the authorities by virtue of the issuances of the President.

The Court asserted that the application of both the *overbreadth* and *void for vagueness doctrines* was unwarranted on the ground that these doctrines were applicable only to free speech cases. Unfortunately for the respondents, P.P. 1017 was invalidated in so far as it calls on the military to take over public utilities and to enforce laws. The Court's decision is discussed below.

a. Facial challenge on the ground of the overbreadth doctrine and the void for vagueness doctrine.

The respondents assert that in applying the *overbreadth doctrine*, P.P. 1017 would be void for encroaching on both unprotected and protected rights under the Constitution. However, the Court pointed out that the "overbreadth doctrine is not used for testing the validity of a law that reflects legitimate state interest in maintaining comprehensive control over harmful (for example lawless violence, insurrection, and rebellion), constitutionally unprotected conduct."[54] Rather, such a doctrine is used only in a limited context on the freedom of speech. Since P.P. 1017 pertains to 'conduct' and not free speech, the overbreadth doctrine is inapplicable. In addition to this, the Court noted that invalidation of laws should be "used sparingly and only as a last resort"[55]—the reason for which is the fact that "a person to whom a law may be applied will not be heard to challenge a law on the ground that it may conceivably be applied unconstitutionally to others, for example in other situations not before the Court."[56]

To invalidate a law using the overbreadth doctrine would actually require the Court to "examine P.P. 1017 … not on the basis of its actual operation to the petitioners, but on the assumption or prediction that its very existence may cause others not before the Court to refrain from

53. *Id.* at 31.

54. *Id.*

55. *Id.* (citing Broadrick v. Oklahoma, 413 U.S. 601 (1973)).

56. *David, et al.,* G.R. No. 171396, at 31.

constitutionally protected speech or expression."[57] Therefore, such invalidation is unacceptable.

With regard to the attack based on vagueness, the Court found that:

> [T]he "void for vagueness doctrine" which holds that "a law is facially invalid if men of common intelligence must necessarily guess at its meaning and differ as to its application" is actually governed by the very same principles governing the overbreadth doctrine… a litigant may challenge a statute on its face only if it is vague in all its possible applications. Again, petitioners did not even attempt to show that P.P. 1017 is vague in all its applications.

The fact that the petitioners "failed to establish that men of common intelligence cannot understand the meaning of P.P. 1017"[58] made it inappropriate for the Court to invalidate the P.P. 1017 on the ground of *void for vagueness* doctrine.

b. Constitutional Basis of P.P. 1017

The Court further discussed the constitutional basis of P.P. 1017 which removes any possibility of invalidity of such a proclamation. In discussing the constitutional basis of the Proclamation, the Court divided the last provision into three parts.

In upholding the validity of the first part of the provision which reads:

> [B]y virtue of the power vested upon me by Section 18, Article VII… 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.[59]

The Court remarked that such a provision pertains to the *calling out power*, which is one of the graduated powers[60] granted by the Constitution to the

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57. *Id.* at 40.

58. *David, et al.*, G.R. No. 171396 at 40.

59. Presidential Proclamation No. 1017 (Feb. 24, 2006).

60. From the least benign, the graduated powers of the President includes:

> 1) The *calling out power* that is based on the first sentence of art. VII, § 18 of the Constitution which reads:
>
> The President shall be the Commander-in-Chief of all the armed forced of the Philippines and whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion or rebellion.

President as Commander-in-Chief and dissimilar from a declaration of Martial Law and of a state of rebellion. In highlighting the difference, Martial Law was described as:

> [a] warning to citizens that the military power has been called upon by the executive to assist in the maintenance of law and order, and that, while the emergency lasts, they must, upon pain of arrest and punishment, not commit any acts which will in any way render more difficult the restoration of order and the enforcement of law.[61]

However, since P.P. 1017 does not authorize acts such as (a) arrests and seizures without judicial warrants, (b) ban of public assemblies, (c) take over of news media and the press, and (d) the issuance of decrees which can only be issued where there is a declaration of military rule, such a declaration cannot be considered a proclamation of Martial Law.

In comparison to the state of rebellion, the Court stressed that P.P. 1017 does not emanate from the President's authority to declare a state of rebellion since the latter is merely "an act declaring a status or condition of public moment or interest."[62] Under such a scenario, Proclamation 427[63] (hereinafter, P.P. 427), which is merely a declaration of state of rebellion and packaged by the Court as "harmless, without legal significance, and deemed not written" should be distinguished from a proclamation such as P.P. 1017, which is far from being innocuous for such is a use of the President's extraordinary power to take over privately owned public utility and business

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> 2) The power to suspend the privilege of the writ of habeas corpus that is based on the second sentence of art. VII, § 18 of the Constitution which reads:
>
> 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…
>
> 3) The power to declare Martial Law that is also based on the second sentence of art. VII, § 18 of the Constitution which reads:
>
> In case of invasion or rebellion, when the public safety requires it, he may… place the Philippines or any part thereof under Martial Law.

