

THE SCOPE, JUSTIFICATIONS AND LIMITATIONS OF EXTRADECISIONAL JUDICIAL ACTIVISM AND GOVERNANCE IN THE PHILIPPINES*

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“Political philosophy must analyze political history; it must distinguish what is due to the excellence of the people, and what to the excellence of the laws; it must carefully calculate the exact effect of each part of the constitution, though thus it may destroy many an idol of the multitude, and detect the secret utility where but few imagined it to lie.”

– Bagehot¹

I. INTRODUCTION

Justice Oliver Wendell Holmes, Jr., in one of the most famous maxims in law, said that:

The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.²

* Awardee, Irene Cortes Prize for Best Paper in Constitutional Law (2009); Cite as Bryan Dennis Tiojanco & Leandro Angelo Aguirre, *The Scope, Justifications and Limitations of Extradecisional Judicial Activism and Governance in the Philippines*, 84 PHIL. L.J. 73, (page cited) (2009).

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¹ cited in WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 193 (Meridian ed. 1956).

² OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).

In the Philippines, these “felt necessities of the time”,³ as well as the shared political culture and history of the Filipino people, have served as fertile ground to the rise of what the writers of this paper will refer to as extrajudicial judicial activism and governance.

The Philippines has judicialized its governance as a mode of correcting the deficiencies of democratic processes. By judicialized governance the writers mean the phenomenon where principled courts step into the void left by dysfunctional democratic majorities. Judicial governance in this sense is a form of judicial activism, which refers “to a judge’s readiness to use his court...to advance substantive social or political causes.”⁴

Traditionally, the modes by which the judiciary, particularly the Supreme Court, has exercised judicial activism and governance were limited to the confines of an actual case and controversy. The 1987 Constitution strengthened this role of the courts through the codification of policy objectives and substantive norms, and the expansion of the judiciary’s certiorari jurisdiction.⁵ The Supreme Court itself has also expanded the judicial role in these two areas by construing the grand normative statements of the Constitution as directly enforceable by courts, without need of legislative implementation, as well as by relaxing the traditional requirements for standing.

Recently, however, the Supreme Court has forayed into extrajudicial modes of judicial governance and activism, most prominent of which are its use of both its expanded rulemaking power and its convening function. The writers refer to these modes as extrajudicial to distinguish them from the activism and governance exercised by courts through their decisions, which settle the cases and controversies brought before them by private parties for adjudication.

Although much legal discourse has already tackled the propriety of judicial governance through Court decisions, there is still a scarcity of commentary on the issue of judicial governance through extrajudicial means. This paper hopes to initiate discourse, by exploring the basis and justification of this power, as well as its scope and limitations. Particularly, this paper argues that the Supreme Court’s exercise of extrajudicial modes

³ *Id.*

⁴ Raul Pangalangan *Chief Justice Hilario G. Davide, Jr.: A Study in Judicial Philosophy, Transformative Politics and Judicial Activism*, 80 PHIL. L.J. 538, 539 (2006).

⁵ See CONST. arts. II, III, XII, XIII, & VIII, § 1.

of judicial activism and governance finds basis not only textually in our Constitution but also in the peculiar political culture and history of the Philippines as well as structurally, in our own reconfiguration of the system separation of powers.

Our paper also argues that a heavy dependence on first, the cooperation of the political departments for the enforcement of its initiatives and, more importantly, on the support of the people for the principles it enforces, effectively checks this power of the Judiciary, consistent with the principles of democratic government and separated powers.

Critics of the Judiciary's exercise of extrajudicial governance and judicial activism point to its inconsistency with the underlying principles of democratic government as expounded mostly by American legal thinkers. The premise is that these Western Institutions which we transplanted to Philippine soil work best when utilized consistently with the ideology that gave birth to them. There may be some truth to this. However, what may be overlooked in this line of criticism is that our political culture allows for this form of exercise of judicial power. Political culture, which refers to "a people's attitudes and orientations to politics,"⁶ "has a significant effect on society's choice of political institutions. How these institutions then function within and in relation to others is very much affected by the environment around them."⁷

II. JUDICIAL GOVERNANCE AND THE REPRESENTATION OF MINORITIES

A. THE COURTS' TRADITIONAL ROLES IN A DEMOCRACY

The proper role of any court in a democracy, according to Barak, is a function of place and time, influenced by the environment and always in a state of flux.⁸ Inevitably, our "recognition and realization of the proper role of the judiciary will vary with different democracies at different times."⁹ This nonetheless, the Supreme Court has traditionally maintained four fundamental roles in a Presidential system of government. First, it settles

⁶ Diana Mendoza, *Understanding the Philippine Political Culture*, in *POLITICS AND GOVERNANCE: THEORY AND PRACTICE IN THE PHILIPPINE CONTEXT* 19 (1999).

⁷ *Id.* at 20.

⁸ Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 25 (2002).

⁹ *Id.*

actual controversies involving rights which are legally demandable and enforceable.¹⁰ Second, it exercises the power of judicial review, through which it performs either a checking function by determining the constitutional validity of the acts of the other departments of government,¹¹ or an umpiring function when it “mediates to allocate constitutional boundaries.”¹² Third, in exercising its power of judicial review, “the Court performs not only a checking function but also a legitimating one.”¹³ The Supreme Court’s prestige and the spell it casts as a symbol enables it to entrench and solidify acts of the other departments of government. In declaring an act as valid, the Supreme Court can generate consent and may impart permanence.¹⁴ Fourth, the Court is also “a great and highly effective educational institution.”¹⁵ Justices, to borrow Dean Rostrow’s phrase, “are inevitably teachers in a vital national seminar.”¹⁶

The Supreme Court also possesses the constitutional function of defining and proclaiming the fundamental values and principles of our society.¹⁷ In fact, evolving, protecting and defending these values and principles are arguably the Supreme Court’s *raison d’être*.¹⁸

B. JUDICIAL GOVERNANCE

Uniquely, our 1987 Constitution has allowed the judicialization of governance as a mode of correcting the deficiencies of democratic processes.¹⁹ For our purposes, we define judicial governance as the phenomenon where principled courts step into the void left by dysfunctional democratic majorities.²⁰

¹⁰ CONST. art. VIII, § 1.

¹¹ See *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 2 L.Ed. 60 (1803); *Casanovas v. Hord*, No. 3473, 8 Phil. 125, Mar. 22, 1907; *Francisco v. House of Representatives*, G.R. No. 160261, 415 SCRA 44, Nov. 10, 2003.

¹² *Angara v. Electoral Commission*, No. 45081, 63 Phil. 139, 158, Jul. 15, 1936; See also *Neri v. Senate Committee on Accountability of Public Officers and Investigations*, GR No. 180643, 549 SCRA 77, Mar. 25, 2008.

¹³ ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 29 (1962).

¹⁴ *Id.* at 129.

¹⁵ *Id.* at 26.

¹⁶ *Id.* at 26, quoting Eugene Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952).

¹⁷ *Id.* at 68.

¹⁸ *Id.*

¹⁹ Raul Pangalangan, “Government by Judiciary” in the Philippines: Ideological and Doctrinal Framework, in *ADMINISTRATIVE LAW AND GOVERNANCE IN ASIA: COMPARATIVE PERSPECTIVES* (2009).

²⁰ Raul Pangalangan, *Passion for Reason: Judicial activism and its limits*, PHIL. DAILY INQUIRER, Feb. 1, 2008, available at <http://opinion.inquirer.net/inquireropinion/columns/view/20080201-116069/Judicial-activism-and-its-limits>.

1. Role of Political Culture

Philippine political culture accords judicial institutions more respect or legitimacy than other government institutions.²¹ It is hardly surprising therefore that this culture approves of policy-making by the judiciary, which has generally enjoyed a reputation for expertise and rectitude, and accorded much or more legitimacy as that of executives and legislatures. Although there has been some criticism, the Court's pronouncements in this area have been accepted as a given facet of democratic governance.

2. New Role

Traditionally, the modes by which the judiciary, particularly the Supreme Court, has exercised such governance were limited to the confines of an actual case and controversy. The 1987 Constitution strengthened this role of the courts through the codification of policy objectives and substantive norms, and the expansion of the judiciary's certiorari jurisdiction. The Supreme Court itself has also expanded the judicial role in governance by construing the grand normative statements of the Constitution as directly enforceable by courts, without need of legislative implementation, as well as by relaxing the traditional requirements for standing.²²

Recently, however, the Supreme Court has forayed into extradecisional modes of judicial governance through its use of both its expanded rulemaking power and its convening function.

C. REPRESENTING MINORITY RIGHTS

Apropos to the Court's exercise of extradecisional judicial governance is its role in representing minority rights. In the country's modern political evolution as a democratic state, this has been a fairly recent phenomenon. During the 18th century, the conception of what is a democratic government was limited to "that institutional arrangement for arriving at political decisions which realizes the common good by making the people itself decide issues through the election of individuals who are to assemble in order to carry out its will."²³ Thus involving the Judiciary in the

²¹ See C. Neal Tate, *Why the Expansion of Judicial Power*, in THE GLOBAL EXPANSION OF JUDICIAL POWER 31-32 (Tate & Vallinder eds. 1995).

²² See Pangalangan, *supra* note 19.

²³ Joseph Schumpeter, *The Classical Doctrine of Democracy*, in THE DEMOCRACY SOURCEBOOK 5 (Dahl, et al. eds. 2003).

politics of the people was in the past considered as hostile to a democratic system of Government.²⁴

This view has become inadequate if not inappropriate given our political culture. History has taught us that majorities with unchecked powers to set governmental policy often arrogate for themselves benefits at the expense of the remaining minority even when there are no relevant differences between the two groups.²⁵ The task for democracies therefore has been of devising ways of “protecting minorities from majority tyranny that is not a flagrant contradiction of the principle of majority rule.”²⁶ This is unarguably a natural role for courts.

Modern democracy’s answer is government not based solely on the rule of people through their representatives, but also on the basis of respect for and enforcement of human rights.²⁷ Rights are “those fundamental preferences that experience and history...have taught are so essential that the citizenry should be persuaded to entrench them and not make them subject to easy change by shifting majorities.”²⁸ They are quintessentially undemocratic, since they constrain the state from enforcing certain majoritarian preferences.²⁹

In addition to being democratic, the Philippines is also a republican State.³⁰ A republic, by definition, is “a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior.”³¹ It was once asserted as necessary to a republic that all classes of citizens should have some of their own number in the representative body in order that their interests will be well attended to.³² Experience, however, has proved this to be difficult to achieve:

The idea of an actual representation of all classes of the people by persons of each class is altogether visionary. Unless it were expressly provided in the Constitution that each different occupation

²⁴ *Colegrove v. Green*, 328 U.S. 549, 553-554 (1948).

²⁵ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 7 (1980).

²⁶ *Id.* at 8.

²⁷ Barak, *supra* note 8, at 20.

²⁸ ALAN DERSHOWITZ, *RIGHTS FROM WRONGS: A SECULAR THEORY OF THE ORIGINS OF RIGHTS* 81 (2004).

²⁹ *Id.* at 16.

³⁰ CONST. art. II, § 1.

³¹ James Madison, *The Federalist* 39, in *THE FEDERALIST PAPERS* 112 (Roy Fairfield ed. 1961) (emphasis supplied).

³² Alexander Hamilton, *The Federalist* 35, in *id.* at 97.

should send one or more members the thing would never take place in practice.³³

It is well to note that James Madison, the Father of the U.S. Constitution, considered it sufficient for a Republican form of government that the persons administering it be appointed, either directly or indirectly, by the people, and that they hold their tenure either during pleasure, for a limited period, or during good behavior.³⁴ Considering that members of the Judiciary, including those of the Supreme Court, are appointed indirectly by the People through the directly elected President,³⁵ and that such members hold their office during good behavior, administration by them is still consistent with fundamental Republican theory.

Constitutionalist Alexander Bickel laments that “It remains in large part...a task of pragmatic trial and error to construct representative deliberative institutions that are responsive to the views, the interests, and the aspirations of heterogeneous total constituencies, and that are yet not so fragmented or finely balanced as to be incapable of decisive action; that are capable of decisive action, yet identified with the people, and so containing within themselves the people’s diversities as to be able to generate consent.”³⁶ Herbert Wechsler, put it more concisely, arguing that what is needed in a Republic is for “government responsive to the will of the full national constituency, without loss of responsiveness to lesser voices, reflecting smaller bodies of opinion, in areas that constitute their own legitimate concern.”³⁷ This need is satisfied, although imperfectly, not by a single institution, but by three separate institutions, each answering to a differently weighted constituency.³⁸

Having been directly elected by the People, Congress³⁹ and the President⁴⁰ represent the majority interests in our Constitutional Democracy. The protection of human rights, especially the rights of every individual and every minority group, therefore, cannot be left only in the hands of the legislature and the executive, which, by their nature, reflect majority opinion.⁴¹ On the other hand, the Supreme Court’s “sole constituency is the

³³ *Id.* at 96.

³⁴ Madison, *supra* note 31.

³⁵ CONST. art. VII, § 4.

³⁶ BICKEL, *supra* note 13, at 192.

³⁷ *Id.* at 193.

³⁸ *Id.*

³⁹ CONST. art. VI, §§ 7-8.

⁴⁰ art. VII, § 4.

⁴¹ Barak, *supra* note 8, at 21.

blindfolded lady without the right to vote.”⁴² It represents, and is the protector of, political minorities.⁴³

D. THE PROTECTION OF HUMAN RIGHTS

The prime duty of the Government is to serve and protect the people.⁴⁴ This protection, Justice V.V. Mendoza posits, is not limited to protection against physical harm, but also to the protection of human rights.⁴⁵ After all, “[t]he very essence of civil liberty consists in the right of every individual to claim the protection of the laws whenever he receives an injury.”⁴⁶ And “[o]ne of the first duties of government is to afford that protection.”⁴⁷

Being a duty of the whole Government, the protection of human rights, like those enshrined in the Bill of Rights, is a duty shared by all of its departments. However, of the three departments, the Judiciary, particularly the Supreme Court, is the best equipped and situated to fulfill this role.

Government acts usually have two aspects: their immediate, necessarily intended, practical effects; and their perhaps unintended or unappreciated bearing on values that we hold to have more general and permanent interest, such as rights.⁴⁸ Being directly accountable to the people, the political departments are sometimes prone to disregard the latter aspect. The framers of the U.S. Constitution were committed to the belief that a representative body, accountable to its constituents, was the best institution for the protection of liberty and individual rights.⁴⁹ Experience, however, has shown that pressure for immediate results that are strong enough, and coupled with high emotions, will cause the people through their representatives to act on expediency, rather than consider such actions’ long term effects on, say, human rights.⁵⁰

In contrast, the Judiciary has, at least theoretically, “the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the

⁴² *Francisco v. House of Representatives*, G.R. No. 160261, 415 SCRA 44, Nov. 10, 2003 (Puno, J., concurring and dissenting).

⁴³ *The Supreme Court as Protector of Political Minorities*, 46 YALE L.J. 862 (1937).

⁴⁴ CONST. art. II, § 4.

⁴⁵ *Vicente V. Mendoza, The Protection of Civil Liberties and the Remedies for Their Violations*, 81 PHIL. L.J. 345, 361 (2006).

⁴⁶ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

⁴⁷ *Id.*

⁴⁸ BICKEL, *supra* note 13, at 24.

⁴⁹ ROBERT REMINI, *THE HOUSE: THE HISTORY OF THE HOUSE OF REPRESENTATIVES* 24 (2007).

⁵⁰ BICKEL, *supra* note 13, at 25.

ends of government.”⁵¹ Given the institutional incentives structured by electoral pressures, as well as the desire to protect fundamental values from the whims of a majority, a democratically unresponsive institution is well-suited to carry out the countermajoritarian function necessary for the protection of minority rights.⁵² The Judiciary is best suited to be the protector of human rights, precisely because it

...is insulated from political responsibility and un beholden to self absorbed and excited majoritarianism. The Court’s aloofness from the political system and the Justices’ lack of dependence for maintenance in office on the popularity of a particular ruling promise an objectivity that elected representatives are not – and should be – as capable of achieving. And the more deliberative, contemplative quality of the judicial process further lends itself to dispassionate decisionmaking.⁵³

After World War II, the liberal and democratic countries like the Philippines explicitly gave their Judiciaries this authority to protect human rights,⁵⁴ thus:

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 best be protected by the political branches of government has been diluted. There is a catalogue of causes for this failed expectation, but let me just cite the main ones. Elected officials usually go for what is popular; but the vindication of human rights sometimes demands taking unpopular decisions especially in instances when, due to technicalities, the rights of the righteous are trumped by the rights of the wicked. Likewise, elected officials sometimes demur in making decisions that will displease their powerful constituencies.

Such a tilted stance cannot be taken by protectors of human rights, who must at all times maintain an even keel on the rights of opposites. Also, elected officials have been found to be sometimes more interested in high- profile issues or those with great impact on

⁵¹ *Id.* at 25-26.

⁵² CHRISTOPHER ZURN, *DELIBERATIVE DEMOCRACY AND THE INSTITUTIONS OF JUDICIAL REVIEW* 38 (2007).

⁵³ JESSE CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* 68 (1980).

⁵⁴ Reynato Puno, *The View from the Mountaintop*, Keynote Address during the National Consultative Summit on Extrajudicial Killings and Enforced Disappearances, in *A CONSPIRACY OF HOPE: REPORT ON THE NATIONAL CONSULTATIVE SUMMIT ON EXTRAJUDICIAL KILLINGS AND ENFORCED DISAPPEARANCES* 41 (2007).

the larger number of their constituents. Oftentimes, however, human rights cases are low-profile, especially when they affect the marginalized, or people whose existence others would hardly recognize or, worse, people dismissed as the “invisibles” of society. Indeed, no less than the United Kingdom itself, the bulwark of parliamentary supremacy, recently adopted the Human Rights Act of 1998 conceding to the courts the power to enforce human rights as defined in the European Convention for the Protection of Human Rights. In the Philippines, the debate is over on whether the protection of human rights can better be entrusted to an independent judiciary.⁵⁵

The 1987 Constitution strengthened the Judiciary’s power in protecting human rights primarily by expanding not only its certiorari jurisdiction⁵⁶ but also its rulemaking power.⁵⁷ The 1987 Constitution likewise adopted additional provisions to ensure the Courts’ independence, such as nomination by a Judicial and Bar Council without the need of confirmation by the Commission on Appointments,⁵⁸ and administrative supervision over lower courts and their personnel.⁵⁹ The changes adopted by the Constitutional Commission in the new Constitution clearly provided the foundations for an independent and emboldened judiciary which has heretofore exercised its newfound powers with unabashed zeal. Thus one is tempted to ask whether or not the changes wrought by the post martial law Constitution have preserved the balances in our structure of government necessary to maintain harmony between coordinate branches of government in a working democratic and republican system.

III. PRECONDITIONS FOR THE REALIZATION OF THE JUDICIARY’S ROLE IN PHILIPPINE DEMOCRACY

Certain preconditions must exist in a legal system for the judiciary to be able to realize its proper role. Aaron Barak discusses four preconditions common to all democratic systems of law: first, that the legal system must operate in a democracy; second, the judiciary must be independent; third, judicial objectivity and impartiality must be present; and fourth, there must be public confidence in the judiciary.⁶⁰

⁵⁵ Reynato Puno, *The Philippine Judiciary: The Knighted Sentry*, speech delivered on Nov. 23, 2007 during the Pacific Conference on Judicial Legal Instituted, Guam at the Hilton Hotel, Guam.

⁵⁶ CONST. art. VIII, § 1.

⁵⁷ art. VIII, § 5(5).

⁵⁸ art. VIII, § 9.

⁵⁹ art. VIII, § 6.

⁶⁰ Barak, *supra* note 8, at 53-54.

A. DEMOCRATIC FORM OF GOVERNMENT

Article II, Section 1 of the 1987 Constitution provides:

Sec. 1. The Philippines is a democratic and republican State. Sovereignty resides in the people and all government authority emanates from them.

This explicit provision in the Constitution, along with what has already been discussed above, satisfies the first essential precondition in Barak's enumeration.

