

JUDICIAL REVIEW: *QUO VADIS?*

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Next year, we expect the move to amend or revise our 1987 Constitution to gain momentum. The farthest foresight cannot provide us with any authoritative view on whether the move will really take off and fly. We are currently confronted by a financial time bomb and defusing it is the first of our priorities. The threatening financial crisis should not, however, metastasize our minds on how we should readjust our Constitution to make it more attuned to the needs of the fast changing times. The pressing need to give our Constitution a hostile look is now beyond argument. Even a nodding acquaintance with the ebb and flow of our history will inform us that we have not promulgated any of our Constitutions under the best of circumstances.

The 1899 Malolos Constitution, which was preceded by no less than nine organic documents¹ in six years, was drafted amidst a war between Spain and the United States. The Philippines was caught in the middle, but

* Speech delivered on the 43rd Anniversary of the Philippine Constitution Association (PHILCONSA), September 27, 2004 at Manila Polo Club. This article continues Volume 79's judicial review discussion. Vicente V. Mendoza, *Implementing an Effective Certiorari Jurisdiction*, 79 PHIL. L.J. 27, (2004); Franklin Drilon, *Judging Congress*, 79 PHIL. L.J. 35 (2004); Oscar Franklin Tan, *The 2004 Canvass: It is Emphatically the Province and Duty of Congress to Say What Congress Is*, 79 PHIL. L.J. 39 (2004); Artemio Panganiban, *Judicial Activism in the Philippines*, 79 PHIL. L.J. 265 (2004).

Cite as Reynato Puno, *Judicial Review: Quo Vadis?*, 79 PHIL. L.J. 249, (page cited) (2004).

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¹ Namely, Mabini's Constitutional Programme of the Philippine Republic (June 1898); the Organic Decree of June 23, 1898; Paterno's Autonomous Scheme of Government (June 19, 1898); Aguinaldo's Proclamation on May 24, 1898; the Ponce Constitution (April 1898); the Makabulos Constitution (April 17, 1898); Jacinto's *Pagkatatag ng Pamahalaan sa Hukuman ng Silangan* (February 1898); the 1897 Biak-na-Bato Constitution; the Evangelista Constitution (December, 1896); and the Katipunan Constitution (1892).

worse, during a struggle for independence between warring Filipino independence fighters. Due to the difficulty of travel and the unsettled condition of the times, as war was raging on in some parts of the country, provisional delegates to the Malolos Convention had to be replaced by permanent delegates and out of the original plan to elect 110 delegates, only 85 made it. Manila was under the complete control of American military authorities led by Gen. Wesley Merritt, Military Governor of the Philippines, and Spain was about to cede the Philippines to the United States while furious debates persisted at the Malolos Congress. When the Malolos Constitution drafted by Felipe Calderon was approved by the Congress and forwarded to President Aguinaldo for executive approval,² Apolinario Mabini advised President Aguinaldo to veto it on the ground that, among others, it was not appropriate to adopt a constitution during troubled times. Indeed, a day before President Aguinaldo proclaimed the Malolos Constitution as the fundamental law of the land, United States President McKinley had just appointed the First Philippine Commission or the Schurman Commission to investigate the war-ravaged Philippines and submit recommendations for its reconstruction.³ Needless to state, the Philippines at that time was not a free and independent nation.

The 1935 Constitution was drafted under no different circumstances. I need only to quote the musings of your President Emeritus, former Vice President and brilliant constitutionalist Arturo M. Tolentino, on the 1935 Constitution, *viz*:

How did the Constitution come into being? It started by a law enacted by the American Congress, the so-called Tydings-McDuffie Law, providing for Philippine independence after a transition period, and authorizing the Filipinos to adopt a constitution. In other words, the legal basis for the adoption of the Philippine Constitution was not the free sovereign will of the Filipino people. It was the will of the American Congress expressed in the Tydings-McDuffie Law authorizing the Filipino people to adopt a constitution. The source of authority of that constitution was not the Filipino people themselves. It was the American Congress.

