HISTORY AND THE GENERATION OF DECISIONAL RULES

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Judicial power, which includes the duty to settle actual controversies involving legally demandable and enforceable rights, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Philippine Government, is vested in the Supreme Court and in such lower courts as may be established by law.[1] Yet, when the Highest Court of the land exercises this power, its action is immediately distinguishable from the work of courts in general. In the hands of the Supreme Court, the exercise of judicial power achieves a normative result, providing for jurisprudence embodying authoritative rules that are statutorily regarded as forming part of the legal system of the Philippines.[2] This distinction is sufficient to invite scrutiny of Supreme Court decisions and resolutions. Indeed, it has provoked questions related to judicial intervention in areas considered to be political, decisional control of economic policy,[3] perceived judicial activism, and the countermajoritarian difficulty vis-à-vis the limits of judicial review.[4] Discussion of this kind has been robust, but not much light has been shed on

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[1] CONST. art. VIII, sec. 1.

[2] CIVIL CODE, art. 8 provides, "Judicial decisions applying or interpreting the laws or the Constitution shall form part of the legal system of the Philippines." Moreover, the principle of *stare decisis* observed in this jurisdiction, calls for adherence to precedent, or abiding by the rule established in a final decision of the Supreme Court. See De Mesa v. Pepsi-Cola Products, G.R. Nos. 153063-70, August 19, 2005.

[3] This area of interest alone has generated several law review articles, such as Ricardo J. Romulo, *The Supreme Court and Economic Policy: A Plea for Judicial Abstinence*, 67 PHIL. L. J. 348 (1993), Perfecto J. Fernandez, *Judicial Overreaching in Selected Supreme Court Decisions Affecting Economic Policy*, 67 PHIL. L. J. 332 (1993), Solomon Ricardo B. Castro & Martin Israel L. Pison, *The Economic Policy Determining Function of the Supreme Court in Times of National Crisis*, 67 PHIL. L. J. 354 (1993).

[4] Professor Alexander M. Bickel formulated the point very clearly in 1962 in THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS. At 16, he writes,

> The root difficulty is that judicial review is a counter-majoritarian force in our system.... When the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it. That, without mystic overtones, is what actually happens.... It is the reason the charge can be made that judicial review is undemocratic.

A few Philippine scholars, however, are of the view that the countermajoritarian difficulty is not one that is felt in this jurisdiction considering that the power of judicial review, although concededly a unique American heritage, has consistently been founded upon the text of the Philippine constitutions, from the 1935 Constitution to the 1987

the peculiar enterprise in which the Supreme Court is engaged when it decides a dispute — the production of rules.

In constitutional law, the production or generation of rules is viewed as legislative in nature.[5] When a decision is rendered, it involves a judgment or award in favor of one party and against another, and providing the reason or reasons in support of the conclusion obtained. The judgment, however, performs not only the function of resolving a dispute; jurisprudence further yields a rule of law. To be sure, as evidence of what the law means, judicial decisions are considered as assuming the same authority as the statute itself. The reason provided or doctrine announced, because it will be recorded, reported and cited (as precedent) in later cases, where applicable, contains the kernel of the decisional rule. When a series of precedents come into existence, the rule enunciated may be considered as having gained acceptance. Thus, when undertaken by the judicial branch, primarily through the Supreme Court, the production of rules takes a complexion entirely different from legislative process.[6] It is, by and large, a practice, as to both process and result that has successfully eluded examination. After all, the branch of Government that exercises it is one of last resort and there is no avenue for further review. Because these decisional rules are formulated and promulgated within the context of an actual case or controversy, their prescriptive or normative effect may easily be dismissed as inconsequential, as is the question on the processes of production that implicate whether that which is deemed part of the legal system of the Philippines is credible, reliable, stable and legitimate.

True, the Constitution itself discusses how the Supreme Court must act, as a collegial body, in deciding a controversy[7] and in what form its final decision must be enunciated. Whether the question presented before the Supreme Court involves constitutional meaning or the interpretation of a statute, judicial decisions must be promulgated within the context of an actual case or controversy, or for the specific purpose of resolving a real dispute. The task of a judge – of adjudication and decision-making – is, in truth, a fairly simple one, aided specifically by an adversarial system[8] of public dispute resolution. The Constitution itself, as part of the rigorous demands of

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Constitution. See Florentino P. Feliciano, *The Application of Law: Some Recurring Aspects of the Process of Judicial Review and Decision Making*, 37 AM. J. JUR. 17 (1992).

[5] Legislative power is understood to include the power to make laws, to amend and repeal them. It may be delegated under specific circumstances, regarded as proper or due delegation, to the Executive Department and to the local governments, recognizable in the form of (implementing) rules and regulations.

[6] The production of rules by the legislative branch, or the enactment of laws, is not a guarded process, although the internal rules of procedure of the legislature is not subject to judicial inquiry. Rather, the process may considered a thoroughly public one, where, by and large, all documents and discussions related to the creation of laws are recorded and made available for public examination. The same may be said of administrative rule-making, although the provisions of the Revised Administrative Code invites re-examination to determine if it continues to be responsive to a developing democracy that craves access to and meaningful participation in this vital process, beyond the public hearing. Nevertheless, there are certain areas or situations where the process remains opaque, but not inherently so.

[7] CONST. art. VIII, secs. 3, 13, 15-16.

[8] The adversary system is said to be fundamental to the public dispensation of justice and to a sound judicial system. David Kessler, former Commissioner of the United States Food and Drug Administration, in relation to the conduct of litigation against tobacco manufacturers, criticized the dominant view in relation to adversary system, in A QUESTION OF INTENT: A GREAT AMERICAN BATTLE WITH A DEADLY INDUSTRY (2001).

due process, requires only that decisions specify the facts and the law upon which they are made.[9] In *Velarde v. Social Justice Society*,[10] the Supreme Court had the opportunity, recently, to articulate that, at all times, the decision must be clear, concise, complete and correct. It explained further the parts of a "good decision" as consisting of a statement of the case, statement of facts, issues or assignment of errors, court ruling and dispositive portion. This case even grants the judicial magistrate liberality in adding an introduction, prologue or epilogue, "especially in cases in which controversial or novel issues are involved."[11]

There is less concern, however, in finding a decision complete in all its parts, than there is in discerning those fine elements that indicate that a Supreme Court decision is entitled to faith and trust not only as an acceptable solution to the "actual case or controversy," but as an abiding construction and application of the law. The field of inquiry on the materials and instruments that inform the process of producing these rules is still a dim place. When these rules are produced and become enforceable not only against the actual litigants, but foisted upon the public as the binding interpretation of the law, they are offered without a handbook or a manual of use — litigants, lawyers and law professors alike must cultivate that discipline in discerning, if not divining, the ensconced *ratio decidendi*.[12]

Of course, there are a few apparent forms and practices that govern the judicial production of rules, such as respect for precedent and adherence to the principle of *stare decisis*. This begs the question, however, for a mere restatement of precedent or *stare decisis* cannot be a viable substitute for probing what truly lends soundness to the process of adjudication and legitimacy to the rules it generates. This investigation is an extensive one, and will not be done here; rather, the focus of this discussion will center upon one observable implement –recourse to history in the application of laws, particularly where this is dispositive of dispute. In his scholarly Separate Opinion in the case of *Cruz v. Secretary of Environment and Natural Resources*,[13] Justice Reynato Puno, citing

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[9] CONST. art. VIII, sec. 14, which provides:

> No decision shall be rendered by any court without expressing therein clearly and distinctly the facts and the law on which it is based.
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> No petition for review or motion for reconsideration of a decision of the court shall be refused due course or denied without stating the legal basis therefor.

[10] G.R. No. 159357, April 28, 2004.

[11] *Ibid.*

[12] In other jurisdictions, there appears to be an organized effort at discovering the foundation of judicial behavior, thus wrote Andrew D. Martin and Kevin M. Quinn in their unpublished work *Bayesian Learning about Ideal Points of U.S. Supreme Court Justices, 1953 – 1999, 23 July 2001*, available at <http://www.csss.washington.edu/Papers/wp16.pdf> April 15, 1006:

> [A]t the heart of attitudinal and strategic explanations of judicial behavior is the assumption that justices have well-defined policy preferences. In the literature these preferences have been measured in a handful of ways, including using factor analysis and multidimensional scaling techniques, looking at past votes in a single policy area, content-analyzing newspaper editorials at the time of appointment to the Court, and recording the background characteristics of the justices. Scholars have used these measures successfully to explain behavior in some policy areas, including civil rights, but have been less successful in others, such as economics cases. (citations omitted)

[13] G.R. No. 135385, 6 December 2000.

Judge Richard Posner's work on Friedrich Nietzche's 1874 essay "On the Uses and Disadvantages of History for Life," emphasized the indispensable character of the "distinct sociology and the labyrinths of [the law's] history" in fully exploring the "sense and subtleties" of the Indigenous Peoples Rights Act (IPRA).[14] According to Judge Posner —

> [L]aw is the most historically oriented, or if you like the most backward-looking, the most 'past-dependent,' of the professions. It venerates tradition, precedent, pedigree, ritual, custom, ancient practices, ancient texts, archaic terminology, maturity, wisdom, seniority, gerontocracy, and interpretation conceived of as a method of recovering history. It is suspicious of innovation, discontinuities, 'paradigm shifts,' and the energy and brashness of youth. These ingrained attitudes are obstacles to anyone who wants to re-orient law in a more pragmatic direction. But, by the same token, pragmatic jurisprudence must come to terms with history.[15]

This, of course, is not the only paean that has been made to the utility of history; an entire course is devoted to the exploration of the significance of history in law. But it does serve to dramatically call attention to how law implicates history, particularly in the area of adjudication and decision-making, and presents an interesting field of study in legal history, which has, curiously enough, not opened itself to academic interest and investigation.

