Constitutional Kritarchy under the *Grave Abuse Clause*

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We fear to grant power and we are unwilling to recognize it when it exists.

- Mr. Justice Oliver Wendell Holmes

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INTRODUCTION

It was not long ago when a "democratic" façade hid an exercise of power by only a few in the Philippine political system. The constitutional-authoritarianist rule that the country experienced during the Martial Law era remains a bleak reminder of the conquest of the Philippine masses by the power of stalwart political regimes. Come 1986, the political environment had an upheaval against this fastidious demagoguery. The illusion of constitutionalism could no longer sustain the felt necessities for a revolution in the political system. The Filipino people overthrew a dictator and instituted a new Constitution that would be the casket of authoritarianism.

The ideals that fueled the commissioners who drafted this new Constitution were fears of another despot arising in future administrations. Drawing from the wisdom of political theory conceived from Polybius to Montesquieu, the Constitution was written with a dedicated intent — to enact a methodology by which despotism and arbitrary rule would be eliminated; a methodological separation of authority and a demarcation of powers to diffuse the hold of the few over national governance. So that, at last, the remains of authoritarianism will finally rest in a proper sepulcher.

The drafters of the new Constitution thus knighted one of the three branches of government with the role of overseer and inserted in the very first section of Article VIII thereof, a new phraseology that would add to the role of the Supreme Court, aside from being a pacifier of societal conflicts. This was the power and authority "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."[1]

This is the *Grave Abuse Clause* of the 1987 Constitution and this *Clause* gives the Supreme Court of the Philippines the power and authority to nullify acts of any branch or instrumentality of the Government that may be deemed as an act of grave abuse of discretion.

When the drafters of the 1987 Constitution gave the Supreme Court the power to determine acts of grave abuse of discretion, they perhaps unwittingly handed the individuals who shall compose the Supreme Magistracy with the authority to disregard and nullify acts of the other branches of the Government that they may find to be acts within the

1. PHIL. CONST. art. VIII, §1 ¶ 2. ("The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law. Judicial power includes 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 on the part of any branch or instrumentality of the Government.").

contemplation of the *Grave Abuse Clause*. This authority is now recognized in modern legal theory and in Constitutional Law as the doctrine of *judicial supremacy*.

But to say that it is only the *supremacy* of one branch over the other that is existent, is a wanting perspective.

Who defines an act as one that is of grave abuse of discretion? What standards identify acts as those that fall under the coverage of the *Grave Abuse Clause?*

The Supreme Court was granted authority to declare void the acts of the other branches of the government that is in *grave abuse of discretion* under the *Grave Abuse Clause*. However, there is no precise definition for *what* and *when* an act is in "grave abuse of discretion." There is no provision in the Constitution that defined the instances when an act is in grave abuse of discretion. The definition and the determination are left with the authoritative interpreters of the Constitution — the sitting magistrates of the Supreme Court.

I. The Nature of Political Rule and the Separation of Powers

It is the Supreme Court that determines what the Constitution provides. What the Constitution provides is enough room for the Court to virtually step into any controversy where an act of the Government is in question and to adjudge whether or not it falls under the *Grave Abuse Clause*. Recent jurisprudence renders this problematization as quite apparent in the Philippine context. The realization that the Philippine Legal System may now be transforming into something that the drafters of the Constitution never expressly envisioned but nonetheless impliedly allowed — is a realization that is worth discussing. That the Supreme Court is now exercising power over the other branches — and with a drop of a gavel — rules over the other branches and the lower instrumentalities is a reality. That a concomitant political theory should therefore find a place, albeit as a mere alternative to modern theories, is a thesis worth a page or more.

The notion that constitutional questions ultimately must be decided by the Supreme Court and the ascendancy of a novel theory of judicial supremacy renders a stark and distinct legal theory that is so much more applicable in the Philippine system given the dominance of jurisprudence that recognize the vast expanse of authority that the Supreme Court has over the legal system as well as in terms of governance of the country. Although *judicial supremacy* is, of course, "a complicated concept that can include many

relationships and permutations,"[2] this Note uses the term in a more specific sense, as it focuses on the Supreme Court's view of its own power and authority, *vis-à-vis* the Congress and the Executive — as well as the different instrumentalities of the Government — to decide constitutional questions and to strike down acts under the authority of the *Grave Abuse Clause*. In particular, this Note emphasizes the Supreme Court's view in recent years that it alone among the three branches has been allocated the power to provide the full substantive meaning of all constitutional provisions and that it has the authority to settle issues that it deems *transcendental*[3] and for the welfare of the people under the *Salus Populi* doctrine, declare acts of the other branches as acts in grave abuse, and hence, unconstitutional.[4]

When the drafters of the 1987 Constitution knighted the Supreme Court with the judicial power 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 under the *Grave Abuse Clause* — there was not only a broadening of the scope of *judicial power* to include the power to determine whether a grave abuse of discretion — there was also an implied grant of the power to nullify the acts under the *Grave Abuse Clause*. It is this implied grant of power and this perhaps unintended broader scope of power that is the focal point of this Note.

This Note will engage the traditional theory of judicial supremacy and argue that judicial supremacy as an apologetic doctrine is no longer apt, given the modern self-interpreting role of the Supreme Court and the clear textual grant of constitutional reign under the Grave Abuse Clause. Instead, judicial supremacy as a thesis should be consolidated with the rest of the theoretical and practical powers of the Court to provide for an amalgamated or synthetical politico-legal theory of what may be termed as Constitutional Kritarchy — or the rule of judges. This Note will, albeit briefly, trace the oscillations of the political question doctrine and survey the relationship of the doctrine to the Supreme Court's contemporary view of its institutional capability and the proper scope of its powers of judicial review as well as its

2. Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy,* 102 COLUM. L. REV. 237, 240 (2002).

3. Transcendental causes such as those of public policy and public interest as well as for the safeguards of democracy — motherhood statements that the Supreme Court have been invoking in its determination of the necessity to rule upon issues that are vaguely judiciable but nonetheless controversial — in a sense that the contentions depend on the view of the other branch of the government on the one hand and the view of the Supreme Court on the other.

4. *Salus populi est suprema lex* — the welfare of the people is the supreme law. This Latin maxim has been used by the Supreme Court in its justification of its authority to decided the controversial *Estrada v. Arroyo* decision in 2001.

Grave Abuse powers under the Grave Abuse Clause. The Note provides this account for both the classical-restrictive theory, which is rooted in the prudential interpretation of historical jurisprudence on the exercise of judicial review, and the modern-liberal theory, rooted in the text and structure of the 1987 Constitution, which provides for a constitutionally created method of asserting judicial rule.

The Note chronicles the Supreme Court's decisional fluctuation in recent years between both versions of judicial review theory, as well as its recent disregard of the political question doctrine. The Note argues that the decisional fluctuations are part of a larger trend in which the Supreme Court has embraced the view that it alone, among the three branches of government, has the power and constitutional capacity to render the full substantive meaning of all constitutional provisions and that the Supreme Court has become self-aware of its potential powers under the Grave Abuse Clause of the 1987 Constitution. The Note concludes that constant use of the powers under the Grave Abuse Clause is troubling because the doctrine forces the Court to confront the institutional strengths of the political branches, as well as the Constitutional Commissions, to the point of judicial rule over matters that could well be left with the respective governmental institutions.

A. Judicial Review Powers

Judicial review is the power of courts to determine the validity of the acts of the Legislative or Executive departments of the government. In the United States, judicial review "includes the authority, when the issue is presented in a case within the court's jurisdiction, to declare federal and state statutes unconstitutional."[5] In the Philippines, judicial review not only includes the power to declare statutes unconstitutional it also includes the power to declare *acts* of the governmental instrumentalities as unconstitutional.[6]

The power of Constitutional interpretation was what once was determined and justified under the premise that there were *conflicting claims of authority*[7] and that the Supreme Court merely steps into the dispute to

5. Anna Leah Fidelis T. Castañeda, *The Origins of Philippine Judicial Review, 1900-1935*, 46 ATENEO L.J. 121, 122 (2001) (citing DAVID CURRIE, THE CONSTITUTION OF THE UNITED STATES: A PRIMER 14 (1988)).

6. Sinon v. Civil Service Commission, 215 SCRA 410, 415-17 (1992).

7. JOAQUIN G. BERNAS, S.J., THE 1987 CONSTITUTION OF THE PHILIPPINES: A COMMENTARY 846-49 (1996). Father Bernas explains the theory of judicial review powers as being rooted in modern constitutionalism and it is the Court's duty to settle controversies when its powers of Constitutional interpretation is

determine who has a better and stronger legal right so as to prevail in the dispute.

