

**EASING THE COUNTER-MAJORITARIAN DIFFICULTY:  
*THE JUDICIARY IN A DEVELOPING DEMOCRACY\****

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**I. INTRODUCTION**

Legal literature is certainly replete with texts and writings as to why certain exercises of judicial power are undemocratic. Such proposition rests on the premise that the Constitution should be allowed to grow without a judicial check and that the electoral process should determine the course of constitutional development.<sup>1</sup>

As is inevitable in assertions of such controversy, the expanse of legal literature also runs abound with writings arguing the opposite – that the active exercise of judicial power is a democratic exercise.

Indeed, the democratic or undemocratic character of judicial review is no mere quandary of academic or political philosophy. But far beyond the prospects of its practical consequences, what legal literature is perhaps not so abundant in is a discourse on the rootedness of this power in the milieu in which it is exercised. For what cannot be taken for granted in the determination of the democratic or undemocratic character of the exercise of judicial power is the democratic or undemocratic character of the state-society in which it is exercised. For certainly, how can one call counter-majoritarian the striking down of a legislative statute or executive action which does not truly reflect the general will of the majority of the citizenry?

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<sup>1</sup> Eugene Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. (1952) in *SELECTED ESSAYS ON CONSTITUTIONAL LAW* 2 (1963).

The counter-majoritarian Judiciary then becomes the instrument to counter the tyranny of a presumed majority. Thus, while for some jurisdictions the seeming counter-majoritarian nature of the Judiciary is hard to accept, for others perhaps, it may not be so difficult after all.

#### A. THE PHILIPPINES

The Declaration of Principles and State Policies of the 1987 Constitution foremost provides that:

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

This form of government, like in many other developing nations, was transplanted by the American government. This is a form of government forged, not from the collective experience and milieu of the Filipino people, but from the history and experience of the American nation. Thus, while John Stuart Mill posits that men do not just wake up one morning to find political institutions sprung up like trees,<sup>2</sup> it would appear that in the Philippines they just did.<sup>3</sup>

Also, prior to American colonization, strong kinship ties have already characterized the Filipino people, and such characteristic endures up to this day. In the Philippines, unlike in the United States, the family is “the strongest unit of society, demanding the deepest loyalties of the individual and coloring all social activity with its own set of demands.”<sup>4</sup> And such strong communal values of the family, according to Jean Grossholtz, are often in conflict with the impersonal values of the institutions of the larger society.<sup>5</sup>

Thus, the wholesale transplantation of the representative institutions of the American model during their colonial rule merely “enabled local caciques [chiefs] to consolidate their hold on the national state, and fostered

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<sup>2</sup> JOHN STUART MILL, *Representative Government*, in 43 GREAT BOOKS OF THE WESTERN WORLD 328 (Hutchins ed. 1984).

<sup>3</sup> “Prior to American colonial rule... the Philippines had no significant experience with national-level democratic institutions... American colonials – building on the residual architecture of the previous Spanish colonial state...” See Paul Hutchcroft & Joel Rocamora, *Strong Demands and Weak Institutions: The Origins and Evolution of the Democratic Deficit in the Philippines*, JOURNAL OF EAST ASIAN STUDIES 259, 262 (2003).

<sup>4</sup> Alfred McCoy, *An Anarchy of Families: The Historiography of State and Family in the Philippines*, in AN ANARCHY OF FAMILIES: STATE AND THE FAMILY IN THE PHILIPPINES 1 (1994), citing JEAN GROSSHOLTZ, POLITICS IN THE PHILIPPINES 86-87 (1964).

<sup>5</sup> *Id.*

the creation of a solid, visible national oligarchy.”<sup>6</sup> And between this oligarchy and the state, there exists ‘rent-seeking’ activities<sup>7</sup> and patron-client relations.

It is against this backdrop that the majoritarian model will be tested. As one author aptly put it: “while we have adopted wholesale the democratic form from the United States model, the interplay of political factors that largely affect the intended outcome of majoritarianism, is uniquely our own.”<sup>8</sup>

## II. PHILOSOPHICAL UNDERPINNINGS OF OUR SYSTEM OF GOVERNMENT

Before the present form of Philippine government was transplanted by the Americans, the democratic-republican concept of government was largely derived from various political thinkers of the Western World.<sup>9</sup> In revisiting the counter-majoritarian difficulty, it is only prudent to return to the foundations of majority rule and the pitfalls that undermine its materialization.

### A. THE THEORY OF GOVERNMENT

Jean Jacques Rousseau, in his eminent opus *The Social Contract*, labels the collective grouping of all citizens as the “sovereign”,<sup>10</sup> and this sovereign expresses the general will which is directed towards the common good – that which is in the best interest of society as a whole. This general will is expressed in the general and abstract laws of the state, which are created early on in the state’s life by an impartial law-giver.

Now Rousseau makes a distinction between laws and mere decrees. In essence, the law is a codification of the collective desire of the people; it is made by the whole people for the whole people and constitutes the restraints which the people place upon themselves.<sup>11</sup> Decrees on the other

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<sup>6</sup> PAUL HUTCHCROFT, *The Political Foundations of Booty Capitalism in the Philippines*, in *BOOTY CAPITALISM: THE POLITICS OF BANKING IN THE PHILIPPINES* 25 (1998); see also Benedict Anderson, *Cacique Democracy and the Philippines: Origins and Dreams*, 169 *NEW LEFT REV.* 3, 11 (1988), cited in Hutchcroft & Rocamora, *supra* note 3, at 263.

<sup>7</sup> McCoy, *supra* note 4, at 10.

<sup>8</sup> Edda Marie Sastine, *Judicial Review and the Myth of the Majority*, 83 *PHIL. L.J.* 775, 777 (2009).

<sup>9</sup> See also David v. Macapagal-Arroyo, G.R. No. 171396, 489 *SCRA* 160, May 3, 2006. The Court therein made reference to the political theorists Jean Jacques Rousseau, John Locke, and John Stuart Mill in the determination of the extent of the powers of the President.

<sup>10</sup> JEAN JACQUES ROUSSEAU, *The Social Contract*, in 38 *GREAT BOOKS OF THE WESTERN WORLD* 392 (Hutchins ed. 1984).

<sup>11</sup> *Id.* at 399.

hand, are the general guidelines under which the people choose to live in the course of their daily lives and applies only to certain groups or objects.

From the aforementioned description, it would seem that Rousseau was making a distinction between a Constitution and a statute. To fast track to Chief Justice Marshall's pronouncement in *Marbury v. Madison*,<sup>12</sup> a Constitution is the exercise by the people of their original right to establish for their government such principles which in their opinion shall most conduce to their own happiness.<sup>13</sup> It is the establishment by the people, in their sovereign capacity, fundamental principles designed to be permanent.<sup>14</sup> As it organizes the government and defines the powers and functions of the various departments,<sup>15</sup> it is necessarily created early on in a state's life. The institution of a government is an act of sovereignty as it is made not by contract, but by law.<sup>16</sup> This proposition that Rousseau's "law"<sup>17</sup> may be likened to a Constitution [or at least its individual provisions] further finds support in the fact that Rousseau himself undertook to write the constitutions of Poland and Corsica, at the invitation of both states, and therein assumed the role of an impartial law-giver.

Decrees, on the other hand, may be likened to the statutes enacted by the Legislature or the issuances of the Executive in that it concerns the regulation of the day-to-day affairs of the people, and thus serves as the guidelines under which the people choose to live.<sup>18</sup>

At this point, it must be noted that according to Rousseau, only the social contract requires unanimous consent. As to all other acts of sovereignty, the vote of the majority is enough to bind the rest.<sup>19</sup> As to this principle of majority rule, Rousseau explains that:

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<sup>12</sup> 1 Cranch (5 U.S.) 137 (1803).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> ARISTOTLE, *THE POLITICS*, at 151 (Sinclair trans. 1979); *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803); *Angara v. Electoral Commission*, No. 45081, 63 Phil. 139, Jul. 15, 1936.

<sup>16</sup> ROUSSEAU, *supra* note 10, at 423.

<sup>17</sup> Rousseau, however, classifies law into four: (1) Political Laws or Fundamental Laws, which is the main subject of his work *The Social Contract*; (2) Civil Laws; (3) Criminal Laws; and (4) Morals, Customs, and Beliefs of the people.

<sup>18</sup> Aristotle, in *The Politics*, also makes a distinction between Constitutions and laws in this wise:

"*Constitution* is the arrangement which states adopt for the distribution of offices of power, and for the determination of sovereignty and of the end which the whole social complex in each case aims at realizing. *Laws* are distinguishable from descriptions of constitutions in that they prescribe the rules by which the rulers shall rule and shall restrain those that transgress the laws."

<sup>19</sup> ROUSSEAU, *supra* note 10, at 426.

When in the popular assembly a law is proposed, what the people is asked is not exactly whether it approves or rejects the proposal, but whether it is in conformity with the general will, which is their will. Each man, in giving his vote, states his opinion on that point; and the general will is found on counting votes. When therefore the opinion that is contrary to my own prevails, this proves neither more or less that I was mistaken, and that what I thought to be the general will was not so. If my particular opinion had carried the day I should have achieved the opposite of what was my will; and it is in that case that I should not have been free.

This presupposed, indeed, that all the qualities of the general will still reside in the majority: when they cease to do so, whatever side a man may take, liberty is no longer possible.<sup>20</sup>

And under that social contract where every individual consented to be part of one body politic, John Locke – an earlier political thinker – posits that such individual has placed himself “under an obligation to every one of that society to submit to the determination of that majority.”<sup>21</sup>

Now, to carry out the governance of the daily affairs of the state by issuing such decrees, there exists the government.<sup>22</sup> Rousseau is careful to point out that the government and the sovereign are not only different, but are separate and distinct from each other. And there lies the possibility that the robustness of government may be at odds with the sovereign will.<sup>23</sup> For while the government must act in accordance with the interests of the sovereign – and consequently, the general will – that artificial body nonetheless has a life of its own. And the difficulty lies in ensuring that the government consistently acts in behalf of sovereign and does not attempt to make the general will subordinate to its own. John Stuart Mill later on voices the same concern that one of the greatest dangers of democracy lies in “the sinister interest of the holders of power: it is the danger of class legislation; of government intended for the immediate benefit of the dominant class, to the lasting detriment of the whole.”<sup>24</sup> Again, to fast track to the words of James Madison in *The Federalist No. 51*:

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<sup>20</sup> *Id.*

<sup>21</sup> JOHN LOCKE, *Concerning Civil Government, Second Essay*, in 35 GREAT BOOKS OF THE WESTERN WORLD 47 (Hutchins ed. 1984).

<sup>22</sup> ROUSSEAU, *supra* note 10, at 407. Rousseau describes the government as “an intermediate body set up between the subjects and the sovereign, to secure their mutual correspondence, charged with the execution of the laws and the maintenance of liberty, both civil and political.”

<sup>23</sup> *Id.* at 408.

<sup>24</sup> MILL, *supra* note 2, at 369.