² Three versions were considered by the Malolos Convention: one submitted by Felipe Calderon, the other by Apolinario Mabini, and the third by Pedro Paterno.

³ GREGORIO ZAIDE, PHILIPPINE CONSTITUTIONAL HISTORY AND CONSTITUTIONS OF MODERN NATIONS (1970); Roberto Regala, *The Malolos Congress, the 1934 Constitutional Convention and the 1971 Constitutional Convention*, THE DEFENDER, Jul. 1969, at 13.

It would, perhaps not have been so bad from this aspect of the legal basis of the Constitution if the American Congress had just said, "Filipinos, you may adopt a Constitution." But no. The Tydings-McDuffie Law went a little bit further. It provided that the constitution to be adopted must comply with certain enumerated requirements which must be embodied in the constitution of the Philippines.

Where would you find a constitution of a sovereign people where some other people dictate that certain terms or provisions must be contained in that constitution? From this point of view, or from the legal basis of the Constitution, I would dare say that the Malolos Constitution was more of an act of a sovereign people than our present Constitution.

But that was not enough. The Tydings-McDuffie Law further said: "After your constitution shall have been adopted in convention, it shall be submitted to the President of the United States for his approval before it can be submitted to a plebiscite by the Filipino people." And that requirement was followed.

How could we contend or claim with this background, that we, who now constitute a sovereign state, have a Constitution that has for its legal basis the sovereign will, the unfettered sovereign will, of the Filipino people? We cannot, because without that enabling Act from the American Congress, we could not have even called the convention that drafted our Constitution.

Of course, the Constitution that was drafted, as has been said, is one of the best constitutions produced in a convention. But that does not do away with the fact that its legal source is not the spontaneous free sovereign will of the Filipino people.⁴

The 1973 Constitution has its share of foibles. The '60s was marked by turmoil and turbulence. There were aboveground movements assailing traditional processes but the underground groups were pressing for an armed revolution.

On March 16, 1967, the Philippine Congress passed Resolution No. 2, (later amended on June 17, 1969, by Resolution No. 4) calling for a convention to propose amendments to the 1935 Charter. On November 20, 1970, the delegates to the Convention were elected and on June 1, 1971, they began their work. Before the Constitutional Convention could finish its

⁴ Arturo Tolentino, *The Importance of a Constitutional Convention*, THE DEFENDER, Feb. 1968, at 8.

work, Proc. No. 1081 was issued on September 21, 1972, placing the entire country under martial rule. Some delegates were detained, others went into hiding or voluntary exile, and the remaining delegates continued their deliberation in a climate of uncertainty. On November 29, 1972, the Convention approved the Proposed Constitution of the Republic of the Philippines. Pres. Dec. No. 73 was then issued "submitting to the Filipino people for ratification or rejection" the proposed Constitution, and set the date for the plebiscite for January 15, 1973. But on January 7, 1973, General Order No. 20 was issued directing "the plebiscite scheduled to be held on January 15, 1973, be postponed until further notice." Meanwhile, Citizens Assemblies were organized pursuant to Pres. Dec. No. 86, and were later asked if they approved of the New Constitution. Thereafter, Proc. No. 1102 was issued declaring that the proposed Constitution has been ratified by an overwhelming vote of the members of the Citizens Assemblies. Martial law and the unorthodox ratification of the 1973 Constitution severely affected its integrity.

The 1987 Constitution similarly saw the light of day under turbulent times. On February 15, 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 February 22, 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 the opposition candidate, Mrs. Corazon C. Aquino. They sparked a People Power revolution that toppled down the government of President Marcos. On February 25, 1986, in defiance of the 1973 Constitution, Mrs. Aquino was proclaimed President of the Republic.

President Aquino immediately assumed power and set aside the 1973 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 June 1, 1986, the Constitutional Commission, with all its members appointed by President Aquino, convened. Within four months and a half, or on October 15, 1986, it finished its task. On February 2, 1987, a plebiscite was held and the proposed Constitution was ratified by the people. Verily, the 1987 Constitution 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.

