THE JUDICIAL RULE-MAKING FUNCTION: A NON-INTERPRETIVE PERSPECTIVE TO THE ROLE OF THE JUDICIARY*

*Juan Paolo F. Fajardo***

> *"While victims of enforced disappearances are separated from the rest of the world behind secret walls, they are not separated from the constitutional protection of their basic rights."*
> *–Chief Justice Reynato Puno, Secretary of National Defense v. Manalo*[1]

INTRODUCTION

The judiciary is constantly accused of judicial legislation whenever it engages in activism just as it is accused of timidity whenever it engages in restraint. Recent accusations of judicial legislation are more alarming than familiar, however, because they are made when there is no case before the Supreme Court. Recently, Chief Justice Reynato Puno publicly defended guidelines issued to prefer the imposition of fines over imprisonment in libel cases. He ended by saying that:

> The Circular does not violate the doctrine of separation of powers because it is based on cases decided by the Court in the constitutional exercise of its power to interpret our laws. It does not erode the rule of law but strengthens its sinews, for it follows the architecture of our

---

This article was submitted and awarded 1st place for the Volume 83 PHILIPPINE LAW JOURNAL Editorial Board Exam. *Cite as* Juan Paolo Fajardo, *The Judicial Law-Making Function: A Non-interpretative perspective to the role of the Judiciary*, 83 PHIL. L.J. 749, (page cited) (2009).

** *Chair*, PHILIPPINE LA JOURNAL (2009; Member, 2006). Violeta Calvo-Drilon-ACCRALAW Scholar for Legal Writing (2009). Clerk, Office of the Supreme Court Associate Justice Carpio Morales (2008-present); J.D., University of the Philippines College of Law (2009). AB Economics, *cum laude*, Ateneo De Manila University.

The author wishes to thank the following professors who encouraged me to pursue the art and craft of legal writing: Dean Raul C. Pangalangan, Dean Marvic MVF Leonen, Jesus M. Disini, Associate Dean Patricia S. Daway, and Rafael Morales, Francis Jardaleza, and the rest of the UP College of Law Class 1974, whose undying support ensures that the JOURNAL and legal writing in the College will remain forever vibrant.

This author also thanks Joseph Alden Valmonte of the Volume 83 editorial board for his invaluable support.

[1] Secretary of National Defense, et al. v. Manalo, G.R. No. 180906, October 7, 2008.

> Constitution that gives preferred status to freedom of speech and of the press.[2]

The Supreme Court had been accused of effectively ordering the decriminalization of libel without Congressional authority. It is striking that the "power to interpret our laws" was invoked by the Chief Justice outside the traditional case and controversy restriction on judicial review. The statement could be perceived as the same refrain of judicial supremacy Justice Laurel's ruling in the case of Angara v. Electoral Commission, one heard by some as saying that some branches are more co-equal than others. The Supreme Court's promulgation of the writs of amparo and habeas data, formally under its rule making power to enforce constitutional rights unlike the guidelines on libel, have been similarly criticized.

The ultimate question is: where does the Court draw its legitimacy from in undertaking these new initiatives outside its already expanded power of judicial review? (The guidelines on libel will be treated as part of initiatives under the rule making power for purposes of this paper.) This paper seeks to establish that these new initiatives are perfectly legitimate under the explicit provisions of the 1987 Constitution. The first section explores the rule making power and distinguishes it from judicial review. The second section explores the new initiatives and establishes that they are valid procedures and not substantive issuances that amount to judicial legislation. The third section argues that, beyond the explicit provision authorizing the Supreme Court to promulgate rules, these are legitimate in the context of the Court's functional role in protecting human rights in a democracy. The final section argues that the rule making power, as one avenue of judicial action, achieves majoritarian ends because it breaks political gridlocks and serves as a catalyst in advancing democratic values.

I. THE 1987 CONSTITUTION AND THE JUDICIAL POWER

A. THE EXPANDED JUDICIAL POWER

The 1987 Constitution enshrines an expanded set of values constitutionally committed by the Filipino people after the Marcos dictatorship.[3] The underlying commitment is to complete "a peaceful social

---

[2] Raul Pangalangan, The Chief Justice Replies, Philippine Daily Inquirer, February 7, 2008, available at, http://opinion.inquirer.net/inquireropinion/columns/view_article.php?article_id=117452

[3] For a landmark analysis of the impact of these additional provisions on judicial review, *see* Oscar Franklin Tan, *The 2004 Canvass: It is Emphatically the Province and Duty of Congress to Say What Congress Is*, 79 PHIL.

and economic revolution"[4] which began with the EDSA Revolution. In particular, the framers drafted three completely new sections: Article II, the Declaration of Principles and State Policies; Article XII, National Economy and Patrimony; and Article XIII on Social Justice and Human Rights.[5] Thus, the Constitution was transformed from a "definition of the powers of government"[6] into the aspirational manifesto of the shared EDSA experience.

A broad range of non-self-executing social and economic provisions were injected into the 1987 Constitution, a list of social and economic rights left to legislators to flesh out but written into history alongside the longstanding, traditional rights.[7] Commission Vice-Chairman Gregorio Tingson explained the decision to devote an entire article to the Declaration of Principles and State Policies:

> ...this particular article makes positive affirmations, asserts national intentions and unashamedly proclaims for all the world to hear what kind of a country we are grateful to God for; for what nature of a government we intend for our citizenry to support; what dimensions of power; privileges and responsibilities tax-paying citizens must be aware of...[8]

The Filipino people ratified this lengthy collection of rights, responsibilities and dreams. The 1987 Constitution is thus a symbol of national consensus through a legitimate and open political process.

As the Commission expanded the "great landmarks of the Constitution,"[9] it also expanded the power of judicial review to include the "duty" "to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government."[10] Thus, the Supreme Court

---

L.J. 39, 80-97 (2004). This recent editorial examination submission greatly influenced the structure and style of this article.

[4] Raul Pangalangan, CHIEF JUSTICE HILARIO G. DAVIDE JR.: A STUDY IN JUDICIAL PHILOSOPHY Transformative Politics and Judicial Activism, 80 PLJ 548 (2006).

[5] 1987 Constitution, Articles II, XII, XIII

[6] Angara v. Electoral Commission, 63 Phil. 139 (1936).

[7] Raul Pangalangan, CHIEF JUSTICE HILARIO G. DAVIDE JR.: A STUDY IN JUDICIAL PHILOSOPHY Transformative Politics and Judicial Activism, 80 PLJ 548 (2006), citing Joaquin Bernas, CON-COM RECORD, Vol. 2, Record No. 35 (21 July 1986).

[8] JOAQUIN BERNAS,S.J., THE INTENT OF THE 1986 CONSTITUTIONAL WRITERS, 73 (1995).

[9] Angara v. Electoral Commission, 63 Phil. 139 (1936).

