

THE PHILIPPINES' AUTHORITARIAN CONSTITUTION*

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INTRODUCTION

The Philippines' 1987 Constitution is an authoritarian constitution, not by design, but by interpretation. It is authoritarian¹ because, rather than divide the powers of government to avoid concentration of these powers in any one branch,² the Constitution, as interpreted today, concentrates power in the executive branch. The division of governmental powers into legislative, executive, and judicial represents the most important principle of government that guarantees the liberties of the people, because “it prevents a concentration of powers in the hands of one person or class of persons.”³ This is not where Philippine jurisprudence is heading.

Supreme Court decisions during the administration of Rodrigo Duterte (2016-2022) weakened, if not obliterated, constitutional checks on the president's powers.⁴ Duterte emerged from every legal battle unscathed, making him the only post-Marcos president who never lost a case before the Supreme Court.

The irony should be obvious to students of Philippine law. The 1987 Constitution *is* a “revolutionary constitution,”⁵ the product of a “People Power Revolution” that ousted the dictator Ferdinand Marcos, Sr. from

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¹ There are nuanced definitions of “authoritarian constitutions.” See Zachary Elkins, Tom Ginsburg, & James Melton, *The Content of Authoritarian Constitutions*, in CONSTITUTIONS IN AUTHORITARIAN REGIMES (Tom Ginsburg & Alberto Simpser eds., 2014). I employ a simple definition of an “authoritarian constitution.” It is one with weak or in-existent checks and balances or where the executive branch is superior to the other branches of government.

² *In re* COA Opinion on Computation of Appraised Value of Properties Purchased by SC Justices, A.M. No. 11-7-10-SC, 678 SCRA 1, 9, July 31, 2012.

³ *Araneta v. Dinglasan*, 84 Phil. 368, 441 (1949).

⁴ See discussion *infra* Part V.

⁵ Nirmal Sengupta, *Towards New Democracy?*, 22 ECON. & POL. WKLY. 124, 124–25 (1987).

office. Moreover, it was part of the spike in constitution-writing that peaked in the late 1980s in what is known as the “third wave” of democracy—that time when political leaders and publics in the 1970s and 1980s ended authoritarian systems and created democratic ones.⁶ It is the product of “revolutionary constitutionalism”—the use of the constitution-making process to attempt to institutionalize and bring a political revolution into a successful conclusion.⁷

I develop an argument that I first raised elsewhere,⁸ that a constitution is what the interpreters—in this case, the Supreme Court—say it is. My thesis is that regardless of the manner through which a constitution is written, regardless of the attempts to craft a revolutionary document, this revolutionary tone can be thwarted by interpretation.

I present literature that suggests an explanation for the Supreme Court’s failure to live up to expectations. The Philippine Supreme Court acts consistently with other courts of former colonies when it displays a reluctance to act as a check on executive power; this is a feature of the post-colonial experience. Compounding this historical burden is the Filipino admiration for an authoritarian streak in their leaders. Together, these undermine the revolutionary features of the 1987 Constitution.

This is my theory: Public support for President Duterte can be explained as support for strong leaders with the understanding that they deliver on their promises. Strong leaders are preferred checks on potential abuses under a democracy. This explains the anti-democratic behavior of the Supreme Court. The provisions in the 1987 Constitution on the “separation of powers” and “checks and balances,” which should bring balance in terms of power and accountability, cannot be fully implemented because the Supreme Court itself shares the same preference for a strong leader. This bias undermines the anti-authoritarian features of the Constitution.

In short, judicial decisions that are anti-democratic, ironically, are promulgated to implement the Filipino vision or version of democracy.

⁶ Samuel P. Huntington, *How Countries Democratize*, 124 POL. SCI. Q. 31 (2009).

⁷ Stephen Gardbaum, *Revolutionary Constitutionalism*, 15 INT’L J. CONST. L. 173, 173–74 (2017).

⁸ Dante Gatmaytan, *The Redacted [REDACTED] Constitution: Democratic Backsliding through [REDACTED] Constitutional Interpretation*, paper delivered at The Global Summit, The University of Texas at Austin School of Law (Jan. 12, 2021).

I. REVOLUTION

After the removal of Marcos, Sr., President Corazon Aquino assumed leadership of the country and promised that her government would be based on transparency, rule of law, and protection of human rights. These principles were later incorporated in the 1987 Constitution.⁹ Marcos's one-man rule was replaced by a multi-party constitutional system, a government of divided powers, a lively and free press, and other accepted notions of Western democracy.¹⁰

In March 1986, President Aquino created a Constitutional Commission ("ConCom") to draft a constitution. On June 2, the ConCom convened with 48 appointed members from various fields and possessing divergent ideological beliefs. It spent a month and a half on public hearings, weeks on regional consultations, and two months on floor debates.¹¹

The 1987 Constitution reestablished a liberal democratic regime with an independent judiciary.¹² It expanded the power of the judiciary through several constitutional provisions intended "to make it a stronger bulwark against the possibility of new abuses by a would-be authoritarian ruler."¹³ It introduced various institutional and popular mechanisms which could check the excesses of executive power,¹⁴ established democratic procedures, and spelled out civil liberties.¹⁵

Seventy-six percent of the 22 million voters (with a turnout of nearly 90% of those registered) approved the Constitution on February 2, 1987.¹⁶

Hastily drafted, the 1987 Constitution left major articles to be filled in by legislation. Still, there was widespread belief by democratic reformers

⁹ Noel Morada, *Political Legitimacy in an Unconsolidated Democratic Order: The Philippines*, in *POLITICAL LEGITIMACY IN ASIA: NEW LEADERSHIP CHALLENGES* 196 (John Kane, Hui-Chieh Loy, & Haig Patapan eds., 2011).

¹⁰ Albert F. Celozza, *Democratic Development for the Philippines*, 7 *PEACE REV.* 199 (1995).

¹¹ Bernardo M. Villegas, *The Philippines in 1986: Democratic Reconstruction in the Post-Marcos Era*, 27 *ASIAN SURV.* 194, 202 (1987).

¹² C. Neal Tate, *The Judicialization of Politics in the Philippines and Southeast Asia*, 15 *INT'L POL. SCI. REV.* 187, 190 (1994).

¹³ *Id.*

¹⁴ Diane A. Desierto, *Universalist History of the 1987 Philippine Constitution (II)*, 11 *HISTORIA CONSTITUCIONAL* 427, 430 (2010).

¹⁵ Mark R. Thompson, *Off the Endangered List: Philippine Democratization in Comparative Perspective*, 28 *COMP. POL.* 179, 180 (1996).

¹⁶ *Id.* at 192.

that detailed constitutional regulations would prevent authoritarian reversals.¹⁷

The 1987 Constitution reflected the membership of the ConCom. Almost half of the commissioners had participated in mass movements and protests on issues including land reform, conflict resolution, and gender equality. These non-traditional members advanced powerful arguments for political restructuring and socio-economic reform during the commission's deliberations.¹⁸

The text of the 1987 Constitution reflected the heterogenous and contingent character of the People Power movement. There are provisions designed to prevent authoritarian capture by the president—the one cause that united the diverse movement for democratization. It sets a one-term limit on the presidency. It also includes language that constrains the executive branch's use of emergency powers.¹⁹

Strengthening the Judiciary

The 1987 Constitution strengthens the judiciary's power to check authoritarianism. During Marcos's authoritarian regime, the Supreme Court had frequently relied upon the "political question" doctrine to avoid reviewing the president's acts. Under Philippine law, political questions are "those questions which, under the Constitution, are to be decided by the people in their sovereign capacity, or in regard to which full discretionary authority has been delegated to the legislative or executive branch of the government."²⁰ During the Marcos era, this doctrine had operated as an alibi for quiescent judges and a jurisdictional barrier for more courageous ones.²¹

The 1987 Constitution expands the Supreme Court's judicial review powers, empowering the court to determine whether "any branch or instrumentality of the government" has committed a "grave abuse of discretion amounting to lack or excess of jurisdiction." In addition to widening judicial review powers, the 1987 Constitution grants the Supreme Court the power to promulgate rules on, among others, "the protection and

¹⁷ Jürgen Rüländ, *Constitutional Debates in the Philippines: From Presidentialism to Parliamentarianism?*, 43 ASIAN SURV. 461, 464 (2003).

¹⁸ Surabhi Chopra, *The Constitution of the Philippines and Transformative Constitutionalism*, 10 GLOB. CONSTITUTIONALISM 307, 312 (2021).

¹⁹ *Id.* at 313.