61. *David, et al.,* G.R. No. 171396 at 46 (citing Aquino v. Ponce Enrile, 59 SCRA 183 (1974)).

62. *Id.*

63. Presidential Proclamation No. 427 (Jul. 26, 2003) is a declaration of a state of rebellion, which, in accordance with the case of Sanlakas v. Executive Secretary, 421 SCRA 656 (2004), is constitutional since such should be only be regarded as an "utter superfluity" given the fact that it "only gives notice to the nation that such a state exists and that the armed forces may be called to prevent or suppress it."

affected with public interest as authorized under Sec. 17, Art. XII of the Constitution.

If the first part of the provision was upheld by the Court, the second part, which reads: "I... do hereby command the Armed Forces... to enforce obedience to *all the laws* and to *all decrees*, orders and regulations promoted by me personally or upon my direction..."[64] did not escape judicial scrutiny given the fact that although the President has the power to ensure that laws are faithfully executed based on Section 17 of Article XII of the Constitution, her power is limited to the issuances enumerated under Chapter 2, Book III of Executive Order No. 292 otherwise known as the Administrative Code of 1987, to wit:

1. Executive Orders
2. Administrative Orders
3. Proclamations
4. Memorandum Orders
5. Memorandum Circulars
6. General or Special Orders

Therefore, the portion of P.P. 1017 which grants President Arroyo the authority to promulgate *decrees* and to call the military to enforce or implement *any laws* was declared unconstitutional given the fact (1) that it is Congress and not the President which is vested with legislative powers to issue decrees and (2) the power of the military to enforce law pertains only to its duty to suppress lawless violence and does not encompass other laws remote to this duty.

The last part of the proclamation which reads: "I... do hereby command the Armed Forces... *as provided in Section 17, Article XII* of the Constitution do hereby declare a State of National Emergency"[65] suffered the same fate as the second portion of the provision scrutinized by the Court. The *ponencia* stressed that the Congress, as the repository of emergency powers, as provided in Section 23 (2), Article, VI of the Constitution may, during national emergency, "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."[66] Precipitating any issue on the matter, the Court held that although it was within the power of the

64. Presidential Proclamation No. 1017 (Feb. 24, 2006) (emphasis supplied).

65. *Id.* (emphasis supplied.)

66. PHIL. CONST. art. VI, § 23 (2) (emphasis supplied).

President to declare a state of national emergency, she had no power, without legislation, to exercise powers of the State under Section 17, Article XII of the Constitution, for example, to take over or direct the operation of privately-owned public utility or business affected with public interest. If such was the case, the Constitution should have expressly provided for such a power under the list of graduated powers of the President as the Commander-in-Chief. Having not done so, the Constitution merely authorized the President to take over or direct the operation of privately owned public utility or business affected with public interest upon a delegation from the Congress. Given the fact that the Congress had not granted authority, the President had no power through P.P. 1017 to assume the powers under Section 17, Article XII of the Constitution.

c. Applied Challenge.

The *ponencia* stressed that the courts "are not in liberty to declare statutes invalid although they may be abused or misabused or may afford an opportunity for abuse in the manner of application,"[67] since the validity of a law must be determined not from its effects but from its "general purpose and end desired."[68] On this score, Justice Sandoval-Gutierrez pointed out that there was nothing in P.P. 1017 which authorized the police to conduct acts that would violate the constitutional rights of the citizens. As a matter of fact, the law on its face reveals a noble purpose of suppressing all forms of lawless violence, invasion or rebellion. Thus, P.P. 1017 cannot be invalidated simply by the incidental consequences arising from its execution. She went on to say that like P.P. 1017, G.O. No. 5 does not suffer any infirmity since it was merely an "internal rule issued by the executive officer to his subordinates… for the proper and efficient administration of law."[69] Absent arbitrariness or unreasonableness, this order cannot be invalidated on its face.

However, the Court showed qualms with regard to the provision pertaining to the calling of the military to "suppress and *prevent acts of terrorism* and lawless violence." Stressing the absence of an agreed definition of terrorism, the members of the Court through Justice Sandoval-Gutierrez voiced their fear that such deficiency may lead to possible abuse and oppression on the part of the military and a grant to the President of an encompassing power to determine what acts constitute terrorism—acts that go beyond the *calling out power* of the President and violative of the Constitution. Precipitating any issue on the matter, the Court held that in

67. *David, et al.,* G.R. No. 171396 at 61.

68. *Id.*

69. *Id.*

the absence of a legislation defining terrorism, the part of P.P. 1017 which pertains to *acts of terrorism* should be declared unconstitutional.

In closing, Justice Sandoval-Gutierrez pointed out that the (1) warrantless arrests of petitioner Randolph David and Ronald Llamas; (2) the dispersal of rallies and warrantless arrest of *Kilusang Mayo Uno* (KMU) members; (3) imposition of standards on media or any prior restraint of the press; and (4) warrantless search of the Tribune offices, were not authorized by the Constitution, not even by the valid provisions of P.P. 1017 and G.O. No. 5.[70] But given the fact that the individual police officers were not identified, the Court was without power to impose any civil, criminal or administrative sanctions.