If all men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.<sup>25</sup>

Recognizing that there must be some kind of mechanism must exist to hold the government in check, Rousseau proposes that a regular assembly of all the people is the best means of ensuring that the government does not usurp sovereign power.<sup>26</sup> In these assemblies, the people are to vote on whether the incumbent government and its officers should remain in power.<sup>27</sup> It is in this exercise of popular sovereignty that the general will can continuously be expressed. Thus, Rousseau puts forward that the Constitution must provide for an agreed-upon time wherein all citizens may assemble to voice their concerns and to determine whether the incumbent administration should continue.

In such assemblies, when the people determine the composition of government by means of popular vote, they are of course expected to vote in accordance to what they believe to be is the common good. In other words, citizens are to vote for what would be good for the state even though it may be detrimental to their own private interests.

While it is undisputable that the general will, as Rousseau conceives it to be, leans toward the common good, he however acknowledges that the discernment of the people may not always necessarily express the general will. It is here that he makes another distinction: between the *general will* and the *will of all*.<sup>28</sup> The will of all is “no more than a sum of particular wills” or individual desires.<sup>29</sup> Rousseau recognizes that it is almost impossible that an individual’s interests in all cases would coincide with the common good.<sup>30</sup> It is even possible that the will of all is shared by majority of the population, and yet is still not the general will.

Moreover, Rousseau also recognizes that while the periodic assembly of people to exercise popular sovereignty can deter the

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<sup>25</sup> THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed. 1961).

<sup>26</sup> ROUSSEAU, *supra* note 10, at 420, 424.

<sup>27</sup> *Id.* at 424.

<sup>28</sup> *Id.* at 396.

<sup>29</sup> *Id.*

<sup>30</sup> In modern-day democracies, elections more often than not, express the will of all; the preferences of each person is added up and the most popular choice emerges as winner.

government from acting in behalf of its own interest, it cannot guard against the laziness of the people themselves. Nor can it guard against the ignorance or individual interest of the controlling body, the electorate, which John Stuart Mill feared.<sup>31</sup>

And, towards the end of his *Social Contract*, Rousseau proposes the establishment of a “tribunate”, the function of which is to defend and ensure the safety of the laws, thus:

This body, which I shall call the *tribunate*, is the preserver of the laws and of the legislative power. It serves sometimes to protect the Sovereign against the government... sometimes to uphold the government against the people... and sometimes to maintain the balance between the two.<sup>32</sup>

This body does not share in either legislative or executive power<sup>33</sup> and although according to Rousseau, this renders it incapable of doing anything,<sup>34</sup> its great power lies in the fact that it can prevent anything from being done.<sup>35</sup>

## B. REPRESENTATIVE GOVERNMENT

For Rousseau, the people cannot elect representatives to express the general will for them. Sovereignty, being inalienable, cannot be represented and the deputies of the people of the people are not their representatives, but merely their stewards.<sup>36</sup>

Later political thinkers such as John Stuart Mill, however, have advanced that “the ideally best form of government is representative government.”<sup>37</sup>

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<sup>31</sup> MILL, *supra* note 2, at 363.

<sup>32</sup> ROUSSEAU, *supra* note 10, at 432.

<sup>33</sup> This echoes Baron de Montesquieu’s theory of separation of powers of government in Chapter XI of *The Spirit of Laws*. The influence of Montesquieu’s political thought is apparent in Rousseau’s *The Social Contract* as he is cited in various parts. See CHARLES DE MONTESQUIEU, *The Spirit of Laws*, in 38 GREAT BOOKS OF THE WESTERN WORLD 70 (Hutchins ed. 1984); see also THE FEDERALIST NO. 47, at 302 (James Madison) (Clinton Rossiter ed. 1961).

<sup>34</sup> Alexander Hamilton was of the same view and elucidates that “the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution... The judiciary... has no influence over the sword or the purse...” See THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

<sup>35</sup> A corollary power of the courts is the power to issue writs of mandamus to compel the performance of purely ministerial duties imposed by law.

<sup>36</sup> ROUSSEAU, *supra* note 10, at 422.

<sup>37</sup> MILL, *supra* note 2, at 341.

The meaning of representative government is, that the whole people, or some numerous portion of them, exercise through deputies periodically elected by themselves the ultimate controlling power, which, in every constitution, must reside somewhere.<sup>38</sup>

If we are, however, to understand that the ultimate expression of the general will is the Constitution of a state, and that the acts that require absolute acts of sovereignty is the creation of laws, or as we are to understand it, Constitution-making, then this difference in opinion between Rousseau and Mill is not ultimately irreconcilable, at least in the Philippine context. For as aforementioned, in the republican and democratic system of government of the Philippines, sovereignty still resides in the people and all government authority emanates from them.<sup>39</sup> And in the aspect of Constitution-making, revision, or amendment, such cannot be made by the elected representatives without the ratification of the people at large in a plebiscite called for the purpose.<sup>40</sup>

Mill, in the *Representative Government*, further identifies two dangers or evils that may arise in a representative form of government: “*first*, general ignorance and incapacity, or to speak more moderately, insufficient mental qualifications, in the controlling body; *secondly*, the danger of its being under the influence of interests not identical with the general welfare of the community.”<sup>41</sup>

### C. DEMOCRACY

The term “democracy” is derived from the Greek word *demokratia*, a combination of the Greek words *demos* – which means people – and *kratos* – which means rule. Democracy, as it was conceived, means “rule by the people”.<sup>42</sup>

This ideal of “rule by the people”, in modern times, manifests itself in a Republican form of government. James Madison defined a republic as:

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<sup>38</sup> *Id.* at 355.

<sup>39</sup> CONST. art II, § 1.

<sup>40</sup> CONST. art. XVII, § 4; For a full discussion, see Vicente V. Mendoza, *On Amending the Constitution*, 81 PHIL. L.J. 633 (2007).

<sup>41</sup> MILL, *supra* note 2, at 363.

<sup>42</sup> In The Federalist No. 10, James Madison defines pure democracy as a society consisting of a small number of citizens, who assemble and administer the government in person. This is akin to the city-states of ancient Greece from whence the term derives. This is to be distinguished from a republic, wherein the scheme of representation takes place. In modern times, however, democracy refers more to a political ideology rather than a structure of government.

...a government which derives all its power directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behaviour. **It is essential to such a government that it be derived from the great body of society, not from an inconsiderable proportion, or a favourable class of it.** It is sufficient for such a government that the person administering it be appointed either directly or indirectly, by the people; and that they hold their appointments by either of the tenures just specified.<sup>43</sup> (emphasis supplied)

From this definition, it can be deduced that a republic is a representative form of government. For it is the existence of representative institutions that ensures that the government and consequently, the laws that it enacts, reflects not merely the will of the monarch or of a “favourable class”, but is necessarily the general will.<sup>44</sup> Madison envisioned that such a design will

...refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.<sup>45</sup>

In a democratic and republican state then, the “rule of the majority”, as expressed through their duly elected representatives in government, is “rule by the people”.

In sum:

Democracy is government of, by, and for the people while the essence of republicanism is representation... A Republican government is a **responsible government** whose officials are at all times accountable to the people, and its **purpose is the promotion of the common good** according to **the will of the people** as expressed in the Constitution or through their duly elected

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<sup>43</sup> Tolentino v. Commission on Elections, G.R. No. 148334, Jan. 21, 2004 (Puno, J., *dissenting*), citing JOSE ARUEGO, THE FRAMING OF THE PHILIPPINE CONSTITUTION 1 (1949). On the other hand, Jean Jacques Rousseau calls a Republic “every state that is governed by laws, no matter what the form of its administration may be: for only in such a case does the public interest govern, and the *res publica* ranks as a *reality*.” See ROUSSEAU, *supra* note 10, at 400.

<sup>44</sup> Gerard Chan, *Ascertaining the Vox Populi within a Democratic and Republican Context: The Role of Congress as a National Board of Canvassers*, 79 PHIL. L.J. 106, 108 (2004).

<sup>45</sup> THE FEDERALIST NO. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961).

representatives. This will is **usually** determined by the will of the majority.<sup>46</sup> (emphasis supplied)

### III. The Counter-Majoritarian Difficulty

*[T]he practice of judicial review in the Philippines derives as much from colonial practice and history as from the extension to the Philippines of American Constitutional law, part and parcel of which, it was generally assumed, was the power of the courts to determine the constitutional validity of the acts of the other departments of government.*<sup>47</sup>

Even prior to the Philippine Supreme Court's first exercise of the power of judicial review in 1907, in the case of *Casanovas v. Hord*,<sup>48</sup> legal scholars in the United States have already begun to criticize this power they themselves created. Judicial review is viewed by some as running counter to the principle of majoritarianism that underlies a democratic-republican state.<sup>49</sup>

Thomas Jefferson considered judicial review to be a very dangerous doctrine which would place the people under the despotism of an oligarchy. For Jefferson, the people themselves are the only safe depositories of government and that implies "absolute acquiescence in the decisions of the majority - the vital principle of republics, from which there is no appeal but force."<sup>50</sup>

#### A. ELECTIONS

The counter-majoritarian difficulty prescinds from the conclusion of legal scholars that democracy is indubitably characterized by majoritarian rule.<sup>51</sup> However, this chapter shall tend to show that such characterization, far from being a legal conclusion, is but a presumption accorded to governments, perhaps for reasons of legal and political convenience. And

<sup>46</sup> Carmelo Sison, *The Supreme Court and the Constitution*, 67 PHIL. L.J. 308, 308 (1993).

<sup>47</sup> VICENTE V. MENDOZA, JUDICIAL REVIEW OF CONSTITUTIONAL QUESTIONS 22 (2004).

<sup>48</sup> No. 3473, 8 Phil. 125, Mar. 22, 1907. Here, the Court nullified a provision of the Internal Revenue Act for impairing the obligation of contracts by imposing a tax on already perfected mining concessions and *ad valorem* tax based on the market value of the mines.

<sup>49</sup> See James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

<sup>50</sup> Samuel Freeman, *Constitutional Democracy and the Theory of Judicial Review*, 9 LAW AND PHILO. 327 (1990).

<sup>51</sup> See Oscar Franklin Tan, *The New Philippine Separation of Powers: How the Rulemaking Power may Expand Judicial Review into True Judicial Supremacy*, 83 PHIL. L.J. 868, 876 (2009).

such presumption is in fact rebuttable, in the first place, by the very hallmark that defines democracies: *elections*.<sup>52</sup>

Majority rule, as the cornerstone of the democratic system of government, has as its foundation the fundamental rights of the individual to vote and to freely express & exchange ideas.<sup>53</sup> Furthermore, it is a generally accepted proposition that elections is the very heart of democracy and is its defining institution.<sup>54</sup>

“Election is the means by which the people choose their officials for definite and fixed periods and to whom they entrust, for the time being, as their representatives the exercise of powers of government.”<sup>55</sup> It is the “embodiment of the popular will, the expression of the sovereign power of the people.”<sup>56</sup> In the eloquent words of Justice Laurel, it is the “means by which the great reservoir of power [is] emptied into the receptacle agencies wrought by the people through their Constitution in the interest of good government and the common weal.”<sup>57</sup>

### 1. Electoral System

There are two broad types of electoral system. One is the single-member-district plurality system (SMDP), wherein a single member is elected from each district by a plurality of votes.<sup>58</sup> The other is the proportional representation (PR) system, the guiding principle of which is to represent parties rather than territories. In this system, parties are to be awarded seats in direct proportion to their share of the vote.<sup>59</sup>

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<sup>52</sup> It is acknowledged that there is a difference between the concepts of majority rule and an electoral majority. However, it is submitted that both are intertwined concepts.

