THE POWERFUL JUDICIARY AND THE CONCEPT OF RULE OF LAW IN THE PHILIPPINES: Correlations, Consequences and Implications

By Joan S. Largo[1]

Ladies and gentlemen:

As I stand here this afternoon--- before such icons as Chief Justice Artemio V. Panganiban and Chief Justice Hilario Davide, Jr., before highly-respected and widely-popular business leaders as the President of the Metrobank Foundation, Mr. Anecito Sobrepena, the President of Cebu Business Club, Mr. Dondi Joseph, the President of Mandaue Chamber of Commerce and Industry, Mr. Philip Tan and the President of Mactan Chamber of Commerce, Mr. Efrain Pelaez, Jr., before the pillars of the legal community in Cebu headed by the Justices and Judges of the various courts in Cebu City, Mandaue and Lapu-lapu City, the President of IBP Cebu City Chapter, Pres. Earl Bonachita and of the IBP Cebu Chapter, Pres. Ferdinand Pepito, before the brilliant minds in the academia, headed by no less than our University President, Fr. Dionisio M. Miranda, SVD, and Vice President for Academic Affairs, Fr. Anthony Salas, SVD, the highly-respected deans of the law schools here in Cebu, their law professors, the Chair, faculty and students of the Department of Political Science of our very own School of Law and Governance, and before you our dearest students--- I am imbued with deep sense of gratitude to the Chairman and members of the Board of Trustees of the Foundation for Liberty and Prosperity for this singular opportunity to explore this less- charted terrain of Rule of Law in the Philippines.

Let me state at the outset that the ideas I intend to share with you this afternoon are still provisional, and by no means conclusive or final. This public lecture is but one of the two parts of the CJ Panganiban Professorial Chair grant. I intend that after this, and in the first semester of the next academic year, the select students of USC School of Law and Governance will have a robust debate on just how powerful courts should be as we all work to move this country forward.

Let me just digress for a moment and share with you this deep pride that I have of the debating society in our law school. I hope you can forgive me if I am a bit immodest about the fact that USC College of Law is home of many champion debaters, from Beijing Moot Court competition to ANC CVC Law Debates. So this public lecture this afternoon is a prelude, so to speak, to the rousing discourse that my students will make on this topic in the next academic year.

---

[1] Dean, University of San Carlos School of Law and Governance. LLB (USC, 1999, *Cum Laude* and Class

I. **Outline of Lecture**

I. Rule of Law: Concepts and Theories
II. Rule of Law in Developed Countries and Selected Countries in Asia
III. Rule of Law in the Philippines
IV. The Philippine Judiciary
V. Judicial Review and Rule of Law
VI. The Expanded *Certiorari* Jurisdiction of Philippine Courts under the 1987 Constitution
VII. The Powerful Court: Correlations, Implications, Consequences on the Rule of Law in the Philippines

II. Lecture Proper

More than two thousand worth of academic literatures on Rule of Law and still, it is a widely-held view that "Rule of Law is an inherently vague term, meaning different things to different people"[2], or "The Rule of Law is a historic ideal and appeals to the Rule of Law remain rhetorically powerful. Yet the precise meaning of Rule of Law is perhaps less clear than ever before."[3] Even acknowledged authorities on the subject, such as Randall Peerenboom[4], has this to say about Rule of Law:

> "Rule of Law is an essentially contested concept. It means different things to different people, and has served a wide variety of political agendas".

The concept itself is so widely accepted as to amount to a universal aspiration[5], yet, for all its pervasiveness, many find that it to be still an abstraction.

---

[2] Tom Nachbar, Judge Advocate US Army Reserve.
[3] Richard Fallon, Jr., Professor of Law, Harvard Law School.
[4] Author, *Asian Discourses of Rule of Law,* Routledge Curzon (2004).
[5] A legal analyst once remarked, "[t]he beauty of the 'rule of law' is that it is neutral. No one-the human rights community, the business community, the Chinese leadership- objects to it. Indeed, human rights advocates believe that the rule of law can prevent and remedy human rights abuses; security analysts believe that establishing the rule of law is crucial to rebuilding states plagued by internecine conflict; development experts assert that the rule of law is a critical factor behind economic growth.' See Mark Ellis, *Toward a Common Ground Definition of the Rule of Law Incorporative Substantive Principles of Justice*, 72 U. Pitt. L. Rev. 191 (2010), citing Matthew Stephenson, *A Trojan Horse in China?, in Promoting the Rule of Law Abroad: In Search of Knowledge* 196 (Thomas Carothers ed., 2006).

At its core, though, legal analysts and academicians agree that Rule of Law is about government of laws, and not of men. It goes as far back as in the time of Plato who wrote in his work, "The Laws" that---

> "[W]here the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off; but if law is the master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state."

Aristotle would later on write that---

> ". . . . Therefore he who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men. The law is reason unaffected by desire.[6]

For all of the irony in the concept of Rule of Law, that of being widely-written (and talked) about yet remaining vague, we all can agree that Rule *of* Law, though meaning different things to folks of different persuasions, is still Supremacy of the Law, Equality of All before the Law. It is differentiated from Rule *by* Law where law is considered supreme yet the state and state actors are not bound by it.