In sum, all our Constitutions were enacted in an atmosphere far from ideal. I join the voices that tell us that the time to review our Constitution is now. The time is better for we are no longer under any foreign power; no longer under an authoritarian regime; no longer when the embers of rage rule our hearts and minds. The time is now for the galloping forces of globalization and technology are fast changing our landscape, and to standstill is not an option. I submit that in reviewing our Constitution, the power of judicial review should be revisited.

I. ORIGIN OF JUDICIAL REVIEW

It is difficult to divine the origin of judicial review. Legal historians, however, traced its roots to Greece. In ancient Greece, the *ecclesia* was the popular legislative assembly. Athenian law was of two kinds: the *nomos*, the higher law, which was concerned with the organization of the State, and the *psephisma*, the lower law which dealt with lesser matters. They followed the principle that a *psephisma* cannot conflict with the *nomos*. If it did, the *psephisma* was considered void. They made it difficult to violate the higher law. The proponent of a *psephisma* that violated the *nomos* was made criminally liable. The Greeks therefore conceived of a higher law which cannot be changed, and a lesser law, which is not beyond change.

This idea attracted the early major philosophers. Plato enthusiastically taught that law should reflect the divine order of things and should not be subject to the changing interests of men. In chorus, Aristotle opined that laws were norms above human passions. Similarly, Roman jurisprudence recognized "one eternal and unchangeable law binding all nations through all time ..."

This Greco-Roman conception of a higher law which ought not to be changed gained considerable support in the Middle Ages, although it was given a theological spin. According to Aquinas, natural law was a *lex* of divine origin to which all other norms are subject. Medieval theory of law therefore distinguished between two types of norms: *jus naturale* which was superior and inviolable, and *jus positivum* which was valid only if in accord with *jus naturale*. In time, natural law theory was challenged by legal positivism which, in essence, recognized the superiority of positive law. I allude to the struggle between natural law and positive law because it provides the broad background in understanding the emergence of the power to review acts of parliament and acts of government which hitherto were beyond question.

II. JUDICIAL REVIEW IN ENGLAND

Prescinding from this brief background, let us fast-track the evolution of judicial review. First, let us study the power of courts to review the validity of laws in a parliamentary government. The classic parliamentary model is the Westminster model or the British model. The Westminster model teaches us the doctrine of "sovereignty of parliament." Dicey is credited with giving the doctrine of "sovereignty of parliament" its classic formulation. According to Dicey, "sovereignty of parliament" means "that Parliament . . . has the right to make and unmake any law whatsoever; and further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament."⁵

The implications of this doctrine of "sovereignty of parliament" on the power of judicial review are far-ranging. First, it does not recognize any "higher law" (namely, a Constitution) which could affect the validity of an Act of Parliament. Hence, even such basic document as the Magna Carta of 1215 can be modified or repealed by an Act of Parliament. In *Chester v. Bates*,⁶ the Magna Carta was described as similar to every other law of England and not beyond change. In the language of the case "it is not condemned to that immunity from development or improvement which was attributed to the laws of the Medes and the Persians." Second, the doctrine of "sovereignty of parliament" means that an Act of Parliament cannot be invalidated by courts even if parliament failed to observe its procedures for enacting laws. The case law states that it is for the parliament to correct the law, not the courts whose power is merely to apply the law. Third, the doctrine of "sovereignty of parliament" bars courts from examining whether a law violates international law. The unbending rule is that an Act of Parliament cannot be *ultra vires*.

III. JUDICIAL REVIEW IN THE UNITED STATES

Contrasted with the British model (the parliamentary model) enthroneing the "sovereignty of parliament," the American model (constitutional model) champions the supremacy of the rule of law. In a constitutional model, the parliament is not sovereign for its laws can be struck down if they violate the Constitution (a higher law), and questions of

⁵ ALBERT VENN DICEY, *THE LAW OF THE CONSTITUTION* (1885). Only a few systems remain without constitutional judicial review: they are, among others, Great Britain and the Netherlands in Europe, and Lesotho, Liberia, and Libya in Africa.