V. ANALYSIS

A. On the lifting of P.P. 1017

The respondents assert that P.P. 1017 has been rendered moot and academic by virtue of the issuance of Presidential Proclamation 1021,[71] issued by the President supposedly, to lift P.P. 1017. The Court held the view that although, the issue is moot, the case, nonetheless, falls under the exceptions enumerated, to wit:

1. the cases 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 election law in question;
4. for concerned citizens, there must be a showing that the issues raised are of transcendental importance which must be settled early; and
5. for legislators, there must be a claim that the official action complained of infringes upon their prerogatives as legislators.[72]

Thus, judicial review is still appropriate. However, this situation is not new following the series of pronouncements made by the President and counter reactions of the courts from the time she assumed the position from her predecessor, former President Estrada.

70. *Id.*

71. The proclamation partly reads, "I, Gloria Macapagal-Arroyo… by virtue of the powers vested in me… declare that the state of national emergency has ceased."

72. *David, et al.,* G.R. No. 171396 at 24.

It must be remembered that on 01 May 2001, President Arroyo issued Presidential Proclamation No. 38 declaring a state of rebellion in the National Capital Region as a response to the EDSA TRES revolt. She likewise issued General Order No. 1 directing the AFP and the PNP to suppress the rebellion and thereafter, warrantless arrests of suspected leaders of the violent movements were effected pursuant thereto. The issues of constitutionality of the state of rebellion and the warrantless arrests were discussed in the case of *Lacson*.[73] However, even before the Court was able to rule on those matters presented, President Arroyo lifted the proclamation which led the Supreme Court to declare the case moot and academic.

In the present case, President Arroyo likewise lifted her declaration of a state of national emergency before the Court was able to rule on the constitutionality of the proclamation. In the words of Justice Panganiban, President Arroyo and her cabinet through their actions seemed to be "testing the outer limits of presidential prerogatives and the perseverance of [the] Court in safeguarding the people's constitutionally enshrined liberty. They are playing with fire, and unless restrained, they may one day wittingly or unwittingly burn down the country."[74] The President and her cabinet seem to be fond of this maneuver—concocting proclamations which would test the limits of presidential prerogatives as set in the constitution which will later be retracted before the Court can rule on the constitutionality of such an act in the hope that the issue will be rendered moot and academic. Unfortunately, the citizens and their liberties are sacrificed in the course of the President's brash exercise of power, which calls on the Courts to provide a more effective check on the President's actions.

In the case at bar, the Court declared that the issuance of P.P. 1021 effectively rendered the case moot and as such, allowed judicial review was only allowed by virtue of the important constitutional issue involved. But a closer look at P.P. 1017 and P.P. 1021 reveal a plausible conclusion that the latter proclamation did not repeal parts of P.P. 1017 contrary to the Court's earlier pronouncement.

It must be noted that P.P. 1017 was composed of two parts—the part calling out the AFP to suppress lawless violence and the part where the President declared a *state of National Emergency*. These two parts are connected by a conjunction *and*, which, according to the rules on statutory construction, would mean a *joinder* or union of two matters[75]—in this case, an order and a declaration. A careful reading of P.P. 1021 which in part reads,

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73. Lacson v. Executive Secretary, 357 SCRA 756 (2001).

74. *See* David, et al., G.R. No. 171396, Justice Panganiban Concurring Opinion.

75. RUBEN E. AGPALO, STATUTORY CONSTRUCTION 206 (3d ed. 1995).

"I... declare that the state of national emergency has ceased"[76] would reveal that such declaration applies only to the declaration part of P.P. 1017 and not the part where the President called the AFP. This fact puts a question on whether there was indeed a lifting of P.P. 1017 which would prop the contention that the case was neither moot nor academic. Therefore, all the discussions pertaining to exceptions did not serve any purpose except to provide a scholastic discussion, given the view that P.P. 1017, or at least, a part thereof, remains to subsist.

B. On the Overbreadth and Void for Vagueness Doctrines

The majority, through Justice Sandoval-Gutierrez held that the *Overbreadth Doctrine* is "an analytical tool developed for testing 'on their faces' statutes in free speech cases."[77] This same definition was used to characterize the *void for vagueness doctrine*, which characterization, according to the dissent of Justice Tinga, was a blunder on the part of the majority, for to accept such characterization would subject and limit the doctrine to "the same principles governing the overbreadth doctrine."[78] This perspective is shared by the author since there is a need to separate the application of the overbreadth doctrine and the void for vagueness doctrine in view of the fact that for a law to be vague, it must lack clarity and precision—which is not necessarily true to a law which is overbroad.

