NAVIGATING THROUGH SHIFTING SANDS: REINFORCING JUDICIAL INDEPENDENCE IN THE PHILIPPINE CONTEXT*

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The primary duty of the Court is to render justice. The resolution of the issues before it must be grounded on law, justice and the basic tenets of due process, unswayed by the passions of the day or the clamor of the multitudes, guided only by its members' honest confidence, clean hearts and their unsullied conviction to do what is right under the law."

- Justice Santiago Kapunan[1]

Independence stands the danger of becoming isolationism.

- Prof. Merlin M. Magallona[2]

INTRODUCTION

Political communication has emerged as a significant concern in the fields of law, psychology, and other social sciences.[3] In the Philippines, while the prominence of the field can be attributed to such recent events as the so-called Edsa "II" and "III", it is submitted that this newfound interest is due more to the gradual accumulation of the body of evidence showing that the skillful use and manipulation

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[1] Estrada v. Sandiganbayan, G.R. No. 148560, 19 November 2001 (Kapunan, S., dissenting opinion).

[2] MERLIN M. MAGALLONA, *Philippine Experience in Judicial Independence: General Context and Specific Problems*, 72 PHIL. L. J. 174 (1997).

[3] SHANTO, IAN GARR & ADAMS, SIMON, THE METHOD IS THE MESSAGE: THE CURRENT STATE OF POLITICAL COMMUNICATION (last visited 29 July 2002) http://psych.annualreview.org.

of technology and the media is essential to shaping public opinion, thereby effecting societal change. While traditional modes of gathering or influencing public opinion (i.e. use of lobbyists, surveys, and partisan groups) have declined in importance,[4] the advent of new technology that allows direct transmission of one's views in a large scale to a large audience calls for a reassessment of traditional notions governing the concept of "public opinion." Essential to this is the identification of *loci* that genuinely promote or effect change.

SOME PREMISES

The premises underlying this paper are fourfold: 1) despite all the safeguards currently in place, judicial decision-making can never be immune to public opinion, 2) the threat that public opinion poses to judicial independence is more apparent than real, 3) this perceived threat arises from a misappreciation of the role of public opinion in democratic governance, and 4) rather than suppress public opinion, the remedy to such a perceived threat, is the cultivation of a "Rule of Law Culture." The need for an expansive approach in appreciating the concepts of civil society and public opinion is imperative. In this light, considerable effort was expended to avoid the temptation to either romanticize or demonize these concepts.

I. THE CONTEMPORARY APPEAL OF CIVIL SOCIETY

Civil society has emerged as the central locus of public opinion in many contemporary societies in the age of electronic media. A concept developed from the ideas of one of the greatest political theorists of modern times, Antonio Gramsci,[5] the role of civil society involved the generation of consent and the formation of the collective will. Gramsci recognised "new forms of plurality and association specific to modern civil society"[6] which encompassed, among others, neighborhood associations, churches, unions, cultural associations and political parties. These modern forms of association manifested capacities for organizing social action capable of transforming themselves into vehicles for social action. The capacity for action included the skillful coaptation of channels of information dissemination used in clarifying or defining the path society takes through the advocacy of ethical values and norms affecting the manner in which society should be governed. Such advocacy

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[4] *Id.* at page 8.

[5] NOBERTO BOBBIO, CIVIL SOCIETY AND THE STATE 82-94 (1988); *The International Gramsci Society* (last visited 29 July 2002) http://www.italnet.nd.edu/gramsci/.

[6] *Id.*

of ethical and moral norms, therefore, necessarily pervaded every aspect of the state and governmental channels.[7] Under this formulation, traditionally sheltered channels such as courts, could not escape ethical or moral scrutiny. This writer posits that public opinion and the independence of the judiciary are not necessarily divergent concepts. The harmonizing of these concepts occurs when one situates the proper role of public opinion in a judicial system that jealously guards its independence.

A. THE TRADITIONAL LOCUS: MEDIA

Mass media plays an indispensable role in providing the information needed to enable citizens to participate in governance. Prior to the electronic age, traditional media served as the main channel by which principled criticism of the judiciary is brought to fore.[8] No less than the present Supreme Court Chief Justice has observed that it is through these channels that the safeguarding of some of our most cherished freedoms is accomplished.[9]

While it is indisputable that the media plays an invaluable role in shaping public opinion,[10] the two are not synonymous – media mirrors public opinion, albeit, sometimes, in a distorted manner. Indeed, the misconception that the media reflects the public pulse is sometimes too pervasive for comfort.[11] All too often, there is a tendency to confuse which is the medium and which is the message.

The problem, however, is that the message reflects the class ownership of media in our society. While the law guarantees a free press to the extent of according free press and expression the status of preferred rights, the opinions freely expressed by our media rarely reflect the opinion of the masses. To say that the free press is public opinion fails to take into consideration the economic interests and motivations behind every editorial and media facility in existence.

To illustrate this point, consider the favorable treatment by the media in its coverage of EDSA II[12] in contrast with the unsavory portrayal of EDSA III.[13] While both involved hundreds of thousands of people expressing their grievances at the

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[7] *Id.*

[8] DON R. PEMBER, MASS MEDIA AND THE LAW 234 (1998).

[9] HILARIO G. DAVIDE, *The Partnership between the Judiciary and Media in the New Millenium*, 4 CT. SYS. J. 1 (1999).

[10] *Id.*

[11] D. PEMBER, *supra* note 7.

[12] ARMANDO DORONILA, *Case of Estrada Partisans Extreme Exercise in Futility*, PHILIPPINE DAILY INQUIRER, May 19, 2001.

[13] DELMAR CARINO, *Again it's 13-6 Against Estrada*, PHILIPPINE DAILY INQUIRER, April 4, 2001.

EDSA shrine, the former was portrayed as a triumph of society[14] while the latter was portrayed as a mob of drug addicts, bussed multitudes, the uneducated, and the uninformed.[15] In reality, the public opinion fostered by traditional media remains essentially elitist, exclusionary and selective: its tireless moralizing reflecting the Judeo-Catholic ethos that Rizal long ago denounced as hypocritical.

One needs to be pragmatic by simply accepting that media cannot be considered reflective of the public opinion. In taking this stance, however, one should avoid going to the other extreme of espousing total divorce between the press and public opinion. The discussion so far only endeavors to make the proper delineation between the two concepts. In no way is it asserted that the media has nothing to do with public opinion. Nonetheless, though it is conceded that the media plays a role in the shaping of public opinion, a discussion on the latter's effect on judicial independence would be better appreciated by relying on another indicator.

