Social Justice

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> *It is a document which in clear and in unmistakable terms reaches out to the underprivileged, the paupers, the sick, the elderly, disabled, veterans*[,] *and other sectors of society. It is a document which opens an expanded improved way of life for the farmers, the workers, the fishermen, the rank and file of those in service to the* [G]*overnment. And that is why I say that the Article on Social Justice is the heart of the new Charter.*
>
> — Cecilia Muñoz-Palma[1]

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I. WHY SOCIAL JUSTICE?

There is a growing global call for social justice because of the worsening inequality within and among countries.[2] In addition, many developing countries continue to struggle against mass poverty despite the worldwide decline of people languishing in "extreme poverty," defined as those having per capita income below one dollar and 25 centavos per day,[3] from two billion to one billion in twenty years (from 1990-2010) or five years earlier than the target date of 2015 under the Millenium Development Goals.[4]

Some commentators attribute this accomplishment mainly to free trade and globalization which, they suggest, can be done again in the next 20 years to finally end mass poverty in the world.[5] This optimism ignores that all or a major portion of that one billion reduction occurred in China,[6] where the starting point was the more radical re-structuring of agriculture based on intensive family-sized farming and away from collective farming, rather than free trade and globalization.[7] Moreover, observers ignore that social change preceded or at least accompanied this paradigm change in agriculture

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1. President, Constitutional Commission of 1986. V RECORD OF THE CONSTITUTIONAL COMMISSION 106 (1986) [hereinafter V RECORD].
2. THE UNITED NATIONS RESEARCH INSTITUTE FOR SOCIAL DEVELOPMENT (UNRISD), INEQUALITIES AND THE POST-2015 DEVELOPMENT AGENDA 1 (2013) & ELIZABETH STUART, MAKING GROWTH INCLUSIVE: SOME LESSONS FROM COUNTRIES AND THE LITERATURE 11 (2011).
3. The Economist, Towards the end of poverty, *available at* http://www.economist.com/news/leaders/21578665-nearly-1-billion-people-have-been-taken-out-extreme-poverty-20-years-world-should-aim (last accessed Dec. 31, 2014).
4. *Id.*
5. *Id.*
6. The Economist, Not Always With Us, *available at* http://www.economist.com/news/briefing/21578643-world-has-astonishing-chance-take-billion-people-out-extreme-poverty-2030-not (last accessed Dec. 31, 2014).
7. JIKUN HUANG, ET AL., SMALL-SCALE FARMERS IN CHINA IN THE FACE OF MODERNISATION AND GLOBALISATION 5 (2012).

together with a meritocracy that works for China, wherein almost all leaders have decades of experience in public office from the bottom up.[8]

This is not the place to debate the issue of democracy versus autocracy that is usually provoked by China's phenomenal achievement. Economic growth and development, defined as growth plus equitable distribution,[9] is a complex process that cannot be reduced to any single factor. But for purposes of this Article, the assumption is that it is unlikely, for a myriad of reasons, that the China phenomenon can be replicated by any country still with mass poverty, like the Philippines.

The irony of it may be that, even if the Philippines followed the policies of other successful North East Asia countries rather than China — namely Japan, Korea, and Taiwan — and successfully addressed mass poverty by reducing its number from the present 24% of the population[10] to below 10%, the high level of inequality in the Philippines will follow the same pattern of increasing inequality that the developed countries are experiencing today.[11] This is the prognosis of the recent study by Thomas Piketty — that the historical trend of a higher rate of return on capital than the economic growth rate will continue, thereby worsening inequality, unless drastic measures are undertaken to avert it.[12]

It is this Article's position that one of the major causes why the Philippines has been the laggard in this part of the world in addressing mass poverty and inequality for the past 50 years is mainly attributable to its people. As a lawyer-philosopher would put it —

> Poverty results not from natural market forces but from the way we have shaped corporate law, labor law, employment law, trade law, education law, and also property law. Poverty is neither a natural disaster nor an act of God. It is a preventable disease. The question is not whether we can do anything about it; the question is whether we want to.[13]

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8. *See generally* JOE STUDWELL, HOW ASIA WORKS: SUCCESS AND FAILURE IN THE WORLD'S MOST DYNAMIC REGION (2013).

9. RICHARD B. GOODE, GOVERNMENT FINANCE IN DEVELOPING COUNTRIES 230 (1984).

10. National Statistical Coordination Board, StatWatch, *available at* http://www.nscb.gov.ph/stats/statwatch.asp (last accessed Dec. 31, 2014).

11. Nina Pavcnik, *Globalization and within-country income inequality*, *in* MAKING GLOBALIZATION SOCIALLY SUSTAINABLE 233 (Marc Bacchetta & Marion Jansen eds., 2011).

12. THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 351 (2014).

13. Joseph William Singer, *Titles of Nobility: Poverty, Immigration, and Property in a Free and Democratic Society*, 1 J.L. PROP. & SOC'Y 1, 12 (2014).

This Article submits that, despite the lofty promises of the Constitution and political leaders, social justice, the central theme and "heart" of the Constitution,[14] has not been delivered because our society *does not want to.* This is manifested in social legislation that contains loopholes (e.g., allowing agrarian reform by way of distribution of shares of stock rather than land);[15] execution of a law that is marked by under-funding and shameless deference to the interests of the rich and the powerful (e.g., long-term lease of Davao Penal Colony lands);[16] and jurisprudence that gets in the way of substantial justice because of the convenient application of legal doctrines or maxims, such as *stare decisis*,[17] "equal protection and equal justice,"[18] or judicial restraint[19] particularly in cases involving economics which the Supreme Court rationalizes as better left to the policy-making role and wisdom of Congress.[20]

Why the Supreme Court invokes the doctrine of avoiding "policy issues" — even in cases with far reaching consequences on economic and social policies, and on the poor — when its power of judicial review includes the power to interpret the Constitution[21] and to promulgate "controlling principles" for the guidance of the Legislature and the Executive,[22] is a valid question to ask and, thus, is the primary concern of this Article. The Constitution contains many economic principles and

14. V RECORD, *supra* note 1, at 106.

15. *See* An Act Instituting a Comprehensive Agrarian Reform Program to Promote Social Justice and Industrialization, Providing the Mechanism for its Implementation, and for Other Purposes [Comprehensive Agrarian Reform Law of 1988], Republic Act No. 6657, §§ 20 & 31 (1988).

16. SATURNINO M. BORRAS, JR., PRO-POOR LAND REFORM: A CRITIQUE 201 (2007).

17. *See, e.g.*, Lambino v. Commission on Elections, 505 SCRA 160 (2006).

18. *See, e.g.*, Central Bank Employees Association v. Bangko Sentral ng Pilipinas, 446 SCRA 299 (2004).

19. *See, e.g.*, Hacienda Luisita Incorporated, v. Presidential Agrarian Reform Council, 660 SCRA 525 (2011) & Francisco, Jr. v. Nagmamalasakit na mga Manananggol ng mga Manggagawang Pilipino, Inc., 415 SCRA 44 (2003).

20. *See, e.g.*, Tañada v. Angara, 272 SCRA 18 (1997) & La Bugal-B'Laan Tribal Association, Inc. v. Ramos, 445 SCRA 1 (2004).

21. Myrna Dimaranan Vidal, Judicial Legislation: Dissected, *available at* http://ca.judiciary.gov.ph/index.php?action=mnuactual_contents&ap=j60200 (last accessed Dec. 31, 2014).

22. JOAQUIN G. BERNAS, S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 951 (2009 ed.) (citing Quizon v. COMELEC, 545 SCRA 635 (2008) & Mattel, Inc. v. Francisco, 560 SCRA 504 (2008)).

prescriptions on poverty and inequality,[23] such that avoiding economic issues especially on landmark cases leaves a gaping hole in the delicate balance of separation of powers and in the scope of judicial review. As a result, social justice is not served. This cannot be countenanced.

II. WHAT IS SOCIAL JUSTICE?

A. Selective Scan of Other Countries

The Philippines is one of the few countries that has institutionalized social justice in its Constitution,[24] a fact not reflected in several Supreme Court decisions.[25] Others in this limited circle are the Republic of South Africa and Spain.[26]

For instance, it is a fact that provisions on social and economic (SE) rights are absent in the United States (U.S.) Constitution.[27] Instead, substantive SE rights are embodied in several federal state constitutions.[28] This is precarious, however, because a federal state constitution is

> primarily a system of negative rights that protects against harmful [G]overnment action but does not create positive obligations for the [G]overnment. Thus, even if economic and social rights were enumerated within this system, full implementation of these rights would be severely limited under a domestic framework.[29]

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23. *See, e.g.*, PHIL. CONST. art. II; PHIL. CONST. art III, § 11; & PHIL. CONST. art. XIII.