It is essential to the present case to discuss the instances when the void for vagueness doctrine should apply given that the majority of the Bench ratiocinated that since a doctrine like the overbreadth doctrine applies only to free-speech cases, any possibility of its application to P.P. 1017 would be incongruous.

In passing, American cases hold that the *void for vagueness doctrine* would apply to "a statute which either forbids or requires the doing of an act [is] in terms that are so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."[79] Such a statute is unconstitutional for the reason that it:

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76. Proclamation No. 1021 (Mar. 3, 2006).

77. *David, et al.,* G.R. No. 171396 at 39 (citing Justice Mendoza Concurring Opinion in Estrada v. Sandiganbayan, 369 SCRA 393 (2001)).

78. *David, et al.,* G.R. No. 171396, Dissenting Opinion of Justice Tinga.

79. *See* Connally v. General Construction Co., 269 U.S. 385, 391, 70 L.Ed. 328 (1926) cited in Ermita-Malate Hotel and Motel Operators Association. v. City Mayor, 20 SCRA 849, 867 (1967).

1. Violates due process for failure to accord persons fair notice of the conduct to avoid; and
2. Leaves law enforcers unbridled discretion in carrying out its provisions.[80]

With the following premises, Justice Panganiban remarked in his concurring opinion in the case of *Estrada v. Sandiganbayan*[81] that this "doctrine… can only be invoked against that specie of legislation that is utterly vague on its face, for example, that which cannot be clarified whether by a saving clause or by construction."[82]

It must be noted that U.S. Courts allowed facial challenges to vague statutes even if these do not implicate free speech. The reason for this, as pointed out by Justice Kapunan in his dissenting opinion in the Plunder Law case filed against former President Estrada, is that to limit the applicability of the vagueness doctrine would be "tantamount to saying that no criminal law can be challenged however repugnant it is to the constitutional right to due process."[83] Moreover, a long line of U.S. decisions including *Springfield v. City of Columbus*[84] which involved a challenge to a Columbus City Ordinance banning certain assault weapons, upheld the doctrine that the court "will resolve vagueness challenges in ways different from the approaches it has fashioned in the law of overbreadth"[85] since the former is not limited to free speech cases unlike the latter principle.[86] Therefore, to characterize such a doctrine as applying only to free speech cases would be overly limiting, for it may, as can be observed from the very purpose of the doctrine, be applied to other cases outside the fundamental constitutional rights. This brings to mind a similar argument raised by Justice Tinga in the case of *Romualdez v. Sandiganbayan,*[87] when he poignantly held that "the fact

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80. Estrada v. Sandiganbayan, 369 SCRA 393 (2001).

81. *Id.*

82. *Id.* at 487 (citing People v. Nazario, 165 SCRA 186 (1998)).

83. *Id.* at 530, Justice Kapunan Dissenting Opinion.

84. Springfield v. City of Columbus, 29 F.3e 250, 1994 FED App 239 (6th Cir 1994).

85. Lockheart, et al., *Vagueness and Overbreadth: An Overview* in CONSTITUTIONAL LAW, CASES-COMMENTS-QUESTIONS 740 (6th ed. 1989).

86. *See* Lanzetta v. New Jersey, 306 US 451 (1939); Springfield Armory, Inc. v. City of Columbus, 29 F.e3d 250, 1994 FED App 239 (6th Cir 1994).

87. Romualdez v. Sandiganbayan, 435 SCRA 371 (2004).

that a particular criminal statute does not infringe upon free speech does not mean that a facial challenge to the statue on vagueness cannot succeed."[88]

This Analysis does not purport to say that in case the *void for vagueness doctrine* is found to apply to other cases not involving the freedom of speech, the respondent's contention that the case should have been dismissed would prevail. What is being pointed out is that: *first*, declaring the proclamation void due to vagueness would require the President to state clearer parameters and standards of how she used her powers under the state of emergency and *second*, it would have been more scholastically challenging if the arguments raised in this case have been discussed and refuted on different grounds like, as pointed out by Justice Tinga, exploring the realm of rights and obligations of both the petitioner and respondents and not just the inapplicability of a facial challenge.

C. On the Locus Standi of Petitioners

Justice Sandoval-Guttierez, penning for the majority, accepted the stand of the petitioners that they have a right to sue based on three grounds: 1) transcendental importance of the case, 2) right of a citizen to take legal action on matters involving a public right, and 3) direct injury test on cases of a real party in interest.

In more recent jurisprudence involving constitutional issues, the Court drew a distinction between a person who has *locus standi* and a real party in interest who suffered direct injury by reason of the law or statute under attack. Standing, as a requisite before one can file a suit, has the following elements:

1. petitioner must have a personal interest in the suit (an injury suffered which may be legal, economic or environmental;[89]
2. the injury must be traceable to the governmental act challenged; and
3. the injury must be redressable by the remedy being sought by the petitioner.[90]

However, there were decisions, such as that of Justice Mendoza's *ponencia* in the second *Kilosbayan v. Morato*[91] case which followed the view

88. *Id.* at 396 (citing Estrada v. Sandiganbayan, 369 SCRA 393 (2001)).