²⁰ *Tanada v. Cuenco*, 100 Phil. 1101, 1066 (1957).

²¹ Chopra, *supra* note 18, at 313–14.

enforcement of constitutional rights, pleading, practice, and procedure in all courts,” which has no equivalent in past constitutions.²²

Thirty years after the 1987 Constitution went into effect, former Chief Justice Hilario Davide (who worked as a member of the ConCom that drafted the Constitution) beamed with pride when he described their work:

Our Constitution is the only constitution in the world that is pro-God, pro-Filipino, pro-people, pro-poor, pro-family, pro-marriage, pro-women, pro-youth, and pro-environment. It contains sufficient provisions against abuse of power and guarantees people’s active participation in governance including the use of people power. I have yet to see another constitution that could surpass our present Constitution[.]²³

Davide added that it was the only constitution in the world that provided a separate article on social justice and human rights,²⁴ and enshrined the principles of servant-leadership²⁵ and environmental or climate justice.²⁶ Political scientists likewise noted that “[t]he themes of participatory democracy, social justice, and human rights permeate the whole Constitution.”²⁷

II. CONSTITUTION-WRITING

As stated earlier, the 1987 Philippine Constitution was part of a global movement that featured a shift in constitution-making. Many of the constitutions created in new democracies in the 1980s and 1990s recognize

²² *Id.* To ensure the potency of the power of judicial review to curb grave abuse of discretion by “any branch or instrumentalities of government,” Article VIII, Section 1 of the Constitution engraves, for the first time into its history, the so-called “expanded certiorari jurisdiction” of this Court (*Francisco v. House of Representatives* [hereinafter “*Francisco*”], G.R. No. 160261, 415 SCRA 44, Nov. 10, 2003). In constitutional litigation, the mere invocation of a political question does not warrant an immediate or summary dismissal of a case. It falls, as it always has, within judicial power to determine for itself whether the legality and the limits of the exercise of a power have been observed and respected. *See Lopez v. Senate*, G.R. No. 163556 (Resolution), June 8, 2004.

²³ Hilario G. Davide Jr., *The System of Justice in the Philippines*, 66 PHIL. SOC. REV. 111, 119 (2018).

²⁴ *Id.*

²⁵ *Id.* at 120.

²⁶ *Id.* at 121.

²⁷ Maria Ela L. Atienza, *The 1986 Constitutional Commission and the 1987 Constitution: Background, Processes, and Outcomes*, in CHRONOLOGY OF THE 1987 CONSTITUTION 10–11 (Maria Ela L. Atienza ed., 2019).

not just civil and political rights, but also social and economic rights as fundamental individual rights, and impose not just restraints, but also positive duties on the state in relation to these rights. Transformative constitutional orders²⁸ also tend to include strong judicial review powers and allow liberal access to the courts.²⁹

Post-authoritarian constitutions make the state more accountable, representative, and participatory. They enhance accountability by strengthening judicial scrutiny and expanding the range of constitutional rights. These constitutions repose great responsibility in the government for building a more egalitarian society. Traditional liberal wariness of executive power thus coexists with considerable optimism about the government's potential to reform itself and the larger polity.³⁰

Following the Third Wave, Southeast Asian states amplified human rights provisions and placed institutional safeguards for those rights such as constitutional courts and human rights commissions. Even less-than-democratic regimes, to some degree, reinforced courts and expanded provisions for the rule of law. In short, "constitutionalism has significantly broadened and deepened its reach in Asia in modern and contemporary times."³¹

The changes in the texts of constitutions did not guarantee that former colonies will tread the same paths as their colonizers.

Dressel and Bünthe point out that the constitutional trajectories and realities in Southeast Asia are not clear. They point to the diversity within the region in terms of colonial history (British, Spanish, French, Dutch); religion (Christianity, Islam, Buddhism, Hinduism); and political regimes (democratic, semi-authoritarian, authoritarian). Not only do constitutional practices differ substantially but the very notion of liberal Western constitutionalism is regularly and deeply contested. The barriers to a more intense constitutional practice in Southeast Asia are still considerable. These countries still have to deal with interventionist militaries, human rights abuses, citizens' struggle with the extent of the rule of law, judicial review, and notions of justice.³²

²⁸ See discussion *infra*, Part VII.

²⁹ Chopra, *supra* note 18, at 310.

³⁰ *Id.*

³¹ Björn Dressel & Marco Bünthe, *Constitutional Politics in Southeast Asia: From Contestation to Constitutionalism*, 36 CONTEMP. SOUTHEAST ASIA 1, 2 (2014).

³² *Id.*

The role of constitutional courts also varies. Their role in democratic consolidation is almost entirely country-specific and explanatory in nature. Rather than presenting general theories of the conditions under which constitutional courts may play a role in such processes, the literature describes the roles that particular courts have played in particular countries under particular conditions.³³

This is particularly true in Asia, a region characterized by regime diversity and one that still struggles with authoritarian enclaves, legacies of executive dominance, and an often-technocratic understanding of the judicial process and the rule of law.³⁴ “The effects of foreign transplants like constitutional courts and broad assumptions about how the rule of law is created thus need to be analyzed *in situ*.”³⁵

III. THE PHILIPPINE CASE

I clarify the coverage of this lecture. There are studies that analyze the role *courts* play in authoritarian regimes,³⁶ those that study *constitutions* in authoritarian regimes,³⁷ the role of courts in fragile democracies,³⁸ studies of “authoritarian constitutionalism,”³⁹ and legalistic autocrats.⁴⁰ There are studies

³³ Theunis Roux, *Constitutional Courts as Democratic Consolidators: Insights from South Africa after 20 Years*, 42 J. S. AFR. STUD. 5 (2016).

³⁴ Björn Dressel, *Governance, Courts and Politics in Asia*, 44 J. CONTEMP. ASIA, 259, 274 (2014).

³⁵ *Id.*

³⁶ RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES (Tom Ginsburg & Tamir Moustafa eds., 2008).

³⁷ CONSTITUTIONS IN AUTHORITARIAN REGIMES (Tom Ginsburg & Alberto Simpser eds., 2014).

³⁸ SAMUEL ISSACHAROFF, FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS (2015).

³⁹ AUTHORITARIAN CONSTITUTIONALISM: COMPARATIVE ANALYSIS AND CRITIQUE (Helena Alviar Garcia & Günter Frankenberg eds., 2019). *See also* Roberto Niembro Ortega, *Conceptualizing Authoritarian Constitutionalism*, 49 L. AND POL. IN AFR., ASIA & LATIN AM. 339 (2016).

⁴⁰ Kim L. Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545 (2018). Scheppele explains that new autocrats are benefiting from the crisis of confidence in public institutions and attacking the basic principles of liberal and democratic constitutionalism because they want to consolidate power and entrench themselves in office. The autocrats who hijack constitutions seek to benefit from the superficial appearance of both democracy and legality within their states. “They use their democratic mandates to launch legal reforms that remove the checks on executive power, limit the challenges to their rule, and undermine the crucial accountability institutions of a democratic state.” *See id.* at 547.

of the Philippine Supreme Court's performance under the Marcos authoritarian regime.⁴¹

This is not a study of abusive constitutional borrowing—or “the use of designs, concepts, and principles taken from core aspects of liberal democratic constitutionalism, but which are turned into attacks on the minimum core of electoral democracy.”⁴²

While it is true that colonial experience might be one way for borrowing to occur,⁴³ the Philippine Constitution has since changed. In its most recent iteration, Agabin explains that there is an interface and accommodation of indigenous law with the hybrid legal system of the Philippines.⁴⁴ If anything, the 1987 Constitution has been infused with indigenous, not borrowed, ideas. The Philippines may be answering the question: Can the constitutions of modern nation-states be decolonized?⁴⁵

These are not the subjects of this study.

The Philippines does not have an authoritarian constitution. An authoritarian constitution is a combination of a descriptive “map of political powers” and a “façade” constitution, which Toth calls a pseudo-constitution. The text of a pseudo-constitution is typically inconclusive because some parts are effective in a descriptive sense only, while others are systematically disregarded. These constitutions lack normative relevance because all political power resides with the leader of the ruling party.⁴⁶

This is an inquiry into the role of courts in interpreting a *democratic* constitution, one consciously designed to deter dictatorships.

⁴¹ See C. Neal Tate & Stacia L. Haynie, *Authoritarianism and the Functions of Courts: A Time Series Analysis of the Philippine Supreme Court, 1961-1987*, 27 L. & SOC'Y REV. 707 (1993).