Nineteenth century theorists[7] and modern day organizations such as the World Justice Project[8] point, in different degrees and in varying ways, to four fundamental principles of the Rule of Law:

> *First*, the government and its officials and agents are accountable under the law;

---

[6] Aristotle, Politics bk iii (Steven Everson ed., Cambridge Univ. Press 1988) cited by Ricardo Gosalbo-Bono in his work, "*The Significance of the Rule of Law and Its Implications for the European Union and the United States,* 72 U. Pitt. L. Rev. 229 (2010).

[7] See for instance the works of Albert Van Dicey and of Friedrich A. Hayek, *The Road to Serfdom* 72 (U Chicago, 1944) and Friedrich A. Hayek, *The Constitution of Liberty* 208 (U Chicago, 1960) cited by Todd J. Zywicki, Associate Professor of Law, George Mason University School of Law in *Rule of Law, Freedom and Prosperity: A Symposium Sponsored By the Law and Economics Center at George Mason University School of Law: The Rule of Law, Freedom and Prosperity, 10 S. Ct. Econ. Rev. 1 (2002).*

[8] The World Justice Project® is an independent, non-profit organization… advancing the rule of law worldwide (please see http://worldjusticeproject.org/who-we-are last accessed February 25, 2013, 4:39 PM.

> *Second*, the laws are clear, publicized, stable and fair, and protect fundamental rights, including security of persons and property;
>
> *Third*, the process by which laws are enacted, administered and enforced is accessible, fair and efficient; and
>
> *Fourth*, access to justice is provided by competent, independent and ethical adjudicators, attorneys or representatives and judicial officers who are of sufficient numbers, have adequate resources, and reflect the make-up of the community they serve.

Thus, it is posited that for whenever we determine whether the Rule of Law is adhered to in a country, we look to the checklist of a law being public, clear and consistent, binding to all state actors, relatively stable, generally prospective and fairly enforced.[9] At its core are as such propositions of Constitutionalism, that is, law as a restraint, and Rule-based decision making.

To accomplish all these, a legal system must have a machinery that makes laws and which makes laws accessible to everyone. There must also be a body, usually a court and administrative agency, that enforces the law. To the discourse on Rule of Law are thus injected such formal and instrumental mechanisms as Legislature and Courts, and even the principle of separation of powers.

However, it was observed that having a law, promulgated by one who is clothed with authority to do so, and made known and applied equally to everyone, cannot be enough. An unjust law--- even if applied to all rich and poor, powerful and powerless alike--- will still invite disobedience.

Thus, there is the school of thought that holds that into the discussion on publicity, clarity, efficacy and predictability of laws must be included such values as conceptions of human rights, forms of government and even economic arrangements. These were later on referred to as the thin and thick conceptions of

---

[9] In his work, *The 'Rule of Law' as a Concept of Constitutional Discourse,* 97 Colum. L. Rev. 1 (1997), Professor Richard H. Fallon, Jr. expounded on these five elements as follows: "(1) The first element is the capacity of legal rules, standards, or principles to guide people in the conduct of their affairs. People must be able to understand the law and comply with it. (2) The second element of the Rule of Law is efficacy. The law should actually guide people, at least for the most part. In Joseph Raz's phrase, "people should be ruled by the law and obey it." (3) The third element is stability. The law should be reasonably stable, n31 in order to facilitate planning and coordinated action over time. (4) The fourth element of the Rule of Law is the supremacy of legal authority. The law should rule officials, including judges, as well as ordinary citizens. (5) The final element involves instrumentalities of impartial justice. Courts should be available to enforce the law and should employ fair procedures."

the Rule of Law, or sometimes, formal and substantive concepts of the Rule of Law.

The thin (or formal) concept of the Rule of Law concerns itself with the institutional mechanism such as having a law that is promulgated by duly-constituted authority, public and accessible, clear, stable and predictable, and with clear enforcement mechanisms. The thick (or substantive) concept begins with the basic elements of thin conception and then incorporates some elements of political morality.

It has been suggested to use the thin and thick conceptions of rule of law in the legal analysis on the extent of observance of rule of law in a country.

A. Rule of Law in some countries

Rule of Law in the United States of America

Rule of Law discussions in the US center around the idea of liberalism. The underlying theme is always about freedom and liberty, enforced by a court that is empowered to declare acts of other branches of the government void when they come in conflict with the constitution under the concept of Judicial Review. The rule of law discourses revolve around tensions between political liberty (democracy) and private liberty (individual rights).[10]

Rule of Law in EU

Despite the legal differences among European states in concepts of sovereignty, constitutional mechanisms and protection of individual human rights, rule of law is a value commonly shared by them as expressed in Article 2 of the Treaty on European Union (TEU) as amended by the Treaty of Lisbon. The Court of Justice of European Union refers to the European Community as a "Community based on the rule of law." The decisions of its public authorities are reviewable by an independent Court of Justice, and the Treaty of European Union declares that the "Union is founded on the values of respect for human dignity, freedom, democracy, equality, rule of law, and respect for human rights, including the rights of persons belonging to minorities…"[11]

---

[10] Brian Z. Tamanaha for instance cites the work of James Madison and Alexander Hamilton in the *Federalist Papers* where Madison was quoted to have expressed what to him was the core dilemma of liberal democracies: 'To secure the public good and private rights against danger of the majority faction and at the same time to preserve the spirit and form of popular government, is then the great object to which our inquiries are directed. See Brian Z. Tamanaha, The Rule of Law in the United States, *Asian Discourses of Rule of Law,* Routledge Curzon (2004).

