JUDICIAL REVIEW AND THE MYTH OF THE MAJORITY*

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I. MAJORITY RULE

The counter-majoritarian difficulty survives as the single most persistent critique to the exercise of judicial review in the Republican structure of government. In our jurisdiction, the concept of power concentrated on a small group of individuals, learned in the law as they must presumably be so, is viewed by most legal scholars as abhorrent to the ideals of democracy such that the highest court in the land has been, time and again, deemed a potential bastion of tyranny.[1]

For this is not just any power.[2] Judicial review connotes the highly privileged authority of interpreting the Constitution, and striking down statutes and acts---'lesser law', that violate it. The tension is not so much in the court's status as interpreter or final arbiter, but in the fact that it checks acts of other departments, co-equal branches elected by the public according to the democratic mandate.

The will of the people, the majority, is purportedly subjected to decision-making by a chamber that professes independence, aloofness to popular will, and accountability to no one but itself. Alexander Bickel goes further to say that judicial review is undemocratic, a deviant institution which depreciates the central function that is the electoral process and the policymaking power of representative houses.[3]

The resulting decisions of the court become part of the law of the land. And whether or not judges engage in lawmaking in the exercise of their

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[1] Arturo Tolentino, *Supreme Court: Potential Tyrant?*, 36 SAN BEDA L.J. 8 (1995).

[2] RECORD OF THE CONSTITUTIONAL COMMISSION 645-46 (1986).

[3] ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 16-23 (1962).

adjudicatory function, the foundations of their interpretations are imbedded in the body of law, in accord with the demand for stability. Hence, judicial review becomes a headier threat, precisely because it pertains to the construction of the Constitution, in matters of greatest moment, against the wishes of a majority which is, in turn, powerless to affect it.[4] It cuts against the grain of democratic philosophy itself.

In American representative democracy then, the gravest concern of legal scholars is the counter-majoritarian character of judicial review, and its essential irreconcilability with popular government. Majority rule has been considered the keystone of the democratic system in theory and practice, and its effectivity is dependent on the preservation of two fundamental rights of the individual: the right to vote, and the right to freely express and exchange ideas.[5]

Although in theory, the majoritarian ideal would be for all the people to participate in lawmaking by casting their ballots, and make informed choices through the freedom to engage in discourse, its cumbersome quality has paved the way for lawmaking conducted by representative assemblies instead. Thus, the system is now one where public policies are wrought in both Houses of Congress, where the people's chosen leaders represent their interests, subject to popular control during periodic elections.

However, considering this paramount obsession with "majority rule", the question remains to be asked: Is the present system as adherent to the will of the people as it professes to be? More specifically, in the Philippine context (where judicial review has been adopted)[6], is there a strongly entrenched tradition of majoritarianism, from elections to the lawmaking process, that renders judicial review inutile, and the members of the court mere power-grabbers?

This is not, as Bickel warns, a form of nitpicking of the "impurities in one part of the system"[7] to try to justify "departure from the desired norm in another part".[8] The quest for the will of the majority concerns so much more than pinpointing deficiencies in the tripartite structure. It lies at

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[4] *Id.*

[5] JESSE CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 5 (1980).

[6] CONST. art. VIII, sec. 5 (4)(2)

[7] ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 17 (1962).

[8] *Id.*

the heart of the law. Thus, there is a need to look beyond ingrained conflicts to reassess the validity of the opposing positions, always in conjunction with what Oliver Wendell Holmes called "the felt necessities of the time".[9]

Fortunately or unfortunately, the rise of judicial review in our country, though hardly novel, departs sharply from the American experience.[10] While we have adopted wholesale the democratic form from the United States model, the interplay of political factors that largely affect the intended outcome of majoritarianism, is uniquely our own.

The central goal then, is to zero in on judicial review in the Philippine context. By reviewing the historical underpinnings of judicial review in the Philippine setup, it is delineated as a democratic system with a vastly different application in terms of culture and society, from its American model. Furthermore, by looking into the authenticity of MAJORITY RULE in the Philippines, the ultimate charge of the countermajoritarian tendencies of judicial review is revisited and assessed.