Now, there are a number of decisions where resort to history is observable as a relevant element of adjudication. We turn our attention in this paper, however, to the specific judicial exercise of putting history to use in the task of discovering and declaring the meaning of the law, or producing the decisional rule, as applicable to the resolution of the dispute. The aim of this paper is to explore this use of history in the production of decisional rules and takes off, in part, from the discussion of Prof. Emmanuel Q. Fernando on the role of substantive reasons in adjudication and former Supreme Court Justice Florentino Feliciano's discussion concerning the clarification and specification of community values in adjudication. Selected cases shall be used in exploring and demonstrating the manner by which history, including legal history, is utilized in adjudication and how it impacts the creation of decisional rules. The first part of the paper discusses what is meant by history and the use of history, with a brief survey of the observable uses of history by the Supreme Court;[16] the second part considers the of

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[14] Republic Act No. 8371 (1997).

[15] Cruz v. Secretary of Environment and Natural Resources, G.R. No. 135385, December 6, 2000, citing Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573, 573 (2000).

[16] The focus of this Article, which will be later further disclosed, is the use of history in Supreme Court decision-making. It explores the challenges that this method imposes upon adjudication, particularly in lending the same stability. However, the author concedes that the study is a narrow one, considering that the work of the Supreme Court as an institution cannot be fully grasped without a consideration of the other elements and factors that comprise it. There, indeed, have been efforts in the past to understand the judicial process as an institutional one, and independently of an assessment of the normative result of its work. Edward Rubin and Malcolm Feeley engaged in this enterprise when they described the process, using the phenomenological approach, as consisting of

former Supreme Court Justice Florentino Feliciano and Professor Emmanuel Q. Fernando, as providing an adequate framework on which an understanding of adjudication may be based; and the third part pertains to the introduction and exploration of the problems and issues arising from the use of history in the generation of decisional rules. The discussion is designed to be descriptive, rather than prescriptive; although this field of study is rich in other jurisdictions, particularly in the United States, the desire in this Article is to allow local sources (particularly the reported cases) to disclose the observable practice as regards the use history and its impact on adjudication, as to both process and normative result (with emphasis on the latter).

I. HISTORY IN JURISPRUDENCE

To begin, it would do well to survey what, in broad terms, may be called the uses of history in jurisprudence. In this regard, the use of the term "history" is made in a general sense, as pertaining to factual accounts of what transpired in the past, although the term itself simply means in Greek, "to inquire." The term "use of history," in its broad signification, pertains to those practices observed in promulgated decisions in the Philippines, specifically: (a) the utilization of the historical method, (b) the recitation or narration of events that are considered historical, (c) the legislative history of the proceedings through the legislative mill or the background of the law, (d) a discussion of events that happened in the past that can explain the reason for and the purpose of enacting the law or its evolution in the same or other jurisdictions, and (e) generally, the exposition of the development of legal system, specific areas of laws and particular legal institutions.

Historical method is used here in the sense of a looking-back in time and thus being engaged in a chronological framework of analysis and understanding. The process of adjudication, which is employed in rendering public justice, involves an adversarial mode of resolving a dispute. The outcome inextricably involves upholding right by finding fault, pinning blame, imputing liability, deciding responsibility or, to bring the discussion within the conceptual understanding of judicial power and cause of action, confirming the existence of an enforceable right which has been transgressed through a wrongful act — all of which concern an examination of how the dispute arose in the

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institutional coordination of individual integrative efforts, and further explored how this idea provides an argument in support of the proposition that the process itself is a legitimate one. They expressed this concern in this manner:

> The judiciary, after all, is an institution; any American jurisdiction, whether federal or state, consists of hundreds or thousands of individual judges, plus a variety of other employees. Modern scholars have much to say about the structure of institutions, but say relatively little about their conceptual processes. Mary Douglas has written an insightful book entitled How Institutions Think, but her topic is the way institutions structure individual thought, not the way that institutions solve problems or develop new ideas. Yet most political and governmental action these days springs from ideas generated in the institutional context itself, not from either individual theory or charismatic leadership. Edward Rubin & Malcolm Feeley, *Creating Legal Doctrine*, 69 CAL. L. REV. 1989, 1992 (1996).

In addition, it is worth mentioning here that, in other jurisdictions, there are works dealing specifically with theories of legal history.

first place. The method is also apparent in the use of precedent and the application of *stare decisis*, where the focus is on locating in past decisions the applicable authority.

In a number of decisions, the Supreme Court has also had the opportunity to offer a narrative of historical events. It is important to draw this distinction, for it is likewise an interesting subject for scholarly study to delve into how law has shaped and how legal materials have documented Philippine history. For example, as noted by Chief Justice Hilario Davide, Supreme Court decisions have paved the way for historic events, such as the suspension of the privilege of the writ of habeas corpus in *Lansang v. Garcia*,[17] which ushered experimentation in the manipulation of law and legal institutions during the period of Martial Law, and subsequently, the ascension to power of the Aquino administration in 1986. The events surrounding the success of EDSA Dos are narrated in detail by the Supreme Court in the cases of *Estrada v. Desierto* and *Estrada v. Macapagal-Arroyo*.[18] The account rivals those found in Philippine history books and

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[17] 149 Phil. 547 (1971).

[18] Estrada v. Desierto, et al., G.R. Nos. 146710-15, 146738, Resolution, April 3, 2001. On 2 March 2001, the Supreme Court promulgated a Decision in which it narrated the events:

> On January 17, the public prosecutors submitted a letter to Speaker Fuentebella tendering their collective resignation. They also filed their Manifestation of Withdrawal of Appearance with the impeachment tribunal. Senator Raul Roco quickly moved for the indefinite postponement of the impeachment proceedings until the House of Representatives shall have resolved the issue of resignation of the public prosecutors. Chief Justice Davide granted the motion.
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> January 18 saw the high velocity intensification of the call for petitioner's resignation. A 10-kilometer line of people holding lighted candles formed a human chain from the Ninoy Aquino Monument on Ayala Avenue in Makati City to the EDSA Shrine to symbolize the people's solidarity in demanding petitioner's resignation. Students and teachers walked out of their classes in Metro Manila to show their concordance. Speakers in the continuing rallies at the EDSA Shrine, all masters of the physics of persuasion, attracted more and more people.
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> On January 19, the fall from power of the petitioner appeared inevitable. At 1:20 p.m., the petitioner informed Executive Secretary Edgardo Angara that General Angelo Reyes, Chief of Staff of the Armed Forces of the Philippines, had defected. At 2:30 p.m., petitioner agreed to the holding of a snap election for President where he would not be candidate. It did not diffuse the growing crisis. At 3:00 p.m., Secretary of National Defense Orlando Mercado and General Reyes, together with the chiefs of all the armed services went to the EDSA Shrine. In the presence of former Presidents Aquino and Ramos and hundreds of thousands of cheering demonstrators, General Reyes declared that 'on behalf of your Armed Forces, we wish to announce that we are withdrawing our support to this government.' A little later, PNP Chief Director, Director General Panfilo Lacson and the major service commanders gave similar stunning announcement. Some Cabinet secretaries, undersecretaries, assistance secretaries, and bureau chiefs quickly resined from their posts. Rallies for resignation of the petitioner exploded in various parts of the country. To stem the tide of rage, petitioner announced he was ordering his lawyers to agree to the opening of the highly controversial second envelope. There was no turning back the tide. The tide had become a tsunami.
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> January 20 turned to be the day of surrender. At 12:20 a.m. the first round of negotiations for the peaceful and orderly transfer of power started at Malacanang's Mabini Hall, Office of the Executive Secretary, Secretary Edgardo Angara, Senior Deputy Executive Secretary Ramon Bagatsing, Political Adviser Angelito Banayo, Asst. Secretary Boying Remulla, and Atty. Macel Fernandez, head of the Presidential Management Staff, negotiated for the petitioner. Respondent Arroyo was represented by now Executive Secretary Renato de Villa, now Secretary of Finance Alberto Romulo and now Secretary of Justice Hernando Perez. Outside the palace, there was a brief encounter at Mendiola between pro and anti Estrada protesters which resulted in stone-throwing and caused minor injuries. The

emphasizes the ability of the court to document history in its decisions. Indeed, jurisprudence is replete with other examples. A brief account relating to the expulsion of the Jesuits from the Philippines in 1776 may be found in *Alviar v. Cullum*.[19] The separation of the Independent Catholic Church from the Holy Roman Catholic Church is discussed in *Evangelista v. Ver*,[20] while the case of *Jamias v. Rodriguez*[21] where the

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negotiations consumed all morning until the news broke out the Chief Justice Davide would administer the oath to respondent Arroyo at high noon at the EDSA Shrine.

At about 12:00 noon, Chief Justice Davide administered the oath to respondent Arroyo as President of the Philippines. At 2:30 p.m., petitioner and his family hurriedly left Malacanang Palace. Estrada v. Desierto, et al., G.R. Nos. 146710-15, 146738, Mar. 2, 2001.

