

LOBBYING THE JUDICIARY: PUBLIC OPINION AND JUDICIAL INDEPENDENCE*

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In every case, a judge shall endeavor diligently to ascertain the facts and the applicable law, unswayed by partisan interests, public opinion or fear of criticism

Rule 3.02, Philippine Code of Judicial Conduct

Of all the control of judicial activity, that by public opinion is the most effective
Max Rheinstein, 1947

I. INTRODUCTION

Law was once described as reflecting here on earth the universal principles of divine justice,¹ and the administration of justice seen as partaking of the Divine. “Of law no less can be acknowledged, than that her seat is the bosom of God; her voice harmony of the world.”²

Justices and judges are entrusted with the extraordinary prerogative of passing judgment over their fellowmen, their rights, property, honor, their freedoms and even their very lives.³ As such they must enjoy independence of action and freedom of judgment. They must have sufficient training and intelligence to guide them in making decisions, and they must possess honesty and integrity to assure their impartial judgment⁴. “All suitors,” the Supreme Court intoned in *Luque v.*

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¹ ELIZABETH MENCSEH, *The History of Mainstream Legal Thought*, THE POLITICS OF LAW 14 (1990).

² *Id.*

³ AMBROSIO PADILLA, *Free Press and Independent Judiciary*, 6 THE LAW REVIEW 349 No. 4 (1956).

⁴ *Id.*

Kayanan, "are entitled to nothing short of the cold neutrality of an independent, wholly free, disinterested and impartial tribunal".⁵

Lately, our Supreme Court has been at the forefront of turbulent events rocking the country's political atmosphere. These recent political developments undoubtedly show an increasing and more active role for the judiciary in our society. As with countries with strong traditions of judicial power and independence, we may be moving towards greater "*judicialization of society*"⁶ where issues of political import are brought to the judicial forum for resolution. This "judicialization" came early in the political history of the United States where many of the political laws of our country were borrowed. As Alexis de Tocqueville observed, "Scarcely any political question arises in the United States that is not resolved sooner or later, into a judicial question".⁷

With the advent of the increased "judicialization" of society, the principle of judicial independence then acquires great significance.

In Canada, judicial independence is viewed as a most significant principle, which lies at the foundation of the legal order⁸. "The courts" says Chief Justice Howland of the Ontario Court of Appeal in the case of *R. v. Valente*, "stand between the state and the individual to maintain the supremacy of the law".⁹ The increasing judicialization of society also makes the courts vulnerable to pressures and threats to its independence.

In our own jurisdiction, Dean Merlin Magallona observes that these sources of pressures and threats "ramifies into every conceivable partisan interest in justiciable conflicts."¹⁰ These threats and pressures include those coming directly from the parties themselves and/or from the molders of public opinion: Civil Society, the Church and Media. Thus the courts in many instances find themselves torn between the voices of civil society, the litigants and the silent voice of the law. Indeed in recent political events our Supreme Court not only found itself in the forefront of events, many times it also found itself torn between such conflicting voices.

⁵ 29 SCRA 178 (1963).

⁶ SHIMON STREET and JULES DESCHENES, JUDICIAL INDEPENDENCE: THE CONTEMPORARY DEBATE 593 (1985).

⁷ JACK W. PELTASON, FEDERAL COURTS IN THE POLITICAL PROCESS 1 (1955).

⁸ S. STREET AND J. DESCHENES, *Supra* note 6 AT 612.

⁹ *Id.*

¹⁰ MERLIN MAGALLONA, *Philippine Experience in Judicial Independence: General Context and Specific Problems*, 72 PHIL. L. J 168.

This paper aims to examine the role of civil society vis-à-vis the principle of judicial independence in the light of the some recent decisions by our Supreme Court. The writer shall first discuss the concept of judicial independence and the process as well as the politics of judicial decision making. It shall then discuss the role of civil society in our country—its history, the different elements comprising it and the various roles it has played in our country's history and government. Finally, the paper shall scrutinize the dynamic interplay between civil society and the concept of judicial independence specifically in the light of recent landmark decisions rendered by our Supreme Court.

II. JUDICIAL INDEPENDENCE: COURTS, POLITICS & JUSTICE

The judiciary is a significant social institution, and like the other branches of government, contributes to shaping the life of the community¹¹. The increasing role it has assumed warrants a re-examination of one of its most significant aspects -- its independence and impartiality¹². At first glance, the courts seem to be relatively untroubled about public opinion, their job is to decide cases, not to be concerned with public reactions to their decisions, nor to be bothered by the public views regarding the courts or legal processes¹³. But this statement is more apparent than real, this section shall examine the fragile and vulnerable bastion of judicial independence and analyze the politics behind judicial decision making. Based on these analyses, it will be observed that there is a growing trend towards a redefinition of judicial independence and the emergence of the concept of "judicial accountability."¹⁴

A. JUDICIAL INDEPENDENCE

Sir Ninian Stephen defines an independent judiciary as "a judiciary which dispenses justice according to law without regard to the policies and inclinations of the government of the day."¹⁵ Erkki Juhani Taipale, a European jurist, found the focus of judicial independence in 'that the organs administering justice can only be

¹¹ *Supra* note 6, at p. 590.

¹² *Id.*

¹³ HARWOOD CHILDS, PUBLIC OPINION: NATURE, FORMATION AND ROLE at 6 (1964).

¹⁴ *Supra* note 6 at p. 654.