<sup>53</sup> JESSE CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* 5 (1980).

<sup>54</sup> RICHARD KATZ, *DEMOCRACY AND ELECTIONS* 3 (1997).

<sup>55</sup> *Garchitorena v. Crescini*, No. 14514, 39 Phil. 258, Dec. 18, 1918.

<sup>56</sup> *Taule v. Santos*, G.R. No. 90336, 200 SCRA 512, 519, Aug. 12, 1991; *Carlos v. Angeles*, G.R. No. 142907, 346 SCRA 571, 582, Nov. 29, 2000. The German philosopher George Wilhelm Friedrich Hegel even posits that:

It is in this right [to elect Members of Parliament] that there lies the right of the people to participate in public affairs and in the highest interests of the state and government. The exercise of this right is a lofty duty, because there rests on it the constituting of an essential part of the public authority, i.e. the representative assembly, because indeed this right and its exercise is, as the French say, the act, the sole act, of the ‘sovereignty of the people’.

<sup>57</sup> *Moya v. del Pierro*, No. 46863, 69 Phil. 199, 204, Nov. 18, 1939.

<sup>58</sup> PHILIPS SHIVELY, *POWER AND CHOICE: INTRODUCTION TO POLITICAL SCIENCE* 209 (2000).

<sup>59</sup> ROD HAGUE & MARTIN HARROP, *COMPARATIVE GOVERNMENT AND POLITICS* 150 (6<sup>th</sup> ed. 2004)

The electoral system of the Philippines is predominantly that of the plurality format – the so-called ‘first-past-the-post system.<sup>60</sup> In such a system, one only needs to receive the most votes in an electoral district in order to emerge as the winner. In other words, a plurality of votes suffices; a majority is unnecessary.<sup>61</sup>

However, despite the fact that in a plurality system those who are elected do not necessarily enjoy the support of the majority, it is still posited that “the capacity of first past the post to produce majority government, at least given national competition between two parties, is often presented as the method’s greatest strength.”<sup>62</sup>

The problem with the Philippines, however, is that while the SMDP system is expected to yield a two-party system, as is evident in the United States, Philippine politics instead produced many weak and unstable parties.<sup>63</sup>

Thus, the very manner by which the Philippines elects its government undermines the existence of a supposedly majoritarian government, as government more often than not enjoys only minority support, producing a system of mere plurality rule.<sup>64</sup>

A government that possesses the mandate of the majority could best come about through no less than the majoritarian methods such as (1) the alternative vote (AV) system wherein voters rank the candidates and if no candidate wins a majority in the first preferences, the bottom candidate is eliminated and his votes are then redistributed according to second preferences. This procedure is repeated until a candidate has a majority; or (2) the two-ballot system wherein if no candidate wins a majority on the first ballot, the top two candidates then face-off in a run-off election.<sup>65</sup>

## 2. Pitfalls

As was shown earlier, John Stuart Mill identifies a number of threats to democracy. Another is the possibility that the system will encourage

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<sup>60</sup> The Philippines has a mixed electoral system in that positions for the Executive branch and the Senate are purely based on plurality vote, while the House of Representatives is a combination of SMDP for district representatives and PR system for party-list representatives – a mixed member majoritarian (MMM) system.

<sup>61</sup> HAGUE & HARROP, *supra* note 59 at 146.

<sup>62</sup> *Id.* at 149.

<sup>63</sup> Hutchcroft & Rocamora, *supra* note 3, at 278.

<sup>64</sup> See ANDREW HEYWOOD, *POLITICS* 233 (2<sup>nd</sup> ed. 2002).

<sup>65</sup> HAGUE & HARROP, *supra* note 59, at 148.

unworthy or unfit people to stand for election. Thus, representative democracy must face the problem with Plato's guardianship: how to guard against shady leaders who may obtain power.

The other side of this coin which is an equal source of threat or obstacle to a truly representative government is the possible behavior of the voters. For Mill, it is vital that voters should vote in accordance with their idea of the general interest; that is, they should vote for whichever candidate they feel most likely to improve the citizenry and efficiently manage the affairs of the country in the interest of all. Mill's worry is that a voter may give a 'base and mischievous vote', that is, reflecting the voter's personal or class interest.<sup>66</sup>

Helpful in this matter is the notion of Jean Jacques Rousseau's ideal citizen who is trained to will nothing contrary to the will of society – the 'general will'. Hence, for Rousseau, voting for what is in one's view is the common good, is a matter of voting in accordance with one's idea of the general will. Mill's most pressing concern, however, is that the uneducated poor that comprise the numerical majority will, out of a combination of ignorance and class interest, make a bad choices. This is also in consonance with Rousseau's view that the greatest obstacle to the emergence of the general will is not that individuals fail to perceive it, but rather, is attributable to the failure to be sufficiently motivated to act upon it. Thus, Rousseau maintains that large inequalities must be absent in order for people to be able to vote for the common good of society and not merely for their own personal or class interest. Thus he proposes that no citizen shall ever be rich enough to buy another, and none poor enough to be forced to sell himself.<sup>67</sup>

The point that Mill wanted to stress was that representative democracy must maintain certain safeguards to prevent it from being dictated to by ignorance and class interest. In the *Federalist No. 10*, James Madison affirmed that the "most common and durable source of factions – those groups that actuated by some common interest adverse to the permanent and aggregate interest of the community – has been the various and unequal distribution of property."<sup>68</sup>

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<sup>66</sup> MILL, *supra* note 2.

<sup>67</sup> ROUSSEAU, *supra* note 10.

<sup>68</sup> THE FEDERALIST NO. 10, at 79 (James Madison) (Clinton Rossiter ed., 1961).

**a. Philippine Electoral Politics**

Professor Dante Gatmaytan, in describing traditional politics in the Philippines, noted that there exists an elite democracy “where political and economic power were shared between shifting coalitions of elite families, leaving little if any room for policy determination or legislation by majority of the Filipinos.”<sup>69</sup> Citing David Timberman, he described Philippine political culture as regards the electoral system as being:

...marked by the primacy of kinship, the influence of particularism and personalism, the importance of reciprocity and patron-client relations, the emphasis on smooth interpersonal relations and the effect of pervasive poverty on values and behavior... Response to the concerns of the majority of the Filipinos, if any was achieved on an ‘ad hoc and self-serving basis.’

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Traditional Philippine politics were characterized by the close correlation between landownership, wealth, and political power. Politics were driven by the rivalries between wealthy families and competing economic interests. Political affiliations and loyalties were determined primarily by family and linguistic ties, patron-client relationships and patronage. Public office was seen as a vehicle for the control and allocation of privileges and government resources among competing elite factions and their followers.<sup>70</sup>

Electoral support is thus mustered not through assent to the programs, policies, ideology, or platform of candidates, but instead, through pork barrel, patronage, cash, and violence.<sup>71</sup> Materializing the fears of Rousseau and Mill, the poor which comprise the majority of the electorate “are too busy to make ends meet to take elections seriously..., vote-selling, nominal participation in the electoral system, and general indifference towards illegitimate governments so long as they deliver basic economic needs”<sup>72</sup> are all too commonplace in the Philippines.

**b. A Policy Vote?**

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<sup>69</sup> Dante Gatmaytan, *Tradition, Contestation, and Democratization: Law and the Challenge of Philippine “Folk Democracy”*, 76 PHIL. L.J. 77, 84 (2001).

<sup>70</sup> *Id.* at 84-85.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 86-87.

It has already been established that majority rule is fundamentally intertwined with the rights of the individual to vote and to freely express & exchange ideas.<sup>73</sup> This free exchange of information is necessary so that the people can exercise informed political participation through suffrage. The voting pattern and preferences of the electorate, however, reveal that they in fact lack the necessary knowledge and motivation to truly effect the general will.

It is submitted that in the Philippines, voter preference largely revolves around two patterns: (1) retrospective voting and (2) the trustee model.

The theory of retrospective voting is one that is double-edged. It advances the view that if voters think that an incumbent performed well while in office, then it is likely that they will re-elect that official and perhaps those other members of that official's party. Corollarily, if the voters think the incumbent did a terrible job, or more commonly, that certain issues have arisen discrediting that official, then it is also likely that the voters will not re-elect that official and shall opt for another candidate.<sup>74</sup>

The trustee model is akin to Aristotle or Rousseau's aristocracy where the people elect those they think is the best among the candidates.<sup>75</sup> Edmund Burke also echoes this notion of a *natural aristocracy* or individuals "who from their success are presumed to have sharp and vigorous understandings, and to possess the virtues of diligence, order, constancy, and regularity, and to have cultivated a habitual regard to communitative justice."<sup>76</sup> Thus, the people simply entrust to this "aristocracy" the task of determining policy in the expectation that the latter will act in pursuit of the common good – the general will. The voting pattern of the Filipino people shifting from messianic celebrities to traditional politicians,<sup>77</sup> from benign housewives to hardened military men, is all but a manifestation of an aspiration to place a leader of utmost integrity and capability in both political branches of government.

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<sup>73</sup> CHOPER, *supra* note 53, at 5.

<sup>74</sup> See Kaitlin Franks, *Retrospective Voting*, Senior Thesis in Economics, Apr. 30, 2009, available at <http://thesis.haverford.edu/dspace/bitstream/10066/3624/1/2009FranksK.pdf>. (last visited Feb. 21, 2010).

<sup>75</sup> "Aristocracy" for Aristotle and Rousseau literally means "rule of the best". See ROUSSEAU, *supra* note 10, at 412; ARISTOTLE, *The Politics*, in 9 GREAT BOOKS OF THE WESTERN WORLD 493 (Hutchins ed. 1984).

<sup>76</sup> Edmund Burke, *Letter from the New to the Old Whigs* (1791).

<sup>77</sup> See Sheila Coronel, *Between Tinsel and Trapo*, May 7, 2004, available at <http://www.pcij.org/imag/2004Elections/Perspectives/tinsel-trapo.html> (last visited Feb. 21, 2010).

What can be gleaned from this voting pattern is that there appears to be a superficial knowledge on the part of the people whenever they go to the polls. In the perceived failures of government, the people tend to attribute them solely on government officials without due regard to the intricacies and complexities of the issues involved to determine if the failure was due to human error or to uncontrollable external factors. In the appraisal of the virtues of candidates for office, it is doubtful that the people actually inform themselves on the nature of the office, the qualifications and experience necessary to effectively discharge its functions, and whether the candidate is thus fit to occupy such office.