24. *See* Edsel Tupaz, Disaster in the Philippines: The Need to Clarify Socioeconomic Rights, *available at* http://jurist.org/sidebar/2011/12/edsel-tupaz-sendong.php (last accessed Dec. 31, 2014).

25. *See, e.g.*, Calalang v. Williams, 70 Phil. 726 (1940); Guido v. Rural Progress Administration, 84 Phil. 847 (1949); Asociacion de Agricultores de Talisay-Silay, Inc. v. Talisay-Silay Milling Co., Inc., 88 SCRA 294 (1979); Federation of Free Farmers v. Court of Appeals, 107 SCRA 352 (1981); Heirs of Juancho Ardona v. Reyes, 125 SCRA 220 (1983); Ang Bagong Bayani-OFW Labor Party v. Commission on Elections, 359 SCRA 698 (2001); & Garcia v. Philippine Airlines, Inc., 576 SCRA 479 (2009).

26. Tupaz, *supra* note 24. *See also* Mark Eric Butt, et al., Fundamental Social Rights in Europe (Working Paper by the Directorate for General Research of the European Parliament) 18, *available at* http://www.uni-mannheim.de/edz/pdf/dg4/SOCI104_EN.pdf (last accessed Dec. 31, 2014).

27. COLUMBIA LAW SCHOOL HUMAN RIGHTS INSTITUTE,, ET AL., HUMAN RIGHTS, SOCIAL JUSTICE AND STATE LAW: A MANUAL FOR CREATIVE LAWYERING 2 (2008).

28. *Id.*

29. *Id.*

In the case of India, SE and cultural rights are not "Fundamental Rights" but "Directive Principles" which the State shall strive to fulfill.[30] They are "not justiciable rights and their non-compliance cannot be taken as a claim for enforcement against the State."[31]

In the European Union, civil and political (CP) rights are protected under the European Convention on Human Rights[32] but SE rights are governed by the European Social Charter (ESC)[33] which

> requires the signatory [S]tates to take legal and administrative measures in the areas of working life and social security. Although it does not provide for any real sanctions for infringing the rules, it does obligate the signatory states to send a report every two years to the Committee of Experts, which then identifies infringements and submits proposals for changes. As a result, the ESC has had a major influence on the legislation of the signatory [S]tates.[34]

Among the EU Member States, fundamental SE rights are not embodied in Scandinavian constitutions arising from a legal tradition of judicial restraint, although welfare rights are prominent in their systems primarily from agreements between trade unions and employers; and from consensus in politics and society.[35]

In the United Kingdom (U.K.), there is no list of fundamental rights given that it has no written constitution.[36] What governs in protecting fundamental rights in the U.K. are "various texts, such as the Magna Carta of 1215, the Petition of Rights of 1627, the Act of Habeas Corpus of 1679[,] and the Bill of Rights of 1689."[37] Fundamental rights are deduced from the acts of the parliament and from common law, given the principle that it is the parliament that holds the sovereign power.[38] Nonetheless, fundamental SE rights are still not recognized in British jurisprudence.[39]

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30. Jayna Kothari, Social Rights and the Indian Constitution (Article on the Law, Social Justice & Global Development Electronic Journal), *available at* http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2004_2/kothari/ (last accessed Dec. 31, 2014).
31. *Id.*
32. European Convention on Human Rights, *entered into force* Sep. 3, 1953, 213 U.N.T.S. 221.
33. European Social Charter, *entered into force* Feb. 26, 1965, 529 U.N.T.S. 89.
34. Butt, et al., *supra* note 26, at 12.
35. *Id.* at 16.
36. *Id.* at 29.
37. *Id.*
38. *Id.*
39. *Id.*

The German and French constitutions also do not contain SE rights.[40]

Meanwhile, under the 1977 Russian Constitution, SE rights — such as the rights to work, housing, education, rest, and medical care — receive more stress than CP rights.[41] However, it took some time even after the end of the Stalin era for the rights enshrined in the 1977 Russian Constitution to exist in real terms, as "Stalinism was an arbitrary system of rule whose defining characteristic was the deliberate subordination of the people's well-being to the pursuit of the dictatorship's grandiose goals."[42]

B. The Philippines — Social Justice in the 1935, 1973, and the 1987 Constitutions

It has been said that, "[i]ndividual and social justice as the primary goals of a justice system must be realizable from the terms of the constitutional provisions."[43] There must be a set of principles providing for the rights and duties in society, and defining the distribution of both benefits and burden of social cooperation.[44] Especially, one might add, when there is an apparent conflict between individual justice and social justice in specific cases.

In the 1935 Constitution, social justice meant "justice to the common *tao*."[45] The concept of social justice is provided in that Constitution's Article II, which enunciates its Declaration of Principles and State Policies.[46] Section 5 of said Article II declares that the State must insure the well-being and economic security of the people.[47] For such principle to be realized, Section 6 of its Article XIII provides that "[t]he State shall afford protection to labor, especially to working women and minors, and shall regulate the relations between landowner and tenant, and between labor and capital in industry and in agriculture. The State may provide for compulsory arbitration."[48] The scope is principally socio-economic well-being.[49]

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40. Butt, et al., *supra* note 26, at 16-19.

41. Mark B. Smith, Social Rights in the Soviet Dictatorship: The Constitutional Right to Welfare from Stalin to Brezhnev 389, *available at* http://www.humanityjournal.net/wp-content/uploads/2014/06/3.3-Social-Rights-in-the-Soviet-Dictatorship.pdf (last accessed Dec. 31, 2014).

42. *Id.* at 392.

43. Numeriano F. Rodriguez, Jr., *Towards Individual and Social Justice: Structural Analysis of the 1973 Constitution, as Amended*, 57 PHIL. L.J. 104, 106 (1982).

44. *Id.*

45. BERNAS, *supra* note 22, at 77.

46. *See* 1935 PHIL. CONST. art. II (superseded 1973).

47. 1935 PHIL. CONST. art. II, § 5 (superseded 1973).

48. 1935 PHIL. CONST. art. XIII, § 6 (superseded 1973).

49. BERNAS, *supra* note 22, at 77.

In the 1973 Constitution, the concept of social justice was similarly lodged under its Declaration of Principles and State Policies.[50] Hence, Section 6 of Article II of the 1973 Constitution exhorts that "[t]he State shall promote social justice to ensure the dignity, welfare, and security of all the people. Towards this end, the State shall regulate the acquisition, ownership, use, enjoyment, and disposition of private property, and equitably diffuse property ownership and profits."[51] Critically, at this juncture, the words "dignity" and "welfare" made their appearance as did "equitably diffuse" with respect to property.

Social justice in the 1987 Constitution builds on the concepts of the previous Constitutions.[52] The 1987 Constitution also provides that "[t]he State shall promote social justice in all phases of national development."[53] However, in contrast to previous Constitutions, it elaborated the concept in a separate article (Article XIII), which defines "social justice" in its very first Section, to wit —

> Section 1. The Congress shall give highest priority to the enactment of measures that protect and enhance the right of all the people to human dignity, reduce social, economic, and political inequalities, and remove cultural inequities by equitably diffusing wealth and political power for the common good.
>
> To this end, the State shall regulate the acquisition, ownership, use[,] and disposition of property and its increments.[54]

Thus, the scope of Section 1 consists of:

(1) human dignity (a right of all the people);

(2) social inequality (to be reduced);

(3) economic inequality (to be reduced);

(4) political inequality (to be reduced);

(5) cultural inequities (to be removed); and

(6) property and its increments (to be regulated in its acquisition, ownership, use, and disposition).[55]

Article XIII goes on to specify certain sectors to which Congress must give priority, namely, labor, agrarian reform, urban land reform and housing,

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50. 1973 PHIL. CONST. art. II (superseded 1987).

51. 1973 PHIL. CONST. art. II, § 6 (superseded 1987).

52. BERNAS, *supra* note 22, at 82.

53. PHIL. CONST. art. II, § 10.

54. PHIL. CONST. art. XIII, § 1.

55. BERNAS, *supra* note 22, at 1238-39.

health system, protection of women, people's organizations, and protection of human rights.[56] It also provides more focused provisions in dealing not only with economic and social inequities, but also with political inequalities and cultural inequities.[57] It also expands on the "due process" clause[58] by requiring the State to provide "adequate consultative mechanisms" for the exercise of "the right of the people and their organizations to effective and reasonable participation at all levels of social, political, and economic decision-making,"[59] as has been embodied, e.g., in the statutory requirement of "free, prior, and informed consent" of indigenous peoples under the Indigenous Peoples Rights Act (IPRA).[60]

The controlling principle regarding the *means* to achieve social justice is provided in the last sentence of Paragraph 1, Section 1, Article XIII — "by equitably diffusing wealth and political power for the common good."[61]

Lastly, in furtherance of this well-emphasized mandate, the extent of social justice in the 1987 Constitution also includes numerous, mostly new, provisions in its other articles.[62]

Clearly, social justice under the 1987 Constitution is more encompassing than in the 1935 and 1973 Constitutions. The principle is clear enough — a

56. *Id.* at 1239.