[10] Article VIII, Sec. 1, par. 2, 1987 Constitution

was empowered to enforce both the letter and the spirit of the new constitutional commitments.

B. RESTRICTIONS DUE TO THE ANTI-MAJORITARIAN NATURE OF JUDICIAL POWER

The "expanded *certiorari* jurisdiction"[11] laid the foundation for the judiciary's most admired post-EDSA triumphs. It is important to note, however, that the judicial power was never expanded to the point of removing its traditional restrictions. The judicial power under Article VIII, Sec. 1 remains limited to "actual controversies involving rights which are legally demandable and enforceable," even though the Court has in many instances relaxed the fundamental case and controversy and standing requirements. For example, *David v. Arroyo* recognized the standing of all petitioners due to the "transcendental importance" and "far-reaching implications" of the case and declared key portions of Proclamation 1017, perceived as a virtual declaration of Martial Law by President Gloria Macapagal-Arroyo, despite the fact that this proclamation had already been lifted before the decision. Further, although the scope of "not truly political"[12] questions was drastically expanded to prevent a recurrence of the judiciary's Martial Law passivity, the Supreme Court itself has affirmed that the political question doctrine has not been done away with altogether.[13]

These restrictions remain because the judicial power is theoretically anti-majoritarian, wielded by unelected Justices with no direct accountability to the people. As Chief Justice Reynato Puno emphasized in the case of *Francisco v. House of Representatives:*

> *The 1987 Constitution expanded the parameters of judicial power, but that by no means is a justification for the errant thought that the Constitution created an imperial judiciary.* An imperial judiciary composed of the unelected, whose sole constituency is the blindfolded lady without the right to vote, is counter-majoritarian, hence, inherently inimical to the central ideal of democracy. We cannot pretend to be an imperial judiciary for

---

[11] Francisco v. House of Representatives, G.R. No. 160261. November 10, 2003.
[12] Francisco v. House of Representatives, G.R. No. 160261. November 10, 2003.
[13] Id.
Macalintal vs. Comelec, G.R. No. 157013, July 10, 2003 (Puno, J., concurring and dissenting opinion).

> in a government whose cornerstone rests on the doctrine of separation of powers, we cannot be the repository of all remedies.[14]

Further, Professor Alexander M. Bickel argued that judicial review is "a counter-majoritarian force,"[15] "undemocratic,"[16] and a "deviant institution"[17] in democracy that "thwarts the will of representatives of the actual people of the here and now."[18] Professor Bickel proposed that judicial review has "a tendency over time seriously to weaken the democratic process"[19] and quoted Professor James Bradley Thayer:

> The people, all this while, become careless as to whom they send to the legislature; to often they cheerfully vote for men whom they would not trust with an important private affair, and when these unfit persons are found to pass foolish and bad laws, and the courts step in and disregard them, the people are glad that these fewer wiser gentlemen on the bench are so ready to protect them against their more immediate representative xxx The tendency of a common and easy resort to this great function xxx is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility.[20]

Chief Justice Puno himself warned:

> ...that under certain circumstances, the active use of judicial review has a detrimental effect on the capacity of the democratic system to function effectively. Restraintists hold that large-scale reliance upon the courts for resolution of public problems could lead in the long run to atrophy of popular government and collapse of the broad-based political coalitions and popular accountability that are the lifeblood of the democratic system. They allege that aggressive judicial review saps the vitality from constitutional debate in the legislature. It leads to democratic debilitation where the legislature and the people lose the ability to engage in informed discourse about constitutional norms.[21]

---

[14] Francisco v. House of Representatives, G.R. No. 160261. November 10, 2003, (Puno, J., concurring opinion).
[15] ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH, 16-18 (1962).
[16] Id.
[17] Id.
[18] Id.
[19] Id.
[20] Id.
[21] Francisco v. House of Representatives, G.R. No. 160261. November 10, 2003, (Puno, J., concurring opinion).

C. THE RULE MAKING POWER DISTINGUISHED FROM THE POWER OF JUDICIAL REVIEW

It must be emphasized that the traditional limitations of case and controversy, standing, and the political question doctrine apply only to the power of judicial review, as reflected in the text of Article VIII, Sec. 1. These limitations thus do not apply to the judiciary's other powers, although these often remain unnoticed due to the prominence of judicial review. Recent events have highlighted one of these dormant powers in Article VIII:

> Sec. 5. The Supreme Court shall have the following powers:
> ...
> (5) Promulgate rules concerning the protection and enforcement of constitutional rights...Such rules...shall not diminish, increase, or modify substantive rights[22]

The power to promulgate rules is a traditional power of the judiciary,[23] but was made explicit in the 1987 Constitution "in order to stress that constitutional rights are not merely declaratory but are also enforceable."[24] It must be emphasized that the rule making power can no longer be checked by legislative power, and the Supreme Court explained in the case of *People v. Echegaray:*

> The rule making power of this Court was expanded. This Court for the first time was given the power to promulgate rules concerning the protection and enforcement of constitutional rights. The Court was also granted for the first time the power to disapprove rules of procedure of special courts and quasi-judicial bodies. *But most importantly, the 1987 Constitution took away the power of Congress to repeal, alter, or supplement rules concerning pleading, practice and procedure.*[25]

The rule making power is explicitly restricted in that rules should "not diminish, increase, or modify substantive rights."[26] In the case of *People v. Lacson,* Justice Josue Bellosillo explained that the breach of this restriction leads to judicial legislation:

> Courts cannot - by an act of judicial legislation - abridge, amend, alter, or nullify statutes. We do not sit as councils of revision,

---

[22] Article VIII Sec. 5 (5)
[23] JOAQUIN BERNAS,S.J., THE INTENT OF THE 1986 CONSTITUTIONAL WRITERS, 969 (1995).
[24] JOAQUIN BERNAS,S.J., THE INTENT OF THE 1986 CONSTITUTIONAL WRITERS, 527 (1995).
[25] Echegaray v. Sec of Justice, G.R. No. 132601, January 19, 1999.
[26] Article VIII sec. 5(5).