Under the 1935 Constitution, the power to "check" not only acts of the Legislature but that of the Executive was also made explicit in the text. The power of judicial review in the text of the 1935 Philippine Constitution contemplated a broad power that encompassed not only the authority to determine the validity of acts passed by the Legislature, but also acts of the Executive department in the form of executive orders or administrative regulations.[8]

Under the 1987 Constitution and together with the knighting of the Supreme Court as the overseer is the imposition of limitations upon the Executive and the Legislative branches. The Executive *power of the sword* was limited in its exercise of police power in terms of the use of the Military as well as that of Martial Rule.[9] The Chief Executive is also limited in his or her appointive powers — the same must go through congressional approval first.[10] The Legislative *power of the purse* is now totally withheld from the

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invoked. Citing Angara v. Electoral Commision, 63 Phil. 139, 158 (1936), he explains that:

> …when the judiciary mediates to allocate constitutional boundaries, it does not assert any superiority over the other departments; it does not in reality nullify or invalidate an act of the legislature, but only asserts the solemn and sacred obligation assigned to it by the Constitution to determine conflicting claims of authority under the Constitution and to establish for the arties in an actual controversy the rights which that instrument secures and guarantees to them.

This power is limited to mere determination of who has a *better* right in conflicts of authority. However, there is a shift in modern jurisprudence in the use of this authority as will be discussed *infra*.

8. *See* Angara v. Electoral Commission, 63 Phil. 139 (1936), *cited in* Castañeda, *supra* note 5, at 122 (2001).

9. PHIL. CONST. art. VII, § 18, ¶ 3 ("The Supreme Court may review, in an appropriate proceeding filed by any citizen, the sufficiency of the factual basis of the proclamation of martial law or the suspension of the privilege of the writ or the extension thereof, and must promulgate its decision thereon within thirty days from its filing.").

10. PHIL. CONST. art. VII, § 16, ¶ 1 ("The President shall nominate and, with the consent of the Commission on Appointments, appoint the heads of the executive departments, ambassadors, other public ministers and consuls, or officers of the armed forces from the rank of colonel or naval captain, and other officers whose appointments are vested in him in this Constitution. He shall also appoint all other officers of the Government whose appointments are not otherwise provided for by law, and those whom he may be authorized by law

Executive and is explicitly lodged with the Legislative except in a few instances.[11] All in all, there was meant to be a wall between the branches that would clearly delineate and demarcate the boundaries by which the branches can exercise their respective authorities — and the powers of governance rest not just in one body of the few, but in three bodies all equal and under the "check-and-balances" scheme.[12]

There was also a creation, or rather, separation of the Constitutional Commissions from the main branches of the Government. Under Article IX of the 1987 Constitution, three Constitutional Commissions — all collegiate bodies, were formed and institutionalized. They are: the Civil Service Commission (CSC), the Commission on Audit (COA), and the Commission on Elections (COMELEC). The first is the "personnel office of the government, the second the auditing office, and the third is charged with the administration of the all important election process."[13] COMELEC is charged with the sovereign duty to "enforce and administer all laws and regulations relative to the conduct of an election, plebiscite, initiative, referendum, and recall."[14] Being a Constitutional Commission, COMELEC is an administrative agency possessing executive, quasi-judicial, and quasi-legislative powers.[15] All the Constitutional Commissions were *supposed* to be *independent.* [16] This "independence" of the different branches and instrumentalities of the Government and the Constitutional Commissions is, of course, subject to the authority of the Supreme Court to review their acts

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to appoint. The Congress may, by law, vest the appointment of other officers lower in rank in the President alone, in the courts, or in the heads of departments, agencies, commissions, or boards.").

11. PHIL. CONST. art. VII, § 20 ("The President may contract or guarantee foreign loans on behalf of the Republic of the Philippines with the prior concurrence of the Monetary Board, and subject to such limitations as may be provided by law...").

12. *See* People of the Philippines v. Vera, 65 Phil. 56, 94 (1937); Tañada v. Cuenco, 103 Phil. 1051, 1061-2 (1957); Macias v. COMELEC, 3 SCRA 1, 7-8 (1961); *see also* Bengzon v. Senate Blue Ribbon Committee, 203 SCRA 767 (1991); Bondoc v. Pineda, 201 SCRA 792 (1991); Gonzales v. Macaraig, 191 SCRA 452 (1990); Pacete v. Acting Chairman of the Commission on Audit, 185 SCRA 1 (1990); People of the Philippines v. Dacuycuy, 173 SCRA 90 (1989); Santiago v. Guingona, 298 SCRA 756 (1998) on separation of powers.

13. BERNAS, *supra* note 7, at 898.

14. PHIL. CONST. art. IX, C, § 2 (2).

15. BERNAS, *supra* note 7, at 932.

16. PHIL. CONST. art. IX, A, § 1.

as to whether they are in excess of their jurisdiction under the *Grave Abuse Clause*.[17]

B. *Declaring Acts in Grave Abuse of Discretion*

However multifarious the issues may be, it could be argued that the Supreme Court has the sole authority to determine whether it has jurisdiction under the *Grave Abuse Clause* on any given issue.[18] All the branches of the government yield to the Supreme Court's interpretation of what is rightful under the Constitution. The Supreme Court's *Judicial Review* powers yield only to the Constitution itself (which the Supreme Court has the lawful duty to interpret) and established judicial pronouncements (which the Supreme Court may revoke or reverse by a subsequent pronouncement).[19]

There are two theories on the use of the Grave Abuse powers: the classical theory, which is rooted in prudential decisions following the *Marbury v. Madison* philosophy, and the modern theory, which is rooted in the textual interpretation of the 1987 Constitution and the modern active role of the Judiciary in nation-building.

The *Classical Theory* is a theory of restraint and moderation. Hence it may be properly termed as the Classical-Restrictive Theory on the use of the Grave Abuse powers. This view, in brief, holds that the Supreme Court should liberally grant the governmental body whose acts are in question the benefit of discretion and that the Court must exercise *caution* in striking down acts of the body. This theory is best amplified by the attitude of the Supreme Court in cases where it expressly mentioned that: "Grave abuse of discretion" means "such capricious and arbitrary exercise of judgment as is equivalent, in the eyes of the law, to lack of jurisdiction."[20] Even mere abuse

17. PHIL. CONST. art. XII, § 1, ¶ 2 (which provides that judicial power includes 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 on the part of any branch or instrumentality of the Government*).

18. *See generally* Joaquin G. Bernas, *Separation of Powers: The Supreme Court and the Political Departments*, 11 ATENEO L.J. 8-29 (1961); *see also* Jose L. Sabio, *This is Judicial Tyranny, Plain and Simple*, 30 ATENEO L.J. 78 (1986); Anna Leah Fidelis Castañeda-Anastacio, *Making Sense of* Marbury, 46 ATENEO L.J. 107 (2001); and Anna Leah Fidelis Castañeda-Anastacio, *The Origins of Philippine Judicial Review*, 46 ATENEO L.J. 107 (2001).

19. The Supreme Court has yielded to an exhaustion of administrative remedies, as well as to the political question doctrine.

20. Abad Santos v. Prov. of Tarlac, 67 Phil. 480 (1939).

of discretion is not sufficient by itself to justify the intervention of the reviewing court and for the issuance of a writ of certiorari. For that purpose, the abuse of discretion must be grave and patent, and it must be shown that it was exercised "arbitrarily" or "despotically."[21] The abuse of the discretion must be so patent and gross as to amount to an evasion of positive duty or to a virtual refusal to perform the duty enjoined by, or to act in contemplation of law.[22] In the Classical-Restrictive Theory, moderation is the keyword. Not only moderation, but self-control and prudence should be the guiding virtues in any magistrate's tribunal. This theory is the classical view that provides for the prudential use of the political question doctrine.

The *Modern Theory*, in contrast, is exemplified by the proactive stance taken by the Supreme Court in recent jurisprudence. In this theory, grave abuse of discretion is meant to be such act of the body in question that amounts to a "lack of power"[23] as determined by the Supreme Court. The Supreme Court has a *duty*[24] to watch over the whole government. When an act is unconstitutional it is the Supreme Court's *duty* to declare it unconstitutional because the members of the Court "cannot shirk from it without violating their oaths."[25] This perspective renders the Supreme Court not only with the authority but the *duty* to determine whether a governmental act, however well-intended, is permitted under the law. Judicial vigilance, as for example in the Court's view of its duty in its defense of labor rights,[26] lies in the *proactive* nature in the Supreme Court's decision-

21. *See* Tavera Luna, Inc. v. Nable, 72 Phil. 278 (1941); Palma & Ignacio v. Q & S Inc., et al., 17 SCRA 97, 100 (1966); *see also* Villa-Rey Transit, Inc. v. Bello, 7 SCRA 735 (1963); Abig v. Constantino, 2 SCRA 299 (1962).