[11] Ricardo Gosalbo- Bono, *The Significance of Rule of Law and Its Implications for the European Union and the United States,* 72 U. Pitt. L. Rev. 229 (2010).

Rule of Law China

The 1999 Constitution of the People's Republic of China declares that "[th]e People's Republic of China governs the country according to law and makes it a socialist country ruled by law"[12]. Its concept of rule of law is in direct contrast however with that of the United States. Studies showed that people are more concerned with economic growth than democracy and civil liberty, thus, rule of law is viewed in ways that are starkly different from liberal democratic framework, viz: a non-democratic system where Political Party plays a leading role, and an interpretation of rights that emphasizes stability, collective rather than individual rights, and subsistence as the basic right rather than civil and political rights.

Thus, even as the Chinese President, Hu J'intao, declared that, "we will continue to expand people's democracy and build a socialist country under the rule of law in keeping with China's national conditions"[13], scholars such as Randall Peerenboom, who trained the lens of study on China for a long time, has remarked that in terms of implementation of the Rule of Law, there still is much to be desired in China at present.[14]

Rule of Law in Singapore

The British common law framework forms as foundation for Singapore, with its Westminster parliamentary system, political checks of election, and checks on abuses of power coming in the form of judicial review over administrative action.[15]

As a non-liberal "communitarian" democracy, rule of law in Singapore is seen in instrumental terms. The ruling People's Action Party or PAP manages democracy under a Westminster parliamentary system and exercises strict paternalistic control. Individual autonomy is subordinated to a national ideology contained in *Shared Values White Paper* presented to the Parliament in 1991.[16]

---

[12] http://english.gov.cn/2005-08/05/content_20813.htm last visited February 22, 2013, 1:47 PM.

[13] Written Interview by Wall Street Journal and Washington Post with President Hu J'intao (Jan. 17, 2011), available at http://et.china- embassy.org/evig/zgxx/+789150.htm.

[14] Randy Peerenboom, *Competing Conceptions of Rule of Law in China,* Asian Discourses of Rule of Law, id., at 113 and 136.

[15] Li-ann Thio, *Rule of Law within a Non-liberal 'Communitarian' Democracy*, Asian Discourses of Rule of Law, id., at 183.

[16] **Statements** The basis for developing this Singapore identity was to identify key common values that all racial groups and faiths can subscribe to and live by. Outside of these Shared Values, each community can practise its own values as long as they are not in conflict with national ones. The main theme underlying the set of Shared Values emphasises communitarian values and reflects Singapore's heritage. **Nation before community and society above self**: Putting the interests of society ahead of the individual. **Family as the basic unit of society**: The family is identified as the most stable fundamental building block of the nation.

The rule of law is aimed at preserving the socio-political stability necessary to attract foreign investment and fuel economic growth.

B. Rule of Law in the Philippines

As early as in the first Constitution that was adopted in the country, the rule of law concept was already embedded in our legal system. The Malolos Constitution of 1899 designated the law-making authority and vested upon separate branches of government the authority to enforce and apply them.[17] Such primacy of law and concerns relating to its legitimacy and enforceability were carried on in the more broadly-written 1935 Constitution[18]. Then came the 1973 Constitution[19]. While *prima facie* carrying the rule of law elements found in the 1935 Constitution, it was in fact the 1973 Constitution that provided for the impetus for the changed concept of rule of law in the Philippines.

The 1973 Constitution

At the outset, the 1973 Constitution was already hounded with questions relating to its adherence to the amendatory provisions found in the 1935 Constitution. The ratification of the 1973 Constitution was hounded with controversy and intrigues.[20]

Community support and respect for the individual: Recognises that the individual has rights, which should be respected and not light encroached upon. Encourages the community to support and have compassion for the disadvantaged individual who may have been left behind by the free market system. **Consensus, not conflict**: Resolving issues through consensus and not conflict stresses the importance of compromise and national unity. **Racial and religious harmony**: Recognises the need for different communities to live harmoniously with one another in order for all to prosper. (accessed at http://infopedia.nl.sg/articles/SIP_542_2004-12-18.html on February 23, 2013, 2:42 PM)

[17] Title II, Article 4 of the 1899 Malolos Constitution reads: " Article 4. The Government of the Republic is popular, representative, alternative, and responsible, and shall exercise three distinct powers: namely, the legislative, the executive, and the judicial. Any two or more of these three powers shall never be united in one person or cooperation, nor the legislative power vested in one single individual.", accessed at http://www.gov.ph/the-philippine-constitutions/the-1899-malolos-constitution/ on February 24, 2013 at 12:41 pm

[18] See for instance the declaration of principles and the allocation of law-making authority upon the legislative department (Article VI), and the power to determine the constitutionality of laws upon the Judiciary (Article VIII), 1935 Constitution last accessed at http://www.gov.ph/the-philippine-constitutions/the-1935-constitution/ on February 24, 2013, 12:48 pm.