B. INDEPENDENCE OF THE JUDICIARY

It is essential in a democracy that the judge and the judiciary be independent in order that the constitution can be protected within the framework of a democracy⁶¹ since "the judiciary can effectively fulfill its role only if the public has confidence that the courts, even if sometimes wrong, act wholly independently."⁶²

According to Barak, independence of the judiciary means that the judge, in judging, is "subject to nothing other than the law."⁶³ Such that once appointed as a judge, he or she must act independently of, and be independent of everything else but the law. Apart from the independence of the judge, this personal independence must go hand in hand with institutional independence.⁶⁴

In the 1987 Constitution, several safeguards have been embodied in the Constitution to safeguard the independence of the judiciary. These, as discussed by Justice Isagani Cruz,⁶⁵ are as follows:

- The Supreme Court is a constitutional body. It cannot be abolished nor may its membership or the manner of its meetings be changed by mere legislation.⁶⁶
- The members of the Supreme Court may not be removed except by impeachment.⁶⁷

⁶¹ *Id.* at 54.

⁶² Johan Steyn, *The Case for a Supreme Court*, 118 LAW Q. REV. 382, 388 (2002), *quoted in id.*

⁶³ Barak, *supra* note 8, at 54.

⁶⁴ *Id.*

⁶⁵ ISAGANI CRUZ, PHILIPPINE POLITICAL LAW 244-245 (2002).

⁶⁶ CONST. art. VIII, § 4(1).

⁶⁷ art. IX, § 2.

- The Supreme Court may not be deprived of its minimum original and appellate jurisdiction as prescribed in Article VIII, Section 5, of the Constitution.⁶⁸
- The appellate jurisdiction of the Supreme Court may not be increased by law without its advice and concurrence.⁶⁹
- Appointees to the judiciary are now nominated by the Judicial and Bar Council and no longer subject to confirmation by the Commission on Appointments.⁷⁰
- The Supreme Court now has administrative supervision over all lower courts and their personnel.⁷¹
- The Supreme Court has exclusive power to discipline judges of lower courts.⁷²
- The members of the Supreme Court and all lower courts have security of tenure, which cannot be undermined by a law reorganizing the judiciary.⁷³
- They shall not be designated to any agency performing quasi-judicial or administrative functions.⁷⁴
- The salaries of judges may not be reduced during their continuance in office.⁷⁵
- The judiciary shall enjoy fiscal autonomy.⁷⁶
- The Supreme Court alone may initiate rules of court.⁷⁷
- Only the Supreme Court may order the temporary detail of judges.⁷⁸
- The Supreme Court can appoint all officials and employees of the judiciary.⁷⁹

C. JUDICIAL IMPARTIALITY AND OBJECTIVITY

The image of justice is a blindfolded woman holding scales. It is for this reason that in a democracy, in addition to judicial independence, a judge must realize his or her role with impartiality and objectivity. Impartiality is defined as the judge treating the “parties before him equally, providing them with an equal opportunity to make their respective cases, and is seen to treat the parties so... with the judge [having] no personal stake in the outcome.”⁸⁰

⁶⁸ art. VIII, § 2.

⁶⁹ art. VI, § 30.

⁷⁰ art. VIII, § 9.

⁷¹ art. VIII, § 6.

⁷² art. VIII, § 11.

⁷³ art. VIII, § 11.

⁷⁴ art. VIII, § 12.

⁷⁵ art. VIII, § 10.

⁷⁶ art. VIII, § 3.

⁷⁷ art. VIII, § 5(5).

⁷⁸ art. VIII, § 5(3).

⁷⁹ art. VIII, § 5(6).

⁸⁰ Barak, *supra* note 8, at 55.

It means simply that Judges should “perform their judicial duties without favor, bias or prejudice.”⁸¹

Hand in hand with impartiality is objectivity. Objectivity means “making decisions on the basis of considerations that are external to the judge that may even conflict with his or her personal views.”⁸² In objectivity, “the question is not what the judge wants but what society needs.”⁸³ The purpose of objectivity is not to detach the judge from his past, his values, beliefs and experiences but to encourage him to “make use of all of these personal characteristics to reflect the fundamental values of the society as faithfully as possible.”⁸⁴

D. PUBLIC CONFIDENCE

Public confidence means, according to Barak:

confidence in judicial independence, fairness, and impartiality... public confidence in the ethical standards of the judge... public confidence that judges are not interested parties to the legal struggle, and that they are not fighting for their own power, but to protect the constitution and democracy... public confidence that the judge does not express his own personal views, but rather the fundamental beliefs of the nation. Indeed, the judge has neither sword nor purse, all he has is the public's confidence in him.⁸⁵

Several traits have been pointed out that help maintain this confidence of the public in its judges: first, the judge should be aware of his power and its limits; second, the judge must be able to recognize his own mistakes; third, in their writing and thinking, the judge must always display modesty; and fourth, judges should be honest. Part of this honesty is that if judges make law, then they should say so and not hide behind the rhetoric that “judges declare what the law is but do not make it”⁸⁶

The Philippine Supreme Court recognizes that “the effectiveness of the administration of justice depends in a large measure on public trust and

⁸¹ A.M. No. 03-05-01-SC, Canon 3, § 1 (2004). This is the Code of Judicial Conduct for the Phil. Judiciary.

⁸² Barak, *supra* note 8, at 55.

⁸³ *Id.* at 56.

⁸⁴ *Id.*

⁸⁵ *Id.* at 59.

⁸⁶ *Id.* at 61-62.

confidence on the judicial system”⁸⁷ since a “court that does not have the trust or confidence of the people cannot effectively dispense its functions as resolver of disputes, a respected issuer of punishments, or a valued deliberative body.”⁸⁸

It sought to address this issue of public confidence with the establishment of its Public Information Office (“PIO”) whose task is to provide the “essential information on acts and decisions – primarily of the Supreme Court, but also of the entire Judiciary – especially those that affect national life.”⁸⁹ The primary objective of the PIO is to bring the Court closer to the people.

IV. 1987 CONSTITUTION: A STRUCTURALIST INTERPRETATION

The framework of a democratic constitution rests on the strategic placement and inter-relationship of provisions aimed at safeguarding political and civil liberties. The organization of government into a tripartite structure of co-equal branches, alongside a strengthened Bill of Rights and other provisions “all combine to create opportunities for “[a]mbition ... to counteract ambition”⁹⁰ so that “the private interest of every individual may be a sentinel over the public rights.”⁹¹ This blueprint of government containing branches that are coordinate and in conflict at the same time permits a system of checks and balances that ensure that one great branch of government should never assert supremacy over the other.

A. THE STRUCTURAL FRAMEWORK OF DEMOCRATIC CONSTITUTIONS

Structuralism at its simplest level proposes that there must be some meaning in the organization and grouping of Constitution provisions. Professor Akhil Reed Amar argues that structure should not be divorced from the text given that the Constitution was ratified as a single document where each amendment is meant to be fit and be read in the context of the

⁸⁷ Camilo Quiason, *Legal Parameters of the Relations of the Judiciary with Media and the Public*, in 4 THE COURT SYSTEMS JOURNAL 115 (1999), *quoted in* COURTING THE PUBLIC: A STRATEGY MANUAL TO BUILD PUBLIC TRUST AND CONFIDENCE IN THE COURTS, prepared by the Public Information Office, Supreme Court.

⁸⁸ David Rottman & Alan Tomkins, *Public Trust and Confidence in the Courts: What Public Opinion Surveys Mean to Judges*, in COURT REVIEW 24 (1999), *quoted in id.*

⁸⁹ COURTING THE PUBLIC: A STRATEGY MANUAL TO BUILD PUBLIC TRUST AND CONFIDENCE IN THE COURTS, prepared by the Public Information Office, Supreme Court.

⁹⁰ Steven Calabresi & Kevin Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1155-56 (1991).

⁹¹ *Id.*

whole.⁹² To interpret the Constitution faithfully and “[t]o do justice to these basic facts about the text, we must read the document holistically and attend to its overarching themes.”⁹³

Northwestern University Professor Steven G. Calabresi and Atty. Kevin H. Rhodes referring to *The Federalist No. 51* described it, thus:

The genius of the American Constitution lies in its use of structural devices to preserve individual liberty. Checks and balances, separation of powers, and federalism all combine to create opportunities for “[a]mbition ... to counteract ambition” so that “the private interest of every individual may be a sentinel over the public rights.” By thus fragmenting power and institutionalizing conflict, the new political science of the eighteenth century sought to oblige a government by men and over men “to control itself.”⁹⁴

Referring to the same structural devices, Professor Amar wrote:

[T]he phrases “separation of powers” and “checks and balances” appear nowhere in the Constitution, but these organizing concepts are part of the document, read holistically. Each of the three great departments-- legislative, executive, judicial--is given its own separate article, introduced by a separate vesting clause. To read these three vesting clauses as an ensemble (as their conspicuously parallel language and parallel placement would seem to invite) is to see a plain statement of separated powers. And a close look at the interior of these three articles reveals a variety of interbranch checks....⁹⁵

In the Philippines, our Court, speaking in *Angara v. Electoral Commission*⁹⁶ explained that “The separation of powers is a fundamental principle in our system of government. It obtains not through express provision but by actual division in our Constitution.”⁹⁷

Thus the Constitution’s clauses that describe the operation of government were intended to form a coherent structure such that beyond the actual text, the very framework and arrangement of the Constitutional provisions bear their own meaning.⁹⁸ The very concept of separation of

⁹² Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 29 (2000).

⁹³ *Id.* at 30.

⁹⁴ Calabresi & Rhodes, *supra* note 90, at 1155-56.

⁹⁵ Amar, *supra* note 92, at 30.

⁹⁶ No. 45081, 63 Phil. 139, Jul. 15, 1936

⁹⁷ *Id.* at 158.

⁹⁸ Stephen L. Carter, *The Political Aspects of Judicial Power: Some Notes on the Presidential Immunity Decision*, 131 U. PA. L. REV. 1341, 1364 (1983).

powers, for example, is not explicit in any provision but inferred from the fact that there are three separate articles in the Constitution for the legislative, executive and judiciary each with their own vesting clauses saying that legislative power belongs to the Congress,⁹⁹ executive power belongs to the President of the Philippines¹⁰⁰ and judicial power belongs to one Supreme Court and in such lower courts as may be established by law.¹⁰¹

1. Independence v. Interdependence

a. *Independence*

Montesquieu, in his famous treatise *The Spirit of the Laws*, authoritatively analyzed the nature and extent of the executive, legislative and judicial powers, warning that any combination of these powers would create a system inherently directed towards tyrannical actions,¹⁰² thus:

In every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law. By virtue of the legislative power, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third, he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the judiciary power, and the other, simply the executive power of the state.

The political liberty of the subject is a tranquility of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite that the government be so constituted as one man need not be afraid of another.

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again, there is no liberty, if the judiciary power be not separated from the legislative and the executive. Were it joined with the

⁹⁹ CONST. art. VI, § 1.

¹⁰⁰ art. VII, § 1.

¹⁰¹ art. VIII, § 1.

¹⁰² *Macalintal v. Commission on Elections*, G.R. No. 157013, 405 SCRA 614, 697, Jul. 10, 2003 (Puno, J., concurring and dissenting).

legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and that of trying the causes of individuals.¹⁰³

b. Interdependence

This concept of separation of powers, however, as explained by James Madison in *The Federalist No. 47*, need not be a strict division of functions among the three branches saying that the Constitution in and of itself has sufficient division of functions to avoid consolidation of powers in one particular branch and that a "rigid segregation of the three branches would undermine the purpose of the separation doctrine."¹⁰⁴ As Justice Jackson has said, the Constitution enjoins upon its branches separateness but interdependence, autonomy but reciprocity.¹⁰⁵ The case of *Angara v. Electoral Commission*¹⁰⁶ adopted this principle to the Philippines and went on to add that, "[t]he Constitution has provided for an elaborate system of checks and balances to secure coordination in the workings of the various departments of the government."¹⁰⁷

The idea of checks and balances, on the other hand, can be gleaned from the different powers given to each branch such that each branch of government necessarily has to work and cooperate with each other to achieve a particular act. The interaction is described in *Marcos v. Manglapus* thus:

[T]he Constitution has blocked out with deft strokes and in bold lines, allotment of power to the executive, the legislative and the judicial departments of the government. Thus, the 1987 Constitution explicitly provides that "[t]he legislative power shall be vested in the Congress of the Philippines" "[t]he executive power shall be vested in the President of the Philippines" and "[t]he judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law" These provisions not only establish a separation

¹⁰³ *Id.*, citing MONTESQUIEU, *THE SPIRIT OF THE LAWS* (Thomas Nugent trans., 1949).

¹⁰⁴ *Id.*

¹⁰⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., *concurring*).

¹⁰⁶ No. 45081, 63 Phil. 139, 158, Jul. 15, 1936.

¹⁰⁷ *Id.* at 156.

of powers by actual division but also confer plenary legislative, executive and judicial powers subject only to limitations provided in the Constitution. For as the Supreme Court in *Ocampo v. Cabangis* pointed out "a grant of the legislative power means a grant of all legislative power; and a grant of the judicial power means a grant of all the judicial power which may be exercised under the government."¹⁰⁸

This interplay of the principles of separation of powers and checks and balances was further elaborated on by Justice Laurel in the case of *Planas v. Gil*,¹⁰⁹ thus:

There is more truism and actuality in interdependence than in independence and separation of powers, for as observed by Justice Holmes in a case of Philippine origin, we cannot lay down "with mathematical precision and divide fields of black and white" but also because "even more specific to them are found to terminate in a penumbra shading gradually from one extreme to the other."¹¹⁰

2. Formalist v. Functionalist

The distinctions between these two concepts were discussed in the cases of *Myers v. United States*¹¹¹ and *Humphrey's Executor v. United States*¹¹² in respect to the relationship between the Presidency and the administration wherein both tested the claim of the President regarding his inherent executive authority to remove presidential appointees from office in the face of statutory limitations on removal.¹¹³

In *Myers*, "the reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires."¹¹⁴

In *Humphrey's Executor Court*, "[t]he fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of

¹⁰⁸ *Marcos v. Manglapus*, G.R. No. 88211, 177 SCRA 668, 688-89, Sep. 15, 1989. See also Angara, 63 Phil. at 157.

¹⁰⁹ No. 46440, 67 Phil. 62, Jan. 18, 1939.

¹¹⁰ *Id.* at 74.

¹¹¹ 272 U.S. 52 (1926).

¹¹² 295 U.S. 602 (1935).

¹¹³ Peter Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

¹¹⁴ *Id.*

the others, has often been stressed, and is hardly open to serious question.”¹¹⁵

From these two cases we can see that in the *Myers* decision, the Court viewed the separation of powers principle less restrictively, thus allowing for greater interdependence and interplay to exist within and among the three branches and not just being limited to what is explicitly stated.

3. Judicial Review in the Structural Framework

While the structure of our government supposedly ensures that one great branch of government should never assert supremacy over the other, the Supreme Court’s supremacy over the area of constitutional interpretation, however, has always been assumed as essential to our constitutional fabric. When the court declares an act of a co-equal branch of government to be in conflict with the constitution, the court essentially acts as the final arbiter of the question involved. The conventional view today is that judicial supremacy in constitutional interpretation has been fixed at the onset of our constitutional enterprise¹¹⁶ to the extent that the Court’s supremacy has been described as a permanent and indispensable part of our constitutional system.¹¹⁷ This convention is obviously at odds with a tripartite structural arrangement that is premised on co-equality with the result that the “hard cases” that reach our courts, perpetually descend to the making of bad laws, and the bad laws stemming from hard cases exacerbate the cycle.

However, unlike the political situation in *Marbury v. Madison* when the U.S. Supreme Court first asserted its power of judicial review:

The vital thing [now] is that as a matter of strict legal theory, judicial review of Acts of Congress for federal constitutionality no longer rests wholly on the arguments of *Marbury v. Madison*, or on those of Federalist No. 78, or on any other argument that might have been urged in early years. It rests also on the visible, active, and long-continued acquiescence of Congress in the Court’s performance of this function. The Court now confronts not a neutral Congress nor a Congress bent on using its own constitutional powers to evade the Court’s mandate... but rather a Congress which has accepted, and

¹¹⁵ *Id.*

¹¹⁶ ROBERT BURT, *THE CONSTITUTION IN CONFLICT* 105 (1992).

¹¹⁷ *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

which by the passage of jurisdictional and other legislation has facilitated, this work of the Court.¹¹⁸

This acquiescence by the other two great branches of government is made even more apparent by the insertion of two particular provisions in the Civil Code of the Philippines which took effect on August 30, 1950.

Article 7 of the Civil Code provides that "... When the Courts declare a law to be inconsistent with the Constitution, the former shall be void and the latter shall govern...." Article 8, on the other hand, provides that "Judicial decisions applying or interpreting the laws or the Constitution shall form part of the legal system of the Philippines."

Article 7, taken from the ruling in *Marbury*, "refers to the competence of courts to interpret the Constitution in cases coming before them."¹¹⁹ Article 8, on the other hand, discusses the authoritativeness of Supreme Court decisions as part of the law of land.¹²⁰

Justice V.V. Mendoza explains that these two provisions constitute recognition by both the Executive and Legislature of the competence and authoritativeness of Supreme Court decisions,¹²¹ which makes its decisions "binding not only on the litigants but on all others including the other departments of the government."¹²² The Court had occasion to explain in *Caltex (Phil.), Inc. v. Palomar*,¹²³ that:

In effect, judicial decisions assume the same authority as the statute itself and, until authoritatively abandoned, necessarily become, to the extent that they are applicable, the criteria which must control the actuations not only of those called upon to abide thereby but also those in duty bound to enforce obedience thereto.¹²⁴

It can therefore be seen that Article 8 is not just a restatement of the doctrine of *stare decisis* but that it "applies to all those subject to law and governs their conduct in their relation to one another and to the state by declaring Supreme Court doctrines part of the 'law of the land.'"¹²⁵

¹¹⁸ CHARLES BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 70-71 (1969).

¹¹⁹ VICENTE V. MENDOZA, JUDICIAL REVIEW OF CONSTITUTIONAL QUESTIONS: CASES AND MATERIALS 233 (2004).

¹²⁰ *Id.* at 233-34.

¹²¹ *Id.* at 233-35.

¹²² *Id.* at 235.

¹²³ G.R. No. 19650, 18 SCRA 247, Sep. 29, 1966.

¹²⁴ *Id.* at 257.

¹²⁵ MENDOZA, *supra* note 119, at 236.

Despite this acquiescence, “there remains undoubtedly a specially heightened interest in this confrontation between the ultimate national representative body, on the one hand, and on the other a Court acting in the name of an all but unamendable fundamental national law.”¹²⁶ It is because of this that the Court has developed mechanisms to mitigate its confrontations with the other great branches of government – one such mechanism is the requirement of case and controversy. As Professor Paul Freund has pointed out:

[T]he paradox of the Court’s function is that while the Court passes judgment on some of the profoundest national issues, nevertheless it does so only when absolutely necessary to the solution of a conventional lawsuit... The two elements are not antithetical. Together they help to explain the ultimate paradox of the Court’s power, the power of a small group of judges appointed for life, to set aside the acts of the representatives of the people in a democracy. The rules of ‘case or controversy’ can be seen as the necessary corollary of this vast power – necessary for its wise exercise and its popular acceptance.¹²⁷

a. Case and Controversy

Ever since *Marbury v. Madison*¹²⁸ laid the foundations of the power of judicial review which allowed the Court to declare acts of the political branches of government void, that power has always been exercised in the context of an actual case and controversy. *Marbury* itself provided that, “[t]he judicial power of the United States is extended to all cases arising under this constitution.”¹²⁹

According to Professor Bickel:

If, [referring to *Marbury v. Madison*] as Marshall argued, the judiciary’s power to construe and enforce the Constitution against the other departments is to be deduced from the obligation of the courts to decide cases conformable to law, which may sometimes be the Constitution, then it must follow that the power may be exercised only in a case. Marshall certainly offered no other coherent justification for lodging it in the courts, and the text of the

¹²⁶ BLACK, *supra* note 118, at 71.

¹²⁷ Paul Freund, *The Supreme Court*, in TALKS ON AMERICAN LAW 81 (Rev. ed. 1972), *quoted in* MENDOZA, *supra* note 119, at 87.

¹²⁸ 5 U.S. (1 Cranch) 137 (1803).