22. *See* Franklin Baker Co. of the Phil. v. Trajano, et al. 157 SCRA 416 (1988).

23. Arroyo v. De Venecia, 277 SCRA 268, 294 (1997).

24. *See* Artemio V. Panganiban, *Gravely Abusive Contracts: The Role of the Supreme Court in Promoting Judicial Statesmanship,* 49 Ateneo L.J. 3, 4 (2004) (where Mr. Justice Panganiban explained that the role that the Supreme Court has undertaken is one of *judicial statesmanship*. The role of the Supreme Court in the recent decisions cited in this Article is in regard to the Supreme Court's contribution to the Philippine economy and the general business community as well as in the protection of democracy and free trade).

25. *See also* Tolentino v. Secretary of Finance, 235 SCRA 630, 803 (Bellosillo, J. dissenting); also at 797 (Romero, J. dissenting).

26. *See e.g.* Garcia v. National Labor Relations Commission, 264 SCRA 261, 267 (1996) (where the Supreme Court ruled that the labor tribunal acted with grave abuse of discretion in treating a mere letter from private respondent as private respondent's appeal in violation of the labor tribunal's own rules on appeal prescribed under Section 3(a), Rule VI of the New Rules of Procedure of the National Labor Relations Commission); *see also* Philippine Airlines Inc. v. National Labor Relations Commission, 263 SCRA 638, 657 (1996) (where the

making and in its construction of the law and even of the rules of the body in question.[27] This view gives the magistrate enough leeway to justify judicial intervention on issues that it may deem to be of importance to the public interest, and hence, contrary to the prudential view on the passive nature of magistrates.

The classical theory remains the well-entrenched theory but the modern theory is gaining approbation from many sitting justices. As Mr. Justice Romero queried:

> …is this Court to assume the role of passive spectator or indulgent third party, timorous about exercising its power or more importantly, performing its duty, of making a judicial determination on the issue of whether there has been grave abuse of discretion by the other branches or instrumentalities of government, where the same is properly invoked?
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> The time is past when the court was not loathe to raise the bogeyman of the political question to avert a head-on collision with either the Executive or Legislative Departments. Even the separation of powers doctrine was burnished to a bright sheen as often as it was invoked to keep the judiciary

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Supreme Court ruled that the labor arbiter committed grave abuse of discretion when he failed to resolve immediately by written order a motion to dismiss on the ground of lack of jurisdiction and the supplemental motion to dismiss as mandated by Section 15 of Rule V of the New Rules of Procedure of the NLRC); Mañebo v. National Labor Relations Commission, 229 SCRA 240, 248 (1994) (where the Supreme Court ruled that the labor arbiter gravely abused its discretion in disregarding the rule governing position papers. In this case, the parties have already filed their position papers and even agreed to consider the case submitted for decision, yet the labor arbiter still admitted a supplemental position paper and memorandum, and by taking into consideration, as basis for his decision, the alleged facts adduced therein and the documents attached thereto.); Gesulgon v. National Labor Relations Commission, 219 SCRA 561, 566 (1993) (where the Supreme Court, in its ardent defense of labor rights argued that the public respondent gravely abused its discretion in treating the motion to set aside judgment and writ of execution as a petition for relief of judgment. In doing so, public respondent had, without sufficient basis, extended the reglamentary period for filing petition for relief from judgment contrary to prevailing rules). In all these cases, the Supreme Court ruled with the presupposition that it has the mandate and the duty to grant Labor the fullest protection of the law, including statutory construction and in its exercise of the *Grave Abuse* powers.

27. *See* Information Technology Foundation of the Philippines v. COMELEC, 405 SCRA 614 (2004) (Tinga, J. dissenting); Theoben Jerdan C. Orosa, Note, *The Failed Computerization of the National Elections and the Nullification of the Automated Election Contract,* 49 ATENEO L.J. 258, 284 (2004); *see also* Commissioner of Internal Revenue v. Court of Appeals, 257 SCRA 200, 209, (1996); Santiago v. Guingona Jr., 298 SCRA 756, 786, (1998).

> within bounds. No longer does this condition obtain. Article VII, Section 2 of the Constitution partly quoted in this paragraph has broadened the scope of judicial inquiry. This Court can now safely fulfill its mandate of delimiting the powers of co-equal departments like the Congress, its officers or its committees which may have no compunctions about exercising legislative powers in full.[28]

It is to be noted that both theories are well supported by jurisprudence and this author makes a presupposition that it is only with the ratiocination of the sitting magistrate and the exercise of judicial modesty by which the theories are held to be separately applicable. But what has been made clear is that the temptation in asserting judicial rule is no longer limited by constitutional metes. The time has passed where the Judiciary sat side-by-side with the legislative and the executive branches in terms of power and control. As quoted above, "no longer does this condition obtain."

C. Constitutional Permissiveness in Judicialization

The idea that some constitutional questions are left to the sole discretion of the Congress or the Executive cannot coexist with the Philippine theory of judicial review. If one subscribes to the view that, in all contexts, the Court alone must give independent meaning to the Constitution without deference to the political branches, then it is apparent that there is no theoretical basis for the *political question doctrine*. In fact, the demise of the political question doctrine, as Prof. Rachel Barkow explained in her article *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy,*[29] correlates with the ascendancy of the modern view in the Philippine Supreme Court of judicial *supremacy*.[30] This view of the

28. *Tolentino v. Secretary of Finance*, 235 SCRA at 630, 793 (1994) (Romero, J., dissenting). Mr. Justice Romero's dissenting opinion sought to answer the issue of the scope of judicial inquiry into the acts of the other branches of the government.

29. Barkow, *supra* note 2, 240-42.

30. *See* Artemio V. Panganiban, *Judicial Globalization,* Lecture before the First Australasia Judicial Educators Forum (Feb. 14, 2003) (on file with author) (where Mr. Justice Panganiban himself explained that the role the Supreme Court is playing these past years have made a huge impact in the economy, in the field of commerce, in the field of science and in human rights, as well as in the field of elections and in democratization — the premise of all these is that the Supreme Court is mandated with a "duty" to protect the ideals of the people — a role that the present Court has seen fit to undertake); *see also* Artemio V. Panganiban, *Gravely Abusive Contracts,* 49 ATENEO L.J. 3, 4-5 (2004) where Mr. Panganiban believed and argued that it was not just authority that was conferred upon the Supreme Court to nullify acts in grave abuse of discretion but rather, it was a "duty."

Constitution is not at odds with the expansive textual provision of the Constitution on judicial power. Though the legal structure and the legal history may bespeak otherwise, there are many arguments that support the contention that the Supreme Court and the Judiciary's authority ought to be recognized as more than supreme. In effect, by having the power to tell the other branches what they can and cannot do (or what is within and without their authority), the Supreme Court *rules* over the other branches.

The quandary on whether the Court should yield to political questions was problematized by Prof. Barkow:

> The most memorable line from *Marbury v. Madison* is its simply worded yet monumentally powerful assertion that it is 'emphatically the province and duty of the judicial department to say what the law is.' This phrase could be read in isolation to establish seemingly limitless constitutional authority in the Supreme Court. *The Constitution is law; it is the Supreme Court's province — its duty — to say what the law is; therefore it is the Supreme Court's province and duty to answer all constitutional questions.*
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> The problem, of course, is that this eloquent excerpt from Marbury cannot be taken out of context. *The duty 'to say what the law is' does not necessarily imply a court monopoly on interpretation. This duty leaves room for deference to the constitutional interpretation of the political branches.* Indeed, the Constitution may contain provisions that dictate an interpretive role for the political branches.[31]

The quandary must remain just that — a *theoretical* and hypothetical quandary that the Supreme Court may determine or not in their decision-making processes.

In contrast, the United States Supreme Court needs to construe the United States Constitution so as to derive their authority to declare acts of the other branches as unconstitutional. The Philippine Supreme Court does not have the same dilemma in determining its powers and the scope of its authority. As earlier noted, Article VII, Section 2 of the Constitution has broadened the scope of judicial inquiry. The Supreme Court can now safely fulfill its mandate of delimiting the powers of co-equal departments like the Congress, or the Executive and their respective officers or their committees.[32] Or as they have done in recent jurisprudence — check even the powers of the Constitutional Commissions.[33]

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31. Barkow, *supra* note 2, at 239 (emphasis supplied).