⁴² ROSALIND DIXON & DAVID LANDAU, THE CONCEPT AND SUBSTANCE OF ABUSIVE CONSTITUTIONAL BORROWING 36 (2021).

⁴³ *Id.* at 41. On this point, the authors argue that borrowing may be demonstrated by showing the pathways through which it can occur. This includes legal education and scholarly exchange, colonial relationships and influences, and the role played by international development assistance, and the work of international governmental and nongovernmental actors operating across different constitutional systems and contexts.

⁴⁴ Pacifico Agabin, *The Influence of Philippine Indigenous Law on the Development of New Concepts of Social Justice*, in MIXED LEGAL SYSTEMS, EAST AND WEST 167, 180 (Vernon V. Palmer, Mohamed Mattar, & Anna Koppel eds., 2015).

⁴⁵ Lena Salaymeh & Ralf Michaels, *Decolonial Comparative Law: A Conceptual Beginning*, 86 RABEL J. COMPARATIVE AND INTL. PRIV. L. 168, 183 (2022).

⁴⁶ Gabor Attila Toth, *Breaking the Equilibrium: From Distrust of Representative Government to an Authoritarian Executive*, 28 WASH. INT'L L.J. 317, 324–26 (2019).

This is not to say that the Philippines is a model democracy. Since 1986, the Philippines has been a qualified democracy at best. Various authors refer to the country as an “elite democracy,” a “cacique democracy,” a “weak state,” an “oligarchic democracy,” a “low intensity democracy,” a “patrimonial oligarchic state,” a “clientelist electoral regime,”⁴⁷ and a “populist democracy.”⁴⁸ All these suggest that the Philippines is a “defective democracy.”⁴⁹

It has been observed, however, that democratic ambitions expressed in the 1987 Constitution and in public discourse diverge so drastically from day-to-day realities in the Philippines.⁵⁰ Even with free and competitive elections, universal suffrage, and a vivid civil society, democracy in the Philippines is marred by persistent procedural weaknesses in accountability and the rule of law, incomplete achievements in areas of equality and rights, and generally poor political outcomes exacerbated by patrimonial practices.⁵¹

My own theory for the Philippines suggests that colonization is an ineffective means of transmitting constitutional values.⁵² This is also consistent with the other experiences of former colonies and reflects failed attempts at legal transfers.⁵³

My theory that it is unfair to gauge the Philippines against Western standards is receiving support from recent literature that recognizes the role of colonial past in the Global South. The Philippines is not alone when former colonies are found wanting in assuming the colonizer’s legal systems.

The colonial experience leads to mixed results and its impact on constitutionalism is determined by a range of factors such as: (a) the identity of the colonizer (Spanish, Portuguese, British, French, German empires, etc.); (b) the nature of colonialism (e.g. settler v. exploitation colonialism); (c) the type of imperial rule (direct v. indirect); (d) the duration and intensity of the

⁴⁷ NATHAN GILBERT QUIMPO, *CONTESTED DEMOCRACY AND THE LEFT IN THE PHILIPPINES AFTER MARCOS* 21–22 (2012).

⁴⁸ Jorge Tigno, *A Leader who Shoots from the Lip*, 72 *THE WORLD TODAY* 32 (2017).

⁴⁹ Julio C. Teehankee & Cleo Ann A. Calimbahin, *Mapping the Philippines’ Defective Democracy*, 47 *ASIAN AFF.: AN AM. REV.* 97 (2020).

⁵⁰ Björn Dressel, *The Philippines: How Much Real Democracy?*, 32 *INT’L POL. SCI. REV.* 529 (2011).

⁵¹ *Id.* at 541.

⁵² Dante Gatmaytan, *Constitutional Deconsecration: Enforcing an Imposed Constitution in Duterte’s Philippines*, 62 *ATENEO L.J.* 311, 313 (2017).

⁵³ Dante Gatmaytan, *Legal Transfers as Colonization: Initial Thoughts on Decoloniality and the Constitution*, 93 *PHIL. L.J.* 276 (2020).

colonial encounter and the time of decolonization (Latin America v. Asia and Africa); and (e) the manner of transition to independence (negotiated v. liberation war).⁵⁴

A Global South lens also acknowledges the similarities experienced by former colonies.

The colonial experience had some recurring features: a substantial period of foreign domination that interrupted autonomous evolution and replaced indigenous ideas, institutions, and elites with foreign ones; a colonial state structured by an imperial modality of resource extraction and social administration predicated on European superiority; a legal system imported from or heavily influenced by the metropolis, which entrenched structures of political oppression, economic exploitation, racism, and physical violence; and the forced integration of colonized societies into a hierarchically structured global order, in which power and wealth were increasingly centered in Europe and North America.⁵⁵

There are factors that prevent democracies from consolidating. Southeast Asia's democracies remain unconsolidated because their armed forces and other elite groups that support them remain powerful and can undermine civilian rule by various means, which include controlling the executive and legislative bodies of government and the conventional media.⁵⁶ In the Philippines, military officers remain politically active, limiting democratic leaders' ability to enforce democratic rules and protect human rights.⁵⁷

Some Asian hybrid regimes⁵⁸ transitioned toward a more liberal and democratic regime, but it took decades to transform an instrumental

⁵⁴ Philipp Dann, Michael Riegner, & Maxim Bönnemann, *The Southern Turn in Comparative Constitutional Law: An Introduction*, in THE GLOBAL SOUTH AND COMPARATIVE CONSTITUTIONAL LAW 1, 15–16 (Philipp Dann, Michael Riegner, & Maxim Bönnemann eds., 2020).

⁵⁵ *Id.* at 16.

⁵⁶ Sorpong Peou, *The Limits and Potential of Liberal Democratisation in Southeast Asia*, 33 J. CURRENT SOUTHEAST ASIAN AFF. 19, 37 (2014).

⁵⁷ *Id.* at 38.

⁵⁸ A hybrid regime is a product of global political economy where authoritarians often borrow ideas from their liberal counterparts (or vice versa). The majority of East Asian states are, or once were, hybrid regimes, including, for example, Hong Kong, Thailand, Malaysia, Indonesia, Singapore, South Korea, Taiwan, and Japan. Even in China, which remains as a one-party regime, public discourse about law and constitutionalism is common. Weitseng Chen, *Same Bed, Different Dreams: Constitutionalism and Legality in Asian Hybrid Regimes*,

commitment to law into one with a normative nature, commonly seen in genuine democracies. Taiwan accepted the idea of liberal constitutionalism as early as in the 1920s when forming its constitution, yet genuine practices of constitutionalism did not happen until after its democratization in the 1990s. Similarly, Japan during the Meiji years (1868–1912) adopted an illiberal form of constitutionalism, which helped to stabilize and modernize the country. A normative commitment to constitutionalism, however, did not exist until years after World War II, when liberal democracy was imposed by the United States on Japan. Similarly, under pressure from the United States, South Korea created its own constitution right after World War II, but that did not change the regime's authoritarian nature until its democratization in the late 1980s. In Hong Kong, the British introduced the idea of the rule of law to their colony, but ever since, it has possessed a typical form of authoritarian legality and constitutionalism, with occasional turbulence as a result of democratic movements.⁵⁹

These transitions, however, do not imply that a move toward a liberal and democratic regime always materializes. An increasing number of people—especially the middle class, intellectuals, and the less privileged—require the authoritarians to live up to their commitment to legality and constitutionalism, but some authoritarians appear to be able to defuse such tensions.⁶⁰

Judicial Review

Grafting judicial review onto non-Western legal systems presented its own set of problems.

In many Asian hybrid regimes, courts are not expected to check the government but to assist the executive branch in facilitating policy implementation.⁶¹ The Philippines, compared to its East Asian neighbors, is the only country that exercises judicial review with any regularity.⁶²

Chen suggests that, because courts do not act as a main mechanism to challenge or serve as checks on other political institutions, the performance of the judiciary should be evaluated differently.⁶³

in THE GLOBAL SOUTH AND COMPARATIVE CONSTITUTIONAL LAW 250, 258–59 (Dann, Riegner, & Bönemann eds., 2020).

⁵⁹ *Id.* at 253–54.

⁶⁰ *Id.* at 254.

⁶¹ *Id.* at 252.

⁶² Tom Ginsburg, *Constitutional Courts in East Asia*, in COMPARATIVE CONSTITUTIONAL LAW IN ASIA 47, 49 (Rosalind Dixon & Tom Ginsburg eds., 2014).

⁶³ Chen, *supra* note 58, at 263.