⁶ 1 KB 829 (1920).

violation are resolved not by the parliament but by a judicial body. The constitutional model elevates the courts from a position of powerlessness to power *vis-à-vis* its relationship with congress and the executive. In the extreme view of Chief Justice Charles Evans Hughes of the United States, "[T]he Constitution is what the judges say it is."⁷ Hughes' view, given when he was still the governor of New York, is of course overstated.

Today, the United States Supreme Court is conceded to be a powerful court of law. It is a far cry from the notion of Alexander Hamilton who described it in his *Federalist Paper No. 78* as "the least dangerous branch of government" as it has "neither force nor will, but merely judgment."⁸ Perhaps, this will explain the inauspicious start of the American Court. The vignettes of history tell us that on September 24, 1789, President George Washington started naming the members of the Court. One of his nominees refused to serve, another resigned within two years. During the next few years, others declined to serve and several justices regularly absented themselves from sessions of the Court. When the Court met for the first time on February 1, 1790, only three justices were present. The lack of quorum did not present any problem because they had no case to decide. The records show that the Court had hardly any case to decide during the first three years of its existence. How different is the United States Court today! Professor Alexander Bickel well noted that "the least dangerous branch of the American government is the most extraordinary powerful court of law the world has ever known."⁹

⁷ New York Governor, later Chief Justice, Charles Evans Hughes, Address at Elmira, New York, May 3, 1907.

⁸ ALEXANDER HAMILTON, *The Federalist No. 78* ("The Judiciary Department"), in 43 GREAT BOOKS OF THE WESTERN WORLD 230 (Encyclopedia Britannica, Inc., Maynard Hutchins ed. 1982).

⁹ See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1986). See also Alexander Bickel, *The Supreme Court 1960 Term Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961). This system has been adopted by the following countries: Denmark, Estonia, Ireland, Norway, Sweden (in Europe), Botswana, Gambia, Ghana, Guinea, Kenya, Malawi, Namibia, Nigeria, the Seychelles, Sierra Leone, Swaziland, Tanzania (in Africa), Iran, Israel (in the Middle East), Bangladesh, Fiji, Hong Kong (until July 1, 1997), India, Japan, Kiribati, Malaysia, the Federal States of Micronesia, Nauru, Nepal, New Zealand, Palau, Papua New Guinea, Philippines, Singapore, Tibet, Tonga, Tuvalu, Vanuatu, Western Samoa (in Asia), Canada, the United States of America (in North America), Argentina, Bahamas, Barbados, Belize, Bolivia, Dominica, Dominican Republic, Grenada, Guyana, Haiti, Jamaica, St. Christopher/Nevis, Trinidad and Tobago (in Central and South America).

IV. THE HYBRIDS

THE GERMAN AND FRENCH MODELS

The British parliamentary model and its opposite, the American constitutional model bred hybrids. The most significant of them are the German and French models.

A. THE GERMAN MODEL

In 1949, Germany adopted its Basic Law. A parliamentary system was put in place but the parliament was not a xerox copy of the British parliament. Legislative and executive powers were fused in the parliament, but it did not have the unlimited powers of its British counterpart. The position of chancellor was strengthened, and the limits of the parliament's power to delegate its lawmaking authority were strictly defined. It also partly broke away from the British system where judicial review of acts of parliament is nonexistent. Instead, it adopted a system where acts of parliament can be reviewed and set aside by courts. Even then, it did not fully adopt the American system of judicial review. The power of review was given to a different kind of court – the constitutional court – which is not identical to the Supreme Court of the United States.¹⁰

B. THE FRENCH MODEL

Similarly, the French model does not strictly follow any model. It has its own distinct design undoubtedly dictated by its different political