> empowered to judicially reform or fashion legislation in accordance with our own notions of prudent public policy. Certainly, lest we are prepared to ride roughshod over this prerogative of Congress, we cannot interfere with the power of the legislature to surrender, as an act of grace, the right of the State to prosecute and to declare the offense no longer subject to prosecution after certain periods of time as expressed in the statute.
>
> ...
>
> "Furthermore, the right of the State to prosecute criminals is a substantive, nay, inherent right. To unduly limit the exercise of such right for a short period of one (1) or two (2) years through the expedient of a procedural rule is unconstitutional, considering the limitation in our fundamental law on the rule-making power of this Court, that is, its rules must not "diminish, increase or modify substantive rights."[27]

The case of *Chicago & G.T. R. Co. v. Wellman* alluded to why this kind of overlap is prohibited, and stated:

> [Judicial power] is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.[28]

II. PRESENT APPLICATION OF THE SUPREME COURT'S RULE MAKING POWER

A. ACCUSATIONS OF JUDICIAL LEGISLATION

Chief Justice Puno sees expanded use of the rule making power as part of the Supreme Court's duty to enforce the expanded constitutional commitments of the 1987 Constitution. He welcomes this expanded power as the framers' prophetic response[29] to the "frailties of our freedom, the inadequacy of our laws if not the inutility of our system of justice."[30] Initially reacting to the spate of extra-judicial killings in the country, he proclaimed that:

---

[27] G.R. No. 149453, April 1, 2003.

[28] 143 U. S. 339, 345.

[29] Reynato Puno, The View From the Mountaintop, delivered on the occasion of the National Consultative Summit on Extrajudicial Killing and Enforced Disappearances, Centennial Hall, Manila Hotel, July 16, 2007, available at, http://www.supremecourt.gov.ph/publications/summit/EJK_Summit CJRSP Keynote Speech.pdf

[30] Id.

> Given these vulnerabilities, the Judiciary, on its part, has decided to unsheathe its unused power to enact rules to protect the constitutional rights of our people, the first and foremost of which is the right to life.[31]

However, the number and breadth of the Puno Court's recent initiatives have given rise to the criticism that the rule making power has given rise to a species of judicial legislation that is especially alarming because it does not even take place within the confines of an actual case and controversy. Some "archantagonists of judicial power warning against the wisdom of its exercise"[32] have decried how some of these initiatives are "short-circuiting the separation of powers."[33]

A standard distinguishing an exercise of the rule making power and a usurpation of legislative power, inferred from the case of *Ople v. Torres* that nullified the creation of a national ID system through a mere executive order, is that a rule "confers no right, imposes no duty, affords no protection, and creates no office."[34] This standard mirrors the explicit restriction in Article VIII, Sec. 5(5). The three most notable procedural developments of the Puno Court are: 1) the Rules on the Writ of Habeas Data;[35] 2) the Rules on the Writ of Amparo;[36] and 3) the "Guidelines In The Observance Of A Rule Of Preference In The Imposition Of Penalties In Libel Cases."[37] Although these developments have been hailed as milestones in the protection of human rights, it might be argued that these initiatives are actually substantive in nature even though they technically do not create new rights nor modify existing ones, if only because of their sheer scope. If true, this means that these lauded initiatives are actually prohibited exercises of judicial legislation.

It is argued, however, that no new right was created in each of these initiatives and that any new protection arises merely as the operationalization of an existing constitutional right. Procedure in this constitutional context

---

[31] Id.

[32] Reynato Puno, The View From the Mountaintop, delivered on the occasion of the National Consultative Summit on Extrajudicial Killing and Enforced Disappearances, Centennial Hall, Manila Hotel, July 16, 2007, available at, http://www.supremecourt.gov.ph/publications/summit/EJK_Summit_CJRSP_Keynote_Speech.pdf

[33] Raul Pangalangan, Judicial Activism and Its Limits, Philippine Daily Inquirer, February 1, 2008, available at, http://www.services.inquirer.net/print/print.php?article_id=20080201-116069 .

[34] Ople v. Torres, G.R. No. 127685 July 23, 1998.

[35] A.M. No. 08-1-16-SC

[36] A.M. No. 07-9-12-SC

[37] Admin Circular 08-2008

will inevitably appear substantive because, as Professor Laurence Tribe points out, substantive values underlie all procedural rules and give them intrinsic value.[38] The breadth of these initiatives is justified by the transformation of the judicial power in the 1987 Constitution's text, a transformation that goes beyond the expanded *certiorari* jurisdiction and a component of which is the rule making power. The case of *Tolentino v. Secretary of Finance* expounded:[39]

> ...in imposing to the court the duty to annul acts of government committed with grave abuse of discretion, the new Constitution transformed the Court from passivity to activism. This transformation, dictated by our distinct experience as a nation, is not merely evolutionary but revolutionary. Under the 1935 and 1973 Constitutions, the court approached constitutional violations not by finding out what it should not do but what it must do. The Court must discharge its solemn duty by not resuscitating a past that present. Secondly, the paucity of [the] power of the Judiciary in checking human rights violations was remedied by stretching the rule-making prerogative.[40]

B. THE WRIT OF HABEAS DATA

The Writ of Habeas Data allows a petitioner to update, rectify, suppress or destroy the database, information or files regarding him kept by a respondent,[41] such as the military. It is basically a "remedy available to any person whose right to privacy in life, liberty or security is violated or threatened by an unlawful act or omission of a public official or employee or of a private individual or entity engaged in the gathering, collecting or storing of data or information regarding the person, family, home and correspondence of the aggrieved party."[42]

This procedural rule is based on a person's right to privacy which can be gathered from "the piecemeal and scattered provisions of privacy

---

[38] LAURENCE TRIBE, CONSTITUTIONAL CHOICES, 13.

[39] G.R. No. 115455, 30 October 1995, 249 SCRA 628

[40] Reynato Puno, The View From the Mountaintop, delivered on the occasion of the National Consultative Summit on Extrajudicial Killing and Enforced Disappearances, Centennial Hall, Manila Hotel, July 16, 2007, available at, http://www.supremecourt.gov.ph/publications/summit/EJK_Summit CJRSP Keynote Speech.pdf.

[41] A.M. No. 08-1-16-SC, 4.

[42] Section 1, A.M. No. 08-1-16-SC.

protection clauses in the 1987 Constitution."[43] The constitutions of Brazil and Columbia incorporate the writ to habeas data and treat it as an explicit constitutional right alongside the right to privacy.[44] Other Latin American countries such as Argentina and Peru have identical if not stronger provisions.

Habeas Data was promulgated due to the growing erosion of personal privacy especially in the context of computer technology and advanced information systems which have led to the gradual decline in an individual's ability to control flow of one's personal information. "This paints the chilling prospect that one's profile formed from the gathering of data from various sources may divulge one's private information to the public."[45] Furthermore, this poses disturbing situations wherein one's private information may be "inaccurate, outdated or, worse, misused."[46]

The constitutional right to privacy has indubitably existed even before the habeas rules were promulgated. In the case of Morfe v. Mutuc[47] the Anti-Graft and Corrupt Practices Act was assailed on ground that the statute was an unlawful invasion of the constitutional right to privacy. While the court recognized the constitutional right to privacy citing the principles invoked in the U.S. case of Griswold v. Connecticut,[48] the court did not find merit in the petition as the law did not require the disclosure of information.