¹²⁹ *Id.*

Constitution, whatever other supports it may or may not offer for Marshall's argument, extends the judicial power only "to all Cases" and "to Controversies," and not otherwise.¹³⁰

Discussing the meaning of "case and controversy", the U.S. Supreme Court in *Muskrat v. United States*,¹³¹ explained:

By cases and controversies are intended the claim of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection of rights, or the prevention, redress, or punishment of wrongs.¹³²

Put another way, "cases' and 'controversies' limit the federal courts to 'questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process'"¹³³

Adopting this concept to the Philippines, Justice Laurel in *Angara v. Electoral Commission*¹³⁴ stated that:

[T]his power of judicial review is limited to actual cases and controversies to be exercised after full opportunity of argument by the parties, and limited further to the constitutional question raised or the very *lis mota* presented. Any attempt at abstraction could only lead to dialectics and barren legal questions and to sterile conclusions unrelated to actualities.¹³⁵

This requirement of case or controversy, according to Justice Vicente V. Mendoza, gives the judiciary the opportunity, denied to the legislature, "of seeing the actual operation of the statute as it is applied to actual facts and thus enables it to reach sounder judgment... [as well as] enhances public acceptance of its role in our system of government."¹³⁶ In doing so, it serves a two-fold purpose:

- (a) It limits the business of courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process and;

¹³⁰ BICKEL, *supra* note 13, at 114.

¹³¹ 219 U.S. 346 (1911).

¹³² *Id.*

¹³³ *Flast v. Cohen*, 392 U.S. 83, 95 (1968), *quoted in* LOUIS FISHER, *AMERICAN CONSTITUTIONAL LAW* 97 (1990).

¹³⁴ No. 45081, 63 Phil. 139, 158, Jul. 15, 1936.

¹³⁵ *Id.*

¹³⁶ MENDOZA, *supra* note 119, at 86-87.

- (b) It confines them to a role assigned to the judiciary under a system of separation of powers, to assure that they will not intrude into areas committed to the other branches of government.¹³⁷

Professor Freund explains the advantage of having a case or controversy requirement, thus:

By declining to give advisory opinions, the Court refrains from intrusion into the lawmaking process. By requiring a concrete case with litigants adversely affected, the Court helps itself to avoid premature, abstract, ill-informed judgments. By placing a decision on a non-constitutional ground whenever possible, the Court gives the legislature an opportunity for sober second thought, an opportunity to amend the statute to obviate the constitutional question, a chance to exercise that spirit of self-scrutiny and self-correction which is the essence of a successful democratic system.¹³⁸

This requirement is now enshrined in the 1987 Constitution, thus: "Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable...."¹³⁹

4. The Limitations on Extradecisional Judicial Governance

Dissenting in the 1936 United States Supreme Court case *United States v. Butler*, one of that Court's anti-New Deal decisions, Justice Harlan Stone¹⁴⁰ warned his colleagues that "the only check upon our own exercise of power is our own sense of self-restraint."¹⁴¹ The following year, however, the Supreme Court made a sudden jurisprudential shift in *West Coast Hotel Co. v. Parrish*,¹⁴² *NLRB v. Jones & Laughlin*¹⁴³ and *Steward Machine Co. v. Davis*,¹⁴⁴ as part of the famous "switch in time that saved nine." By that time, the Second New Deal had already been massively endorsed by landslide victories in the Presidency and Congress.¹⁴⁵ With massive public support on his side, then President Franklin D. Roosevelt announced his Judiciary Reform Bill of 1937, more popularly called the Court Packing Plan. Although the bill aimed generally to overhaul and modernize

¹³⁷ *Id.* at 87.

¹³⁸ Freund, *supra* note 127, *quoted in id.*

¹³⁹ CONST. art. VIII, § 1.

¹⁴⁰ 297 U.S. 1.

¹⁴¹ *Id.* at 79.

¹⁴² 300 U.S. 379 (1937).

¹⁴³ 301 U.S. 1 (1937).

¹⁴⁴ 301 U.S. 548 (1937).

¹⁴⁵ BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* 260 (2005).

all of the federal court system, its most important provision would have granted the President power to appoint an additional Justice to the U.S. Supreme Court for every sitting member over the age of 70½, up to a maximum of six. Consequently, continued judicial resistance would have placed the independence of the Supreme Court at serious risk.¹⁴⁶

Self-restraint is not the only check upon the Supreme Court's exercise of Judicial power. Even without the requirement of an actual case or controversy to confine it, there are other limitations imposed by the Philippine political and institutional landscape on the Supreme Court's exercise of its rulemaking powers and convening function.

a. Internal Restraints

Internal restraints revolve around “that set of standards that judges think should govern their conduct on and off the bench.”¹⁴⁷ This is in large part conditioned by the legal training of Justices, which emphasizes rationality and a legal orientation. In his classic study *Democracy in America*, Alexis de Tocqueville wrote that “Men who have made a special study of the laws derive from this occupation certain habits of order, a taste for formalities, and a kind of instinctive regard for the regular connection of ideas, which naturally render them very hostile to the revolutionary spirit and the unrelenting passions of the multitudes.”¹⁴⁸ Legalism, which is the operative outlook of the legal profession, forms the basis of most of our judicial institutions and procedures.¹⁴⁹ Another internal check on the Justices is the New Code of Judicial Conduct for the Philippine Judiciary,¹⁵⁰ which emphasizes independence,¹⁵¹ integrity,¹⁵² impartiality,¹⁵³ propriety,¹⁵⁴ equality,¹⁵⁵ competence and diligence.¹⁵⁶ Like all public officers and employees, Justices also take an oath of office to uphold and defend the Constitution.¹⁵⁷ Finally, the qualifications for appointment to the Supreme Court, which include that the appointee must be “a person of proven

¹⁴⁶ *Id.*

¹⁴⁷ WALTER MURPHY & C. HERMAN PRITCHETT, COURTS, JUDGES, AND POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS 282 (4th ed. 1986)

¹⁴⁸ Available at http://xroads.virginia.edu/~HYPER/DETOC/toc_indx.html

¹⁴⁹ BRIAN TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 59 (2004).

¹⁵⁰ THE CODE OF JUDICIAL CONDUCT FOR THE PHIL. JUDICIARY, *supra* note 81.

¹⁵¹ Canon 1

¹⁵² Canon 2

¹⁵³ Canon 3

¹⁵⁴ Canon 4

¹⁵⁵ Canon 5

¹⁵⁶ Canon 6

¹⁵⁷ CONST. art. IX-B § 4.

competence, integrity, probity, and independence,”¹⁵⁸ provide also another internal check.

b. Institutional Restraints

The judicial system itself imposes certain institutional and moral restrictions on the Justices. One of the most important institutional restraints is the composition of the Supreme Court, which is composed of a Chief Justice and fourteen Associate Justices.¹⁵⁹ Justices of the Supreme Court who wish to engage in extrajudicial modes of judicial governance must of necessity muster support from a sufficient number of their colleagues in order for it to push through.¹⁶⁰

Lower court judges can also hamper and even frustrate the commands of the Supreme Court.¹⁶¹ An example of this is the Makati Regional Trial Court Judge who, despite the Supreme Court's issuance of the circular calling attention emergent rule of preference for the imposition of fine only rather than imprisonment in libel cases under certain circumstances, still sentenced to six months to two years imprisonment Daily Tribune publisher Ninez Cacho Olivarez for being found guilty of libel. This was aside from the P5 million as moral damages and P33,732.25 plus interest in actual damages and P4,000 as a libel fine also imposed against Olivarez.¹⁶² Given, the circular merely laid down guidelines, but more egregious resistance from lower courts may be imagined. Lower courts may, for example, disagree on the propriety of the Court's exercise of its expanded rulemaking power and refuse to grant petitions for the writs of amparo and habeas data even to seemingly qualified applicants.

If confronted with systematic evasion, the Supreme Court can, of course, invoke its power of administrative supervision over all courts and the personnel thereof, and suspend or even dismiss errant judges.¹⁶³ But it will do so only in the last resort. Judicial governance comes at a full circle, therefore: the Supreme Court must take into account the reaction of inferior judges, and lower courts must in turn divine the counter-reaction of the Supreme Court. At the same time, “both must keep a wary eye on public

¹⁵⁸ art. VIII, § 7(3).

¹⁵⁹ art. VIII, § 4(1).

¹⁶⁰ See MURPHY & PRITCHETT, *supra* note 147, at 283.

¹⁶¹ *Id.* at 284.

¹⁶² Julie Aurelio, *Tribune publisher Olivares found guilty of libel*, Philippine Daily Inquirer, Jun. 6, 2008 available at <http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20080606-141064/Tribune-publisher-Olivares-found-guilty-of-libel>.

¹⁶³ CONST. art. VIII, § 6.

opinion and maneuverings within the other branches of government to ascertain how these will affect the policy concerned.”¹⁶⁴

c. Political Checks by the President

The Judiciary does not have at its command the physical means of enforcing many of its decisions and initiatives other than that supplied by the President and Congress. Courts only have a few officers at their disposal, enough to keep order in the courtroom and to move prisoners safely in and out of the court. But generally judicial orders are observed without much compulsion, either because even the losers believe in the fairness of the adjudicative process or recognize that non-acquiescence would be futile since the executive branch usually stands ready to enforce a judicial decision.¹⁶⁵ After all, the Constitution commands the President to “ensure that the laws be faithfully executed.”¹⁶⁶ And Judicial decisions applying or interpreting the laws or the Constitution form part of the law of the land.¹⁶⁷

Still, there is always the danger of noncompliance by the political branches of court orders. The birth of judicial review was itself necessitated by this danger. In 1803, then Chief Justice John Marshall was threatened with impeachment if he granted the writ of *mandamus* to William Marbury or dared declare unconstitutional the Judiciary Repeal Act of 1802 (abolishing circuit courts), which was sponsored by Jefferson’s Republican Party. In addition, Marshall realized the damage to the Court’s prestige if it issued the writ of *mandamus* and Jefferson went with his threat to ignore it.¹⁶⁸ It was to avoid this clash with the Presidency and embarrassment of the Court that Marshall, in the seminal case of *Marbury v. Madison*,¹⁶⁹ eventually denied relief to William Marbury.

Chief Justice Roger Taney had a more direct collision with executive power. Following then President Abraham Lincoln’s suspension of the writ of habeas corpus and substitution of civilian courts with military courts in Maryland, the military arrested a notorious secessionist and confined him in Fort McHenry. After the rebuff of Taney’s effort to serve a writ of habeas corpus on the commander of the fort, the Chief Justice attempted to have the general arrested for contempt. The marshal, however, was refused

¹⁶⁴ MURPHY & PRITCHETT, *supra* note 147, at 285.

¹⁶⁵ *Id.* at 243.

¹⁶⁶ CONST. art. VII, § 17.

¹⁶⁷ CIVIL CODE, art. 8.

¹⁶⁸ MENDOZA, *supra* note 119, at 15-16.

¹⁶⁹ 5 U.S. (1 Cranch) 137 (1803).

admission to the fort. Chief Justice Taney's only resort was to "lecture the President in a blistering opinion charging Lincoln with violating his oath to support the Constitution."¹⁷⁰

Also, the President may wield his power of appointment in order to check the exercise of the Supreme Court of its extradecisional powers. Members of the Supreme Court and judges of lower courts are appointed by the President from a list of at least three nominees prepared by the Judicial and Bar Council for every vacancy. These appointments need no confirmation from Congress.¹⁷¹ Like the Court's expanded certiorari jurisdiction and rulemaking powers, the Judicial and Bar Council (JBC) is an innovation introduced by the 1987 Constitution. The JBC takes the place of the Commission on Appointments in the matter of judicial appointments. It is the JBC that will screen judicial appointments and not the Commission on Appointments, which was thought to be a highly political body likely to be influenced by considerations other than the merits of the candidate for judicial office. This was because, in the past, "persons without credentials except their political affiliation and loyalty were able to infiltrate and emasculate the judiciary."¹⁷² Justice Isagani Cruz, however, thinks that

...the supposed guarantees to the independence of the JBC are not really that effective. The reason is this. Of its regular members, the Secretary of Justice is under the President's constitutional power of control, and the representative from the Congress usually belongs to the party in power, of which the President is the actual or titular head. As for the appointive members, there is no limit on the number of terms they may serve as such, which means that they will tend to defer to the "suggestions" of the President in hopes of being rewarded with re-appointment. With only the Chief Justice theoretically not under his influence, the President can simply order the rest of the body to nominate whomever he wants to appoint, thus making judicial appointments his unlimited prerogative.¹⁷³

d. Congressional Restrictions

Recall that Chief Justice John Marshall was also threatened with impeachment if he declared unconstitutional the Republican-sponsored Judiciary Repeal Act of 1802. Marshall held a strong conviction that the Act was unconstitutional, violating the independence of the judiciary.¹⁷⁴

¹⁷⁰ MURPHY & PRITCHETT, *supra* note 147, at 286.

¹⁷¹ CONST. art. VIII, § 9.

¹⁷² CRUZ, *supra* note 65, at 252.

¹⁷³ *Id.* at 253.

¹⁷⁴ ACKERMAN, *supra* note 145, at 9.

Nevertheless, in *Stuart v. Laird*,¹⁷⁵ with Marshall not participating, a unanimous U.S. Supreme Court held that Congress did have the authority under the Constitution both to establish and abolish lower federal courts. In 1804 the Republican dominated House of Representatives had impeached Justice Samuel Chase. It was here that the Court's strategic retreat in *Stuart* began to pay off: when the moment of truth came at the Senate impeachment trial, enough Republican senators joined the Federalist minority to acquit Chase.¹⁷⁶

Impeachment, which Lord Bryce described as the "heaviest piece of artillery in the congressional arsenal,"¹⁷⁷ serves as one of the congressional restrictions to the exercise of judicial power. Recently, there were reported plans to impeach Philippine Supreme Court Chief Justice Reynato S. Puno. The threat to remove Justice Puno from his post was reportedly tied to the Supreme Court's alleged non-promulgation of a decision disqualifying an incumbent House member despite the concurrence in mid-2008 of 14 justices.¹⁷⁸ A retired justice said there were reports that moves were afoot to impeach Puno to pave the way for a Supreme Court that would allow Charter change (Cha-cha).¹⁷⁹ In the end, the Chief Justice received overwhelming public support against his impeachment, and the impeachment plan failed.¹⁸⁰

V. RECENT INITIATIVES OF THE PUNO COURT: EXTRADECISIONAL MODES OF JUDICIAL ACTIVISM AND GOVERNANCE

A. THE CONVENING FUNCTION

Given these premises, we now go into the many ways by which the present Supreme Court has exercised its "expanded" powers under Article VIII of the 1987 Constitution.

Recently, the Court, in the exercise of its expanded rulemaking power, promulgated the Writs of Amparo and Habeas Data along with some other rules intended to level the playing field such as the Rule of Procedure for Small Claims Cases. The provenance of all these rules are two summits convened by the Court to allow it to acquire inputs from various sectors in

¹⁷⁵ 5 U.S. 299 (1803).

¹⁷⁶ ACKERMAN, *supra* note 145, at 9.

¹⁷⁷ *Francisco v. House of Representatives*, G.R. No. 160261, 415 SCRA 44, 187, Nov. 10, 2003 (Puno, J., *concurring and dissenting*).

¹⁷⁸ Norman Bordadora et al., *Puno: Keep Off Judiciary*, Philippine Daily Inquirer news article, January 12, 2009, available at <http://www.inquirer.net/specialfeatures/charterchange/view.php?db=1&article=20090112-182750>.

¹⁷⁹ *Id.*

¹⁸⁰ Jay Rempillo & Joaquim Corsiga, *Support Continues to pour in For Chief Justice Reynato Puno*, Supreme Court Public Information Office Court News Flash, January 22, 2009, available at <http://sc.judiciary.gov.ph/news/courtnews%20flash/2009/01/01220901.php>.

order to search for holistic solutions to determine the proper role the judiciary should take in utilizing its expanded powers granted by the 1987 Constitution — described as “the most pro human rights of our fundamental laws”¹⁸¹ — so that the problems of extralegal killings and enforced disappearances on the one hand, and increasing access to justice by the poor on the other, could be addressed.¹⁸²

These summits were the National Consultative Summit on Extrajudicial Killings and Enforced Disappearances (“Summit”) and the Forum on Increasing Access to Justice: Bridging Gaps & Removing Roadblocks (“Forum”). In all of these recent initiatives and forays of the Court in rulemaking and convening, none of them were ever exercised in the context of an actual case and controversy, contrary to the traditional limitation to the exercise of judicial power. There is also no provision in the Constitution expressly granting convening power to the Court. While inevitably criticized in some fronts, the Court’s “adventure” is not without basis.

One of the main objectives of both the Summit and the Forum was to gather facts in order to give the Court adequate information to formulate and propose the appropriate solutions to these problems. While this may be seen as intruding into the domain of the Legislature, Justice Laurel in *People v. Vera*¹⁸³ explained that: “There is nothing essentially legislative in ascertaining the existence of facts or conditions as the basis of the taking into effect of a law. That is a mental process common to all branches of the government.”¹⁸⁴

The traditional method by which Courts ascertain “the existence of facts and conditions” is the adversarial process of trial, with its elaborate rules on evidence and procedure. The ceremonies and rigid structure of trial is a product of centuries of experience, and is generally believed as the most reliable means of ascertaining the truth in an adversarial proceeding. While efficient for the purpose of trials, some of these rules may prove too cumbersome for, say, the collection of facts for the purpose of drafting rules. For example, cross examination is commonly considered to be an effective way to determine whether the witness is testifying truthfully or less than fully

¹⁸¹ Puno, *supra* note 54, at 40.

¹⁸² See A CONSPIRACY OF HOPE: REPORT ON THE NATIONAL CONSULTATIVE SUMMIT ON EXTRAJUDICIAL KILLINGS AND ENFORCED DISAPPEARANCES 23 (2008); and BRIDGING GAPS, REMOVING ROADBLOCKS: PROCEEDING FROM THE PHILIPPINE SUPREME COURT’S FORUM ON INCREASING ACCESS TO JUSTICE BY THE POOR 1 (2009).

¹⁸³ G.R. No. 45685, 65 Phil. 56, Nov. 16, 1937.

¹⁸⁴ *Id.* at 118.

truthfully. Nevertheless, cross examination of legislative facts is less likely to be useful than cross examination of adjudicative facts. Legislative facts tend to be of a general, conclusory nature, while adjudicative facts are about specific elements in individual situations.¹⁸⁵

In addition, the Court in *Abakada v. Ermita*,¹⁸⁶ explained that:

[T]he legislature may delegate to executive officers or bodies the power to determine certain facts or conditions, or the happening of contingencies, on which the operation of a statute is, by its terms, made to depend, but the legislature must prescribe sufficient standards, policies or limitations on their authority...

The rationale for this is that the preliminary ascertainment of facts as basis for the enactment of legislation is not of itself a legislative function, but is simply ancillary to legislation. Thus, the duty of correlating information and making recommendations is the kind of subsidiary activity which the legislature may perform through its members, or which it may delegate to others to perform...The Constitution as a continuously operative charter of government does not require that Congress find for itself every fact upon which it desires to base legislative action or that it makes for itself detailed determinations which it has declared to be prerequisite to application of legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate.¹⁸⁷

An example of this kind of delegation is Article 5 of the Revised Penal Code, which makes it a duty of the courts to give recommendations as to the propriety of repressing an act not punishable by law or lessening the penalty provided for by law:

Art. 5. Duty of the court in connection with acts which should be repressed but which are not covered by the law, and in cases of excessive penalties. — Whenever a court has knowledge of any act which it may deem proper to repress and which is not punishable by law, it shall render the proper decision, and shall report to the Chief Executive, through the Department of Justice, the reasons which induce the court to believe that said act should be made the subject of legislation.

In the same way, the court shall submit to the Chief Executive, through the Department of Justice, such statement as may be deemed proper, without suspending the execution of the sentence, when a

¹⁸⁵ Administrative Law Glossary, available at http://biotech.law.lsu.edu/Courses/study_aids/adlaw/glossary/Evidence.html.

¹⁸⁶ G.R. No. 168056, 469 SCRA 10, Sep. 1, 2005.

¹⁸⁷ *Id.* at 120-21.

strict enforcement of the provisions of this Code would result in the imposition of a clearly excessive penalty, taking into consideration the degree of malice and the injury caused by the offense.

Given this, the convening of the two summits, which resulted in proposals submitted to both the Executive and the Legislature, cannot be said to be Legislative in nature. Also, the Summit and the Forum were convened primarily to formulate rules would address the issues that motivated their calling. It is therefore also justified as an alternative method of fact-finding to trial type proceedings used by the courts for the purpose of properly informing itself when it exercises its rulemaking function.