All told, media with its current ownership and attitude can not accurately be considered representative of public opinion. It is but an aspect of the concept, public opinion. With the constitutional guarantees of free press and expression, it can be vigorously opinionated, though not necessarily vigorously accurate. This point is necessary in the subsequent discussion on the role of media in some recent decisions of our Supreme Court.

B. A VIABLE ALTERNATIVE: CIVIL SOCIETY

The demise of communism in Europe and the wave of democratic movement in the world, partly triggered by EDSA I, II, and III has spurred renewed interest in the idea of civil society. Lately however, the term has been used so loosely that "it has become synonymous, at best, with what we used to call 'cause-oriented groups', and at worst, with un-elected meddlers and hecklers without any real political base."[16] An unfortunate turn of events indeed, considering that the concept has solid foundations. To be sure, the concept is far from new. It traces its classical roots from Aristotle,[17] then undergoes significant refinement in the hands of Gramsci and his followers.[18] For Gramsci, civil society is a modern historical product borne of the world of needs and relations. Rather than a mere natural

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[14] *Id* at 12.

[15] *Id* at 13.

[16] RANDY DAVID, *The Spirit of Civil Society* ,Philippine Daily Inquirer ,July 14, 2002.

[17] *The Celebration of Civil Society* (last visited 29 July 2002) http://www.usyd.edu.au/philosophy/redding/HH_Ch10.shtml.

[18] *Id.*

phenomenon, it is an active and complex process spurred by the movements of several sectors of society.[19] He defined the concept thus: "[Civil Society is] the political and cultural hegemony which a social group exercises over the whole of society, as the ethical context of the state."[20]

Gramsci's civil society did not confine itself to the sphere of economic relations but also included the spontaneous forms of social organizations. He advances a totally different concept from Marx in that nowhere does he suggest that civil society belongs to the terrain of economic activity. Instead, he fixes two structural levels - the one that can be called civil society, that is the assemblage of organizations commonly referred to as private, and the political society or the state.[21] Unlike the revolutionary left, civil society does not seek to do away with the state. Rather, it conducts its activities within the bounds permitted by the state, seeking to change those bounds in fundamental ways. Of great significance to our discussion is the way Gramsci confronted Marx's economic reduction of civil society by his "methodological differentiation" of the latter from economics and the state.[22] His concern was that the natural reduction of civil society gives rise to problems concerning transitions to a genuinely democratic society. Left unchecked, this could lead to the demise of that web of independent societal associations that guards against the excesses of the state and strategically calculating forces of the market economy.[23] This last comment is made even more significant when viewed in light of the discussion made earlier about the limitations of media.

By separating the three spheres, Gramsci allows a thematisation of the generation of consent through a cultivated social hegemony. Put differently, the autonomy Gramsci gives civil society minimizes the likelihood of political maneuvering, cooption and clientelistic inducement by powerful economic institutions.[24] The relationships within this trichotomous framework, the state, civil society and economy, are illustrated in the following figure:

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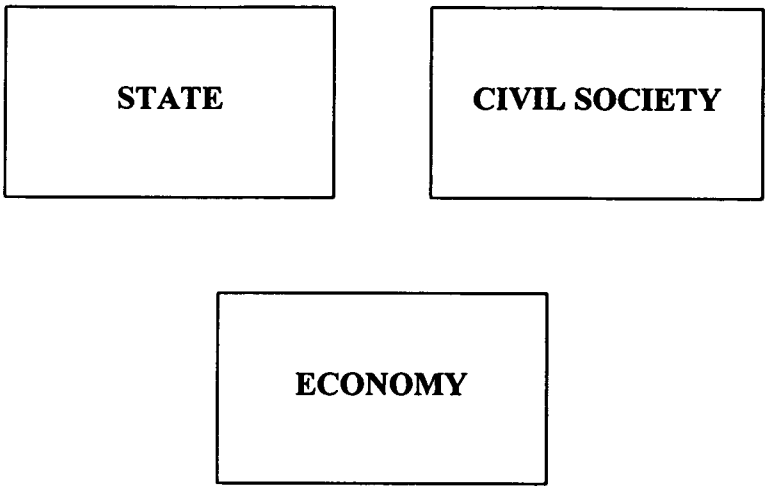
[19] N. BOBBIO, *supra* note 4.
[20] *Id.* at 84.
[21] *The International Gramsci Society*, *supra* note 4.
[22] COHEN & ARATO, CIVIL SOCIETY AND POLITICAL THEORY 146-147 (1992).
[23] *Id.* at 38.
[24] *Id.* at 39.

Figure I. State-Civil Society Relations According to Gramsci



The catalyst of the current interest on the role of Civil Society in governance is the development of technology and media, which makes it easier to crystallize opinion at a level and speed which could not have been imagined by the original civil society thinkers. Traditionally, the only venue where equality in the means of expression was possible was on the streets. Fortunately, recent technological advances have given us more. Electronic mail and short message services (text messaging) are good examples. Both provide a means whereby one can express his views on any matter and communicate it at a speed previously unheard of and a scale previously unreachable. They provide a highly accessible form of communication to sectors previously denied access by traditional forms of media. To a certain extent, this levels the playing field as it allows discourse between traditionally unequal classes. Indeed, in cyberspace and in text messages, the speaker's preeminence is irrelevant and one need not rely on credentials in order to be heard.

Recent events confirm the immense capability of these new modes of communication in disseminating public opinion. Nothing better illustrates this than the almost spontaneous mobilization of forces at EDSA II following the

controversial vote during President Estrada's impeachment trial.[25] That such a mobilization came only within a matter of hours after the closing of that day's session at the impeachment court is a testament to the speed by which public sentiment travels nowadays.

While it is conceded that civil society does not represent the entire public sentiment, it is maintained that within the present context, due to its solid theoretical framework and the recent technological developments, it remains as a viable barometer of public opinion.