57. *Id.* at 82.

58. PHIL. CONST. art. III, § 1.

59. PHIL. CONST. art. XIII, § 16.

60. An Act to Recognize, Protect and Promote the Rights of Indigenous Cultural Communities/Indigenous People, Creating a National Commission of Indigenous People, Establishing Implementing Mechanisms, Appropriating Funds Therefor, and for Other Purposes [The Indigenous Peoples Rights Act of 1997], Republic Act No. 8371 (1997).

61. PHIL. CONST. art. XIII, § 1.

62. *See, e.g.*, PHIL. CONST. art. II, §§ 11, 14, 16, 22, 23, & 26 (provisions on dignity and human rights; women; right to a balanced and healthful ecology; total human liberation; indigenous peoples; non-governmental, community-based or sectoral organizations; and against political dynasties); PHIL. CONST. art. III, § 11 (free access to courts and legal assistance to the poor); PHIL. CONST. art. V (on absentee voting); PHIL. CONST. art. VI (on term limits and the party-list system of representation); PHIL. CONST. art. VII (on term limits for the president and vice-president); PHIL. CONST. art. X, § 9 (on sectoral representation in local governments); PHIL. CONST. art. XII, §§ 1 & 6 (provisions on equitable distribution as the primary goal of the national economy ahead of an increase in goods and services and productivity; and "the use of property bears a social function" and "distributive justice"); & PHIL. CONST. art. XIV (on mandatory quality and free education in both elementary and secondary school levels).

reduction of inequality, or *removal* of inequity, must be done if social justice is to be served.[63]

C. Social Justice as Human Rights and its Dimensions

Certainly, there should be no mistaking that both CP and SE rights are integral parts of Human Rights.[64] This is consistent with the progressive evolution of the scope of human rights to address and to correct centuries of injustice, oppression, and acts of inhumanities committed by the few on the many.[65]

Amartya K. Sen, Nobel Laureate in Economics, provides insights on that evolution.[66] He reminds that "first generation" CP rights and "second generation" SE rights of today go beyond the scope of the American Declaration of Independence of 1776, the French Affirmation of 1789, and the Lincolnian formulation of life, liberty, and "fruits of labor."[67] Further, the expanded scope of human rights today includes subsistence, medical care, quality education, protection against unemployment and poverty, unionism, and just and favorable remuneration[68] (which has as its counterpart, "family living wage and income" under the 1987 Constitution).[69] This is recognized not only by individual states but by the international sphere as well, because of "the global recognition of endemic poverty and systemic inequity."[70] Indeed, international affirmation of these rights is institutionalized in the Universal Declaration of Human Rights, which has attained universal acceptance.[71] This international affirmation is critical because, as Sen argues, without institutionalization, then there is no right; because rights must be connected to some obligation.[72]

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63. PHIL. CONST. art. XIII, § 1.

64. Ruth Gavison, On The Relationship between Civil and Political Rights, and Social and Economic Rights, *available at* http://www.gavison.com/a2655-on-the-relationship-between-civil-and-political-rights-and-social-and-economic-rights (last accessed Dec. 31, 2014).

65. *Id.*

66. *See generally* AMARTYA K. SEN, THE IDEA OF JUSTICE (2009).

67. *Id.* at 379-82.

68. *Id.* at 380.

69. *Id.* (citing PHIL. CONST. art. XV, § 3 (3).

70. DEEN K. CHATTERJEE, DEMOCRACY IN A GLOBAL WORLD: HUMAN RIGHTS AND POLITICAL PARTICIPATION IN THE 21ST CENTURY 2 (2008).

71. JOAQUIN G. BERNAS, S.J., INTRODUCTION TO PUBLIC INTERNATIONAL LAW 161 (2009 ed.).

72. SEN, *supra* note 66, at 382.

However, there are still claims that "CP rights should be seen as prior and primary"[73] and "relegating the protection of SE rights to regular laws and policies."[74] This implies that, "[i]n institutional terms, [ ] while SE rights are protected only against arbitrariness or discrimination by the Government, CP rights are protected against legislative decisions as well."[75] On this point, noted human rights law expert Ruth Gavison pointedly argues —

> [i]t is therefore important to emphasize some of the ways in which SE concerns are at least as central to human welfare and to the structure of human societies as are CP concerns. [T]hese issues are not matters of conceptual analysis or of the nature of rights. Their analysis requires a closer look at the background conditions and the presuppositions of life in democracies.
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> ...
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> Among civil rights, the ones most clearly related to dignity are the rights not to be tortured, raped, or defamed. Not allowing a person to express various ideas is a serious limitation of liberty, but its connection to dignity is more remote. Usually, dignity also requires some ability to control one's life and [to] participate in the decisions made in one's political community. [T]hese are positive rights against the [S]tate, which is required to confer the powers and provide the resources needed for the implementation of their exercise. But not being able to survive, or not being able to marry or to have children for lack of ability to support them, or not being able to afford a standard life-saving medicine — these are instances where the threat to human dignity is clear and obvious. In terms of relevance to human welfare and dignity, the need to avoid a life reduced to the struggle for subsistence may often be more primary and central than the need to gain political liberty.[76]

Parenthetically and unfortunately, as will be discussed later, there are decisions of the Supreme Court which continue to interpret social justice as negative rights to be protected from arbitrariness and discrimination, and not as affirmative rights entitled to pro-active legislation and full implementation to correct injustices embedded in its society. Accordingly, this Article believes that the legal profession, including the Supreme Court over the years, has not measured up to what Justice Antonio T. Carpio posed as its primary challenge, "to close the gap between law and justice."[77]

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73. Gavison, *supra* note 64.

74. *Id.*

75. *Id.*

76. *Id.*

77. Antonio T. Carpio, Antonio Carpio: Closing the Gaps between Law and Justice, *available at* http://archives.newsbreak-knowledge.ph/2007/11/30/antonio-carpio-closing-the-gaps-between-law-and-justice-2/ (last accessed Dec. 31, 2014).

Philippine jurisprudence has, in fact, been ambivalent on the concept that there are human rights that pre-date and supersede any Constitution, and which demand a minimum of well-being for everyone by reason of his or her humanity.[78] As an American legal scholar puts it —

> Sometimes it is important to state the obvious, to confront truths so fundamental we have forgotten to see them. Here is a simple truth. Human beings have needs, and we cannot live without access to the things we need. Here is another truth: both sovereignty and property are premised on exclusion. That leaves us with a problem. How do we reconcile our needs and our borders?
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> ...
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> If all human beings are free and equal, then each person is entitled to belong somewhere and to obtain the things they need to live and to be free. Yet not all sovereigns enable their people to live in freedom; nor do they ensure that their people can obtain basic sustenance, much less live fulfilling lives. If people cannot obtain what they need where they are, or if they have no place where they are entitled to be, then our exclusion of them denies their humanity.[79]

On this score, the property rights issue in South Africa has similarities with that in the Philippines since, as that American legal scholar continues —

> [t]hat nation is wrestling with the problem of how to respect property rights while redistributing them to undo decades of racial oppression. How can the rights of owners be respected while righting the historic wrongs of apartheid? How can one protect property while taking it away? The question begs the question; that is to say, ownership of property is only presumptively legitimate and lawful. Possession may be [9/10] of the law but that other 10ths matters. Property rights in a free and democratic society cannot be justified unless they are open to all.[80]

In the Philippine context, Arsenio M. Balisacan, the present head of the National Economic and Development Authority, argues that addressing inequality also makes good economic sense — that it is no longer debatable that sustained high growth is required for poverty reduction, that addressing high inequalities is a pre-condition for sustained high economic growth, and that the worst inequalities are in ownership of land and access to natural resources.[81]

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78. CHATTERJEE, *supra* note 70, at 84-85.

79. Singer, *supra* note 13, at 1-2.

80. *Id.* at 11.

81. Arsenio M. Balisacan and Nobuhiko Fuwa, Growth, Inequality and Politics Revisited: A Developing-Country Case, *available at* http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan027369.pdf (last accessed Dec. 31, 2014).