1. National Consultative Summit on Extrajudicial Killings and Enforced Disappearances

The National Consultative Summit was convened as a response to the continued rise of extralegal killings and disappearances, especially among activists, media and judges, since 2001, despite existing and new mechanisms implemented to curb the same.¹⁸⁸ Observing that the worsening problem constituted a “brazen assault on the rule of law”¹⁸⁹ which “heightens public distrust in our system of justice”,¹⁹⁰ and observing that with the inaction and silence of the Executive and Legislature, the problems of the Executive arising out of questions concerning its legitimacy, and the political deadlocks stalling the legislative machinery¹⁹¹ no immediate solutions were forthcoming, the Court decided that it was no longer enough for it to indulge in its traditionally passive role and that a pro-active stance was necessary. Explaining the rise of the role of the judiciary in the protection of human rights, Chief Justice Puno stated that “nothing less is required by the universality of human rights than a seamless, synchronized, and synergistic action on the part of the political and apolitical branches of government to address violations of human rights.”¹⁹²

In line with this, Chief Justice Puno proposed that in order to strengthen the rule of law, a reexamination of Philippine legal procedures must be done in order to make them “more helpful to the victims, more forceful against suspected perpetrators, and more demanding of government

¹⁸⁸ A CONSPIRACY OF HOPE, *supra* note 182, at 1.

¹⁸⁹ *Id.* at 2.

¹⁹⁰ *Id.*

¹⁹¹ Felipe Gozon, Jr. & Theoben Orosa, *Watching the Watchers: A Look into the Drafting of the Writ of Amparo*, IV 82 PHIL. L.J. 8, 10 (2008).

¹⁹² Puno, *supra* note 54, at 42.

agents to solve such cases, and at the same time streamlining these procedures and remedies.”¹⁹³

Intent on fully using the expanded rulemaking powers granted to it by the 1987 Constitution, the Court, in an unprecedented move, convened the National Consultative Summit on Extrajudicial Killings and Enforced Disappearances on July 16-17, 2007. The Summit gathered around 400 delegates representing the three branches of government as well as human rights watchdog groups, civil society, military and police, media, the academe, religious sector and the international community: basically “the most authoritative scholars representing the rainbow of interests of the different stakeholders of the justice system.”¹⁹⁴ The purpose of the Summit was “to prevent losing eye contact with these [extrajudicial] killings and [enforced] disappearances, revive our righteous indignation, and spur our united search for the elusive solution to this pestering problem.”¹⁹⁵

With these in mind, the objectives of the Summit were as follows:

- To search for holistic solutions and provide inputs to the Supreme Court in its objective to enhance existing rules, or promulgate new ones, both adjudicative and non-adjudicative, in the protection and enforcement of constitutional rights, including the protection of witnesses;
- To examine the concept of extralegal killings and enforced disappearances pursuant to the standards provided for by local and international laws, including the United Nations instruments;
- To revisit the rules of evidence such as hearsay, circumstantial, forensic and the like, as well as rules on police investigations and evidence gathering; and
- To explore more remedies for the aggrieved parties aside from the writ of habeas corpus.¹⁹⁶

As newspaper reports summarized it: “The Summit’s main objective is to develop agreement on solutions that must be undertaken by government agencies and advocates of human rights from the media, private sector, and civil society organizations.”¹⁹⁷ Another report stated that:

¹⁹³ A CONSPIRACY OF HOPE, *supra* note 182, at 23.

¹⁹⁴ *Id.* at 3.

¹⁹⁵ Puno, *supra* note 54, at 39.

¹⁹⁶ A CONSPIRACY OF HOPE, *supra* note 182, at 23-24.

¹⁹⁷ *Extrajudicial Killings and Enforced Disappearances: Searching for Solutions National Consultative Summit at the historic landmark Manila Hotel*, MANILA BULLETIN, Jul. 17, 2007, in A CONSPIRACY OF HOPE, *supra* note 182, at 217.

“Solutions to the cancer of summary killings and violent kidnappings is the goal of the multisectoral two-day summit...It is remarkable that the conference is convened not by the Executive, which enforces the law, or the Congress, the supplier of answers to national ills, but by the Supreme Court, historically viewed as a low-key player in the national life.”¹⁹⁸

After two days of discussions, speeches, workshops and plenary sessions, the Summit came out with reports and proposals for the three branches of government, the Philippine National Police, the Armed Forces, the Commission on Human Rights, the media, the academe and civil society for their appropriate action. In the Summary of Recommendations resulting from the Summit, some of the main proposals were the undertaking of a serious study of the Writs of Amparo and Habeas Data in order to determine how it can be utilized in the Philippines as both a protective and remedial tool for the protection of the constitutional rights of victims as well as undertaking a study on the ways by which the scope and application of the Writ of Habeas Corpus, as the only remedy available to victims at that time, could be expanded.¹⁹⁹

Aside from the promulgation of the two writs, the Summit also resulted in action proposals given for both the Executive and Legislature. The significance of the Summit can be further seen in the fact that some of the proposals to the Legislature have already been incorporated into bills currently pending with the Senate and the House of Representatives. These proposals are the following:

- To study carefully the possibility of creating a new crime where the victim or the offended party is a journalist, judge, media, militant who is killed or kidnapped in the course of the performance of his duties or the conduct of his profession, as at present, extralegal killings and kidnappings are not penalized in the Revised Penal Code (RPC);
- To create legislation concerning the definition, coverage and penalties for extralegal killings... and to possibly include the doctrine of command responsibility;

¹⁹⁸ *Curing a Cancer*, MANILA TIMES, Jul. 17, 2007, in *A CONSPIRACY OF HOPE*, *supra* note 182, at 218.

¹⁹⁹ A.M. No. 07-9-12-SC, *The Rationale for the Writ of Amparo*, at 46.

- To recognize Torture as a grave punishable offense consistent with the International Convention Against Torture...²⁰⁰

All of these proposals are now contained in Senate Bill No. 2669, or the Philippine Act on Crimes against International Humanitarian Law and Other Serious International Crimes ("IHL Bill"), which was filed more than a year after the conclusion of the Summit. The relevant provisions of this bill in relation to the proposals abovementioned are:

Sec. 5. Crimes Against Humanity. Crimes against humanity are hereby defined and penalized as follows:

A. For the purpose of this Act, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

1. Murder;

...

6. Torture;

...

8. Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

...

9. Enforced disappearance of persons;

...

B. For the purpose of paragraph A:

1. "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph A against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

...

5. "Torture" means the intentional infliction of severe pain or suffering, whether physical, mental, psychological and pharmacological upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

...

²⁰⁰ A CONSPIRACY OF HOPE, *supra* note 182, at 20.

7. "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity'

...

9. "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support *or* acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.²⁰¹

It can be seen that with the filing of the IHL Bill, the Legislature followed the lead of the Court and took a serious look at the recommendations generated from the Summit.

2. Forum on Increasing Access to Justice: Bridging Gaps, Removing Roadblocks

The Forum started with the recognition on the part of the Court that access to the justice system is a fundamental right.²⁰² Along with this recognition is the realization that for many poor Filipinos the maxim of equality stating that "where there is a right, there must be a remedy" remains just an ideal detached from the reality of their everyday lives.²⁰³ This is reflected in the observation of Chief Justice Puno that "Large inequalities in wealth lead to disparities in political power and in the enforcement of laws... We cannot allow the begging of hands in our midst to multiply any further without fueling the social rage in our society."²⁰⁴

The forum was convened primarily to enable the Court to receive inputs directly from the various stakeholders in the justice system especially those that are the most vulnerable and therefore allow our courts to better promote and protect the "second generation human rights" – the social, economic and cultural rights – of our people especially the poor and the vulnerable.²⁰⁵ The specific objectives of the forum were:

²⁰¹ S. No. 2669, An Act Defining and Penalizing Crimes Against International Humanitarian Law and other Serious International Crimes, Operationalizing Universal Jurisdiction, Designating Special Courts, and for Related Purposes, available at <http://senate.gov.ph/lisdata/89398230l.pdf>.

²⁰² BRIDGING GAPS, REMOVING ROADBLOCKS: PROCEEDING FROM THE PHILIPPINE SUPREME COURT'S FORUM ON INCREASING ACCESS TO JUSTICE BY THE POOR 1 (2009).

²⁰³ *Id.* at 14.

²⁰⁴ *Id.* at 179.

²⁰⁵ *Id.* at 10.

- To identify and validate the issues and concerns of the marginalized sectors regarding the court system;
- To provide inputs as to how the Court under its constitutional rule-making power can enhance existing rules or promulgate new ones to increase their access to justice through the courts, thus upholding our people's socio-economic rights.²⁰⁶

Many of the recommendations that emerged from the forum were not new and had been proposed before in one form or another, to wit: first, maximize the use of alternative dispute resolution (“ADR”) in cases involving the poor; second, provide training and accreditation to paralegals and allow their participation in administrative and court proceedings; third, exempt specific sectoral groups from payment of certain court fees and bonds; fourth, provide effective legal representation to poor litigants by giving *pro bono* lawyers incentives, such as tax benefits or Mandatory Continuing Legal Education credits, or by compelling members of the IBP to represent the poor; fifth, fully implement the new law on the Public Attorney’s Office (“PAO”); sixth, coordinate the efforts of the PAO, Department of Interior and Local Government (“DILG”), the Bureau of Jail Management and Penology, the Department of Social Welfare and Development and the courts to decongest jails; seventh, give orientation and training to police and prosecutors on the proper handling of cases of the marginalized sectors; eighth, enact a Magna Carta for workers in the informal sectors; and ninth, give priority to the speedy disposition of cases involving the poor.²⁰⁷

From the inputs and suggestions gathered throughout the entire two days of the forum, recommendations were made to the other branches of government including the judiciary. For its part, as a result of these recommendations, the Court came out with rules of procedures for small claims cases, and the rule on mandatory legal aid service among others.

²⁰⁶ *Id.* at 10.

²⁰⁷ Reynato Puno, Philippine Justice Sector Stakeholder’s Meeting, delivered on Jul. 21, 2008 at the Asian Development Bank.

B. THE EXPANDED RULEMAKING POWER

What Professor Michael Perry said of noninterpretative review in human rights can also be said of the convening function of the Supreme Court and the exercise of its rulemaking power resulting therefrom:

[T]he function of noninterpretative review in human rights cases can be understood as prophetic. But the usefulness of the biblical analogy is limited, for, unlike prophecy, noninterpretative review is coercive, and there is a radical difference between prophecy and coercion. "Having highlighted an issue of principle," wrote [Alexander] Bickel, "the Court proceeds with the attempt to make society live up to its resolution of it..."²⁰⁸

The promulgation of rules is the one attempt of the Courts to make society live up to these principles taken up in the summits convened by it. This power, while not the primary function of courts, has always been part of the traditional powers of the judiciary²⁰⁹ being an essential aspect of the primary goal of adjudication.²¹⁰ These different areas of traditional rulemaking are procedure, administration and regulation of legal practice.²¹¹ However, the 1987 Constitution, "a robust, reactive document to the trivialization of human rights during the authoritarian years, 1972 to 1986",²¹² expanded the rulemaking power of the Court to include the power of the Supreme Court to "promulgate rules concerning the protection and enforcement of constitutional rights".²¹³

This expanded rulemaking power of the Court is explicitly provided for in the 1987 Constitution "in order to stress that constitutional rights are not merely declaratory but are also enforceable."²¹⁴ The Constitution provides thus:

Sec. 5. The Supreme Court shall have the following powers:

...

5) Promulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts, the admission to the practice of law, the integrated bar,

²⁰⁸ MICHAEL PERRY, *THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS* 125 (1982).

²⁰⁹ JOAQUIN BERNAS, S.J., *THE INTENT OF THE 1986 CONSTITUTIONAL WRITERS*, 969 (1995).

²¹⁰ CHARLES GRAU, *JUDICIAL RULEMAKING: ADMINISTRATION, ACCESS AND ACCOUNTABILITY* 49 (1978).

²¹¹ *Id.* at 2-3.

²¹² Puno, *supra* note 54, at 40.

²¹³ CONST. art. VIII, § 5(5).

²¹⁴ BERNAS, S.J., *supra* note 209, at 527.

and legal assistance to the under-privileged. Such rules ... shall not diminish, increase, or modify substantive rights....

...

Sec. 6. The Supreme Court shall have administrative supervision over all courts and the personnel thereof.²¹⁵

Aside from the textual basis of the rulemaking power of the Supreme Court, there are also several analytical arguments in support of this power, thus:

Courts, not legislatures, have the familiarity with practice in the courts needed to identify procedural problems and develop solutions to them. Legislatures are too slow in acting on procedural matters to which, by their isolations from the judicial process, they are insensitive. Needed changes are thereby delayed. Legislatures are also motivated by interests other than the efficient administration of justice – favoritism and political dealing too often result in the adoption of inferior rules. Moreover, legislatures are not held responsible for the administration of justice by the public – the courts are.²¹⁶

In addition to this, Justice Mendoza, speaking on the grant of power to the Electoral Commission in *Angara v. Electoral Commission* to judge all contests relating to the election, explained that the power to prescribe rules of procedure is incidental to the grant of the power to judge.²¹⁷

This power of the Court is not subject to the limitations on the power of judicial review, such as case and controversy, political question and standing, precisely because these are limitations only on the adjudicative function of the Court, which rule making, by its very nature, is not. In addition to this, “the 1987 Constitution took away the power of Congress to repeal, alter, or supplement rules concerning pleading, practice and procedure.”²¹⁸ It is, however, limited by the explicit proviso in the Constitution that rules promulgated by the Court should not “diminish, increase, or modify substantive rights”²¹⁹ and that to do so would constitute judicial legislation. Justice Corona explained the reason for this proscription, thus:

²¹⁵ CONST. art. VIII, §§ 5(5) & (6).

²¹⁶ GRAU, *supra* note 210, at 11.

²¹⁷ MENDOZA, *supra* note 119, at 32.

²¹⁸ Echegaray v. Sec. of Justice, G.R. No. 132601, 301 SCRA 96, 112, Jan. 19, 1999.

²¹⁹ CONST. art. VIII, § 5(5).

In resolving controversies, this Court's duty is to apply or interpret the law. It cannot make or amend the law without treading the perilous waters of judicial legislation. It is not within the Court's power to enlarge or abridge laws; otherwise, the Court will be guilty of usurping the exclusive prerogative of Congress.²²⁰

While this power of the judiciary has rarely been noticed given the preoccupation with judicial review, recent events as well as activities of the Supreme Court under Chief Justice Puno have brought these other powers to the forefront, and as a result has invited unavoidable criticism as to the propriety of its exercise.

1. Substantive v. Procedural Rights

In *Republic v. Gingoyon*,²²¹ the Court, quoting *Fabian v. Desierto*,²²² explaining the nature of substantive rights, stated that "if the rule takes away a vested right, it is not procedural, and so the converse certainly holds that if the rule or provision creates a right, it should be properly appreciated as substantive in nature."²²³ As a consequence of this, it is universally viewed that substantive rules are outside the legitimate purview of judicial rulemaking.²²⁴

Procedural rules, once described as the "handmaiden of justice",²²⁵ are said to be the means by which litigants may assert substantive rights.²²⁶ These rules "provide policy makers, such as chief judges, ... opportunities to affect the flow and resolution of cases, the accessibility of the justice system, and the experiences ordinary people have with law."²²⁷ Examples of this type of rulemaking are the Rules of Civil Procedure, Rules of Criminal Procedure, Rules on Special Proceedings, Rules of Evidence among others. More recent examples of procedural rules are the Rule on Examination of a Child Witness²²⁸ which took effect on December 15, 2000,²²⁹ and the Rule on DNA Evidence²³⁰ which took effect on October 15, 2007.²³¹

²²⁰ *Manotok IV v. Heirs of Barque*, G.R. No. 162335, 574 SCRA 468, 581, Dec. 18, 2008 (Corona, J., *separate opinion*).

²²¹ G.R. No. 166429, 481 SCRA 457, Feb. 1, 2006.

²²² G.R. No. 129742, 295 SCRA 470, Sep. 16, 1998.

²²³ *Gingoyon*, 481 SCRA at 468.

²²⁴ GRAU, *supra* note 210, at 3.

²²⁵ Martha Minow, *Politics and Procedure*, in *THE POLITICS OF LAW* 86 (David Kairys, ed. 1998).

²²⁶ GRAU, *supra* note 210, at 3.

²²⁷ Minow, *supra* note 225, at 93.

²²⁸ A.M. No. 00-4-07-SC (2000).

²²⁹ § 33.

²³⁰ A.M. No. 06-11-5-SC (2007).

²³¹ § 14.

In discussing the relationship between procedure and substance, the Supreme Court in *Aneco Realty and Development Corporation v. Landtex Development Corporation*²³² made the definitive statement that “substantive justice trumps procedural rules.”²³³ In support of this, it cited *Barnes v. Padilla*²³⁴ where the Court stated that:

Let it be emphasized that the rules of procedure should be viewed as mere tools designed to facilitate the attainment of justice. Their strict and rigid application, which would result in technicalities that tend to frustrate rather than promote substantial justice, must always be eschewed. Even the Rules of Court reflect this principle. The power to suspend or even disregard rules can be so pervasive and compelling as to alter even that which this Court itself has already declared to be final.

...

The emerging trend in the rulings of this Court is to afford every party litigant the amplest opportunity for the proper and just determination of his cause, free from the constraints of technicalities. Time and again, this Court has consistently held that rules must not be applied rigidly so as not to override substantial justice.²³⁵

There, however, remains considerable disagreement with the idea that substance and procedure can be so easily separated. Adherents of the legal process view would argue, for example, “that procedure and substance cannot be divided, because at its heart the substance of justice is procedure; over time, substance collapses into procedure and the maintenance of a procedural system rather than the results in particular cases. Equal application of the law, in both its procedural and substantive aspects, *is* a substantive value, and perhaps the most important one.”²³⁶ Still some observers point out that “procedure and substance cannot be separated because each embrace competing purposes and values, each of these values are subject to contested interpretations in individual circumstances.”²³⁷

From these observations, it seems that the substance and procedure are more intertwined than what the Court in *Aneco* and *Barnes* made it out to be. As one observer notes, this distinction is not perfect as it is widely

²³² G.R. No.165952, 560 SCRA 182, Jul. 28, 2008.

²³³ *Id.* at 193.

²³⁴ G.R. No. 160753, 461 SCRA 533, Jun. 28, 2005.

²³⁵ *Id.* at 541.

²³⁶ Minow, *supra* note 225, at 90.

²³⁷ *Id.* at 92.

recognized that the distinction between these two forms of rulemaking is replete with extensive gray areas.²³⁸

One of these gray areas is the power granted to the Court by the 1987 Constitution to “promulgate rules concerning the protection and enforcement of constitutional rights.”²³⁹ The adoption of the Writs of Amparo and Habeas Data in our jurisdiction has rekindled the debate as to where substantive rights flow into procedural rights, and the extent of the role of Courts asserting protection of Human Rights in creating or embracing these writs.

2. Protection and Enforcement of Constitutional Rights

a. *The Writ of Amparo*

According to Justice Adolfo S. Azcuna:

A Writ of Amparo is a special remedy to protect and enforce Constitutional Rights other than the right to physical liberty.

The basis for it is the provision in the Constitution that states that the Supreme Court has, among other powers, that of adopting rules to protect and enforce Constitutional Rights.²⁴⁰

In the Philippines, the coverage of the Writ of Amparo is not as expansive as “Constitutional Rights other than the right to physical liberty.” Presently worded, the Philippine 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.”²⁴¹ While the Writ of Habeas Corpus is a “remedy for all forms of arbitrary personal restraint”,²⁴² the “writ shall cover extralegal killings and disappearances or threats thereof.”²⁴³ Amparo was promulgated in response to the alarming escalation of extralegal killings and enforced disappearances in the country prompting

²³⁸ GRAU, *supra* note 210, at 3.

²³⁹ CONST. art VIII § 5(5).

²⁴⁰ Adolfo Azcuna, *A Field Guide to a New Kind of Lawyering*, delivered at the Commencement Exercises, Ateneo de Manila University School of Law, Meralco Theatre, Lopez Bldg., Ortigas Ave., Pasig City, Apr. 25, 2004.