The Supreme Court remained steadfast as it affirmed its conclusion and further narrated —

Petitioner insists he is the victim of prejudicial publicity. Among others, he assails the Decision for adverting to newspaper accounts of the events and occurrences to reach the conclusion that he has resigned. In Our Decision, we used the totality test to arrive at the conclusion that petitioner has resigned. We referred to and analyzed events that were prior, contemporaneous and posterior to the oath-taking of respondent Arroyo as president. All these events are facts which are well-established and cannot be refuted. Thus we adverted to prior events that built up the irresistible pressure for the petitioner to resign. These are: (1) expose of Governor Luis 'Chavit' Singson on October 4, 2000; (2) the 'I accuse' speech of then Senator Teofisto Guingona in the Senate; (3) the joint investigation of the speech of Senator Guingona by the Blue Ribbon Committee and the Committee on Justice; (4) the investigation of the Singson expose by the House Committee on Public Order and Security; (5) the move to impeach petitioner in the House of Representatives; (6) the Pastoral Letter of Archbishop Jaime Cardinal Sin demanding petitioner's resignation; (7) a similar demand by the Catholic Bishops Conference; (8) the similar demands for petitioner's resignation by former Presidents Corazon C. Aquino and Fidel V. Ramos; (9) the resignation of respondent Arroyo as Secretary of DSWD and her call for petitioner to resign; (10) the resignation of the members of petitioner's Council of Senior Economic Advisers and of Secretary Mar Roxas III from the Department of Trade and Industry; (11) the defection of then Senate President Franklin Drilon and then Speaker of the House of Representatives Manuel Villar and forty seven (47) representatives from petitioner's Lapiang Masang Pilipino; (12) the transmission of the Articles of Impeachment by Speaker Villar to the Senate; (13) the unseating of Senator Drilon as Senate President and of Representative as Speaker of the House; (14) the impeachment trial of petitioner; (15) the testimonies of Clarissa Ocampo and former Finance Secretary Edgardo Espiritu in the impeachment trial; (16) the 11-10 vote of the senator-judges denying the prosecutor's motion to open the 2nd envelope which allegedly contained evidence showing that petitioner held P3.3 billion deposit in a secret bank account under the name 'Jose Velarde'; (17) the prosecutors' walkout and resignation; (18) the indefinite postponement of the impeachment proceedings to give a chance to the House of Representatives to resolve the issue of resignation of their prosecutors; (19) the rally in the EDSA Shrine and its intensification in various parts of the country; (20) the withdrawal of support of the then Secretary of National Defense and the then Chief of Staff General Angelo Reyes together with the chiefs of all armed services; (21) the same withdrawal of support made by the then Director General of the PNP, General Panfilo Lacson, and the major service commanders; (22) the stream of resignations by Cabinet secretaries, undersecretaries, assistant secretaries and bureau chiefs; (23) petitioner's agreement to hold snap election and opening of the controversial second envelope. All these prior events are facts which are within judicial notice by this Court. There was no need to cite their news accounts. The reference by the Court to certain newspapers reporting them as they happened does not make them inadmissible evidence for being hearsay. The news account only buttressed these facts as facts. For all his loud protestations, petitioner has not singled out any of these facts as false. Estrada v. Desierto, et al., G.R. Nos. 146710-15, 146738, Resolution, April 3, 2001.

[19] 86 Phil. 193 (1950).

[20] 8 Phil. 653 (1907).

[21] 81 Phil. 303 (1948).

Supreme Court was called upon to decide the matter of the grant of authorization to solemnize marriages, covered the schism within the Philippine Independent Church. In some instances, such as the reference to the Sakay Rebellion in *United States v. Sakay, et al.*,[22] the decision itself may be considered a repository of historical evidence. In the latter case, the Supreme Court quotes in full two letters signed by Macario Sakay, providing an interesting look into the events covered.[23]

Indeed, through this particular use of history by the Supreme Court, it is possible to plot the political history of the Philippines from the Spanish regime, through the Japanese occupation, the Third Republic and up to the present.[24] Likewise, through the decisional materials of the Supreme Court, the legal framework – from the test case of *Lansang v. Garcia*[25] to the ratification cases, on which constitutional authoritarianism had been established during the dark period of Martial Law, may be analyzed.[26] For the student of legal history, however, this is a peculiar use of history in the sense that it holds the information that may help to understand the Supreme Court's own

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[22] 8 Phil. 255 (1907).

[23] *Id.* at 259-260. The texts of these letters state:

> Mr. Pio del Pilar, Major-General,
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> Upon receipt of this order, please comply with the same and direct the troops to enter the town of Teresa and carry out the following:
>
> Seize all foods, such as palay, which you can carry, also take the money in order to defray the expenses of our soldiers and the war.
>
> Arrest the concejal Memimno Grebillos, and all persons concerned with him in determining our commissioners and as soon as arrested you will punish them as provided in Order No. 9 or April 10, 1904, prescribing that the tendon Achilles shall be cut and the fingers of both hands crushed.
>
> Should the townspeople offer resistance to the troops, burn all the houses, without showing mercy to the inhabitants.
>
> All the provisions of this letter have been passed on by the supreme junta, on account of the treacherous conduct of the inhabitants of Teresa toward our commissioners.
>
> (Signed) MACARIO SAKAY
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> Major Ramos:
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> Your letter reporting the result of your expedition received in this office.
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> Upon receipt of this letter, direct Captain Franca to take away Francisco Rosalia and Faustina Custodio and cut the tendons of their feet and crush the fingers of their hands. Do not fail to obey this order, otherwise you will be held responsible for noncompliance therewith, because they are traitors to our government. Sultan is major but he is a secret service agent and so is Faustino.
>
> This punishment shall be carried out in the presence of those married person who are released, and enroll and administer the oath of fidelity to such as are not enlisted. Also administer the oath to those that are ordered released and cause a list of their names to be captured by the enemy, so that it may be known that they are members of the army.
>
> God be with you.
>
> November 14, 1905.
>
> (Signed) MACARIO SAKAY.

[24] See Forbes v. Chuoco Tiaco, Brodett v. Dela Rosa, 77 Phil. 752 (1946); Kuroda v. Jalandoni, et al., 83 Phil. 171 (1949); Tolentino v. Catoy, 82 Phil. 300 (1948); Punsalan v. Mendoza, G.R. No. 69576, November 19, 1985; Garcia v. COMELEC, G.R. No. 111230, September 30, 1994; Romualdez v. RTC, G.R. No. 104960, September 14, 1993; & Marcos v. Manglapus, G.R. No. 88211, September 15, 1989.

[25] 149 Phil. 547 (1971).

[26] See also Gonzales v. COMELEC, 129 Phil. 7 (1967); Javellana v. Executive Secretary, 151-A Phil. 35 (1973); & De Leon v. Esguerra, G.R. No. 78059, August 31, 1987.

historiography, or decisions as forming the Court's interpretation of the significance of historical events.

Another form of use of legal history is the narration of the development of a law or an area of law, as in the case of *Chung Fu Industries, Inc. v. Court of Appeals*,[27] where the Supreme Court embarked on taking "a leaf from history and briefly tracing the evolution of arbitration as a mode of dispute settlement," even though the discussion did not prove dispositive of the dispute or essential to the formulation of the decisional rule relating to recourse to the courts following the rendition of an award in arbitration.

History is implicated in Supreme Court decisions in yet another way. In ascertaining the intention of the legislature in enacting a law, there are instances where the Supreme Court has considered the general history of the law, or its genesis, including the various steps leading up to and attending its enactment, as shown by the legislative journals, covering the history of the statute from the time it was introduced until it was finally passed. The message of the President, the testimony given in the congressional hearings, the report of the committees, the amendments and the opposition made to the passage of law, all form part of the genesis of the law.[28] The historical method of this sort formed the foundation of the Supreme Court's decision on the impeachment complaint against Chief Justice Hilario Davide.[29]

To be sure, the historical method has been regarded as a mode of statutory interpretation as well. According to Dean Roscoe Pound, code provisions are assumed to be in the main declaratory of the law as it previously existed; the code is regarded as a continuation and development of pre-existing law...all exposition of the code and of any provision thereof must begin by an elaborate inquiry into the pre-existing law and the history of the development of the competent juristic theories among which the framers of the code had to choose. The Supreme Court utilizes this method of interpretation, whenever it is called upon to construe amended, re-enacted, and adopted acts. In such a case, "the method serves to give a reliable picture of the circumstances surrounding new laws."

There are a number of excellent examples to demonstrate this practice. In *Rubi v. Provincial Board of Mindoro*,[30] the Supreme Court's analysis in relation to the constitutionality and validity of Section 2145 of the Administrative Code of 1917 turned principally upon gaining an accurate understanding of the term "non-Christian" as used in the challenged statute. For this purpose, the Supreme Court explored the history of related statutes, as well as the treatment of the "uncivilized elements" of the Philippine Islands throughout the relevant periods. Writing for the Supreme Court, Justice Malcolm stated, "[i]n order to put the phrase in its proper category, and in order to understand the policy of the Government of the Philippine Islands with reference to the

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[27] G.R. No. 96283, February 25, 1992.

[28] Burril v. Edminister, 119 NE 367 (1918); &, U.S. v. St. Paul Railroad Co., 347 U.S. 310 (1954).

[29] Francisco v. House of Representatives, G.R. No. 160261, November 10, 2003.