¹⁵ *Id.* at p. 594.

subordinate to the law, and that only the law can influence the contents of the decisions made by these organs. No other state authority, not even the highest, is allowed to influence decisions made by the judicial organs. This judicial independence is a guarantee for the fulfillment of the legal security of the individual.”¹⁶

Judicial independence is one of the most significant principles which lie at the foundation of the court system.¹⁷ In order for the court to be able to resolve disputes impartially and to pass judgment which will be accepted by the rival parties, particularly when one of them is the government or one of its agencies, the court must be independent and free from any external pressure or influence.¹⁸ And a judiciary is not independent unless courts of justice are enabled to administer law by absence of pressure from without, “whether exerted through the blandishments of reward or the menace of disfavor.”¹⁹

The concept of judicial independence has two dimensions: “the independence of the individual judge and the collective independence of the judiciary as a body”.²⁰ “The independence of the individual judge is comprised of two essential elements: substantive independence, which is also referred to as functional independence, *sachliche Unabhaengigkeit* in German terminology or decisional independence in American terminology”²¹ and personal independence.”²² Substantive independence means, “in the discharge of his function a judge is subject to nothing but the law and the commands of his conscience. This aspect of the concept of judicial independence refers to the neutrality of mind of the judge, to his impartiality and his total freedom from irrelevant pressures”.²³ Personal independence means that, “the judicial terms of office and tenure are adequately secured. Personal independence is secured by judicial appointment during good behavior terminated at retirement age, and by safeguarding judicial remuneration.”²⁴

¹⁶ *Supra* note 6, at p. 51.

¹⁷ *Id.* At p. 654.

¹⁸ *Id.*

¹⁹ A. PADILLA, *supra* note 3 citing Justice Frankfurter’s concurring in *Pennkamp v. Florida*, 328 U.S.

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²⁰ *Supra* note 19 at 598.

²¹ *Id.* at p. 699.

²² *Id.*

²³ *Id.*

²⁴ *Id.* p. 599.

B. POLITICIANS IN BLACK ROBES²⁵

The official theory of judicial behavior is that judges stand outside the body politic and they decide cases on the basis of a body of rules and according to the inexorable and unvarying commands of logic.²⁶ But judicial decisions frequently conflict with popular beliefs and attitudes about important social problems.²⁷ Court decisions involving civil rights, pollution control, the rights of AIDS victims, drug testing, and other issues routinely involve courts in political conflict.²⁸ The legal and political culture may not fit together easily yet both are basic parts of our society. In the advent of increased judicialization of society, the connection between the judiciary and the popular political culture becomes closer and closer.²⁹

"Judicial decision making, then, must be understood to operate in a complex arena in which law and precedent are inevitably intermixed with personality, prejudice and politics. Were judicial decision making simply a matter of law and precedent or simply derived from a product of personality, prejudice, and politics, our analysis would be greatly simplified. We must, however turn our attention from traditional conceptions for the purpose of arriving at a more complete consideration of the role played by the truly human factors."³⁰ "By considering courts within the context of the political landscape as a whole, we can better define their political functions by comparison and contrast with other institutions of state government."³¹ "What before was conceptualized in terms of jurisprudence must now be more clearly articulated as 'judicial politics.'"³²

Dean Pacifico Agabin in his book *Unconstitutional Essays* writes that judicial review can be used as a political weapon, and that the basic instrument wielded by the judiciary in the arena of politics is judicial review. He writes, "By means of judicial review the courts can effect changes in power relationships among the three departments of government, as well as among the power elite."³³ Through this principle, the Supreme Court can become an active participant in the struggle for political power."³⁴ Later, we shall look at cases in which the Philippine Supreme Court wielded the power of Judicial Review arguably as a "political weapon" in

²⁵ HENRY GLICK, *COURTS, POLITICS AND JUSTICE* 312 (1993).

²⁶ JACK PELTASON, *FEDERAL COURTS IN THE POLITICAL PROCESS* 21 (1955).

²⁷ *Supra* note 26 at p. 6.

²⁸ *Id.* at p. 7.

²⁹ *Supra* note 27 at 17.

³⁰ *Id.*

³¹ HERBERT JACOB and KENNETH VINES, *The Judiciary in American State Politics*, JUDICIAL DECISION MAKING 247 (Glendon Schubert ed., 1963).

³² *Supra* note 32 at 258.

³³ JORGE COQUIA, *The Jurisprudence on People Power* 353 SCRA 593.

³⁴ *Id.*

legitimizing the assumption of Gloria Macapagal-Arroyo as President following EDSA II.

C. PUBLIC OPINION AND JUDICIAL INDEPENDENCE

The Philippine Code of Judicial Conduct provides: "In every case, a judge shall endeavor diligently to ascertain the facts and the applicable law unswayed by partisan interests, public opinion or fear of criticism."³⁵ Under this and other canons, public opinion is not supposed to have an effect on the court's decisions because court decisions should be made by an impartial judge. However, since judges are only human and have been born and reared in a particular locality or society, it is quite likely that public opinion would have an effect, directly or indirectly, in the most ordinary cases as in difficult controversial ones.³⁶ Llewellyn and the legal realists often note that the important factor in judicial decision making is the reaction of the judge to the fact-stimuli of life around him.³⁷ There is some evidence of a link between public opinion and the courts.³⁸ This nexus, however, may either be because public opinion matched the direction of the decision because the public may be sympathetic to the interest in issue or because the court may have been indirectly influenced by public opinion. A key problem here is finding clear evidence of public opinion.³⁹ In the United States, much social science research assumes that judges are "politicians in black robes", they will behave in about the same way as legislators or other officials. But while national public opinion and Supreme Court decisions sometimes move in the same direction, social scientists have not yet identified a clear link between the two.⁴⁰

In the Philippine setting, the situation is different as will be seen in the discussion below. Recent political events in the country's history will show how public opinion forged by civil society played a major role in re-shaping the political terrain and how public opinion may have threatened the independence of the Supreme Court and affected the outcome of some of its most important recent decisions.

³⁵ Rule 3.02, Philippine Code of Judicial Conduct.

³⁶ HENRY GLICK, COURTS, POLITICS AND JUSTICE 313 (1993).

³⁷ S. SIDNEY ULMER, *Supreme Court Behavior and Civil Rights*, 13 WESTERN POLITICAL QUARTERLY 288 (1960).