II. CIVIL SOCIETY AND THE CONCERN FOR JUDICIAL INDEPENDENCE

A. PUBLIC OPINION AND JUDICIAL INDEPENDENCE

Public opinion challenges the myth of judicial sacredness with the realities of the exercise of political power. Judicial independence is the fundamental precept that provides for a judiciary that is free from external influences.[26] It requires a judiciary that impartially ascertains the facts of a case and applies the appropriate legal principles. Our governmental system relies on this impartiality which is based on the principle of checks and balances created to ensure that no single branch would dominate the government.[27] Of equal importance to this principle is the right of every person to have his case heard before an impartial judge. Under our system of government, every citizen must be assured that resort to the courts will always remain a viable option as it guarantees the impartiality and fairness of a judge in resolving disputes.[28] As held by the Supreme Court, "all suitors are entitled to nothing short of the cold neutrality of an independent, wholly free, disinterested and impartial tribunal."[29] Judicial independence, thus, exists for both institutional and individual purposes.

1. Institutional Independence

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[25] VOLT CONTRERAS AND CHRISTIAN ESGUERRA, "*High Court Under Pressure from Estrada Friends, Foes*" PHILIPPINE DAILY INQUIRER, January 21, 2001.

[26] Report of the American Bar Association Commission on Separation of Powers and Judicial Independence (last visited 29 July 2002) http://www.abanet.org/judind/publ/home.html.

[27] M. MAGALLONA, *Philippine Experience in Judicial Independence: General Context and Specific Problems*, 72 PHIL. L. J. 164 (1997).

[28] VICENTE ABAD SANTOS, *The Role of the Judiciary in Policy Formation*, 41 PHIL. L. J. 568-570 (1966).

[29] Luque v. Kayanan, 29 SCRA 178 (1969).

Under the institutional concept of judicial independence, the insulation of the courts from external influence is perceived as the central element of a judiciary in a society that upholds the rule of law.[30] Central to this insulation is the setting up of textual safeguards that prevent or minimize any incursion into the process of judicial decision-making. Under this traditional paradigm, vigorous discourse must inform decision-makers of the political branches to make them effective. However, with respect to the judiciary, its isolation from external influences is essential to its ability to carry out its work by applying the law and the law alone, to a given set of facts and circumstances.

The 1987 Constitution is replete with textual safeguards that provide our judiciary with the armor of institutional independence. Magallona[31] narrows down these safeguards into three categories:

> (1) a system of Control over the discretion of the President as the appointing power;
> (2) elimination of legislative power as a decisive factor in appointments to the Supreme Court and all judges of inferior courts; and
> (3) greater control by the Supreme Court over the system of judicial appointment."[32]

Under our Constitution, the President can only appoint from a list of nominees prepared by a constitutional body known as the Judicial and Bar Council.[33] Also, members of the judiciary are given security of tenure.[34] To reinforce this tenurial security, Congress is banned from passing a law that reorganizes the judiciary.[35] The judiciary, aside from having fiscal autonomy[36] is also free from administrative supervision by the other branches of government.[37]

Viewed in the light of these provisions, the institutional independence of the judiciary in our jurisdiction can hardly be deemed threatened. In fact it has been observed that, "...few constitutional systems in the world, if ever, could match the elaborate mechanism instituted in the Philippine Constitution and the laws for its

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[30] M. MAGALLONA, *supra* note 26 at 164.
[31] *Id.*
[32] M. MAGALLONA, *supra* note 26 at 170.
[33] CONST. art. VIII, sec. 9.
[34] CONST. art. VIII, sec. 11.
[35] CONST. art. VIII, sec. 2.
[36] CONST. art. VIII, sec. 3.
[37] CONST. art. VIII, sec. 6.

protection and preservation,"[38] What is more vulnerable, however, is the other aspect of judicial independence which will be discussed next.

2. Decisional Independence

The judiciary does not exist in a vacuum. Recognition of this fact has given rise to the concept of decisional independence. While institutional independence concerns itself with the preservation of the integrity of the judiciary as a whole, decisional independence focuses on the ability of the individual judge to remain impartial in a given case. The ability of a judge to interpret the facts and apply the laws fairly, are key elements to the administration of justice.[39] Indeed, given that only a relatively few number come in contact with the institution itself, it is through the acts of individual judges that much of the perceived independence of the judiciary can be attributed to.

The justice system is based on the resolution of facts and the analysis of law in a deliberative, not political process. In this respect, judicial independence can only be said to exist if a judge bases his decisions on, "good faith interpretations of the laws and the facts of the individual case before them."[40] Any form of external influence that may cause him to deviate from such an interpretation diminishes judicial independence. Fear of any adverse repercussion due to his decision is the main concern of a judge as far as decisional independence is concerned. Decisional independence therefore mainly relies upon, both the Constitutional provision of security of tenure for members of the judiciary and the prescribed mode of redress given by law to litigants unhappy with a particular decision, which is appeal. Judges however, unfortunately bear the burden of suffering the brunt of attacks made by litigants, interested parties and even politicians.

The factors which affect decisional independence have increasingly become varied.[41] And with the increase of such factors, the traditional safeguards are seemingly inadequate. We have seen how the media and the other two branches of government exert external pressure upon a judge making a decision. With recent developments, new sources of pressure have cropped up. New technology, e.g. electronic mail campaigns, has made it possible for an individual to intrude into a judge's chambers. Where before, a judge may confine himself to the privacy of his

[38] M. MAGALLONA, *supra* note 26 at 166.

[39] ALFRED P. CARLTON JR., *Preserving Judicial Independence – An Exegesis*, 29 FORDHAM URBAN L. J., 835 (2002).

[40] *Id.*

[41] PAUL J.CARRINGTON, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROB. 79 (1998).

chambers in order to evaluate the merits of a given case free from distraction, he can barely do so now. The reach of new information technologies is exponentially increasing each passing moment.[42] The speed at which this growth occurs renders it nearly impossible for the law to catch up. Indeed, the traditional forms of insulation pose no defense to these new forms of intrusion. It is therefore clear, that while institutional independence remains generally unthreatened by recent events, the same can hardly be said of decisional independence. The succeeding part of the paper discusses how this threat arises.

B. POINTS OF CONFLICT

Public opinion and the skillful use and manipulation of the media are the most powerful channels through which civil society can stage its agenda. This creates several problems. First, the nature of judicial decision-making is supposed to be deliberative and contemplative.[43] A judge arrives at a decision by sifting through evidence that constitutes the body of facts upon which his decision is based.[44] In order to stay within the mantle of objectivity, the law provides the judge with a system of rules that would enable him to determine to the extent possible, which facts are objective and which are not. The judge is then supposed to apply the law on the facts he thus gathers.[45] The intrusion of views and opinions other than the judge's into this deliberation taints the entire process for it can no longer be said that the judge arrived at his decision unfettered by such views. As discussed, civil society in its current form can easily penetrate the innermost sanctums where a judge finds refuge from external pressure. Is there a viable way to shield a judge from text messages or e-mail campaigns?