[19] http://www.gov.ph/the-philippine-constitutions/1973-constitution-of-the-republic-of-the-philippines-2/.

[20] In the case of *Javellana vs Executive Secretary, GR No. L-36142, March 31, 1973 (En Banc),* the factual setting relating to its tumultuous adoption was described in this manner: "On March 16, 1967, Congress of the Philippines passed Resolution No. 2, which was amended by Resolution No. 4 of said body, adopted on June 17, 1969, calling a convention to propose amendments to the Constitution of the Philippines. Said Resolution No. 2, as amended, was implemented by Republic Act No. 6132, approved on August 24, 1970, pursuant to the provisions of which the election of delegates to said Convention was held

On the question of validity of the ratification, six Justices of the Supreme Court held that the Constitution proposed by the 1971 Constitutional Convention was not validly ratified in accordance with Article XV, Section 1 of the 1935 Constitution, which provides for only one way of ratification, *i.e.*, "in an election or plebiscite held in accordance with law and participated in only by qualified and duly registered voters. Yet, the Court ruled that "there is no further judicial obstacle to the new Constitution being considered in force and effect" because "there are not enough votes to declare that the new Constitution is not in force."

Since then, many other challenges to governmental actions committed during martial law had been made, such as the validity of Arrest, Search and Seizure Order (ASSO), Presidential Commitment Order (PCO) and Presidential Detention Action (PDA), which were brushed aside by the Court upon the invocation by the Marcos regime of political question doctrine. The other perceived abuses were chronicled by Chief Justice Roberto Concepcion in his sponsorship speech[21] during the deliberation of the framers of the 1987 Constitution.

The 1987 Constitution

In the words of its framers, the 1987 Constitution is unique because "it was drafted in an atmosphere of a revolutionary government."[22] It was "predicated on experience in the sense that it is built on the past[23]", "the culmination of the February revolution and is, in fact, its necessary consequence[24]".

---

on November 10, 1970, and the, 1971 Constitutional Convention began to perform its functions on June 1, 1971. While the Convention was in session on September 21, 1972, the President issued Proclamation No. 1081 placing the entire Philippines under Martial Law. On November 29, 1972, the Convention approved its Proposed Constitution of the Republic of the Philippines. The next day, November 30, 1972, the President of the Philippines issued Presidential Decree No. 73, 'submitting to the Filipino people for ratification or rejection the Constitution of the Republic of the Philippines proposed by the 1971 Constitutional Convention, and appropriating funds therefor,' as well as setting the plebiscite for said ratification or rejection of the Proposed Constitution on January 15, 1973. Soon after, or on December 7, 1972, Charito Planas filed, with this Court, Case G.R. No. L-35925, against the Commission on Elections, the Treasurer of the Philippines and the Auditor General, to enjoin said 'respondents or their agents from implementing Presidential Decree No. 73, in any manner, until further orders of the Court,' upon the grounds, inter alia that said Presidential Decree 'has no force and effect as law because the calling . . . of such plebiscite, the setting of guidelines for the conduct of the same, the prescription of the ballots to be used and the question to be answered by the voters, and the appropriation of public funds for the purpose, are, by the Constitution, lodged exclusively in Congress . . .,' and 'there is no proper submission to the people of said Proposed Constitution set for January 15, 1973, there being no freedom of speech, press and assembly, and there being sufficient time to inform the people of the contents thereof.'

[21] See Volume I, Record of Constitutional Convention (RCC) No. 27

[22] Commissioner Maambong, id.

[23] Commissioner (later on, Justice of the Supreme Court) Adolf Azcuna, Volume III, Journal No. 106, October 15, 1986

[24] Commissioner Concepcion, id.

It was unabashedly a direct reaction to the abuses of a "repressive and rapacious regime"[25]. Decrying the many cases where the plea of "political question" was set up, resulting in the dismissal of cases, Commissioner Concepcion proposed[26] that judicial power in the Constitution be defined in this way:

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

something which is "new in our constitutional law."[27]

C. The Philippine Courts under the 1987 Constitution

And so it came to pass that our courts ceased to be the "weakest", "least dangerous" branch of government in this country.

Already, there are notable distinctions between Philippine Courts and US courts. While courts in both jurisdictions possess judicial power that is understood to mean the power to settle not only actual controversies that are legally demandable and enforceable (traditional judicial power), but also to determine whether or not the acts of the other branches of the government are in accord with the Constitution (judicial review), the Philippine courts wield such power by virtue of express mandate in the past and present Constitutions. In contrast, the US courts possess the power of judicial review not by express constitutional fiat but by judicial pronouncement in the landmark case of *Marbury vs. Madison*[28].