¹⁰ ARNE MAVCIC & GAGIK HARUTYUNAN, CONSTITUTIONAL REVIEW AND ITS DEVELOPMENT IN THE MODERN WORLD: A COMPARATIVE CONSTITUTIONAL ANALYSIS (1999) *available at*

<http://www.concourt.am/Books/harutunyan/monogr3/ch1p2.htm>. A constitutional court is defined as "a special body that as the bearer of the protection of constitutionality holds certain legal superiority in relation to other branches of power. Its review covers all legislative acts that are the highest legal instruments of a specific legal and political system. The status of a true institution with the power to provide constitutional review should only be held by the institution that in the specific system of separation of powers holds such a limiting relation to the legislative power that it may annul statutes adopted by the legislative body. It is a judicial institution established in view of special and exclusive decision-making powers on constitutional matters. This institution is located outside the ordinary court system and is fully independent of other branches of public authorities."

history. As we know, the 1958 Constitution set up France's Fifth Republic. It established a parliament, but not a parliament with illimitable powers. It allowed a President directly elected by the people, which was unusual in a classic parliamentary system. As the President has a direct mandate from the people, his office is not merely ceremonial. He wields on his own distinct powers especially in times of crisis. France's bias towards strong heads of government can be traced to the glory days of Napoleon Bonaparte and Charles de Gaulle. The 1958 Constitution of France is different from the Basic Law of Germany in a very significant aspect. It does not enumerate rights and freedoms like the Basic Law of Germany or the American Bill of Rights. The 1958 Constitution of France also introduced scrutiny of the compatibility of statutes with the Constitution. The power is given to a Constitutional Council. However, the power of the Constitutional Council is different from the Constitutional Court of Germany or the United States Supreme Court. The Council scrutinizes the compatibility of statutes with the Constitution before its official promulgation. In other words, its power is not a review but a preview of a statute before its promulgation. Under this system, private citizens hardly have any access to the Council.¹¹

V. JUDICIAL REVIEW IN THE PHILIPPINES

I now come to our history of judicial review which should be fairly familiar to all students of Constitutional law and I need not discuss it extensively.

The distribution of powers under the 1935 Constitution followed the American model. The three branches of government were supposed to be on even balance, and the point of the balance rests on the negative principle that tyranny should not be allowed to rule any one branch. Tyranny is to be prevented by disallowing any branch to overwhelm another through excessive power. In this scheme, the judiciary was given the power to review laws enacted by Congress as well as acts of the executive and set them aside when they infringe the Constitution. But even while the power of judicial review is awesome, there were controls to assure that its exercise would not result in judicial tyranny. One of these controls is the use of the political question doctrine which bars the judiciary from intervening in issues whose resolution is lodged by the Constitution in the hands of either the executive, the legislative or the people themselves. In deft and definite strokes, Mr.

¹¹ This system has been adopted in France (in Europe), Algeria, Comoros, Djibouti, Ivory Coast, Morocco, and Mozambique (in Africa).

Justice Jose P. Laurel in *Angara v. Electoral Commission*¹² drew the parameters of the power of judicial review as limited by the political question doctrine. We followed the *Angara* ruling with faith, and for a time we had no disquietude in the relationship between and among the three branches of government.

This serenity was not to last long. The serendipity of the 1935 Constitution was tested by the tumult of the '60s and the '70s. The writ of *habeas corpus* was suspended and when that remedy proved inadequate, President Marcos wielded the state's ultimate weapon by declaring martial law. The President's exercise of his commander-in-chief powers distorted the distribution and balance of state powers. The legislature was shut down; the executive became the dominant branch of government; and the exercise of certain political and civil rights was diminished. The rearrangement of powers and its effects on individual rights brought to the limelight the judiciary and its power of judicial review. Demand was made for the Highest Court of the land to exercise its power of review, to set aside the presidential proclamation of martial law, and to void the 1973 Constitution's ratification. It is difficult to imagine a more momentous case that ever confronted the High Court. We do not need hyperactive minds to imagine its life and death implications. In any event, the High Court decided these cases by following the traditional and prudential path in constitutional litigations. It declined to strike down the acts of the Chief Executive and the ratification by the people of the 1973 Constitution on the ground that they constitute political questions.