II. JUDICIAL REVIEW IN THE PHILIPPINES

At the outset, the practice of judicial review has never been formally established in the Philippines. The Supreme Court of the American regime simply exercised it, assuming it part of Western law, a feature that was extended to the colonies.[11] The 1935 Constitution followed the distribution of powers of the American model and grants the judiciary the authority to review laws enacted by Congress and the executive. Controls were in place to prevent its encroachment on the other two branches, the foremost of which was the political question doctrine. In *Angara v. Electoral Commission*, Justice Jose Laurel drew the parameters of judicial review:

> "The Constitution has blocked out with deft strokes and in bold lines, allotment of power (to the three departments of government. But i)n times of disquietude or political excitement, the great landmarks of the Constitution are apt to be forgotten or marred, if not entirely obliterated. In (those) cases, the judicial department is the only constitutional organ which can be called upon to

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[9] Justice Oliver Wendell Holmes, from the first of twelve Lowell lectures delivered on November 23, 1880 which were the basis for *The Common Law*.

[10] Vicente Mendoza, *The Nature and Function of Judicial Review*, 31 IBP JOURNAL 1 (2005).

[11] *Id.*

> determine the proper allocation of powers...it does not in reality nullify or invalidate an act of the legislature, but it only asserts the solemn and sacred obligation assigned to it by the Constitution..."[12]

But never was judicial deference more apparent than in the cases on the ratification of the 1973 Constitution, and the infamous Martial Law cases.[13] The Supreme Court followed the traditional path, and declined to strike down the acts of the Chief Executive on the ground that they constitute political questions. This hands-off attitude created a backlash in that it colored the subsequent environment for the drafting of the next Charter. When the Dictator Ferdinand Marcos was finally ousted, the atmosphere was so charged with grim resolve that the balance of power between spheres of government was affected. Former Chief Justice Roberto Concepcion, author of what was to be the famed judicial review provision, explained that this expanded mandate is "actually a product of our experience during martial law."[14] Thus was Article VIII, Sec. 1, par. 2 born, a provision which was absent in the previous two Charters:

> "Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to a lack or excess of jurisdiction on the part of any branch or instrumentality of the Government."[15]

The formulation of the 1987 Constitution produced a myriad of changes and implications that jarred the tripartite setup. While prepared with the best of intentions, foremost of which was to safeguard the rule of law and ensure that the agency of the people never rest in one man again, several jurists believed that by this new grant of judicial power, the Commission overreacted. In the fear of another dictator, they downgraded and weakened the presidency, and cemented the role of the High Court as constitutional

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

[13] Planas v. Comm'n on Elections, et. al., G.R. No. L-35925, January 22, 1973, Javellana v. Executive Secretary,

G.R. No. L-36142, March 31, 1973, Sanidad v. Comm'n on Elections, G.R. No. L-44640, October 12, 1976.

[14] RECORD OF THE CONSTITUTIONAL COMMISSION 434-36 (1986).

[15] CONST. Art. VIII, Sec. 1, par. 2

guardian and supreme arbiter. They also reduced the powers of the legislative branch, the only other political agency whose mandate comes directly from the people.[16]

Still, despite the peculiar social milieu out of which the present Charter took form, judicial review in our country remains a genuine counterweight to excesses from the other two branches. By declaring it not just a prerogative, but a duty incumbent upon the courts to uphold basic individual rights in instances of grave abuse of discretion, Article VIII has thus drawn in deft and bold strokes the path the Supreme Court must take. Unlike in the American setup where case law laid down the court's "province and duty"[17], here, the Justices are textually bound to judicial review.

> "American magistrates are accorded the luxury of choosing between being passivists or activists in their philosophical approach to judicial controversies. This luxury is not granted to Philippine judges, who must decide all legitimate issues of grave abuse of discretion...why should unelected judges be able to reverse the actions of the elected? The answer is simple: The sovereign people expressly mandated them to do so through the Constitution, which the electorate overwhelmingly voted for[18]."