The idea of judicial review is incompatible with Sino-traditions, which view the emperor as the sovereign who wields indivisible powers as mandated by heaven. It is incompatible with Marxist-Leninist theory, which vests ultimate power in the supreme will of the people as expressed through a people's congress, which wields legislative power and supervises the enforcement of the constitution. In Brunei, the sultan enjoys supreme executive authority and the constitution precludes judicial review over any of his acts or omissions, or those of his delegates.⁶⁴

Judicial review has been able to take root in post-authoritarian Asian states with specialist constitutional courts facilitating and consolidating the transition to democracy. Scholars describe “East Asian Constitutionalism” where courts in Japan, South Korea, and Taiwan adopted and operated review mechanisms. These courts helped end authoritarianism and ushered in constitutional democracies, with the help of strong economic development, competitive elections, and an active civil society.⁶⁵

Countries that have become mature democracies generally have strong institutions such as an independent and competent judiciary and bureaucracy, but the shift from autocratic rule to electoral democracy is not commonly accompanied by significant improvements in these and other institutions or the rule of law in the short and medium terms.⁶⁶

The Philippine Case

The Philippines adopted a US-inspired, US-approved Constitution in 1935.⁶⁷ On paper, constitutional law should have followed US jurisprudence. To an extent, the Philippine judiciary does resort to foreign jurisprudence but “only if no local law or jurisprudence exists to settle the controversy. And even then, it is only persuasive.”⁶⁸ The Supreme Court is not beguiled by

⁶⁴ Thio Li-ann, *Varieties of Constitutionalism in Asia*, 16 *ASIAN J. COMP. L.* 285, 291 (2021).

⁶⁵ *Id.* at 291–92.

⁶⁶ John Lee, *Understanding Authoritarian Resilience and Countering Autocracy Promotion in Asia*, 13 *ASIA POL'Y* 99, 113 (2018).

⁶⁷ For a history of the adoption and amendment of constitutions in the Philippines, see Dante Gatmaytan, *Constitutional Change as Suspect Projects: The Philippines*, 14 *J. COMP. L.* 139 (2019).

⁶⁸ *Philippine Airlines, Inc. v. Ct. of Appeals*, G.R. No. 54470, 185 SCRA 110, 121, May 8, 1990. In an early case, the Supreme Court explained that:

[T]he body of the common law as known to Anglo-American jurisprudence is not in force in these Islands, “nor are the doctrines derived therefrom binding upon our courts, save only in so far

foreign jurisprudence, some of which are hardly applicable because they have been dictated by different constitutional settings and needs.⁶⁹

There are other reasons that might explain differences in the implementation of judicial review in the Philippines.

A recent study asserts that the “vestiges of imperial power—such as the durable US majority on the Filipino Supreme Court or the US Supreme Court’s right to hear appeals from the islands—were subtle safeguards that bounded the political development of the island.”⁷⁰ Foley writes that “[t]he Supreme Court of the Philippines was the cornerstone of US control, aiding in the legal transition and serving as a major judicial failsafe.”⁷¹ He continues:

Grafting US lawyers, laws, and legal structures onto the Philippines did not just allow Americans to better pursue their economic and military interests but also constituted an exercise of cultural power. By blending Spanish civil law and US common law, Filipino elites and their US patrons crafted a new legal meaning. Civil law takes legislation as its primary basis, whereas common law relies on the ongoing interpretation of courts and judges. By blending the two systems, the Supreme Court of the Philippines nested aspects of common law within preexisting civil law schemas [...] Because common law grants ongoing interpretation of courts and judges binding force, the transition to common law increased the power of US judges relative to the legislative and executive branches. It also imposed many of the prevailing norms and precedents of the

as they are founded on sound principles applicable to local conditions, and are not in conflict with existing law” (U. S. *vs.* Cuna, 12 Phil. Rep., 241); nevertheless many of the rules, principles, and doctrines of the common law have, to all intents and purposes, been imported into this jurisdiction, as a result of the enactment of new laws and the organization and establishment of new institutions by the Congress of the United States or under its authority; for it will be found that many of these laws can only be construed and applied with the aid of the common law from which they are derived, and that to breathe the breath of life into many of the institutions introduced in these Islands under American sovereignty recourse must be had to the rules, principles, and doctrines of the common law under whose protecting aegis the prototypes of these institutions had their birth.

See Alzua v. Johnson, 21 Phil. 308, 331 (1912).

⁶⁹ *Francisco*, 415 SCRA 44, 130.

⁷⁰ Timothy J. Foley, *The Judicial Failsafe: American Legal Colonialism in the Philippines*, 62 AM. J. LEGAL HIST. 1, 24 (2022), available at <https://doi.org/10.1093/ajlh/njac009>.

⁷¹ *Id.* at 12.

US Supreme Court onto the islands, enhancing US judicial authority.⁷²

Additionally, emerging research shows that informal networks based on loyalty, friendship, and patron-client ties “influence judicial appointments, professionalism on the bench, and even judicial decision-making” in the Philippines.⁷³

Judicial misconduct (anti-democratic behavior) can be attributed to improper incorporation of the institution into a colony. In the next part, I examine other cultural aspects that might have an impact on judicial behavior.

IV. AUTHORITARIANISM

To be clear, the Duterte regime is not the first time the Supreme Court favored the executive in its decisions. Judicial loyalty to the president was a feature of the Court during the Marcos era. Collusion with the strong executive has also marked the kind of performance the Philippine judiciary has over the years.⁷⁴ More bluntly, the Court served as a rubberstamp⁷⁵ of President Marcos, Sr.’s actions.

Bernas listed the legacy of martial law jurisprudence:

1. The martial law proclamation of 1972 had been validly made on the basis of an existing rebellion;
2. The imposition of martial law carried with it the suspension of the privilege of the writ of *habeas corpus*;
3. The martial law administrator could legislate on any matter related to the welfare of the nation;
4. The martial law administrator could create military tribunals and confer on them jurisdiction to try civilians for crimes related to the purpose of martial rule;

⁷² *Id.* at 13.

⁷³ Björn Dressel, *The Informal Dimension of Constitutional Politics in Asia: Insights from the Philippines and Indonesia*, in CONSTITUTIONAL COURTS IN ASIA: A COMPARATIVE PERSPECTIVE 60, 84 (Albert H.Y. Chen & Andrew Harding eds., 2019).

⁷⁴ Teehankee & Calimbahin, *supra* note 49, at 100.

⁷⁵ Arthur Zich, *The Marcos Era*, 10 WILSON Q. 116, 121 (1986).

5. In the absence of any other operative constituent body, the martial law administrator could even propose amendments to the Constitution. All of the above, moreover, are confirmed by the broad grant of power found in Article XVII, Section 3(2) of the 1973 Constitution, which was itself ratified in a most unique manner;
6. Under martial law, claims of denial of a speedy trial were unavailing and the suspension of the privilege of the writ of *habeas corpus* also suspended the right to bail.⁷⁶

One assessment concluded that the Constitution was systematically mangled by the introduction of authoritarian mechanisms to perpetuate one person in power.⁷⁷

The Supreme Court's complicity and abandoning of Western democratic values by sanctioning authoritarian mechanisms had dire consequences on its reputation. Once an independent and coordinate body in government, the Court became subordinate to the executive. Long considered the guardian of the Constitution and the rights of citizens, as well as the ultimate arbiter of issues involving legitimacy, the Court was perceived as the legitimizer of constitutional authoritarianism and consequently lost public esteem. The Court validated, and thus legitimized, all the acts of the president as the administrator of martial law and decided many issues in favor of the government.⁷⁸

By the end of 1974, the Philippine judiciary was no longer in a position to provide any serious checks on the martial law regime. Until the end of the regime, the Supreme Court did not render a single decision that posed even a mild threat to Marcos's rule. Marcos, Sr. never had to use or threaten coercion on the judges, nor did he have to replace oppositionist judges. He had sufficient support in the Supreme Court in the early days of

⁷⁶ Joaquin G. Bernas, *From One-Man Rule to People Power*, 46 ATENEO L.J. 44, 56–7 (2001). Another author observed that the regime established under martial law was “a radical departure from the traditional limited and representative government which the Filipinos have known since the establishment of the Commonwealth in 1935. It is definitely not a representative government in the tradition of liberal democracy.” See Silverio Benny J. Tan, *The Philippines after the Lifting of Martial Law: A Lingering Authoritarianism*, 55 PHIL. L.J. 418, 434 (1980).