Thus, the President continued to be the dominant force in the legal landscape. Under Amendment No. 1 of the 1973 Constitution, the president was further given the unusual power to make laws. Congress abdicated its lawmaking powers, the first time legislative power was surrendered to the executive. With the legislative and executive powers concentrated in the presidency, the judiciary became more passive in the exercise of its power of review. There was more resort to the doctrine of political question to justify non-interference in acts of government.

Soon, the volume and velocity of the problems that confronted the Marcos government reached a disturbing level. This is neither the place to discuss the root and branches of these hydra-headed problems nor is this the time to pass judgment on the wisdom of their solutions adopted by the Marcos government. That judgment can be given more fairly by posterity,

¹² 63 Phil. 139 (1936).

when the neutrality of time can endow the chroniclers of history with a 20-20 vision. Be that as it may, judicial control of government wrongdoings weakened, proving to be critical to the administration's fate. The passivity with which the power of judicial review was wielded by the courts drove those who sought grievance for their complaints to take to the streets. Street sovereignty reigned over the sovereignty of the parliament; the people's tribunal determined what the rule of law ought to be and not the courts of justice. In the end, people power settled the issues which the courts declined to resolve. In fine, the people gave the problem its political solution after a passive court refused to intervene.

We now have the 1987 Constitution, the product of a people's revolution. It established a strong judiciary, one that can be activist if it wanted to. The judiciary was given extra strength by expanding the definition of judicial power. Art. VIII, §1 of the 1987 Constitution, reads: "Judicial power includes the duty of courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the government." The author of this expanded definition of judicial power is no less than Chief Justice Roberto Concepcion, a Commissioner of the Constitutional Commission. He explained its rationale as follows:

[T]his is actually a product of our experience during martial law ... [t]he role of the judiciary during the deposed regime was marred considerably by the circumstance that in a number of cases against the government, which then had no legal defense at all, the Solicitor General set up the defense of political question and got away with it. As a consequence, certain principles concerning particularly the writ of *habeas corpus* ... and other matters related to the operation and effect of martial law failed because the government set up the defense of political question ... The Committee on the Judiciary feels that this was not a proper solution to the question involved. It did not merely request an encroachment upon the rights of the people, but it, in effect, encouraged further violations thereof during the martial law regime.

[B]riefly stated, courts of justice determine the limits of power of the agencies and offices of the government as well as those of its officers. In other words, the judiciary is the final arbiter on the question whether or not a branch of government or any of its officials has acted without jurisdiction or in excess of jurisdiction, or so capriciously as to constitute an abuse of discretion amounting to

excess of jurisdiction or lack of jurisdiction. This is not only a judicial power but a duty to pass judgment on matters of this nature . . . [this] means that the courts cannot hereafter evade the duty to settle matters of this nature, by claiming that such matters constitute a political question.¹³

This expanded definition catapulted the judiciary to new heights of power. Among other effects, the doctrine of political question which restrained the judiciary's checking powers, was considerably emasculated. The clear picture that leaps out of the 1987 constitutional canvass is a restored legislature, a less potent president, a more powerful court, and a more participatory people.

Sadly, the rebalancing of state powers in the 1987 Constitution did not solve our problems. On the contrary, the resort to people power to resolve national and local political conflicts, and the active use of the power of judicial review to check the political branches' abuses have raised new and serious concerns. Thus, there is a concordance of calls for reexamination of the balance of powers fixed in the 1987 Constitution. On the trestle board as a priority is the call to redraw the latitude and the longitude of the power of judicial review.