Amid growing concerns of constitutional monopoly in other jurisdictions which have adopted judicial review[19], this seems hardly sufficient a response anymore. The best option, then, is to employ the realist lens to first investigate the defective character of majoritarian machinery in Congress; secondly, assess the role of the courts holistically in the social context; and try to pinpoint what elements are lacking in the Philippine model that the judiciary, whether rightfully, or wrongfully, attempt to fill.

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[16] Arturo Tolentino, *Supreme Court: Potential Tyrant?*, 36 SAN BEDA L.J. 8 (1995).

[17] Marbury v. Madison, 1 Cranch (5 US) 137, 2 (1803).

[18] Artemio Panganiban, *Judicial Activism in the Philippines*, 29 PHIL. L.J. 265, 269.

[19] Allison Martens, Beyond the Countermajoritarian Difficulty: Attending to the Dangers of the Rise of Judicial Supremacy, Sept. 5, 2004 (prepared for delivery at the 2004 Annual Meeting of American Political Science Association

3. THE MYTH OF PURE MAJORITARIANISM

Consider that what Western scholars find so abhorrent in judicial review is nothing even remotely touching on its substance; they deny neither the wisdom, the legal basis, nor even the question of whether or not it acquires social legitimacy. There is no ingrained defect in judicial decisions, just *solely because* it was decided by fewer individuals. The antagonism revolves purely around its incompatibility with *procedure*: that a minority can overturn a presumed consensus of the majority by pitting it against the benchmark that is the Constitution. Since what is held so sacred is this 'presumed majority', it seems logical to trace how this is determined by the representative bodies elected to their respective positions.

In the American system, widely viewed as the international model for democratic strains in all phases of government, the reality is that democracy in action is not a mirror of popular will.[20] The tension between the judiciary and Congress is not as sharply defined as it was first made out to be: Congress and the executive are by no means as democratic, and the Court is much more subject to popular will than conventional wisdom would grant.

> "If there is any single axiom that describes the Congress, it is that neither the method for selection of its members, nor its actual modes of behavior result in the automatic translation of the majority will into detailed legislation... The result is the possibility, indeed not infrequently, the actuality, of minority control over the making of government policy."[21]

Jesse Choper attempts to outline the election and interelection process, stacking it against the majoritarian standard. He states that at the outset, even disregarding the geographical differences, and assuming a normal dispersal of constituent interests, the election of lawmaking representatives produces no more than a very crude approximation of majority rule. Furthermore, that the people go to the polls only occasionally while their principles and interests change actively over time, is not even the

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[20] CHOPER, *supra* note 5 at 12.
[21] CHOPER, *supra* note 5 at 12.

bigger problem so much as the initial act of *choosing* a candidate who most likely shares his interest.[22]

In the Philippine setting, there is no need to belabor the lamentable state of voter education; a discussion of the election process itself and its attendant horrors need not be delved into. From a social realist viewpoint, analyzing how and where the judiciary is situated, and how the mechanics of the majority rule operate, we cannot but glimpse into the mechanics of Philippine society itself, which operates largely under the patron-client model.[23] Simply put, the thrust of this perspective is that Philippine politics revolves around interpersonal relationships---especially familial and patron-client ones -- and factions composed of personal alliances. This is deemed to be most manifest and applicable in elections and the political party system, where the polity is structured less by organized interest groups or distinct social occupations, than by a network of mutual aid relationships between pairs of individuals, through the cultivation of 'dyadic ties'.[24]

Inheriting feudal undertones from its colonial past, social life in the Philippines is a tapestry of co-dependency relationships, between patrons, the privileged few, and the clients, the undermined groups who forever look to the former as their benefactors and protectors. Under this paradigm as well, elections are reduced to mere proxy wars between warring elites, so that Congress is a "*whose* who" of aristocratic families, if not the sons and daughters from these families themselves. Thus, the public conscience is marred by short-term concerns of day-to-day survival, choosing the candidates who they think they can get the most dole-outs from.

> "The official political dogmas of this ruling and possessing class enshrined the equality of right, the cult of consent, and the idea that power had to be ennobled by sentiment in the family, controlled by...legal rule in the state, and justified by voluntary agreement...but their actual social life was another story...there they showed their almost complete disbelief in all institutions not founded on blood, property, or power. There they acted as if a moment of personal presence were worth a thousand promises and as if any

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[22] CHOPER, *supra* note 5 at 14.