D. Human Rights, Equality, and Democratic Solidarity

As of the writing of this Article, a controversy is brewing in the U.S. about the immigration pronouncement by President Barack H. Obama giving special treatment to "unregistered aliens."[82] Paul R. Krugman discusses the historical and socio-economic context of the issue and ends up applauding the President's initiative because it is "*not about the money, or even social aspects*[*;*] *what really matters, or should matter, is the humanity*."[83] The U.S., after all, is a nation of immigrants,[84] and America gave all of these immigrants a place while explicitly banning titles of nobility to emphasize that liberty and equality are not contradictory but integral parts of human rights.[85]

Regarding the often overlooked ill-effects of inequality to democratic solidarity, Michael J. Sandel said that —

> the tendency of philosophers to frame the question in terms of utility or consent leads them to overlook the argument against inequality most likely to receive a political hearing and most central to the project of moral and civic renewal[.]
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> ...
>
> [the] more important reason to worry about the growing inequality [is that] too great a gap between rich and poor undermines the solidarity that democratic citizenship requires.
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> ...
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> As inequality deepens, rich and poor live increasingly separate lives. The affluent send their children to private schools (or to public schools in wealthy suburbs), leaving urban public schools to the children of families who have no alternative. A similar trend leads to the secession by the privileged from other public institutions and facilities. Private health clubs replace municipal recreation centers and swimming pools. Upscale residential communities hire private security guards and rely less on public police protection. A second or third car removes the need to rely on public transportation. And so on. The affluent secede from public places and services, leaving them to those who [cannot] afford anything else.

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82. *See* Michael D. Shear, et al., *Obama Plan May Allow Millions of Immigrants to Stay and Work in U.S.*, N.Y. TIMES, Nov. 13, 2014, *available at* http://www.nytimes.com/2014/11/14/us/obama-immigration.html?_r=0 (last accessed Dec. 31, 2014).

83. Paul R. Krugman, *Suffer Little Children*, N.Y. TIMES, Nov. 20, 2014, *available at* http://www.nytimes.com/2014/11/21/opinion/paul-krugman-immigration-children.html (last accessed Dec. 31, 2014) (emphasis supplied).

84. Neil Shah, America Is a Nation of Immigrants, But Not the Way It Used to Be, *available at* http://blogs.wsj.com/economics/2014/10/10/america-is-a-nation-of-immigrants-but-not-the-way-it-used-to-be/ (last accessed Dec. 31, 2014).

85. U.S. CONST. art. I, § 10.

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> Institutions that once gathered people together and served as informal schools of civic virtue become few and far between. The hollowing out of the public realm makes it difficult to cultivate the solidarity and sense of community on which democratic citizenship depends.
>
> So, quite apart from its effects on utility or consent, inequality can be corrosive to civic virtue. Conservatives enamored of markets and liberals concerned with re-distribution overlook this loss.[86]

This centrality of equality as a matter of human right critical to democratic solidarity is most profound in the field of labor. One writer who tried to see if the minimum wage was sufficient for a decent life, and concluded it was not, had this extraordinary insight about the working poor being disparaged as being a burden to society, which is even more applicable in the Philippine setting, to wit —

> We should feel shame at our own dependence on the underpaid labor of others. When someone works for less pay than she can live on — when, for example, she goes hungry so that you can eat more cheaply and conveniently — then she has made a great sacrifice for you, she has made you a gift of some part of her abilities, her health, and her life. The 'working poor,' as they are approvingly termed, are in fact the major philanthropists of our society. They neglect their own children so that the children of others will be cared for; they live in substandard housing so that other homes will be shiny and perfect; they endure privation so that inflation will be low and stock prices high. To be a member of the working poor is to be an anonymous donor, a nameless benefactor, to everyone else.[87]

E. Social Justice in a Market Economy — The Need to Adjust Starting Positions

It is worth noting at this point that the 1987 Constitution does not mandate total equality, but only equitable diffusion.[88] This is consistent with the kind of economy it promotes based on "freedom of initiative and self-reliance,"[89] which recognizes the "indispensable role of the private sector, encourages private enterprise, and provides incentives to needed investments."[90]

This economic environment would disallow, for example, a collectivist approach to property where private ownership is not possible. It also would

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86. MICHAEL J. SANDEL, JUSTICE: WHAT'S THE RIGHT THING TO DO? 128-29 (2009).

87. BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA 221 (2001).

88. PHIL. CONST. art. XIII, § 1.

89. PHIL. CONST. art. XIII, § 2.

90. PHIL. CONST. art. II, § 20.

allow differences in accomplishments and resources arising from the heterogeneity of people and the effort they put into their endeavors, provided that the people have equal capacity to avail of opportunities and these opportunities are really available to all. To that end, if such capacity and opportunity are not readily available, then the Constitution mandates Government intervention with corrective measures, if necessary, with the exercise of its police powers.

The measures to be enacted are supposed to enable the poor to freely and effectively compete in the marketplace of ideas, enterprise, and work opportunities. The fact that markets are never perfect and have no moral limits; or that perfect institutions can never be in place; or that ideal justice is not fully attainable do not stand in the way of rendering what Sen describes as "functional justice" to attain "social realizations" arrived at by a process of public reasoning and participatory social decisions.[91] As already mentioned, the right of participatory decision-making is a new provision in Article XIII.[92]

As for the "tension between the unerring efficiency of the free markets and the imperative that some kind of fairness should prevail,"[93] the solution of another Nobel Laureate Economist Kenneth Arrow "proved that not only are all perfect markets efficient, all efficient outcomes can be achieved using a competitive market, *by adjusting starting positions*."[94]

Indeed, adjusting starting positions is what social justice is about in the Philippine setting. This kind of adjustment was not necessary in the U.S. because, except for the native Indian population, its constituency were all immigrants who started from the same position.[95]

The Philippines, unlike the U.S., has a long history of oppression and neglect under two colonial regimes and a domestic ruling-elite that exists to this day.[96] This is what explains the absence of comparable provisions on social justice in the U.S. Constitution, but which have a special place in the Philippine Constitutions. Why some of our legal scholars, including justices of the Supreme Court try to shoehorn our concept of social justice into American standards and jurisprudence is, therefore, difficult to understand.

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91. SEN, *supra* note 66, at 22.

92. PHIL. CONST. art. XIII, § 16.

93. TIM HARFORD, THE UNDERCOVER ECONOMIST 73 (2006).

94. *Id.* at 73 (emphasis supplied).

95. *See* Fundación Diálogo Argentino Americano, History of the United States of America, *available at* http://www.dialogoaa.com.ar/history1.html (last accessed Dec. 31, 2014).

96. *See generally* ALFRED MCCOY, AN ANARCHY OF FAMILIES: STATE AND FAMILY IN THE PHILIPPINES (2009).

In the Philippines, the distribution measures to adjust starting positions consist of both income reform and asset reform programs. Income reform involves near- and medium-term programs such as the conditional cash transfer program[97] and, over the long-term, the access of the poor to quality education and quality health services.[98] Until their education and health services are of the same quality as those enjoyed by the children of the rich, the children of the poor cannot break out of the vicious cycle of poverty, and social justice will not be served.

On the other hand, the asset reform programs consist principally of four laws, namely; (1) Agrarian Reform — embodied in Republic Act (R.A.) No. 6657 of 1988[99] and R.A. No. 9700 of 2009;[100] (2) Urban Land Reform and Housing;[101] (3) IPRA;[102] and (4) the Fisheries Code.[103]

III. SOCIAL JUSTICE JURISPRUDENCE BEFORE THE 1987 CONSTITUTION

A. The Greatest Good to the Greatest Number

In the Philippines, the classic jurisprudential pronouncement on social justice comes from Justice Jose P. Laurel in the 1940 case of *Calalang v. Williams*,[104] wherein it was said —

97. Pantawid Pamilyang Pilipino Program, About us, *available at* http://pantawid.dswd.gov.ph/index.php/about-us (last accessed Dec. 31, 2014).

98. World Bank, Philippines: National Program Support for Basic Education, *available at* http://www.worldbank.org/en/results/2014/04/10/philippines-national-program-support-for-basic-education (last accessed Dec. 31, 2014).

99. Comprehensive Agrarian Reform Law of 1988.

100. An Act Strengthening the Comprehensive Agrarian Reform Program (CARP), Extending the Acquisition and Distribution of All Agricultural Lands, Instituting Necessary Reforms, Amending for the Purpose Certain Provisions of Republic Act No. 6657, Otherwise Known as the Comprehensive Agrarian Reform Law Of 1988, as Amended, and Appropriating Funds Therefor, Republic Act No. 9700 (2009).

101. An Act to Provide for a Comprehensive and Continuing Urban Development and Housing Program, Establish the Mechanism for its Implementation, and for Other Purposes [Urban Development and Housing Act of 1992], Republic Act No. 7279 (1992).