Second, the very nature of the judicial process makes it counter-majoritarian. While ours is a democratic society, the very framework of the law provides that the judiciary be impelled to act only when its powers are invoked, and that it remain "unfettered in the performance of its duties once it is so impelled."[46] A judge must be able to protect the people from the temporary whims of the majority. The court's complete detachment, in fact and appearance from political entanglements and its abstention from injecting itself into the clash of forces in political settlements is therefore of paramount importance.[47] It is irrelevant to the

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[42] D. PEMBER, *supra* note 7.

[43] V. ABAD SANTOS, *supra* note 27 at 568-570.

[44] *Id.*

[45] *Id.*

[46] FLORENTINO FELICIANO, *On the Functions of Judicial Review and the Doctrine of Political Questions*, 39 Phil. L. J. 444-447 (1964).

[47] Baker v. Carr, 369 U.S. 186 (1962).

process of judicial decision-making what the majority thinks. In fact, it is this quality that enables it to veto enactments of the people's representative's in the legislature. In this light, one sees the inevitable clash between public opinion and the judiciary once such a move is made by the latter.

Third, and perhaps most important of all, judges and justices are and always will be, human. While we do not encounter the same problems faced by jurisdictions that employ juries[48], it would be naïve to assert that judges are impervious to the kind of influence that would affect a jury member. True, our judicial system prides itself in its reliance on individuals known for their integrity and decisiveness. Moreover, our judges are continuously trained in the proper performance of their duties. Still, studies in psychology have shown that not even the most intense discipline can shield an individual from societal influence.[49] External factors such as the views of family members and friends, religious background, political affiliations and even the exposure to beliefs divergent to those held by the individual, inevitably work themselves into the individuals decision-making process whether conscious or not.[50] Judges and justices after all, remain part of society, hence they remain within the mechanics of group behavior.[51] While it is possible to assume that our judges are less susceptible to these influences, to actually believe that they are immune would be the height of naivete'.

A look into some recently decided cases would best illustrate this point. In *Estrada v. Arroyo*[52] for example, the Supreme Court came under heavy criticism due to its reliance on "dubious grounds"[53] in resolving that case. Issued after the events that culminated in EDSA II, it was then being argued whether or not the petitioner was still the legitimate head of the executive branch. In a 13-0 decision, the Supreme Court upheld the respondent, ruling that the petitioner had resigned as president.[54] Given that there was actually no resignation letter, the Court applied the principle of looking at the "totality of prior, contemporaneous and posterior facts" in order to determine whether or not the petitioner had resigned.[55] While this conjecture was hardly controversial, what came under heavy fire was the court's reliance on a certain cabinet member's diary entries to establish this point.[56] Indeed, quoting heavily from that diary, it was not made clear whether the Court actually did get to see the said diary or whether it merely relied on the report of a leading newspaper which quoted

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[48] ROBERT G. LEHRER, AMERICAN INSTITUTIONS, POLITICAL OPINION AND PUBLIC POLICY (1976).

[49] DAVID MYERS, SOCIAL PSYCHOLOGY (1999).

[50] *Id.*

[51] *Id.*

[52] Estrada v. Arroyo, G.R. No. 146710-15, 2 March 2001.

[53] PHILIPPINE DAILY INQUIRER, March 5, 2001, quoting Atty. Rene Saguisag.

[54] Estrada v. Arroyo, *supra* note 51.

[55] Estrada v. Arroyo, *supra* note 51.

[56] *SC Ruling Seen lifting the Economy*, PHILIPPINE DAILY INQUIRER, March 6, 2001, at A6.

the said diary.[57] Without going into a discussion on the admissibility and probative value of the said document, suffice it to say that it seemed that this was one case where the Supreme Court made a "highly controversial" (if not disputed) ruling. A look into the factual milieu reveals that there may have been forces besides judicial reasoning at work then. The decision came out on March 2, 2001. But on January 20, 2001 the same Supreme Court swore in the respondent as president at the EDSA Shrine.[58] While the presence of the Chief Justice could be excusable in light of his duty to swear in the president, the presence of the other justices in an undeniably political exercise raises some doubts as to their capability to remain impartial in deciding the case. Moreover, it was already conceded by the general public that a change of the head government had occurred, with the Cabinet members already resigned and the military siding with the rallyists at EDSA.[59] Was this then an exercise of the legitimizing power of the judiciary? Hardly. As observed by Bernas, a noted constitutionalist,

> "As I see it, the Supreme Court's problem was not so much whether to uphold the legitimacy of Gloria Macapagal-Arroyo's presidency. After having participated in the oath-taking of President Arroyo on January 20, the court faced the problem of how to put a judicial seal of approval on the new presidency."[60]

Viewed in this light, the court actually had no choice but to rule the way the public wanted it to. To rule otherwise would be like putting toothpaste back into the tube.[61] In a sense, the Court was constrained to rule in the way it was expected by the public and not the way it should. As Bernas placed it, "The Court is realistic and knows what it can and cannot achieve."[62] Public opinion through civil society seems to have forced its way through.

A similar situation occurred in *Estrada vs. Sandiganbayan*.[63] With the constitutionality of the plunder law at issue, the case had a more interesting side issue: the acquittal of the former President Estrada. Tensions were already high weeks before the promulgation of the decision.[64] Not a few sectors overstepped normal restraints and pre-judged the court.[65] In general, there was a clamor for

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[57] CLARISSA S. BATINO, *Stocks, Peso up after Ruling*, PHILIPPINE DAILY INQUIRER, March 6, 2003, at A6.

[58] ISAGANI CRUZ, *The Gag Order*, PHILIPPINE DAILY INQUIRER, March 4, 2001, at A7.

[59] *Id.*

[60] JOAQUIN G. BERNAS, *13-0: What does it Mean?*, TODAY, March 4, 2001.

[61] JOAQUIN G. BERNAS, *President Arroyo's Legitimacy*, TODAY, February 28, 2001.

[62] *Id.*

[63] G.R. No. 148560, 19 November 2001.

[64] JOAQUIN G. BERNAS, *Sounding Board*, TODAY, September 26, 2001.