³⁸ *Supra* note 41 at p. 323.

³⁹ *Id.*

⁴⁰ *Id.* At p. 312.

D. TOWARDS AN INDEPENDENT AND ACCOUNTABLE JUDICIARY

Two fundamentally conflicting concepts lie at the surface of any discussion on judicial independence and public opinion. Judicial independence is indispensable to a democratic and free society. At the very least, judicial independence is necessary to temper the acts of the political branches, in keeping them within the boundaries demarcated by the fundamental law. However, the same imperative that requires the Court to act in proper cases and controversies likewise demands some degree of accountability for judicial acts.⁴¹ Judicial independence is therefore, not an absolute. Were the opposite premise true, “judicial independence might become isolationism”, warns Dean Magallona, “and 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.”⁴² The tension between public accountability and judicial independence should be resolved by a careful exercise of judgment in order that the proper balance between these two very important values be maintained.⁴³ Civil society is therefore tasked to help maintain this delicate balance so that society will reap the benefits which accrue from a judiciary that enjoys the confidence of all sectors of society and which at the same time remains responsive to social change.⁴⁴

III. CIVIL SOCIETY

A. WHAT IS CIVIL SOCIETY?

The earliest conception of civil society comes from Aristotle who referred to it as *politike koinonia* or political society/community defined as “a public ethical-political community of free and equal citizens under a legally defined system of rule.”⁴⁵ The Latins translated this term as *societas civilis* or civil society. Translations aside, it should be noted that this early definition posts no distinction between political and civil society or between the state and civil society. Rather, the classical concept was understood to be a community of individuals united by a “legitimate

⁴¹ *Supra* note 6, at 657.

⁴² *Supra* note 10.

⁴³ *Supra* note 6 at p. 657.

⁴⁴ *Id.* at p. 658.

⁴⁵ JEAN L. COHEN, and ANDREW ARATO, CIVIL SOCIETY AND POLITICAL THEORY 84 (1992).

political order”⁴⁶ where the state and civil society formed an aggregate body. Under this formulation, political order was maintained by people’s adherence to *ethos* or their common set of norms and values in which law, was seen as a statement of *ethos* rather than an imposition.⁴⁷

Although a number of philosophers contributed to the evolution of the current notion of civil society, it was not until Hegel that a clear distinction between state and civil society was established. He defined civil society as distinct from the family and the state, qualifying civil society in the modern era.⁴⁸ Hegel’s definition is reflected in Siliman and Noble’s modern definition of civil society as the “voluntary, rule-abiding, politically active sector of society, autonomous from the state.”⁴⁹

B. CIVIL SOCIETY AND PUBLIC OPINION

History is marked by the triumph of public opinion. From Machiavelli’s *Vox populi, vox Dei* to the more recent uprisings and eventual overthrow of repressive rulers, governments recognize the extensive role played by public opinion. As David Hume put it, “It is...on opinion only that government is founded; and this maxim extends to the most despotic and most military governments, as well as to the most free and most popular.”⁵⁰ Despite the importance played by public opinion, there is a lack of a consensual working definition among authors. At its vaguest, public opinion refers to “any collection of individual opinions.”⁵¹ Stuart Oskamp qualifies this collection of individual opinions as those shared by “large groups of people (sometimes called publics) who have particular characteristics in common.”⁵² As such, public opinions are attitudes held by a group of people with shared characteristics. But public opinions are public not only insofar as the people who share common attitudes. Rather, a more pertinent aspect of public opinions lies in the degree of agreement where “...a majority is not enough, and unanimity is not required, but the opinion must be such that while the minority may not share it, they feel bound, by conviction, not by fear, to accept it.”⁵³ Agreement in opinion is

⁴⁶ SUDIPTA KAVIRAJ and SUNIL KHLNANI, *CIVIL SOCIETY: HISTORY AND POSSIBILITIES* (2001).

⁴⁷ *Supra* note 51 at p. 85-87.

⁴⁸ *Supra* note 3 at p. 23.

⁴⁹ SIDNEY SILMAN and LELA GARNER NOBLE, *Citizen Movements and Philippine Democracy* ORGANIZING FOR DEMOCRACY: NGOs, CIVIL SOCIETY, AND THE PHILIPPINE STATE 299-300 (1998).

⁵⁰ HARWOOD L. CHILDS, *PUBLIC OPINION: NATURE, FORMATION AND ROLE* 27, 42 (1965).

⁵¹ *Id.* at p.12.

⁵² STUART OSKAMP, *ATTITUDES AND OPINIONS* 2nd Ed. 16 (1991).

⁵³ *Supra* note 50 citing A. L. LOWELL in *PUBLIC OPINION AND POPULAR GOVERNMENT* 15-16 (1913).

arrived with the integration of a group's personal convictions and environmental factors.

Public opinion is formed by two factors—personal and environmental. The former pertains to both tangible and intangible attitudes of an individual. As such, a person's stereotypes, internal conflicts, values and motives, among others, are brought into the formation of his opinion and later, of public opinion. The latter on the other hand, pertains to the family, the church and the school or academe as the prime environmental shapers of a person's opinion.⁵⁴ Of the three, the family is closely related to the personal factor in the formation of public opinion, because the family is a person's first and most immediate exposure to society. It influences most of a person's initial stereotypes, internal conflicts, core values and motives which are then reinforced, nullified and enriched by a person's interaction with the church and the academe.

For example, the academe may correct a person's initial racist convictions brought about by racist values imparted by his/her family. The church and the academe, being environmental factors, therefore safeguard the formation of the individual that shapes public opinion at least to the extent that they rectify aberrations in the familial shaping of an individual's views by imposing social constraints and defining acceptable modes of behavior.

Today, environmental factors are not limited to the church and the academe. Such factors have since expanded to include influences such as Non-Government Organizations (NGOs), business and media, which in our society form the bulwark of Civil Society.