The Supreme Court in Ople v. Torres,[49] made the strongest pronouncement on privacy:

> ...the right to privacy does not bar all incursions into individual privacy. The right is not intended to stifle scientific and technological advancements that enhance public service and the common good. It merely requires that the law be narrowly focused and a compelling interest justifies such intrusions. Intrusions into the right must be

---

43 A.M. No. 08-1-16-SC , Rationale for the Writ of Habeas Data, 14. *See* Morfe v. Mutuc, 92 SCRA 424; Ople v. Torres, G.R. No. 127685 July 23, 1998. For an analysis of the legal foundations of the right to privacy in the Philippines, see, generally, IRENE CORTES, THE CONSTITUTIONAL FOUNDATIONS OF PRIVACY (1970); Oscar Franklin Tan, *Articulating the Complete Philippine Right to Privacy in Constitutional and Civil Law: A Tribute to Chief Justice Fernando and Justice Carpio*, 82(4) PHIL. L.J. 78 (2008). Volume 82 of the *Philippine Law Journal* was erroneously paginated.

44 A.M. No. 08-1-16-SC , Rationale for the Writ of Habeas Data, 16.

45 A.M. No. 08-1-16-SC , Rationale for the Writ of Habeas Data, 15-16.

46 A.M. No. 08-1-16-SC , Rationale for the Writ of Habeas Data, 16.

47 92 SCRA 424

48 A.M. No. 08-1-16-SC , Rationale for the Writ of Habeas Data, 16.

49 G.R. No. 127685 July 23, 1998.

> accompanied by proper safeguards and well-defined standards to prevent unconstitutional invasions. We reiterate that any law or order that invades individual privacy will be subjected by this Court to strict scrutiny.[50]

The Writ of Habeas Data merely operationalizes the right to privacy which has already received strong pronouncement and support from the Courts. What it proposes is a procedure by which an individual may assert his right of control over his personal information, while recognizing that state may also have a lawful interest in information, which is already in line with the standards of Ople v. Torres. In fact, the writ allows the respondent in an application for writ to interpose a defense of national security, state secrets, privileged communication, confidentiality of the source of information of media and other.[51] As such, the writ cannot really be considered substantive.

This illustrates the relevant interplay between the role of the courts to defend constitutional rights such as privacy, through an expanded power not confined to the case and controversy requirement, while avoiding the constitutional restriction against judicial legislation as the writ does not diminish, increase, or modify substantive rights.

C. THE WRIT OF AMPARO

The Writ of Amparo is "a remedy available to any person whose right to life, liberty and security is violated or threatened with violation by an unlawful act or omission of a public official or employee, or of a private individual or entity."[52] Compared to the writ of Habeas Corpus which is focused on personal liberty, Amparo offers a more comprehensive remedy covering the entire gamut of constitutionally protected rights.

The heart of Amparo lies in Section 9 of the writ. It requires the respondent in an application for Amparo within 72 hours to file a verified written return with supporting affidavits, asserting that the respondent did not violate or threaten with violation the right to life liberty, liberty, and security of the aggrieved party, through any act or omission. It requires the respondent to explain the steps or actions taken in determining the fate or whereabouts of the aggrieved party and the person or persons responsible

---

[50] Id.

[51] Sec. 10, A.M. No. 07-9-12-SC, The Rule on the Writ of Amparo.

[52] Sec. 1, A.M. No. 07-9-12-SC, The Rule on the Writ of Amparo.

for the threat, act or omission. It requires respondent to state all relevant information in his possession pertaining to the threat, act or omission against the aggrieved party.

The Puno Court's serious commitment to protect human rights can be gleaned from the plethora of interim measures and reliefs that may be granted to a petitioner in aid of his or her application for the writ. The reliefs include Temporary Protection Order,[53] Inspection Order,[54] Production Order,[55] and Witness Protection Order,[56] none of which accompany the original Writ of Habeas Corpus.

More importantly, the Writ of Amparo is a direct exercise by the Judiciary of its Rule-making function:

> The expanded rule-making power, on the other hand, can provide for a simplified and inexpensive procedure for the speedy disposition of cases. This enhanced rule-making power proved providential two decades later as the country once again plagued by the scourge of extrajudicial killings and enforced disappearances.[57]

The operationalization of Amparo was the recurring theme in the National Consultative Summit on Extrajudicial Killings and Enforced Disappearances sponsored by the Supreme Court from July 16-17, 2007, the purpose of which was "to prevent losing eye contact with these [extra-judicial] killings and disappearances, revive our righteous indignation, and spur our united search for the elusive solution to this pestering problem."[58] Among the main points made in the Summary of Recommendations was the proposal "to undertake a serious study of the writ of Amparo to see how it can be availed of, as a(sic) protective and remedial tool, for the greater protection of the constitutional rights of the victims; to undertake a study on how to attain a more creative and resourceful application of the writ of *habeas corpus*."[59]

There is no debate that Amparo is substantive in nature. Originating from Mexico in ,1841,[60] Amparo developed from a narrowly constructed

---

[53] Sec. 14(a), A.M. No. 07-9-12-SC, The Rule on the Writ of Amparo.
[54] Sec. 14(b), A.M. No. 07-9-12-SC, The Rule on the Writ of Amparo.
[55] Sec. 14(c), A.M. No. 07-9-12-SC, The Rule on the Writ of Amparo.
[56] Sec. 14(d), A.M. No. 07-9-12-SC, The Rule on the Writ of Amparo.
[57] A.M. No. 07-9-12-SC, The Rationale for the Writ of Amparo, 46.
[58] A.M. No. 07-9-12-SC, The Rationale for the Writ of Amparo, 45.
[59] A.M. No. 07-9-12-SC, The Rationale for the Writ of Amparo, 46.
[60] A.M. No. 07-9-12-SC, The Rationale for the Writ of Amparo, 32.

procedural device designed to protect citizens in limited instances to a broader remedy used "to cover the whole range of constitutional rights."[61]

The specific text in the Mexican Constitution thus provides:

> The federal courts shall protect any inhabitant of the Republic in the exercise and preservation of those rights granted to him by the Constitution and by laws enacted pursuant hereto, against attacks by the Legislative and the Executive powers of the federal or state governments, limiting themselves to granting protection in the specific case in litigation, making no general declaration concerning the statute or regulation that motivated the violation.[62]

Under the Mexican Amparo:

> The plaintiff could bring a proceeding in the Supreme Court, and eventually the intermediate appellate courts, to protect constitutional rights; to test constitutional laws; and to challenge certain judicial decisions.[63]

Argentina, Venezuela, Guatemala, El Salvador, Costa Rica, Panama, and very recently, Bolivia, Ecuador, and Paraguay, all states which shared the Philippine experience of extra-judicial killings and force disappearances, followed Mexico's direction and "adopted the extraordinary writ in their Constitutions."[64]

While this writ has been integrated in the constitutions of various Latin states, such does not necessarily confer upon the writ, the nature of a substantive right. Habeas Data merely operationalizes the rights to life, liberty, and security which are already recognized in the constitution in the Bill of Rights under Article III, section 1 and 2. The fact that the rule enhances an individual's accessibility to these rights does not mean it is right away, a substantive matter. In fact the Supreme Court is merely exercising its prerogative under its rule-making function to explore the gamut of remedies that could lead to the protection of such right. Furthermore, the location of the writ in Latin constitutions does not affect whether it is inherently procedural as our constitution has a number of detailed procedures in it in relation to the protection of rights that do not possess a substantive

---

[61] id, p. 32
[62] Secretary of national Defense v. Manalo, p. 25
[63] id., p. 32
[64] id., p 32

character, such as the procedures for assailing the validity of a declaration of Martial Law.