32. *Tolentino v. Secretary of Finance*, 235 SCRA at 630, 793 (1994).

33. *See* Orosa, *supra* note 27.

II. The Concept of Judicial Rule and Constitutional Kritarchy

The concept of judicial rule runs starkly opposite to the idea of the equality of the three branches of government. The primordial idea in democratic political theorization has always been equality and separation of powers — that the law-making body, the law-enforcing body, and the law-adjudicating body are all co-equal.

> The idea of an apportionment of the powers of government, and of their separation into three coordinate departments is not a modern invention of political science. It was suggested by Aristotle in his treatise on 'Politics' and was not unfamiliar to the more advanced of the medieval jurists. But the importance of this division of powers, with the principle of classification, were never fully apprehended, in theory, until Montesquieu gave to the world his great work 'Spirit of the Laws.' Since then his analysis of the various powers of the state has formed part of the accepted political doctrine of the civilized world.[34]

But the *praxis* or the combination of both the theory and the application of the theory resulted in another concept. Where the law-making body can make laws but may be nullified by the law-adjudicating body; and where the law-enforcing body's acts are in grave abuse of discretion as the law-adjudicating body may determine — the law-adjudicating body is apparently in control over the two other bodies. This form of control is authorized by the Constitution and in this judicial power lies not only the supremacy of the Judiciary over the other branches of government — but its control over the other two.

It is tempting to temper this realization with apologetic statements such as *judicial supremacy* but the verdant visualization of the hierarchy promotes a different political theory. This is a distinctive rule of the law-adjudicators or the magistrates that denies the other branches a leveled up view (or a theoretical equality); this is a rule of the magistrates or a *rule of judges*: to put it in one word — *Kritarchy*.

This Note uses kritarchy in two senses. Kritarchy is used in a broad sense to denote judicial rule far more than the accepted judicial supremacy concept; and at the same time to describe the political institutionalization and judicialization that the 1987 Constitution laid down and designed.

Kritarchy[35] is a political theory in which the rules are interpreted by sitting judges over and above what other public officials may interpret the

34. Government v. Springer, 50 Phil. 259 (1927) (Johnson, J., concurring).

35. I Robert Southey, Sir Thomas More or Colloquies on the Progress and Prospects of Society (1844). The term "kritarchy," compounded from the Greek words "kritès" (judge) or "krito" (to judge) and "archè" (principle, cause), was coined in 1844 by the English romantic poet Robert Southey.

law to be. Other public officials are subservient to the interpretations of the sitting judges of what the law is — and hence, what public officials and private citizens can and cannot do.

Law being the command of the sovereign — the ultimate sovereign enforcer becomes, not the executor nor the legislator, but the interpreter. Hence, kritarchy is also a political system, one based on respect for law — moral, natural or positive. It differs from other political systems by its consistent adherence to the application of the rules of justice. Even courts of law, police forces, and other organizations that look after the day-to-day business of maintaining law, are denied any power, privilege or immunity that is not in conformity with *natural* or *positive* law. If *"monarchy"* denotes rule by one person and *"oligarchy"* rule by a few,[36] *"democracy"* rule by a majority; it is quite rough to understand "*kritarchy*" as referring to *rule by judges.* In the Bible, the rule of judges over Israel was referred to as a *kritarchy*.[37] However, the use of the word "rule" should not mislead us into thinking that the rule of judges is like the rule of monarchs and oligarchs, much less that it is a particular sort of oligarchy.

Monarchs and oligarchs seek political rule,[38] *i.e.* the ability and power to enforce obedience to their commands, rules, decisions and choices on their subjects. In short, monarchs and oligarchs rule by a mixture of direct command and legislation.[39] Judges, on the other hand, are not supposed to legislate but to find ways and means to settle conflicts and disputes in a lawful manner.[40] They do not seek to enforce obedience to their commands as such, but respect for law, which is an order of things that is understood to be objectively given and not something that answers to whatever desires or ideals the judges may have.[41]

"Kritarchy" is mentioned in among others Webster's Unabridged Dictionary, The Oxford English Dictionary and the American Collegiate Dictionary.

36. PLATO, THE REPUBLIC 21 (Penguin Classics Reprints 1983).

37. Southey, *supra* note 35.

38. THOMAS HOBBES, THE LEVIATHAN (1660) as cited by Justice Holmes in his advisory opinion on *The Referendum and the Woman Voter,* 160 Mass. 586, 593 (1894).

39. *See* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1861).

40. *See* JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION, 26-7 (1985); *see also* Arthur von Mehren, *Book Review,* 63 HARV. L. REV. 370, 371 (1949).

41. Michael van Notten, From Nation State to Stateless Nation, *available at* http://www.liberalia.com/htm/mvn_stateless_somalis.htm (last accessed Aug. 1, 2004).

In this sense, kritarchy is not alien to local doctrines that hold that courts are bound to follow the plain words of the statute as to which there is no room for construction, regardless of the consequences[42] or the personal opinion of the sitting magistrates.[43]

One must recognize what exists. When authority is conferred upon a person or an entity — such authority exists independently of the person or the entity and hence, must be recognized as a concept *per se*.

The Philippine Judiciary is powerful and its powers are limited only by the supreme law — the Constitution. But the Constitution itself gives the Judiciary, and the Supreme Court in particular, that such grant has virtually elevated the Supreme Court into the level of priests for the modern day Delphi. The Constitution as a Delphic document has attained a profundity in the legal world as being near to a Bible. The Supreme Court Justices of the present have taken as one of their solemn duties to make sure that the other branches of the government are performing their duties in a manner that is not contrary to the law.

III. Historical-Institutional Analysis of the Philippine Constitutional Kritarchy

The Philippine legal system is one that has been handed down by several systems. It has been argued to be a civil system tracing its roots from the Roman-Spanish Civil system.[44] It has also been argued that what we really have is a Philippine Common Law system derived from the Anglo-American tradition.[45] A more synthesized perspective has been offered that ours is a

42. Tañada v. Yulo, 61 Phil. 517 (1935).

43. Pascual v. Pascual-Bautista, 207 SCRA 561 (1992), where Justice Paras explained that:

> Verily, the interpretation of the law desired by the petitioner may be more humane but it is also an elementary rule in statutory construction that when the words and phrases of the statute are clear and unequivocal, their meaning must be determined from the language employed and the statute must be taken to mean exactly what it says. (citing Baranda v. Gustilo, 165 SCRA 758-759 [1988]). The courts may not speculate as to the probable intent of the legislature apart from the words (citing Aparri v. Court of Appeals, 127 SCRA 233 [1984]).

44. Ruben F. Balane, The Spanish Antecedents of the Philippine Civil Code 41-43 (1979).

45. *In Re* Shoop, 41 Phil. 213 (1920) (where it was explained that "our judges can go further to diagnose the intent of the law and give it fulgour and effect and that the judge-made law is recognized in the Philippines.").

hybrid system.[46] That our legal system greatly depends, if not solely, at least in part, from judicial precedents developed from the oscillation and the derivation of the mean between the civil law sense and the common law product.[47]

There is one great premise to all these systems that has attained a commonality of acceptance — that there is a *separation of powers* between the enacting body and the interpreting body.

But separation of powers is another theory that is rooted in antiquely crafted jurisprudence and political theory for governmental prudence. In modern parlance, it has taken the status of a doctrine applicable to the three governmental branches, albeit its exercise is constitutionally left with the Judiciary, or more poignantly, with the Supreme Court.

A. The United States Supreme Court: The Primordial Model

A historical analysis of the Philippine legal system would yield to an understanding of where the ideas that moved the system happened to come from. The American progenitors of Philippine legal thought brought the U.S. legal system into the Philippines, which was their colony at the time.

The U.S. Constitution vested the whole judicial power in one Supreme Court.[48] The Philippine legal system took its cue from the American legal system. Handed down from the colonial rule of the early 1900's — the Supreme Court of the Philippines, as an institution, was patterned after the United States Supreme Court — and for a particular breadth of time, was actually part and subsumed by the American Courts System in the pre-World War era.[49]

Gunther, in his analyses of constitutional cases, observes three notable documents and several landmark jurisprudence that shaped the judicial institution of the United States Supreme Court.[50] The basic document that

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46. JOSE P. LAUREL, ASSERTIVE NATIONALISM 80 (1931).