[30] 39 Phil. 660 (1919).

uncivilized elements of the Islands, it is well first of all to set down a skeleton history of the attitude assumed by the authorities towards these 'non-Christians,' with particular regard for the legislation on the subject."[31] The Supreme Court's survey covered the period before the acquisition of the Philippines by the United States to acquisition, as well as a discussion on the Manguianes.

Of the various forms that the use of history in jurisprudence takes, use of history as narrative does not present a problem in law or in the process of producing a decisional rule, rather an issue in the use of history arises where the pronouncement upon the application of law is a judgment based upon legal history, or where there is a declaration of a particular interpretation of history or historical event, which is intimately related to discharge of the Supreme Court's adjudicatory function, for history, with an emphasis on the ways in which the past differed from the present – "history as an account or the pastness of the past" – enormously complicates the task of legal argument.[32] This may be so even where the use of history is confined to an examination of legislative history as an aid to interpretation. Take the case of *Diaz v. Intermediate Appellate Court*,[33] where it appears that the consideration of the legal history was used in determining whether an illegitimate child may represent her parents in the estate of the latter's legitimate parent pursuant to Article 992 of the Civil Code. Citing that the "lines of distinction between legitimates and illegitimate, which goes back far in legal history, have been softened but not erased by present law" and that present legislation has not "gone so far as to place legitimate and illegitimate children on exactly the same footing," and decided that illegitimate children have only those rights expressly or clearly granted by law, hence, article 992 cannot be deemed as having been suppressed or amended.[34] An example that relates to a constitutional issue is the case of *Estrada v. Desierto*.[35] There former President Joseph Estrada asserted that he continued to be entitled to executive immunity. After affirming the principle that public office is a public trust as one of the great themes of the 1987 Constitution, as further articulated in specific provisions thereof, the Supreme Court reviewed the history of the doctrine of executive immunity (which was characterized as first recognized in jurisprudence) and came to the conclusion that the immunity no longer extends to a resigned official. It bears stressing that the construction given the executive immunity was based upon a consideration of the "legal history" on executive immunity, using case law and the Records of the 1987 Constitutional Commission as sources.

Where recourse to history, whether in employing the historical method of adjudication or in making interpretations based upon history is dispositive of the dispute, problems arise. Although the method of history is an acknowledged part of adjudication, recent articulations of the method may have strained the limits of sound adjudication, particularly where the task is understood primarily as bringing a resolution

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[31] *Id.* at 670.

[32] Stuart Banner, *Legal History and Legal Scholarship*, 76 WASH. U.L.Q. 37, 37 (1998).

[33] G.R. No. 78328, June 3, 1991.

[34] *Ibid.*

[35] G.R. No. 146710-15 & G.R. No. 146738, April 3, 2001.

to a dispute — as making findings of fact to stand scrutiny and arriving upon an application of the law to such facts that will not only merit the faith of the litigants. Particularly where it concerns the decisions of the Supreme Court, it must have that character of reliable authority as to constitute being part of legal system of the Philippines. Here then lies the essential problem. While law has appropriated history as a tool of interpretation in adjudication, there appears to be no acknowledgment of, hence no effort to address, its inherent limitations as essentially relating to events, ideas and institutions as they were in the past. History engages historians to understand, that is to situate and contextualize, these events in the past (not in the present), but the observable practice is that history is engaged in jurisprudence to provide prescriptions for the present and future.

II. ADJUDICATION AND DECISIONAL RULES

There are, to be sure, certain constraints, which are recognized as having been imposed upon judicial decision-making and adjudication, including use of legal precedent, the discipline of the judicial craft, and the court's internal operating practices. Even in the area of what is termed as "crisis-driven decision-making,"[36] there appears to be conceded permissible precepts of adjudication, such as constitutional norm, statutory provision, or case precedent. Indeed, in other jurisdictions, it has been observed that theories of law, of the judicial process, and of adjudication, abound (from a search for neutral and general principles to a call for a return to pragmatic guidance for judges).[37] There is some authority that Philippine jurisdiction is spared from this labor. It is not intended for this Article to advance a theory in this area; however, to adequately ground the succeeding discussion on the Supreme Court's use of history, it is necessary to provide a framework to function as a reference point by which to understand what informs the process of creating decisional rules, including a brief discussion on the meaning of the term decisional rules as used in this Article, approaching the formulation of jurisprudence and, generally, understanding adjudication. This is a difficult, but necessary preliminary undertaking here, so that the examination of approaching the use of history in crafting jurisprudential doctrine may be properly understood in the context of the tacit but rigorous demands of sound adjudication. Put otherwise, to frame the examination of history in jurisprudence and what practices may evolve to inform, control and refine its use towards the creation of legitimate and binding decisional rules, those ideas which have been formed to understand the process and result of adjudication must also be examined.

It is recognized in law that judicial decisions applying the laws or the Constitution form part of the legal system of the Philippines. Thus, while jurisprudence cannot create law or be considered an independent source of law, it is nonetheless evidence of what the law means. It is for this reason that judicial decisions of the

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[36] Harry T. Edwards, *The Judicial Function and the Elusive Goal of Decision Making*, 1991 WIS. L. REV. 837 (1991).

[37] The requirement that the Court's opinions be principled and firmly rooted in text and precedent is intended, first, to minimize judicial discretion and the arbitrary imposition of a Justice's personal views and, second, to promote certainty and stability in the law.

Supreme Court are considered part of the legal system and assume the same authority as the statute itself.[38] More significantly, however, as former Justice Florentino Feliciano pointed in his Concurring Opinion in *Enrile v. Salazar*, statutes do not exist in the abstract, but rather "bear upon the lives of people in the specific form given them by judicial decisions interpreting those norms." Judicial decisions give specific shape and context to such norms, and in this form bind other courts, the party-litigants, as well as the public. It is for this reason that a judicial decision must be crafted and formulated to stand their scrutiny. Indeed, of the three great departments of government, it is the judiciary which must resort to non-coercive measures to generate acceptance of court decisions. In referring to decisional rules, what is primarily being identified those doctrines set out in judicial decisions, involving the interpretation of the law or the Constitution and its subsequent application. The concern of this Article is an articulation, by way of a descriptive and exploratory analysis, of the issues that surround the use of history in the process and formulation of decisional rules by the Supreme Court. To contextualize this exercise, a framework for understanding the process and formulation of decisional rules is attempted to be developed using the ideas expounded by Prof. Emmanuel Q. Fernando on substantive reasons in adjudication and the application of laws in adjudicative value clarification and specification set out by former Supreme Court Justice Florentino Feliciano.

Former Supreme Court Justice Florentino P. Feliciano explored "application of law," as part of the process of judicial review and the exercise of judicial power, and had occasion to discuss the importance of clarifying and specifying community values in the application of law. His assertion required an elaboration upon the distinctive functions of a judge and the peculiar nature of adjudication and decision-making by the Supreme Court. These latter two ideas serve as a basic platform, together with the further elucidations on adjudication offered by Professor Emmanuel Q. Fernando, from which to launch the discussion of the relevant observations regarding the use of history in the creation of decisional rules.

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[38] As a result of this legal principle, the basic rules on prospectivity and retroactivity applicable to statutes and administrative rules apply with equal force to decisions. In addition, it has been held that:

> Only from this Tribunal's decisions and rulings do all other courts, as well as lawyers and litigants, take their bearings. This is because the decisions referred to in article 8 of the Civil Code which reads. "Judicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system of the Philippines," are only those enunciated by this Court of last resort. We said in no uncertain terms in Miranda, et al. vs. Imperial, et al. (77 Phil. 1066) that '[O]nly the decisions of this Honorable Court establish jurisprudence or doctrines in this jurisdiction.' Thus, ever present is the danger that if not faithfully and exactly quoted, the decisions and rulings of this Court may lose their proper and correct meaning, to the detriment of other courts, lawyers and the public who may thereby be misled. But if inferior courts and members of the bar meticulously discharge their duty to check and recheck their citations of authorities culled not only from this Court's decisions but from other sources and make certain that they are verbatim reproductions down to the last word and punctuation mark, appellate courts will be precluded from acting on misinformation, as well as be saved precious time in finding out whether the citations are correct. Insular Life Assurance Co., Ltd., Employees Assoc., et al. v. Insular Life Assurance Co., Ltd., et al. G.R. No. 25291, January 30, 1971.

In brief, Justice Feliciano's discussion illuminates the inquiry into adjudication by advancing two significant assertions, among others: (1) that the basic function of adjudication involves not only dispute resolution but also the formation of a normative result, which is complicated by the presence of a freedom of choice on the part of the judicial magistrate and implicates the formulation of precedent upon which the choice may be founded and (2) decision-making by the Supreme Court is authoritative and, as such, must be examined considering that its formulation is in accordance with certain prescribed rules.[39]

According to Justice Feliciano, the distinctive functions of a judge are two-fold. The first function, which borrowing from Judge Friendly, Justice Feliciano terms as the "deciding" function is a practical one: the resolution of the case pending before him, within definite time limits. The second function, or the "law-making function," of the judge has much larger dimensions and relates to the clarification and development of the body of legal prescriptions one or more of which he is in the course of applying to the particular case before him. While these two functions cannot be divorced one from the other, it is the second task that concerns us here, considering it impacts the shape or content of the norms applied in resolving the controversy and the precedential value of such application for future cases. He further asserts that it is not significant that the judicial officer is provided with freedom of choice; the important questions are, rather, what are the areas of choice open to the judge and how spacious are these areas in the particular case. In his article, former Justice Feliciano explored the "manner of factors bear(ing) upon him (the judge) as he exercises his freedom of choice... (the) kinds of operations (that) should he intellectually engaged in as he tries to make up his mind conformably with his oath of office."[40]

Agreeing with Professor Corbin, Justice Feliciano adopts the three phases of the process for application of legal norms, thus: (a) the determination of the operative facts; (b) the determination of the applicable legal or normative prescriptions; and (c) relating the applicable prescriptions to the operative facts.[41] In respect of determination of operative facts, the area of judicial choice relates to at least two aspects: firstly, proof of facts, that is, the adequacy of the proof of record that certain events occurred in time and space; and secondly, the appraisal of specific facts or the total constellation of facts as operative in nature. Appellate courts, such as the Supreme Court, which are typically not triers of facts, tend to have lesser latitude of discretion than trial courts in this

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[39] Feliciano, *op. cit. supra* note 4.