THE FUTURE OF JUDICIAL REVIEW

What are our options? As I said, there are various competing models. On one pole is the Westminster model, where the supremacy of the parliament precludes judicial review of its laws. This model in its pure form hardly commands any significant following today.¹⁴ Even in England, the doctrine of "sovereignty of parliament" has been considerably diluted. With its membership in the European Union, the British Parliament has to follow the regulations, directives, and decisions of the European Council, the European Commission, and the European Court of Human Rights. Moreover, there is the trend where decisions of great constitutional impact are submitted not to the parliament but to the people by referendum. A good example is the issue of British membership to the European Union, which was decided by referendum. Likewise, record shows how some parliaments in Europe failed to protect the civil rights of the people. The most notorious example was Nazi Germany, where the parliament's unfettered delegation of legislative power enabled Hitler to assume

¹³ I RECORD OF THE CONSTITUTIONAL COMMISSION 434-36 (1986).

¹⁴ See *supra* note 5.

dictatorial powers and inflict untold sufferings on the whole mankind. Indeed, the reputation and record of parliaments as protectors of human rights have declined in many parts of the world.

On the opposite pole is the American model. The contribution of its Supreme Court to the development of the rule of law is beyond argument. Even then, the question of whether courts should be conservative or activist continues to be a hot button issue. The question has revived criticisms of the undemocratic character of judicial review. According to Professor Bickel, "when the court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now, it exercised control, not in behalf of the prevailing majority but against it."¹⁵ The contrary view is well articulated by Professor Choper, another distinguished legal scholar. He explained that "the overriding virtue and justification for vesting the Supreme Court with the awesome power of judicial review is to guard against governmental infringement of individual liberties secured by the Constitution." He contends that the task of safeguarding the Constitution should be given to the Supreme Court, 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 capable of achieving. Aside from this counter-majoritarian aspect of judicial review, scholars also debate the method of interpretation that should be used in deciphering the meaning of the Constitution. The methods are difficult to reconcile and we need not discuss them now.

As I said, there are hybrid models in between the British and American models. These hybrid models did not follow the no-review policy of the British but neither did they follow the judicial review doctrine of the Americans. Under these hybrid models, review of acts of parliament and acts of government is given to a specialized body generally known as Constitutional Court.¹⁶ The Constitutional Court made its maiden appearance in the 1920 Constitution of Austria which was drafted by the great Hans Kelsen.¹⁷ The Constitutional Court originally conceptualized by

¹⁵ BICKEL, *supra* note 9.

¹⁶ See *supra* note 9.

¹⁷ Lee Epstein et al, *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 45 LAW & SOC. REV. 362 (2001). Epstein et al.

Kelsen has been adopted in many countries but its form has been modified to suit the diversity of needs of people.¹⁸

I urge you to study these Constitutional Courts, especially their compositions and competencies, as we reexamine the balance of powers in our government. Some of them are composed not only of legal scholars but scholars from other disciplines, notably political science. This is in response to the need for judicial decisions to reflect the best not only in the field of law but the best in related fields of knowledge. It can well solve the phenomenon called judicialization of politics. For today, cases that reach the courts have far-ranging implications not only in law, but also in politics and economics and they can be decided only by those with multi-dimensional minds. Or consider the competency or jurisdiction of Constitutional Courts. Some of them have only a power known as preventive review of statutes of parliament. This is an *a priori* review or a preview given to laws before they

enumerated the essential differences between the American and the Austrian models: the American system is diffused, and as such, ordinary courts engage in judicial review and declare an act unconstitutional while the Austrian model is centralized since only a single court exercises judicial review while the others are typically barred from doing so; the American system can only exercise judicial review after an act has occurred or taken effect, while in the Austrian or European models the courts in certain jurisdictions have either *a priori* or *a posteriori* review or both over treaties and governmental acts; in the American system, courts can resolve only actual cases or controversies, i.e., after they have been filed in court while in the Austrian or European models, most constitutional courts can exercise review in the absence of an actual case or controversy; and finally, in the American model, only those who have legal standing or a personal or real stake in the outcome of the case can bring the suit, whereas in the Austrian or European systems, the range can be broad, from governmental actors, including executives and members of the legislature to individual citizens.