C. PEOPLE POWER I AND ITS AFTERMATH

Civil society reached its boiling point with the assassination of Benigno Aquino, Jr., the main opposition of Ferdinand Marcos. The "Parliament of the Streets, the snap election, People Power I finally put an end to the Marcos regime.⁵⁵ With this, the contributions of the old oligarchy, an educated middle class, the Church, NGOs and other forces gained official recognition. Though the left was part of the mobilization that followed Ninoy's assassination, its boycott of the snap elections marginalized its contributions and to a certain degree, stunted its voice

⁵⁴ *Id.* at p. 110-111.

⁵⁵ JEAN L. COHEN and ANDREW ARATO, *CIVIL SOCIETY AND POLITICAL THEORY* 84 (1992).

during the first part of Aquino's government. On the other hand, this pivotal role played by the Church, the NGOs, etc. was eventually institutionalized by the 1986 Constitutional Commission acknowledged by no less than the Constitution by providing that every Filipino citizen has a right to be directly involved in the task of law-making and congressional lobbying.

D. NGOs

The National Economic and Development Authority (NEDA) refers to NGOs as "private, non-profit voluntary organizations that are committed to the task of socio-economic development and that are established primarily for service". As of June 1993, more than fifty-eight thousand NGOs were registered under Securities and Exchange Commission (SEC). The number has grown since.⁵⁶

NGOs revel in their smallness. The strength of NGOs is in their size. To understand NGOs, one must look into their core values, which Isagani Serrano succinctly describes as follows: "Small is beautiful. Big can be beautiful too if it is an aggregation, not concentration, of myriads of small." NGO values are often a source of conflict with the government because while NGO politics is a politics of redistribution, government politics is that of integration and concentration of power. NGOs however, realize that at the end of the day, politicians are the ones who call the shots.⁵⁷ Though apolitical theoretically, NGOs are in actuality political if only in terms of their contribution, as part of civil society, to democratization and their involvement in policy formulation. For example, the Sama-Samang Inisyatiba ng Kababaihan sa Pagbabago ng Batas at Lipunan (Sibol), composed of thirteen women organizations, NGOs and support groups authored a legislative proposal to reform the Philippine law on rape. Through lobbying and participation, SIBOL succeeded in redefining rape. The success of SIBOL is both the triumph of NGOs and a reflection of the latter's power in the political process.⁵⁸

E. CHURCH, ACADEME AND MEDIA

1. The Church

⁵⁶ ISAGANI SERRANO, *NGOS & POLITICS* 29 (1992).

⁵⁷ *Supra* note 100 at p. 30-31.

⁵⁸ *Supra* note 49.

The introduction by the Americans of a secular democracy at the turn of the last century broke the unholy alliance between Church and State in the Philippines. Once the center and source of political authority, the Catholic Church emerged as the "second government" the civil society that acted outside and even against the state. Even without the near-formal unity with government that the Church enjoyed during the Spanish times, it retained its influence over a society that could not totally divorce itself from the pervasive influence of the clergy.

It is this writer's submission that, more than NGOs, the church plays a pervasive if not insistent role in influencing public opinion as it affects governance. The Church has not shirked from using the bully pulpit to influence events and government decisions. As we shall see later, it has not shied away from trying to shape key judicial decisions.

The Church's impact was most evident in People Power I, not only in terms of its advocacy and agitation, but in physically making available thousands of priests, nuns and religious and the laity at the EDSA I barricades. They formed human chains that prevented the military from breaking the stand of rebel soldiers in military camps at EDSA.

Emboldened by its role and the importance accorded to its leaders by President Cory Aquino, the Church has since been active in raising its voice on every conceivable subject affecting governance and the public life. It is as if no one in the Church has read Christ's admonition to render unto Caesar what belongs to Caesar. In the process, the church, though apolitical like the NGOs, is very much at the forefront of the political process.

2. The Academe

Like the students who participated in the First Quarter Storm and People Power I, the support of the university students was a major factor in the success of People Power II. The academe sees a responsibility not only in the academic enrichment of students but also in their participation in important social issues. Education is regarded not only as a means for economic security but also as an opportunity to serve those who are deprived in society.⁵⁹

⁵⁹ RAINIER IBANA, *Isang Malawakang Pananaw sa Teorya at Pagpapatupad ng Civil Society o Kalipunan ng mga Karaniwang Kapwa Tao (KKK) sa Proceso ng Demokratisasyon sa Pilipinas* Civil Society Making Civil Society Volume 3: Philippine Democracy Agenda (Miriam Coronel Ferrer ed.) 74 (1997).

3. Media

Media holds the unique role of bringing the voice of the NGOs, the church, the academe and other sectors together by providing a channel through which civil society reaches the government and vice-versa. Government, in turn, lets the people see what it is doing through the media. Media also ensures that public officials are held accountable for their actions.⁶⁰ If media does not report the government anomalies and activities, then the rest of the populace would be shrouded in darkness and it would be harder for civil society to gain access to information on political issues. NGOs, the church, academe and media all cooperate to shape public opinion.

Unquestionably, civil society has emerged stronger since its initial flourishing during the Marcos and post-Marcos regime. However, there is a perception that a strong civil society is indicative of a weak state. Notwithstanding its repression of civil society, Marcos' firm hand led to a stronger state in terms of bureaucratic and military scope. In contrast, civil society strengthened after People Power I but Corazon Aquino's soft approach eventually led to military and citizen dissatisfaction resulting in a number of coup attempts destabilizing the state. Certainly, the ideal situation would be a strong state alongside a strong civil society but whether or not that can be achieved, civil society certainly has a pivotal role to play in the executive and legislative branches of government.⁶¹

F. CIVIL SOCIETY AND THE EXECUTIVE

Section 16 of the Philippine Constitution provides for the right of civil society to participate in the state's decision making and the resultant cooperation of the state with the civil society. Since its inception in 1987, the state has remained cognizant of this provision as evidenced by the informal and formal channels available for civil society's proactive stance in policy-making.