⁷⁷ Bernardo M. Villegas, *The Philippines in 1986: Democratic Reconstruction in the Post-Marcos Era*, 27 ASIAN SURV. 194, 202 (1987).

⁷⁸ Carolina G. Hernandez, *Constitutional Authoritarianism and the Prospects of Democracy in the Philippines*, 38 J. INT'L AFF., 243, 252 (1985).

martial law to ensure that key decisions did not go against him, even if the Court did not strongly endorse his crisis rule.⁷⁹

The dictatorship had a huge impact on the judiciary: In the words of the Supreme Court itself, “the many judicial problems spawned by extended authoritarian rule which effectively eroded judicial independence and self-respect will require plenty of time and determined efforts to cure.”⁸⁰

V. THE AQUINO INTERREGNUM

The first item in President Corazon Aquino’s political agenda was the dismantling of institutions used by her predecessor to govern the country under the 1973 Constitution. The new Constitution abandoned a unicameral parliament, and entrusted policymaking to a bicameral Congress generating high expectations that the new public policymaking apparatus would strengthen democracy and facilitate economic progress, political stability, social harmony, and tranquility.⁸¹

For a moment, the Philippines seemed to regain its footing as a democracy. “[T]he Philippines has embraced constitutionalism with a passion,”⁸² Pangalangan wrote in 2004. He added, “today constitutionalism and the rule of law tradition that it has fostered remain relevant as the non-negotiable, neutral framework for competing claims and powers.”⁸³

A 2014 study showed that the Supreme Court, aside from performing its usual functions, “has also played crucial roles in shaping the democratic and institutional set-up that eventually emerged.”⁸⁴

⁷⁹ Neal Tate, *Courts and Crisis Regimes: A Theory Sketch with Asian Case Studies*, 46 POL. RES. Q. 311, 327–28 (1993).

⁸⁰ *Animas v. Minister of the Ministry of National Defense*, G.R. No. 51747, 146 SCRA 406, 417, Dec. 29, 1986.

⁸¹ A.B. Villanueva, *Post-Marcos: The State of Philippine Politics and Democracy During the Aquino Regime, 1986–92*, 14 CONTEMP. SOUTHEAST ASIA 174, 176–77 (1992).

⁸² Raul C. Pangalangan, *The Philippine “People Power” Constitution, Rule of Law, and the Limits of Liberal Constitutionalism*, in ASIAN DISCOURSES OF RULE OF LAW 365, 375 (Randall Peerenboom ed., 2004).

⁸³ *Id.*

⁸⁴ Lucia Pellegrina, Laarni Escresa, & Nuno Garoupa, *Measuring Judicial Ideal Points in New Democracies: The Case of the Philippines*, 1 ASIAN J. L. SOC’Y 125, 129 (2014). The authors give the following examples: At the height of the two people’s uprisings or “people power,” it timely swore into oath Aquino and Arroyo as the presidents of the Philippines, immediately solving the issue of succession and legitimacy at the same time. Other important developments include: Chief Justice Hilario Davide presiding over the impeachment trial of Estrada when the Senate convened itself into an impeachment court; under Chief Justice Reynato Puno, the

This strengthening of the judiciary's independence and policymaking power has made the Philippine Supreme Court one of the most powerful courts in the world, from a formal legal standpoint. Some 10 years after the People Power Revolution, the Court appears to have regained the powerful and prestigious position it had had before martial law, despite, or perhaps because of, the nearly continuous turmoil that beset the Corazon Aquino presidency from 1986 to 1992 and which delayed the establishment of a stable democracy.⁸⁵

However, when the "third wave" reached its democratic peak in the mid-2000s, progress began to stall or even reverse quickly.⁸⁶

Duterte

This reacquisition of the Supreme Court's prestige lasted briefly.⁸⁷ The Court resumed churning out pro-executive decisions. The most prominent of these—all promulgated during Duterte's administration—are the following:

1. The Court sided with Duterte when the latter wanted the late Ferdinand Marcos, Sr. buried in a cemetery designated for heroes.⁸⁸

Court exercising its rule-making powers by promulgating the Rules on the Writ of *Amparo* and the Writ of *Habeas Data* in response to the extra-judicial killings and involuntary disappearances of journalists, leaders, and members of the left and progressive movement during the Arroyo government; the Court deciding on constitutional and key issues that involve the term extension or survival of the incumbent president (this happened under the Ramos administration in 1997 in *Santiago v. COMELEC*, G.R. No. 127325, 270 SCRA 106, Mar. 19, 1997 and under Arroyo's administration in 2006 in *Lambino v. COMELEC*, G.R. No. 174153, 505 SCRA 160, Oct. 25, 2006).

⁸⁵ *Id.*

⁸⁶ Rainer Einzenberger & Wolfram Schaffar, *The Political Economy of New Authoritarianism in Southeast Asia*, 11 AUSTRIAN J. OF SOUTHEAST ASIAN STUD. 1, 2 (2018).

⁸⁷ In one view, instead of being transformed into a catalyst for democratic deepening, "People Power" was unable to control the oligarchic elites and to reduce economic inequality. For the next decade, there was no majority party driven by ideology, ethnicity, or any other social cleavage that dominated the Philippine political arena. Just like its pre-martial law form, post-1986 democracy was defined by the personality of the president as the ultimate dispenser of patronage propped up by political clans and economic elites. See Dan Slater & Aries A. Arugay, *Polarizing Figures: Executive Power and Institutional Conflict in Asian Democracies*, 62 AM. BEHAV. SCI. 92, 99 (2018).

⁸⁸ *Ocampo v. Enriquez*, G.R. No. 225973, 835 SCRA 484, Aug. 8, 2017.

2. By a vote of 8-6, the Court granted the government's petition to cancel Chief Justice Maria Lourdes Sereno's appointment on the grounds of alleged violations in the appointment process.⁸⁹
3. The Court sided with the Duterte administration on every case involving the imposition of martial law, erasing virtually every constitutional safeguard in the 1987 Constitution.⁹⁰
4. The Court dismissed a petition that would have compelled Duterte to release his health records.⁹¹
5. The Court also threw out a challenge to Duterte's withdrawal from the Rome Statute on the ground that the petition had become moot.⁹²

The removal of Chief Justice Sereno "through a highly dubious legal maneuver" effectively cowed the courts.⁹³

Here lies the irony: The new, post-Marcos Constitution was designed to limit presidential powers, but in transferring more power to other branches of government, the unintended consequence is that the president remains powerful, but in a less transparent way.⁹⁴

The expansion of the Supreme Court's powers in 1987 as a check against the other branches of government created higher incentives for judicial capture. The data seems to confirm a general tendency for pro-administration voting on the Court from early stages. The incentives for the executive to set aside traditional rules and judicial qualifications in appointing members to the Court become heightened in the presence of political risks and uncertainty.

⁸⁹ Republic v. Sereno, G.R. No. 237428, May 11, 2018.

⁹⁰ Dante Gatmaytan, *Duterte, Judicial Deference, and Democratic Decay in the Philippines*, 28 ZEITSCHRIFT FÜR POLITIKWISSENSCHAFT 553 (2018). These cases are Lagman v. Medialdea, G.R. No. 231658, 829 SCRA 1, July 4, 2017; Padilla v. Congress, G.R. No. 231671, 832 SCRA 282, July 25, 2017; Lagman v. Pimentel III, G.R. No. 235935, 854 SCRA 184, Feb. 6, 2018; and Lagman v. Medialdea, G.R. No. 243522, Feb. 19, 2019.

⁹¹ De Leon v. Duterte, G.R. No. 252118, May 8, 2020.

⁹² Pangilinan v. Cayetano, G.R. No. 238875, Mar. 16, 2021.

⁹³ Mark R. Thompson, *Explaining Duterte's Rise and Rule: "Penal Populist" Leadership or a Structural Crisis of Oligarchic Democracy in the Philippines?*, 41 PHIL. POL. SCI. J. 5, 19 (2020).

⁹⁴ Desiree Desierto, *Judicial Independence: Evidence from the Philippine Supreme Court (1970–2003)*, in THE POLITICAL ECONOMY OF GOVERNANCE 41, 54 (2015).

VI. TRANSFORMATIVE CONSTITUTIONALISM

Judicial deference cannot be explained simply by pointing to the Philippines' colonial past. The third wave of democratization gave the Philippines an opportunity to rewrite the rules at a fundamental level, and it produced a transformative constitution.