It bears noting that while the above cited provision from the Mexican Constitution offers a broader mechanism for enforcement of constitutional rights through their courts, it stops short from allowing the judiciary from directly encroaching into Executive and Legislative powers in the process. In fact, by limiting the exercise of Amparo to "specific cases in litigation"[65] and precluding the courts from passing on the validity of the "statute or regulation"[66] in question, it balances the judicial duty to protect the Constitution with "the limitations on judicial power characteristic of the civil law tradition."[67]

D. GUIDELINES IN THE OBSERVANCE OF A RULE OF PREFERENCE IN THE IMPOSITION OF PENALTIES IN LIBEL CASES

This circular merely notifies all courts and judges of an "emergent rule of preference"[68] in the application of fines rather then imprisonment in libel. This rule of preference applies only upon the existence of attendant circumstances supplied in the circular as inferred from a line of Supreme Court cases.[69] Examples of these are:

> (1) when the accused wrote the libelous article merely to defend his honor against the malicious messages that earlier circulated around the subdivision, which he thought was the handiwork of the private complainant; (2) when the accused committed the libel in the heat of anger and in reaction to a perceived provocation; (3) when passions evoked during the election period in 1988 agitated the accused into writing his libelous letter; and (4) when the accused was merely exercising a civic or moral duty to his client when he wrote the defamatory letter to private complainant. Stated differently, the judge,

---

[65] Secretary of National Defense, et al. v. Manalo, G.R. No. 180906, October 7, 2008.

[66] Id.

[67] Id.

[68] Admin Circ. 08-2008

[69] Fernando Sazon v. Court of Appeals and People of the Philippines 325 Phil. 1053, 1068 (1996); Quirico Mari v. Court of Appeals and People of the Philippines 388 Phil. 269, 279 (2000) Roberto Brillante v. Court of Appeals and People of the Philippines November 11, 2005, 474 SCRA 480 In Jose Alemania Buatis, Jr. v. People of the Philippines and Atty.

Jose Pieraz G.R. No. 142509, March 24, 2006, 485 SCRA 275.

> in the exercise of his discretion, should impose the penalty of imprisonment when these circumstances are inexistent.[70]

As an offshoot of the recent controversies involving the First Gentleman Mike Arroyo's filing-spree of libel cases against journalists and other members of the press, these guidelines have been criticized as of late for strengthening "press freedom at the expense of the institutionalization of the rule of law."[71] This implies that there is a specific methodology by which the Supreme Court may "shape how lower courts decide actual cases."[72] The Court must speak through "precedent, and not through guidelines."[73] In other words, the Judiciary should not resort to its rule-making function to issue guidelines that have the effect of amending laws, as such properly belongs to the court's certiorari powers, which may only be exercised in an actual case and controversy.

The critics of the Puno Court have even gone so far as to say that:

> [It] doesn't make the memo illegal but it makes it woefully ill-advised, at a time the republican forces in this country have censured President Arroyo for precisely this sort of constitutional shortcut. For how can a judiciary that can barely contain its powers censure a President who abuses hers?[74]

The substantive nature of these guidelines is at the heart of this debate. Does it have the effect of "diminishing, increasing, or modifying substantive rights"[75] or is it a proper exercise of the court's rule-making function as the same "confers no right, imposes no duty, affords no protection, and creates no office."[76]

Although the circular only suggests a preference and results in no direct amendment of the law, it nonetheless affects the extent of the right conferred by Libel Laws[77] to complainants. To that degree, the circular is essentially substantive in nature, while treading dangerously at the heels of judicial legislation.

---

[70] reaction to the column of former UP [University of the Philippines] Dean of the College of Law, Raul C. Pangalangan entitled "Judicial Activism and its Limits," which appeared in the 1 February 2008 issue of the Philippine Daily Inquirer.

[71] Raul Pangalangan, Judicial Activism and its Limits, Philippine Daily Inquirer, February 1, 2008.

[72] Id.

[73] Id.

[74] Id.

[75] Article VIII 5(5).

[76] Ople v. Torres, G.R. No. 127685 July 23, 1998.

[77] Art 355, Revised Penal Code.

Libel as a crime punishable in the Revised Penal Code acts as a balance between the protection of the right of individuals to free speech and press from prior restraint and the potential abuses that may arise from it. The operative element in libel cases is the presence of actual malice.

Administrative Circular 08-2008, merely enumerates an emergent rule in the Supreme Court cited several case precedents wherein the court considered specifically identified conditions or circumstances by which fines could be preferred. As clarified by Chief Justice Puno:

> The imposition of fine does not decriminalize libel for the simple reason that fine is a criminal penalty. Let me just quote the pertinent provisions of the Revised Penal Code, viz: Art. 25. Penalties which may be imposed ... [and] Art. 26. Fine -- when afflictive, correctional, or light penalty....
>
> In imposing fines, courts are given leeway by ... the Revised Penal Code, viz: Art. 66. Imposition of fines [taking into account] "the mitigating and aggravating circumstances, but more particularly to the wealth or means of the culprit." The article speaks for itself.[78]

The Chief Justice's response to the criticisms highlight the fact that the Administrative Circular was intended as a purely procedural matter, as it prescribes a preference for cash penalties but does not affect it's character as a punishable act under the RPC. Under the standards established in Article VIII, Section 5(5), the procedural rule does not diminish, increase, or modify substantive rights.

As inherently procedural rules, they find clear textual support in the 1987 Constitution, which provides that "the Supreme court shall have the powers to promulgate rules concerning the protection and enforcement of constitutional rights..."[79] making them legitimate. Furthermore, the object of these initiatives, namely the protection of press freedom and human rights, are also anchored upon Constitutional directives which possess the people's approval through their ratification of the new constitution.

The social dimension of the present Constitution, coupled with greater powers of certiorari and rule-making, reflect existing theories which justify and support such an active role.