[23] Benedict Tria Kerkvliet, *"Toward a More Comprehensive Analysis of Philippine Politics: beyond the patron-client, factional framework."* 26 JOURNAL OF SOUTHEAST ASIAN STUDIES 1 (1995).

[24] *Id.*

> exercise of power could be tolerated so long as the veil of sentiment covered it."[25]

But even going further than the elections, to the actual dynamics within Congress itself, representatives possess a tendency to obfuscate and conceal their positions on many issues.[26] Despite the program-based, two-party American system that our own structure lacks, there is a lack of stability in the voting patterns of said representatives, along with erratic changes in alliances and coalition groups. Needless to say, such erratic behavior is even more prevalent among Filipino congressmen, since there is no healthy culture of program-based politics in the country. While a well-entrenched political elite rules in the countryside and in the national arena, political parties do not provide windows into their members' policy preferences, remaining inherently weak at the core, such that some consider them as no more than "alliances of convenience."[27]

Not only do candidates for senators and house representatives form short-lived coalitions that disperse as easily as their founding, they also cannot be relied upon to articulate consistent views on public issues that would create lasting impressions on the people, and contribute to voter information. On the flipside, these representatives are also sadly misinformed as to the dynamic preferences of their constituencies.[28]

Thus, in the Philippines, the gloss of feudalism that permeates the election process, the short-lived, superficial dynamics in Congress, and the individual nuances of the participants, prevent a purely majoritarian ideal from materializing. It remains an abstraction, a mystical entity as elusive as "The People" it supposedly stands for.

JUDICIAL ACTIVISM IN THE PHILIPPINES: BEYOND THE CONSTITUTIONAL IMPERATIVE

In peering into the myth of the majority rule in the country's political setup, there is forwarded neither a blind allegiance to the rigors of judicial review, nor a summary comparison of two kinds of political

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[25] ROBERTO MANGABEIRA UNGER, SOCIAL THEORY: ITS SITUATION AND ITS TASK (1987).

[26] CHOPER, *supra* note 5 at 12.

[27] A phrase coined by Jose Luis Martin Gascon, in an interview with the Philippine Center for Investigative Journalism in their EDSA 20th Anniversary issue, at http://www.pcij.org/ i-report/ edsa20/ chito-gascon2.html last viewed on 10 November, 2008

[28] CHOPER, *supra* note 5 at 12.

structures, and finding one sadly lacking. The aim is to emphasize the need to rise above dogmatic allusions to 'democracy' and contextualize the relationship between a presumably majoritarian Congress and a presumably elitist court, in the dynamics of the unique Philippine legal reality. By pointing out several leaks in the umbrella of majority rule consistently espoused by critics of judicial review, it may be better appreciated how the latter fosters a healthy checks-and-balance system between the two branches of government, with the realization that before a full-blown overhaul of the political structure *and* the constitutional tradition in the Philippines can be made, a more expedient option has yet to present itself.

Truth be told, the Supreme Court *is* tasked with the cumbersome and potentially malleable power to check on the excesses of the other two departments of government. And while in pointing out that the Legislative mechanism does have its own democratic deficiencies there was no denouncement of its *intrinsic* merit, neither is it justified to rule out a whole institution in place because of errors in judgment, difference of opinion, or deficiencies in procedure. Truth be told, lawmaking activity in the Philippines presents *less* opportunity for discourse between and among citizens and representatives, than when actual cases and controversies are brought before the tribunal.

Supreme Court decisions are reviewed, criticized, and analyzed after they have been promulgated, but even before judicial review may be validly exercised, several requirements must also be complied with. The court itself employs self-checking or self-regulation, and refrains from deciding on acts of Congress, unless they come within the bounds strictly delineated in the Constitution.

For example, in *Montesclaros v. Commission on Elections*[29], the court refused to act on petitioners' contention that the proposed bill fixing the maximum age for membership in the *Sangguniang Kabataan* at 18 years old is violative of their constitutional rights. Petitioners also wanted the date for elections postponed.