Davis and Klare explain the South African example of a transformative constitution:

The South African Constitution is different—it is a transformative constitution. The “Constitution is a document committed to social transformation”, as the Constitutional Court (CC or the Court) has emphasized on many occasions.” The “Constitution has set itself the mission to transform society in the public and private spheres”. The Constitution of the Republic of South Africa, 1996 embraces an aspiration and an intention to realise in South Africa a democratic, egalitarian society committed to social justice and self-realisation opportunities for all. The text acknowledges that the new dispensation arose in a particular historical context and that the democracy it inaugurates and celebrates is permanently a work-in-progress, always looking forward, always subject to revision and improvement.⁹⁵

Transformative constitutionalism is a new concept in comparative law. The term is associated with the rise of activist tribunals in a number of Global South jurisdictions, and many of those who invoke transformative constitutionalism understand it as a counter-model to the Global North. With an optimistic belief in the power of courts to bring about change, it appears to many Southern scholars as a fresh approach, unburdened by the skepticism toward judicial intervention present in the United States and other Northern jurisdictions.⁹⁶

Transformative constitutionalism is the inducement of nationwide social change through peaceful political processes anchored in the law.⁹⁷

In South Africa, the constitutional court infused transformative constitutionalism and other concepts in the founding values of the

⁹⁵ Dennis M. Davis & Karl E. Klare, *Transformative Constitutionalism and the Common and Customary Law*, 26 S. AFR. J. HUM. RTS. 403, 404 (2010).

⁹⁶ Michaela Hailbronner, *Transformative Constitutionalism*, 65 AM. J. COMP. L. 527, 528 (2017).

⁹⁷ Felix Dube, *The South African Constitution as an instrument of doing what is just, right and fair*, 54 DIE SKRIFLIG 1, 4 (2020).

constitution, it being the judicial view that the function of the constitutional court is “to articulate the fundamental sense of justice and right shared by the whole nation as expressed in the text of the Constitution.”⁹⁸

The South African Constitution is an unmistakable departure from liberalism toward an “empowered” model of democracy.⁹⁹

Case law, by and large, set the road to a “more just, egalitarian, inclusive, and caring legal structure.”¹⁰⁰ “Tangible steps have been taken guided by the boldness and originality of the constitutional text and by the intellectual courage and imagination of some jurists. More than a few heroic judgements have been rendered, showing the capability of the courts to transform the common law.”¹⁰¹

The Philippines

The 1987 Philippine Constitution is a transformative constitution.¹⁰²

⁹⁸ *Id.* at 5.

⁹⁹ Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. HUM. RTS. 146, 152 (1998).

¹⁰⁰ Davis & Klare, *supra* note 95, at 509.

¹⁰¹ *Id.* Notwithstanding the aspirations for justice, right and fairness expressed in the preamble, the founding values, and the Bill of Rights, South Africa experiences unprecedented levels of injustice, wrong, and prejudice. The past two decades show that the Constitution is not unchallengeable but has many shortcomings that can only be addressed if South Africans acknowledge that the Constitution has limitations and that whereas it is the supreme law, it is not the *ultimate law*. Dube, *supra* note 97, at 5.

¹⁰² REYNATO S. PUNO, EQUAL DIGNITY & RESPECT: THE SUBSTANCE OF EQUAL PROTECTION AND SOCIAL JUSTICE 212 (Josephine Maribojoc ed., 2012). Puno writes:

The centrality and pervasiveness of the social justice and substantive equality imperative in the 1987 Constitution is evident in its infusion into the charter not just as a policy Declaration of Principles and State Policies in Article II and even as an entire Article on Social Justice and Human Rights in Article XIII. Social Justice is also a transformative equality principle underlying the fabric of these different aspects, among others, of our national and individual lives: the legislature which now gives space to sectoral representatives; the civil service with the guarantee of the right to self-organization of government employees; the military in ensuring care and benefits of war veterans; the economy with its declared goal to have “a more equitable distribution of opportunities, income, and wealth”; the system of taxation which should not only be uniform and equitable, but also progressive; and the exercise of suffrage with the provision for voting of persons with disabilities or who are illiterate without assistance from other people. The 1987 Constitution, compared to all the previous organic and fundamental laws of the country, saw a crescendo of social justice and substantive equality provisions, both in terms of number and strength[.] *Id.* at 213.

Chopra¹⁰³ outlined the changes introduced by the 1987 Constitution. Aside from the anti-authoritarian provisions, the influence of reformist forces can be seen in an array of provisions on social and economic welfare, rights, and equity:

Article II of the Constitution, the Declaration of Principles and State Policies, declares that 'the promotion of the general welfare' is necessary to enjoy the 'blessings of democracy'. It directs the state to 'guarantee full respect for human rights' and promote 'social justice'. The state is also enjoined to foster a 'just and dynamic social order' and reduce poverty through policies that 'provide adequate social services'. In addition, Article II requires the state to 'protect and promote' the right to health and the right to 'a balanced and healthful ecology'.

Article XIII, titled Social Justice and Human Rights, assigns further 'social justice' duties to the state. It requires the legislature to prioritize legislation that reduces 'social, economic and political inequalities'. The state is also obligated to guarantee a range of labour rights, ensure access to land for agricultural workers, protect the rights of subsistence fisherman to access marine and fishing resources and provide employment opportunities for the poor. In addition, Article XIII requires the state to provide the poor with 'decent housing and basic services', and prohibits evictions or house demolitions targeting the poor except 'in accordance with law' and in 'a just and humane manner'. Article XIII imposes policy-making obligations related to health as well. It asks the state to 'endeavor to make' essential goods, health and other social services available at affordable prices, particularly prioritizing the needs of the poor, the disabled, women and children.

Article XIV of the Constitution recognizes education as a right, requiring the state to 'protect and promote the right of all citizens to quality education'. This overreaching obligation is disaggregated into more specific duties. The state is required to establish and maintain a system of free public elementary and secondary education. It is also tasked with providing inclusive education for adults, persons with disabilities and out-of-school children. Article XIV recognizes the right of all Filipinos to select their profession or studies, noting that admission and academic requirements must be 'fair, reasonable and equitable'. Article XV obligates the state to 'defend' the right of children to 'proper care

¹⁰³ Chopra, *supra* note 18, at 314.

and nutrition’ and the ‘right of the family to a family living wage and income.’¹⁰⁴

Chopra concluded that transformative constitutional texts place difficult demands on the judiciary in relation to social and economic rights, pushing the judiciary to shift into unfamiliar domains. At the same time, institutional legitimacy—including legitimacy on questions of social and economic justice—requires judges to maintain a boundary between constitutional law and politics. These challenges are heightened by the combination of ambition and ambiguity in the 1987 Constitution. The Supreme Court has to negotiate a prior additional set of interpretive dilemmas before it embarks on enforcing social and economic rights. But, absent textual clarity, the Court’s engagement with social justice provisions in the Constitution remained inchoate and liminal. It asserted jurisdiction over these provisions but avoided meaningful elucidation.¹⁰⁵

Chopra focused on socio-economic rights, and this would not explain why power is reconcentrated in the executive branch.

My own view is that the transformative nature of the 1987 Constitution goes beyond socio-economic rights. It extends to all the anti-authoritarian provisions of the Constitution. The Supreme Court ought to resolve issues with a view to defeating creeping authoritarianism. The Court, however, has to grapple with its colonial moorings as discussed above, and Duterte’s populism.

VII. POPULISM

The Populists

Rodrigo Duterte has become the best-liked president in the post-Marcos Philippines, with four-fifths of Filipinos consistently expressing their support for him in opinion polls, not despite, but because of, his brutal war on drugs.¹⁰⁶ Duterte demonstrates the ability to convince his subjects that he continues to rule democratically despite autocratization.¹⁰⁷

¹⁰⁴ *Id.* at 314–15.

¹⁰⁵ *Id.* at 329–30.

¹⁰⁶ Mark R. Thompson, *Pushback After Backsliding? Unconstrained Executive Aggrandisement in the Philippines Versus Contested Military-Monarchical Rule in Thailand*, 28 *DEMOCRATIZATION* 124, 134 (2021).