[40] *Id.* at 35.

[41] *Id.* at 36. Justice Feliciano explains:

> The first thing that should be noted about these three phases is that they are not related to one another in a simple linear sequence. Each phase is heavily and reciprocally affected by the other two phases: indeed, as a practical matter, all three phases may occur in parallel fashion. For, of course, the operative or relevant facts are those which tend to bring the fact situation within the ambit of a norm potentially applicable to that situation. The relevance of particular facts is, in other words, a function of the (provisional) applicability of a particular norm to the configuration of facts. Conversely, a specific legal prescription may be regarded as potentially applicable precisely because inspection of the aggregate situation shows that it includes certain facts as components thereof.

operation. The extent of choice open to the judge in the second and third phases of the process of applying law — the determination of applicable prescription and the relating of such prescription to operative facts — is the focal point for purposes of understanding the generation of decisional rules by the Supreme Court.

Thus, focusing a little more sharply on the tasks of determining applicable prescriptions and relating them to relevant facts, it may be seen that choice inheres in the selection of the most appropriately applicable norm from among those which may generally or potentially suit the shape of the facts before the judge. However broadly or narrowly he may have initially defined the scope of the norm, the judge would have several options, which may include: (a) discarding the tentatively selected prescription and ascertaining whether another is available which would cover or take adequate account of the additional unruly facts; (b) modifying and extending or constricting or otherwise reshaping by interpretation the coverage of the prescription considered tentatively applicable; or (c) overruling and reversing that prescription, assuming it is non-constitutional and non-statutory in character, and starting the development of a new one.

Faithfulness to the discharge of the unique functions of adjudication demands rationality to the extent that the normative result captures the basic and enduring common interests of the society they are sworn to serve and succeed in being grounded in such common interest, not on personal, parochial preferences. According to Justice Feliciano, judicial applications of law must also be impartial or unbiased, uninfluenced by exclusive or special interests of either litigant or of the judge not relevant to, or incompatible with, the broader interests of the community. The system of applying law should routinely create expectations of complete resolution, rather than partial or fragmentary disposition, of the underlying dispute between the parties and of avoidance of further litigation. In this manner, the judicial process should make possible and reinforce the stability of reasonable expectations in the community by enhancing the predictability of outcomes of recourse to systems of application of law, while at the same time, the judicial process must be sensitive and responsive to developing conditions in the community, including emerging changes in dominant conceptions of what constitutes immoral behavior. Access to judicial institutions of dispute resolution should be open to all without regard to lack of ability to pay for the effective delivery of justice.[42] When we turn then to the consideration of history as an implement of law-application, the question arises as to whether its use as such considers the record of the past itself as a separate embodiment and understanding of community expectations and values. For, if as observed by a former Supreme Court justice, sound adjudication involves providing a complete resolution to the dispute, based upon underlying community values, it must be determined whether the function of values clarification and specification are not destroyed by the existence, though not acknowledged, of different and, at times, conflicting, legal historiography.

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[42] Feliciano, *op. cit. supra* note 4 at 47-48.

Justice Feliciano's thesis on the clarification and specification of community value in the application law or creation of decisional rule is dovetailed by Prof. Emmanueal Q. Fernando's ideas on substantive reasons in adjudication, which taken together, provide an adequate tool in examining the role of history in the creation of decisional rules. Writing in 1991, Prof. Fernando discussed the role and logic of substantive reasons in adjudication. While he concedes a substantive reason, no matter how sound or forceful, is not sufficient in itself to justify conclusively the decision in any given case, his analysis and classification of the reasons employed in adjudication is useful in understanding in obtaining an appreciation of generation of decisional rules. He distinguishes between formal and substantive reasons. A formal reason is an authoritative legal rule, or a readily identifiable rule directly covering a case and providing sufficient ground for rendering a decision.[43] It is further described as requiring no controversial interpretation and value judgment; necessitating only the purely mechanical skill of identifying the rule and determining whether the facts of the case admit of its application.

According to Prof. Fernando, substantive reasons are based on moral, economic, political, institutional or other social considerations. Unlike formal reasons, they are not necessarily derived from authoritative legal sources[44] and applying them involves controversial interpretation and the use of value judgment. They may be applied whether or not a rule directly covering the case already exists. It is interesting that rules may be further distinguished from substantive reasons in terms of four characteristics: (a) levels of generality, (b) degrees of precision, (c) degrees of directiveness, and (d) ability to self-justify.[45] Prof. Fernando explains further –

> These logical distinctions between rules and substantive reasons explain not only why the latter, not the former, necessitate the use of value-judgment in interpretation but also why the latter's content may be further articulated by rules. In being more general, less precise and justifying, substantive reasons serve as the guiding rationale for the construction for rules. The express or embody the fundamental principles or policies, like those found in the Constitution, or in certain statutes. By incorporation of these principles into law, substantive reasons not only justify themselves but also more specific rules constructed in their light.[46]

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[43] Enrique M. Fernando, *The Role and Logic of Substantive Reasons in Adjudication*, 66 PHIL. L. J. 54. At 56, Prof. Fernando provides the requirements of formal reason: (a) the formal reason is a rule; (b) the rule can be mechanically identified by means of some source-based test (as distinguished from a content-based test), or depending exclusively on facts of human behavior capable of being described in value-neutral terms, and applied without resort to moral argument; and (c) the rule is mechanically applied.

[44] Legal sources are generally categorized into two types: (a) primary and (b) secondary sources. Broadly defined, primary sources are limited to statutes and Supreme Court cases, as officially reported. The author construes Prof. Fernando's use of the term as unrelated to this legal signification, but hastens to add that the term as utilized by Prof. Fernando may include reference to Supreme Court cases as sources of a formal rule, particularly where the doctrine is considered as having a high level of authority as precedent and is accepted as settled.

[45] "Rules possess a love level of generality, a high degree of precision, a high degree of directiveness (i.e., dictating rather than merely guiding or influencing the result), and not self-justifying. Substantive reasons, on the other hand, possess a high level of generality, a low degree of precision a low degree of directiveness, and are self-justifying." E. Fernando, *op. cit. supra* note 43, at 57.

[46] E. Fernando, *op. cit. supra* note 43 at 57.

What is important for our enterprise here is the fundamental difference between rules and substantive reasons, in that the latter functions on two levels while rules only on one.

> [S]ubstantive reasons function on two levels, whereas rules function only one. On the first level, substantive reasons directly influence acts, or, in the judicial situation, the result or decision. Insofar as their effect is not mediated by rules, they belong to the same level. Both are mandatory norms of conduct, but they differ in that substantive reasons are more general, less precise and less indicative of a course of action than rules. On the other hand, in their higher-level sense, substantive reasons affect rules in two ways. First, they help determine the scope of a rule. Specifically, they serve as guiding standards against which rules are interpreted in particular situations. Rules may be narrowed, widened or qualified in the light of underlying substantive reasons. Secondly, substantive reasons supply rules with some weight, that is, they help support the application of a rule when the latter is measured against the weight of contrary reasons.[47]

Prof. Fernando concludes that formal adjudication is one which applies largely, if not solely, to rules. Notwithstanding formal adjudication's appeal, as approaching, if not achieving, even-handedness, impartiality and uniformity, substantive reasons abound in jurisprudence. He finds it unavoidable for decisions to be formed upon substantive reasons, considering that "there will always be situations [referred to as "hard cases"[48]] where the law is not amenable to a clear, undisputed and mechanical interpretation, which is satisfying to justice."[49]

Two ideas were further developed which are significant for the consideration of history in adjudication: (a) requirements of good substantive reason and (b) weighing substantive reasons. In providing a prescriptive analysis of substantive reasons, Prof. Fernando provided not only a clearer and cogent justification for decision, but enable reasoning to undergo scrutiny by the legal community. The most important task of the judge is to become very clear as to what community values or interests are engaged, and in what degree, in the case before him, given the facts provisionally designated as operative and the legal norms tentatively deemed applicable. He must be able to

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[47] *Id.* at 57-58.

[48] Hard cases may be classified into four categories: (a) cases in the gaps; (b) cases governed by legal norms; (c) cases of conflict and (d) cases of unsatisfactory law.