Also, given that this voting pattern seems to revolve around personality-politics, it is likewise doubtful if the policies enacted by the elected representatives on certain issues do in fact reflect the will of the people, considering that the people – except for the Catholic Church perhaps<sup>78</sup> – for the most part do not vote based on issues. Such that it becomes suspect that government enactments can be deemed to bear the mark of the popular will which proponents of the counter-majoritarian difficulty aim to protect.

### 3. Electoral Fraud

Another problem with Philippine elections can be summed up by a statement given by – in all amusing irony – former President Joseph Estrada<sup>79</sup> that “election cheating has been prevalent in the country; that is why we have a bad government.”<sup>80</sup>

Almost a century ago, no less than the Supreme Court itself in *Luna v. Rodriguez*,<sup>81</sup> has recognized a fact that remains generally accepted up to this day:

“Experience and observations taught the legislature and the courts that, at the time of a hotly contested election, the partisan spirit of ingenious and unscrupulous politicians will lead them beyond the limits of honesty and decency by the use of bribery, fraud, and

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<sup>78</sup> See Raul Pangalangan, *Transplanted Constitutionalism: The Philippine Debate on the Secular State and the Rule of Law*, III 82 PHIL. L.J. 1 (2007).

<sup>79</sup> President Estrada won the presidency in 1998 garnering 42.1% of the total number of votes cast but was ousted from office through a popular uprising of the people known as the EDSA II Revolution in 2001 due to charges of plunder.

<sup>80</sup> Jose Rodel Clapano, *New Law vs. Election Cheaters Sought*, THE PHIL. STAR, Sep. 1, 2009 at A2.

intimidation, despoil the purity of the ballot and defeat the will of the people at the polls.”<sup>81</sup>

Justice Perfecto in his dissent in *Ramos v. COMELEC*,<sup>82</sup> emphasized with seductive words of rhetoric the value of elections in our system of government:

Popular suffrage is the means of expression of the will of our people whom, according to our fundamental law, sovereignty resides. Suffrage is the strong trunk which connects and supports all the branches of the government on the solid, firm and life-giving earth of popular support. That is why it is indispensable that we should not allow that trunk to be weakened and broken by wood borers and termites of fraud and lawlessness. Otherwise, all the structure is liable to crumble.<sup>83</sup>

Electoral fraud is the deliberate act of manipulating the rules, procedures, and results of elections.<sup>84</sup> “Fraud takes numerous forms, including payment for individual votes, padding electoral lists with the names of recently deceased voters or voters from other districts, and altering local tally lists in favor of a candidate after the votes have been counted at the local level.”<sup>85</sup> Philippine elections is still laden with problems such as fraud – both massive and small-scale – political violence, patronage, and money politics.<sup>86</sup> This is attributable to the fact that:

[F]rom a procedural perspective, the electoral process is riddled with opportunities for committing fraud, from voters’ registration to ballot box stuffing and wholesale cheating through vote shaving and tampering with electoral records. The Commission on Elections has been ineffective in preventing fraud, thus straining its credibility as the institution tasked with managing the country’s election. Modernization and computerization of the electoral process which is

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<sup>81</sup> *Luna v. Rodriguez*, No. 13744, 39 Phil 208, 213, Nov. 29, 1918.

<sup>82</sup> No. 1882, 80 Phil 722, Apr. 10, 1948. In this case, the Court held that the duty of the Commission on Elections to investigate and act on the propriety or legality of a canvass of election made by the municipal board of canvassers, is discretionary and is therefore not susceptible to mandamus.

<sup>83</sup> *Id.* at 743 (Perfecto, J., *dissenting*).

<sup>84</sup> LUZVIMINDA TANCANGCO, AN ANATOMY OF ELECTORAL FRAUD: CONCRETE BASES FOR ELECTORAL REFORMS 59 (1992).

<sup>85</sup> Brendan Luyt, *The Hegemonic Work of Automated Election Technology*, JOURNAL OF CONTEMPORARY ASIA (2007); see e.g. *Pimentel v. Commission on Elections*, G.R. No. 133509, 325 SCRA 196, Feb. 9, 2000. In this case, the Supreme Court held that the sheer magnitude in the difference between the tallies of the Election Returns, Certificates of Canvass, and Statement of Votes renders the defense of honest mistake or oversight due to fatigue incredible, and thereby ordered that criminal informations be filed against the City Board of Canvassers of Pasig City.

<sup>86</sup> Julio Teehankee, *Electoral Politics in the Philippines in* ELECTORAL POLITICS IN SOUTHEAST ASIA.

popularly considered as a solution to all these problems remains stalled due to anomalies from within the COMELEC itself.<sup>87</sup>

It is thus no surprise why Dean Raul Pangalangan describes Philippine liberal democratic institutions as “a mere façade for unreconstructed elites.”<sup>88</sup> Joseph Schumpeter and other political scholars, in elucidating on the *theory of electoral accountability*, have also established that:

- (1) The public, being largely apathetic about political matters and in any case ill-informed regarding public issues, cannot provide the necessary and sufficient conditions for the maintenance of democratic procedures;
- (2) A liberal political and social elite are committed to the preservation of democratic forms, at least more committed than the average citizen; therefore
- (3) What maintains the democratic tradition is not extensive public participation in political policy-making, but, instead, competition among elites whose behavior is regulated by periodic review procedures. Competition among elites and review by citizens of political leaders are provided by elections.<sup>89</sup>

From the foregoing, it could be said that what we may very well have is perhaps but a “myth of the majority”.<sup>90</sup>

## B. THE POLICY-MAKING PROCESS

For Thomas Jefferson, Congress is the branch of government that is “mainly republican” for it is the nearest practicable approach to a pure republic – *i.e.* “representatives chosen either *pro hac vice*, or for such short terms as should render secure the duty of expressing the will of their constituents.”<sup>91</sup>

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<sup>87</sup> *Id.*

<sup>88</sup> Raul Pangalangan, *Chief Justice Hilario G. Davide Jr.: A Study in Judicial Philosophy, Transformative Politics and Judicial Activism*, 80 PHIL. L.J. 538, 562 (2006).

<sup>89</sup> Kenneth Prewitt, *Political Ambitions, Volunteerism, and Electoral Accountability*, LXIV AM. POL. SCI. REV. 5, 5 (1970).

<sup>90</sup> Sastine, *supra* note 8.

<sup>91</sup> THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 669-70 (Adrienne Koch & William Peden eds. 1944); *cited in* Gerard Chan, *supra* note 44, at 112-13.

In this branch of government, “decision-making is based on the majority principle and a free and public debate among equals”.<sup>92</sup> Dean Wellington, however, observed that majoritarianism is not carried through consistently in the legislative and executive practice.<sup>93</sup>

It has been stated earlier that, more often than not, elected representatives of the people in government are not voted upon on the basis of programs, policies, ideology, or platform. This is in part due to the fact that political parties or individual candidates lack a concrete foundational ideology, such that, when the people vote for them, they are necessarily voting on the basis of such ideology, which is a clear expression of their will.<sup>94</sup> Thus, when the people elect a person in government, that individual does not necessarily embody the will of the people.

This is in stark contrast to the American model where “the most valuable opportunity to influence the course of public affairs is the choice [Americans] are able to make between the parties in the principal elections.”<sup>95</sup> The goal is not simply to elect particular candidates, but to put a particular party into office in the conviction that the public policy it sets forth will furnish a general direction over the government as a whole.<sup>96</sup>

The lack of such is a critical problem in the Philippines, because on a structural level, elections is the most common mechanism by which the people impose their will on government.<sup>97</sup> Once an individual is elected into office, he is already presumed to embody the will of the people, through his/her policies, at that point in time, and for his entire term. Regular consultations with constituencies to constantly keep up with their preferences and opinions are desirable, but not mandated by law.

The cumbersome process of legislation also provides occasions where the programs or policies espoused by an elected representative is diluted in the effort to reach compromises and consensus which normally happens in the halls of Congress. Added to this is the fact that the legislative process in the Philippines is driven by the politics of pork and patronage.<sup>98</sup>

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<sup>92</sup> Torbjorn Vallinder, *When the Courts Go Marching In*, in *THE GLOBAL EXPANSION OF JUDICIAL POWER* 13 (1995).

<sup>93</sup> *The Nature of Judicial Review*, 91 *YALE L.J.* 486, 488 (1982).

<sup>94</sup> The party-list system in the Philippines, however, may be one example where the people vote for clear-cut platforms and programs which they want to forward in government.

<sup>95</sup> PETER WOLL, *AMERICAN GOVERNMENT* 183 (14<sup>th</sup> ed 2002).

<sup>96</sup> *Id.* at 183-84.

<sup>97</sup> Other mechanisms include referendum, initiative, and recall proceedings.

<sup>98</sup> Hutchcroft & Rocamora, *supra* note 3, at 285.

The power to make laws has been used by legislators for their personal or family gain by protecting their businesses and their various interests.<sup>99</sup> Such that dilution may not necessarily arise from another representative's effort to advance his/her espoused policy (which supposedly is espoused in behalf of the constituency), but from the particularistic interests of that representative.

Oscar Tan, however, in cautioning against taking the extreme view that "elected leaders and the electorate itself are distrusted to the point that the burden of articulating society's most cherished virtues is thrust solely upon unelected judges' shoulders",<sup>100</sup> opines:

[T]he accepted premise is that democracy has never equated to pure majority rule, that it has always involved institutions and representatives to channel this majority will into manageable governance. 'There can be no automatic and blanket equation of Congress or the Executive branch with the voice of the people.' **What is crucial... is that policy decisions are made by those accountable, even if not always responsive, to electoral majorities.**<sup>101</sup> (emphasis supplied)

### C. OVERLAPPING OF FUNCTIONS

Among the fundamental roles maintained by the Judiciary in our system of government is that it serves a checking function and a legitimating function.<sup>102</sup> The former derives from the Court's exercise of its power of judicial review in determining the constitutional validity of the acts of the other departments of government. While the latter, derives from the restraint of the court in applying this power to strike down executive or legislative enactments.<sup>103</sup> According to Professor Charles Black, when the Supreme Court sustains a legislative or executive act against a charge of unconstitutionality, is in effect validating or legitimating that act.<sup>104</sup>

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<sup>99</sup> Sheila Coronel, *Politics as Business*, in *THE RULEMAKERS: HOW THE WEALTHY AND THE WELL-BORN DOMINATE CONGRESS* 40 (2007).

<sup>100</sup> Tan, *supra* note 51.

<sup>101</sup> *Id.* at 912 (internal citations omitted).

<sup>102</sup> See Sison, *supra* note 46, at 310 (1993); Bryan Dennis Tiojanco & Leandro Angelo Aguirre, *The Scope, Justification and Limitations of Extrajudicial Judicial Activism and Governance in the Philippines*, 84 PHIL. L.J. 73, 76 (2009). Other traditional functions of the court include the adjudicating function of settling actual cases and controversies involving rights which are legally demandable and enforceable and an educating function where the Court is essentially a teacher in a vital national seminar.

<sup>103</sup> For a more detailed discussion on the Supreme Court's exercise and application of its extraordinary certiorari jurisdiction, see Skarlit Labastilla, *Dealing with Mutant Judicial Power: The Supreme Court and its Political Jurisdiction*, 84 PHIL. L.J. 2 (2009).