When further compared with other courts in Europe, the Philippine courts concededly possess greater power. Ordinary courts in Europe do not possess such jurisdiction to disregard a statute repugnant to the constitution. Such authority is reserved to another body, a constitutional court, and further restricted by such concepts as parliamentary supremacy. In fact, in France, there is no review of

---

[25] Commissioner Rama, Volume III, Journal No. 106, October 15, 1986.
[26] Volume I, RCC No. 27.
[27] Id.
[28] 5 U.S. 137 (1803).

enacted legislation at all. France's Constitutional Council[29] can examine the constitutionality of a proposed statute only before it becomes law.[30]

Judicial Power of Philippine Courts

The authority of our courts under the 1987 Constitution may thus be classified into three. There is the traditional notion of judicial power as the authority to settle actual disputes involving rights that are judicially demandable and enforceable. There is judicial review, as part and parcel of judicial power and as a component of the check and balance system in this presidential set-up of government. Narrower in scope than judicial power per se, judicial review refers to the authority of courts to declare void any act of any branch of government that is in conflict with the constitution. And then, by express declaration in Section 1, Article VIII of the 1987 Constitution, there is the authority of the courts[31] to invalidate any act of any branch or instrumentality of the government when done in grave abuse of discretion amounting to lack or excess of jurisdiction, otherwise referred to as the expanded certiorari jurisdiction, or expanded judicial review.

When it comes to reviewing the acts of the co-equal branches of Philippine government, namely, Legislative and Executive, the Philippine courts, just like their American counterpart, are quick to point out there is no judicial supremacy but only the supremacy of the Constitution.

In fact, this power to review the acts of the co-equal branches is exercised cautiously, if not grudgingly, with numerous self-imposed restraints, such as the presumption of constitutionality ("to doubt is to sustain"), the stance of purposeful hesitation whenever courts are asked to declare unconstitutional the acts of the co-equal branches of the government, the requirements of actual case, proper party, necessity of deciding constitutional question, as preconditions before courts will exercise the power of judicial review.

Even then, and despite the avowed policy of restraint, the exercise of the power of judicial review has already elicited criticisms, the strongest of which being that the power is seen to be counter-majoritarian. Why allow fifteen non-elected judges to reverse and set aside the decisions--- the will--- of the political branches of the government which consist of officials who are elected to represent the people?

---

[29] Perceived to be a "fourth branch" of government.

[30] See Gustavo Fernandes de Andrade, *Comparative Constitutional Law: Judicial Review, 3 U. Pa. J. Const. L. 977, 2001.*

[31] In *JM Tuason & Co. v. Court of Appeals, 3 SCRA 696,* the Supreme Court ruled that this power of judicial review is exercisable not only by the Supreme Court but also of all lower courts, ie., from the Court of Appeals to the courts of general (Regional Trial Courts) and limited (Municipal Trial Courts) jurisdiction.

It may be worth stressing that this criticism of courts as counter-majoritarian came about when the nullification is supposedly based on the *letters* and/or intent of the Constitution. What to make then of the authority of the court to set aside and nullify decisions of any branch or instrumentality of the government on ground of *discretion*, that is, alleged "grave abuse of discretion"?

D. The Expanded Certiorari Jurisdiction

The expanded certiorari jurisdiction of our courts finds anchor on the express provision of the 1987 Constitution found in Article VIII, Section 1, second paragraph thereof, which states in part---

> "…and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the government."

It was called expanded certiorari jurisdiction because the certiorari jurisdiction of the courts *prior* to 1987 Constitution refers only to the authority of the higher court to review and set aside the decision of lower courts on ground of grave abuse of discretion. Now and with the 1987 Constitution, this authority has been extended to acts not only of lower courts, but also of "any branch or instrumentality of the government".

It cannot be overemphasized that the exercise of this power is anchored on grave abuse of discretion as opposed to judicial review that is premised on violation of the letters and/or intent of the Constitution.

Not only is this power first in our Constitution and in our legal system, it may even be first in the world. Hence, the bold claim that ours is a powerful court, that with the birth of the 1987 Constitution, the Judiciary is no longer the weakest, or the least dangerous branch of government. This non-elected branch of government *is* powerful, and has, in fact, all the potentials of becoming more powerful than the two elected branches of government.

According to the framers of the Constitution

The record of deliberations of the 1986 Constitutional Commission clearly indicates that the exercise of expanded certiorari jurisdiction of the Courts is to be limited to the instance when "the Judiciary feels that the department or branch concerned has acted without jurisdiction or in excess of its jurisdiction amounting to an *arbitrary* abuse of power".[32]

---

[32] Vol 1, Journal 27 1986 Constitutional Commission approved on July 11, 1986, emphasis supplied.