---

[78] Raul Pangalangan, Judicial Activism and its Limits, Philippine Daily Inquirer, February 1, 2008.
[79] Article VIII Sec. 5(5)

III. JUSTIFYING THE GREATER ROLE OF THE JUDICIARY IN PHILIPPINE DEMOCRACY

It is readily established that the Supreme Court's recent initiatives operationalize existing constitutional rights, and that they do not themselves create new rights despite the extensive nature of some of the procedures promulgated. Thus, the breadth of these new initiatives is grounded in the 1987 Constitution itself. The rule making power was intentionally made explicit as part of a set of changes designed to promote a more active judiciary. Clearly, the rule making power was intended to be used in the same manner as the expanded *certiorari* jurisdiction.

This textual authority establishes that broad use of the rule making power cannot be anti-majoritarian because the people ratified the Constitution. Further, the structure that results from the 1987 Constitution's changes emphasizes the Supreme Court's traditional functional role in democracy as the branch best positioned to protect human rights.

A. THE STRUCTURAL INABILITY OF THE POLITICAL BRANCHES TO PROTECT MINORITY RIGHTS

The Supreme Court serves what Professor Michael Perry calls a prophetic function,[80] in that it acts as "an advocate or champion, speaking for those who are too weak to plead their own cause." Indeed, the major activity of the prophets was *interference*, remonstrating about wrongs inflicted on other people, meddling in affairs which were seemingly neither their concern nor their responsibility."[81]

Such a function is crucial because minority rights are indispensable in democracy. The case of *Philippine Blooming Mills* states that "the purpose of the Bill of Rights is to withdraw "certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts.""[82] This is a compromise made by the majority when the Constitution was ratified, a balance struck between "postulates of respect for the liberty of the individual xxx and the demands of an organized society."[83]

---

[80] MICHAEL PERRY, THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS (1982).

[81] Id., at 146.

[82] Philippine Blooming Mills Employment Organization v. Philippine Blooming Mills Co., Inc. and Court of Industrial Relations, G.R. No. L-31195 June 5, 1973.

[83] MICHAEL PERRY, THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS, 93 (1982).

It is the protection of these individual liberties as a result of the compromise that form the foundation of a democratic society and facilitate majoritarian processes.

In this context, Professor Perry argues:

> I can see no special reason for supposing elected officials can be trusted to resolve [human rights] disputes in an impartial, politically disinterested fashion. To the contrary, the high premium elected officials place on remaining in office virtually assures that most of them will resolve such disputes in whatever fashion they think best serves their interest in reelection, which is to say in the fashion the majority, not the minority, wants the disputes resolved.[84]

It is the Supreme Court, Professor Perry's prophet that is tasked to constantly remind the majority of the compromise they made. Thus, the 1987 Constitution enhanced the Supreme Court's anti-majoritarian nature. The Justices are appointed[85] and may only be removed by impeachment,[86] enjoy fiscal autonomy,[87] and have security of tenure until reaching the age of seventy or becoming incapacitated.[88] The number of Justices members is fixed at 15, with any vacancy to be filled within ninety days from the occurrence of such.[89] Most importantly, while Congress is authorized by the Constitution "to define, prescribe and apportion the jurisdiction of the several courts," it may not deprive the Supreme Court of its appellate jurisdiction over cases involving issues of constitutionality,[90] and Congress may not increase the Supreme Court's appellate jurisdiction without its advice and concurrence.[91]

The intentional insulation from political accountability, the very characteristic that makes it theoretically anti-majoritarian, equips the Supreme Court to be the arbiter of the nation's highest values. These are the "enduring values xxx we hold to have more general and permanent interest"[92] and were transformed into constitutional commitments. Professor Bickel believes government should serve these values, beyond

---

[84] Herbert Weschler,Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 6.
[85] Art. VIII, Sec. 8 and 9
[86] Id.
[87] Id., at Sec. 3
[88] Id., at Sec. 11
[89] Id., at Sec. 4(1)
[90] Id., at Sec. 2
[91] Art. VI, sec. 30
[92] ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH, 24 (1962).

"what we conceive from time to time to be our immediate needs."[93] The problem lies in the failure of the political branches to perceive these values "when the pressure for immediate results is strong enough and emotions ride high enough."[94] Thus, Chief Justice Puno concludes that:

> The new role given to courts both in developed and developing democracies is not difficult to understand. Heretofore, the protection of human rights has been principally entrusted to the political branches of government or to our electorally accountable officials and not to politically independent judiciaries. Over the years, however, the expectation that human rights could be best protected by the political branches of government has been diluted xxx Elected officials usually go for what is popular but the vindication of human rights sometimes demand taking unpopular decisions especially in instances, where due to technicalities, the right of the righteous is trumpeted by the rights of the wicked.[95]

B. THE ROLE OF THE SUPREME COURT IN ADVANCING CONSTITUTIONAL VALUES

The American Constitution was drafted centuries before the Philippines' 1987 Constitution and is a much shorter document. In this context, Professor Perry proposes that human rights are best advanced with what he calls a noninterpretive approach, characterized by "reference to a value judgment other than one constitutionalized by the framers."[96] Once the Supreme Court makes a value judgment, it must utilize its powers to implement this. Professor Perry continues:

> Once a traditional value has been accepted as an aspect of constitutional liberty, the Court must give that value a consistent and principled interpretation. Otherwise, the actual contours tradition supplies may reflect the same prejudice and insensitivity that necessitate judicial protection of unenumerated rights in the first place... Once it has been found that a particular right is an element of constitutional liberty, the Court no longer looks exclusively to

---

[93] Id.

[94] Id.

[95] Reynato Puno, The View From the Mountaintop, delivered on the occasion of the National Consultative Summit on Extrajudicial Killing and Enforced Disappearances, Centennial Hall, Manila Hotel, July 16, 2007, available at, http://www.supremecourt.gov.ph/publications/summit/EJK_Summit CJRSP Keynote Speech.pdf.

[96] MICHAEL PERRY, THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS, 11 (1982).