89. JOAQUIN G. BERNAS, S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 940 (2003 ed.). [hereinafter BERNAS, CONSTITUTION].

90. *See* Telecommunications and Broadcast Attorneys of the Philippines, Inc. v. Commission on Elections, 289 SCRA 337, 343 (1998).

that *locus standi* presents a broader rule than that of the rule on "real party in interest." Such a view, according to a distinguished constitutionalist, Joaquin Bernas, SJ, citing the second *Kilosbayan* case, is used only when constitutional issues are involved.[92] Given the very small margin of those who supported this view and those who did not, the majority further ratiocinated that:

> The difference between the rule on standing and real party in interest has been noted by authorities, thus, "It is important to note… that standing, because of its constitutional and public policy underpinning is very different from questions relating to whether a particular plaintiff is the real party in interest or has capacity to sue … Standing restrictions require a partial consideration and the proper rule of the judiciary on certain areas."[93]

Following the decision of Kilosbayan, the case of IBP thus recognized that:

> [T]he Court has the discretion to take cognizance of a suit which does not satisfy the requirement of legal standing when paramount interest is involved. In not a few cases, the Court has adopted a liberal attitude on the *locus standi* of a petitioner where the petitioner is able to craft an issue of transcendental significance to the people. Thus, when the issues raised are of paramount importance to the public, the Court may brush aside technicalities of procedure. In this case, a reading of the petition shows that the IBP has advanced constitutional issues which deserve the attention of this Court in view of their seriousness, novelty and weight as precedents.[94]

This brings us to a conclusion that a citizen may bring a case involving a constitutional issue despite not having suffered a direct injury.

There is no doubt as to the standing of petitioners Randolph David et al., Ninez Cacho-Olivares, The Tribune, opposition Congressmen, KMU and ALG. However, such a finding of standing was not conferred to petitioners Jose Anselmo Cadiz and Loren Legarda for neither did they nor any of the groups they represented suffer direct injury by virtue of P.P. 1017. However, adhering to the chain of decisions which held that a relaxation of standing requirements shall be allowed on matters which are of *transcendental importance*, the Court held that all petitioners have *locus standi*. This is how the concept of *locus standi* applied to constitutional issues is seen today. But as noted by Fr. Joaquin Bernas, "the last word on *locus standi* had not yet been

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91. Kilosbayan v. Morato, 246 SCRA 545 (1995).

92. BERNAS, CONSTITUTION, *supra* note 89, at 944, 946.

93. *Kilosbayan,* 246 SCRA at 562 (citing FRIEDENTHAL, KANE AND MILLER, CIVIL PROCEDURE 328 (1985 ed.)).

94. IBP v. Zamora, 338 SCRA 81 (2000).

said"[95] thus, "whether it [the concept of *locus standi*] will stay that way still remains to be seen."[96]

D. On the Calling Out Power in P.P. 1017

The Constitution provides that "[t]he President shall be the Commander-in-Chief of all the armed forces of the Philippines and whenever it becomes necessary, he may call out such armed forces..."[97] This is the basis of the President's *calling out power*. It must be pointed out, however, that such a power is not without limitations. The Constitution specifically provides that the President may call out the AFP only for the following purposes: to prevent or suppress lawless violence, invasion, or rebellion.[98]

By definition, invasion covers the crimes of treason, conspiracy, proposal to commit treason, misprision of treason, espionage, inciting to war to give motives for reprisals, violation of neutrality, correspondent with hostile country, and flight to enemy's country,[99] all of which involve a foreign element or "violation by a subject of his allegiance to his sovereign or to the authority of his State."[100]

Rebellion, on the other hand, is defined under Article 134 of the Revised Penal Code, providing—

> [R]ebellion... is committed by rising publicly and taking arms against the Government for the purpose of removing from the allegiance to said government or its laws, the territory of the Republic of the Philippines or any part thereof, or any body of land, naval or other armed forces, or depriving the Chief Executive or the Legislature, wholly or partially, of any of their powers of prerogatives.[101]

Unlike the other two, lawless violence is devoid of any definition in our present law, thereby making it more difficult to determine whether such incident has occurred. A closer look at the discussions of the Commissioners during the deliberations of the Constitutional Commission would reveal

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95. BERNAS, CONSTITUTION, *supra* note 89, at 945.

96. *Id.* at 949.

97. PHIL CONST. art. VII, § 18.

98. *See id.*

99. *See generally* 2 LUIS B. REYES, THE REVISED PENAL CODE BOOK, art. 114 - 121 (1998).

100. *Id.* at 3.