<sup>104</sup> See Florentino Feliciano, *The Application of Law: Some Recurring Aspects of the Process of Judicial Review and Decision Making*, 37 AM. J. JURIS. 17 (1992).

Elections also serve a checking and legitimating function in a democratic republican system. The checking function derives from the fact that elections are conducted in regular intervals such that the representatives in government remain accountable to the people that elect them. This accounts for the conventional view of elections as “a mechanism through which politicians can be held to account and forced to introduce policies that somehow reflect public opinion.”<sup>105</sup> And as they wish to be [re]elected over other candidates in the next elections, they must necessarily discharge their duties in government well and in consonance with public opinion in order to sway the electorate in their favour. Verily, Joseph Schumpeter’s minimalist conception of democracy is that it is simply an institutional arrangement for filling public office by a *competitive struggle for the people’s vote*, and that the people thus have the opportunity of accepting or refusing men who are to govern them.<sup>106</sup>

The legitimating function is manifested itself when politicians are re-elected as this only shows that the people approve of their actions and policies while in office. This function is even more pronounced when one takes into account the doctrine of condonation of misconduct of public officers during a previous term.<sup>107</sup> The rule in our jurisdiction is that:

[A] public official cannot be removed for administrative misconduct committed during a prior term, since **his re-election to office operates as a condonation of the officer's previous misconduct** to the extent of cutting off the right to remove him therefor.<sup>108</sup> (emphasis supplied)

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When the people have elected a man to office, it must be assumed that they disregarded or forgave his faults or misconduct, if he had been guilty of any. It is not for the Court, by reason of such faults or misconduct to practically overrule the will of the people.<sup>109</sup>

Corollarily, when people disapprove of the actions and policies of the incumbent representatives in the political departments of government, then it is the expected outcome that such individuals will not be re-elected into office.

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<sup>105</sup> HEYWOOD, *supra* note 64, at 230.

<sup>106</sup> *Id.* at 229.

<sup>107</sup> For a more detailed discussion on the doctrine and its nuances, see Miguel Silos, *A Re-Examination of the Doctrine of Condonation of Public Officers*, 84 PHIL. L.J. 22 (2009).

<sup>108</sup> *Aguinaldo v. Santos*, G.R. No. 94115, 212 SCRA 768, 773, Aug. 21, 1992.

<sup>109</sup> *Pascual v. Prov. Board of Nueva Ecija*, No. 11959, 106 Phil. 466, Oct. 31, 1959; *citing* 17 A.L.R. 281.

And herein lies the difficulty when the court, through judicial review, exercises this checking and legitimating function according to James Bradley Thayer:

The people, all this while, become careless as to whom they send to the legislature; too often they cheerfully vote for men whom they would not trust with an important private affair, and when these unfit persons are found to pass foolish and bad laws, and the courts step in and disregard them, the people are glad that these fewer wiser gentlemen on the bench are so ready to protect them against their more immediate representative... **The tendency of a common and easy resort to this great function... is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility.**<sup>110</sup> (emphasis supplied)

Thus, Professor Alexander Bickel remarks that the power of judicial review has a “tendency over time to weaken the democratic process.”<sup>111</sup> This erosion of the democratic process, wherein it is the sovereign people that holds in check their representatives in government through informed political participation in the democratic process of periodic elections, according to Chief Justice Puno could result from:

...large-scale reliance upon the courts for resolution of public problems [that] could lead in the long run to atrophy of popular government and collapse of the broad-based political coalitions and popular accountability that are the lifeblood of the democratic system... [A]ggressive judicial review saps the vitality from constitutional debate in the legislature. It leads to democratic debilitation where the legislature and the people lose the ability to engage in informed discourse about constitutional norms.<sup>112</sup>

“In declaring a law unconstitutional, an unelected court thwarts enforcement of a law that presumably reflects the will of the voters. It also arguably makes the people lax toward enforcing constitutional norms themselves.”<sup>113</sup> As one author noted, “the Supreme Court should concentrate on the preservation of a democratic society by guaranteeing all citizens free access to the political process and the instruments of political

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<sup>110</sup> ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 16-18 (1962).

<sup>111</sup> *Id.*

<sup>112</sup> *Francisco v. House of Representatives*, G.R. No. 160261, 415 SCRA 44, 207, Nov. 10, 2003 (Puno, J., *concurring*).

<sup>113</sup> KATHLEEN SULLIVAN & GERARD GUNTHER, *CONSTITUTIONAL LAW* 26 (16<sup>th</sup> ed. 2009).

change, while at the same time allowing majority government to rule, as long as the political process is open and untrammelled.”<sup>114</sup>

Eugene Rostow, however, advances that it has never been true that dependence on the courts lead people to become careless as to whom they send to the political offices of government.<sup>115</sup> He further states that “the election of petty and irresponsible men to state and national legislatures reflects cultural and sociological forces”<sup>116</sup> among them are the “deplorable level of popular education, the nature of political tradition, and the acceptance of graft.”<sup>117</sup>

Professor Charles Black adds that the political process in a democracy is not limited to the regular election of Congressmen, Senators and the President. It includes the exercise of the people of their constitutionally-guaranteed rights,<sup>118</sup> which necessarily must have assurance that it shall be enforced. Thus:

The national political process... also includes the proposal and adoption – or defeat – of amendments to the Constitution. It includes the construction and maintenance of a federal judiciary, the granting of jurisdiction to courts, the selection of justices. It includes the passage, and keeping on the books, of statutes recognizing the judicial function of declaring acts of Congress unconstitutional. It includes the acquiescence and ever pride of the people in this assumption; it includes that slow development from decade to decade which built it into our national consciousness... It includes teaching our children that the rights which we are guaranteed are real because they will be enforced by a Court removed from constituency pressure and from the necessity to make deals. It includes, to sum up, the maintenance... of the Court’s position as constitutional arbiter.<sup>119</sup>

Contrary to the proposition that the Judiciary may have a tendency to dwarf the political capacity of the people, it in fact enables the people to maximize that capacity by upholding its existence and all necessary incidents thereto.

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<sup>114</sup> Ricardo Romulo, *The Supreme Court and Economic Policy: A Plea for Judicial Abstinence*, 67 PHIL. L.J. 348, 353 (1993).

<sup>115</sup> Rostow, *supra* note 1.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> More particularly, political rights which, according to Justice Vicente V. Mendoza, “enable the citizens to participate in their government, to criticize its actions, and to engage in advocacy. They include the right of suffrage, initiative, referendum, and recall, the right of speech and assembly, the right of association, the right to information on matters of public concern, and the freedom of the press.” Vicente V. Mendoza, *The Protection of Civil Liberties and the Remedies for their Violation*, 81 PHIL. L.J. 345, 346 (2007).

<sup>119</sup> CHARLES BLACK, JR., *THE PEOPLE AND THE COURT* 104 (1960).

In the area of suffrage alone, the Supreme Court has recently promulgated decisions that uphold the primordial right of the people to participate, to the fullest extent possible, in the selection of the country's leaders.<sup>120</sup> In *Palatino v. COMELEC*, the Court upheld the right of the electorate to register as voters 120 days prior to the next elections.<sup>121</sup> In *Penera v. COMELEC*,<sup>122</sup> the Court upheld the rights of public office aspirants to freedom of expression and free speech by ruling that "any unlawful act or omission applicable to a candidate shall take effect only upon the start of the campaign period."<sup>123</sup> This pronouncement, in effect, abolished the existence of premature campaigning in our jurisdiction. Finally, in *Roque v. COMELEC*,<sup>124</sup> the Court denied a petition seeking to nullify COMELEC's award of the 2010 Elections Automation Project (automation project) to the joint venture of Total Information Management Corporation (TIM) and Smartmatic International Corporation (Smartmatic) and to permanently prohibit the implementation of the said contract-award. Thus, paving the way for the automation of the 2010 Elections which is viewed by many as a significant step towards clean and credible elections in the Philippines.<sup>125</sup>

The foregoing only illustrates how the checking and legitimating function of the judiciary reinforces the checking and legitimating function of elections. Such function of the judiciary has had similar effects on other constitutionally-granted rights necessary for the people's full participation in the political process and affairs of government. It ensures that the process continues and is not thwarted by the very politics of it. As Archibald Cox argues, instead of deadening the sense of moral responsibility or dwarfing the political capacity of the people, the Court may very well provide the stimulus that will quicken moral education.<sup>126</sup>

#### IV. THE EXERCISE OF JUDICIAL POWER

There is only one permissible ground for the courts to exercise the power of judicial review,<sup>127</sup> and that is, where the law or governmental action is repugnant to the Constitution – the highest law of the land.<sup>128</sup>

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<sup>120</sup> *Palatino v. Commission on Elections*, G.R. No. 189868, 608 SCRA 248, Dec. 15, 2009.

<sup>121</sup> *Id.*

<sup>122</sup> G.R. No. 181613, 605 SCRA 574, Nov. 25, 2009 (Resolution) *reversing* *Penera v. COMELEC*, 599 SCRA 609, Sept. 11, 2009 (Decision).

<sup>123</sup> *Id.*

<sup>124</sup> G.R. No. 188456, 599 SCRA 69, Sep. 10, 2009.

<sup>125</sup> *Id.*

<sup>126</sup> ARCHIBALD COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 117-18 (1976).

<sup>127</sup> For a discussion on the limitations and qualifications on the exercise of judicial review, see Vicente V. Mendoza, *The Protection of Civil Liberties and the Remedies for their Violation*, 81 PHIL. L.J. 345 (2007).

For Aristotle, a *Constitution* is not just the arrangement which states adopt for the distribution of offices of power,<sup>129</sup> but it is also the determination of the end which the whole social complex in each case aims at realizing.<sup>130</sup> In *Marbury v. Madison*, Chief Justice Marshall intimated that the Constitution is the embodiment of the fundamental, permanent principles the People believe shall most conduce to their own happiness.<sup>131</sup> As fundamental, permanent principles, it trumps the “will of the representatives of the actual people of the here and now.”<sup>132</sup> And, according to Dean Raul Pangalangan:

For the Philippine Supreme Court today, those “neutral principles” were handed on a silver platter by the drafters of the 1987 Constitution, who... codified into the charter the various activist causes...<sup>133</sup>

Oscar Tan further notes that the new provisions and sheer length of the 1987 Constitution has provided for quite a number of textual hooks as new bases for petitions without the Court having to justify the very existence of the right it is enforcing.<sup>134</sup> The Court, in construing the Constitution, must take into account the object sought to be accomplished by its adoption, and the evils, if any, sought to be prevented or remedied.<sup>135</sup>

The existence of flawed democratic institutions in the Philippines has been acknowledged by former Chief Justice Hilario Davide in *PIRMA v. COMELEC*<sup>136</sup> that democratic institutions are used as a “legitimizing tool for those who wish to perpetuate themselves in power”<sup>137</sup> and that the Constitution, “evidently concerned with the evils of this immutable linkage between political dynasties and a feudal socio-economic structure”<sup>138</sup> intended to discourage the concentration of political and economic power.<sup>139</sup>

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<sup>128</sup> Pangalangan, *supra* note 88, at 539.