[49] E. Fernando, *op. cit. supra* note 43 at 60. It should be noted that "easy cases" may also make use of substantive reasons, where the use of formal reason is reinforced by substantive ones. Prof. Fernando cites at 61 the case of *Mobil Oil v. Diocares* 140 Phil. 171 (1969), as an example. There the dispute was amenable to resolution by the application of article 2125 of the Civil Code on the validity of an unrecorded mortgage. But substantive reasons, such as "equity, justice, binding effect of promise and harmful consequences of noncompliance" were provided to reinforce the formal reason. Another way to understand "easy cases," in relation to formal and substantive reasons, is to advert to Judge Benjamin Cardozo. In his Storrs lectures delivered at Yale on "The Nature of the Judicial Process," Judge Cardozo estimated that of the cases coming before his court, then the Court of Appeals of New York, "a majority... could not, with semblance of reason, be decided in any way but one. The law and its application alike are plain. Such cases are predestined... to affirmance.... In another and considerable percentage, the rule of law is certain and the application alone doubtful.... Finally, there remains a percentage, not large indeed and yet not so small as to be negligible, where a decision one way or the other will count for the future, will advance or retard, sometimes much, sometimes little, the development of the law." BENJAMIN N. CARDOZO, THE NATURE OF JUDICIAL PROCESS 164-165 (1961).

apprehend such values and translate them into terms sufficiently concrete and operational so as to be able to relate them to both the facts and the probably applicable authoritative policy. The detailed relating of basic community interests to the facts and the norm or norms provisionally applicable may be done through, and in the course of, carrying out the other tasks of application.

As a broad proposition, he asserted that substantive reasons, whether they be in the form of principles or policies, "must be constructed out of values which are widely-shared in society and deemed worthy of or considered sufficiently significant to be accorded legal recognition." With regard to principles, he specifically noted three basic requirements for the construction of a "good principle": (a) the socio-moral norm to be formulated must adequately reflect its guiding rationale, that widely accepted rightness value upon which the norm is based (understood as morally or socially right and deemed significant independently of community acceptance); (b) given the norm's range of factual application, the facts of the case must fall within this range; and (c) the decision must be one which accords with the relevant norm as it applies to the facts of the case.[50] As to policies, (a) the goal must represent a value of public interest which will benefit the community as a whole or at least, a significant segment thereof; (b) since prediction rather than subsumption is the key concept essential to analyzing policies, there is, unlike principles, a weaker, less definite connection between the facts of the case and the value promoted; and (c) a causal means-end relation, not a non-causal one of accordance must hold between the decision and the further goal (the decision must be best suited to achieve the goal).[51] When transported as a tool or element of adjudication, the process engages history to function not merely in the informative, but in a distinctly normative way, and formed to provide guidance as to how it should be received in the present. Turning to the salutary propositions advanced by Justice Feliciano and Professor Fernando, the application of law in adjudication towards the creation of decisional rules, where founded upon substantial reasons, such as a clarification of community values indicates that the doctrine announced may gain an adequate degree of stability and reliability. It behooves the Supreme Court, in shifting from decision making to law making, to be aware of the potential character of the doctrines under consideration, whether the preferred rule is principle or policy, as this preliminary assessment may validly canalize the resort to history.

The inherent limitations of the matter and method of history in adjudication beg for recognition. The past, in relation to the period, milieu, society in which a law had been enacted and promulgated, cannot be expected to hold the answers to questions asked in the present. In its use then of history as aid to legal interpretation, effort must be exerted to examine and fully contextualize the past in the past. This measure should greatly contribute to an accurate construction of the development of the law to the present. True, in certain instances, as in the case of *Diaz v. Intermediate Appellate Court*, it may be sufficient to trace merely the change in legislative language, particularly where the change is not reflective of a shift in apparent substantive reasons

[50] E. Fernando, *op. cit. supra* note 43 at 78.
[51] *Id.* at 80.

or in shared community values. However, where constitutional and statutory interpretation demands an inquiry into the meaning of the doctrine beyond the text, and calls for conclusions based upon an appreciation of evolving political, social or cultural changes, the goals of substantive reasons cannot be achieved unless there is a thorough examination of sources. Accordingly, where a departure from formal reasons is intended to be made, or where formal reasons require further substantiation by reference to substantive reasons, such as through the use of history, the latter being dispositive of the dispute, litigants must be provided with adequate opportunity to make presentations thereon, otherwise the expectation of complete resolution of the underlying dispute as part of judicial application of law cannot arise.

The survey of the Supreme Court's uses of history in this discussion has been brief, but arguably adequate to convey that history certainly plays a significant role in adjudication. It is a role that may lend to or detract from the stability of the structure of rules created in the course of adjudication. When made to assume this place in the generation of decisional rules, legal history's contributions must be measured so as to allow its articulation of rules that shall continue to be coherent with the existing policy structure and amenable to being projected as normative result to govern future conduct. It is past that must be responsive to the fluid development of law.

III. USE OF HISTORY IN THE FORMULATION OF DECISIONAL RULES

That adjudication, constitutional or otherwise, implicates the use of history should thus be conceded.[52] The question this presents is not whether the practice should be admitted, rather, whether the practice constitutes what Mark Tushnet calls "good practice" of "history-in-law,"[53] developed and applied by lawyers and legal academics (as opposed to historians), or as formulated here, the ability of such a practice to evolve into a thorough usefulness as substantive reasons underpinning the creation of decisional rules supported.

Let us take the case of *Estrada v. Escritor*[54] to demonstrate. On July 27, 2000, a fellow named Alejandro Estrada filed a sworn letter-complaint against court interpreter Soledad Escritor of the Regional Trial Court of Las Pinas City. Estrada, who lived in Bacoor, Cavite and who was not in any manner related to Escritor, appeared to have been an outraged civic-minded citizen who feared that Escritor's conduct would tarnish the image of the judiciary. He was referring to Escritor's alleged co-habitation with a man not her husband. The complaint was brought under the rubric of Book V, Title I,

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[52] In the United States, the Supreme Court has long understood that the task of constitutional analysis requires historical research to discover the meaning imparted to constitutional provisions by those who enacted them. This process of using history to interpret the Constitution is called interpretivism or intentionalism by legal scholars, such as Hart Ely, Owen Fiss, among others. The term is not used here, to avoid the inadvertent adoption of the peculiar issues that have arisen in employing interpretivism. See William E. Nelson, *History and Neutrality in Adjudication*, 72 VA. L. REV. 1237 (1986).

[53] Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case of History-in-Law*, in *Symposium on Trends in Legal Citations and Scholarship*, 71 CHI. KENT L. REV. 909 (1909).

[54] Estrada v. Escritor, A.M. No. P-02-1651, August 4, 2003.

Chapter VI, Section 46 (b) (5) of the Revised Administrative Code subjecting any officer or employee of the Civil Service to disciplinary action for "disgraceful and immoral conduct."

Escritor, who did not obtain the services of counsel in the course of the administrative proceedings against her, invoked the religious beliefs and practices, as well as moral standards, of her religion, the Jehovah's Witnesses, in asserting that her conjugal arrangement with a man not her husband does not constitute disgraceful and immoral conduct, which warrants the imposition of disciplinary action against her.

The investigating judge found the factual allegations of Escritor meritorious and recommended the dismissal of the complaint. He also noted that by strict Catholic standards, the live-in relationship of respondent with her mate should fall within the definition of immoral conduct. He pointed out, however, that the more relevant question is whether or not to exact from respondent Escritor, a member of 'Jehovahs Witnesses,' the strict moral standards of the Catholic faith in determining her administrative responsibility in the case at bar. He added that "religious freedom is a fundamental right which is entitled to the highest priority and the amplest protection among human rights, for it involves the relationship of man to his Creator." However, the Office of the Court Administrator, while concurring with the factual findings of the investigating judge, departed from the recommendation to dismiss the complaint. Deputy Court Administrator Lock stressed that although Escritor had become capacitated to marry by the time she joined the judiciary as her husband had died the year before, she may still be subject to disciplinary action for voluntarily carrying out a relationship with a married man. DCA Lock found Escritor's defense of freedom of religion unavailing to warrant dismissal of the charge of immorality.

When the matter was referred to the Supreme Court, it was taken as a dispute implicating Article III, Section 5 of the Constitution on religious freedom, even though it was "not articulated" in this manner by Escritor. Writing for the majority, Justice Puno stated that the "case at bar takes us to a most difficult area of constitutional law where man stands accountable to an authority higher than the state," and set out the task of the High Tribunal "in this highly sensitive area of law," as that of "balancing between authority and liberty." He further acknowledged the task to not be without difficulty, considering that the American origin and tradition that brought the religion clauses to Philippine jurisdiction were cultivated in a particularly contentious area of law — "[I]n perhaps no other area of constitutional law have confusion and inconsistency achieved such undisputed sovereignty. Nevertheless, this thicket is the only path to take to conquer the mountain of a legal problem the case at bar presents...."[55]

The thicket came to be a nearly overwhelming chronicle of the history and development of the religion clauses in the Philippines, following an extensive discussion covering the old world antecedents of the American religion clauses, the adoption of the

[55] *Ibid.*

American religion clauses, and jurisprudence and standards related to the American religion clauses.

At the close of the majority opinion's discussion of the American religion clauses, the Supreme Court concludes that there existed two principal strains relating to standards in the application of the religion clauses: (a) separation, or strict separation, or the tamer version of strict neutrality or separation, and (b) benevolent neutrality or accommodation.