Civil society influences the executive and the Cabinet through a number of informal ways but the single most common means of influencing policy-making outside formal structures is the informal dialogue. Informal dialogues serve as an

⁶⁰ David Mervin, *The News Media and Democracy in the United States* Democratization and the Media. 6 (Randall, Vikey ed.) 1998.

⁶¹ Isagani Serrano, NGOs and Politics 46-47 (1992).

avenue where policy-makers get the pulse of the people thereby affecting their opinions and stands on national policies. Notwithstanding the efficacy of informal dialogues, formal institutional structures are also provided for a more direct and procedural participation of civil society in the executive. Some of these structures include seat allotments in local development councils and the formation of liaison groups such as the "NGO desks" in some national departments. Of these formal structures, national councils or committees where policies of national interests are formulated serves as the most common means of civil society participation in the executive branch of government.⁶² The influence of civil society through this formal channel is concretely seen in one of the cornerstones of the Ramos administration—Philippine Agenda 21.⁶³

G. CIVIL SOCIETY AND THE LEGISLATIVE

While the executive consults the civil society via seat allotments in local development councils, civil society participation is institutionalized by the legislative via sectoral representative appointments in Congress and local law-making arenas.⁶⁴

The 1987 Constitution equipped civil society with legal means to participate in the legislative branch of government. This can be seen in the Constitutional provision providing for the citizen's right to "directly propose, enact or approve, or reject any act or law or part thereof passed by Congress or any local legislative body."⁶⁵ The legal framework actualizing these provisions are found in the laws on

⁶²Alex Brillantes Jr., *State-Civil Society Relations in Policy-Making: Civil Society and the Executive*, 2 STATE-CIVIL SOCIETY RELATIONS IN POLICY MAKING 22-25 (1997).

⁶³Philippine Agenda 21 (PA 21) was an action agenda ensuring sustainable development towards the 21st century. Key actors of this agenda were the government, business and civil society. Each of the key actors conducted consultation within their groups. Then, representatives from the government, business and civil society met to pen a consensus agreement for sustainable development. The consensus agreement was continuously revised until the final draft of PA 21 was formed. With the inclusion of civil society as a key actor in PA 21, stakeholders such as the farmers, fisherfolks, Overseas Filipino Workers, women, children, youth and the marginalized sector of society like the disabled and the poor were accounted for. The output was an agenda recognizing civil society as intermediaries of information, technology and expertise for effective mobilization of resources.

Philippine Agenda 21 is a testament of the important role that civil society plays in the executive branch of government. As such, there must be constant dialogue between the government and civil society. Furthermore, civil society must maximize its potential in policy formulation and implementation through intensive lobbying backed by research and public consensus. After a concrete output such as PA 21, monitoring and evaluation of the output and its faithfulness to the key players' objectives should be continuous to gauge the efficacy of the agreement.

⁶⁴Patricia Ann Paez, *State-Civil Society Relations in Policy-Making: Focus on the Legislative* 2 State-Civil Society Relations in Policy Making 21-32 (1997).

⁶⁵CONST. article VI, Section 32.

initiative and referendum⁶⁶ and the Party List Law⁶⁷. Though the Constitution is vague on the matter, the Supreme Court's interpretation of the party list law limits participation only to marginalized sectors.⁶⁸

IV. WAGGING THE JUDICIAL DOG: CIVIL SOCIETY AND THE JUDICIARY

In this section actual cases recently decided by our Supreme Court shall be examined to look into the dynamics between civil society and the judiciary. How civil society groups played an active role in "lobbying the judiciary" to advocate their respective goals will be demonstrated by showing events prior to, during and subsequent to the promulgation of the decision. These surrounding events will show how civil society groups have grown into a potent force capable of influencing the manner our judiciary decides important cases. For our purpose, three cases will be analyzed, namely: *Philippine Bar Association v. Commission on Elections*⁶⁹, *Estrada v. Arroyo*⁷⁰ and the recent case of *Estrada v. Sandiganbayan*.⁷¹

A. THE SNAP ELECTION CASE

The constitutionality of B.P. 883 calling for special national elections (SNAP elections) on February 7, 1986 for the offices of President and Vice-President of the Philippines was assailed by the petitioner in *PBA v. Comelec*.⁷² While B.P. 883 provided the mechanism for the holding of the snap elections, it allowed President Marcos to continue holding office even after the calling of the special elections. Marcos tendered a "qualified resignation" of the presidency which enabled him to remain in office during the campaign as the resignation took effect after the February 7, 1986 special presidential elections and only upon the proclamation and qualification of the candidate chosen by the electorate.

Opponents of BP 883 went to the Supreme Court via a petition for prohibition on the ground that BP 883 violated Section 9, Article VII of the 1973 Constitution. The said constitutional provision provided that a special election

⁶⁶ Rep. Act No. 6735 (1989).

⁶⁷ Rep. Act No. 7941 (1995).

⁶⁸ *Ang Bagong Bayani-OFW v. Commission on Elections* G.R. No. 147589, June 26, 2001.

⁶⁹ 140 SCRA 455.

⁷⁰ 353 SCRA 452.

⁷¹ G.R. No. 148560, November 19, 2001.

⁷² *Supra* note 69.

would be necessary only when a vacancy is created by death, permanent disability, removal from office, or resignation. The provision clearly mandates that there must be an actual vacancy, a real vacancy and not a simulated or fictitious vacancy or a vacancy *in futuro*.

Chief Justice Ramon Aquino and six Justices, namely Justices Claudio Teehankee, Hermogenes Concepcion Jr, Vicente Abad Santos, Efren Plana, Venicio Escolin and Lorenzo Relova voted to dismiss the petitions in this case and to deny the prayer for the issuance of an injunction restraining respondents from holding the election on February 7, 1986. Justices Hugo Gutierrez Jr, B.S de la Fuente, Serafin Cuevas, Nestor Alampay and Lino Patajo voted to declare B.P. 883 unconstitutional and to grant the injunction prayed for.