47. Cesar L. Villanueva, *Comparative Study of the Judicial Role and Its Effects on the Theory on Judicial Precedents in the Philippine Hybrid Legal System*, 65 PHIL. L.J., March-June 1990.

48. GERALD GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 7 (10d ed. 1983) (citing Marbury v. Madison, 5 U.S. (1 Cranch.) 137 (1803)).

49. Ocampo v. Cabañgis, 15 Phil. 626, 628-9 (1910) (where Mr. Justice Elliot explicitly asserted that the Philippine courts are part of the American Legal System; and the principles in the latter have great weight in application to the former.).

50. GUNTHER *supra* note 48, at 5-6.

vests and delimits the powers of the Judiciary is the Constitution of the United States, which was created in response to the inadequacies of the Articles of Confederation and was ratified by nine states in 1788.[51]

Although there was some debate at the Constitutional Convention about the role of the Judiciary in revieweing legislative acts, nothing in the U.S. Constitution expressly gives the U.S. Supreme Court power to rule on the constitutionality of acts of the Congress or state statutes, nor the power to review decisions of state courts.[52] The division of power between the states and the federal government created the possibility of conflict for supremacy between them. This was resolved by the *Supremacy Clause*.[53]

Although there is no specific provision for judicial review, the U.S. Constitution created an independent Judiciary with power equal to the other two departments.[54] And as clarified in *Marbury v. Madison*,[55] the Judiciary

51. *Id.* The United States Constitution currently consists of seven articles and 26 amendments. Some of the significant amendments expounded on the important protections of individual liberty, including the writ of *habeas corpus*, prohibition of *ex post facto* laws, and the Privileges and Immunites Clause. Two groups of amendments, however, provide the majority of the civil liberties in the United States today: *The Bill of Rights* and the *Civil War Amendments*. Many of the states included a Bill of Rights in the original Constitution. Adoption of the first 10 amendments, or Bill of Rights, was prompted largely by the concerns expressed during the state ratification conventions. These amendments did not affect state power; they were only limitations on the power of the federal government. They were reactions to calls for democracy. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 6 (Harvey C. Mansfield & Delba Winthrop trans. 2000). The conquest over slavery in 1865, provided legal support to eradicate slavery, which had been recognized in the original Constitution. In 1866, the United States Congress enacted the Civil Rights Act to prohibit racial discrimination practices by the states. The President vetoed the Act on grounds that it was unconstitutional, and although Congress overrode the veto, the fourteenth amendment was proposed to overcome constitutional objections to the Civil Rights Act. It was ratified largely because Congress made ratification a condition for the rebel states to be represented in Congress. The fifteenth amendment prohibited denial of the right to vote for racial reasons.

52. *See* GUNTHER *supra* note 48, at 5; *see also* Henry P. Monaghan, *Marbury and the Administrative State,* 83 COLUM. L. REV. 1, 7-9 (1983).

53. U.S. CONST. art. VI, § 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

54. U.S. CONST. art. III creates the Supreme Court and extends judicial power to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made…under their authority."

was thus responsible to decide cases, using the Constitution as the supreme law.

In *Marbury,* the petitioners (Marbury et al.) were appointed justices of the peace for the District of Columbia by President Adams and confirmed by the Senate of Adam's last day in office. Their formal commissions were signed but not delivered. Madison, as Secretary of the State, was directed by the new President (Jefferson) to withhold the petitioners' commission. In a writ of mandamus directly to the Supreme Court, the petitioners brought the issue arguing that under the Judiciary Act of 1789, which established the Supreme Court, the Supreme Court was authorized to issue writs of mandamus to public officials. The Supreme Court ruled that it is empowered to review acts of Congress (in this case the Judiciary Act) and void those which it finds to be repugnant to the Constitution. The petitioners' action was discharged because the Court does not have original jurisdiction — the Court declared the Judiciary Act to be unconstitutional. Though the facts demonstrated a plain case for a mandamus action, and under the Judiciary Act the Supreme Court could so act, the Supreme Court withheld a favorable decision to the petitioners because the grant by the Judiciary Act of jurisdiction was unconstitutional and void. The petitioners claim that since the original grant of jurisdiction to the Supreme Court is general and the clause assigning original jurisdiction contained no negative or restrictive words, the legislature may assign original jurisdiction in addition to that specified in the Constitution. But petitioners' contention would render the Supremacy Clause ineffectual, hence, an inadmissible construction. The grant of judicial power extends to all cases arising under the Constitution and laws of the United States, indicating that the courts must consider the Constitution. Since the Constitution is superior to any ordinary legislative act, it must govern to which both apply. The *Supremacy Clause* declares that the Constitution and those acts of Congress made *in pursuance thereof* shall be the supreme law of the land.[56] Thus, the Supreme Court must govern a case to which both apply.

This opinion has prompted an ongoing debate about whether the Supreme Court is the ultimate voice in constitutional interpretation for the whole government.[57] It has been argued that the Judiciary is the least

55. Marbury v. Madison, 5 U.S. (1 Cranch.) 137 (1803).

56. Construing U.S. CONST. art. VI, § 2.

57. Barkow, *supra* note 2, at 241. As professor Barkow observed, indeed, in the past several years, the meaning of judicial supremacy has been the topic of a lively academic debate. *See, e.g.*, Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1362 (1997) (defending Cooper v. Aaron and "its assertion of judicial primacy without qualification"); Neal Devins & Louis Fisher, *Judicial Exclusivity and Political*

powerful branch of the government in the sense that it neither controls public funds nor the military. But the same criticism recognized that there indeed remains the power of review that may be exercised in the absence of textual limitations on its exercise.[58]

This view of the U.S. Supreme Court of the role of the Judiciary as the sole interpreters of the Constitution was tested in a controversial case. In *Nixon v. United States*,[59] on whether the Senate could impeach a federal judge pursuant to Article I, Section 3, Clause 6 based on the report of a

Instability, 84 VA. L. REV. 83, 106 (1998) ("No single institution, including the judiciary, has the final word on constitutional questions."); Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347, 348 (1994) (arguing for comparative institutional competence whereby "each institution must interpret the Constitution in order to decide how much deference to give to specific decisions by other institutions"); David E. Engdahl, *John Marshall's "Jeffersonian" Concept of Judicial Review*, 42 DUKE L.J. 279, 280 (1992) (concluding that Marshall held the "Jeffersonian" view of judicial review whereby "each organ of government is obliged to decide independently... constitutional questions... none being bound by the others' opinions on the same question"); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1270 (1996) (arguing that the President "is not bound by, or legally required to give deference to, the constitutional determinations of Congress or the courts"); Sanford Levinson, *Constitutional Protestantism in Theory and Practice: Two Questions for Michael Stokes Paulsen and One for His Critics*, 83 GEO. L.J. 373, 373-74 (1994) (agreeing largely with Paulsen's notion of constitutional rather than judicial supremacy); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power To Say What the Law Is*, 83 GEO. L.J. 217, 221 (1994) ("The President's power to interpret the law is, within the sphere of his powers, precisely coordinate and coequal in authority to the Supreme Court's."); David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 117 (1993) (refuting the view that "the President is sometimes entitled to claim direct access to 'the Constitution,' unmediated by constitutional law as the courts have developed it"). Anna Leah Fidelis T. Castañeda, *Making Sense of Marbury*, 46 ATENEO L.J. 107 (2001) (observing that "hallowed doctrines and institutions, like judicial review and the American Supreme Court, are both dynamic and contingent.").

58. ALEXANDER HAMILTON, THE FEDERALIST NO. 48 456; *see also* THE FEDERALIST NO. 78 467 (Clinton Rossiter ed., 1961) (where Hamilton argued that "If it be said that the legislative body are themselves the constitutional judges of their own powers and that the construction they put upon them is conclusive upon the other departments it may be answered that this cannot be the natural presumption where it is not to be collected from any particular provisions in the Constitution." In other words, although judicial review is the norm, there are exceptions, which are expressed in "particular provisions in the Constitution." Hamilton, however, provided no such provision.).