¹⁰⁷ *Id.* at 135. Duterte made a deliberate effort to replace the liberal constitutional order with an illiberal model. Duterte targets dissent in independent media and the opposition

Duterte enjoys electoral support because he articulates the problems faced by the suffering public in their everyday lives and represents their misery in mainstream public spaces like politics. This suffering is mostly associated with the structural violence of poverty: from everyday physical insecurity due to prevalence of petty lawbreakers in their community to perennial economic deprivation.¹⁰⁸

Duterte also reflects the populist publics' demand to bring authenticity to Philippine politics to interrupt the country's hypocrisy-dominated politics. Authenticity is understood as a politician's transparency in terms of the details of both his or her public and private life; authenticity is also recognized as consistency in how a politician conducts himself or herself as a public official and as a private citizen.¹⁰⁹

Populist publics also vote for Duterte to overcome the perceived bureaucratic inertia. Duterte is seen by supporters as a representation of a persistent political will. For the populist publics, the persistence of political will is demonstrated when politicians are determined—in both capacity and willingness—to overcome all impediments, including legal challenges, just to be able to do their desired course of action. Populist publics demand that politicians refrain from using the complexity of the bureaucracy as an excuse. Rather, politicians should demonstrate that determined action can overcome bureaucratic inertia.¹¹⁰

Additionally, scholars have noted Filipinos' "populist attitudes." Regardless of the political leadership across different regimes, Filipinos have certain attitudinal dispositions such as supporting strong leaders with authoritarian political values.¹¹¹ The majority has emancipated itself from the liberal-democratic educated elite's claim to being the authority when it comes to determining what constitutes good government. The liberal-democratic discourse left its opponents voiceless by making illiberal alternatives taboo;

and shows little regard for the rule of law and institutional checks and balances. The politicized use of impeachment procedures and other legal processes against the Chief Justice of the Supreme Court and members of constitutional bodies has undermined the system of checks and balances and mechanisms of accountability. See IMELDA DEINLA & BJÖRN DRESSEL, INTRODUCTION: FROM AQUINO II TO DUTERTE: CHANGE, CONTINUITY—AND RUPTURE 27 (2019).

¹⁰⁸ Cleve V. Arguelles, "We are Rodrigo Duterte": *Dimensions of the Philippine Populist Publics' Vote*, 11 ASIAN POL. & POL'Y 417, 426 (2019).

¹⁰⁹ *Id.* at 428.

¹¹⁰ *Id.* at 430.

¹¹¹ Ronald A. Pernia, *Authoritarian Values and Institutional Trust: Theoretical Considerations and Evidence from the Philippines*, ASIAN J. COMP. POL. 1, 17 (2021).

they were declared morally inferior and in need of democratic enlightenment and education.¹¹²

Duterte's populism is a latent characteristic of the country's authoritarian political culture and illiberal values.¹¹³ His trust ratings show that the Philippines has entered into a new social contract with a strongman who expresses little regard for civil liberties, but who holds the promise of delivering peace and prosperity to all.¹¹⁴ Curato explains that there are demands for accountability by a public that questions whether the president is really looking out for them. They illustrate how support for Duterte is negotiated in everyday practice.¹¹⁵

The Middle Class

Duterte also appeals to the middle class.¹¹⁶

Garrido explains upper- and middle-class support for Duterte by equating it with a politics of discipline. Duterte developed a new way of thinking about the "problem" of democracy. As seen on the ground, the problem is not that institutions are weak but that valued institutions are actively contradicted by disvalued ones. Elites dominate politics but that people, including the poor and the middle class themselves, do not follow the rules. We are asked to see institutional contradiction as a moral dilemma, a conflict between the way things are done and the way they should be done.¹¹⁷

This raises questions about citizens' ambivalence about liberal democratic institutions such as civil liberties or the rule of law, putting into question their own capacity to understand the value of democracy.¹¹⁸

¹¹² PETER KREUZER, PEACE RESEARCH INSTITUTE FRANKFURT, A PATRON-STRONGMAN WHO DELIVERS: EXPLAINING ENDURING PUBLIC SUPPORT FOR PRESIDENT DUTERTE IN THE PHILIPPINES 25 (2020).

¹¹³ Ronald A. Pernia, *Human Rights in a Time of Populism: Philippines under Rodrigo Duterte*, 19 ASIA-PAC. SOC. SCI. REV. 56, 66 (2019)

¹¹⁴ Nicole Curato, *Toxic Democracy? The Philippines in 2018*, SOUTHEAST ASIAN AFF. 261, 263 (2019).

¹¹⁵ Nicole Curato, *The Power and Limits of Populism in the Philippines*, 117 CURRENT HISTORY 209, 213 (2018).

¹¹⁶ Sheila S. Coronel, *The Vigilante President: How Duterte's Brutal Populism Conquered the Philippines*, 98 FOREIGN AFF. 36, 42 (2019).

¹¹⁷ Marco Garrido, *Democracy as Disorder: Institutionalized Sources of Democratic Ambivalence Among the Upper and Middle Class in Manila*, 99 SOC. FORCES 1036, 1057 (2021).

¹¹⁸ Adele Webb, *Why are the Middle Class Misbehaving?: Exploring Democratic Ambivalence and Authoritarian Nostalgia*, 65 PHIL. SOCIO. REV. 77, 84 (2017).

This view is criticized, however, because it:

1. neglects the notion of the citizens in a given society as the constitutional creators of their own democracy;
2. imposes upon middle-class actors an idealized democratic imaginary, emphasizing how they should imagine democracy rather than paying attention to how they actually do; and
3. in so doing, obscures important dynamics and contradictions of power within a polity that might influence, shape, or constrain people's demand for democracy, and their evaluation of its legitimacy.¹¹⁹

One example of this approach is Professor Aries Arugay's observation that Duterte is identified as part of a cabal of populist strongmen bent on undermining the liberal foundations of democracy.¹²⁰ He added: "In Southeast Asia, the outcome of the 2019 elections further proved that democracy remains in deficit in the region. Almost all states in the region seem to be comfortable in suspending or sabotaging their own democratization processes."¹²¹

Arugay mistakenly measures, as I have on many occasions, Southeast Asian choices as a failure to live up to Western standards. His statements assume that Southeast Asia has strayed from the path to democratization.

Another example might be attitudes toward Myanmar's legal system. Myanmar inherited outdated English law that was hindering its economic development and the success of its democracy. The solution, some suggest, is working with the World Bank to implement projects to "address inadequate legal and judicial systems."¹²²

The suggested solution to Myanmar's problem is to upgrade skills to implement English law, not decolonizing the legal system. Klafter writes: "The international community should persuade Myanmar to prioritize reform

¹¹⁹ *Id.* at 84–85.

¹²⁰ Aries Arugay, *The 2019 Philippine Elections: Consolidating Power in an Eroding Democracy*, HEINRICH BÖLL STIFTUNG – SOUTHEAST ASIA, June 21, 2019, at <https://th.boell.org/en/2019/06/21/2019-philippine-elections-consolidating-power-eroding-democracy>.

¹²¹ *Id.*

¹²² Craig Evan Klafter, *Myanmar, Rule of Law, and an Imperfect Inheritance*, 44 FLETCHER FORUM WORLD AFF. 121, 131–32 (2020).

of its legal and judicial systems, and other former British colonies should work with the World Bank to help Myanmar determine effective reforms.”¹²³

The political role of the middle class is more significant. Ferdinand Marcos, Sr. drew much of his legitimacy from the educated middle stratum in the late 1960s and into the early 1970s, with the “New Society” and the concentration of power under martial law. In 2001, tens of thousands of middle-class citizens would again demand the removal of Joseph Estrada as president against the wishes of large sections of lower-class voters. Duterte’s popularity might more accurately be seen as a continuation of this contingent historical middle-class narrative.¹²⁴

The Filipino, one study shows, is constructed as a subject that cannot be trusted to use the freedom, democracy provides, correctly, or to stay within the bounds of behavior that is deserving of freedom. If the Philippines as a nation needs discipline, then an exercise of power that infringes on people’s full liberal rights is deemed legitimate and necessary for renewal.¹²⁵

Democratic ambivalence is a situated, negotiated response to the experience and observation of how democracy works. Furthermore, ambivalence provides a key insight into the dynamics of inclusion and exclusion, and the contradictions of power that are inherent within a democracy. Rather than a failed agency, or a kind of middle-class “misbehavior,” ambivalence is a warning sign that all is not well in contemporary democracies, including the Philippines.¹²⁶

VIII. ANALYSIS

Recent jurisprudence reconcentrates power in the executive branch. A review of literature shows that it makes little sense to compare the performance of a formal colony like the Philippines with its colonial mentors. The experience of former colonies—now separately and seriously studied—shows that post-colonial courts generally support the executive. In other words, the Philippine Supreme Court is not an aberration; it falls into a

¹²³ *Id.* at 132.

¹²⁴ Webb, *supra* note 118, at 86–87.

¹²⁵ *Id.* at 93.