There was no majority opinion rendered in this case. Instead the justices submitted various concurring, dissenting and separate opinions. Scattered throughout these opinions were signposts and indicia of pressure from various groups which obviously affected the outcome.

In Justice Teehankee's concurring opinion, he averred that "the *real* issue at bar has thus veered from the purely justiciable issue of the questioned constitutionality of the Act due to the lack of an actual vacancy in the office of [the] President and transformed itself into a *political question* that can only be truly decided by the people in their sovereign capacity in a fair, clean and honest election."⁷³ Teehankee quoted Labor Minister Blas Ople who said that "the people's minds have been prepared and conditioned to expect the holding of the February 7th, 1986 presidential elections and that the Court from its ivory tower should not stand in the way."⁷⁴ Ople, said that "the people and the world will not believe that the administration did not help influence a court annulment of the elections, no matter how unfair this charge of interference in judicial independence might be."⁷⁵ Senator Pelaez was also cited by Teehankee as thus: "these supervening events...may have converted the snap poll issue into a political one, which would remove from the Supreme Court the authority to step present snap poll activities on its tracks".⁷⁶ Finally Pelaez says that: "With these developments, the issue has been decided by the political will of the people. This Honorable Court should not put obstacles to their exercise of that will. Beyond these considerations, national survival depends on the forthcoming snap poll."⁷⁷

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Supra* note 69.

⁷⁷ *Id.*

Juxtaposed with the dissenting opinion of Justice Gutierrez on the same issue, the case provides an indication about how public opinion on an issue affects the justices in different ways.

Justice Gutierrez wrote:

"National interest and political stability cannot be premised upon violations of our fundamental law. Political expediency and the momentary, easily forgotten cry of the public are too precarious and shifting to become legal foundations of a free and hopefully prosperous society. Indeed, much depends on the forthcoming elections but even more is at stake in the maintenance of constitutionalism upon which our democratic government is founded and because of which popular and free elections are held."⁷⁸

Justice Patajo's dissent faced the issue head on when he said "The constitutionality of BP 883 is a justiciable one and not a political question which the Court must decide without equivocation."⁷⁹

Teehankee's citations show a classic Catch-22 situation. Had the Supreme Court decided against the constitutionality of B.P. 883—and there was obvious textual support in the 1973 Constitution, the Court would have stood in the way of the 1986 election, which, from all indications was something greatly desired not only by Civil Society but the entire society at large. From hindsight, the Court deciding another way would have possibly made a great difference in Marcos' and his family's fortunes in 1986.

B. THE LEGITIMACY OF THE ARROYO PRESIDENCY

International media response to the downfall of President Joseph Estrada was measured when placed alongside the Philippine media's largely euphoric response. Separate articles in the International Herald Tribune, the Far Eastern Economic Review and other newspapers and periodicals were guarded, if not cynical. The Far Eastern Economic Review bannered People Power II as 'RICH PEOPLE'S POWER' the week after the installation of President Gloria Macagal Arroyo. The International Herald Tribune rued the absence of the "Rule of Law" and suggested that the events were forged by the sentiments of the mob.

⁷⁸ *Id.*

⁷⁹ *Id.*

The bind that the Supreme Court found itself after the legitimacy of the installation of Arroyo as president in the case of *Estrada vs Arroyo*⁸⁰ was quite unique: no less that the Chief Justice gave the Oath of Office to President Arroyo at EDSA II. The Chief Justice was accompanied by a coterie of associate justices of the Supreme Court during this historic occasion. Moreover, Chief Justice Davide presided over the failed impeachment trial that precipitated the events of EDSA II.

When the case was brought before the Supreme Court the pivotal issue presented was whether petitioner Joseph Estrada resigned as President on of January 20, 2001 when respondent Gloria Macapagal-Arroyo took her oath as the 14th President of the Republic. Estrada contended that he was a president “on leave” while the respondent was merely an “acting president”. The Court, with by a vote of “13-0” ruled that based on the “totality of prior, contemporaneous and posterior facts and circumstances”, the petitioner resigned as President.”

That this decision paved the way for the respondent’s ascent to the presidency in effect legitimated the historic “Edsa Two” or “People Power Two” cannot be denied. The court, with the exception of the Chief Justice and Associate Justice Panganiban who inhibited themselves, was unanimous. At the very least, all thirteen voting justices agreed in the result.. Justices Josue Bellosillo, Jose Vitug and Vicente Mendoza filed their concurring opinions while Justices Santiago Kapunan, Bernardo Pardo, Consuelo Ynares-Santiago, and Angelina Sandoval-Gutierrez concurred in the result and filed separate opinions.

As in *PBA vs COMELEC* these concurring and separate opinions give us a clue as to the actual state of mind of the justices during the process of deliberations. Again, it will be observed that civil society played a major role in the outcome of the case.

The majority opinion, in its “Epilogue” gave its “word of caution” to the “hooting throng. The majority then went on to say that “Rights in a democracy are not decided by the mob whose judgment is dictated by rage and not by reason. Nor are rights necessarily resolved by the power of number for in a democracy, the dogmatism of the majority is not and should never be the definition of the rule of law.”⁸¹

Was reference by a the majority opinion to a “hooting throng” a manifestation of the pressures brought to bear upon the Court during its

⁸⁰ 353 SCRA 452.

⁸¹ *Id.*

deliberations in the case? More directly, wouldn't this be an implied admission that somehow the justices in deciding this case took into consideration factors aside from law?