The Supreme Court took the case as an opportunity to summarize, clarify and classify Philippine jurisprudence related to free exercise of religion. It proved to be pivotal, as the High Court came to categorically rule:

> We here lay down the doctrine that in Philippine jurisdiction, we adopt the benevolent neutrality approach not only because of its merits as discussed above, but more importantly, because our constitutional history and interpretation indubitably show that benevolent neutrality is the launching pad from which the Court should take off in interpreting religion cases. The ideal towards which this approach is directed is the protection of religious liberty 'not only for a minority, however small-not only for a majority, however large-but for each of us' to the greatest extent possible within flexible constitutional limits.[56]

Thus, even as it found the American and Philippine religion clauses to be similar in form and origin, the Supreme Court declared that "Philippine constitutional law has departed from the U.S. jurisprudence of employing a separationist approach," and that constitutional construction unmistakably supports the assertion that "benevolent neutrality is the lens with which the Court ought to view religion clause cases."

The basic foundation of the High Court's adherence to the benevolent neutrality doctrine may be summarized as: (a) the provisions of the 1935, 1973 and 1987 constitutions on tax exemptions of church property, salary of religious officers in government institutions, optional religious instruction and the preamble all reveal without doubt that the Filipino people, in adopting these constitutions did not intend to erect a high and impregnable wall of separation between Church and state; (b) recognition of the religious nature of the Filipino people and the elevating influence of

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[56] Notwithstanding the assiduous discussion, the doctrine only signaled for the Court the need to remand the case to the Office of the Court Administrator, with an order for the Solicitor General to intervene in the case where it will be given an opportunity (a) to examine the sincerity and centrality of respondent's claimed religious belief and practice; (b) to present evidence on the state's compelling interest to override respondent's religious belief and practice; and (c) to show that the means the state adopts in pursuing its interest is the least restrictive to respondent's religious freedom.

An area of investigation which may be covered separately is the assertion that the Supreme Court here did not promulgate a binding interpretation of the relevant constitutional provision, but announced a theory for understanding the same, which is not within the province of adjudication.

religion in society; and (c) decisional support, citing *Aglipay v. Ruiz*,[57] *Garces v. Estenzo*,[58] and *Victoriano v. Elizalde Rope Workers Union*.[59]

While the categorical pronouncement of what doctrine is set out by the case brings relief enough to scholars and students alike, who will not have to labor in search for that part of the decision which constitutes binding authority, the discussion cannot be spared from questions, particularly as it relates to the use of history as a fundamental basis of the doctrine.

As material and method, history, it seems, provides a sense of stability to the pronouncement of a decisional rule. Take *Estrada v. Escritor*, although the Supreme Court there had revisited its interpretation of the religion clauses in decided cases, and in one instance even categorically declared an interpretation to be inapt,[60] the sweep of the survey tends to fortify the conclusion which the Supreme Court reached.

What is interesting in *Estrada v. Escritor* is that it is a significant material in constitutional law. It is the first to articulate categorically the evolution over time of an adherence to the benevolent neutrality strain (which is derived from American jurisdiction), as fundamentally Filipino. It did not signal the departure, but documented it, at the same time commanding future adherence to the stated doctrine. It is almost as if, in truth, if the shift in thinking had occurred at all, it happened in the present. The elaborate resort to history, however, conceals this and makes it appear that the new doctrine was simply formally disclosed. Austin Sarat, writing for the Legal Studies Forum in 1999, noted that "[i]ndeed the authority or legitimacy of a judicial decision is to some extent a product of its ability to clothe itself in the history of law or in the authority of the past recorded in the transcript, to plausible claim that there is nothing innovative being done or said even while new departures are being undertaken."[61] Whether this lends stability to judicial rule-making in the Philippines, however, is another question, and one that requires a further, but perhaps prejudicial inquiry into what makes for a legitimate decisional rule for all stakeholders (litigants, lawyers, the courts and the public).

Extensive use of history is notable in disputes concerning constitutional questions, as in *Estrada v. Escritor*. The agenda for history in constitutional adjudication may be different from the resolution of other disputes, but it seems reasonable to take these cases as forming part of the development of thinking on the constitution in the Philippines (this being distinct and separate from promulgating a decision that resolves the dispute). Where a court is quite conscious of the function or outcome of

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[57] 64 Phil. 201 (1937).

[58] 192 Phil. 36 (1981).

[59] Victoriano v. Elizalde Rope Workers Union, Inc., G.R. No. 25246, September 12, 1974.

[60] Reference is to Victoriano v. Elizalde Rope Workers Union, Inc., *supra*, which has not been overturned. In Estrada v. Escritor, however, the Supreme Court took the opportunity to state that there was in Victoriano a misapplication of the compelling state interest test.

[61] Austin Sarat, *Rhetoric and Remembrance: Trials, Transcription, and the Politics of Critical Reading*, 23:4 LEGAL STUDIES FORUM (1999). Whether this qualifies as "legitimate use" of history is yet another matter.

adjudication as forming the discourse on the constitution, it is not difficult to take the view that the relevance goes to the creation of decisional rules but not to their authoritativeness or legitimacy. It must be perceived as an explicit contribution to scholarship. In this regard, it is worthy to note what has been observed elsewhere —

> As constitutional theory implicates history, so any account of constitutional history rests on certain theoretical assumptions. In order to decide what kind of evidence to consult, it is necessary to have in mind an idea of the nature and scope of the Constitution, or what constitutes it. Furthermore, the purpose of constitutional history, like any other historical inquiry, may involve normative concerns raising questions of political theory and moral philosophy. Concerned as it is with knowledge of past decisions and actions that may have a direct bearing on questions of policy, constitutional history may be more subject to normative-theoretical demands than scholarship in fields that have less immediate practical import.[62]

It must be noted that *Estrada v. Escritor* traced not the textual development of the religion clauses, or changes in the language employed, but the development of the constitutional meaning, giving rise to issues as regards the discovery of the doctrinal meaning announced. To be sure, when Justice Puno considered the "difference in context in which the First Amendment was adopted and in which it is applied today," he recognized at least one difficulty imposed by this particular use of history. Indeed, if history is to be taken as "past as past" and "past events further understood in the past," it renders tenuous any proposal to use history as a basis for the creation of decisional rule, which is intended to function in the prescriptive. How can a dispute situated in the present find a solution in the past and how can a rule so developed be formed and evolve to control conduct in the present (as in resolving the dispute) and to guide action in the future. It was earlier asserted that a decisional rule, to adequately be accepted as the normative result of adjudication, must provide formal or substantive reasons, and, on the whole, consider the clarification and specification of community value. But if the normative result is based upon substantial reasons founded upon history or a historical inquiry, how is it possible to construct them out of values which are widely-shared in society and deemed worthy of or considered sufficiently significant to be accorded legal recognition? Texts drawn from legal history that are then constituted as present legal authority may have been drafted or written by people who used words differently from the way they are used today, who thought differently from the way people think today, and who may themselves inform any pasts community values, such that the text of the past can no longer be considered as indicative of a single authoritative voice. It can thus not function as a source of answers to the questions that are contentious today, particularly where substantial translation or interpretation may be invested before a current meaning becomes discernible. Consider one such constraint mentioned by Justice Puno:

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[62] Herman Belz, *History, Theory and the Constitution*, in HERMAN BELZ, A LIVING CONSTITUTION OR FUNDAMENTAL LAW? AMERICAN CONSTITUTIONALISM IN HISTORICAL PERSPECTIVE (2002) available at <http://www.constitution.org/cmt/belz/lcfl_09.htm.> April 15, 2006.

> This provisions borrowed from the Jones Law, was readily approved by the Convention. In his speech as Chairman of the Committee on Bill of Rights, Delegate Laurel said that modifications in phraseology of the Bill of Rights in the Jones were avoided whenever possible because the 'principles must remain couched in a language expressive of their historical background, nature, extent and limitations as construed and interpreted by the great statesmen and jurists that vitalized them....
>
> Considering the American origin of the Philippine religion clauses and the intent to adopt the historical background, nature, extent and limitations of the First Amendment of the U.S. Constitution when it was included in the 1935 Bill of Rights, it is not surprising that nearly all the major Philippine cases involving the religion clauses turn to U.S. jurisprudence in explaining the nature, extent and limitations of these clauses. However, a close scrutiny of these cases would also reveal that while U.S. jurisprudence on religion clauses flows into two main streams of interpretation – separation and benevolent neutrality – the well-spring of Philippine jurisprudence on this subject is for the most part, benevolent neutrality which gives room for accommodation. [63]

While it may be said that the historical theme of *Estrada v. Escritor* was confined to a discussion of the development of the religion clauses as disclosed by cases, the Court's conclusion that there has been a departure from the American tradition, owing in part to the religious nature of the Filipino people and the elevating influence of religion in society folded into the cases discussed, that the milieu of that past has been ignored, although it may be significant, begs attention. This is particularly important in constitutional litigation and adjudication, where, genuinely or otherwise, there is some desire to understand the intent of the framers. However, legal scholarship in this field has broadened to admit of the notion that it is not the intent of framers, but the understanding of the ratifiers[64] as the vessel of original, if not pervasive, meaning and the pivotal instrument in steering the course of textual development and interpretation. When the difficulty is articulated in this way, it becomes critical to inquire whether those principles and practices which hold the historian to his course should be adopted as an implement of the process of producing doctrine or decisional rules. That Philippine law is an example of transplant presents a further problem in the assessment of the development of meaning, the expression of community values in the present and assessment of the texts or sources. Even Justice Antonio Carpio in his Dissent in *Estrada v. Escritor*, noted this problem in sources. He cites Thomas Jefferson as having championed the free exercise of religion and non-establishment clauses in the U.S. Constitution, from which the counterpart provisions in the Philippine constitutions were adopted, and referred to Jefferson's letter to the Baptists in 1802. He then indicates by way of footnote that, while generally regarded as the leading advocate of the First Amendment, Thomas Jefferson was neither a framer nor a signer of the U.S. Constitution. Justice Carpio wrote:

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[63] Estrada v. Escritor, A.M. No. P-02-1651, August 4, 2003.