[65] *Id.*

conviction which necessarily required that the Plunder Law be upheld.[66] On November 19, 2001, in a decision marked by heavy dissenting opinions, the Court ruled that the said law was not constitutionally infirm. Considerable debate continues as to the correctness of the ruling, but for our purposes, suffice it to say that considerable pressure was indeed brought to bear upon the Supreme Court in the final days prior to the promulgation of the decision. Rallies were held, fora were conducted, text messages and emails were sent. Again, Civil Society reared its head. The atmosphere was so rife with pressure and speculation that Justice Ynares-Santiago began her dissenting opinion thus:

> "It is an ancient maxim in law that in **times of frenzy and excitement**, when the desire to do justice is tarnished by anger and vengeance, there is always the danger that vital protections accorded an accused may be taken away."[67] (emphasis supplied)

Given the general sentiment then, it was of great concern whether the Court had been operating under the same set of parameters during the *Estrada vs. Arroyo* decision.

One also has to contend with the obvious effect of adverse publicity. The media, in its quest for sensational stories that would capture the audience's attention, remains dangerous in this respect. All too often, it has been seen as limited in its treatment of facts, focusing more on personalities and being infatuated with stories that have a negative content.[68] To be sure, criticism is essential to our judiciary, so long as it is principled. Care must be taken, however, that such criticism does not degenerate into attacks against the institution itself. For in its hurried quest for truth, the media might very well let misinformation prevail.

C. NEITHER IMPULSIVENESS NOR COMPLACENCY

After all is said and done, one cannot dispute basic human nature. Thus, even if protected by institutional safeguards, one should not expect absolute impartiality from a judge. To argue otherwise would be to close one's eyes to increasingly prevalent problems such as judicial activism. Though absolute impartiality is the goal, it might be inherently impossible. Indeed, it is still debatable if this is in fact desired.[69] The judicial process after all, has been said to be "governed

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[66] *Id.*

[67] Estrada vs. Sandiganbayan, G.R. No. 148560, 19 November 2001.

[68] LOUIS H. POLLAK, *Criticizing Judges* 79 JUDICATURE 298 (1996).

[69] V. ABAD SANTOS, *supra* note 27 at 569-572.

not by pure logic, but by experience."[70] Writing on this topic, no less than former Justice Abad Santos has pointed out that, "If we narrow the limits of the concept of a judge, I daresay that any fresh honor graduate of a reputable law school can discharge the highest judicial function."[71]

Still, it bears emphasis that left unchecked, there is a danger for public opinion in general and civil society in particular to overstep its bounds and threaten judicial independence. This does not mean that both are evils that must be curtailed. The discussion above centers on the premise that there is no power that is not subject to abuse. The danger of public opinion is not in its nature, but in the manner it is currently being exercised and to some extent, manipulated.

Against this backdrop, the current situation does not warrant an alarmist response; neither does it counsel complacency. It is asserted that while the current state of judicial independence remains essentially sound, problems do exist. But one does not stop at identifying the problems. It bears emphasis that these potentially serious problems, if left unchecked, could degenerate into real threats to judicial independence.[72]

III. MONSTERS IN THE MIST: THE CONFLICT BETWEEN PUBLIC OPINION/CIVIL SOCIETY AND JUDICIAL INDEPENDENCE IS MERELY ILLUSORY

The contradiction between public opinion and judicial independence is more apparent than real. The discussion so far reveals a fundamental misconception on the nature of the two concepts. To a certain extent, this arises from a misappreciation of the proper role of civil society and public opinion in democratic governance. The proper role public opinion as far as judicial independence is concerned is **two-fold**: first, it promotes judicial accountability, a necessary element for independence; and second, it protects the judiciary from the encroachment of the other two branches of government. At this point, it bears emphasis that the perceived tension arises due to the manner by which public opinion is currently being exercised or manipulated. Thus, it is imperative that a knee-jerk reaction or solution such as censorship should not be used. Instead, considerable effort should be exerted to understand the problem.

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[70] *Id.* at 569 citing OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881).

[71] *Id.*

[72] *Supra* note 25.

A. CURRENT MECHANISMS FAIL TO ADDRESS THE ROOT OF THE PROBLEM

To advocate any form of censorship does not only violate two constitutionally protected freedoms, i.e. freedom of speech and freedom of the press,[73] it also betrays a fundamental mistake in assessing the situation. Moreover, this inability to understand, fails to open one's eyes to the fact that censorship is severely limited in its effectivity. To illustrate, it is expected that partisan groups mouth intemperate even inaccurate criticism that will, in one way or another, tend to undermine the public confidence in the impartiality of our judiciary. Such criticism also tends to affect judicial independence. Often generated and delivered by groups whose interests are in disagreement with a particular decision, one asks the question: Is such criticism-protected speech? The answer is yes. Thus, there is nothing to censor. Still, the problem remains. The criticism was irresponsibly exercised. In such situations, mechanisms already in place hardly seem adequate. Just recently, the Supreme Court held a lawyer in contempt for giving press statements about the plunder case, "aimed at undermining the Court's integrity and authority, and interfering with the administration of justice."[74] Even in such instances, contempt is still ineffective. For the view that either the court is closing ranks or that it resents being criticized, though unfair, remains to be addressed.

B. PUBLIC OPINION IS ESSENTIAL IN PROMOTING JUDICIAL ACCOUNTABILITY

Independence is not an end by itself.[75] It is simply a mechanism by which the promotion of impartial decision-making is safeguarded. Viewed in this light, the apparent tension between judicial independence and judicial accountability is dispelled. For it becomes clear that both need one another. An unaccountable judge would eventually defeat the ends that his independence was supposed to serve. Thus, accountability counterbalances independence[76] and the promotion of the former is essential to the existence of the latter.