Exceptionally revealing was Justice Vitug's "A reminder of an elder to the youth." Vitug said: "If, as the sole justification for its being, the basis of the Arroyo presidency lies alone on those who were at EDSA, then it does rest on loose and shifting sands and might tragically open a Pandora's box more potent than the malaise it seeks to address."⁸²

Justice Kapunan was even more emphatic, he wrote that first: "people power is not one of the modes prescribed by the Constitution to create a vacancy in the Office of the President" and second that "people power is a "vague and ambiguous" concept". Kapunan noted that there are no judicial standards to know what number would suffice for a valid "people power". He insisted that the right of the people to assemble and petition the government for redress of their grievances does not go to the extent of directly acting to remove the President from office by means outside the framework of the Constitution."⁸³

Justice Ynares-Santiago was clearly apprehensive that the Court's legitimation of Arroyo's presidency may have the effect of "encouraging People Power Three, People Power Four, and People Power ad infinitum".⁸⁴ Indeed these words of Justice Ynares-Santiago proved prophetic when barely two months later a larger multitude appeared at "Edsa III," staged a violent siege on Malacanang Palace on May 1, 2001, and would have taken power but for timely intervention of the military.⁸⁵ In her separate opinion, Justice Ynares-Santiago admitted to the presence of a threat to use of mob action if the Court did not immediately proclaim Arroyo as a permanent and *de jure* President. She also called attention to the fact that baseless rumors and charges of bribery were being spread to influence and pressure the justices in their decision.⁸⁶

The pattern of "spreading baseless rumors" using Justice Ynares Santiago's words, reached its apogee in the manner in which forces identified with EDSA II and Civil Society tried to influence the Court's decision in late 2001 on the Plunder Law.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ RANDY DAVID, *People Power and the Legal System: A Sociological Note*
<http://www.upd.edu.ph/forum/2002/jan02/isyu.html> last visited July 29, 2002.

⁸⁶ 353 SCRA 452.

C. THE CONSTITUTIONALITY OF THE PLUNDER LAW

The most interesting aspect about *Estrada vs Sandiganbayan*,⁸⁷ the Supreme Court's decision about the plunder law, was not about the result of the case or what the court said but how sectors clearly identified with EDSA II and Civil Society tried to influence the Court's decision on the matter. The method of influencing the Court's decision presents an interesting case study on the dynamics of interaction between civil society, media and a traditionally sheltered institution that normally acts behind the scenes.

Petitioner in *Estrada vs Sandiganbayan* went before the court challenging the constitutionality of Republic Act No. 7080, entitled "An Act Penalizing the Crime of Plunder," Petitioner averred that the law must be struck down as unconstitutional for being violative of the due process clause because of the vagueness of some of its provisions. Though what was on trial is not the guilt or innocence of the petitioner but rather the constitutionality of the law, the Supreme Court decision evidently would have a great impact on the petitioner and should have seriously compromised government efforts to bring petitioner before the bar of justice.

In practical terms, were the law struck down as unconstitutional, Mr. Estrada would be allowed to post bail and reacquire his liberty. The two lesser charges he faced—perjury and illegal use of alias—were bailable offences.

Voting 10-4 with one abstention, the Supreme Court upheld the constitutionality of the Plunder Law with Chief Justice Davide, Justices Josue Bellosillo, Ricardo Puno, Jose Melo, Jose Vitug, Vicente Mendoza, Artemio Panganiban, Leonardo Quisumbing, Arturo Buena and Sabino de Leon in the majority. Justices Bernardo Pardo, Consuelo Ynarez-Santiago, Angelina Sandoval-Gutierrez and Santiago Kapunan voted to strike down the law as unconstitutional. Justice Antonio Carpio abstained.

As mentioned earlier this case presents a unique opportunity for study on the dynamics of interaction between civil society, media and the Court. Prior to the decision in the case, an obviously orchestrated campaign involving the internet, fax, and short message services (text messaging) predicted its outcome. Some groups were preparing to "mount mass actions to apply pressure on the justices."⁸⁸ Atty.

⁸⁷ G.R. No. 148560, November 19, 2001.

⁸⁸ VOLT CONTRERAS and CHRISTIAN ESGUERRA, "High Court Under Pressure from Estrada Friends, Foes" PHILIPPINE DAILY INQUIRER http://www.inq7.net/nat/2001/nov/19/text/nat_1-1-p.htm last visited July 29, 2002.

Leonard de Vera of the Equal Justice for All Movement (E-Just) warning of the possible consequences of a result favoring Estrada informed media that the people were “dangerously passionate and emotionally charged.” He strongly voiced concern that “a decision by the high tribunal rendering the plunder law unconstitutional would trigger mass actions probably more massive than those that led to People Power II.”⁸⁹ Sammy Malunes, spokesperson of the Kilusang Mayo Uno expressed agitation on the rumors that the Estrada camp had a 500-million peso fund to lure the justices to vote in their favor.⁹⁰

As the campaign grew in magnitude, insolence and boldness, more text messages swept the country on November 18, 2001, the day before the decision came out. The messages spread rumors that supposedly eight justices had already voted to declare the law unconstitutional. Another widely circulated text message urged the people to “let the eight justices ‘feel our anger.’”⁹¹

Romy Abaya, leader of Plunder Watch was emphatic in his call for the people to “go back to the streets because the president we threw out of power may get away.”⁹² Roy Calfoforo of the Kongreso ng Mamamayang Pilipino II (Kompil II) expressed the same sentiments when he says that “if the plunder case is lost, Estrada can go free and what People Power II campaigned for will have meant nothing.”⁹³ The group “Plunder Watch” as early as September 16, 2001 urged the people to rally in front of the Supreme Court as the tribunal hears oral arguments regarding the constitutionality of the Plunder Law.

Media identified Justice Santiago Kapunan as the ponente of the case. Prior to the release of the decision, efforts to have Justice Kapunan inhibit himself were announced over the electronic media, SMS, television and the print media. Speculation was rife that some justices were bribed to decide in a certain way.⁹⁴

That it was Justice Bellosillo who eventually penned the decision and not Justice Kapunan came as a surprise to many. Whether or not Kapunan was taken out of the case or whether or not a slim majority favored declaring the Plunder Law unconstitutional now belongs to the realm of speculation, shrouded in the veil of

⁸⁹ *Id.*

⁹⁰ *Supra* note 88.