59. Nixon v. United States, 506 U.S. 224, 226 (1993).

factfinding committee, the Supreme Court opined that there was indeed presented a non-justiciable political question. Mr. Justice White, joined by Mr. Justice Blackmun, however disagreed that the case presented a political question: "Even taking a wholly practical approach, I would prefer not to announce an unreviewable discretion in the Senate to ignore completely the constitutional direction to 'try' impeachment cases."[60] Mr. Justice Souter also concurred only in the judgment, "envision[ing] different and unusual circumstances that might justify a more searching review of impeachment proceedings."[61]

B. The Philippine Supreme Court: The Individuated Copy

The ramifications of the Philippines being patterned after the American legal system coincide with the established principles of separation of powers declared by Mr. Justice Elliot to have been directly borrowed from the United States.[62] In *Ocampo v. Cabañgis*, the Supreme Court, through Mr. Justice Elliot, expressed the nature of the Judiciary's function in relation to the Legislative branch:

> The doctrine is well established in the various States of the Union that the legislatures have no power to establish rules which operate to deprive the courts of their constitutional authority to exercise the judicial functions. A constitutional court when exercising its proper judicial functions can no more be unreasonably controlled by the legislature than can the legislature when properly exercising legislative power to be subjected to the control of the courts. Each acts independently within its exclusive field.
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> But counsel asserts that the courts of the Philippine Islands are not constitutional courts, and 'that Act No. 136, the Acts of Congress and the Commission are the Constitution as far as this Supreme Court is concerned.' We are unable to accept this as a correct statement of the law. In a certain sense these courts are not constitutional courts. In a broader sense, and for the purposes of construing and testing the validity of the Acts of the Philippine Legislature, exist by virtue of a written Organic Law enacted by the supreme legislative body. The validity of all legislative Acts must be determined by their compliance with this Organic Law, and the determination of the legal judicial question, which must in the last analysis be determined by the judiciary. This principle is inherent in every government organized under the American system which distributes the

60. *Id.* at 239 (White, J., concurring).

61. *Id.* at 253 (Souter, J.).

62. Ocampo v. Cabañgis, 15 Phil. 626, 628-89 (1910), where Mr. Justice Elliot explicitly asserted that the Philippine courts are part of the American Legal System; and the principles in the latter have great weight in application to the former.

> powers of government among executive, legislative and judicial departments. In the absence of a restrictive provision in the Organic Law, a grant of the legislative power means a grant of all the legislative power; and a grant of the judicial power means a grant of all the judicial power which may be exercised under the government. With the peculiar restrictions upon the power of the Philippine Government, which lie back of the general statement already made, we have no concern at the present time. Within the relation created by the Acts of Congress the general principles of American constitutional law apply whenever they can be made applicable.[63]

There should be a separation of the Judiciary from the Legislature so that: "proper judicial functions can no more be unreasonably controlled by the legislature than can the legislature when properly exercising legislative power to be subjected to the control of the courts."[64]

What the U.S. Supreme Court had as a system was not only transplanted but was copied by the then developing political institutions of the Philippines. However, to view the Philippine institutions as mere copies are mediocre, to say the least, of an analytical perspective. The Philippine institutions, particularly the Supreme Court has had ample opportunity and history to develop its own "personae" and to imbibe its own character — including strengths and weaknesses.

Three years ago, the Philippine Supreme Court celebrated its 100th year of independence ante-dating the other two branches[65] and even the Constitutions.[66] It has been observed that the present Constitution amplified

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63. *Id.*

64. *Id.*

65. *See* Panganiban, *Judicial Globalization, supra* note 30. ("...on June 11, 2001, the Philippine Supreme Court celebrated its 100th birthday. Our wide-ranging centenary celebrations commemorated the founding of our highest court in 1901. For almost 400 years prior to that year, our country had rudimentary courts established by the US military and the Spanish *conquistadores*. Nonetheless, we reckon the founding of our present Supreme Court only in 1901, because it was only in that year when a tribunal that enjoyed *judicial independence*, as we understand the concept today, was established. Since then, the Court has functioned separately from the other branches of government -- the executive and the legislative. Patterned after the US model, our country rigorously observes the tripartite separation of powers.").

66. Not counting the 1898 *Malolos* Constitution, the country has had three formal Constitutions: (1) the 1935 Constitution under Commonwealth, (2) the 1973 Constitution under the New Society regime of former dictator-president Ferdinand E. Marcos and (3) the present governing Constitution promulgated by a Constitutional Convention in 1987, after the transitional Freedom Constitution, promulgated by former President Corazon C. Aquino after the

the independence of the Supreme Court in so many ways. Unlike its primordial counterpart, the Philippine Supreme Court exercises textual independence under the 1987 Constitution in varied forms.

1. Institutional Structure

The Supreme Court of the Philippines, composed of one Chief Justice and 14 associate justices, is one unified body,[67] which not only reviews the decisions of lower courts[68] and administrative agencies,[69] but also decides with final authority all constitutional issues. The Supreme Court exercises powers that are not reviewable or reversible by any other entity or agency of government. Its decisions are final and binding on the entire Republic. And as a sitting justice observed: "...whether the President and Congress agree

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1986 revolt against Marcos' New Society regime. The three Constitutions provide for three academic legal framework which may be useful as a method of categorization for studies in Constitution drafting as well as in observing the tone of the political influence in the textual analyses of the drafts.

67. PHIL. CONST. art. VIII, § 4(1) ("The Supreme Court shall be composed of a Chief Justice and fourteen Associate Justices. It may sit *en banc* or, in its discretion, in divisions of three, five, or seven Members. Any vacancy shall be filled within ninety days from the occurrence thereof.").

68. An Act Reorganizing the Judiciary, Batas Pambansa Blg. 129 (1981), which created the lower courts, which then included the Court of Appeals, the Court of First Instance, the Circuit Criminal Courts, the Juvenile and Domestic Relations Courts, the Courts of Agrarian Relations, the City Courts, the Municipal Courts, and the Municipal Circuit Courts. Since 1981, several amendments have been made to the organization of the lower courts until the present.

69. *See* 1 JOSE Y. FERIA & MA. CONCEPCION S. NOCHE, CIVIL PROCEDURE ANNOTATED 18-19 (2001). Several institutions act in a quasi-judicial function hence they are deemed to be under the Rules of Court in terms of procedure as well as review of their awards, judgments, final orders or resolutions, or those acts authorized by them in the exercise of their quasi-judicial functions under Rule 43 of the 1997 Rules of Civil Procedure. Some of those quasi-judicial agencies are: Civil Service Commission, Central Board of Assessments Appeals, Securities and Exchange Commission, Office of the President, Land Registration Authority, Social Security Commission, Civil Aeronautics Board, Bureau of Patents, Trademarks and Technology Transfer (Intellectual Property Office), National Electrification Administration, Energy Regulatory Commission, National Telecommunications Commission, Department of Agrarian Reform, Government Servises Insurance System (GSIS), Employees Compensation Commission, Philippine Atomic Energy Commission, Board of Investments, Constructions Industry Arbitration Commission, and the National Labor Relations Commission.

with those decisions or not, they are duty-bound to honor, recognize and enforce them. This is the essence of the rule of law — law as interpreted with finality by the Supreme Court."[70]

2. Fiscal Autonomy

The Judiciary's fiscal autonomy is guaranteed by the 1987 Constitution. Thus, the Legislature, with its plenary powers over the purse, is constitutionally prohibited from reducing judicial appropriations given the previous year which, once approved, are automatically and regularly released to it by the Executive Department.[71]

3. Individual Security of Tenure

Members of the Judiciary enjoy security of tenure during good office up to the age of 70 years[72] and also security of compensation,[73] neither of which can be reduced by Congress or by the President. Members of the Supreme Court may be removed from office only by a stringent process of impeachment.[74]

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70. *See* Panganiban, *Judicial Globalization, supra* note 30, at 15-16.

71. PHIL. CONST. art. VIII, § 3. ("The Judiciary shall enjoy fiscal autonomy. Appropriations for the Judiciary may not be reduced by the legislature below the amount appropriated for the previous year and, after approval, shall be automatically and regularly released.").

72. PHIL. CONST. art. VIII, § 11. ("The Members of the Supreme Court and judges of lower courts shall hold office during good behavior until they reach the age of seventy years or become incapacitated to discharge the duties of their office.").

73. PHIL. CONST. art. VIII, § 10. ("The salary of the Chief Justice and of the Associate Justices of the Supreme Court, and of judges of lower courts shall be fixed by law. During their continuance in office, their salary shall not be decreased.").