²⁴¹ A.M. No. 07-9-12-SC, § 1. This is the Rule on the Writ of Amparo.

²⁴² Vicente V. Mendoza, *A Note on the Writ of Amparo*, IV 82 PHIL. L.J. 1, 3 (2008).

²⁴³ A.M. No. 07-9-12-SC, § 1.

criticisms from both national and international organizations including the United Nations.²⁴⁴

The Court, in promulgating the Writ, which became effective on October 24, 2007, made use of its expanded rulemaking power for the “protection and enforcement of constitutional rights”²⁴⁵ — a power vested by the Constitution on the Supreme Court in order to make it more effective in checking abuses against constitutional rights, including human rights.²⁴⁶ In making use of this power, Chief Justice Puno explained, thus:

In expanding the judicial rule making authority to enhance the protection and enforcement of constitutional rights, our Constitutional Commissioners were endowed with prophetic eyes. For two decades later, we would be bedeviled by extrajudicial killings and [en]forced disappearances that would expose the frailties of our freedom, the inadequacy of our laws if not the inutility of our system of justice. 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 itself.²⁴⁷

In doing so, it made the centerpiece of the writ the requirement found in section 9 that the respondent in an application for Amparo file a verified written return with supporting affidavits within 72 hours, asserting that he “did not violate or threaten with violation the right to life liberty, liberty, and security of the aggrieved party, through any act or omission”,²⁴⁸ explaining the steps or actions he has taken in order to “determine the fate or whereabouts of the aggrieved party and the persons or persons responsible for the threat act or omission”,²⁴⁹ and requiring the respondent to provide “all relevant information in his possession pertaining to the threat, act or omission against the aggrieved party.”²⁵⁰

²⁴⁴ See Philip Alston, United Nations Special Rapporteur on the State of Human Rights in the Philippines, Press Statement, Feb. 21, 2007, available at http://www.extrajudicialexecutions.org/news/Philippines_21_Feb_2007.pdf. “How many have been killed? The numbers game is especially unproductive, although a source of endless fascination. Is it 25, 100, or 800? I don’t have a figure. But I am certain that the number is high enough to be distressing. Even more importantly, numbers are not what count. The impact of even a limited number of killings of the type alleged is corrosive in many ways. It intimidates vast numbers of civil society actors, it sends a message of vulnerability to all but the most well connected, and it severely undermines the political discourse which is central to a resolution of the problems confronting this country.”

²⁴⁵ CONST. art. VIII, §5(5).

²⁴⁶ BERNAS, S.J., *supra* note 209, at 527.

²⁴⁷ Puno, *supra* note 54, at 41.

²⁴⁸ A.M. No. 07-9-12-SC, § 9. The Rule on the Writ of Amparo.

²⁴⁹ § 9.

²⁵⁰ § 9.

In addition to this, it also included interim reliefs, unique to Amparo, which the petitioner may avail of in aid of his application for the writ. These include Temporary Protection Orders,²⁵¹ Inspection Orders,²⁵² Production Orders,²⁵³ and Witness Protection Orders.²⁵⁴

The Writ of Amparo is considered “one of the most important pieces of a comprehensive constitutional system the Latin American countries have been establishing for the protection of constitutional rights”,²⁵⁵ and was first introduced in Mexico in 1957. Since then, it has been adopted by all Latin American countries, with the exception of Cuba, as well as some European countries.²⁵⁶

In these countries, the Writ’s provisions are expressly set forth in their Constitutions and the proceeding has been the object of statutory regulation.²⁵⁷ In general, these countries adopted the writ in order to provide a remedy for the protection of the whole range of constitutional rights, including socio-economic rights.²⁵⁸

The Philippine version, by contrast resulted simply from the Court’s exercise of its expanded rulemaking power. It is limited only to cases of extralegal killings and enforced disappearances which heretofore had no existing remedies under our legal regime.²⁵⁹ This early, the Writ of Amparo has proven itself to be quite effective. Within just the first month from its effectivity on October 24, 2007, the Writ enabled the release from military custody of Bayan Muna organizer Ruel Muñasque, after having been missing for two weeks, following the order of a judge in Pagadian City, Zamboanga del Sur.²⁶⁰

In *Secretary of National Defense v. Manalo*,²⁶¹ the first Supreme Court decision on the application of the Rule on the Writ of Amparo, the Court explained that:

²⁵¹ § 14(a).

²⁵² § 14(b).

²⁵³ § 14(c).

²⁵⁴ § 14(d).

²⁵⁵ Allan Brewer-Carias, *The Latin American Amparo Proceeding and the Writ of Amparo in the Philippines* (unpublished).

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ A.M. No. 07-9-12-SC, Annotation to the Writ of Amparo, at 48.

²⁵⁹ Gozon, Jr. & Orosa, *supra* note 191, at 17.

²⁶⁰ SUPREME COURT ANNUAL REPORT 5 (2007).

²⁶¹ G.R. No. 180906, 568 SCRA 1, Oct. 7, 2008.

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. The constitution is an overarching sky that covers all in its protection.²⁶²

In this case, the Court *En Banc* in a unanimous decision dismissed the petition filed by the Secretary of National Defense and the Armed Forces of the Philippines Chief of Staff which questioned the Court of Appeals (“CA”) decision requiring: first, their office to furnish the petitioners and the CA with all investigation reports, official and unofficial, with regard to the custody of the former; second, confirm the present official assignments of the military officials involved; and finally, produce all medical reports and records of the petitioners while they were under military custody.

In upholding the CA decision, the Court narrated the events that happened to the petitioners from the time they were abducted by armed men on suspicions of being members of the New People’s Army, the torture they underwent while in military custody, and their eventual escape after more than a year. The Court thereafter ruled that there continued to exist a violation of the Petitioners’ right to security: the right to security as freedom from threat to respondent’s life, liberty, and security, the right to security as protection by the government.

The Court ended by declaring that:

In blatant violation of our hard-won guarantees to life, liberty and security, these rights are snuffed out from victims of extralegal killings and enforced disappearances. The writ of *amparo* is a tool that gives voice to preys of silent guns and prisoners behind secret walls.²⁶³

The Writ of Amparo has gained wide acceptance as an effective tool against curbing military and governmental excesses in their anti insurgency and anti terrorist campaigns. As of January 2009, the statistical data on cases involving the Writ of Amparo are as follows:

²⁶² *Id.* at 10.

²⁶³ *Id.*

Court	Writ of Amparo cases filed	Pending	Decided
Supreme Court ²⁶⁴	8*	4	4
Court of Appeals	30	7	23
Sandiganbayan	1		1
Regional Trial Courts	12	5	7
Total	47	16	35

Of those cases that were decided, the statistics are as follows:

Court	Granted	Dismissed/Closed/Terminated
Supreme Court	1*	3*
Court of Appeals	4	19
Sandiganbayan		1
Regional Trial Courts	2	5
Total	7	28²⁶⁵

b. The Writ of Habeas Data

The Writ of Habeas Data, promulgated on January 22, 2008 and which took effect on February 2, 2008, is a “remedy available to any person whose right to privacy in life, liberty or security is violated or threatened by

²⁶⁴ Writ Of Amparo Cases Filed at the SC:

G.R. No. 180181, Rev. Fr. Robert Reyes v. Hon. Raul Gonzales;
 G.R. No. 182484, Daniel Masangkay Tapuz, et al. v. Judge Elmo del Rosario, et al. DECIDED
 G.R. No. 182545, Maria Gumanoy v. Gloria Macapagal-Arroyo, et al.
 G.R. No. 182616, Atty. Abdallah M. Casar v. Hadji Ebrahim Murad, MILF Chairman, et al.
 G.R. No. 182795, Armando Q. Canlas, et al v. Napico Homeowners Association DECIDED
 G.R. No. 180906, Defense Secretary v. Manalo DECIDED
 G.R. No. 182830, Arante v. PGMA
 G.R. No. 182831, Yanoc v. President Macapagal-Arroyo, et al. DECIDED

* Four (4) were CA’s decisions that were appealed by way of Petition for Review on Certiorari (already counted under Court of Appeals item).

* Two (2) were CA’s decisions that were appealed by way of Petition for Review on Certiorari (already counted under Court of Appeals item)

²⁶⁵ Of the 28 dismissed/closed and terminated cases before the courts, there were:
 cases where subjects themselves denied enforced disappearance and/or force, threat, torture and the like;
 cases where petition was withdrawn on motion of petitioner on the ground that subject is facing charges before the lower court and the only obstacle to his being transferred to the proper authorities to stand trial is the pendency of the petition; cases where the Court found that the petition for the issuance of the writ of *amparo* is not the appropriate remedy; cases where the Court ruled that there was insufficient evidence; cases where petitioners failed to show up on hearing dates.

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.”²⁶⁶ The kinds of relief which can be obtained under the writ can include the “updating, rectification, suppression or destruction of the database or information or files kept by the respondent.”²⁶⁷

The basis of this procedural rule is a person’s right to privacy, a right that has been expressed as early as several thousand years ago,²⁶⁸ as well as incorporated in numerous constitutions of different states. In *Morfe v. Mutuc*,²⁶⁹ the Supreme Court had occasion to say that “[t]he right to privacy as such is accorded recognition independently of its identification with liberty; in itself, it is fully deserving of constitutional protection.”²⁷⁰ In the case of the Philippines, this right has been given life in the “piecemeal and scattered provisions of privacy protection clauses in the 1987 Constitution and the growing number of privacy jurisprudence.”²⁷¹

In *Ople v. Torres*,²⁷² the Supreme Court declared that:

...[t]he 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 justify such intrusions. Intrusions into the right must be 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.²⁷³

The words of Chief Justice Fernando more than 40 years ago in *Morfe* describing the erosion of personal privacy becomes even more relevant in this modern age of computers and advanced information systems:

²⁶⁶ A.M. No. 08-1-16-SC, § 1.

²⁶⁷ A.M. No. 08-1-16-SC, § 6(e).

²⁶⁸ A.M. No. 08-1-16-SC, Rationale for the Writ of Habeas Data, at 11. “Expectations of privacy within one’s home is found in the Talmud, the Jewish civil and religious law, and the Code of Hammurabi.”

²⁶⁹ No. 20387, 130 Phil. 415, Jan. 31, 1968.

²⁷⁰ *Id.* at 436.

²⁷¹ A.M. No. 08-1-16-SC, Rationale for the Writ of Habeas Data, at 14. *See*, *Arnault v. Nazareno*, No. 3820, 87 Phil. 29, Jul. 18, 1950; *Morfe v. Mutuc*, No. 20387, 130 Phil. 415, Jan. 31, 1968; *Ople v. Torres*, G.R. No. 127685, 293 SCRA 141, Jul. 23, 1998.

²⁷² G.R. No. 127685, 293 SCRA 141, Jul. 23, 1998.

²⁷³ *Id.* at 169.

Ultimate and pervasive control of the individual, in all aspects of his life, is the hallmark of the absolute state. In contrast, a system of limited government safeguards a private sector, which belongs to the individual, firmly distinguishing it from the public sector, which the state can control. Protection of this private sector – protection, in other words, of the dignity and integrity of the individual – has become increasingly important as modern society has developed. All the forces of technological age – industrialization, urbanization, and organization – operate to narrow the area of privacy and facilitate intrusion into it. In modern terms, the capacity to maintain and support this enclave of private life marks the difference between a democratic and a totalitarian society.²⁷⁴

“There is more than a chilling prospect that one’s profile formed from the gathering of data from various sources may divulge one’s private information to the public. There is also the unsettling thought that these data may be inaccurate, outdated or, worse, misused.”²⁷⁵

It is recognized that in order for there to be an effective right to informational privacy, individuals must have the right to control the flow of information concerning or describing them.²⁷⁶

It is with these in mind that the Writ of Habeas Data, which “allow the summary hearing of the unlawful use of data or information and to remedy possible violations of the right to privacy”,²⁷⁷ was promulgated.

However, unlike the version of habeas data in the Philippines, the constitutions of several Latin American countries have incorporated this writ as an explicit constitutional right and not just a mere procedural legal mechanism.²⁷⁸ Despite the variance in the scope and concept of habeas data from country to country, fundamentally, the writ will, aside from protecting one’s right to privacy, “provide our people with an additional remedy that will hopefully terminate the extralegal killings and enforced disappearances plaguing our country”²⁷⁹ by entitling the “families of disappeared persons to know the totality of circumstances surrounding the fates of their relatives and impos[ing] an obligation of investigation on the part of government.”²⁸⁰ In addition to this, the writ will not only complements the writ of Amparo

²⁷⁴ Morfe, 130 Phil. at 436, *citing* Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219, 229 (1965).

²⁷⁵ A.M. No. 08-1-16-SC, Rationale for the Writ of Habeas Data, at 15-16.

²⁷⁶ *Id.* at 15.

²⁷⁷ *Id.* at 16.

²⁷⁸ *Id.* at 16.

²⁷⁹ *Id.* at 20.

²⁸⁰ *Id.* at 19.

but will stand as an independent remedy to enforce the right to informational privacy. The importance of this right is explained in the Rationale for the Writ, thus:

For all persons have the right to access information about themselves, especially if it is in the possession of the government. Any violation of this right ought to give the aggrieved person the remedy to go to court to modify, remove, or correct such misinformation. The right to access and control personal information is essential to protect one's privacy, honor and personal identity, even as it underscores accountability in information gathering.²⁸¹

3. Administrative Rules

The 1987 Constitution provides that:

Sec. 6. The Supreme Court shall have administrative supervision over all courts and the personnel thereof.²⁸²

Administrative rules are defined as “those matters which concern the internal operations and management of courts and the court system.”²⁸³ The rationale behind giving the over the administrative supervision over all courts to the Supreme Court is that while the primary goal of all courts is the adjudication of disputes of fact and law, they are nevertheless also bureaucracies.²⁸⁴ Therefore, “[t]he court’s ability to perform its adjudicative role depends upon its ability to manage itself as a bureaucracy. Justice, according to conventional wisdom, requires judicial administration.”²⁸⁵

In particular, one area wherein administrative rules have been widely used is to address a recognized management problem – delay. Delay undermines the performance of courts around the country and possible solutions offered to reduce the problem are complex and require not only the rationing of scarce resources, the increase in court fees, improvements in legislative and judicial quality and the overhaul of our system of court rules. Long before the time William Gladstone intoned his famous aphorism, “justice delayed is justice denied,” the problem of judicial delay had been perennially and chronically festering. Given this problem, this is one area where Court should boldly marshal its expanded rule making

²⁸¹ *Id.* at 20.

²⁸² CONST. art. VIII, § 5(6).

²⁸³ GRAU, *supra* note 210, at 3.

²⁸⁴ *Id.* at 23.

²⁸⁵ *Id.*

powers to solve what remains to be an intractable judicial issue that affects not only access to justice but also the public's perception of its performance.

One small step in the Court's exercise of this particular aspect of its rulemaking power was its promulgation of the Rule of Procedure for Small Claims Cases, which was intended "for an inexpensive and expeditious means of settling disputes over small amounts."²⁸⁶ The more controversial aspect of the exercise of this power involved the media when Chief Justice Puno released the "Guidelines In The Observance Of A Rule Of Preference In The Imposition Of Penalties In Libel Cases." The latter rule was controversial because not a few individuals expressed the opinion that its release smacked of judicial legislation, with some quarters suggesting that the Chief Justice was back to his tendency to butter up to media and the powers that be.

a. Rule of Procedure for Small Claims Cases

The "Rule of Procedure in Small Claims Cases" was crafted to provide a "much swifter and less expensive delivery of justice" especially for the poor since they are the ones especially affected by the protracted battles in court litigation.²⁸⁷ One way by which the Court seeks to address this problem is the establishment of a Small Claims Courts, a system that has been successfully used in many foreign legal systems such as Australia, Canada, Ireland, Israel, New Zealand, South Africa, Hong Kong, Singapore, the United Kingdom and the United States.²⁸⁸

Section 36 of Batas Pambansa 129 commands the Supreme Court to adopt special rules or procedures applicable to, among others, cases requiring summary disposition as the Supreme Court may determine, in order to achieve an expeditious and inexpensive determination thereof without regard to technical rules. With the support of the United States Agency for International Development ("USAID") and the American Bar Association Rule of Law Initiative ("ABA-ROLI") the Supreme Court, with the use of its expanded rulemaking power, promulgated A.M. No. 08-8-7-SC or the Rule of Procedure for Small Claims Cases which became effective on October 1, 2008.

²⁸⁶ A.M. No. 08-8-7-SC, Rationale of the Rule of Procedure for Small Claims Cases, at 35.

²⁸⁷ *Id.* at 29.

²⁸⁸ *Id.*

This Rule provides “for an inexpensive and expeditious means of settling disputes over small amounts”²⁸⁹ than the regular civil process and selects pilot courts, totaling twenty two in number, that would “empower the people to bring suits before them pro se to resolve legal disputes involving simple issues of law and procedure without the need for legal representation and extensive judicial intervention.”²⁹⁰

The theory behind the small claims system is that “ordinary litigation fails to bring practical justice to the parties when the disputed claim is small, because the time and expense required by the ordinary litigation process is so disproportionate to the amount involved that it discourages a just resolution of the dispute.”²⁹¹ One of the key features of the process is that every aspect is designed to allow a person to quickly and inexpensively handle his case from start to finish through the provision of ready-made forms as well as the non-application of strict procedural rules including the rules of evidence.²⁹² In addition to this, in order to allow for a more expeditious disposition of cases, lawyers are not allowed to appear in hearings unless they are actually parties thereto.²⁹³ Also, the small claims judge, through the use of Judicial Dispute Resolution, can employ different methods of dispute resolution in order to encourage the parties to reach an amicable settlement.²⁹⁴ Finally, decisions in a small claims case shall be final and unappealable²⁹⁵ subject, however to the filing of a petition for certiorari under Rule 65 of the Revised Rules of Court.

b. Guidelines in the Observance of a Rule Of Preference in The Imposition of Penalties in Libel Cases

The circular involved was issued on January 22, 2008 and took effect on that same day. The guidelines began by enumerating several cases decided by the Court, and called the attention of all judges, as part of its administrative supervision over all courts, to an “emergent rule of preference for the imposition of fine only rather than imprisonment in libel cases under the circumstances therein specified.”²⁹⁶ Among these circumstances are:

²⁸⁹ *Id.* at 35.

²⁹⁰ BRIDGING GAPS, REMOVING ROADBLOCKS, *supra* note 202, at 191-92.

²⁹¹ *Id.* at 36.

²⁹² BRIDGING GAPS, REMOVING ROADBLOCKS, *supra* note 202, at 192.

²⁹³ A.M. No. 08-8-7-SC, § 17. Rule of Procedure for Small Claims Cases.

²⁹⁴ § 21.

²⁹⁵ § 23, ¶ 2.

²⁹⁶ Admin. Circ. 08-2008.

(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, in the exercise of his discretion, should impose the penalty of imprisonment when these circumstances are inexistent.²⁹⁷

These Guidelines came in the heels of the declaration of open war by the Arroyo administration on the members of media. Dean Raul C. Pangalangan, former Dean of University of the Philippines College of Law, saw this as a “welcome burst of light in this dark hour”²⁹⁸ but nevertheless criticized it for having “strengthened press freedom at the expense of the institutionalization of the rule of law.”²⁹⁹ The criticism went on to say:

That [the calling attention of judges to the ‘emergent rule’] 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?

Sure, the “emergent rule” reflects settled case precedent, but the Supreme Court, when it wants to shape how lower courts decide actual cases, speaks through precedent, not through guidelines.

...
Though no one can accuse it of trying to undermine our liberties, the memo short-circuits the separation of powers just the same.³⁰⁰

Responding to these comments and criticisms, Chief Justice Puno explained:

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

²⁹⁷ Raul Pangalangan, *The Chief Justice Replies*, PHIL. DAILY INQUIRER, Feb. 8, 2008. A reaction of the Chief Justice to the column of former Dean of the University of the Philippines College of Law, Raul Pangalangan, *Judicial Activism and its Limits*, PHIL. DAILY INQUIRER, Feb. 1, 2008.

²⁹⁸ Pangalangan, *supra* note 20.