<sup>129</sup> See also *Angara v. Electoral Commission*, No. 45081, 63 Phil. 139, Jul. 15, 1936; *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803).

<sup>130</sup> ARISTOTLE, *supra* note 15.

<sup>131</sup> *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803).

<sup>132</sup> See BICKEL, *supra* note 110, at 16-18.

<sup>133</sup> Raul Pangalangan, *Judicial Activism and Its Limits*, PHIL. DAILY INQUIRER, Feb. 1, 2008.

<sup>134</sup> Tan, *supra* note 51, at 893.

<sup>135</sup> *Civil Liberties Union v. Exec. Sec.*, G.R. No. 83896, 194 SCRA 317, 325, Feb. 22, 1991.

<sup>136</sup> G.R. No. 129754, Sep. 23, 1997 (Resolution).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

As the Constitution is the written manifestation of the sovereign will of the people, it is the yardstick upon which every act of governance is tested and measured.<sup>140</sup>

### A. JUDICIALIZATION OF POLITICS

*It is one of the paradoxes of democracy that the people at times place more confidence in the instrumentalities of the State other than those directly chosen by them for the exercise of their sovereignty.*

- Claro M. Recto<sup>141</sup>

There has been a marked expansion of judicial power throughout the globe wherein “judges [make] public policies that previously had been made or ought to have been made by legislative and executive officials.”<sup>142</sup> Hence, there is the “infusion of judicial decision-making and of courtlike procedures into political arenas where they did not previously reside.”<sup>143</sup> This expansion, popularly referred to as the “judicialization of politics”<sup>144</sup> is considered suspect as it “substitutes the policy judgment of usually unelected representatives of the socioeconomic and political elite for that of majoritarian political institutions.”<sup>145</sup> The irony present in developing nations and fledgling democracies is that it is the elected representatives of the supposedly majoritarian and representative political institutions that are from socioeconomic and political elite.

When the public and the leaders of interest groups and major economic and social institutions view the majoritarian institutions as immobilized, self-serving, or even corrupt, it is hardly surprising that they would accord the policy-making of judiciaries, who have reputations for expertise and rectitude, as much or more legitimacy as that of executives and legislatures. This tendency should only be

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<sup>140</sup> *Francisco v. House of Representatives*, G.R. No. 160261, 415 SCRA 44, 215, Nov. 10, 2003 (Vitug, J., concurring).

<sup>141</sup> *Valedictory Address* (Feb. 8, 1935) in 1 JOSE ARUEGO, *THE PHILIPPINE CONSTITUTION: ITS ORIGIN, MAKING, AND APPLICATION* 537, 539 (1969); cited in Vicente V. Mendoza, *The Protection of Liberties and Citizens' Rights: The Role of the Philippine Supreme Court*, 21 HUMAN RIGHTS L.J. 129 (1999).

<sup>142</sup> C. Neal Tate & Torbjorn Vallinder, *The Global Expansion of Judicial Power: The Judicialization of Politics*, in *THE GLOBAL EXPANSION OF JUDICIAL POWER* 2 (1995).

<sup>143</sup> Vallinder, *supra* note 84, at 13.

<sup>144</sup> Some authors have used the term ‘judicialization of society’ to refer to situations where issues of political import are brought to the judicial forum for resolution; see Gerard Chan, *Lobbying the Judiciary: Public Opinion and Judicial Independence*, 77 PHIL. L.J. 73, 74 (2002).

<sup>145</sup> Vallinder, *supra* note 92, at 5.

accelerated when judicial institutions are accorded *more* respect or legitimacy than other government institutions.<sup>146</sup>

The judicialization of politics is more a creature of social necessity than that of being an inevitable stage of democratic evolution and consolidation. For while an independent judiciary equipped with the power of judicial review coupled with a codified bill of rights is seen as an essential component of a liberal democracy - and a precondition for judicialization of politics —<sup>147</sup> the active intervention in policy-making and exercise of judicial power may be indicative of a still-developing democracy.

### 1. Active Role in the Political Space

*[Business] is born, and flourishes or fails, not so much in the market place as in the halls of the legislature or in the administrative offices of the government.*<sup>148</sup>

One of the upshots of the judicialization of politics is that the judiciary has emerged as a key player in the political economy. The decisions of the Supreme Court in recent years have impacted the rent-seeking politics common in still-developing democracies such as the Philippines. The Court has nullified large government contracts on account of irregularity in the bidding process.<sup>149</sup> More than that, the Court has blocked moves to create new congressional districts or classification of cities thereby depriving certain politicians the opportunity to increase their share of government funds or to create new bailiwicks.<sup>150</sup> In some instances, the Court even dissolved an entire province<sup>151</sup> or hindered its creation.<sup>152</sup> In a political economy where politicians amass wealth through kickbacks from contracts, pork barrel funds, and internal revenue allotments, such decisions have hit the jugular.

“By means of judicial review the courts can effect changes in power relationships among the three departments of government, as well as among

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<sup>146</sup> C. Neal Tate, *Why the Expansion of Judicial Power?*, in THE GLOBAL EXPANSION OF JUDICIAL POWER 31-32 (1995).

<sup>147</sup> *Id.* at 29.

<sup>148</sup> Thomas McHale, *An Econecological Approach to Economic Development*, at 217 (1959).

<sup>149</sup> *See infra*.

<sup>150</sup> League of Cities of the Phil. v. Commission on Elections, G.R. No. 176951, 571 SCRA 263, Nov. 18, 2008 *reversed by* League of Cities of the Phil. v. Commission on Elections, G.R. No. 176951, Dec. 21, 2009.

<sup>151</sup> Sema v. Commission on Elections, G.R. No. G.R. No. 177597, 558 SCRA 700, Jul. 16, 2008.

<sup>152</sup> Province of North Cotabato v. Rep. of the Phil. Peace Panel on Ancestral Domain (GRP), G.R. No. 183591, 568 SCRA 402, Oct. 14, 2008.

the power elite.”<sup>153</sup> Thus, inevitably, the Supreme Court can, and in fact has, become an active participant in the struggle for political power and a share in the political economy.<sup>154</sup>

#### a. Creation and Abolition of Dominions

Provinces are created and dissolved for chunks of territory, internal revenue allotment, and rich resources.<sup>155</sup> In recent years, entire provinces have been dissolved by the Supreme Court by striking down the legislations that created them on the ground that they do not meet Constitutional requirements.

As early as 1961, *Macias v. Commission on Elections*<sup>156</sup> held that district apportionment laws are subject to review by the courts and thereby nullified Republic Act 3040 – that apportioned representative districts in Philippines – on the ground that the statute apportioned districts without regard to the number of inhabitants in some of the provinces involved, thereby producing disproportionate representation. The Court rationcinated that “equality of representation in the legislature being such an essential feature of republican institutions, and affecting so many lives, the judiciary may not with a clear conscience stand by to give free hand to the discretion of the political departments of Government.”<sup>157</sup>

In *Sema v. COMELEC*,<sup>158</sup> the Supreme Court declared a provision in R.A. 9054 which grants the Regional Assembly of the Autonomous Region of Muslim Mindanao (ARMM) the power to create provinces and cities. The Court ruled that the power to create a province or city inherently involves the power to create a legislative district, and as the Congress, under the Constitution, has the exclusive power to create or reapportion legislative districts as part of its power to make laws, such cannot be delegated to a regional legislative body. In so doing, the Court declared void the creation of the province of Shariff Kabunsuan.

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<sup>153</sup> Pacifico Agabin, *Unconstitutional Essays*; cited in Chan, *supra* note 144, at 77.

<sup>154</sup> *Id.*

<sup>155</sup> See Edu Punay, *SC Voids province of Dinagat Islands*, THE PHIL. STAR, Feb. 12, 2010, at A25.

<sup>156</sup> No. 18684, 113 Phil. 1, Sep. 14, 1961.

<sup>157</sup> *Id.* at 8-9; See however *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936) wherein Justice Brandeis, conveying his *Rules of Avoidance* in his concurring opinion, stated that “it never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.”

<sup>158</sup> G.R. No. 177597, 558 SCRA 700, Jul. 16, 2008.

In *Province of North Cotabato v. Government of the Republic of the Philippines Peace Panel on Ancestral Domain*,<sup>159</sup> the Court declared contrary to the constitution the Memorandum of Agreement on Ancestral Domain (MOA-AD), the signing of which would have paved the way for the creation of the Bangsamoro Juridical Entity (BJE). The BJE would have granted the Bangsamoro people control of their ancestral homeland, having an associative relationship with the central government characterized by shared authority and responsibility as well as joint jurisdiction, authority and management of all natural resources within such territory.

In *Aldaba v. COMELEC*,<sup>160</sup> residents of Malolos City filed a petition to declare unconstitutional R.A. 9591 – creating a legislative district for Malolos City. The said law was passed pursuant to an unofficial projection that the city will attain the minimum population requirement prescribed in the Constitution<sup>161</sup> for a city to merit representation in Congress. The Solicitor General opposed the petition contending that Congress' use of projected population is non-justiciable as it involves a determination on the wisdom and standard adopted by the legislature to determine compliance with a constitutional requirement. The Court nonetheless, ruled in favor of the petitioners and in declaring the law unconstitutional held that:

...questions calling for judicial determination of compliance with constitutional standards by other branches of the government are fundamentally justiciable. The resolution of such questions falls within the checking function of this Court under the 1987 Constitution to determine whether there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of government.

Even under the 1935 Constitution, this Court had already ruled, the overwhelming weight of authority is that district apportionment laws are subject to review by courts. Compliance with constitutional standards on the creation of legislative districts is important because the aim of legislative apportionment is to equalize population and voting power among districts.<sup>162</sup>

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<sup>159</sup> G.R. No. 183591, 568 SCRA 402, Oct. 14, 2008.

<sup>160</sup> G.R. No. 188078, Jan. 25, 2010.

<sup>161</sup> CONST. art. VI, § 5(3).

<sup>162</sup> *Aldaba v. Commission on Elections*, G.R. No. 188078, Jan. 25, 2010. *See however*, *Aquino III v. Commission on Elections*, G.R. No. 189793, Apr. 7, 2010. There the Supreme Court upheld R.A. 9716, which created an additional legislative district for the Province of Camarines Sur, on the ground that the minimum population requirement of the Constitution applies only for a city to be entitled to a representative but not for a province.