102. The Indigenous Peoples Rights Act of 1997.

103. An Act Providing for the Development, Management and Conservation of the Fisheries and Aquatic Resources, Integrating All Laws Pertinent Thereto, and for Other Purposes [The Philippine Fisheries Code of 1998], Republic Act No. 8550 (1998).

104. *Calalang*, 70 Phil. at 726.

> The promotion of social justice [ ] is to be achieved not through a mistaken sympathy towards any given group. Social justice is 'neither communism, nor despotism, nor atomism, nor anarchy,' but the humanization of laws and the equalization of social and economic forces by the State so that justice in its rational and objectively secular conception may at least be approximated. Social justice means the promotion of the welfare of all the people, the adoption by the Government of measures calculated to insure economic stability of all the competent elements of society, through the maintenance of a proper economic and social equilibrium in the interrelations of the members of community, constitutionally, through the adoption of measures legally justifiable, or extra-constitutionally, through the exercise of the powers of underlying the existence of all [G]overnments on the time-honored principle of *salus populi est suprema lex*.
>
> Social justice, therefore, must be founded on the recognition of the necessity of interdependence among diverse units of a society and of the protection that should be equally and evenly extended to all groups as a combined force in our social and economic life, consistent with the fundamental and paramount objective of the state of promoting the health, comfort, and quiet of all persons, and of bringing about 'the greatest good to the greatest number.'[105]

The emphasis is on "the necessity of interdependence" which has led the Court in several cases to rule that social justice is not meant to favor one class of people over another, but should promote the welfare of *all* the people — as in this case, where the traffic regulation was meant to benefit the city of Manila as a whole.[106] The logic, however, is questionable.

If there is already a well-functioning interdependence that only needs to be protected, there would be no need for social justice. However, if there is no well-functioning interdependence, then social justice is needed to equalize the parts to attain a stable interdependent system.

In the 1940 case of *Guido v. Rural Progress Administration*[107] concerning a case for prohibition against the exercise of Commonwealth Act No. 539[108] which allowed the President or his delegate to expropriate private lands for the benefit of bona fide tenants and which first sowed the seeds of agrarian reform, the Court said —

> 'the promotion of social justice to insure the well-being and economic security of all the people should be the concern of the [S]tate,' is a

105. *Id.* at 734-35.

106. *Id.*

107. *Guido*, 84 Phil. at 847.

108. An Act Authorizing the President of the Philippines to Acquire Private Lands for Resale in Small Lots; Providing for the Creation of an Agency to Carry Out the Purposes of this Act; and Setting Aside Funds and Authorizing the Issuance of Bonds for the Payment of Said Lands, Commonwealth Act No. 539 (1940).

> declaration, [ ] that 'the Philippines is a Republican [S]tate' created to secure to the Filipino people 'the blessings of independence under a regime of justice, liberty[,] and democracy.'
>
> ...
>
> The promotion of social justice ordained by the Constitution does not supply paramount basis for untrammeled expropriation of private land by the Rural Progress Administration or any other [G]overnment instrumentality. Social justice does not champion division of property or equality of economic status; what it and the Constitution do [guarantee] are equality of opportunity, equality of political rights, equality before the law, equality between values given and received, and equitable sharing of the social and material goods on the basis of efforts exerted in their production.[109]

Clearly, then, in granting the petition for prohibition, the Court at that time is of the opinion that social justice demands societal interdependence and certainly not the grant of privilege for the few.[110] Hence, *against property rights, social justice is not an argument for the Court to rule in favor of the poor.*[111]

By explicitly excluding property rights from the scope of social justice, the decision virtually shut the door on any meaningful reform involving land, e.g., agrarian, urban, and ancestral. That exclusion reduces the social justice concept to mere and literal *equal justice*.

Hence, with this underlying notion of social justice pervading the Philippine legal consciousness back then, it is no wonder that the Land Reform Code of 1963,[112] with its limited vision, liberal retention limits, and voluntary approach to agrarian reform, was doomed from the start as social legislation. The good news is that, despite this, the enactment of and the legal challenges to the validity of the Land Reform Code confirmed that, at the very least, there had been a growing recognition in the mind of the Supreme Court that the Government must undertake certain activities in its sovereign capacity which were previously left to the private sector, if it is to meet the increasing social challenges of the times as discussed in *Agricultural*

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109. *Guido*, 84 Phil. at 851-52.

110. *Id.*

111. *Id.*

112. An Act to Ordain the Agricultural Land Reform Code and to Institute Land Reforms in the Philippines, Including the Abolition of Tenancy and the Channeling of Capital into Industry, Provide for the Necessary Implementing Agencies, Appropriate Funds Therefor and for Other Purposes [Agricultural Land Reform Code], Republic Act No. 3844 (1963).

Credit and Cooperative Financing Administration v. Confederation of Unions in Government Corporations and Offices.[113]

That case of *Agricultural Credit* tackled the issue on whether or not the employees of the petitioner Administration can stage a strike against said Administration after it was reorganized into the Agricultural Credit Administration (ACA).[114] The Court ruled that the employees cannot do so, pursuant to the legal prohibition against governmental employees to strike.[115]

This is because the very recognition of the demands of modern times impelled the Court to rule that the enactment of the Land Reform Code, together with the reorganization of petitioner Administration into ACA — the job of which is to stimulate the development of farmers' cooperatives — is a governmental function consistent with the constitutional precept on social justice serving the greatest good for the greatest number.

Note how the "the greatest good to the greatest number" can be invoked either to favor the poor (*Agricultural Credit* case) or to favor the rich (*Guido* case), both supposedly inspired by the vision of social justice.

B. Those Who Have Less in Life Should Have More in Law

In 1968, the Court made a significant shift in its view on social justice. In *Del Rosario v. De los Santos*,[116] it said that "as far as the social justice principle is concerned, there is the translation into reality of its significance as popularized by the late President Ramon D. Magsaysay — he who has less in life should have more in law."[117]

The shift in jurisprudential thinking was crystallized in the 1970 decision in *J.M. Tuason & Co., Inc. v. Land Tenure Administration*,[118] when a majority of the Court categorically declared that social justice, contrary to Justice Jose Benedicto L. Reyes' spirited dissent for the classical notion, allows for expropriation of lands for the benefit of the marginalized few in this wise —

> The social and economic conditions are not static. They change with the times. To identify the text of a written [C]onstitution with the circumstances that inspired its inclusion may render it incapable of being responsive to future needs. Precisely, it is assumed to be one of the virtues

113. Agricultural Credit and Cooperative Financing Administration v. Confederation of Unions in Government Corporations and Offices, 30 SCRA 649 (1969).

114. *Id.* at 663.

115. *Id.*

116. Del Rosario v. De los Santos, 22 SCRA 1196 (1968).

117. *Id.* at 1198-99.

118. J.M. Tuason & Co., Inc. v. Land Tenure Administration, 31 SCRA 413 (1970).

> of a written [C]onstitution that it suffices to govern the life of the people not only at the time of its framing but far into the indefinite future.
>
> ...
>
> The conclusion is difficult to resist that the text of the constitutional provision in question, its historical background as noted in pronouncements in the Constitutional Convention and the inexorable need for the Constitution to have the capacity for growth and ever be adaptable to changing social and economic conditions all argue against its restrictive construction.[119]

This was reiterated in the 1974 case of *J.M. Tuason & Co., Inc. v. Makasiar*[120] when it ruled that —

> [m]ore specifically, where a litigation is between parties who may belong to the lower-income groups on the one hand and economically well-entrenched families on the other, as did happen here, there is much to be said for greater caution to be exercised by courts of justice before the claims of the former are adjudged to be bereft of support in legal norms. In a true sense that is to abide by the social justice concept of the Constitution, with its now accepted meaning that *he who has less in life should have more in law*.[121]

C. As a Demand of Human Dignity

The construction of social justice as "having more in law" may be said to have been further expanded in the 1979 case of *Asociacion de Agricultores de Talisay-Silay, Inc. v. Talisay-Silay Milling Co., Inc.*[122] which, albeit *obiter*, delved into the foundations of the dictum on social justice when it said that

> here, in the Philippines, whenever any [G]overnment measure designed for the advancement of the working class is impugned on constitutional grounds and shadows of doubt are cast over the scope of the State's prerogative in respect thereto, the imperious mandate of the social justice ideal consecrated in our fundamental laws, both the old and the new, asserts its majesty, calling upon the courts to accord utmost consideration to the spirit animating the act assailed, not just for the sake of enforcing the explicit social justice provisions of the [A]rticle on 'Declaration of Principles and State Policies,' but more fundamentally, to serve the *sacred cause of human dignity*, which is actually what lies at the core of those constitutional precepts as it is also the decisive element always in the determination of any controversy between capital and labor.[123]

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119. *Id.* at 425 & 427.