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[73] H. DAVIDE, *supra* note 8.
[74] *High Court finds Lawyer Guilty of Indirect Contempt*, PHILIPPINE DAILY INQUIRER, July 30, 2002.
[75] *Supra* note 72.
[76] *Id.*

It is here where public opinion plays an important role. The critique of judicial decisions is essential to the growth of our judicial system but it serves no one if we allow special interests to promote their own agenda through unwarranted criticism of the judiciary. Rational criticism can result in improvements and can serve as an invaluable remedy to an otherwise unrealized error. An enlightened civil society serves as society's watchdog. By properly channeling public opinion, civil society keeps the justice system in check, reminding it of its shortcomings and pointing out its errors. The guardians of the rule of law are made increasingly vigilant by the realization that they are themselves being watched. However, mere criticism is not enough. Care must be taken that efforts to criticize do not degenerate into malicious attacks against the judiciary and its members. Suffice it to say, accountability is best achieved not by a culture that favors misinformation and innuendo, but through a better understanding and knowledge of the law. This idea is best captured by the following statement:

> Criticizing judges is one of the ways in which we hold the judiciary accountable in our democracy. But that Criticism should be limited to questions of integrity, competence, or knowledge of the law, not whether a decision is compatible with a political philosophy, ideology or special interest. If we disagree with the a decision, we can appeal, and if we remain dissatisfied when the appeal is concluded, it may well be that we need to change the law – but not the judge.[77]

At the same time, to merit its independence, the judiciary must be faithful to the law for it is looked upon as the keeper of faith in our democratic society. In a sense, the judiciary is accountable to itself, for it would lose its legitimacy once it fails to follow the very precepts it looks upon for its existence.

C. THE REALITY OF GOVERNANCE IN A DEMOCRATIC SOCIETY: PUBLIC OPINION AS THE GUARDIAN OF AN OTHERWISE WEAK BRANCH OF GOVERNMENT

To advocate for a completely invulnerable justice system is to advocate for a utopian society. We can only carry the fiction of an absolutely impartial judge so far. We must, in the end, come to terms with the fact that we live in a representative government and that law, as we speak of it, has social qualities.[78] A democratic government that fails to heed its people runs counter to its basic principles. It is in this light that one must view the role played by public opinion in general and civil society in particular in safeguarding judicial independence.

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[77] A. CARLTON, *supra* note 38.

[78] PERFECTO V. FERNANDEZ, *Understanding Law as a Social Phenomenon*, 65 Phil L. J. 35 (1995).

The function of the court is to render a decision in the matter brought before it.[79] Such matter can only be acted upon if it reaches the court's attention through the proper procedures. Thus, the court is a passive institution. And from the nature of its function, the court is severely limited and vulnerable compared to the other two branches of government. It does not have the requisite tools for constructive solution to varied problems. As Justice Frankfurter pointed out in *Sherrer v. Sherrer*, "A court is confined within the bounds of a particular record. Only fragments of a social problem are seen through the narrow windows of litigation."[80]

In a sense, the judiciary is helpless. Unlike the other branches of government, it has neither the resources nor the power to actually move society. It derives its motive force from acquiescence. It is essential that it remain within the trust of the public for if it falls in disfavor, it loses its moral compulsion. Thus it has been held that,

> The authority of the Supreme Court ultimately rests on sustained public confidence in its moral sanction. Such a feeling must be nourished by the Court's complete detachment, in fact and appearance from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.[81]

This is not to say that the judiciary is beholden to the people. Hardly. It is merely asserted that since it lacks the resources the other two branches have, the judiciary necessarily has the sovereign will as the driving force behind its pronouncements. Thus, it is the same public opinion that prevents the judiciary from abusing its power that also keeps it intact and protected from the encroachment of the other branches. Should the judiciary choose to remain locked within its ivory tower, totally impervious to the public's plight and concerns, it may very well find itself losing its place in society. For an isolated judiciary that is unheeded in its commands becomes nothing more than a shell of an institution. Magallona cautions, "The judiciary may become too independent for its own good, unmindful of the sense of justice – and morality – of the community from which it derives its reason for being."[82]

One must not forget that legal precepts have to be tested not in an air-tight laboratory or in a vacuum jar in which the human experience is studied in isolation from a myriad influencing factors. The legitimacy of a legal system requires that it be exposed to different societal forces. For it is only in doing so that a reliable decision about its adequacy for adaptation to a social order can be assessed. So long as the public truly believes that the judiciary is independent, it will not hesitate to

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[79] Vecki v. Sorensen, 340 P. 2d 1020 (1959).
[80] 334 U.S. 43 (1947).
[81] Baker v. Carr, 369 U.S. 186 (1962).
[82] M. MAGALLONA, *supra* note 26 at page 175.

rally to its defense. On the other hand, a public that does not trust its judges to exercise sound, even-handed judgment will look upon judicial independence – guaranteed by life tenure and undiminished compensation – as a "problem to be eradicated, rather than a virtue to be preserved."[83]

IV. FOSTERING A RULE OF LAW CULTURE TO STRENGTHEN JUDICIAL INDEPENDENCE

A. A CULTURE CENTERED ON THE RULE OF LAW

As was pointed out in the beginning of this paper, public opinion is an amorphous and commonly misunderstood concept. Hounded by its lack of a clear-cut definition, there is a tendency to confuse it with other institutions which then lead to the view that it's exercise should be limited if not curtailed in a society which believes in the rule of law and more importantly, in the independence of the judiciary. It was therefore necessary to ispel the said misconceptions before an attempt to discuss how public opinion actually does the opposite. This part of the paper will focus on how the current form of civil society, operates as an institution of expression that, if channeled properly, can effectively enhance the rule of law in our society.

The rule of law has been taken to stand for "a universally applicable set of principles under which the state is subject to law and the individual assured of respect for his rights and of means for their enforcement." [84] The Act of Athens, made on June 18, 1955, provides in concrete terms what is meant by this phrase in the form of the following four principles:

1) the State is subject to law;
2) governments should respect the rights of the individual under the rule of law and provide effective means for their enforcement;
3) judges should be guided by the rule of law, protect and enforce it without fare or favor and resist any encroachment by governments or political parties on their independence as judges; and
4) lawyers of the world should preserve the independence of their profession, assert the rights of the individual under the

[83] P. CARRINGTON, supra note 40.
[84] CECILIA MUNOZ-PALMA, *A Plea for the Rule of Law*, 3 J. INTEG. BAR PHIL. 181 (1975).

> rule of law and insist that every individual is accorded a fair trial.[85]

In this light, it has been taken to mean that in our society, the rule of law is supposed to pervade our legal system and applies to all the branches and agencies of the government, most especially the judiciary.[86] This pervasiveness as well as the rationale for its adoption was best explained by the Supreme Court in its ruling in *Gonzales v. Hechanova*: "Ours is supposed to be a regime under the rule of law. Adoption as a government policy of the theory of 'the end justifies the means', brushing aside constitutional and legal restraints, must be rejected, lest we end up with the end of freedom."[87]

One thing that should be pointed out is that the burden of maintaining the rule of law does not fall under the shoulders of the government alone. It requires that the citizen exert utmost respect for the rules promulgated by the duly constituted authorities. Obedience to the laws is an obligation of every member of society. The underlying assumption contained in these pronouncements is that strict adherence must be maintained always and no emergency or excuse can warrant a derogation of these established principles.