In the more recent case of *Navarro v. Executive Secretary*,<sup>163</sup> the Supreme Court struck down R.A. 9355 which created the Province of Dinagat Island. The Court therein ruled that the Constitution<sup>164</sup> mandates that the creation of local government units must follow the criteria established by the Local Government Code.<sup>165</sup> And as Dinagat Island failed to comply with the population and territorial requirement for the creation of a province, the statute that created it was unconstitutional.<sup>166</sup> What is of note in *Navarro* is that the petitioners alleged that the creation of the province was an act of “gerrymandering” for the complete political dominance of an incumbent member of the House of Representatives, who was trying to avoid a clash with another political family. The Court defined “gerrymandering” in this wise:

“Gerrymandering” is a term employed to describe an apportionment of representative districts so contrived as to give an unfair advantage to the party in power. Fr. Joaquin G. Bernas, a member of the 1986 Constitutional Commission, defined “gerrymandering” as the formation of one legislative district out of separate territories for the purpose of favoring a candidate or a party. The Constitution proscribes gerrymandering, as it mandates each legislative district to comprise, as far as practicable, a contiguous, compact and adjacent territory.<sup>167</sup>

The Court, however, dismissed the claim of the petitioners as being unsubstantiated but nonetheless struck down the statute for being unconstitutional.

#### b. Public Biddings

The vigorous exercise by the Judiciary of its expanded *certiorari* jurisdiction over matters within the realm of economic governance has been criticized as an interference “anathema to private investment and economic development.”<sup>168</sup> For such matters, according to Justice Grino-Aquino, are within the sphere of competence of the two other co-equal branches of

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<sup>163</sup> G.R. No. 180050, Feb. 10, 2010.

<sup>164</sup> CONST. art. X, §10.

<sup>165</sup> LOC. GOV. CODE, §§ 7 & 461.

<sup>166</sup> See also *Tan v. Commission on Elections*, G.R. No. 73155, 142 SCRA 727, Jul. 11, 1986. The Supreme Court therein declared that the factual and legal basis for the creation of the province of Negros del Norte did not exist as it failed to satisfy the land area requirement. Hence, Batas Pambansa Blg. 885, creating the new Province of Negros del Norte, was declared unconstitutional.

<sup>167</sup> *Navarro v. Exec. Sec.*, G.R. No. 180050, Feb. 10, 2010. (internal citations omitted).

<sup>168</sup> See Artemio Panganiban, *Judicial Activism in the Philippines*, 79 PHIL. L.J. 265, 274 (2004); see also Perfecto Fernandez, *Judicial Overreaching in Selected Supreme Court Decisions Affecting Economic Policy*, 67 PHIL. L.J. 332 (1993).

government, the wisdom and soundness of which, is not for the courts to pass upon.<sup>169</sup> To interfere in such matters is to encroach upon the policy-making function of the government, from which the judiciary is excluded.<sup>170</sup>

However, freshmen in law schools would note landmark cases of Constitutional Law pertaining to grave abuse of discretion constantly include those involving government contracts, particularly in the aspect of [irregularities in] bidding.<sup>171</sup> Estimates place that “up to 30% of the cost of projects which are subject to bidding are undertaken by national agencies goes to kickbacks... [and] with democracy, corruption was democratized.”<sup>172</sup>

The Supreme Court itself hinted on the presence of such irregularities in *Chavez v. Public Estates Authority*<sup>173</sup> with its affirmation of the transaction’s epithet as the “Grandmother of All Scams”. The Court while grazing on the matter of the P1.74 billion in commissions the Senate Committee discovered the private entity paid as bribe to various persons to secure the contract, was nonetheless clear that the fatal flaw was not solely such anomalies, but rather, the glaring violation of the Constitutional provisions expressly prohibiting the alienation of lands of the public domain.<sup>174</sup>

Thus, there have been calls to revisit and review the “vast powers of the Philippine President to approve and finalize contracts.”<sup>175</sup> Dean Pacifico Agabin observes that our centralized form of government is “adapted to

<sup>169</sup> *Garcia v. Board of Investments*, G.R. No. 92024, 191 SCRA 288, 301, Nov. 9, 1990 (Grino-Aquino, J., *dissenting*). In this case, the majority held that the Board of Investments committed grave abuse of discretion in approving the transfer of the Luzon Petrochemical Corporation (LPC) petrochemical plant from Bataan to Batangas and authorizing the change of feedstock from naphtha only to naphtha and/or LPG. Note that this decision was rendered against the backdrop of the publicized “petroscam” involving the financial arrangements of the LPC project.

<sup>170</sup> *Id.* at 302 (Melencio-Herrera, J., *dissenting*); *see also* *Griswold v. Connecticut*, 381 US 479 (1965). Therein the Court held that it does not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch on economic problems, business affairs, or social conditions.

Justice Vicente V. Mendoza proposes a “double standard” in the exercise of judicial review: stringency in laws affecting civil liberty, but deference in regard to laws on economic and social ventures or experiments. Vicente V. Mendoza, *The Nature and Function of Judicial Review*, 31 IBP J. 1 (2005).

<sup>171</sup> *Chavez v. Nat’l Housing Authority*, G.R. No. 164527, 530 SCRA 235, Aug. 15, 2007; *Brillantes v. Commission on Elections*, G.R. No. 163193, 432 SCRA 269, Jun. 15, 2004; *Information Tech. Foundation v. Commission on Elections*, G.R. No. 159139, 419 SCRA 141, Jan. 13, 2004; *Agan v. Phil. Int’l Air Terminals Co. Inc.*, G.R. No. 159139, 402 SCRA 612, May 5, 2003; *Chavez v. Public Estates Authority*, G.R. No. 133250, 384 SCRA 152, Jul. 9, 2002; *JG Summit Holdings, Inc. v. Court of Appeals*, G.R. No. 124293, 345 SCRA 143, Nov. 20, 2000; *Manila Int’l Airport Authority v. Mabunay*, G.R. No. 126151, 322 SCRA 760, Jan. 20, 2000; *Kilosbayan, Inc. v. Morato*, G.R. No. 118910, 246 SCRA 540, Jul. 17, 1995.

<sup>172</sup> Fernando del Mundo, *Ali Baba is gone, but thieves still around, thriving*, PHIL. DAILY INQUIRER, Feb. 17, 2010, at A10.

<sup>173</sup> G.R. No. 133250, 415 SCRA 403, Nov. 11, 2003.

<sup>174</sup> *Id.* at 416-22.

<sup>175</sup> Amado Mendoza; *cited in id.*

imposition of pressure by powerful economic groups [and] this is especially true for the Presidency, where political power is concentrated to a very high degree.”<sup>176</sup> According to a study made by the Transparent Accountable Governance (TAG):

...corruption’s ‘disproportionate role’ in the [Philippines] ‘must be traced to more ultimate factors. These include the system of patronage politics, at both local and national levels; the lack of information among the majority (originally due to poverty, ignorance and alienation); the manipulation of government by powerful outside vested interests (originally based on land ownership and relations of dependency); the entrenchment of a stratum of political opportunists and big money politics; and a political system used as a means of wealth accumulation based on manipulations of the electoral process.’<sup>177</sup>

This is in consonance with Prof. Gatmaytan’s observation that “once in office, politicians recoup the cost of elections and expand their private economic interests through the use of state power and patronage.”<sup>178</sup>

However, in rendering decisions having economic implications, the Judiciary certainly becomes prone to criticism that in doing so, it is susceptible to subjectiveness owing to the lack of stable standards with which to render such decision.<sup>179</sup> As some authors have cautioned:

In rendering “economic” decisions perceived to be policy mistakes, the Court also opens itself not only to intellectual criticism but also to unfavourable – maybe even unfair – speculations as to why a decision was rendered in a particular way, especially when an issue involves powerful contending parties, vested interests, and enormous amounts of money. In a society where every public position is easily subject to suspicion due to pervasive corruption, the Court will need some reprieve from public excoriation, lest the people lose faith in the judiciary.<sup>180</sup>

## 2. An Accountable Judiciary

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<sup>176</sup> Pacifico Agabin, *Economic Interest Groups and Power Politics in the Philippines*, 70 PHIL. L.J. 291, 306 (1996).

<sup>177</sup> Emmanuel de Dios & Ricardo Ferrer, *cited in id.*

<sup>178</sup> Gatmaytan, *supra* note 69, at 85.

<sup>179</sup> Solomon Castro & Martin Pison, *The Economic Policy Determining Function of the Supreme Court in Times of National Crisis*, 67 PHIL. L.J. 354, 405 (1993).

<sup>180</sup> *Id.*

Governments, and its instrumentalities and officers, are deemed accountable “if citizens can discern whether governments are acting in their best interest and sanction them appropriately, so that those incumbents who satisfy citizens remain in office and those who do not, lose it.”<sup>181</sup> It seeks to assure that “agents will take their responsibility seriously and act on those responsibilities in a way that principals will approve.”<sup>182</sup> The test of accountability then is that the probability that incumbents will survive in office is sensitive to government performance. Thus, in this sense, it is also retrospective in nature.<sup>183</sup>

In our system of government, elections is not the only mechanism that ensures that public officers remain directly accountable to the people. Other proceedings such as recall<sup>184</sup> and impeachment<sup>185</sup> ensure accountability as well.

The evolution of the Philippine Constitution has always been in response to what Justice Holmes referred to as the felt necessities of the time.<sup>186</sup> Indeed, as Chief Justice Puno quips, “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.”<sup>187</sup> Among the provisions that evolved is the accountability of the Members of the Judicial Branch of government, and the mechanisms for the enforcement thereof.

The 1935 Constitution provides:

ARTICLE IX  
Impeachment

Section 1. The President, the Vice-President, the Justices of the Supreme Court, and the Auditor General, shall be removed from office on impeachment for any conviction of, culpable violation of the Constitution, treason, bribery, or other high crimes.

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<sup>181</sup> Jose Antonio Cheibub & Adam Przeworski, *Democracy, Elections, and Accountability for Economic Outcomes*, in DEMOCRACY, ACCOUNTABILITY AND REPRESENTATION 225 (1999).

<sup>182</sup> Delmer Dunn, *Mixed Elected and Nonelected Officials in Democratic Policy Making: Fundamentals of Accountability and Responsibility*, in DEMOCRACY, ACCOUNTABILITY AND REPRESENTATION 300 (1999).

<sup>183</sup> Cheibub & Przeworski, *supra* note 181.

<sup>184</sup> LOC. GOV. CODE., §§ 69-75; Rep. Act No. 9244; *see also* Garcia v. Commission on Elections, G.R. No. 111511, 227 SCRA 100, Oct. 5, 1993.

<sup>185</sup> CONST. art. XI, §§ 2-3; *See* David v. Macapagal-Arroyo, G.R. No. 171396, 489 SCRA 160, 225, May 3, 2006.

<sup>186</sup> OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881)

<sup>187</sup> Reynato Puno, *Judicial Review: Quo Vadis?*, 79 PHIL. L.J. 249, 249 (2004).

Section 2. The House of Representatives by a vote of two-thirds of all its Members, shall have the sole power of impeachment.

Section 3. The Senate shall have the sole power to try all impeachment....

The 1973 Constitution subsumed the impeachment proceedings under a new article: Accountability of Public Officers, which in turn provided that:

ARTICLE XIII  
Accountability of Public Officers

Section 1. Public office is a public trust. Public officers and employees shall serve with the highest degree of responsibility, integrity, loyalty, and efficiency, and shall remain accountable to the people.

Section 2. The President, the Justices of the Supreme Court, and the Members of the Constitutional Commissions shall be removed from office on impeachment for, and conviction of, culpable violation of the Constitution, treason, bribery, other high crimes, or graft and corruption.