74. PHIL. CONST. art. XI, § 2. ("The President, the Vice-President, the Members of the Supreme Court, the Members of the Constitutional Commissions, and the Ombudsman may be removed from office, on impeachment for, and conviction of, culpable violation of the Constitution, treason, bribery, graft and corruption, other high crimes, or betrayal of public trust…"); *see* Adel A. Tamano, *Grounds for the Impeachment of Justices of the Supreme Court: A Policy Analysis,* 48 ATENEO L.J. 661, 662 (2003) (where it was argued that justices as public officers ultimately hold their powers and the exercise of such accountable to the people. "The underlying principle behind the impeachment process is the accountability of public officers. Public officers are merely agents of the people and not their rulers and no man possesses a proprietary or contractual right to a public office

4. Enumerated Review and Administration Powers

The Constitution provides for a virtual grant of unlimited review powers over many and diverse areas of concern for the Supreme Court.[75] It has administrative control and supervision over all lower courts and has the power to promulgate internal rules. It is virtually independent and shielded from external interference. These enumerated powers grant the Supreme Court the much needed leeway through which it can make its kritarchic pronouncements and the denial of interpretative roles from the other branches of government. This is highly in contrast with the model source of the U.S. Supreme Court. The U.S. Constitution does not contain an express textual commitment of judicial review in their Supreme Court.[76] In contrast, the Philippine Supreme Court is textually granted the powers of judicial review as well as the power to nullify acts of the other branches or instrumentalities of the government which it may deem covered by the

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but merely holds it in trust for the people. In other words, public office is simply a public trust and for this reason, public officers and employees must be accountable to the people at all times."); *see also* Francisco v. House of Representatives, 415 SCRA 44 (2003), discussion *infra*.

75. PHIL. CONST. art. VIII, § 5 ("The Supreme Court shall have the following powers: (1) Exercise original jurisdiction over cases affecting ambassadors, other public ministers and consuls, and over petitions for certiorari, prohibition, mandamus, *quo warranto*, and habeas corpus. (2) Review, revise, reverse, modify, or affirm on appeal or certiorari, as the law or the Rules of Court may provide, final judgments and orders of lower courts in: (a) All cases in which the constitutionality or validity of any treaty, international or executive agreement, law, presidential decree, proclamation, order, instruction, ordinance, or regulation is in question. (b) All cases involving the legality of any tax, impost, assessment, or toll, or any penalty imposed in relation thereto. (c) All cases in which the jurisdiction of any lower court is in issue. (d) All criminal cases in which the penalty imposed is *reclusion perpetua* or higher. (e) All cases in which only an error or question of law is involved. (3) Assign temporarily judges of lower courts to other stations as public interest may require. Such temporary assignment shall not exceed six months without the consent of the judge concerned. (4) Order a change of venue or place of trial to avoid a miscarriage of justice. (5) Promulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts, the admission to the practice of law, the Integrated Bar, and legal assistance to the underprivileged. Such rules shall provide a simplified and inexpensive procedure for the speedy disposition of cases, shall be uniform for all courts of the same grade, and shall not diminish, increase or modify substantive rights. Rules of procedure of special courts and quasi-judicial bodies shall remain effective unless disapproved by the Supreme Court. (6) Appoint all officials and employees of the Judiciary in accordance with the Civil Service Law.")

76. Barkow, *supra* note 2, at 254.

Grave Abuse Clause. It is not surprising that the theories on the use of the judicial review powers leave the interpretation of the provisions of the Constitution to the Supreme Court and strip the Congress or the Executive of the power and interpretive authority to construe their roles under the Constitution. The accepted view therefore is that interpretive deference given to the Judiciary must be respected and that substantive legal interpretation of authority comes not from the political branches but from the structural oracle-interpreter status that the Supreme Court reserves exclusively for itself.

What is more obtrusive or, in a sense, more disquieting in the enumerated powers of the Supreme Court is not the manner by which the powers are enumerated and that the role of the Judiciary may have actually been designed to play such a huge role in governance — it is the contextual construction of the sitting magistrates and their self-awareness of these roles (they may play) that are more disconcerting when it comes to the prudential political question doctrine.

C. Political Question Doctrine as an Act of Self-Limitation

If it be said that the legislative body are themselves the constitutional judges of their own powers and that the construction they put upon them is conclusive upon the other departments, it may be answered that this cannot be the natural presumption where it is not to be collected from any particular provisions in the Constitution.

In *Baker v. Carr*,[77] the U.S. Supreme Court had occasion to discuss at length the nature of the political question doctrine, and as observed by many authors: this decision engaged in the most detailed discussion of the political question doctrine.[78] The Court in *Baker* held that a complaint alleging that a state apportionment statute violated the Equal Protection Clause presented a justiciable cause of action.[79] Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the

77. Baker v. Carr, 369 U.S. 186 (1962).

78. Barkow, *supra* note 2, at 265.

79. *Baker*, 369 U.S. at 237.

potentiality of embarrassment from multifarious pronouncements by various departments on one question.[80] The U.S. Supreme Court in *Baker,* thus, recognized the Classical-Restrictive Theory of the political question doctrine.

In *Francisco v. House of Representatives,*[81] involving a controversial justiciability debate on the powers of the Supreme Court to interpret House of Representatives internal rules by virtue of Constitutional textual analysis of the provisions on impeachment, the Court has held that "in our jurisdiction, the determination of a truly political question from a non-justiciable political question lies in the answer to the question of whether there are constitutionally imposed limits on powers or functions conferred upon political bodies."[82] Where there are limits to the powers of the political bodies, then the courts not only has the power to annul those extra-jurisdictional acts but are "duty-bound" to examine whether the branch or instrumentality of the government properly acted within such limits. Thus it appears that the political question doctrine has been decidedly swayed in the favor of pure judicial construction, and that the interpretation of an act as being political in nature is itself, exclusively within the realm of the judicial interpretation. Generally, the Classical-Restrictive Theory on the use of the grave abuse powers are applied in judicial review cases. There are strict requirements to comply with in the invocation of the judicial review powers.

IV. The Shift Towards Judicialization of Political Issues

Judicialization is a phenomenon that is tied up with political issues.[83] Incipient democratization efforts correlate to increased judicialization of politics as they bring increased demands for the rule of law. The consequence however, remains an institutional quandary: the rule of law has to be imposed by a rule of judicial interpretation of the sitting magistrates.

A. The Advent of Judicialization

The Supreme Court was established in 1901 when the Philippines was under the American regime. It promulgated its first decision on 8 August 1901.[84] For several decades, it slowly rose into prominence in its role of societal-

80. *Id.* at 217.

81. Francisco v. House of Representatives, 415 SCRA 44 (2003).

82. *Id.*

83. *See generally* C. Neil Tate and Torbjorn Vallinder, The Global Expansion of Judicial Power 465-81 (1995); *see also* Kenneth M. Holland, Judicial Activism in Comparative Perspective 100-20 (1991).

84. *In Re* Contempt of Marcelino Aguas, 1 Phil. 1 (1901).

conflict pacification. And formally, under the 1935 Constitution, it was constitutionally recognized to be independent from the U.S. Supreme Court.

1. 1901-1935: The Separation of Powers and the Classical Theory of the Judicial Role of Interpretation

In *United States v. Ang Tang Ho*[85] the Supreme Court, making its stand on separation of powers, said that both the Legislature and the Executive have no authority to execute or construe the law. Subject only to the Constitution, the power of each branch is supreme within its own jurisdiction, and it is for the Judiciary only to say when an act of the Legislature is constitutional or not. In *Alejandrino v. Quezon,* where the Supreme Court refused interference on the issue of disciplinary powers of the legislature over its own members, Mr. Justice Malcolm recognized the strict delineation of "exclusive control."[86] It is beyond the power of any branch of the Government of the Philippine Islands to exercise its functions in any other way than that prescribed by the Organic Law or by local laws which conform to the Organic Law.[87] It is not within the power of the Philippine Legislature to enact laws that either expressly or impliedly diminish the authority conferred by an Act of Congress on the Chief Executive.[88]

If any given act of the Philippine Legislature does not, by its nature, pertain to the law-making function, but is either executive or judicial in character, and does not fall within any of the express exceptions established by the Organic Act, such an act is *ultra vires* and therefore null and void.[89]

In the case of *In re Patterson,* Chief Justice Arellano earlier discussed the nature of the deference given to the Executive interpretation of its own powers under the Organic Act.

> Superior to the law which protects personal liberty, and the agreements which exist between nations for their own interest and for the benefit of

85. United States v. Ang Tang Ho, 43 Phil. 1, 2-4 (1922).

86. Alejandro v. Quezon, 46 Phil. 83, 88 (1924).

87. *Id.* at 96.

88. Concepcion v. Paredes, 42 Phil. 599 (1921).

89. *In Re* Patterson, 1 Phil 93 (1902). (Chief Justice Cayetano S. Arellano gave a lengthy discussion on the powers of the Executive department of the Government and the consequent judicial review of the former's acts: "Where a statute authorizes an executive officer to exclude foreigners whom he has reasonable grounds to believe guilty of certain unlawful acts or purposes, he is the sole and final judge of these facts and can not be required to show reasonable grounds for his belief to a court of justice.").