The intent was to make the Judiciary "an effective guardian and interpreter of the Constitution and the protector of the **people's rights**." The implication is that "the Supreme Court cannot, like Pontius Pilate, wash its hands of its responsibility of reviewing acts of public officials and offices."[33]

Speaking about this expanded authority of the courts, the President of the 1986 Constitutional Commission, the late Mdm Justice Cecilia Muñoz- Palma, was recorded to have said that the new Charter clothes the judicial branch with the mantle of independence in order that it may attain once more its lost prestige and regain the faith of the Filipino people. She pointed out that the provisions on the Judiciary aim to make the courts of justice the true and faithful "guardian of the Constitution, protector of the people's rights and freedoms, arid repository of the nation's guarantees against tyranny, despotism and dictatorship". She noted that for the first time and breaking all traditions in the history of the Judiciary in the country, judicial power is defined in the Constitution to include the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction which would mean, according to Chief Justice Roberto Concepcion in his dissenting opinion in Javellana vs. Executive Secretary, that when the grant of power is qualified, conditional or subject to limitations, the issue whether or not such conditions have been met is justiciable or non-political and the courts have the duty rather than the power to determine whether another branch of government has kept within constitutional limits. With this broad definition of judicial power, she stated that the highest Tribunal could no longer evade adjudicating on the validity of executive or legislative action by claiming that the issue is a political question.[34]

From the deliberations it can, thus, be gleaned that the reason for conferring upon courts the power of expanded judicial review is to make the Court the guardian of rights lost or severely diluted during martial law.

According to the Supreme Court

Expounding on this new power, the Supreme Court has these pronouncements:

> "In the past, the Supreme Court, as head of the third and weakest branch of our Government, was all too willing to avoid a political confrontation with the other two branches by burying its head ostrich-like in the sands of the "political question" doctrine, the accepted meaning of which is that "where the matter involved is left to a decision by the people acting in their sovereign capacity or to

[33] Volume III, Journal 109, October, 1986.
[34] October, 1986 Volume III, Journal 109.

> the sole determination by either or both the legislative or executive branch of the government, it is beyond judicial cognizance. Thus it was that in suits where the party proceeded against was either the President or Congress, or any of its branches for that matter, the courts refused to act." [35]

With the expanded certiorari jurisdiction of courts---

> "Even if the question were political in nature, it would still come within our powers of review under the expanded jurisdiction conferred upon us by Article VIII, Section 1, of the Constitution, which includes the authority to determine whether grave abuse of discretion amounting to excess or lack of jurisdiction has been committed by any branch or instrumentality of the government."[36]

History books reveal the tendency of people, coming out of, and coming fresh from, a revolution, to secure their newly-recovered freedoms in courts. Our martial law experience, and our reaction therefrom, all show adherence to this shared tendency, for our 1987 Constitution chronicles the intention to secure for ourselves the rights that were miffed and muffled by the Marcos regime, and to constitute courts as protectors and enforcers thereof.

The power as exercised by our courts

How was this new power wielded by our Supreme Court in the recent past? Petitions for certiorari were entertained by our courts on a myriad of cases.

It was used by an organization composed of men and women who identify themselves as lesbians, gays, bisexuals, or trans-gendered individuals (LGBTs) to nullify the Resolutions of the Commission on Elections (COMELEC) that denied their application to accredit Ang Ladlad as a party-list organization under Republic Act (RA) No. 7941, otherwise known as the Party-List System Act. The argument used in the petition is that such refusal contravened the party's constitutional rights to privacy, freedom of speech and assembly, and equal protection of laws, as well as constituted violations of the Philippines' international obligations against discrimination based on sexual orientation.[37]

---

[35] Aquino vs. Ponce Enrile, 59 SCRA 183, 196.
[36] Coseteng vs Mitra
[37] Ang Ladlad vs Comelec, G.R. No. 190582. April 8, 2010 (En Banc).

It was used to question and nullify a presidential proclamation declaring a state of national emergency[38], and to nullify a presidential issuance creating the Truth Commission[39]

It was used to strike down as unconstitutional the presidential appointment of an Undersecretary Maria Elena H. Bautista as Officer-in-Charge (OIC) of the Maritime Industry Authority (MARINA).[40]

It was resorted to in order to nullify a law [Republic Act (R.A.) No. 9355], otherwise known as An Act Creating the Province of Dinagat Islands, for being unconstitutional[41], and to assail and nullify certain statutory provisions, presidential actions and implementing orders, toll operation-related contracts and issuances on the construction, maintenance and operation of the major tollway systems in Luzon.[42] It was also used to question the exercise of Congress' power to conduct inquiries in aid of legislation insofar as it comes in conflict with the President's executive privilege.[43]

It was used to challenge, on constitutional grounds, the concurrence of the Philippine Senate in the ratification by the President of the Philippines of the Agreement Establishing the World Trade Organization (WTO Agreement).[44]

It was used to annul and set aside the decision of the Board of Investments (BOI)/Department of Trade and Industry (DTI) approving the transfer of the site of the proposed petrochemical plant from Bataan to Batangas and the shift of feedstock for that plant from naphtha only to naphtha and/or liquefied petroleum gas (LPG), on the ground that "the BOI committed a grave abuse of discretion in approving the transfer of the petrochemical plant from Bataan to Batangas and authorizing the change of feedstock from naphtha only to naphtha and/or LPG for the main reason that the final say is in the investor all other circumstances to the contrary notwithstanding."[45]

---

[38] David vs Gloria Macapagal- Arroyo, GR No. 171396, May 3, 2006 (En Banc). In this case, the declaration of state of national emergency and the exercise of the power to call out the armed forces were declared constitutional but warrantless arrest of Randolf S. David and Ronald Llamas; the dispersal and warrantless arrest of the KMU and NAFLU-KMU members during their rallies, in the absence of proof that these petitioners were committing acts constituting lawless violence, invasion or rebellion and violating BP 880; the imposition of standards on media or any form of prior restraint on the press, as well as the warrantless search of the Tribune offices and whimsical seizure of its articles for publication and other materials, were declared unconstitutional.