> tradition to ascertain its contours. Instead, it must develop a reasoned exposition of that value.[97]

Other legal philosophers agree and have proposed different standards by which these values are realized. Professor Bickel postulates that these values are premises which society deduces "not merely from the fact of a written constitution but from the history of the race, and ultimately as a moral judgment of the good society."[98] This suggests that tradition or historical consensus would be a plausible source of these values, "the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well the traditions from which it broke."[99] Professor Herbert Weschler advocates searching for neutral principles. He argues that the Supreme Court should not function as a "naked power organ" and instead act for "reasons that in their generality and their neutrality transcend any immediate result that is involved."[100]

The problem in American philosophy, however, is that these standards did not provide sufficient methodologies for determining the fundamental values sought. Dean John Hart Ely criticized that tradition is tremendously uncertain especially with the passage of time that it is impossible to generate "an answer sufficiently unequivocal to justify overturning the contrary judgment of a legislative body,"[101] and that the search for neutral principles involves determining a sufficient level of generality that nevertheless does not guarantee the appropriateness of the principle determined.[102]

These dilemmas, however, have become significantly less relevant in the Philippines because the 1987 Constitution already outlines the country's fundamental values, including social and economic values. Justice Florentino Feliciano explains: "In our own jurisdiction, the judge's task of gleaning the requirements of community values from applicable and related prescriptions, is lightened in some measure by the "Declaration of Basic Principles and

---

[97] MICHAEL PERRY, THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS, 95 (1982).
[98] ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH, 24 (1962).
[99] MICHAEL PERRY, THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS, 93 (1982).
[100] Herbert Weschler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 6.
[101] John Hart Ely, Foreword: On Discovering Fundamental Values, 39-40
[102] Ely, 33

State Policies" set out in our Constitution."[103] Dean Raul Pangalangan makes a stronger statement:

> For the Philippine Supreme Court today, those "neutral principles" were handed on a silver platter by the drafters of the 1987 Constitution, who as stated above codified into the charter the various activist causes of many of its members, including Chief Justice Davide.[104]

IV. HOW THE ANTI-MAJORITARIAN SUPREME COURT STIMULATES DEMOCRACY

An analysis of the constitutional design establishes that the anti-majoritarian character of the Supreme Court is intentional, and it was further insulated from popular pressures by the 1987 Constitution. It is the great irony of Constitutional Law that this anti-majoritarian character is the very feature that defines the Supreme Court's function as the protector of human rights in Philippine democracy. The ultimate conclusion from this irony is that the Supreme Court's anti-majoritarian character has advanced the post-EDSA democracy further than any other constitutional feature.

This is the answer to what Justice Vicente Mendoza considers the greater question in any study of the legitimacy of judicial action: "whether courts have a special function that makes them the guardians of the Constitution, or whether their function in constitutional cases is a narrow, incidental one, to be performed only when necessary to the decision of specific cases."[105]

A. THE MYSTIC FUNCTION OF THE SUPREME COURT

Clearly, the combination of the expanded *certiorari* jurisdiction, the rule making power and the judiciary's other features intended an active role for the Supreme Court in advancing the constitutional commitments embodied in the 1987 Constitution. It does not suffice, however, to recognize that the nation's highest values have been made explicit. Professor Bickel pushes the analysis further:

---

[103] Florentino Feliciano, The Application of Law: Some Recurring Aspects of the Process of Judicial Review and Decision Making, 37 American Journal of Jurisprudence 17, 46 (1992).

[104] Raul Pangalangan, Judicial Activism and its Limits, Philippine Daily Inquirer, February 1, 2008.

[105] VICENTE V. MENDOZA, JUDICIAL REVIEW OF CONSTITUTIONAL QUESTIONS, 241 (2004).

> ...such values do not present themselves ready-made. They have a past always, to be sure, but they must be continually derived, enunciated, and seen in relevant application. And it remains to ask which institution of our government – if any single one in particular- should be the pronouncer and guardian of such values.[106]

Government action according to Bickel has two aspects, namely: "their immediate, necessarily intended practical effects and their perhaps unintended or unappreciated bearing on values we hold to have more general and permanent interest."[107] He believes "men in all walks of life occasionally perceive this second aspect"[108] and thus, act on principle. Often, however, "when the pressure for immediate results is strong enough and emotions ride high enough, men will ordinarily prefer to act on expediency rather than take the long view."[109] In contrast:

> Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government. This is crucial in sorting out the enduring values of a society...[110]

Judicial action while theoretically anti-majoritarian nonetheless serves as a catalyst that stimulates Philippine democracy. This is seen in the Supreme Court's exercise of its deciding and rule-making functions which work to bridge the gap between the law and society. Ultimately, however, it is seen in the Supreme Court's mystic function, its role of inspiring consensus and educating the public.[111]

According to Justice Feliciano, the first two functions deal with the judge's task of resolving cases and developing "the precedential value of such application for future cases."[112] Outside judicial review, the rule-making function is also evident in the exercise of the rule making power, although this is in the context of developing constitutional values for the future and not in the sense of judicial legislation. These related functions, however, lead to a third higher function of educating society.

---

[106] ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH, 24 (1962).
[107] ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH, 24 (1962).
[108] ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH, 25(1962).
[109] ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH, 25 (1962).
[110] ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH, 26 (1962).
[111] Tan, *supra* note 43, at 237.
[112] Florentino Feliciano, The Application of Law: Some Recurring Aspects of the Process of Judicial Review and Decision Making, 37 American Journal of Jurisprudence 17, 34 (1992).

The Judiciary's role in strengthening democracy depends upon a "delicate, symbiotic" relation. The Supreme Court must "sometimes be the voice of the spirit, reminding us of our better selves." It must provide a "stimulus" and "quicken moral judgment."

> For, the power of the great constitutional decisions rests upon the accuracy of the Court's perception of this kind of common will and upon the court's ability, by expressing its perception, ultimately to command a consensus.[113]

This is explained in practical terms by Eugene V. Rostow, in his article "The democratic Character of Judicial Review,"[114] in which he responds to the claim that "vigorous lead from the Supreme Court inhibits or weakens popular responsibility."[115]

According to Rostow, "the process of forming public opinion is a continuous one with many participants - Congress, the President, the press, political parties, scholars, pressure groups, and so on.[116] In the formation of such public opinion, especially with respect to the "fundamental values" and "enduring principles" which the Courts have the duty to ascertain and defend:

> The discussion of problems and the declaration of broad principles by the Courts is a vital element in the community experience through which policy is made. The Supreme Court is, among other things, an educational body, and the Justices are inevitably teachers in a vital national seminar. The prestige of the Supreme Court as an institution is high, despite the conflicts of the last fifteen years, and the members of the Court speak with a powerful voice.[117]

It is this educative function of the Supreme Court which inspires popular participation in political institutions of a country. Society is constantly in pursuit to form far-reaching moral codes. The prestige and authority of the Supreme Court as the primary interpreter of the constitution, which is the closest approximation of society's moral code, has given it a peculiar role. The responsible exercise of its functions, whether through Judicial Review or through it's rule-making function, has the effect

---

[113] Archibald Cox, The Role of the Supreme Court in American Government, 117-118 (1976).
[114] Id.
[115] Id.
[116] Id.
[117] Id.

"not of inhibiting but of releasing and encouraging the dominantly democratic forces."[118]

Under the 1987 Constitution, the people's reverence in our Supreme Court has been symbolically established through the expansion of their powers of review and rule-making function. In incorporating new-found principles among its provisions, the people have unequivocally declared the enduring rights and values they believe they share.