By the time the issue has reached the court, Congress has already reset the date and moved it back two months later; hence, applying the case or controversy requirement, it ruled that there can no longer be an actual controversy requiring judicial intervention. It ruled further that petitioners

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[29] G.R. No. 152295, July 9, 2002.

did not possess a vested right to the permanence of the age requirement such that this did not come within the ambit of cases involving legal rights which are legally demandable and enforceable.

More importantly, the Supreme Court formulated the guideline for review of bills which are, as yet, in the proposal stage:

> "A proposed bill is not subject to judicial review because it is not a law. A proposed bill creates no right and imposes no duty legally enforceable by the Court. A proposed bill, having no legal effect, violates no constitutional right or duty. The Court has no power to declare a proposed bill constitutional or unconstitutional because that would be in the nature of rendering an advisory opinion on a proposed act of Congress. The power of judicial review cannot be exercised *in vacuo*."[30]

Thus, given the elusive search for the majoritarian ideal, represented by an elected body in a process that is at best, tenuous, it would seem prudent to maintain the only constitutional mechanism in a position to either cut against its excesses, or buttress future valid, and constitutionally sound actions it may take. Rather than shoot down the mechanism of judicial review in a narrow-sighted expectancy that Congress will subscribe to the majority at *all* times and in all situations, it is infinitely more sensible to keep such a safeguard in place. This, of course, should be streamlined according to the specifications and prerequisites prescribed by the Constitution itself. The mechanism would then be more adherent to the rationale for the doctrine of separation of powers.[31]

> "Under the separation of powers, the Court cannot restrain Congress from passing any law, or from setting into motion the legislative mill according to its internal rules. Thus, the following acts of Congress in the exercise of its legislative powers are not subject to judicial restraint: the filing of bills by members of Congress, the approval of bills by each chamber of Congress, the reconciliation by the Bicameral Committee of approved bills, and the eventual approval into law

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[30] *Id.*

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

> of the reconciled bills by each chamber of Congress. Absent a clear violation of specific constitutional limitations or of constitutional rights of private parties, the Court cannot exercise its power of judicial review over the internal processes or procedures of Congress. The Court has also no power to dictate to Congress the object or subject of bills that Congress should enact into law. The judicial power to review the constitutionality of laws does not include the power to prescribe to Congress what laws to enact... To do so would destroy the delicate system of checks and balances finely crafted by the Constitution for the three co-equal, coordinate and independent branches of government."[32]

That judges are human beings is a truism. The recognition of courts as legitimately exercising review powers entails the recognition that they *are* political agencies, to the extent that it is constitutionally incumbent upon them to engage in the dual-faced behavior of actually contributing in the development of public policy while pretending not to. Thus:

> "Since the Court generally deals with the 'trouble cases', it is typically called upon to decide precisely those questions for which neither the existing body of law nor the other agencies of government have been able to provide a solution...it is asked to make social policy, and to do so it cannot depend on neutral principles but must look to its own assessment of the social and political interests involved..."[33]

With the continually problematic way that our democratic institutions have unraveled, the court is dictated by both principle and necessity to take on a more active role. As discussed by Dean Raul Pangalangan, "(Philippine) judges are called upon to exercise the power of judicial on two levels: first, the doctrinal/ logical which is articulate, and second, the intuitive/ political which is by and large kept subtle. In the first, they must speak and act as proper lawyers, straight-jacketed in the forms of

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[32] *Id.*

[33] MARTIN SHAPIRO & ALEX STONE SWEET, ON LAW, POLITICS, AND JUDICIALIZATION 25 (2002).

the craft. In the second, they live out their consciences full, ever-careful not to stray too far from law's gray forms..."[34]

Judicial review, then, is dictated by the need for social legitimacy, through the benchmark of the Constitution. As the Supreme Court checks into acts of the other branches that violate this benchmark, it is merely acting in defense of the will of a timeless majority as against an obscure, ephemeral one.

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[34] Raul Pangalangan, Chief Justice Hilario Davide, Jr. A Study in Judicial Philosophy, Transformative Politics and Judicial Activism