⁹¹ *Id.*

⁹² *Id.*

⁹³ ALFRED ARAYA, *Multi-sectoral Rally draws parallels between Marcos, Estrada* CYBERDYARYO September 24, 2001 http://www.codevan.com.ph/CyberDyaryo/features/f2001_1121_02.htm last visited July 29, 2002.

⁹⁴ PLUNDERWATCH, *People power 2 groups raise alarm over Estrada appeal on Plunder Law's constitutionality SC Justice Kapunan's inhibition sought* September 16, 2001 <http://www.tinig.com/x6/x6pw2.html> last visited July 29, 2002.

secrecy that marks the highest court's deliberations. Were this the case, triumph of opinion and pressure over dispassionate judgement would mar the result. True enough, it turned out that Justice Kapunan dissented from the majority opinion.

Following the promulgation of the decision on November 19, 2001, civil society groups "eagerly welcomed the most recent development in the so-called Estrada saga."⁹⁵ Dr. Carol Araullo, Plunder Watch convenor, felt "vindicated" and said that the justices' decision "upholds truth and justice."⁹⁶ Fr. Robert Reyes, parish priest of the University of the Philippines Church of the Holy Sacrifice and a member of Kompil II said that "the next move is to mobilize ourselves to make a strong statement in keeping up the monitoring of the trials at the Sandiganbayan"⁹⁷. Rasti Delizo, alliance coordinator of Sanlakas was more direct when he said "civil society groups should *continue to exert pressure* until a conviction is made"(italics supplied), Delizo pointed out that pressure can be done by "strengthening the ranks of people's organizations, and continuing vigilance and monitoring of the trials and proceedings in the Sandiganbayan"⁹⁸. Dr. Carol Araullo said that Plunder Watch is planning to conduct "outreach programs in Metro Manila communities as well as in the provinces to educate people of the implications of the plunder cases against Estrada."⁹⁹

The pressure and lobbying done by civil society groups for the Supreme Court to uphold the constitutionality of the law was not only clearly felt but also clearly affected and threatened the public's perception of the Supreme Court's independence. On December 20, 2001, the Court felt compelled to issue a resolution ordering Atty. Leonardo de Vera to explain why he should not be cited for indirect contempt for attempting to influence the high court's decision on the constitutionality of the Plunder Law. The resolution was a result of an administrative case initiated by the Supreme Court against de Vera for "alleged threats against the members of the court" which was in line with the statement of de Vera that the justices voting against the constitutionality of the plunder law were probably bribed by the opposition.¹⁰⁰

Justice Angelina Sandoval-Gutierrez in her dissenting opinion echoed and revealed the dilemma that confronted the court in the face of mounting pressure from civil society groups to decide the Plunder Law case in one way and only that correct way. She wrote: "At times when speaking against popular view can subject a

⁹⁵ ALFRED ARAYA, *Civil Society rejoices over SC decision upholding plunder law, but advises vigilance* November 21, 2001 http://www.cyberdyaryo.com/commentary/c2001_0919_01.htm last visited July 29, 2002.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Supra* note 88.

⁹⁹ *Id.*

¹⁰⁰ MICHAEL UBAC and CHRISTIAN ESGUERRA, *Lawyer faces SC contempt over plunder law case* http://www.inq7.net/brk/2001/dec/20/text/brkpol_3-1-p.htm last visited July 29, 2002.

member of this Court to all sorts of *unfair criticism and pressure from the media*, the lure not to wield the judicial pen is at its crest. Nevertheless I cannot relent to such enticement.”¹⁰¹ Her dissenting opinion underscored the fact that was is R.A. No. 7080 which was on trial and not Mr. Estrada.

In Justice Kapunan’s case, what would have happened if the group did not rally for his inhibition? Reading Justice Kapunan’s dissent and the way he struck down the statute for being vague, it would seem that the decision would have come out with a totally different result. On the one hand, one cannot help but shudder at the thought of how the course of our history would have changed had the ponente not been changed, assuming there was a change. On the other hand, should the dominant and pervasive influence that civil society exerted on the judiciary continue, would transcendental cases be decided in the ballot box? The question that follows then, is whether Kapunan’s dissent awaits the wisdom of another day.

V. CONCLUSION

Increased “judicialization of society” has brought about two new developments in the area of judicial decision making. On the one hand the sanctity of judicial independence, the “crown jewel of constitutional design”¹⁰² inevitably acquires a new level of significance. On the other hand, the calls for increased “judicial accountability” cannot entirely be ignored. These developments require a delicate balance that considers the value in a democratic society of a strong and independent judiciary against the idea of accountability inherent in a tripartite structure.

With the emergence of an empowered civil society hailed as “one of the strongest and most vibrant civil societies worldwide,”¹⁰³ the challenge now for society and the state is to locate a role for the judiciary and civil society that reduces tensions between judicial independence and judicial accountability allowing the opinions of society to flourish without injury to the idea of judicial impartiality.

The growing influence of civil society in our country cannot be denied. Engagement of Civil Society in the Court’s business is not a battle requiring a victor. Rather, this engagement should be viewed as a transformative event that brings into

¹⁰¹ G.R. No. 148560, November 19, 2001.

¹⁰² GERALD E. ROSEN and KYLE W. HARDING, *Safeguarding the Constitution’s ‘Crown Jewel’* 29 FORDHAM URBAN. L.J. 791.

¹⁰³ *People Power Pt 1-Civil Society in the Philippines* COMPASS WEBSITE April 9, 2000 <http://www.abc.net.au/compass/stories/s115745.htm> last visited July 29, 2002.

the picture Hegel's original ethical role creating a society receptive to and nurturing the Rule of Law.

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