CONCLUSION

The deeper wisdom of the 1987 Constitution is that an election victory is far from the only source of legitimacy in a democratic framework. In 2000, The *Philippine Daily Inquirer* awarded then Chief Justice Hilario Davide the distinction of being Filipino of the Year. The newspaper described: "There were fears of violent confrontations; of interventions from the right, from the left and the reds; of anarchic upheavals. But the rule of law prevailed because of one man. His name is Hilario Davide, Jr."[119] The following year, in 2001, for "saving the constitutional system from collapse" during EDSA II, the whole Supreme Court was named Filipino of the Year.[120]

The Supreme Court since drew public praise in every instance in which it took firm stands, often against the people's elected representatives. The case of *Senate v. Ermita*[121] upheld the right of Congress to compel executive officials to appear during inquiries in aid of legislation by partially voiding Executive Order 464. The case of *Bayan v. Ermita*[122] declared unconstitutional the government's "Calibrated Preemptive Response" policy during rallies. Finally, the case of *David v. Arroyo*[123] struck down key sections of Proclamation 1017, perceived to be a virtual declaration of Martial Law by President Gloria Macapagal-Arroyo.

---

[118] Id.

[119] Available at http://www.txtmania.com/articles/davide.php

[120] Artemio Panganiban, Saving the Constitutional System, Address at University of Santo Tomas Central Seminary UST Martyrs' Hall, February 19, 2002, available at http://philippinecommentary.blogspot.com/2005/12/chief-justice-panganiban-in-his-own_23.html

[121] GR Nos. 169777, 169659, 169660, 169667, 169834, & 171246, April 20, 2006

[122] Bayan vs. Ermita, GR Nos. 169838, 169848, & 169881, April 25, 2006

[123] GR Nos. 171396, 171400, 171409, 171483, 11483, 171485, & 171489 , May 3, 2006.

In contrast, the Supreme Court drew public disappointment each time it took a more guarded stance or attempted to compromise with the political branches. The case of *Neri v. Senate Committee*[124] upheld a claim of executive privilege to prevent questioning regarding alleged bribery during legislative investigations. Media minced no words in criticizing the Court; one article called Neri "The Worst SC Decision ever."[125] Very recently, the case of *Suplico v. National Economic Development Authority*[126] dismissed a petition to declare void the controversial $329 million National Broadband Network (NBN) project. The Court held that the issues were already moot and academic since the government had already cancelled the controversial contract. One writer decried: "The image of an "activist" Supreme Court, nurtured by Chief Justice Reynato Puno and cultivated by his predecessors, was demolished in just 18 pages."[127]

Ironically, the more the Supreme Court adheres to its theoretically anti-majoritarian role, the more it gains the public trust. This has been true in the exercise of its familiar power of judicial review, and will likely be true in the exercise of the rule making power it is still exploring. It must be emphasized that recent applications of the rule making power are not usurpations of legislative power in the same way that judicial review of the President's actions is not usurpation of executive power. Despite the broad impact or extensive procedures in some of these initiatives, the rules promulgated by the Supreme Court all merely operationalize established constitutional rights and clearly create do not create any new ones.

Speaking at the landmark Summit on Extrajudicial Killings and Forced Disappearances, Chief Justice Puno proposed that the Supreme Court now sees judicial review and the rule making power as parts of a single whole, that "the paucity of power of the Judiciary in checking human rights violations was remedied by stretching its rule making prerogative."[128] With this thinking, the Supreme Court has recently undertaken broad

---

[124] G.R. No. 180643, available at http://www.supremecourt.gov.ph/jurisprudence/2008/march2008/180643.htm

[125] Ducky Paredes, The Worst SC Decision Ever, March 27, 2008, available at http://www.duckyparedes.com/blogs/2008/03/27/the-worst-sc-decision-ever/

[126] G.R. No. 178830, July 14, 2008

[127] Aries Rufo, SC shirked duty to check abuses in NBN-ZTE ruling: minority, July 15, 2008, available at http://www.abs-cbnnews.com/topofthehour.aspx?StoryId=125192

[128] Reynato Puno, The View from the Mountaintop, p.3, Delivered during the National Consultative Summit on Extrajudicial Killing and Enforced Disappearances, Centennial Hall, Manila Hotel, July 16, 2007 available at http://www.supremecourt.gov.ph/publications/summit/ EJK%20Summit%20CJRSP%20Keynote%20Speech.pdf

initiatives outside the traditional case and controversy requirement, and this is precisely the vision of the modern and nontraditional framework in the 1987 Constitution.

Despite the centuries of theoretical debate since *Marbury v. Madison*[129] regarding the Supreme Court's anti-majoritarian character, Filipinos today recall 2001, when the political branches lay in institutional tatters and the country was held together by an unelected Chief Justice named Hilario Davide, Jr. For all the theoretical proposition that judicial review is a "deviant" institution in modern democracy, it is clear that Filipinos have embraced the Court's boldest decisions. These broke political stalemates and advanced the democratic process akin to how the ruling in *Brown v. Board of Education* rewove the social fabric of the United States and inspired it to embrace the end of segregation.[130] In the same vein, it is clear that the rule making power has gained widespread public support as a parallel judicial tool for the advance of constitutional commitments.

The definitive Philippine answer to the counter-majoritarian dilemma is that judicial action readily paves the way for majoritarian process. The post-EDSA Supreme Court is a continuing link to the greatest majoritarian action in history, the resurrection of Philippine democracy from the ashes of the Marcos dictatorship. Judicial action constantly reminds the Filipino people of the great lessons collectively learned and constitutionalized in that great moment, over the exigencies of the short term.[131] The EDSA Revolution, however, has not yet ended, and one still hopes that the reinvigorated judiciary it created will eventually achieve, in Chief Justice Puno's terms, "a seamless, synchronized, and synergistic action on the part of the political and apolitical branches of government to address violations of human rights."[132]

- o0o -

---

[129] 1 Cranch (5 U.S.) 137, 2 L.Ed. 60 (1803)

[130] LOUIS FISHER & NEAL DEVINS, POLITICAL DYNAMICS OF CONSTITUTIONAL LAW 257 (4th ed. 2006): "Supreme Court efforts to end racial isolation in education exemplify the reaches and limits of the judiciary's ability to transform society. Brown v. Board of Education's declaration that "[s]eparate educational facilities are inherently unequal," 347 U.S. 483, 495 (1954), is widely applauded although it produced little in the way of desegregation. The elected branches eventually rallied behind Brown, making tangible the Brown mandate through a series of 1960's legislative and regulatory initiatives."

[131] Tan, *supra* note 3, at 104.

[132] Reynato Puno, The View from the Mountaintop, p.5, Delivered during the National Consultative Summit on Extrajudicial Killing and Enforced Disappearances, Centennial Hall, Manila Hotel, July 16, 2007 available at http://www.supremecourt.gov.ph/publications/summit/ EJK%20Summit%20CJRSP%20Keynote%20Speech.pdf