[39] Lagman vs Ochoa, G.R. No. 192935. December 7, 2010 (En Banc).

[40] Funa vs Ermita, G.R. No. 184740. February 11, 2010 (En Banc).

[41] Navarro vs Ermita, GR No. 180050, February 10, 2010 (En Banc). This was later on revisited and reversed in 2011.

[42] Francisco, Jr. vs Toll Regulatory Board, G.R. No. 166910. October 19, 2010 (En Banc).

[43] Drilon vs Ermita, G.R. No. 169777, April 20, 2006 (En Banc); Gudani vs Senga, GR No. 170165, August 15, 2006 (En Banc).

[44] Tanada vs Angara, GR No. G.R. No. 118295. May 2, 1997 (En Banc).

[45] Congressman Enrique T. Garcia vs. The Board of Investments, G.R. No. 92024. November 9, 1990 (En Banc).

The Court reviewed the economic decisions of the investors and of the Board of Investments and found that "**[t]here is no need to buy expensive real estate for the site unlike in the proposed transfer to Batangas…** [as] [t]he site is ideal."[46] As a result, the investors abandoned the project and the Bataan Nuclear Power Plant remained to be a grim monument of many wasted public funds.

E. Correlations, Consequences, Implications

In the main then, the power has been used to review acts not only of lower courts but also of Congress, President, Constitutional Commissions such as Comelec--- practically all other branches and instrumentalities of government, most of the time, on constitutional grounds.

There are, however, exceptional and rare instances such as that of *Garcia vs. BOI* when the power was used to reverse and set aside the decision of the executive branch not on any violation of constitutional precept but on the ground that the court has found the other branch to have "gravely abused its discretion".

What is grave abuse of discretion? When is there grave abuse of discretion? The court defined grave abuse of discretion as the exercise of power "in an arbitrary or despotic manner by reason of passion of personal hostility, and must be so patent and so gross as to amount to an evasion of a positive duty or to a virtual refusal to perform the duty enjoined or to act at all in contemplation of law"[47].

At bottom, however, grave abuse of discretion is what the court deems it to be. And here is where danger lies.

As it is, even if Court has shown adherence to Chief Justice Panganiban's philosophy[48] of judicial activism in matters involving freedom and judicial restraint in matters involving economic policy[49], judicial restraint itself has been relaxed. We see the requirement of actual case being relaxed in the name of facial challenge; proper party requirement brushed aside when there are cases deemed by the Supreme Court to be of transcendental importance, and presumption of constitutionality exchanged with heavy presumption of constitutionality in cases involving content-based restrictions to freedom of expression.

This is because judicial restraint, like judicial activism, is a judge-made policy. And like grave abuse of discretion, it can be what the magistrate perceives it to be.

---

[46] Id.

[47] See host of cases such as *Toh vs Court of Appeals,* G.R. No. 140274. November 15, 2000.

[48] See http://cjpanganiban.ph/speeches/spreading-the-gospel-of-liberty-and-prosperity and for speeches and publications of Chief Justice Artemio V. Panganiban, www.cjpanganiban.ph.

[49] See Tanada vs Angara, GR No. 118295, May 2, 1997 (En Banc).

What, then, of empowering courts to look into exercises of discretion by other branches of government?

On the one hand, it was observed that the availability of recourse to courts, whether the question be purely legal or imbued with non-legal concerns such as that of discretion, has foiled the tendency of the people to take their gripes to the streets reminiscent of the People Power Revolution. When people have remedies within the legal system, there is lesser incentive to work outside of it, thereby, in a sense, preserving the stability of legal institutions and thus, the Rule of Law.

But on the other, when courts are so empowered--- by the Constitution no less--- to look into issues that are no longer legal, and already political, the very predictability of laws are threatened, to say the least.

US Supreme Court Justice Antonin Scalia, while not speaking about certiorari jurisdiction, has this to say about "discretion- conferring approach" to decision- making:

> "[There is] . . . another obvious advantage of establishing as soon as possible a clear, general principle of decision: predictability. Even in simpler times uncertainty has been regarded as incompatible with the Rule of Law. .. As laws have become more numerous, and as people have become increasingly ready to punish their adversaries in the courts, we can less and less afford protracted uncertainty regarding what the law may mean. Predictability, or as Llewellyn put it, "reckonability," is a needful characteristic of any law worthy of the name. There are times when even a bad rule is better than no rule at all".[50]

Eschewing greater discretion on the part of judges, he opines that it is in fact the certainty of rules that "[t]he chances that frail men and women will stand up to their unpleasant duty are greatly increased if they can stand behind the solid shield of a firm, clear principle enunciated in earlier cases." Thus, he concludes that the Rule of Law is the law of rules.[51]

Even the Supreme Court Economic Review of the University of Chicago reports that the growing trend in recent years, in many Latin American countries for instance, is to grow "a rule of law that will constrain government meddling in the economy and thereby provide a stable foundation for freedom, democracy