[64] M. Tushnet, *op. cit. supra* at note 53.

> [I]n Everson v. Board of Education [330 U.S. 1 (1947)], the credit for authoring the First Amendment is given to James Madison, an author of the Federalist Papers and knows as the 'Father of the Constitution.' In his dissenting opinion in Wallace v. Jaffree [472 U.S. 38 (1985)], Justice William Rehnquist totally belittles Jefferson's role in the adoption of the First Amendment. Rehnquist claims that Jefferson's 'would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clause of the First Amendment.' Rehnquist even criticizes Jefferson's 'wall of separation' as a 'misleading metaphor.'

Another concern as regards resort to historical discussion in the case is the declaration in the case that Escritor did not articulate the issue as involving free exercise of religion. Consistent with what appears to be the parties understanding of the dispute, it is not apparent that the litigants had presented arguments expounding upon the historical dimension of the case. Where this happens, would it not erode the decision's binding effect upon the litigants where it moves away from their primordial understanding of the dispute and its issues? After all, adopting former Justice Feliciano's discussion, the application of law as part of "law-making function" is inextricable from a consideration of the requirements of the particular dispute before the Court. Thus, where history has not been the basis of litigation or argument, is it acceptable for courts to make use of history as the dispositive consideration, in light of the requirements of the Constitution. This may be viewed as appealing or using history to conceal the need for normative justification. Indeed, even Justice Feliciano observed that law and decision-making are backward looking as shown by the prevalent use of the "language of discovery," as the rhetoric of decision-making. He further asserts that the language in which judicial decisions are cast is still commonly "the rhetoric of ascertainment of or derivation from pre-existing rules of law, rather than the rhetoric of creation of new law or reshaping of it."[65]

Whatever form the use of history takes in adjudication and decision-making, the enterprise must be isolated/delineated from academic undertaking, in order to be appreciated within the context of its practical use. The central difficulty in this respect is that the intention is not to form an insight about the past, but to form a normative principle that cannot be tested against historical data.

> Where other disciplines tend to be organized efforts to understand the world, by formulating testable hypotheses about the world, conventional legal scholarship is an effort to generate plausible normative propositions about what the world should be like. This sort of enterprise simply cannot give rise to any methodology useful for analyzing the past. If it is capable of producing any theory at all, that theory will be normative rather than explanatory. But a normative theory can neither be tested against historical data nor deployed to gain insight about the past. To the extent that law professors want to understand rather than prescribe, they

[65] At other times, however, the employment of such language may be moved by the conscious or unconscious desire to mask the true bases (or some of them) of decision. This has been graphically described as the "squid function" of legal technicality. Perhaps the least desirable effect of use of language of this kind is the concealment from the judge himself of the range of options actually open to him in the specific case.

> will always have to borrow their theoretical apparatus from the knowledge-producing disciplines. This is why the borrowing has always been into rather than out of law. Law has nothing to lend.[66]

Let this not be understood as barring parties from presenting arguments based on history or from tracing doctrinal development through history. To be sure, this is an exercise that has been employed extensively by lawyers and litigants elsewhere and has evolved significantly, known (or derided) as "law office history," raising multitudinous issues of its own. But there is real danger in how a practice of this sort may inform the decision-making process, especially when the gaps in the adversarial system are considered.

> 'The key problem with the adversary system is not that lawyers can make arguments on behalf of their clients,' Langbein said, his head tilted forward and his piercing eyes fixed on me. 'What is special is that we extend that from law to fact.'
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> Instead of arguing on behalf of the individuals whose interests and lives are touched by the facts, Langbein claimed that lawyers actually challenge the facts themselves. 'In the adversary system, the lawyers present two competing versions of what facts are. We therefore have this extraordinary kind of relativism. It is a major flaw in our justice system – that we allow this privatization of facts to occur. It's a combat system, not a truth system.'...
>
> When I was in law school, I was taught that the adversary system was fundamental to the legal system. Through the process of assertion and refutation – with each side putting forward its arguments and trying to destroy the case laid out by the opposition – the truth is supposed to emerge. But in my experience, this is not how the system actually works....To the contrary, a system that put duty to the client above all else cloaked the truth....
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> The adversary system is also supposed to guarantee that each party will have its rights successfully protected by an advocate. But important questions go unanswered if that is the case....[67]

In the United States, for example, the concept of "law office history" is not a new one. Thirty years ago, constitutional historian Alfred Kelly was brought to assist the National Association for the Advancement of Colored People's ("NAACP") legal team in the course of renewed oral arguments in *Brown v. Board of Education*.[68] He developed a brief on the Fourteenth Amendment's historical background. To Kelly, law-office history was simply "the selection of data favorable to the position being advanced without regard to or concern for contradictory data or proper evaluation of the relevance of the data proffered," or put otherwise, "very bad history indeed." This is

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[66] S. Banner, *op. cit. supra* note 32 at 42.

[67] DAVID KESSLER, A QUESTION OF INTENT: A GREAT AMERICAN BATTLE WITH A DEADLY INDUSTRY (2001) Langbein refers to John Langbein, Professor of Law, University of Chicago and Yale Law School.

[68] 347 US 483 (1954).

what has come to described as systematic anachronism and quotation out of context – unconvincing advocacy and unacceptable scholarship.[69]

> [C]lassic errors of law office history by quoting sources selectively, by failing to address and resolve conflicting evidence, and by ignoring current historiography.... [T]hey have the mistake of analyzing the history at too broad a level of generality to prove useful in interpreting legal texts.... In both cases, too much history, if not handled with care, may cloud rather than sharpen analysis....
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> ...Scholars who have worked on this issue generally have used history much the way lawyers use other forms of evidence. The statements of the major players are combed for the perfect quote that reinforces a thesis, or for an admission against interest without regard to context.[70]

Despite its growing professional acceptance in other jurisdictions, dissent has acknowledged that there are certain questions the past cannot and should not be made to answer. Put simply, normative historiography in law may not be possible. Indeed, even Alfred Kelly, reeling from his experience as part of NAACP's legal team condemned the types of history found in constitutional adjudication. Where generated by law office, the method was narrowly selective, formed by the advocate's goal of preparing a brief for a biased and interested litigant. And, where accepted or fashioned by the court in the course of adjudication, it consisted of "a priori history." Charles Miller declared: "[T]he Supreme Court as a whole cannot indulge in historical fabrication without thereby appearing to approve the deterioration of truth as a criterion for communication in public affairs.... [W]here it matters most to society, it matters most that the story be a true one."[71]

Recent Supreme Court decisions, such as *Estrada v. Escritor*, confront advocates and scholars alike with the challenge of using history in litigation, the parameters of which have not been set out, much less explored in this jurisdiction. The unexamined life of history in law has led to innovations in adjudication, but as in concealing the need for normative justification, masks the importance of history in law. In the Philippines, one of the early examples of law transplants, we have a legal past from which empirically formed lessons may be drawn,[72] but not necessarily useable in the sense of forming normative decisional rules.

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[69] Raymond Wolters, *Constitutional History, Social Science, and Brown v. Board of Education 1954-1964*, 5:1 THE OCCIDENTAL QUARTERLY (Spring 2005), available at <http://theoccidentalquarterly.com/vol5no1/rw-browni.html> April 15, 2006.

[70] John C. Yoo, *Clio at War: The Misuse of History in the War Powers Debate*, 10 U. COLO. L. REV. 1169, 1171-1172 (1999).

[71] CHARLES MILLER, THE SUPREME COURT AND THE USES OF HISTORY (1969).

[72] "Law in this respect differs fundamentally from some of the other academic disciplines that have also recently rediscovered an affinity with history. When economists or sociologists turn to history, they look to it as a source of data against which to test non-temporally-bound theories. An economist trying to understand why some countries get richer while others stay poor, for instance, has a record of the past performance of various economies that can support or falsify any particular theory. If the theory is, say, that a country grows wealthy by increasing its exports, one can look to historical growth rates and historical export statistics and see how they match up. A sociologist trying to comprehend the formation of class structures, for example, has a similar historical record to examine. In these examples, the past is a warehouse of empirical data — often filtered through the minds of

Tools have not been developed in Philippine jurisdiction to fully assess the impact of history upon both the process itself of adjudication and the character of rule that is consequently formed (does the historical discussion render the doctrine or decisional rule readily acceptable and does history provide the base to launch what essentially intended to be viewed as normative or as prescribing standards of conduct in the present); the body of theory with respect to Philippine constitutional history and interpretation not being well-formed. But these inadequacies cannot be cited to avoid embarking upon a consideration and exploration of the uses of history in law, particularly in adjudication.

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historians and other data-compilers, to be sure, but no less unmediated than most data about the present — that can help construct or falsify a theory with explanatory power in the present." S. Banner, *op. cit. supra* note 32 at 41.