120. J.M. Tuason & Co., Inc. v. Makasiar, 58 SCRA 180 (1974).

121. *Id.* at 184-85 (emphasis supplied).

122. *Asociacion de Agricultores de Talisay-Silay, Inc.*, 88 SCRA at 294.

123. *Id.* at 344-45 (emphasis supplied).

Assailed in that case was the constitutionality of R.A. No. 809,[124] which the Court declared as a valid "social legislation designed primarily to ameliorate the condition of the laborers in the sugar plantations"[125] that finds support in the inherent police power of the State as well as the constitutional mandate on social justice. Determining what constitutes 'social justice,' the Court further said —

> We hold that more cogently than in regard to the exertion of police power [ ], the criterion for determining whether or not social justice has been overextended in any given case is nothing more than the economic viability or feasibility of the proposed law in favor of labor, and certainly not the existence of exceptional circumstances. In other words, as long as capital in industry or agriculture will not be fatally prejudiced to the extent of incurring losses as a result of its enforcement, *any legislation to improve labor conditions would be valid, provided the assailed legislation is more or less demanded as a measure to improve the situation in which the workers and laborers are actually found.*[126]

As the Philippine jurisprudential notion of social justice was developing into its "humanistic" form, the Court gradually gave more weight to the demands of social justice as against other interests. Despite this, the jurisprudential tension, however, between the classical *greatest good to the greatest number* and the explicit concern for the marginalized remained as the Court could not easily let go of the classical definition, particularly when no substantial proof was presented that the rights of the marginalized have been violated as in the 1983 case of *Heirs of Juancho Ardona v. Reyes*.[127]

In *Heirs of Juancho Ardona*, the Court denied the petition for *certiorari* with preliminary injunction against Presidential Decree No. 564, which created the Philippine Tourism Authority (PTA),[128] as well as the writs of possession granted to the PTA as a consequence of expropriation.[129] The reason the Court ruled in such fashion is because the expropriation was for public use, which is tourism, as was deemed as such by the wisdom of Congress.[130] The

124. An Act to Regulate the Relations Among Persons Engaged in the Sugar Industry, Republic Act No. 809 (1952).

125. *Asociacion de Agricultores de Talisay-Silay, Inc.*, 88 SCRA at 332.

126. *Id.* at 345.

127. *Heirs of Juancho Ardona*, 125 SCRA at 220.

128. Revising the Chapter of the Philippine Tourism Authority Created Under Presidential Decree No. 189, Dated May 11, 1973, Presidential Decree No. 564 (1974).

129. *Heirs of Juancho Ardona*, 125 SCRA at 220.

130. *Id.* at 235.

greater challenge, however, was the charge that the lands being expropriated were under the coverage of the Land Reform Program.[131]

In this regard, the Court said that since agrarian reform is in "a higher level in the order of priorities than other State priorities"[132] then the lands cannot be directed to other public use — having already been taken for public use that is agrarian reform.[133] The Court, "[having] considered the above arguments with scrupulous and thorough circumspection[,] [f]or indeed any claim of rights under the social justice and land reform provisions of the Constitution deserves the most serious consideration,"[134] still denied the petition on evidentiary grounds since no proof was presented that the lands were indeed agricultural lands.[135]

As a result of this jurisprudential tension, the Court sometimes resorted to rationalizations based on the absolute requirement of due process, such that failure of which would still result in the denial of social justice — "this time to the more affluent and fortunate sectors of society,"[136] which "cannot be less condemnable and reprehensible and should be avoided as much as injustice to labor and the poor."[137]

The Court clarified that they

> have not overlooked the laudable principles and guidelines that ... prod the courts to be as liberal as possible in disposing of labor cases and to be ever mindful of the constitutional precept on the promotion of social justice, and of the rather emphatic injunction in the constitution that 'the State shall afford protection to labor.'[138]

Then came the rhetoric and the deadly blow to social justice —

> It is divinely compassionate no doubt to afford more in law to those who have less in life, but clear injustice to anyone amounts definitely to injustice to everyone, and all hopes for judicial redress for wrongdoings would vanish, if the even hand of law, justice[,] and equity were to be made to favor anyone or any group or level of society, whoever they may be.[139]

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131. *Id.* at 238.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Heirs of Juancho Ardona*, 125 SCRA at 238.

136. *Federation of Free Farmers*, 107 SCRA at 462-63.

137. *Id.*

138. *Id.*

139. *Id.*

In other words, the Court flopped back to the paradigm of *equal justice*, by invoking the due process clause.[140]

IV. JURISPRUDENCE AFTER THE 1987 CONSTITUTION

A. Association of Small Landowners versus Department of Agrarian Reform (1989)

One of the most significant jurisprudence on the new social justice thrust of the 1987 Constitution, as implemented by the Comprehensive Agrarian Reform Program (CARP), is the classic decision penned by Justice Isagani A. Cruz in the case of *Association of Small Landowners in the Philippines, Inc. v. Secretary of Agrarian Reform.*[141] Immediately after the ratification of the present 1987 Constitution, the Court has seemingly affirmed anew its notion of social justice as a constitutional directive in favor of the poor.

Hence, the decision in *Small Landowners* disposed of all the issues against CARP at the time — delving not only on the due process and equal protection clauses but also on the scope of the laws on agrarian reform, retention limits, just compensation, separation of powers, the exercise of police and eminent domain powers, and even the legality of the funding.[142]

Indeed, the Court, while conceding that the CARP "is an experiment, as all life is an experiment,"[143] resolved each issue with clarity and eloquence, ending with a grand vision of the farmer's rightful place in our society —

> By the decision we reach today, all major legal obstacles to the comprehensive agrarian reform program are removed, to clear the way for the true freedom of the farmer. We may now glimpse the day he will be released not only from want but also from the exploitation and disdain of the past and from his own feelings of inadequacy and helplessness. At last his servitude will be ended forever. At last the farm on which he toils will be his farm. It will be his portion of the Mother Earth that will give him not only the staff of life but also the joy of living. And where once it bred for him only deep despair, now can he see in it the fruition of his hopes for a more fulfilling future. Now at last can he banish from his small plot of earth his insecurities and dark resentments and 'rebuild in it the music and the dream.'[144]

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140. PHIL. CONST. art. III, § 1.

141. Association of Small Landowners in the Philippines, Inc. v. Secretary of Agrarian Reform, 175 SCRA 343 (1989).

142. *Id.* at 366-92.

143. *Id.* at 392.

144. *Id.* at 392-93.

However, decisions after that case illustrate the persisting jurisprudential tension between the classic notion of social justice and its more humanistic pro-poor variant.

This Article will analyze three cases decided after *Small Landowners* to illustrate the sometimes confusing thinking of the Supreme Court on social justice: the IPRA case — *Cruz v. Secretary of Environment and Natural Resources*;[145] *La Bugal-B'Laan Tribal Association v. Ramos*;[146] and one of the coco levy cases that ruled in favor of Eduardo M. Cojuangco in the matter of the 20% ownership in San Miguel Corporation.[147]

B. The IPRA Case

In the case of *Cruz* under the aegis of the 1987 Constitution, the seemingly conflicting interpretations of the constitutional precept of social justice were finally brought squarely in issue — and as a happy development, in a case concerning the rights of indigenous peoples.

Unfortunately, the Court was equally divided on the constitutionality of IPRA,[148] which on the one hand seems to validate the construction of social justice as upholding the human dignity of people, as against the other interpretation that social justice pertains to the overall interdependence of the elements of society and not just as an edict in favor of a few. Justice Santiago M. Kapunan, in favor of the interpretation that social justice is to give more to those who are marginalized, argued that —

> [t]he framers of the 1987 Constitution, looking back to the long destitution of our less fortunate brothers, fittingly saw the historic opportunity to actualize the ideals of people empowerment and social justice, and to reach out particularly to the marginalized sectors of society, including the indigenous peoples. They incorporated in the fundamental law several provisions recognizing and protecting the rights and interests of the indigenous peoples[.]
>
> ...
>
> IPRA was enacted precisely to implement the foregoing constitutional provisions. It provides, among others, that the State shall recognize and promote the rights of indigenous peoples within the framework of national unity and development, protect their rights over the ancestral lands and ancestral domains[,] and recognize the applicability of customary laws

145. Cruz v. Secretary of Environment and Natural Resources, 347 SCRA 128 (2000).

146. *La Bugal-B'laan Tribal Association, Inc.*, 445 SCRA at 1.