In the Philippines, the rule of law has been equated to the principle of supremacy of the constitution, which prevents arbitrary rule and insures "government by law, instead of government by will."[88] As was held in the case of *Mutuc v. Commissioner on Elections*,

> "The concept of the constitution as the fundamental law, setting forth the criterion for the validity of any public act whether proceeding from the highest official or the lowest functionary, is a postulate of our system of government. That is to manifest fealty to the rule of law, with priority accorded to that which occupies the topmost rung in the legal hierarchy."[89]

Individuals, as part of society should take heed of their obligation to maintain the order provided by our laws. As Former Chief Justice Concepcion stated, "consequently, in our Republic, the primacy of the law depends ultimately upon the this fact and their willingness and readiness to assume the people, upon their awareness of corresponding responsibility; in short, upon their political maturity."[90]

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[85] *Id.*

[86] ARTURO M. TOLENTINO, *The Rule of Law and Our Constitution*, 36 U.S.T.L. REV. 43 (1985).

[87] Gonzales v. Hechanova, 9 SCRA 230.

[88] A. TOLENTINO, *supra* note 85.

[89] Mutuc v. COMELEC, 36 SCRA 228.

[90] ROBERTO CONCEPCION, *The Rule of Law: A Collective Responsibility of the People*, 19 U.S.T.L. REV., 92 (1968).

Those who object to the seemingly unchecked rise of civil society's participation in recent events base their dissent in the latter's seeming over-reliance on the principle of sovereignty of the people. Such fears, though misplaced, are justified. For to advocate the supreme power of the people, and the justness of their acts whatever they may be and in whatever manner they may be carried out, without regard to the legal institutions that may be assailed will simply lead to a society ruled by whim. Still, we are not discussing sovereignty. What has been laid out so far is the irreplaceable, but unfortunately understated role, public opinion plays as the guardian of the judiciary's independence. Again, it is emphasized, that the seemingly irreconcilable conflict between public opinion and judicial independence is more apparent than real. At the core of this conflict is the failure to appreciate the proper role civil society and public opinion exercise in democratic governance.

B. THE DEVELOPMENT OF A RULE OF LAW CULTURE GIVES RISE TO JUDICIAL INDEPENDENCE

A commitment to the rule of law impels every citizen to rally to the defense of the courts even if the decision made by the latter is perceived as wrong or goes against personal interests. In a societal order that is truly governed by the law, personal interests will appear irrelevant when viewed in the light of the need to preserve societal rules. The problem with the current societal set-up however is more deeply rooted than that. It is a problem rooted in culture. Though negative public opinion about the courts suggests that contemporary judicial measures are less than ideal, citizen feedback which is extremely valuable to the entire court system and not without impact, largely remains pessimistic. The current state of our culture seems to maintain a reward system for revealing the misdeeds of public institutions. There is a dearth of subscribers to the ideology that we must assist in keeping the faith in our government. However, there appears to be a culture that punishes those who speak well of it. Thus, we have a media that seems preoccupied with negative publicity and explosive journalism, characterized by a fixation with stories that highlight the mistakes of public officials rather than their accomplishments. Indeed, the causes of public mistrust lie deep in the culture.[91]

Though we cannot hope for a perfect solution to an enduring problem associated with the human condition, it remains imperative that efforts be focused on the re-evaluation of the currently prevailing culture. The flourishing of Judicial Independence can only be maintained in a society that values the maintenance of

[91] P. CARRINGTON, *supra* note 40.

rule and order above personal biases. The following statement is instructive in this respect,

> The need for judicial protection has undoubtedly varied, and the risks of judicial sabotage under the guise of protection are considerable. But we are dealing with basic institutions and basic attitudes; we must take the bad with the good, the fortuitous with the exigent, the trivial with the necessary. We are dealing here not with what might be, but with what we are in fact, the psychological assumptions which sustain cohesion and security.[92]

Thus, for one who is bent on committing one's self to the cause of preserving judicial independence, it is imperative that the foundation for such, an adherence to the rule of law, must first be laid down. For it is the belief in the need to have the law prevail over other concerns that pushes society to value a judge's capability to remain independent. However, this entails not merely the desire to have an independent judiciary, but also the understanding of the goals that judicial independence seeks to further.

C. CIVIL SOCIETY AS A CATALYST OF A RULE OF LAW CULTURE

Recent events could be used as evidence that the public does not fully understand the basis and need for judicial independence, not to mention the goals it is supposed to further. It is precisely this lack of understanding that impedes the development of a culture centered on the rule of law.

The problem also leads to the formation of misappreciations of the role public opinion, or more specifically, civil society plays. All too often, attention is given only to one facet of this role: the communication of the public sentiment to the government. Besides being passive, such a role is severely limited. Civil society also has an active role: the propagation of ideas that spur the development of a culture centered on the rule of law.

Civil society serves as a locus of public sentiment. As such its significance arises not so much from its ability to relay ideas to the government, but from its efficiency in communicating ideas to its members - the general public. Meaningful effort should then be expended to bridge the gap between the judiciary and the public by taking advantage of the venue provided by civil society. Otherwise, a culture that views the judiciary as an aloof, distant and inscrutable institution will prevail. An unenlightened public cannot be expected to take up the cudgels for

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[92] LOUIS L. JAFFE, *The Right to Judicial Review*, 71 HARV. L. REV., 401, 406 (1958).

judicial independence for once this happens, unprincipled criticism is bound to arise. The onset of such occurrences should not be viewed as entirely the public's fault. Indeed, "[n]ot infrequently, the criticism results from nothing more than unfamiliarity with the procedural and substantive legal principles involved."[93]For example, those who rallied and cried for justice for Leo Echegaray, the first person to suffer capital punishment since its revival under present law, while admitting that he is guilty, sought the application of principles that are beyond positive law. They invoked principles that are in a sense beyond the power of the courts. This betrays the unfortunate situation where a heightened expectation on the justice system has been cultivated without corresponding enhancement in power to meet those demands.[94] It also shows how an unenlightened public, though righteous in its intent, may end up petitioning the judiciary for redress that is simply beyond what the latter can give under the law.