101. An Act Revising the Penal Code and Other Penal Laws [REVISED PENAL CODE] art. 134 (1932).

nothing when it comes to lawless violence except that a situation where there is public disorder, as pointed out by Commissioner Regalado, is already more or less covered by such an instance.[102]

Aside from the Constitution, the term lawless violence is also used in the Local Government Code of 1991 which provides that local government officials may call upon appropriate law enforcement agencies to suppress… lawless violence… and apprehend violators of the law when public interest so requires and the local police forces are inadequate to cope with the situation…[103] It can be inferred from this provision that a state of lawless violence connotes a level of criminal activity where the police forces are insufficient to meet and surmount a threat.

In view of the definitions cited above, the question of whether there was an occurrence of any of these three incidents which would necessitate the use of the *calling out power* remains. The respondents assert that given the factual bases she presented, the exercise of the President's *calling out power* is valid—which assertion was supported by the Court when it pronounced that "the calling out power is discretionary power solely vested on the President's wisdom,"[104] subject to the Court's "examination of whether such power was exercised within permissible constitutional limits or whether it was exercised in a manner which constitutes grave abuse of discretion."[105] However, given the overarching effects of P.P. 1017 to fundamental civil liberties, such a simplified sweeping generalization cannot just be had. In examining the provisions of P.P. 1017, the following points should have been highlighted by the Court:

Firstly, assuming *arguendo* that there were indeed factual bases to the declaration, still, the President is not authorized to declare a state of national emergency under article XII, section 17 of the Constitution. As noted by Fr. Joaquin Bernas, the President chose the wrong instrument to accomplish what she wanted in view of the fact that by choosing the *calling out power*, which is the least of her powers, she was proscribed from wielding a greater power.[106] This means that neither can she effect warrantless arrests, searches nor any act that would violate the citizen's constitutional right. Therefore,

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102. *See* 2 Record of the 1986 Constitutional Commission 473.

103. An Act Providing for a Local Government Code of 1991, Republic Act. No. 7160, § 444 (1991).

104. *David, et al.,* G.R. No. 171396 at 30.

105. *Id.* at 30 (citing IBP v. Zamora, 338 SCRA 81(2000)).

106. Joaquin G. Bernas S.J, *Analysis*, Phil. Daily Inquirer, May 5, 2006, at A1. (hereinafter Bernas, Analysis).

any act not within the *calling out power* of the President or done in the exercise of a greater power, should be considered *ultra vires*.

Secondly, article XII, section 17 of the Constitution pertains to an emergency power which, according to article VII, section 23 of the Constitution, may only be exercised upon authorization from the Congress. On this score, the Court was in agreement that a proclamation from the President giving her power to declare a state of national emergency and thereby allowing her to exercise emergency powers such as temporary take-over of privately owned public utilities or business affected with public interest cannot supplant the provisions of the Constitution. An act which implements this provision is illegal and should be rendered unconstitutional.

Thirdly, a facial inspection of the Whereas clauses of P.P. 1017 would reveal that the true intent of the proclamation was really to impede the threat of a rebellion. Assuming that indeed, there existed a threat of rebellion, a proclamation commanding the military to suppress such is also unnecessary in view of the fact that rebellion is a continuing crime and thus, does not require authorities to acquire a warrant before a person suspected of such a crime is apprehended.[107] Therefore, similar to the ruling of the Court in *Lacson,*[108] an exercise of the *calling out power* to suppress rebellion "has no legal significance. It is vague and amorphous and does not give the President more power than what the Constitution says... But whatever the term means, it cannot diminish or violate constitutionally-protected rights."[109]

Lastly, it should have been highlighted by the Court that under the Constitution, "[s]overeignty resides in the people and all government authority emanates from them,"[110] therefore, "civilian authority is, at all times, supreme over the military."[111] This means that the government should generally operate upon civilian authority except in cases provided for in the Constitution—in cases of lawless violence, rebellion, or invasion. A careful reading of P.P. 1017 reveals that it invokes lawless violence as its only justification. To reiterate, what was mentioned above, lawless violence connotes a level of criminal activity where the police forces are insufficient to meet and suppress threats. In view of the fact that lawless violence is the only justification for P.P. 1017, its indicators should have been readily

107. Umil v. Ramos, 187 SCRA 311 (1990). (This case, although often attacked due to its detrimental effects on the rights and civil liberties of citizens, remains to be good law).

108. Lacson v. Executive Secretary, 357 SCRA 756 (2001).

109. *Id.* at 773.

110. PHIL. CONST. art II, § 1.

111. PHIL. CONST. art II, § 3.

apparent to consider the existence of the exercise of *calling out power* reasonably necessary. Unfortunately, such a situation was never claimed nor proven to have existed by the President before or after the issuance of Proclamation 1017, thus, fueling doubts as to whether such a proclamation was indeed necessary.

The Court held that as provided in the case of *Lansang*, the standard that should be applied in inquiring into the President's exercise of power is arbitrariness and not correctness. In this case, the only means by which we can measure whether the President's acts were arbitrary is to delve into her justification for such a proclamation and to prove that such justifications existed. Unfortunately, the President's justification in this case, which is lawless violence, was never proven nor claimed.