147. Republic v. Sandiganbayan (First Division), 648 SCRA 47 (2011).

148. The Indigenous Peoples Rights Act of 1997.

> governing property rights or relations in determining the ownership and extent of the ancestral domains.[149]

On the other hand, former Chief Justice Artemio V. Panganiban, while concurring with preferential treatment of the marginalized, dissents on certain points of its interpretation as he states that —

> True, our fundamental law mandates the protection of the indigenous cultural communities' right to their ancestral lands, but such mandate is 'subject to the provisions of this Constitution.' I concede that indigenous cultural communities and indigenous peoples [ ] may be accorded preferential rights to the beneficial use of public domains, as well as priority in the exploration, development[,] and utilization of natural resources. Such privileges, however, must be subject to the fundamental law.
>
> Consistent with the social justice principle of giving more in law to those who have less in life, Congress in its wisdom may grant preferences and prerogatives to our marginalized brothers and sisters, subject to the irreducible caveat that the Constitution must be respected.
>
> ...
>
> Indigenous peoples may have long been marginalized in Philippine politics and society. This does not, however, give Congress any license to accord them rights that the Constitution withholds from the rest of the Filipino people. I would concede giving them priority in the use, the enjoyment and the preservation of their ancestral lands and domains. But to grant perpetual ownership and control of the nation's substantial wealth to them, to the exclusion of other Filipino citizens who have chosen to live and abide by our previous and present Constitutions, would be not only unjust but also subversive of the [ ] rule of law.
>
> In giving [indigenous cultural communities and indigenous peoples] rights in derogation of our fundamental law, Congress is effectively mandating 'reverse discrimination.' In seeking to improve their lot, it would be doing so at the expense of the majority of the Filipino people. Such short-sighted and misplaced generosity will spread the roots of discontent and, in the long term, fan the fires of turmoil to a conflagration of national proportions.
>
> ...
>
> Rather, the law must help the powerless by enabling them to take advantage of opportunities and privileges that are open to all and by preventing the powerful from exploiting and oppressing them. This is the essence of social justice — empowering and enabling the poor to be able to compete with the rich and, thus, equally enjoy the blessings of prosperity, freedom[,] and dignity.[150]

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149. *Cruz*, 347 SCRA at 252 & 254 (J. Kapunan, separate opinion).

150. *Id.* at 319-20 & 336-37 (J. Panganiban, separate concurring and dissenting opinion).

With the stalemate, the IPRA remains constitutional pursuant to the Rules of Civil Procedure.[151]

The opinion of the former Chief Justice invokes the "more in law" maxim but reverts to the argument that the "Fundamental Law" is equal treatment under the due process clause. It echoes some of the reasoning in the *Guido* case regarding social justice as a negative right to be protected from discrimination and as capacity building and empowerment to enable *"the poor to compete with the rich and, thus, equally enjoy the blessings of prosperity, freedom*[,] *and dignity*."[152] In other words, in that opinion, social justice is not about outcomes but about opportunity; not about affirmative action but of protection.

The opinion of the former Chief Justice appears to ignore that a radical redistribution of assets or access, principally to land and natural resources; quality education and health care to the poor similar to what the rich get; and an equitable diffusion of income, wealth, and political power are necessary pre-conditions to give substance to that empowerment before any fair competition can take place.

The concurring and dissenting opinion appears to forget that the indigenous peoples, now a minority, used to own all these lands and lost them by force of arms, deception, and neglect; and that those who benefitted from these acts, or are in a position to correct them or provide restitution, have a duty to uphold substantial justice instead of invoking legalisms of "reverse discrimination" or the "welfare of the greater majority" or even the deference to "superior" civil, political, or property rights to deny it. To do otherwise, the concurring and dissenting opinion says, would be "exclusionary" — forgetting that the more onerous "exclusionary" misdeed was the unjust taking of their ancestral lands in the first place.

C. The La Bugal Case

Then there is *La Bugal B'Laan Tribal Association v. Ramos*[153] — questioning the validity and the grossly disadvantageous fiscal regime in the Financial and Technical Agreement (FTAA) entered into by the Philippine Government with Western Mining Corporation.[154] The Court ruled that service contracts are not prohibited by the Constitution but refused to "institutionalize" any

151. 1997 RULES OF CIVIL PROCEDURE, rule 56, § 7.

152. *Cruz*, 347 SCRA at 337 (J. Panganiban, separate concurring and dissenting opinion).

153. *La Bugal-B'Laan Tribal Association, Inc.*, 445 SCRA at 1.

154. *Id.* at 80.

sharing agreement on the ground that such is a matter of public policy, outside the bounds of judicial review.[155]

Yet, after invoking judicial restraint from intruding into policy matters that belong to the President and the Congress, giving them "maximum discretion to use the resources of the [ ] country and in securing the assistance of foreign groups *to eradicate the grinding poverty of* [*the*] *people and answer their cry for viable employment opportunities*,"[156] the decision then ventures anyway into policy issues such as the merits of the three fiscal regime options provided by DAO-99-56[157] and pronounced them fair and reasonable, "considering that the contractor puts in all the capital requirements and assumes all the risks, without the [G]overnment having to contribute or risk anything."[158] echoing the claim of the mining industry.[159] The decision then extols the economic benefits of mining to the development of the country without providing supporting empirical evidence — despite the fact that mining "benefits" were, at the least, disputed by reputed economists[160] — and finally concludes, as in the *Guido* ruling and the opinion of the former Chief Justice in *Cruz*, that social justice is about justice for all —

> Verily, the mineral wealth and natural resources of this country are meant to benefit not merely a select group of people living in the areas locally affect[ed] by mining activities, but the entire Filipino nation, present and future, to whom the mineral wealth really belong. This Court has therefore weighed carefully the rights and interests of all concerned, and decided for the greater good of the greatest number. [*Justice for all*], not just for some; [*Justice for the present and the future*], not just for the here and now.[161]

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155. *Id.* at 238.

156. *Id.* at 236 (emphasis supplied).

157. Department of Environment and National Resources, Guidelines Establishing the Fiscal Regime of Financial or Technical Assistance Agreements, DENR Administrative Order No. 99-56 [DAO 1999-56] (Dec. 27, 1999).

158. *La Bugal-B'Laan Tribal Association, Inc.*, 445 SCRA at 170.

159. On the contrary, it is submitted that the Government is risking the loss of its minerals because mining is not only about extraction, but also about exhaustion of non-renewable mineral resources. There is also the risk of adverse effects on the environment which are not fully accounted for by the existing fiscal regime.

160. *See* CIELITO F. HABITO, AN AGENDA FOR HIGH AND INCLUSIVE GROWTH IN THE PHILIPPINES (2010). Habito points out that all economic indicators of mining are low, e.g., labor-output ratio, backward and forward linkages, contribution to GDP, job generation, contribution to Government revenues, among others. Also, "the largest share of value of output accrues to operating surplus, amounting to 43%, indicating that *the benefits from mining accrue primarily to investors*[.]" *Id.* at 52.

161. *La Bugal-B'Laan Tribal Association, Inc.*, 445 SCRA at 236-38.

Ironically, in 2007, the Department of Environment and National Resources issued DAO 2007-12[162] to replace DAO 1999-56,[163] on the ground that the Government ends up getting "from zero to nothing" as additional Government share under the latter.[164] Further, in July 2012, the Aquino administration issued Executive Order No. 79,[165] which also called for a new fiscal regime from Congress.[166] In response, in May 2014, the Mining Industry Coordinating Council endorsed for presidential action a draft bill on a new fiscal regime on mineral mining proposing a larger revenue share for Government.[167] These issuances virtually negate the assumptions and premises of the decision in *La Bugal*.[168]

D. The Coco Levy Case

The coco levy is the subject of many cases, some still pending in the courts. But one case, which has been decided with finality and entry of judgment, gives Eduardo M. Cojuangco, Jr. ownership of shares of stock representing 20% of the total capital stock of San Miguel Corporation.[169] In that case, the Court formulated its own definition of "ill-gotten wealth" ignoring the Philippine Commission on Good Government Rules and existing jurisprudence.[170] It ruled by a 7-4-4 decision that the prosecution failed to prove that, among others, (1) the borrowings of Cojuangco to buy the shares were sourced from, or were the fruits of, the coco levy funds; (2) that Cojuangco violated his fiduciary trust as Chairman and director of United

162. Department of Environment and Natural Resources, Revised Guidelines Establishing the Fiscal Regime of Financial or Technical Assistance Agreements (FTAA), DENR Administrative Order No. 2007-12 [DAO 2007-12] (June 20, 2007).

163. DAO 1999-56, *supra* note 157.

164. HABITO, *supra* note 160, at 56.

165. Office of the President, Institutionalizing and Implementing Reforms in the Philippine Mining Sector Providing Policies and Guidelines to Ensure Environmental Protection and Responsible Mining in the Utilization of Mineral Resources, Executive Order No. 79 [E.O. No. 79] (July 9, 2012).