It lies upon the hands of civil society to present the case of the general public to the system of government in general and to the judiciary in particular. The accomplishment of this task will then enable the latter to act accordingly. It then becomes incumbent upon civil society to apprise the general public of any effort by the government to address the needs thus presented to it. More importantly, civil society should then endeavor to enlighten its members on the intricate processes involved as well as the need for these processes. It is through the use of this simple procedure that the role of public opinion is properly harnessed. A culture centered on the rule of law is does not arise by chance. It requires persistence not merely on the part of government, but of the citizens as well. As former Chief Justice Concepcion remarked,

> In a republican society like ours, adherence to the Rule of Law cannot be achieved unless the people believe in it; unless they expect the law to be at least, reasonably adequate to protect their rights and promote their wellbeing....[s]uch climate, in turn, must be ***deliberately created*** and carefully maintained by precept and by example; by ***words of mouth*** sufficient to impart conviction in the inherent validity of the Rule of Law and by deeds establishing its wisdom and demonstrating its efficacy.[95][emphasis supplied]

As stated earlier, the core of the problem lies in the misappreciation of the judiciary's role in governance. There must be an effort to implement an organized, substantial and sustained public education on the rule of law. This is something that the judiciary cannot do alone. A collaborative effort should be exerted by both the civil society and the judiciary to accomplish this task for one cannot deny the

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[93] FLORANGEL R. BRAID, *Mass Media and the Judiciary*, 4 COURT SYS. J. 4 54 (1999).
[94] *Id.* at 10.
[95] R. CONCEPCION, *supra* note 89 at 94.

considerable power the former wields in representing and shaping the general sentiment.

Judicial leaders would do well in using the findings taken to identify areas of serious concern, and thereby develop and implement meaningful strategies to create innovative changes in the judiciary. The need for such efforts is best explained by Fernandez thus,

> Authority within a social order springs from community of purpose and sharing of goals and interests. Such purpose can be realized goals attained and interests maintained and protected, only through social power exercised in behalf of the entire group. Social power arises from collective responsibility for the collective interest..[96]

A shift from demagogic advocacy to principled criticism is the first step to an orderly relationship between the judiciary and the people it seeks to protect. Once properly apprised, the public can then be rightfully expected to rally to the defense of the judiciary should any form of pressure be exerted against it. The relationship is in no small part symbiotic. For in a representative democracy, the judiciary will remain independent only as long as the people trust it to be so. Indeed, it has been observed that, "A democracy works best when the courts enjoy the public's approbation and support. After all the courts are dependent on the public's perception that the court's are impartial and independent of manipulation or control."[97]

Judges must not only be independent, they must also be seen to be so. For unlike the other two branches of government, the integrity of the judiciary is based upon the perception that it remains unfettered by interests other than the maintenance of the rule of law. Indeed,

> The public expects the executive and the legislative to be biased toward and agenda and the groups that support it. But if the public ever perceives that the court bases its decisions on factors other than evidence, the laws, and the Constitution, it will lose its respect for the law. And when the public loses its respect for the law, we lose the centripetal force that binds us to our nationhood.[98]

D. SUPPORT OF THE JUDICIARY AND THE BAR

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[96] PERFECTO FERNANDEZ, *Understanding Law as Social Phenomenon*, 65 PHIL. L. J. 37 (1990).
[97] A. CARLTON, *supra* note 38.
[98] *Id.*

Beyond the galvanizing efforts of civil society, concrete steps must be taken to supplement the endeavors of the latter. It is suggested that the Bar take a more active role in educating the general public on the need for a judiciary that is free from any form of influence. Perhaps it would be helpful to develop a standing committee whose primary responsibility is to address the problem of having a society generally unaware of the goals judicial independence seeks to further. It has been observed that,

> A special obligation to defend judicial independence falls on the judges and lawyers not because of self-interest but because they are aware of the history and purpose of judicial independence and the myriad ways it can be attacked by powerful interests, private and public.[99]

Moreover,

> It is the primary responsibility of lawyers, particularly the counsel of the prevailing parties, to explain, if not defend, the judgment. Even the attorney of the losing party has serious responsibilities in this regard. While he may opt to condemn the judgment, and emphasize what he deems to be errors therein, he should do so respectfully and in good faith.[100]

In relation to this, the institution of guidelines, when a response to seemingly unenlightened remarks is deemed to be appropriate, as to how it should be done and by whom, should also be considered. It is suggested that timing should be considered as well since it is desirable that the response not be viewed as an act of defense or closing of ranks.

Finally, to address the inordinate amount of inappropriate and sometimes unprincipled criticism the press and the media inevitably commit, it is suggested that perhaps it is time that a codified set of Rules on Media Coverage of the judiciary be promulgated. Such should of course be a collaborative effort between the two institutions.

It should be borne in mind that all these measures are centered upon the utilization of civil society as a catalyst for ethical governance and Judicial Independence. The varied and distinct measures thus cited should all be impelled by the need to propagate a rule-of-law culture that allows judicial independence to flourish.

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[99] JUSTICE MICHAEL KIRBY, *Independence of the Judiciary – Basic Principles, New Challenges* (last visited 29 July 2002) http://www.hcourt.gov.au/speeches/kirbyj/kirbyj-abahk.htm.

[100] F. BRAID, *supra* note 92 at 11-12.

CONCLUSION

Civil society should not be viewed as an anathema to the notion of judicial independence. That it may sometimes be wielded by self-serving parties as a legitimizing factor should not be seen as the fault of the concept itself. It is not the nature of the tool that defines its existence, rather, it is the purpose to which it is applied. In this light, it bears emphasis that the two-fold purpose public opinion serves is inextricably linked to both the active and passive roles of civil society discussed above. In light of recent events, emphasis on the active role of civil society as a catalyst for the cultivation of a rule-of-law culture and less reliance on its passive role as a mere messenger are needed more than ever.

Civil society does not end where governance begins. Civil society's contribution to these relationships is its function as a reservoir of ethical life which is its most important characteristic for Gramsci. To this end, civil society exists as a harmonizing and transforming force that reaches out to the structures of government in an ethical manner. Otherwise stated, within the written parameters of the law, civil society's influence lies in nurturing and maintaining a rule-of-law culture so necessary to the flourishing of the idea of judicial independence. One cannot identify in black and white where one ends and the other begins. After all, the interaction of civil society and government, particularly the judiciary, is ruled by penumbras, one shading gently into the other.

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