E. On the Liability of the President

There is no doubt that the acts of the police in applying the provisions of P.P. 1017 and G.O. No.5 were to some extent, illegal and violative of the constitutional rights of the petitioners. However, the respondents were quick in their reply that the President should not be blamed for the misapplication of the law since such were the acts of police officers and solely said officers' responsibility.[112]

Precipitating any issue on the matter, Solicitor General Benipayo urged the Court to separate the civil rights violations from P.P. 1017 thereby insulating President Arroyo from all responsibilities. The Court, in its discussion of the procedural issues, did just that by invoking presidential immunity in its statement that "it is not proper to implead President Arroyo as respondent… [given the view that] the President, during his tenure of office or actual incumbency, may not be sued in any civil or criminal case."[113] The Court further quipped:

> [o]ther than [the] declaration of invalidity, this Court cannot impose any civil, criminal or administrative sanctions on the individual police officers… they have not been individually identified and given their day in court. Given this pronouncement, there is no doubt that the civil liberties violated would be left unpunished.[114]

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112. David, et al. v. Gloria Macapagal-Arroyo, et al., G.R. No. 171396, May 3, 2006, at 75 (citing the Transcript of Stenographic Notes, Oral Arguments 507-08 (Mar. 7, 2006)).

113. *Id.* at 28 (citing the deliberations of the Constitutional Commission in DE LEON, 2 PHILIPPINE CONSTITUTIONAL LAW 302 (2004 ed.)).

114. *Id.* at 77.

It is a fact that several rights were transgressed by the police officers. Like these officers, the President also swore to protect these very rights, which makes it more difficult to comprehend that the only justification the Executive has offered to explicate such incidents was that the transgressions were brought about by alleged "misapplication of the law."[115] On the contrary, none other the than Senate of the Philippines, in its report[116] on the violations of the constitutional right to freedom of the press, found that National Telecommunications Commission (NTC) Commissioner Solis himself, together with Philippine National Police (PNP) Director General Lomibao, disclosed in several press conferences that they derived their mandate from P.P. 1017. Moreover, the petition of Cacho-Olivares and the *Daily Tribune* revealed that Presidential Chief-of-Staff Michael Defensor himself was quoted as saying that, "the raid [of Tribune] was meant to show a strong presence to tell media outlets not to connive or do anything that would help the rebels in bringing down the government [sic.]"[117] and that after the issuance of P.P. 1017, he declared that "warrantless arrest and take over of facilities including the media, can already be implemented."[118] Therefore, even if indeed there was a misapplication of the law, such was the fault of none other than the President's cabinet secretaries and the subordinate officers of her department.

The Philippine Constitution under article VII, section 17 provides that "[t]he President *shall have control of all the Executive departments, bureaus, and officers*..."[119] In Fr. Joaquin Bernas' commentary on this provision, he said:

> Out of... practical necessity has arisen... the "doctrine of qualified agency" [which] postulates that "all executive and administrative organizations are adjuncts of the Executive departments, the heads of the various executive departments are assistants and agents of the Chief Executive... and 'the acts of the secretaries of such departments, performed and promulgated in the

115. *Id.* at 75 (citing the Transcript of Stenographic Notes, Oral Arguments 507-08 (Mar. 7, 2006)).

116. Philippine Senate Resolution No. 461, An Inquiry on the Violations of the Constitutional right to Freedom of the Press, Senate Report No 69, adopted on Apr. 4, 2006

117. *David, et al.,* G.R. No. 171396 at 12 (citing Petition in G.R. No. 171400, at 11).

118. *Id.* at 10 (citing Petition in G.R. No. 171396, at 5).

119. PHIL. CONST. art. VII, § 17. (emphasis supplied).

> regular course of business, are, unless disapproved or reprobated by the Chief Executive, presumptively the acts of the Chief Executive"[120]

Moreover, it was long established in the case of *Villena v. Secretary of Interior*[121] that "each head of a department is, and must be, the President's alter ego in the matters of that department where the President is required by law to exercise authority."[122] Therefore, given such an immense power, the President cannot be insulated from any responsibility for the acts of persons under his control. As further highlighted by Justice Laurel in his *ponencia*:

> It is therefore logical that he, the President, should be answerable for the acts... of the entire Executive Department before his own conscience no less than before that undefined power of public opinion which, on the Daniel Webster, is the last repository of popular government.[123]

Nothing in the survey of President's Arroyo public statements in the aftermath of P.P. 1017 and G.O. No. 5 would show any reproach nor disapproval of the acts of her Cabinet Secretary and members of the Executive Branch. It can neither be said that such acts and words of General Lomibao, Commissioner Solis, Secretary Defensor and others were outside the regular course of their work. This leads to a conclusion that as far as President Arroyo is concerned, such acts, which became the basis of police actions—the warrantless arrests of the petitioners, the raid of the *Daily Tribune* and dispersal of peaceful rallies, are valid and binding on her, as the head of the Executive Branch. As observed by Dean Raul Pangalangan of the University of the Philippines College of Law, "when President Arroyo signed P.P. 1017—her cabinet secretaries declared that such would authorize warrantless arrests and seizure of private businesses. Under the alter-ego doctrine, the acts of the cabinet secretaries are acts of the President."[124] On this score, contrary to the decision of Justice Sandoval-Gutierrez, neither should the President be insulated from any responsibility nor should she be considered blameless for the violation of the civil liberties of the petitioners.