¹²⁶ *Id.* at 98. For a study on the changing roles of the middle class in Philippine history, see Temario C. Rivera, *The Middle Class in Society and Politics*, in ROUTLEDGE HANDBOOK OF THE CONTEMPORARY PHILIPPINES 363–375 (Mark R. Thompson & Eric Vincent C. Batalla eds., 2018).

pattern—with few exceptions—that emerged from the experiences of former colonies.

As a former colony, the Supreme Court is expected to assist the executive branch in policy implementation.¹²⁷ What the Philippine experience shows is that, even without a formal dictatorship, the Court is easily able to ignore checks and balances. The president is stronger now, recast in a form close to the tribal leaders we followed before colonialism.

That the legal regime of former colonies barely resembles their colonizers' legal system is not new. But writing a post-Marcos constitution could not steer the Supreme Court away from reconcentrating power to the executive.

Going Native

The middle-class preference for strong leaders discussed earlier may be the same impulse that animated pre-colonial governance. I suggest that it reflects the manner Filipinos have always regarded their leaders.

Scott taught us decades ago that:

The datu's power stems from the willingness of his followers to render him respect and material and moral support, to accept and implement his decisions, and to obey and enforce his orders, and is limited by the consensus of his peers. Followers give their support in response to his ability and willingness to use his power on their behalf, to make material gifts or loans in times of crisis, and to provide legal and police protection and support against opponents. The datu's most frequent service is judicial—to resolve petty differences without violence, to render amicable-settlement decisions without recourse to formal courts that administer Islamic or customary law, or to augment his followers' military capacity to exact satisfaction from offenders in other communities. Failure to discharge such duties may result in the quiet withdrawal of cooperation and support, so that autocratic behavior on the part of any datu is the result rather than the cause of subservience on the part of others.¹²⁸

¹²⁷ Chen, *supra* note 58, at 252.

¹²⁸ See William Henry Scott, *Class Structure in the Unhispanized Philippines*, 27 PHIL. STUD. 137, 151 (1979). This excerpt suggests that the datu exercised vast powers, but was not *per se* autocratic. In another piece, Scott points out that “[a]ll the accounts list the datu's duties as twofold: to govern his people, and to lead them in war [...] and succor them in their struggle

From this quote we see that the datu was *not* a dictator. He can exercise authority only insofar as he enjoyed the people's support. Failure to discharge his duties can lead to a loss of this support. He is driven out of office, as it were.

Marcos, Sr. understood Filipino affinity toward authority and assumed the role of a tribal chief. McCoy tells us that, under his dictatorship, "the myth of Marcos as the reincarnation of ancient datu warrior chiefs merged with his larger vision of social re-construction."¹²⁹ Like the datu who ruled a community, or *barangay* (village), before the Spanish conquest, "so Marcos would, through constitutional authoritarianism, govern directly through local units now called *barangay*, thereby liberating the nation from its colonial past."¹³⁰

Marcos is depicted in various pieces of state-sponsored art as a sword-wielding pre-Hispanic datu, an indomitable warrior chief. Thus, Marcos sought legitimation from history as a reincarnation of *Malakas* (strong).¹³¹

Marcos also drilled the need for discipline of citizens with his slogan, "[s]*a ikaunlad ng bayan, disiplina ang kailangan*" (for the progress of the country, discipline is needed).¹³² Marcos typified the traditional leader imposing discipline as he governed, serving as the check on excesses under a democracy.

The strong and dominant leader is a legitimate traditional creature and one who presides over the nation, which is "one extended family, an organic whole in which everyone is a relative to everybody."¹³³ Marcos used these justifications of authoritarian action, using the image of himself and Imelda Marcos as parents and the citizens as their children who may need spanking if they were misbehaving.¹³⁴

and needs." See Willian Henry Scott, *Filipino Class Structure in the Sixteenth Century*, 28 PHIL. STUD. 142, 149 (1980).

¹²⁹ Alfred W. McCoy, *Philippine Commonwealth and Cult of Masculinity*, 48 PHIL. STUD. 315, 334 (2000).

¹³⁰ *Id.*

¹³¹ Mark M. Turner, *Authoritarian rule and the dilemma of legitimacy: The case of President Marcos of the Philippines*, 3 PAC. REV. 356 (1990).

¹³² See Joseph P. McCallus, *The Myths of the New Filipino: Philippine Government Propaganda During the Early Years of Martial Law*, 17 PHIL. Q. CULTURE & SOC'Y, 129, 144 (1989).

¹³³ Turner, *supra* note 131, at 353.

¹³⁴ *Id.*

Rodrigo Duterte followed suit. He appealed to those yearning for the reimposition of “discipline” in the spirit of Marcos.¹³⁵ His discourse on law and order, and on security—the discourse of *walang magulo* (no chaos or orderliness)—derives from his nostalgia for the Philippines’ previous regime of security made possible under the authoritarian rule of Marcos.¹³⁶ This was meant to intensify the present chaotic environment in the Philippines,¹³⁷ and led to his violent political management that presents a vision of orderliness.¹³⁸

Duterte promised to do “whatever it took to reverse rising crime rates, destroy the drug trade, reduce corruption, and rebuild the country’s infrastructure.”¹³⁹ He reflected the views of many Filipinos who had lost faith in conventional, sophisticated, and nuanced solutions. As a result, support for his unconventional leadership style continued.¹⁴⁰ He was the obvious choice for many Filipinos.

Our understanding of what a leader is may apply to the exercise of judicial review.

I invite the reader to extend the literature on the Filipino psyche as an explanation for judicial deference toward the executive. This provides an explanation for judicial behavior beyond loyalty to the appointing power or incompetence. Perhaps the Supreme Court is, like many of us, promoting democracy with a stronger executive, something that cannot be accomplished with a western interpretation of the separation of powers.

¹³⁵ Mark R. Thompson, *The Specter of Neo-Authoritarianism in the Philippines*, 115 CHINA & E. ASIA 220, 221 (2016).

¹³⁶ Soon Chuan Yean, *Social Memory and Philippine Electoral Politics*, 36 SOJOURN: J. SOC. ISSUES SE. ASIA 291, 308 (2021).

¹³⁷ *Id.* at 309.

¹³⁸ *Id.* at 310.

¹³⁹ Lee, *supra* note 66, at 112.

¹⁴⁰ *Id.*; Tigno, *supra* note 48, at 33.

CONCLUSION

*“[I]n every Filipino President
beats the heart of a tribal
chief.”¹⁴¹*

*“[I]f the Palace will give me the
go signal as Senate President
[...] we will overturn the
Veto.”¹⁴²*

If liberal constitutionalism is a play, our lead actor (the datu) is clearly miscast. His skillset is useless in a role which requires him to abide by, among many western values, the separation of powers. The audience, however, applauds and writes glowing reviews of his performance—he has made the character his own.

This deference toward the president cuts across institutions.

The comments of Senate President Vicente Sotto III, quoted above, is befuddling to students of law. Congress has the power to override a veto.¹⁴³ Yet, the head of the Senate is waiting for presidential blessing before Congress can exercise this check on the president. Sotto’s comment, however, may be justified as a manifestation of the Philippines’ pre-colonial deference to executive power.

Only 30 years after the ouster of Ferdinand Marcos, Sr., the Supreme Court exhibited extreme deference toward the president to the point of dismantling, through the exercise of judicial review, constitutional checks on the exercise of executive powers. The present Supreme Court is invigorating the strongman tradition in the Philippines.

Like in many former colonies, in the Philippines, when measured against the record of its colonial forebears, the Supreme Court falls short of expectations. The Philippines belongs to another tradition: former colonies coping with or operating within alien legal systems.

¹⁴¹ ONOFRE D. CORPUZ, *THE ROOTS OF THE FILIPINO NATION* 572–73 (1989).

¹⁴² Christia Marie Ramos, *Senate to overturn ‘endo’ bill veto if Palace gives its go-signal*, INQUIRER.NET, Apr. 11, 2022, available at <https://newsinfo.inquirer.net/1581611/senate-to-overturn-endo-bill-veto-if-palace-gives-its-go-signal-sotto>.

¹⁴³ CONST. art. VI, § 27(1).

The Philippines' history of experience with colonialism is not the only reason the executive is resurgent. The affinity toward authoritarianism might play a significant role on the Supreme Court.

The Philippine case can explain this deference as a product of failed legal transfer coupled with deeply embedded cultural and historical support for a strongman. The pre-colonial tribal chief—now the president (the mayoralty writ large)¹⁴⁴—is accorded the same space to act for the benefit of his followers.

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¹⁴⁴ Coronel, *supra* note 116, at 42.

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