¹⁸ Bodies exercising constitutional review may be: *Constitutional Courts* (in Europe: Albania, Andorra, Austria, Belarus, the Federation of Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, the Federal Republic of Yugoslavia, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Macedonia, Malta, Moldavia, Poland, Romania, the Russian Federation, Slovakia, Slovenia, Spain, Turkey, and Ukraine; in Africa: Angola, Benin, Burundi, the Central African Republic, Egypt, Equatorial Guinea, Gabon, Madagascar, Mali, Rwanda, South Africa, and Togo; in the Middle East: Cyprus, former Iraq, Palestine, and Syria; in Asia: Armenia, Azerbaijan, Georgia, Kyrgyzstan, Mongolia, South Korea, Sri Lanka, Tajikistan, Thailand, and Uzbekistan; in Central and South America: Chile, Surinam, and Tucuman Province in Argentina), *High Courts or their Special Chambers* (in Europe: Belgium, Iceland, Liechtenstein, Monaco, and Kosovo; in the Middle East: Yemen; in Africa: Burkina Faso, Cameroon, Chad, Eritrea, Niger, Sudan, Uganda, Zaire, and Zambia; in Central and South America: Costa Rica, Nicaragua, Panama, Paraguay, and Uruguay), or *Constitutional Councils* (in the Middle East: Lebanon; in Africa: Mauritania and Senegal; in Asia: Cambodia and Kazakhstan).

are finally promulgated. It is part of their consultative function to help parliament avoid the enactment of unconstitutional laws.¹⁹ This is entirely different from our system of repressive review or the posterior review which is done only after an act has been taken by either Congress or the Executive. Our courts do not give advisory opinions on constitutional matters to the legislature or the executive. The obvious advantage of the system followed by Constitutional Courts with preview powers is that it avoids the destructive deadlocks and showdowns between the judiciary and other departments of government and the devastating effects of decisions annulling acts of co-equal branches of government. It may interest you to know that in Southeast Asia, we are the only country that has not adopted the Constitutional Court Model.

Our task is to meticulously study all these models as we search for the model that will respond to our own problems. It is a difficult time for the judiciary but I take comfort in the following words of Professor Aharon Barak, the President of the Supreme Court of Israel:

[T]he duty of a judge is to protect the individual from abusive state action, and to contribute to the meaning of citizenship and civil entitlement. In performing this duty, the court must, inevitably, be in conflict with the other branches, especially so in modern times where more and more political questions present themselves as legal questions, and are brought to be adjudicated before the courts, and especially so where the scope of judicial review over the other branches is wider than in the past. A wider judicial review carries with it wider interest in the courts, and widening tension between the court and the other branches of government. If there will be no conflict and no tension, the court will not be fulfilling its constitutional role. Thus, criticism there will always be. Judges will always be attacked by politicians and the sectors of the public that are unhappy with the court's decisions. The attack may focus on trends (too much activism; too much restraint). The attack may be polite; the attacks may be brutal and sometimes even violent. They may, consciously or unconsciously, erode the legitimacy of the court. They may affect the independence of the judiciary.

¹⁹ Constitutional Courts vary among themselves along the following dimensions, among others: the range of their jurisdiction and powers, the parties who have access to those courts, the mode of appointment of judges to them, the tenure of the judges, the effect of judicial declarations on unconstitutionality, and the ease or difficulty of reversing Constitutional Court decisions.

I see my role as judge as a mission. Judging is not merely a job. It is a way of life. An old *Talmudic* saying regarding judges is the following:

You would think that I am granting you power?
It is slavery that I am imposing upon you.

But it is an odd sort of slavery, where the purpose is to serve liberty, dignity and justice; liberty to the spirit of the human being; dignity and equality to everyone; justice to the individual and to the community. This is the promise which accompanies me to the courtroom daily. *As I sit at trial, I stand on trial.*

A pleasant evening to all of you.

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