166. *Id.*

167. Czeriza Valencia, *Foreign investors want P-Noy's SONA to include gov't support for mining*, PHIL. STAR, July 11, 2014, *available at* http://www.philstar.com/business/2014/07/11/1344748/foreign-investors-want-p-noys-sona-include-govt-support-mining (last accessed Dec. 31, 2014).

168. In the interest of transparency, the Author discloses that he is one of the counsels for the Petitioners in a case pending decision before the Supreme Court on the issue of the mining fiscal regime.

169. *See Republic*, 648 SCRA 47-163.

170. *Id.*

Coco Planters' Bank and of the CIIP Oil Mills in availing of such loans; and (3) that Cojuangco was a close associate of the Marcoses.[171]

That April 2011 decision is the kind of legalistic reasoning that, according to Associate Justices Conchita Carpio-Morales and Arturo D. Brion, in separate dissenting opinions, leads to illogical conclusions; goes against available material evidence and applicable rules of procedure; and ignores the paramount ends of justice in order to justify the giving of the shares valued at about ₱50 billion to Cojuangco — shares which rightfully belong to some 3.5 million coconut farmers who bore the brunt of the coco levy.[172] It is reverse redistribution of wealth at its worst.

Carpio-Morales punctuates her clinical demolition of the majority's findings with the observation that —

> [t]he argument that Cojuangco was not a subordinate or close associate of the Marcoses is the biggest joke to hit the century. Aside from the cited offices or positions of power over coconut levy funds, Cojuangco admitted in Paragraph 3.01 of his Answer that on 25 February 1986, Cojuangco left the Philippines with former President Ferdinand [E.] Marcos[, Sr.].
>
> Clearly, the intimate relationship between Cojuangco and Marcos equates or exceeds that of a family member or cabinet member, since not all of Marcos' relatives or high [G]overnment ministers went with him in exile on that fateful date. If this will not prove the more than close association between Cojuangco and Marcos, I do not know what will.[173]

For his part, Justice Brion maintains that —

> The [G]overnment lost because of the acts of its counsel that amounted to no less than giving the claim away through omission, inaction[,] or precipitate and ill-considered action that, at the very least, should be considered gross negligence of counsel in handling the [G]overnment's case. Under these circumstances, the [G]overnment — like, any other litigant — should be allowed to invoke the same due process right that individuals invoke to secure an equal and impartial justice under the law.
>
> ...
>
> Substantively, what underlies due process is the rule of reason; it is a rule against arbitrariness and injustice measured under the standards of reason. Procedurally, the fundamental requirement of due process involves the opportunity to be heard at a meaningful time and in a meaningful manner. Whether in the substantive or in the procedural signification, due process must comport with the deepest notions of what is fair and right and just.

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171. *Id.*

172. *Id.* at 164-258 (J. Carpio-Morales, dissenting opinion) & at 258-324 (J. Brion, dissenting opinion).

173. *Id.* at 229 (J. Carpio-Morales, dissenting opinion).

...

> [W]hat is at stake is not only public property of significant value [but] ... this case also marks a crucial step in our people's quest for integrity and accountability in our public officers.[174]

In another decision promulgated on 24 January 2012, regarding *Philippine Coconut Producers Federation, Inc. (COCOFED) v. Republic*.[175] The Court voting unanimously — including all seven Justices who voted in favor of Cojuangco in the first case — ruled that the shares equivalent to 24% of the ownership of San Miguel (valued at about ₱71 billion) belonged to the Government in trust for the coconut farmers.[176]

Significantly, the Court adopted the legal definition of ill-gotten wealth, under Section 1 of the PCGG Rules and Regulations, a definition which the April 2011 decision ignored in favor of its crafted definition. In the January 2012 decision, the Supreme Court effectively ruled that United Coconut Planters Bank is a public corporation and its assets are public funds.[177]

Inexplicably, the January 2012 decision in favor of the Government and the farmers has not been accorded entry of judgment at this writing unlike the April 2011 decision. The proceeds of the 24% ownership is still beyond the reach of the farmers while the proceeds of the 20% ownership are safely in the wrong pockets.

Given the apparent inconsistency between the two Supreme Court decisions on essentially the same issues and the same parties, and given that this case is arguably the biggest social justice case ever brought to the Supreme Court, should not the Court reopen the case in the interest of substantial justice?

Chief Justice Ma. Lourdes P.A. Sereno's Dissenting Opinion on the April 2011 decision, belatedly released by the Supreme Court, which adopted the dissenting opinion of Carpio-Morales signaled a way forward —

> As public funds, coco levy funds, including its proceeds and whatever form they may have taken in the past or will take in the future, are to be held by public officers and their assigns or transferees under a continuing public trust in favor of the coconut farmers and the public at large. When the time comes that the legal impediment presented before the Court today is lifted (perhaps through newly discovered evidence or another justifiable reason),

174. *Id.* at 320-21 (J. Brion, dissenting opinion).

175. Philippine Coconut Producers Federation, Inc. (COCOFED) v. Republic of the Philippines, 663 SCRA 514 (2012).

176. *Id.*

177. *Id.*

> the opportunity to revisit the ruling of this Court may present itself, and Philippine history may have a chance to be redeemed in part.[178]

There is no better reason for such a re-opening than the subsequent January 2012 decision of the Supreme Court itself.

E. Precedents on Re-Opening

In this regard, there are enough precedents to justify a re-opening. The Court has become more lenient in allowing cases of transcendental importance which failed to adhere strictly to technical rules of procedure.

One of the more explicit pronouncements of such with regard to social justice is *Ang Bagong Bayani-OFW Labor Party v. Commission on Elections*,[179] which reiterated that

> procedural requirements 'may be glossed over to prevent a miscarriage of justice, when the issue involves the principle of social justice ... when the decision sought to be set aside is a nullity, or when the need for relief is extremely urgent and *certiorari* is the only adequate and speedy remedy available.'[180]

Then there is *Garcia v. Philippine Airlines, Inc.*,[181] which serves as a reminder that social justice to uplift the welfare of humanity continues to be a compelling edict of the Constitution, stating that "social justice principles of labor law outweigh or render inapplicable the civil law doctrine of unjust enrichment[.] The constitutional and statutory precepts portray the otherwise 'unjust' situation as a condition affording full protection to labor."[182]

Then there are the cases, among others, like the *Apo Fruits Corporation v. Land Bank of the Philippines*,[183] where the Court departed from the established doctrine on "just compensation" to grant a landowner a huge windfall in a case of voluntary offer to sell by giving due course to a Second Motion for Reconsideration in spite of entry of judgment, with the Court deciding on the merits when the issue was procedural.[184]

V. FACING THE FUTURE — THERE IS HOPE

178. Republic of the Philippines v. Sandiganbayan (First Division), G.R. No. 166859 (J. Sereno, dissenting opinion) (unreported).

179. Ang Bagong Bayani-OFW Labor Party v. Commission on Elections, 359 SCRA 698 (2001) (citing ABS-CBN v. Comelec, 323 SCRA 811 (2000)).

180. *Id.* at 714.

181. Garcia v. Philippine Airlines, Inc., 576 SCRA 479 (2009).

182. *Id.* at 491.

183. Apo Fruits Corporation v. Land Bank of the Philippines, 647 SCRA 207 (2011).

184. *Id.*

The winds of change that first moved the Court in 1968 and again in 1979 to expand the concept of social justice beyond "equal justice" and "more in law" to the "demand of human dignity" give hope of more changes to come. But that assumes that the Judiciary is willing to play its part with a new generation of jurisprudence by promulgating at every opportunity the compelling principles of the broader concept of social justice in the 1987 Constitution, even if it means revisiting landmark contrary decisions.

But because there is always a price to pay for a worthy vision, perhaps what is even more important is the answer to the question — is our society willing to pay the price of real change?

VI. CLOSING NOTE

This Article is not meant to be prescriptive. It is meant to invite comments, for or against, from those who apply the law, teach it, or practice it to secure some measure of *functional justice* to the poor in their daily struggle to subsist.

Hopefully, the discourse will give the legal profession a better grasp of the state of jurisprudence on social justice and to arrive at a clear consensus on what needs to be done to make it more responsive to the plight of the poor. It is time to tell them that their long years of waiting have ended.

One of the frustrations of the poor is seeing retired Justices move on after retirement, not to help them seek justice at the ground level where it counts, but to the boardrooms or in representation of the rich and the powerful, especially those who had cases before the Court in which they participated. Hopefully, a more thorough review of the quality of the jurisprudence that this Article hopes to trigger will also result in the highest ethical standards that ensure the independence of the Court which, because its members are unelected, is the source of its legitimacy.