²⁹⁹ *Id.*

³⁰⁰ *Id.*

erode the rule of law but strengthens its sinews for it follows the architecture of our Constitution that gives preferred status to freedom of speech and of the press.³⁰¹

Puno's defense did not alter the fact that the guidelines constituted a deviation from Court tradition in respect to the role of precedent, and that the same offered what seemed to be an impermissible amendment of a legislative act — all suspiciously aimed at what other observers held to be nothing but a naked attempt to court media favor. The stinging criticism blunted the effects of what otherwise would have been court practice at the trial levels. Thus, on June 2008, Makati Regional Trial Court Judge Winlove Dumayas, in the exercise of sound discretion, found Daily Tribune publisher Ninez Cacho Olivarez guilty of libel and sentenced her to six months to two years imprisonment and ordering her to pay P5 million as moral damages and P33,732.25 plus interest in actual damages and P4,000 as a libel fine., despite the issuance of the circular by the Court.³⁰² When the Chief Justice, in an apparent retreat from his position, announced that these were “mere guidelines,” judges gleefully took his word for it.

4. Practice Rules

Article VIII, Section 5 of the 1987 Constitution provides that:

Sec. 5. The Supreme Court shall have the following powers:

x x x

5) Promulgate rules concerning... the admission to the practice of law, the integrated bar, and legal assistance to the under-privileged. Such rules ... shall not diminish, increase, or modify substantive rights....

Practice rules are those rules which govern the practice of law: the admission to the practice of law, the integrated bar, and legal assistance to the under-privileged. We have narrowed the definition since pleadings, practice and procedure in courts are already included in procedural rules.

The reason for the power granted to the Court to govern the practice of law has been explained by Justice Ruperto Martin:

The practice of law is not a vested right but a privilege, a privilege moreover clothed with public interest because a lawyer owes substantial duties not only to his client, but also to his brethren in the

³⁰¹ Pangalangan, *supra* note 20.

³⁰² Aurelio, *supra* note 161.

profession, to the courts, and to the nation, and takes part in one of the most important functions of the State – the administration of justice – as an officer of the court. The practice of law being clothed with public interest, the holder of this privilege must submit to a degree of control for the common good, the extent of the interest he has created.³⁰³

An example of practice rules recently promulgated by the Supreme Court is the Rule on Mandatory Legal Aid Service for Practicing Lawyers, which furthers the cause for access to justice by providing poor litigants with competent legal advice.

a. Rule on Mandatory Legal Aid Service for Practicing Lawyers

A product of the Access to Justice Forum, this Rule has for its purpose the enhancement of “the duty of lawyers to society as agents of social change and to the courts as officers thereof by helping improve access to justice by the less privileged members of society and expedite the resolution of cases involving them.”³⁰⁴ It proposes this by requiring 60 hours of mandatory free legal service by members of the bar while requiring such members not allowed by law to practice to support the legal aid program of the Integrated Bar of the Philippines (“IBP”)³⁰⁵ in the hopes that their service and “active support will aid the efficient and effective administration of justice especially in cases involving indigent and pauper litigants.”³⁰⁶

The rule was recommended by the Integrated bar of the Philippines (IBP) after the Forum on Increasing Access to Justice by the Poor: Bridging Gaps, Removing Roadblocks, convened by the Supreme Court and held from June 30 to July 1, 2008. The recommendations were made in recognition of the treaty obligations of the Philippines under the International Covenant on Economic, Social and Cultural Rights (ICESCR) to “take progressive steps in realizing the people’s rights to food, shelter, and livelihood.”³⁰⁷

³⁰³ RUPERTO MARTIN, PHILIPPINE POLITICAL LAW 275 (1981).

³⁰⁴ Bar Matter No. 2012, The Rule on Mandatory Legal Aid Service.

³⁰⁵ §§ 3 & 4(a).

³⁰⁶ § 2.

³⁰⁷ ICESCR art. III. The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant, *quoted in* BRIDGING GAPS, REMOVING ROADBLOCKS: PROCEEDINGS FROM THE PHILIPPINE SUPREME COURT’S FORUM ON INCREASING ACCESS TO JUSTICE BY THE POOR 200 (2008).

The rule, on the one hand, provides incentives to lawyers who comply with it by crediting them with related Mandatory Continuing Legal Education (MCLE) units.³⁰⁸ On the other hand, it provides penalties to those who fail to meet the minimum hours of service, without satisfactorily explaining the reason for the failure, by declaring the erring lawyer to be a member “not in good standing” of the IBP or by payment of a fine of Two Thousand Pesos (P 2,000).³⁰⁹

**C. CAVEAT: SUCH RULES SHALL NOT
DIMINISH, INCREASE, OR MODIFY SUBSTANTIVE RIGHTS³¹⁰**

With the recent surge in the Puno Court’s initiatives and forays into judicial rulemaking as well the breadth that these cover, criticisms have been made that the rulemaking power has given rise to an especially alarming kind of judicial legislation aggravated by the fact that these do not even take place within the confines of an actual case and controversy and can be seen as “short-circuiting the separation of powers.”³¹¹ As the Chief Justice himself recognized that “even while this [rulemaking] power is textually committed by the Constitution to the Judiciary, still we find some archantagonists of judicial power warning against the wisdom of its exercise.”³¹² However, he explains that:

With due respect, let me say that such a sense of unease is now but a footnote in the debate on the proper role of courts in protecting human rights. After World War II, countries that embraced liberal democracy as their political ideology have given their judiciaries the explicit authority to protect the human rights of their citizens. Indeed, this is congruent to the global expansion of judicial power, which has been observed as one of the most significant trends in late 20th and early 21st century governments. Some legal eagles call this phenomenon as the “judicialization of politics.”³¹³

Justice Isagani Cruz also notes that “The new Constitution authorizes the Supreme Court to promulgate rules on an additional subject, to wit, legal assistance to the underprivileged, in line with the social justice policy.”³¹⁴ Aside from the Supreme Court’s power over the Integrated Bar,

³⁰⁸ Bar Matter No. 2012, § 8. The Rule on Mandatory Legal Aid Service.

³⁰⁹ § 7(a).

³¹⁰ CONST. art. VIII, § 5(5)

³¹¹ Pangalangan, *supra* note 20.

³¹² Puno, *supra* note 54, at 41.

³¹³ *Id.*

³¹⁴ CRUZ, *supra* note 65, at 280.

the Rule on Mandatory Legal Aid Service is based also on the rulemaking power of the Supreme Court over this new subject.

The limitation provided for in the Constitution that rules promulgated by the Court in the exercise of its rulemaking power shall not “diminish, increase or modify substantive rights” is one of the main criticisms directed at these initiatives of the Puno Court. With regard to this criticism, it is submitted that it is only the Writs of Amparo and Habeas Data as well as the Guidelines in the Observance of a Rule of Preference in the Imposition of Penalties in Libel Cases that could potentially transgress upon this limitation provided in the Constitution.

In the case, however, of both the Writ of Amparo and the Writ of Habeas Data, these were promulgated by the Court in the exercise of its expanded rulemaking authority to enhance the protection and enforcement of constitutional rights, which in both these cases are the fundamental rights to life, liberty, security and property. It has been established as early as August 30, 1950 that the Supreme Court is the authoritative interpreter of the Constitution.³¹⁵

Discussing the nature of the judicial process in relation to the interpretation of the Constitution, Justice Benjamin Cardozo explains that:

The judge as the interpreter for the community of its sense of law and order must supply omissions, correct uncertainties, and harmonize results with justice through a method of free decision... The great generalities of the constitution have a content and a significance that vary from age to age. The method of free decision sees through the transitory particulars and reaches what is permanent behind them.³¹⁶

Professor Alexander Bickel referring to the “Court as the institution best fitted to give us a rule of principle which we strive to attain along with the principle of self-rule”,³¹⁷ states that:

Hence principle, called constitutional law, is in the Court’s charge, and the other institutions are expected to defer to the Court with respect to it.³¹⁸

³¹⁵ CIVIL CODE, art. 8 provides that “Judicial decisions applying or interpreting the laws or the Constitution shall form part of the legal system of the Philippines.” *See also*, *Cooper v. Aaron*, 358 U.S. 1, 17-19 (1958).

³¹⁶ BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 16-17 (1921).

³¹⁷ BICKEL, *supra* note 13, at 261.

³¹⁸ *Id.*

Put another way, according to Professor Mark Tushnet, “It is not as if the Constitution does not get amended. It does – when the Supreme Court reinterprets the Constitution to satisfy contemporary political desires.”³¹⁹

Therefore with respect to constitutional rights, in enacting these rules, the Supreme Court merely operationalizes them by providing remedies that will enhance and protect the constitutional rights that it itself has evolved.

With respect to the Guidelines, while it only provides for a rule of preference in the imposition of penalties for cases of libel as shown events subsequent to its issuance where a Regional Trial Court Judge still imposed imprisonment, it is, however, altogether unnecessary. The press, the group which the Guidelines primarily benefit, is not, and has never been, a minority which needs special protection from the Court. They are and interest group that is properly represented in, and regularly lobby, our political branches of government. In fact, as shown by the developments in the Right to Reply Bill filed by Senator Aquilino Pimentel, Jr., the press has the power to affect how our lawmakers and even how the President decides on particular issues.

The Supreme Court, the institution that represents, and is the protector of, political minorities,³²⁰ need not have taken it upon itself to “decriminalize” libel, which is a majoritarian preference and not a minority right, and in the process “short-circuit the separation of powers”³²¹ As pointed out by Dean Raul Pangalangan, “the Supreme Court, when it wants to shape how lower courts decide actual cases, speaks through precedent, not through guidelines”³²² not through this sort of “constitutional shortcut.”³²³

The move to decriminalize libel is not so immediate as extrajudicial killings or enforced disappearances as to necessitate immediate action by the Court. In fact, even before the Court issued the Guidelines, bills have already been filed in the Senate and in Congress as early as July 2007.³²⁴ The

³¹⁹ MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 180 (1999).

³²⁰ *The Supreme Court as Protector of Political Minorities*, 46 *YALE L.J.* 862 (1937).

³²¹ Pangalangan, *supra* note 20.

³²² *Id.*

³²³ *Id.*

³²⁴ S. No. 1403, An Act Decriminalizing Libel by Means of Writings or Similar Means Repealing Article 355 of The Revised Penal Code, filed by Senator Francis Escudero on Jul. 31, 2007.

Court should have just waited for the political process to take its course instead of taking an action that would seem to be more of buttering up to the press than protecting press freedom as the Court portrays its action to be.

VI. THE SOCIAL BASES OF JUDICIAL GOVERNANCE IN PHILIPPINE POLITICAL HISTORY AND CULTURE

A. THE FAILURE OF POST-BELLUM ASIAN AND AFRICAN DEMOCRACIES

After World War II, Western colonies in Asia and Africa gained their independence. These new nations naturally turned to Western models of government, each country copying the mother country's template of government.

The Philippines was no exception. As the first Asian country to gain independence in 1946, our leaders adopted the American model of presidential system of government, a natural result of the gradual transplantation of American institutions through various organic acts, through the 1935 Constitution and through amendments to the Constitution that secured American interests in the country. Likewise, another example, Ghana, a former colony of the United Kingdom, adopted the English model of parliamentary democracy after 130 years of British Colonial Rule. Britain conceded independence to the new African country after independence activists, led by Kwame Nkrumah, set up an English-type parliamentary government for the former Gold Coast colony.

At first, these transplanted foreign models were viewed as success stories by the west. After some time, however, most of these Western transplants in Asia and Africa became dysfunctional with democratic governments in many African countries supplanted by authoritarian rulers. By 1958, dubbed "the year of the great collapse", the dismal prospects of these transplanted foreign models came to a head:³²⁵

Within a few weeks of each other, Pakistan, Burma, and the Sudan surrendered their civilian governments into the hands of the military who in varying degrees abrogated constitutions, postponed elections, and abolished or sidetracked political parties. In the Middle East, where Egypt and Syria had already made the transition, the revolution in Iraq installed a general in power, setting in motion the

³²⁵ REMIGIO AGPALO, *ADVENTURES IN POLITICAL SCIENCE* 196 (U.P. Press revised ed. 1996).

abortive American and British military intervention in Lebanon and Jordan, and Lebanon elected the chief of its army to the presidency. Ceylon was having its considerable troubles, and Indonesia, plagued by revolution and political feuding retained only remnants of parliamentary rule under the watchful eye of the military. In Ghana, Nkrumah and his associates ruled with a strong hand, cavalierly overriding the usual rights of the opposition.³²⁶

In contrast to these other African and Asian democracies, the Philippines enjoyed a relatively long and viable existence. Unfortunately, like its African and Asian counterparts, the presidential system, introduced in the Philippines by the United States through McKinley's Instructions in 1900, also collapsed. On September 21, 1972, then President Marcos issued a proclamation placing the entire country under martial law.³²⁷ The following day, he announced that he was going to govern the nation and direct the entire operation of Government in his capacity as Commander-in-Chief of all the armed forces of the Philippines.³²⁸

The collapse of Philippine Presidential government into martial law, much like the failure in Asia and Africa of western models, had it coming. After independence, the Philippines retained all the markers of a semi feudal and semi colonial system lorded over by an oligarchy that either was the direct result of American sponsorship or a continuation of the old Filipino-Spanish elite. The feudal structures of a mainly agricultural economy guaranteed economic underdevelopment, a governmental system that fed on patronage and creeping corruption.

One important reason recognized by political leaders and social scientists for the failure of these political systems was culture. This is largely because of culture's intimate and direct relation to political leadership and organization, which in Third World countries are the independent variables of successful governance and political development.³²⁹

Sukarno, the first President of Indonesia, stated in 1957 that "the cause [of political instability] lies in our practicing a system not suited to our specific requirements, in our indiscriminate adoption of every feature of the system that is known as western democracy."³³⁰ The African social Scientist

³²⁶ RUPERT EMERSON, FROM EMPIRE TO NATION 276-77 (Cambridge: Harvard University Press 1962), *quoted in id.*, at 196.

³²⁷ Proc. No. 1081, Sep. 21, 1972.

³²⁸ Gen. Order No. 1, Sep. 22, 1972.

³²⁹ AGPALO, *supra* note 325, at 197.

³³⁰ *Id.* at 198.

Opeyemi Ola also blamed culture as the basis of what he termed “the crisis of parliamentary democracy in Africa”, thus:

While the parliamentary structure of authority is the product of the industrial culture of the West, it is being made the beginning and generator of industrialization in Black Africa. Parliamentary democracy has been manufactured and artificially grafted unto African culture. In effect, little or no rational attempt has been made to discover and design that political system which is at once harmonious with the ethos of an agrarian civilization and capable of transforming it. The perceived structural dissonance with African culture has therefore conditioned the rejection of Western parliamentary democracy by significant sections of the ruling elites.³³¹

Political instability in the Philippines, which peaked during the Marcos era and which exists today in an even more pernicious form exists also largely because of the country’s unique political culture and history. Each stage of our history fed the next and required adjustments that did not work either because these adjustments did not go into the core of our political and historical structures or were merely reactionary and stop-gap. For instance these same social factors also conditioned the present Constitution’s distribution of governmental powers, in which the Supreme Court was made more powerful than Western models from which our judicial system was originally based. It is well-known that Article VIII of the present Constitution creating “expanded” judicial review was set up as a reaction to human rights abuses during martial law. Its evolution from American-type judicial review gradually created a super court with a penchant for extrajudicial initiatives that Western scholars would decry as disturbing the separation of powers balance and affecting the court’s decisional integrity.

In particular, the aspects of Philippine political culture that support a government of separated powers where the Supreme Court extrajudicially governs are: *first*, its emphasis on the core values of *pakikisama*, *utang na loob*, and personalism; *second*, the primordial cultural importance of kinship affiliation; *third*, its idealization of seemingly objective standards embodied in law alongside an aversion to any form of discretion and open ended decision-making ; *fourth*, its failure to develop not only a communal ideology by which to legitimize political decisions, but also an

³³¹ OPEYEMI OLA, THE CULTURAL BASIS OF THE CRISIS OF PARLIAMENTARY DEMOCRACY IN AFRICA 594 (1972), *quoted in id.*

institution that can be trusted to make those decisions; and *fifth*, its tradition and preference for a dominant national executive.

Critics of the Judiciary's exercise of extrajudicial governance point to its inconsistency with the underlying principles of democratic government, as expounded mostly by American legal thinkers. The premise is that these Western Institutions which we transplanted to Philippine soil work best when they are exercised consistently with the ideology that gave birth to them. There is of course some truth to this. However, what may be overlooked in this line of criticism is that our peculiar political culture and history readily accommodates this form of exercise of judicial power.

B. PHILIPPINE POLITICAL CULTURE

1. Political Culture

People from different cultures think and feel differently about the general goals and the basic procedures of the political system.³³² These general goals and basic procedures include the role of government in a society, the scope and limitations of governmental powers, and the modes by which these powers are exercised by the different instrumentalities of government. Political culture refers to a particular people's "set of values, attitudes, beliefs and orientations, which influences the public's perception of politics."³³³ It "encompasses an individual's or group's knowledge of political institutions and processes, evaluations of how well or how poorly they work, and emotional responses to the political system as a whole."³³⁴ These values, attitudes, and orientations become part of a people's political culture when they are widely held among the population or a sub-group within it.³³⁵

Political culture "shapes the actions of individuals performing political roles throughout the political system."³³⁶ It "plays a significant role in shaping the aspirations and fears, the preferences and prejudices, the

³³² Mendoza, *supra* note 6, at 21.

³³³ *Id.* at 22.

³³⁴ *Id.* at 21.

³³⁵ *Id.* at 22.

³³⁶ Gabriel Almond & G. Bingham Powell, *Political Socialization and Political Culture*, in *COMPARATIVE POLITICS TODAY: A WORLD VIEW* 21 (Almond & Bingham Powell eds. 1980) *quoted in id.*, at 51.

priorities and expectations of a people as they confront the challenges of social and political change.”³³⁷

Political culture has a significant effect on society’s choice of political institutions. How these institutions then function within and in relation to others is very much affected by the environment around them. Merely transferring organizations from one social setting to another does not guarantee that they will function as they previously did or alter society in the same way...Within a particular society, or within societies with rather similar political cultures, a change of political institutions may have roughly the same effect. But where the political cultures differ greatly, there is no reason to expect that similar institutions will generate similar sets of behaviors among those it affects.³³⁸

Obviously, Philippine political culture affects also how the Filipino people view how our own government, including the Supreme Court, should work.

2. Philippine Political Culture

Onofre D. Corpuz describes Philippine political culture as having

a superstructure of attitudes and values of Western origin, resting on a definitely indigenous infra-structure. From the West comes individualism and a high respect for achievement and for the rule of law as well as a sense of community broader than kin or family, whereas indigenous values stress primary-group (i.e., family) loyalty and a particularistic view of public affairs.³³⁹

Philippine political culture emphasizes *pakikisama*, *utang na loob*, and personalism.³⁴⁰ Unfortunately, these core values when used in the political system bring about organizational behavior that is considered negative and dysfunctional when judged by Weberian democratic standards of efficiency and effectiveness. Worse, these values are seen to breed patron-client relations within the political system.³⁴¹

³³⁷ LUCIAN PYE, *ASIAN POWER AND POLITICS: THE CULTURAL DIMENSIONS OF AUTHORITY* 121 (Cambridge: Harvard University Press 1985) *quoted in id.* at 50.

³³⁸ *Id.* at 20.

³³⁹ Onofre Corpuz, *The Cultural Foundations of Filipino Politics*, in *FOUNDATIONS AND DYNAMICS OF FILIPINO GOVERNMENT AND POLITICS* 43 (Abueva & de Guzman eds. 1969) *quoted in id.* at 28.

³⁴⁰ Mendoza, *supra* note 6, at 32.