Section 3. The National Assembly shall have the exclusive power to initiate, try, decide all cases of impeachment. Upon the filing of a verified complaint, the National Assembly may initiate impeachment by a vote of at least one-fifth of all its Members. No official shall be convicted without the concurrence of at least two-thirds of all the members thereof. When the National Assembly sits in impeachment cases, its Members shall be on oath or affirmation.

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Note the difference in the wording of the two Constitutions on the initiation of impeachment complaints. While the 1935 Constitution expressed that Members of the House of Representatives have the sole power of impeachment, the 1973 Constitution revised the wording. Such that, while the National Assembly shall still have the sole power to initiate impeachment, such shall be done through the filing of a verified complaint.

After the fall of the Marcos regime, the 1987 Constitution was drafted and borne out of the experience of a crooked government, further enhanced the article on the Accountability of Public Officers. The provisions on impeachment now read:

## ARTICLE XI

## Accountability of Public Officers

Section 1. Public office is a public trust. Public officers and employees must, at all times, be accountable to the people, serve them with utmost responsibility, integrity, loyalty, and efficiency; act with patriotism and justice, and lead modest lives.

Section 2. The President, the Vice-President, the Members of the Supreme Court, the Members of the Constitutional Commissions, and the Ombudsman may be removed from office on impeachment for, and conviction of, culpable violation of the Constitution, treason, bribery, graft and corruption, other high crimes, or betrayal of public trust. All other public officers and employees may be removed from office as provided by law, but not by impeachment.

Section 3. (1) The House of Representatives shall have the exclusive power to initiate all cases of impeachment.

(2) **A verified complaint for impeachment may be filed by any Member of the House of Representatives or by *any citizen* upon a resolution or endorsement by any Member thereof**, which shall be included in the Order of Business within ten session days, and referred to the proper Committee within three session days thereafter. The Committee, after hearing, and by a majority vote of all its Members, shall submit its report to the House within sixty session days from such referral, together with the corresponding resolution. The resolution shall be calendared for consideration by the House within ten session days from receipt thereof. (emphasis supplied)

(3) A vote of at least one-third of all the Members of the House shall be necessary either to affirm a favorable resolution with the Articles of Impeachment of the Committee, or override its contrary resolution. The vote of each Member shall be recorded.

(4) In case the verified complaint or resolution of impeachment is filed by at least one-third of all the Members of the House, the same shall constitute the Articles of Impeachment, and trial by the Senate shall forthwith proceed.

(5) No impeachment proceedings shall be initiated against the same official more than once within a period of one year.

(6) The Senate shall have the sole power to try and decide all cases of impeachment....

Unlike the previous Charters, the 1987 Constitution is clear and express that ordinary citizens may initiate impeachment complaints even as against members of the Supreme Court.<sup>188</sup> Such initiation no longer rests upon the sole discretion of Congress. Thus, while it may be true that the Judiciary counts no constituency other than the blindfolded lady who has not the right to vote,<sup>189</sup> to a certain extent it is nonetheless directly accountable to the people.

The present state of our Constitution is already ahead of that of the United States in terms of the power of ordinary citizens to initiate cases of impeachment against members of the Judiciary. The U.S. Constitution does not expressly provide for impeachment proceedings and impeachment of members of the Judiciary are based on the provision that judges of courts shall hold their offices during good behaviour.<sup>190</sup> The initiation of impeachment through the filing of articles of impeachment remains largely with the U.S. Congress, much like in the 1935 Philippine Constitution. While there are those that argue that *Jefferson's Manual*<sup>191</sup> empowers individual citizens to initiate the impeachment process themselves, such still cannot compare to the Constitutionally-entrenched accountability of the Philippine Supreme Court to the people.

### 3. An Independent Judiciary

Unlike the Legislature and the Executive Branches, the Judiciary does not count constituents, is never engaged in the banal popularity contest euphemistically denominated as 'elections', and is removed from the pressure and vexations of public panic and greed. Being removed from the

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<sup>188</sup> See e.g. Francisco v. House of Representatives, G.R. No. 160261, 415 SCRA 44, Nov. 10, 2003. The first impeachment complaint filed against Chief Justice Hilario Davide Jr. and seven (7) other Supreme Court Justices was filed by deposed President Joseph Estrada.

<sup>189</sup> Francisco v. House of Representatives (Puno, J., *concurring and dissenting*), 415 SCRA 44, 211, Nov. 10, 2003.

<sup>190</sup> U.S. CONST. art. III, § 1.

<sup>191</sup> "[Jefferson's Manual](#)" is an interpretive guide to parliamentary procedure, and is included (along with the Constitution) in the bound volumes of the Rules of the House of Representatives. It is ratified by each congress and the section covering impeachment lists the acceptable vehicles for bringing impeachment motions to the floor of the House. Some have advanced that another method outlined in the manual, however, is for individual citizens to submit [a memorial for impeachment](#). The relevant provision provides:

*"In the House of Representatives there are various methods of setting an impeachment in motion: by charges made on the floor on the responsibility of a Member or Delegate (II, 1303; III, 2342, 2400, 2469; VI, 525, 526, 528, 535, 536); by charges preferred by a memorial, which is usually referred to a committee for examination (III, 2364, 2491, 2494, 2496, 2499, 2515; VI, 552); or by a resolution dropped in the hopper by a Member and referred to a committee (April 15, 1970, p. 11941-2); by a message from the President (III, 2294, 2319; VI, 498); by charges transmitted from the legislature of a State (III, 2469) or Territory (III, 2487) or from a grand jury (III, 2488); or from facts developed and reported by an investigating committee of the House (III, 2399, 2444)."*

See <http://impeachforpeace.org/ImpeachNow.html> (last visited Feb. 24, 2010).

affair of politicking, the Judiciary enjoys a degree of independence unparalleled by its co-equal branches. And as it seems that it has the power to sheath the sword and to close the purse when the general will of the people, as enshrined in the Constitution, calls for it, its independence becomes even more paramount in our system of limited government.

Judicial independence partakes of two facets: (1) the independence of the institution itself and (2) the independence of the individual judges. The first denotes the insulation of the Judiciary from external influence and pressure, especially from the other branches of government, while the second, the ability of the judge to remain impartial in a given case.<sup>192</sup>

The 1987 Constitution contains provisions to ensure that the independence and integrity of the Judiciary will not be compromised, to wit:

- (1) Fiscal autonomy;<sup>193</sup>
- (2) Security of tenure<sup>194</sup> and compensation;<sup>195</sup>
- (3) Supreme Court justices cannot be removed from office except through a strict process of impeachment;<sup>196</sup>
- (4) The Executive nor the Legislative cannot abolish or restrict the Supreme Court's powers as laid down in the Constitution.<sup>197</sup>
- (5) Freedom from administrative supervision by other branches of government;<sup>198</sup> and
- (6) Ban on the Legislature from passing a law to reorganize the judiciary;<sup>199</sup>

Such safeguards against legislative encroachments are necessary if the courts of justice are to be considered as the bulwarks of a limited Constitution.<sup>200</sup> Justice Kapunan aptly describes the necessary consequence of judicial independence in this wise:

The primary duty of the Court is to render justice. The resolution of the issues brought before it must be grounded on law, justice and the basic tenets of due process, unswayed by the passions of the day or

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<sup>192</sup> Alfredo Molo III, *Navigating Through the Shifting Sands: Reinforcing Judicial Independence in the Philippine Context*, 77 PHIL. L.J. 54, 56 (2002).

<sup>193</sup> CONST. art. VIII, § 3.

<sup>194</sup> §11.

<sup>195</sup> §10.

<sup>196</sup> art. IX, § 2.

<sup>197</sup> art. VIII, § 5.

<sup>198</sup> § 6.

<sup>199</sup> § 2.

<sup>200</sup> THE FEDERALIST NO. 78 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

the clamor of the multitudes, guided only by its members' honest conscience, clean hearts and their unsullied conviction to do what is right under the law.<sup>201</sup>

## V. CONCLUSION

All this is not to say - as Justice Harlan had warned - that the Supreme Court is a haven for reform movements and its interpretation of the Constitution, a panacea for every blot upon the public welfare.<sup>202</sup>

It has been held that the Court does not sit as a super-legislature that determines the wisdom, need, and propriety of laws that touch on economic problems, business affairs, or social conditions.<sup>203</sup> The Court "must reflect the wisdom and justice of the people as expressed through their representatives in the executive and legislative departments of government."<sup>204</sup>

Indeed, periodic elections in a republican democracy serve a checking and legitimating function as much as the Judiciary does in the scheme of separation of powers of government. But in a milieu where elections are less than truly democratic, where more often than not there is mere pluralitarian rather than majoritarian government, and where the supposed majoritarian will has been subjected to particularistic interests of the few, this checking and legitimating function of the Judiciary, traditionally [or rather conservatively] viewed as counter-majoritarian becomes more easily acceptable in a developing democracy such as the Philippines.

David O'Brien came to the conclusion that "the [American Supreme] Court's influence on American life is at once both anti-democratic and counter-majoritarian."<sup>205</sup> However, he was quick to add that "that power, which flows from giving meaning to the constitution, truly rests... solely upon the approval of a free people."<sup>206</sup>

That the public applaud when the Judiciary strikes down actions of the elected representatives in government and is dissatisfied when it shirks in standing firm against the latter, is perhaps a clear indication that the Court's

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<sup>201</sup> Estrada v. Sandiganbayan, G.R. No. 148560, 369 SCRA 394, 514, Nov. 19, 2001 (Kapunan, J., *dissenting*).

<sup>202</sup> Reynolds v. Sims, 377 U.S. 533 (1964) (Harlan, J., *dissenting*).

<sup>203</sup> Griswold v. Connecticut, 381 U.S. 479 (1965).

<sup>204</sup> Angara v. Electoral Commission, No. 45081, 63 Phil. 139, 158, Jul. 15, 1936.

<sup>205</sup> DAVID O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 16 (1993).

<sup>206</sup> *Id.*

exercise and application of its reinvigorated power has the imprimatur of the people. Indeed, as Neal Tate observes:

When the public... view the majoritarian institutions as immobilized, self-serving, or even corrupt, it is hardly surprising that they would accord the policy-making of judiciaries who have reputations for expertise and rectitude, as much or more legitimacy as that of executives and legislatures. This tendency should only be accelerated when judicial institutions are accorded *more* respect or legitimacy than other government institutions.<sup>207</sup>

Those who charge the exercise and application by the judiciary of its power of judicial review as counter-majoritarian necessarily advocate that the latter must exercise restraint and passivity.<sup>208</sup> But while certainly, as Justice Holmes has said, the political branches of government are the “ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.”<sup>209</sup> But when the political branches fail to discharge their duties as guardians and representatives of the will of the majority, then the Court must not shun its duty steer them back to course by not countenancing their particularistic actions.

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<sup>207</sup> Tate, *supra* note 146, at 31-32.

<sup>208</sup> Feliciano, *supra* note 104, at 288-89.

<sup>209</sup> Missouri, Kansas & Texas Ry Co. v. May, 194 U.S. 267, 270 (1904).