---

[50] Rule of Law as Law of Rules, 56 U. Chi. L. Rev. 1175, 1175-81 (1989).
[51] 56 U. Chi. L. Rev. 1175, 1175-81 (1989).

and free markets."[52]

In the symposium on Rule of Law, Freedom, and Prosperity, it was noted that by constraining governmental activity, the rule of law provides an institutional framework conducive to investment, entrepreneurship, and long-term capital development. Individuals are more willing to invest in economic growth where property rights are stable and contracts are secure. The economic success of countries such as Chile, Singapore, and Hong Kong at a time when there is an almost complete absence of democratic politics shows that even when "[d]emocracy was absent, but rule of law values were strong", there is still an environment conducive to growth.[53]

F. Concluding Statements

The Judiciary has always been the focal point of rule of law discussions in any country, developed or developing. It is the courts that play a central role in the promotion of rule in the society. Hence, any aspiration for rule of law in any country begins with the hope of having an independent, effective and non-corrupt judiciary.

In the Philippines, and owing to our experiences during the martial law regime, substantive or thick rule of law finds expression in a Constitution that was described by its framers as having "the basic philosophy of a good Constitution, namely: 1) the allocation of powers of government with checks and balances; and 2) the limitations on the exercise of governmental power for the protection of individual liberties and the promotion of human rights."[54]

However, as with other developing countries, we are still plagued by issues relating to the thin conception of rule of law, issues that are tied up with such concerns as clogged dockets, delayed delivery of justice and even issues of corruptibility of our institutions—concerns that go into the legality and legitimacy aspects of Rule of Law. In the report released by World Justice Project in 2010, the Philippines received very poor to poor marks in the World Justice Project's "Rule of Law Index". The Index, according to the report, is "a new quantitative assessment tool designed to offer a comprehensive picture of the extent to which countries adhere to the rule of law in practice". Philippines ranked sixth, or second to the last in the region, in the areas of Limited Government Power (.57), Absence of Corruption (.45), Clear, Publicized and Stable laws (.43), Regulatory Enforcement (.52) and Access to Civil Justice (.48).[55]

---

[52] Todd J. Zywicki, *THE RULE OF LAW, FREEDOM, AND PROSPERITY: A SYMPOSIUM SPONSORED BY THE LAW AND ECONOMICS CENTER AT GEORGE MASON UNIVERSITY SCHOOL OF LAW*: *The Rule of Law, Freedom, and Prosperity*, 10 S. Ct. Econ. Rev. 1 (2002).

[53] Id.

[54] Remarks of Commissioner Padilla, Volume III, Journal No. 106, October 15, 1986.

[55] http://globalnation.inquirer.net/news/breakingnews/view/20110208-319224/PH-ranks-poorly-in-2010-Rule-of-Law-Index visited on February 17, 2013, 9:46 am. 2012- 2013 Index now available at http://worldjusticeproject.org/country/philippines.

The importance of Rule of Law is a given. As the World Justice Project remarks, "[t]he rule of law is the underlying framework of rules and rights that make prosperous and fair societies possible."

How powerful must Philippine courts be, in upholding rule of law in this country?

Must our courts possess expanded certiorari jurisdiction over and above their traditional judicial authority? Now and in these post-Martial Law years, is the expanded certiorari jurisdiction needed to uphold and promote the fundamental rights brushed aside during the martial law era, when numerous of these rights and safeguards to freedom have already been codified in the Constitution? For instance, the authority of courts to determine the factual basis of declaration of martial law and suspension of the privilege of writs of habeas corpus is safely ensconced in Article VII, Section 18 of the 1987 Constitution. The guarantees against unreasonable searches and seizures are absolutely secured in Article III thereof, and the post-Martial Law Supreme Court thereafter issued various rules in further protection of rights such as the Rules on Writ of Amparo and Writ of Habeas Data.

As the case of *Garcia vs. BOI* shows, the expanded certiorari jurisdiction can turn courts not only as bold guardians of people's rights, but also as unintended policy makers.

The critics of judicial review already warned us of the undemocratic practice of permitting non-elected judges to reverse and set aside the acts of elected officials on constitutional grounds. "But who is to guard the guardians themselves? (*Sed quis custodiet ipsos custodies?*)"[56] How much more, then, when courts review questions that are no longer legal and already concededly political?

Expanded certiorari jurisdiction, thus, comes at a cost to our legal system. Policies, when placed within the pale of review of non-policy makers, suffer from diminished predictability and certain uncertainty.

Adam Smith, the great thinker of our time, said ---

> If society provides for a stable and sensible legal and political framework, the innate genius of human energy and imagination will allow growth to take care of itself.[57]

Where does the expanded certiorari jurisdiction stand in this nation's quest for a stable and sensible legal and political framework? Such is the homework for my students, and a continuing research assignment for me in this Chief Justice Panganiban Professorial Chair grant. #

---

[56] Juvenal (Roman poet and author [AD. 60-138]), Satires.

[57] Cf., *An Inquiry into the Nature and Causes of Wealth of Nations*.