³⁴¹ *Id.*

There is also in the Philippines a primordial cultural importance of kinship affiliation. This explains the prevalence of political dynasties in the Philippines. Lacking sufficient interest groups organized as persistent voting blocs based on categories such as class, religion, ethnicity, or ideology, political alliances in the Philippines and the interests they advocate tend to be defined along familial lines. Like the core values of *pakikisama*, *utang na loob*, and personalism, this primordial nature of kinship affiliation is also seen as adding to the instability and weakness of political institutions that are supposed to be governed by bureaucratic rationalism and universalistic norms.³⁴²

One consequence of a high degree of *pakikisama*, *utang na loob*, and personalism in Philippine political culture has been widespread political cynicism and skepticism about government and the workings of its legal system.³⁴³ In addition, the primordial cultural importance of kinship affiliation in the Philippines is seen as unhealthy for democracy, thus:

The Filipino family is so strong a social unit that all other societal entities and obligations pale in comparison. The strength of these family ties partly explains why Filipinos have difficulty in developing a sense of community outside of the family, and of the public good. The primacy of family loyalties also encourages nepotism and favoritism norms in government, further buttressing popular disenchantment with it.³⁴⁴

Another consequence of the primacy of kinship ties is that it has hindered the formation of real class consciousness among Filipinos.³⁴⁵

Filipinos see little need for collective action among members of their own class, especially if such action threatens to alienate dyadic partners. As a result, most Filipinos take little interest in class or interest group-focused legislation.³⁴⁶

Interpersonal linkages brought about by kinship affiliation have also hindered the emergence of any group loyalties on which cohesive political parties or policy-oriented activities might be based and maintained. Kinship

³⁴² *Id.* at 33.

³⁴³ *Id.* at 32.

³⁴⁴ *Id.* at 34.

³⁴⁵ *Id.*

³⁴⁶ CARL LANDE, LEADERS, FACTIONS, AND PARTIES: THE STRUCTURE OF PHILIPPINE POLITICS 44 (New Haven: Southeast Asia Studies Program, Yale University 1965), *quoted in* Mendoza, *supra* note 6, at 34.

affiliation has thus produced a personalized system of political and corporate relationships, which encourages favoritism and nepotism.³⁴⁷

The emphasis on *pakikisama*, *utang na loob*, and personalism and the primacy of kinship ties in Philippine political culture partly explains what Dean Raul C. Pangalangan laments as “the idealization of seemingly objective standards embodied in law hand-in-hand with the aversion to any form of discretion and open ended decision-making”³⁴⁸ that characterize Philippine Constitutionalism today. The result of all this is that Philippine political culture has failed to develop “a communal ideology by which to legitimize decision”³⁴⁹ and also an “institution that can be trusted to make those decisions.”³⁵⁰ This lack of a common ideology and a trusted political institution had left a void in the political thicket, which the Supreme Court entered partly through extrajudicial modes of judicial governance.

3. The Dominant Executive

“The great security against a gradual concentration of the several powers [of government] in the same department”, said James Madison in *The Federalist* 51, “consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.”³⁵¹ This strategy of “so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places”³⁵² has been called the method of counterpoise.³⁵³

In the Philippines, however, sufficient counterpoise among the three great departments of government has proved difficult to maintain. As a matter of fact, from its inception, the dominant feature of the separation of powers doctrine under the Philippine Constitutional system has always been a strong executive.³⁵⁴ As political scientist Remigio Agpalo points out,

...in spite of the American idea of presidential government, with its principle of separation of powers and checks and balances, which

³⁴⁷ *Id.* at 34-35.

³⁴⁸ Pangalangan, *supra* note 19.

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ James Madison, *The Federalist No. 51*, in *THE FEDERALIST PAPERS* 160 (Fairfield ed. 1961).

³⁵² *Id.* at 159.

³⁵³ MORTON WHITE, *PHILOSOPHY, THE FEDERALIST, AND THE CONSTITUTION* 161 (Oxford University Press 1987).

³⁵⁴ VICENTE V. MENDOZA, *FROM MCKINLEY'S INSTRUCTIONS TO THE NEW CONSTITUTION: DOCUMENTS OF THE PHILIPPINE CONSTITUTIONAL SYSTEM* 53 (1978).

was introduced in the country as early as 1900, the Philippines has always had some kind of dominant executive.³⁵⁵

The question may be asked: Why does the Philippines always have some kind of dominant executive? After surveying the origin and development of Philippine Constitutionalism beginning with the signing of the Treaty of Paris in 1898 up to the adoption of the 1973 Constitution and its amendment in 1976, Retired Associate Justice Vicente V. Mendoza concluded that this

...allocation of powers in our society reflects our historic background and experience as well as our political culture, the dominant feature of which has been a strong executive, whether symbolized by the *datu*, the alien Governor General, or the President or Prime Minister.³⁵⁶

4. Historic Background and Experience

Throughout the centuries and different political periods, the pattern which has continued in the Philippine political system is that of the dominant executive.³⁵⁷

The roots of Filipino culture may be found in the pre-Spanish *barangay*. As a political system, the *barangay* was lead by a *datu* or chief who exercised legislative, executive, judicial, and military powers. Remigio Agpalo calls the regime of the *barangay* a “pangulo regime”, which is led by a chief who serves as a head: a dominant executive who, like the head, is on top in relation to the other parts of the *barangay*.³⁵⁸

During the Spanish regime (1571-1898), the various *barangays* were centralized under a single political system. The Governor-General, who was the chief executive of this enlarged political system eventually called the Philippines, occupied a predominant position in the polity. After all, he was “the sole and legitimate representative of the Supreme Power of the Government of the King of Spain in Filipinas, and as such [was] the Supreme Chief of all offices of public administration. In this capacity, he [had] the capacity of supreme inspection over said offices, not excluding the tribunals of justice.” In earlier times, the Governor-General was also

³⁵⁵ AGPALO, *supra* note 325, at 187.

³⁵⁶ MENDOZA, *supra* note 354.

³⁵⁷ AGPALO, *supra* note 325, at 203.

³⁵⁸ *Id.* at 198-200.

President of the Royal *Audiencia*, which was the Spanish regime's analogue to the present Supreme Court.³⁵⁹

During the Philippine Revolution (1898-1901), the Constitution of the republic that was established did not provide for a strong executive. Nevertheless, General Emilio Aguinaldo, who assumed the role of dictator and later as President of the Revolutionary Congress at Malolos, continued playing the role of a dominant executive and military chief until his capture.³⁶⁰

Under the American regime, the national executive at first was the military Governor (1898-1901) and later the Governor-General (1902-1935), both of which, being the top official of the colonial and imperial government, was a dominant leader.³⁶¹ Although early decisions of the Supreme Court purported to find in the Philippine Bill of 1902 a separation of powers,³⁶² it was only in the Jones Law (also known as the Philippine Autonomy Act), which was passed by the U.S. Congress on August 29, 1916,³⁶³ that a real separation of powers, with its corollary feature of checks and balances, was obtained.³⁶⁴ The government established by the Jones Law was divided into three more or less independent, but not coordinate, branches: executive, legislative, and judicial.³⁶⁵ The main feature of this separation of powers was the heavy concentration of power in the executive department, which was always headed by an American Governor General.³⁶⁶

[T]he doctrine of separation of powers, designed to prevent the concentration of powers in any one man or group of men and thereby protect individual liberty, was yet utilized for a different purpose. For though the three branches of government were separate and independent [under the Jones law], they were not, either in practice or in theory, equal. The American Governor General was the supreme authority. The doctrine of separation of powers was used to preserve that authority by confining the Filipino-controlled Legislature to strict lawmaking. There was thus inaugurated a tradition of strong executive which was to become a feature of the constitutional system of the nation even after independence.³⁶⁷

³⁵⁹ *Id.* at 201.

³⁶⁰ *Id.* at 201-02.

³⁶¹ *Id.* at 202.

³⁶² *U.S. v. Bull*, No. 5270, 15 Phil. 7, 27, Jan. 15, 1910; *Severino v. Governor General*, No. 6250, 16 Phil. 366, 384, Aug. 3, 1910.

³⁶³ MENDOZA, *supra* note 354, at 14.

³⁶⁴ *Id.* at 16.

³⁶⁵ *Id.* at 116.

³⁶⁶ *Id.*

³⁶⁷ *Id.* at 17.

The Jones Law served as the organic act of the Philippines for almost two decades until November 15, 1935, when the 1935 Philippine Constitution inaugurated the Commonwealth Government of the Philippine Islands.³⁶⁸ During this Commonwealth era (1935-1946), the superficial legal appearance showed that the executive had become no longer dominant. Nevertheless, the political reality was that the Philippine executive became more dominant during this era.³⁶⁹ As in the Jones Law, the three departments established by the 1935 charter were not even nearly equal; the vast powers of the Governor General were conferred on the President of the Philippines.³⁷⁰

Manuel L. Quezon, the President at that time, discarded the American model of presidential government. Instead, Quezon transformed the presidential system into a system of government "where, among others, the executive is superordinate to the legislature. Quezon exercised not only the traditional roles of the President under a presidential regime...but also those of Party Chief, Chief Legislator and Chief of the Nation."³⁷¹ In the words of an official of the Commonwealth National Assembly, President Quezon became "the central figure in the constellation of contemporary statesmen around which the other stars revolve and from whom they borrow their lights."³⁷²

During the period of the Independent Republic (1946-1972), Philippine Presidents, following Quezon's example, asserted their dominant position in the political system. The success of these presidents varied. Nevertheless, all Presidents tended to dominate the Philippine political system.³⁷³

Former University of the Philippines President Dr. Vicente Sinco questioned the wisdom of the Constitutional Convention in modeling the 1935 Constitution after the Jones Law, instead of the U.S. Constitution.³⁷⁴

³⁶⁸ *Id.* at 22.

³⁶⁹ AGPALO, *supra* note 325, at 202.

³⁷⁰ MENDOZA, *supra* note 354, at 23.

³⁷¹ AGPALO, *supra* note 325, at 202.

³⁷² *Id.*

³⁷³ *Id.* at 203.

³⁷⁴ VICENTE SINCO, PHILIPPINE POLITICAL LAW 257 (11th ed. 1962), *quoted in* MENDOZA, *supra* note 354, at 24-25. "The Constitutional Convention was largely influenced by the previous organic laws of the Philippines when it decided to this vast authority in the President without taking into account of the fact that the Governor-General then was the representative of a foreign sovereign whose seat was far removed from this country and, therefore, susceptible to political apprehensions over any possible action on the part of its inhabitants of a conquered territory that might seriously menace its authority and prestige. Consequently, it became imperative for that sovereign to invest its representative with all the power necessary to act promptly and effectively in case of need in uprooting any menace to its authority regardless of the effects of his action

History Professor Gregorio Zaide observed that “[w]ith his strong powers, it is possible for a President who may be ambitious, ruthless, and unscrupulous to become a dictator.”³⁷⁵ This same sentiment was also declared by the late Senator Claro M. Recto, thus:

Under our Constitution the President of the Philippines could easily convert himself into an actual dictator within the framework of the charter. With his control of local governments and all that signifies in terms of elections, with huge sums and unlimited sinecures to distribute, with emergency powers to rule by executive decrees as a last resort, he is restrained only by his own conscience from perpetuating himself or his party in power.³⁷⁶

Professor Zaide and Senator Recto’s fears and apprehensions became a reality when, on September 21, 1972, then President Ferdinand E. Marcos issued a proclamation placing the entire country under martial law.³⁷⁷ The following day, he announced that he was going to govern the nation and direct the operation of the entire Government in his capacity as Commander-in-Chief of all the armed forces of the Philippines.³⁷⁸ Consequently, during the martial law regime (1972-1981), the executive in the person of the dictator Ferdinand Marcos exercised simultaneously the roles of Chief of State, Chief Executive, Chief Administrator, Commander-in-Chief of the Armed Forces, Chief of Foreign Relations, Party Chief, Martial Law Chief, Chief Legislator (from 1972-1978, as Sole Legislator), and Chief Exponent of the Ideology of the New Society.³⁷⁹

The 1935 Constitution was replaced by the 1973 Constitution, which restructured the government from a presidential system to a parliamentary system. The head executive under the 1973 Constitution, the Prime Minister, was made even more powerful than the President under the 1935 Constitution.³⁸⁰ Thus, even after the lifting of martial law, the executive remained the dominant chief and leader of the nation.³⁸¹

upon the rights of personal liberty...The Constitutional Convention either failed to consider this difference or noting it, was convinced that the extreme concentration of power in one man, which was the fashion in many European countries of that day, was the most desirable attribute of good government.”

³⁷⁵ GREGORIO ZAIDE, *PHILIPPINE CONSTITUTIONAL HISTORY AND CONSTITUTIONS OF MODERN NATIONS* 89 (1970).

³⁷⁶ Claro M. Recto, *Our Constitution*, THE MANILA TIMES, Feb. 8, 1949, *quoted in Id.*, at 89.

³⁷⁷ Proc. No. 1081, Sep. 21, 1972.

³⁷⁸ Gen. Order No. 1, Sep. 22, 1972.

³⁷⁹ AGPALO, *supra* note 325, at 202.

³⁸⁰ Irene Cortes, *The Framing of the 1973 Constitution in Historical Perspective*, 48 PHIL. L.J. 460, 475 (1973)

³⁸¹ AGPALO, *supra* note 325, at 203.

Immediately after the February 1986 People Power revolution, President Corazon C. Aquino assumed revolutionary legislative power and issued the Provisional Freedom Constitution, which vested legislative power in the President until the first Congress was convened. Thus the only difference between the scope of the legislative powers of President Aquino and that of Marcos was that, where President Marcos exercised the power concurrently with the regular Batasang Pambansa, President Aquino exercised it alone.³⁸²

Although the 1987 Constitution, ostensibly weakened Presidential power as a reaction to the Marcos dictatorship, upon closer scrutiny, it actually “merely clipped the military and commander-in-chief powers of the President, the other powers, however, remain intact, if not even greater.”³⁸³ Thus,

[I]n the presidential system, Philippine style, the president is the supreme patron, who is expected to use the powers to appoint, to release budget allocations, to approve contracts, etc. to benefit his or her allies and supporters.

The setup gives so much power to the president, who exercises these to get compliance from Congress, the bureaucracy, and the opposition...Politicians are dependent on patronage for their survival. Bereft of presidential patronage, they risk losing their following to rivals who have Malacañang support.³⁸⁴

5. Political Culture

There is a cultural basis for the continuing emergence in Philippine political history of dominant chief executives despite changes in administrations and legal regimes. This cultural basis is the perception of both the society and the polity as bodies, which is developed through the pervasive influence of language on the subliminal fields of perception of the Filipino and is reinforced by folk sayings, rites of passage, ordinary activities of the family, and epithets.³⁸⁵

³⁸² JOAQUIN BERNAS, S.J., *THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY* 610 (1996 ed.).

³⁸³ Gerard Chan, *Ascertaining the Vox Populi in a Democratic and Republican Context: The Role of Congress as a National Board of Canvassers*, 70 PHIL. L.J. 106, 115-16 (2004).

³⁸⁴ Yvonne Chua, *The Perks of Lawmaking*, in *THE RULEMAKERS: HOW THE WEALTHY AND THE WELL-BORN DOMINATE CONGRESS* 125 (2007).

³⁸⁵ AGPALO, *supra* note 325, at 206.

The Filipino language and its different dialects influence in the formation of perceptions, conceptions, or beliefs that the society and the polity are bodies because these languages and dialects structure the society and polity as such. The terms used for various elements of the family, the basic unit of society and the polity, are about or related to the body. For example, the root word for the Tagalog word for sibling, *kapatid*, is *patid*, which means part. Likewise, the polity or its sub-units have their respective *pangulo* (one who serves as the head), *kinatawan* (one who serves as the body), *kanang kamay* (right hand), and *mga galamay* (fingers); the *pangulo* and *kinatawan* are leaders, the *kanang kamay* the subleader, and the *mga galamay* are the rank-and-file government personnel.³⁸⁶

It is not only through language that Filipinos are socialized to believe or perceive that the society or the polity is a body. Various rites of passage such as those performed during baptism, graduation, wedding, and a death in a family. For example, in the lamentations over a death in the family, the life of the dead is narrated, relating him to certain events significant to the family. The members of the family eat, pray, play parlor and card games, and go to the church and cemetery together.³⁸⁷

Therefore, behavior in the society and the polity is regulated by the basic law of an organism — interdependence of hierarchical elements. Consequently, the political elite are seen as the leaders and guardians of the people, who in turn support the elite.³⁸⁸

If the society and the polity are bodies, then, logically, it must have persons or agencies who serve as heads. This was the conclusion of Emilio Jacinto, the brains of the Katipunan: the organization that started the Philippine Revolution in 1896:

In any society or association, there is a need for one that serves as head, one authority which is superordinate to all who will provide good order, maintain true unity and help in the attainment of goals...The agency which serves as head is called the government and those who will exercise its authority are called Chiefs of the People.³⁸⁹

³⁸⁶ *Id.* at 204-05.

³⁸⁷ *Id.* at 205-06.

³⁸⁸ *Id.* at 164.

³⁸⁹ *Id.* at 206.

6. Philippine Political History

As much as its culture, Philippine history has also contributed to the judicialization of Philippine politics. As Chief Justice Reynato S. Puno has pointed out, the 1987 Constitution, like all previous Philippine Charters, was “enacted in an atmosphere far from ideal.”³⁹⁰

The 1987 Constitution similarly saw the light of day under turbulent times. On 15 February 1986, President Marcos was proclaimed by the *Batasang Pambansa* amidst allegations of massive fraud and cheating in the snap presidential elections. A week later, on 22 February 1986, then Minister of National Defense, now Senator Juan Ponce Enrile, and then Vice Chief of Staff, General, later President, Fidel Ramos joined the fight against President Marcos as they threw their support behind opposition candidate, Mrs. Corazon C. Aquino. They sparked a People Power revolution that toppled down the government of President Marcos. On 25 February 1986, in defiance of the 1973 Constitution, Mrs. Aquino was proclaimed President of the Republic.

President Aquino immediately assumed power and set aside the 1983 Constitution. She initially governed under a provisional constitution popularly known as the *Freedom Constitution*. Article VI of the Freedom Constitution called for the adoption of a new constitution to be drafted by a Constitutional Commission. On 1 June 1986, the Constitutional Commission, with all its members appointed by President Aquino, convened. Within four months and a half, or on 15 October 1986, it finished its task. On 2 February 1987, a plebiscite was held and the proposed Constitution was ratified by the people.³⁹¹

“Verily,” concluded Chief Justice Puno, “the 1987 was adopted when we were still reeling from the divisive effects of martial law. The nation was still red with rage when the 1987 Constitution was ratified.”³⁹²

These “far from ideal” circumstances introduced to Philippine Constitutionalism a “radical rearrangement of the powers of government,”³⁹³ giving the Judiciary more powers, while at the same time

³⁹⁰ Reynato Puno, *Judicial Review: Quo Vadis?*, speech delivered during the 43rd Anniversary of the Philippine Constitution Association in 2004, in JOSE MIDAS P. MARQUEZ, *THE CONSTITUTIONAL PHILOSOPHY OF PHILIPPINE JURISPRUDENCE: THE WRITINGS OF SENIOR ASSOCIATE JUSTICE REYNATO S. PUNO* 27 (2005).

³⁹¹ *Id.* at 27.

³⁹² *Id.*

³⁹³ *Francisco v. House of Representatives*, G.R. No. 160261, 415 SCRA 44, 199, Nov. 10, 2003 (Puno, J., concurring and dissenting).

ostensibly diminishing the powers of the President, and pruning the powers of the legislature,³⁹⁴ thus:

The 1987 Constitution is the most pro human rights of our fundamental laws. It ought to be for it was a robust, reactive document to the trivialization of human rights during the authoritarian years, 1972 to 1986. Indeed, it was written by those whose common thread is their bountiful bias in favor of human rights. This preeminent prejudice in favor of human rights induced in our constitutional commissioners to reexamine the balance of power among the three great branches of government — the Executive, the Legislature, and the Judiciary. The reexamination easily revealed that under the then existing balance of power, the Executive, thru the adept deployment of the commander-in-chief powers, can run roughshod over our human rights. It further revealed that a supine legislature can betray the human rights of the people by defaulting to enact appropriate laws, for there is nothing you can do when Congress exercises its power to be powerless. It is for this reason and more, that our Constitutional Commissioners, deemed it wise to strengthen the powers of the Judiciary, to give it more muscular strength in dealing with the non-use, misuse, and abuse of authority in government.³⁹⁵

While purporting to diminish the powers of the presidency, it can be seen that even from its inception, the Philippines has been governed by a strong executive, a *Pangulo* regime, where the president holds sway over the other two departments of government through the powers of appointment, the skilful wielding of the power of the purse, and the power over the sword.

Ironically, the framers of the 1987 Constitution recognized this, and sought to include structural measures to provide a counterpoise to the traditionally dominant executive. That the constitutional framers may have failed can be traced to our political culture and the social dynamics of the historical forces that traditionally operate within our society. The spirit of EDSA I, the force behind the crafting of the 1987 Constitution, was a weak one because EDSA did not install fundamental changes in our political superstructure, supplanting the Marcos oligarchy with the old oligarchy that the late dictator promised to throw out when he declared martial law though Proclamation 1081.