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120. BERNAS, CONSTITUTION, *supra* note 89, at 858 (citing Lacson Magallanes v. Paño, 21 SCRA 895 (1967) and Roque v. Director of Lands, 72 SCRA 1 (1976)).

121. Villena v. Secretary of Interior, 67 Phil. 451 (1939).

122. *Id.* at 464 (citing Myers v. US, 47 Sup. Ct. Rep., 21 at 30; 272 US, 52 at 133; 71 Law. Ed. 160).

123. *Id.* at 465.

124. Dean Raul Pangalangan, *Trifling with Constitutional Sanctities*, Philippine Daily Inquirer, May 5, 2006, at A12.

VI. GENERALIZATION

Noted constitutional commentators would characterize the Supreme Court decision on the constitutionality of P.P. 1017 as another laurel leaf for democracy and another nail in the sarcophagus of arbitrary exercise of executive prerogatives. However, despite the fact that portions of P.P. 1017 have been declared unconstitutional, nothing much was gained out of the whole exercise except a few drawbacks on the part of the President's greater plan, which, in the words if Justice Panganiban, was "to test the outer limits of presidential prerogatives."[125]

So far, it is apparent that the Supreme Court is unwilling to overturn its earlier decisions dealing with the exercise of the President's Commander-in-Chief power as detailed in the cases of *Lansang, Lacson, Intergated Bar of the Philippines and Sanlakas v. Executive Secretary.*[126] These cases provide that the President may exercise the prerogatives provided in article VII, section 18 of the Constitution and limited by the same provision, which decision is subject to judicial review in order to determine whether such an exercise of power is within permissible constitutional limits. An exercise of military power outside such provision would be *ultra vires.*

This decision however, does not hinder the President from exercising such powers whenever, based on her network of intelligence, *it becomes necessary*—a standard which merely calls for factual bases in order to shield the President from any attack of arbitrariness. Given the insurmountable powers of the President and its possible effects on the civil liberties of the citizens, such a standard is insufficient.

In cases where the President exercises her military powers based on factual bases she herself has established, it is the duty of the Court not just to ascertain the existence of such bases, but more importantly, it is within its power and duty to determine whether such facts were sufficient to legalize the exercise of power. The standard should not just be the presence of factual bases but rather existence of factual sufficiency.

Nonetheless, Proclamation No. 1017 can be considered as nothing but a *paper tiger*—a mere flirtation with power.[127] No matter how fearsome it may seem or how threatening its application may be, such a proclamation means nothing more than a threat, aimed to provide a *chilling effect* on the enemies

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125. *See* David, et al. v. Gloria Macapagal-Arroyo, et al., G.R. No. 171396, May 3, 2006, Justice Panganiban Concurring Opinion.

126. Sanlakas v. Executive Secretary, 421 SCRA 656 (2004).

127. *See* David et al., Justice Panganiban Concurring Opinion.

and critics of the government. It cannot be a basis for arbitrary arrests, raids, or even limitation to freedom of speech or of assembly.

However harmless the Proclamation may be, it continues to resound within legal circles primarily because of the consequences of its misapplications, particularly on the civil liberties of the citizens; thus, it must be scrutinized and in the words of Justice Panganiban, *defanged*.

In order to preclude the re-issuance of another P.P. 1017 in the future, clearer standards should be set. This is the new challenge which the Court is facing today—a challenge which entails a balancing of the exercise of state power and the protection of civil liberties and rights of the people. In a system where precedents are followed, it would be very difficult for the Court to tighten its cap and modify, if necessary, its former rulings. However, there is a great need for these to be accomplished before the whole system collapses towards the same rut of a strong state where civil liberties are considered as mere ideals.

As an afterthought, it may be left to mind that the fulfillment of the challenges presented are based on the beliefs held by the majority of the Justices sitting in our Supreme Court. There may be some of them who believe that the only solution to our predicament is the issuance of proclamations such as P.P. 1017 in order to show brawn—the existence of a strong state. Thus, it may be possible after all that such *paper tigers*, in the eyes of our Justices, should be left *fanged* for the betterment of our country's future. Whatever beliefs our Justices hold dear, one thing is certain: as the bulwark of democracy, the Court must be forever vigilant in carrying out its duties so as not to leave unrestrained the exercise of state power, which, if left unchecked would imperil the very blessings of genuine democracy which our fathers have long fought for—a rule by the people, for the people and of the people.