³⁹⁴ *Id.*

³⁹⁵ Puno, *supra* note 54, at 40.

This is not surprising. EDSA I did represent change, but that change was a change at the top. Given our political culture of cynicism and skepticism about government and the workings of its legal system, conditioned by our emphasis on the core values of *pakikisama*, *utang na loob*, and personalism, as well as our primordial cultural importance of kinship affiliation the 1987 Constitution, failing to create fundamental change because its EDSA origins were not, failed to deliver at the most basic level. Instead, our political culture's idealization of seemingly objective standards embodied in law alongside an aversion to any form of discretion and open ended decision-making conveniently found the instrumentality of the Judiciary as the obvious choice of governmental department to provide a counterpoise to the historically dominant Philippine chief executive.

7. The Judicial Counterpoise

The 1987 Constitution upgraded the powers of the Judiciary and strengthened the independence of its courts. It protected the security of tenure of the members of the Judiciary by providing that “[n]o law shall be passed reorganizing the Judiciary when it undermines the security of tenure of its Members.”³⁹⁶ It also guaranteed fiscal autonomy to the Judiciary.³⁹⁷ It depoliticized appointments in the Judiciary by creating the Judicial and Bar Council, which was tasked with screening the list of prospective court appointees.³⁹⁸

The power of confirming appointments to the Judiciary had been taken away from Congress.³⁹⁹ To further insulate appointments in the Judiciary from the virus of politics, the Supreme Court was given the power to “appoint all officials and employees of the Judiciary in accordance with the Civil Service Law.”⁴⁰⁰ And further implementing the principle of separation of powers, it prohibited members of the Judiciary to be “designated to any agency performing quasi judicial or administrative functions.”⁴⁰¹

More importantly, the power of courts to check the arbitrary exercise of power by the other branches of government was expanded by the 1987 Constitution. It redefined judicial power as including the “duty of

³⁹⁶ CONST. art. VIII, § 2.

³⁹⁷ art. VIII, § 3.

³⁹⁸ art. VIII, § 8.

³⁹⁹ art. VIII, § 9.

⁴⁰⁰ art. VIII, § 6.

⁴⁰¹ art. VIII, § 12.

the courts of justice ... 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.”⁴⁰² In addition, the Constitution reinforced the power of the Supreme Court to check human rights violations by expanding its rule-making powers. Article VIII, Section 5(5), specifically empowers the Supreme Court to “promulgate rules concerning the protection and enforcement of constitutional rights.”

As already discussed, these changes that serve to strengthen the Judiciary was dictated by the country’s experience with martial law, which taught us that stronger checks to the executive were needed to prevent another dictatorship.⁴⁰³ The 1987 Charter invested in the Judiciary powers to check the traditionally dominant Executive, providing a judicial counterpoise to it. Dean Pacifico Agabin observes that “Our experience with martial law has swung the pendulum of judicial power to the other extreme where the Supreme Court can now sit as ‘superlegislature’ and ‘superpresident.’ If there is such a thing as judicial supremacy, this is it.”⁴⁰⁴

C. THE GLOBAL EXPANSION OF JUDICIAL POWER

This expansion of judicial power is not unique to the Philippines. All over the world, “the phenomenon of judges making public policies that previously had been made or that, in the opinion of most, ought to be made by legislative and executive officials appears to be on the increase.”⁴⁰⁵ Chief Justice Puno succinctly expounded on the historical and philosophical bases of this trend, thus:

After World War II, countries that embraced liberal democracy as their political ideology have given their judiciaries the explicit authority to protect the human rights of their citizens. Indeed, this is congruent to the global expansion of judicial power, which has been observed as one of the most significant trends in late 20th and early 21st century governments. Some legal eagles call this phenomenon as the ‘judicialization of politics.’

This new role given to courts both in developed and developing democracies is not difficult to understand. Heretofore, the protection

⁴⁰² art. VIII, § 1.

⁴⁰³ Tolentino v. Sec. of Finance, G.R. No. 115455, 249 SCRA 628, Oct. 30, 1995.

⁴⁰⁴ Pacifico Agabin, *The Politics of Judicial Review over Executive Action: The Supreme Court and Social Change*, in UNCONSTITUTIONAL ESSAYS 194 (1996).

⁴⁰⁵ C. Neal Tate & Torbjorn Vallinder, *The Global Expansion of Judicial Power: The Judicialization of Politics*, in THE GLOBAL EXPANSION OF JUDICIAL POWER 2 (Tate & Vallinder eds. 1995).

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 best be protected by the political branches of government has been diluted. There is a catalogue of causes for this failed expectation, but let me just cite the main ones. 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 trumped by the rights of the wicked. Likewise, elected officials sometimes demur in making decisions that will displease their powerful constituencies. Such a tilted stance cannot be taken by protectors of human rights who must at all times maintain an even keel on the rights of the opposites. The constitution is not only the refuge of the worthy but also the worthless, it is not only the fortress of the strong but also the weak. Also, it is the finding that elected officials are sometimes more interested in high profile issues or those with great impact on the larger number of their constituents. Oftentimes, however, human rights cases are low profile especially when they affect the marginalized, or people whose existence some would hardly recognize or worse, people dismissed as the invisibles of society. Indeed, no less than the United Kingdom itself, the bulwark of parliamentary supremacy, recently adopted Human Rights Act of 1998 conceding to the courts the power to enforce human rights as defined in the European Convention for the Protection of Human Rights. All these justified the constitutional scholar, Professor Mark Tushnet, to proclaim that the debate among constitutional designers over parliamentary supremacy versus judicial review is over. Proponents of judicial review have carried the day... "If I have gone to some length in explaining the rise in the role of the judiciary in protecting human rights, it is simply to stress that nothing less is required by the universality of human rights than a seamless, synchronized, and synergistic action on the part of the political and apolitical branches of government to address violations of human rights."⁴⁰⁶

In the United States, it has been observed that:

In spite of these countercurrents [attempts to curb the Court in the 1980s], the expansion of judicial power in the United States, and perhaps even worldwide, is essentially associated today with the great movement toward judicial protection of human rights initiated, or at least dramatically signaled, by the great desegregation decision *Brown v. Board of Education* (374 U.S. 483) in 1954.⁴⁰⁷

⁴⁰⁶ Puno, *supra* note 54, at 41-42.

⁴⁰⁷ Tate, *supra* note 21, at 46-47.

Developed as an alternative to partisan electoral politics and the lobbying of interest groups, the judicial process, where a non-elected, independent and neutral court steps in to correct a failure of the democratic process, is "legitimated in part by the invocation of minority rights against majority will and in part by the argument that in certain rare instances democracy is not self-correcting without judicial intervention."⁴⁰⁸

In Namibia, Political scientist Neil Tate observes that

The expansion of judicial power was one of the key ingredient[s] in the pacts that facilitated Namibian independence under majoritarian rule. The judicialization of politics entails, however, more than a constitutional structure; it is a dynamic process. The Constitution provides only the legal structure; it does not constitute the process. The process will occur when the courts exercise their power of judicial review and the other two branches accept the lessening of their power.⁴⁰⁹

Aside from these countries, judicialization of politics has also been observed in countries such as Canada, Australia, the United Kingdom, France, Italy, Germany even the smaller democracies such as the Netherlands, Sweden, Malta and Israel. The level of judicialization in each of these countries may not be equal in both their breadth as well as effectiveness, however, it seems that for all of them, judicialization of politics will continue and only continue to expand. Observers have noted it would be difficult to do something concrete and useful to try and prevent or reduce this expansion of judicial power.⁴¹⁰ They continue by saying that "Perhaps that is a position that most of the world's democracies will have to accept. Short of that, preventing or reducing the global expansion of judicial power will likely be a slow process, a process through which democratic rule will have to become not just more widespread, but also more effective."⁴¹¹

VII. EXPERIENCE AND HISTORY IN POLITICS

Justice Holmes' observation when he stated that "The life of the law has not been logic; it has been experience..."⁴¹² was shared by the framers

⁴⁰⁸ *Id.* at 47.

⁴⁰⁹ Nico Steytler, *The Judicialization of Namibian Politics*, in *THE GLOBAL EXPANSION OF JUDICIAL POWER* 508 (Tate & Torbjorn eds. 1995).

⁴¹⁰ C. Neal Tate & Torbjorn Vallinder, *Judicialization and the Future of Politics and Policy*, in *THE GLOBAL EXPANSION OF JUDICIAL POWER* 515-28 (Tate & Vallinder eds. 1995)

⁴¹¹ *Id.* at 528.

⁴¹² HOLMES, JR. *supra* note 1.

of the U.S. Constitution. It was not Madison's "classical lucubrations" nor his familiarity with philosophy but rather "his experience in public life and his wide knowledge of the conditions of his day...that bore fruit at Philadelphia."⁴¹³ Not only Madison, but the other two authors of *The Federalist* also usually rested their political beliefs on history and experience.⁴¹⁴

During the United States' 1787 Constitutional Convention, John Dickinson, while defending the power of the lower house to initiate bills of revenue, remarked that "Experience must be our only guide. Reason may mislead us."⁴¹⁵ Elaborating his assertion, Dickinson pointed out that

It was not Reason that discovered the singular & admirable mechanism of the English Constitution. It was not Reason that discovered or ever could have discovered the odd & in the eye of those who are governed by reason, the absurd mode of trial by Jury. Accidents probably produced these discoveries, and experience has given a sanction to them. This is then our guide.⁴¹⁶

A. THE JUDICIALIZATION EXPERIMENT

Expounding on the theory of the U.S. Constitution with respect to free speech, Justice Oliver Wendell Holmes, Jr. said that "it is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge."⁴¹⁷ The same sentiment can be said of every theory that informs the drafting of all Constitutions: they are experiments that draw upon history and experience.

Similarly, the 1987 Constitution's expansion of judicial power as well as the present Supreme Court's use of its expanded powers in its exercise of extrajudicial governance is also an experiment. In breaking from established roles of the Judiciary and reconfigurations of our Separation of Powers, we must keep in mind that:

⁴¹³ WHITE, *supra* note 353, at 45, *citing* Robert Schuyler, *The Constitution of the United States: An Historical Survey of Its Formation* 90-91 (1923); *see however* Douglass Adair, *Experience Must Be Our Only Guide: History, Democratic Theory and the United States Constitution, in Fame and the Founding Fathers* 109-111 (1974), which criticizes this view of James Madison by Schuyler.

⁴¹⁴ *Id.* at 38.

⁴¹⁵ *Id.* at 6, *citing* Farrand's Records of the Federal Convention of 1787, Vol. II, under date of Aug. 13, 1787, at 278.

⁴¹⁶ *Id.* at 46, *citing* Farrand's Records of the Federal Convention of 1787, Vol. II, under date of Aug. 13, 1787, at 278.

⁴¹⁷ *Abrams v. U.S.*, (Holmes, Jr., J., *dissenting*) 250 U.S. 616, 630 (1919).

Change should be a process of growth. The coloration of the new should not clash with that of the old. Change should not come about in violent spasms. Government under law is a continuum, not a series of jerky fresh departures. And so the past is relevant. Around it cluster settled ways of doing and settled expectations which, for the sake of both stability and fairness to the individual, should often, as a matter of principle, control the rate of change in society. Moreover, the recorded past is, of course, experience; it is a laboratory in which ideas and principles are tested. History is "philosophy teaching by example."⁴¹⁸

Our Supreme Court recognized this in the drafting of the Writ of amparo. As section 1 of the rule states, the intended initial coverage of the rule includes only "extralegal killings and enforced disappearances or threats thereof." The members who drafted the rule were wary that without this qualification, the Rule may become too broad and too soon. They agreed, however, that the coverage of the Rule may be expanded later on to cover other constitutional rights, even second generation social and economic rights and third generation environmental rights, as experience and need may necessitate.⁴¹⁹

The Scottish philosopher David Hume, one of the most influential of the Constitutional framers' intellectual creditors, also argued that "to balance a large state or society, whether monarchical or republican, on general laws, is a work of so great difficulty, that no human genius, however comprehensive, is able, by the mere dint of reason and reflection, to effect it."⁴²⁰ He therefore concluded that "experience must guide [the] labour" of those who make a constitution.⁴²¹ When Dickinson said therefore that "accidents probably produced" the discovery of the English Constitution and trial by jury, he did not mean that they had no causes, but rather, he meant that their causes were unknown because of their complexity.⁴²² As Richard Hamilton observes,

The science of politics...like most other sciences, has received great improvement. The efficacy of various principles is now well understood, which were either not known at all, or imperfectly known to the ancients. The regular distribution of power into distinct departments; the introduction of legislative balances and checks; the institution of courts composed of judges holding their offices during

⁴¹⁸ BICKEL, *supra* note 13, at 109.

⁴¹⁹ Gozon, Jr. & Orosa, *supra* note 187, at 18.

⁴²⁰ WHITE, *supra* note 353, at 46, *citing* DAVID HUME, *ESSAYS: MORAL, POLITICAL AND LITERARY* 125 (Oxford 1963; first published in 1741 & 1742).

⁴²¹ *Id.*

⁴²² *Id.* at 47.

good behavior; the representation of the people in the legislature by deputies of their own election: these are wholly new discoveries, or have made their principal progress towards perfection in modern times. They are means, and powerful means, by which the excellences of republican government may be retained and its imperfections lessened or avoided.⁴²³

In the end, we must always be open to the fact that “though experience be our only guide in reasoning concerning matters of fact; it must be acknowledged, that this guide is not altogether infallible, but in some cases is apt to lead us into errors.”⁴²⁴

VIII. POPULAR CONSTITUTIONALISM AND DELIBERATIVE DEMOCRACY⁴²⁵

A. POPULAR CONSTITUTIONALISM

As already pointed out, a fundamental principle of our Constitution is that “The Philippines is a democratic and republican State. Sovereignty resides in the people and all government authority emanates from them.”⁴²⁶ A government is republican only if and to the extent that its actions are guided and controlled by public opinion. This was James Madison’s first principle.⁴²⁷ He understood public opinion to be “an operationally active and authoritative sovereign,” reflecting definite views or positions on public affairs that had been given concrete expression by the people themselves.⁴²⁸ This, essentially, spells out the concept of popular constitutionalism, the central principle of which is that final interpretive authority can and must rest with the people themselves.⁴²⁹

The traditional narrative of our Constitutional system is that constitutional interpretation has been turned over to the judiciary and, in particular, to the Supreme Court.⁴³⁰ This may be true with respect to the

⁴²³ THE FEDERALIST NO. 9 (Alexander Hamilton).

⁴²⁴ WHITE, *supra* note 353, at 47.

⁴²⁵ This section of the paper adopts Stanford Professor Larry Kramer’s theory of popular constitutionalism to the Philippine Constitutional System. For a more thorough explanation of this theory, please refer to his following works: first, Larry Kramer, “*The Interest of the Man*”: James Madison, *Popular Constitutionalism, and the Theory of Deliberative Democracy*, Stanford Public Law Working Paper No. 938721 (2006) [hereinafter Kramer, *The Interest of Man*]; and second, Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004).

⁴²⁶ CONST. art.II, § 1.

⁴²⁷ Kramer, *The Interest of Man*, at 24.

⁴²⁸ *Id.*

⁴²⁹ *Id.* at 42.

⁴³⁰ See MENDOZA, *supra* note 119.

different branches of government. Nevertheless, “final authority to control the interpretation and implementation of constitutional law resides at all times in the community in an active sense.”⁴³¹

B. DELIBERATIVE DEMOCRACY

The people’s control, while real and substantial, is not direct. It is indirect: mediated through popular responses to arguments and to action or inaction of representatives in different parts of government, representatives who are in turn taking their cues from the public. It is, nevertheless, genuine popular control.⁴³² But the use of a constitutional check is not meant to conclude a dispute. It is meant to begin one: to force the kind of debate needed for the enlightenment of public opinion.⁴³³ Separation of powers is thus an instrumentality for generating a robust public discussion, initiated and led by political leaders acting for their own reasons, through which public opinion could be developed and “the people themselves” retain control.⁴³⁴

Government agents, whether legislators, executives, or judges, are just that: agents. When it comes to the Constitution, they are the regulated, not the regulators. They must do their best to decide what the Constitution permits, forbids, or requires them to do, but final interpretive authority always rests with their actual superior, “the people themselves.”⁴³⁵

Separation of powers and checks and balances are mere “auxiliary precautions” to a more basic and primary “dependence on the people.”⁴³⁶ It is a system in which the people’s different agents, including judges, could articulate their varied understandings of the Constitution in the ordinary course of business and, in effect, present these to a common superior for judgment. If constitutional conflicts arose, they would in the end be resolved the only way they should be resolved in a republican government: they would be decided by the people.⁴³⁷

In bestowing the eulogies due to the partitions and internal checks of power, it ought not the less to be remembered that they are

⁴³¹ Kramer, *The Interest of Man*, at 5.

⁴³² *Id.* at 32.

⁴³³ *Id.* at 31.

⁴³⁴ *Id.* at 32.

⁴³⁵ *Id.* at 36.

⁴³⁶ *Id.* at 8.

⁴³⁷ *Id.* at 36.

neither the sole nor the chief palladium of constitutional liberty. The people, who are the authors of this blessing, must also be its guardians. Their eyes must be ever ready to mark, their voice to pronounce, and their arm to repel or repair aggressions on the authority of their constitutions, the highest authority next to their own, because the immediate work of their own, and the most sacred part of their property, as recognizing and recording the title to every other.⁴³⁸

IX. CONCLUSION

During the first years of the republican form of government as we know it today, especially in 1789 during the 1st Congress of the U.S. government, “one of the most important means of initiating legislation came from petitions sent in from individuals and groups seeking relief, assistance or redress of grievances. These petitions represented a long tradition in Britain and America for bringing particular issues to the attention of legislators.”⁴³⁹ That was the brand of governance of their day.

In the Philippines today, individuals and groups seeking relief, assistance or redress of grievances send their petitions not to Congress, but to the Supreme Court. The Court, in turn, has relaxed the doctrines of standing and the like, in order to accommodate within our Constitutional framework this felt need for judicial activism and governance.

Recently, the Supreme Court in its exercise of judicial activism and governance has deemed too restrictive the confines of an actual case and controversy, and has ventured outside the canals of decision-making and into the yet uncharted oceans of rulemaking and convening. Among these recent initiatives are its convening of the *National Consultative Summit on Extrajudicial Killings and Enforced Disappearances* and the *Forum on Increasing Access to Justice*, as well as its promulgation of the cognate writs of *Amparo* and *Habeas Data*, the Rules of Procedure for Small Claims Cases, the Guidelines in the Observance of a Rule of Preference in the Imposition of Penalties in Libel Cases, and the Rule on Mandatory Legal Aid Service for Practicing Lawyers. In so doing, our Supreme Court helms the ship of our Constitution between the rock of krittocracy and the whirlpool of public discontent with our government, to the distant haven of liberty.

⁴³⁸ James Madison, *Government of the United States*, the National Gazette, February 4, 1792 available at http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=875&chapter=63884&layout=html&Itemid=27

⁴³⁹ REMINI, *supra* note 49, at 19.

Through this paper, the authors take the position that the Supreme Court's exercise of extradecisional modes of judicial activism and governance fits well with the Judiciary's role of representing minorities and protecting human rights. In fact, our 1987 Constitution expressly calls for this exercise, and its reconfiguration of our own system of separated governmental powers structurally makes ample room for it. In addition, Philippine political history and culture, with its emphasis on the core values of *pakikisama*, *utang na loob*, and personalism; primordial cultural importance of kinship affiliation; idealization of seemingly objective standards embodied in law alongside an aversion to any form of discretion and open ended decision-making; failure to develop not only a communal ideology by which to legitimize political decisions, but also an institution that can be trusted to make those decisions; and tradition and preference for a dominant national executive, supports a government of separated powers where the Supreme Court extradecisionally governs.

Our Supreme Court has cleverly put forward the idea of extradecisional judicial governance for public discussion in boldly undertaking the various initiatives discussed in this paper. The Court has spurred debate, where its arguments consisted of the initiatives themselves, and their varying degrees of success. In the end, what matters is the people's opinion: ultimately the people's judgment should prevail either by supporting these novel uses or by rejecting them as constituting an impermissible exercise of judicial power.

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