> their respective subjects is the supreme and fundamental right of each State to self-preservation and the integrity of its dominion and its sovereignty. Therefore it is not strange that this right should be exercised in a sovereign manner by the executive power, to which is especially entrusted in the very nature of things the preservation of so essential a right without interference on the part of the judicial power. If it can not be denied that under normal circumstances when foreigners are present in the country the sovereign power has the right to take all necessary precautions to prevent such foreigners from imperiling the public safety, and to apply repressive measures in case they should abuse the hospitality extended them, neither can we shut our eyes to the fact that there may be danger to personal liberty and international liberty if to the executive branch of the Government there should be conceded absolutely the power to order the expulsion of foreigners by means of summary and discretional proceedings; nevertheless, the greater part of modern laws, notwithstanding these objections, have sanctioned the maxim that the expulsion of foreigners is a political measure and that the executive power may expel without appeal any person whose presence tends to disturb the public peace. The privilege of foreigners to enter the territory of a State for the purpose of traveling through or remaining therein being recognized on principle, we must also recognize the right of the State under exceptional circumstances to limit this privilege upon the ground of public policy, and in all cases preserve the obligation of the foreigner to subject himself to the provisions of the local law concerning his entry into and his presence in the territory of each State.[90]

Hence, judicial interventions in matters that involve issues of transcendence or public interest are best left with the Executive in its role of protecting the peace and order of the society. Those were times when the Supreme Court merely saw itself as a strict interpreter of laws and even of executive acts. During these times, prudence in interference was at an all-time high.

2. 1935-1973: Judicial Stewardship

The 1935 Constitution established a fully independent institution that wielded judicial power. The 1935 Constitution gave the Supreme Court explicit powers over a number of original and appellate cases.[91] However, it

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90. *Id.* at 97-98.

91. 1935 PHIL. CONST. art. VIII § 2 (superceded 1973). ("The Congress shall have the power to define, prescribe and apportion the jurisdiction of various courts, but may not deprive the Supreme Court of its original jurisdiction over cases affecting ambassadors, other public ministers, and consuls, nor of its jurisdiction to review, revise, reverse, modify, or affirm on appeal, certiorari, or writ of error, as the law or the rules of court may provide, final judgments and decrees of inferior courts in — (1) All cases in which the constitutionality or

also deprived Congress of authority to define the Supreme Court's jurisdiction over cases affecting ambassadors, other public ministers, and consuls, nor of the latter's jurisdiction to review, revise, reverse, modify, or affirm on appeal, certiorari, or writ of error, as the law or the rules of court may provide, final judgments and decrees of inferior courts.[92] The 1935 Constitution also recognized the inherent right of the Court to fix its own internal rules.[93] These constitutional pronouncements recognized the underlying principle of separation of powers and established the explicit powers of the Supreme Court as the helmsman of the judicial branch.

In *Lopez v. Roxas*,[94] the textual grant by the 1935 Constitution that "the Judicial power shall be vested in one Supreme Court and in such inferior courts as may be established by law"[95] was explained in this wise:

> This provision vests in the judicial branch of the government, not merely some specified or limited judicial power, but 'the' judicial power under our political system, and, accordingly, the entirety or 'all' of said power, except, only, so much as the Constitution confers upon some other agency, such as the power to 'judge all contests relating to the election, returns and qualifications' of members of the Senate and those of the House of Representatives which is vested by the fundamental law solely in the Senate Electoral Tribunal and the House Electoral Tribunal, respectively.
>
> Judicial power is the authority to settle justiciable controversies or disputes involving rights that are enforceable and demandable before the courts of justice or the redress of wrongs for violations of such rights. The proper exercise of said authority requires legislative action: (1) defining such

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validity of any treaty, law, ordinance, or executive order or regulation is in question. (2) All cases involving the legality of any tax, impost, assessment, or toll, or any penalty imposed in relation thereto. (3) All cases in which the jurisdiction of any trial court is in issue. (4) All criminal cases in which the penalty imposed is death or life imprisonment. (5) All cases in which an error or question of law is involved.").

92. 1935 PHIL. CONST. art. VIII § 2 (superceded 1973).

93. 1935 PHIL. CONST. art. VIII § 13 (superceded 1973). ("The Supreme Court shall have the power to promulgate rules concerning pleading, practice, and procedure in all courts, and the admission to the practice of law. Said rules shall be uniform for all courts of the same grade and shall not diminish, increase, or modify substantive rights. The existing laws on pleading, practice, and procedure are hereby repealed as statutes, and are declared Rules of Courts, subject to the power of the Supreme Court to alter and modify the same. The Congress shall have the power to repeal, alter or supplement the rules concerning pleading, practice, and procedure, and the admission to the practice of law in the Philippines.").

94. Lopez v. Roxas, 17 SCRA 756 (1966).

95. 1935 PHIL. CONST. art. VIII § 1 (superceded 1973).

> enforceable and demandable rights and/or prescribing remedies for violations thereof; and (2) determining the court with jurisdiction to hear and decide said controversies or disputes, in the first instance and/or on appeal. For this reason, the Constitution ordains that 'Congress shall have the power to define, prescribe, and apportion the jurisdiction of the various courts,' subject to the limitations set forth in the fundamental law.

In explaining this power, Chief Justice Enrique Fernando wrote in his treatise on Constitutional Law that:

> The courts then under the constitutional scheme are entrusted with the function of deciding actual cases and controversies. They do not participate actively in the process of administration. Their task is of adjudication. Their duty is to apply the law to the facts as found. There is need therefore for a lawsuit, either civil or criminal. If the former, it may be an ordinary civil action or a special proceeding. Moreover, there must be proper cases with the appropriate parties. Courts can thus speak authoritatively only when they adjudge cases. Nonetheless, their role is not minimal. As previously noted, judicial review is inherent in the judicial power. *It is precisely their duty to apply the Constitution as the supreme law, when the facts call for it. In appropriate instances then, they may annul executive or legal action, the Supreme Court of course, having the final say. It is in that sense that courts do in fact exert an influential role in government.* That is unavoidable under the Rule of Law.[96]

This analysis of the nature of judicial power under the 1935 Constitution (as to be transplanted in the 1973 Constitution and enlarged in the 1987 Constitution) rests in the Classical-Restrictive Theory of judicial review. Contrary to the pre-American independence period where high deference was given to political issues and policy-making bodies; the trend of decision making in the latter part of this period is "towards assumption of jurisdiction whenever the Court finds constitutionally imposed limits on powers or functions conferred upon political bodies."[97] As the Supreme Court once noted: "[i]n proper cases and with appropriate parties, this court may annul any legislative enactment that fails to observe the constitutional limitations."[98] However, the judicial department has no power to revise even the most arbitrary and unfair action of the legislative department, or of either house thereof, taken in pursuance of the power committed exclusively to that department by the Constitution. And more importantly, "the judiciary is not the repository of remedies for all political or social ills."[99]

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96. ENRIQUE M. FERNANDO, THE CONSTITUTION OF THE PHILIPPINES 325 (1977) (emphasis supplied).

97. BERNAS, supra note 7, at 860.

98. Vera v. Avelino, 77 Phil. 192 (1946).

99. *Id.* at 198.

In *Avelino v. Cuenco,*[100] the issue was whether or not the election of the respondent-Senator as Senate President was attended by a quorum. The Supreme Court eventually acted upon the issue, modifying its previous reluctance in deciding upon issues that concern only the other branches. The Court used a relatively liberal theory on its assumption of jurisdiction contrary to the prevailing view at that time. In *Tañada v. Cuenco,*[101] it held that although under the Constitution the legislative power is vested exclusively in Congress, this does not detract from the power of the courts to pass upon the constitutionality of acts of Congress. In *Angara v. Electoral Commission,*[102] it ruled that confirmation by the National Assembly of the election of any member, irrespective of whether his election is contested, is not essential before such member-elect may discharge the duties and enjoy the privileges of a member of the National Assembly. In all three cases, the Court insisted on a liberal theory-based answer on the issue of justiciability and ruled by reason of "constitutional supremacy." This period saw the Supreme Court rise in its role in governance and a seeming decline in the use of the political question doctrine. The Liberal Theory on judicial review is starting to hold ground.

3. 1973-1986: The Strong Presidency and the Weak Judiciary

In 1972, President Ferdinand Marcos established his military-backed one-man rule[103] over the Philippines, disbanding the Congress and the political parties and consolidating the Executive branch with the Legislature. The result of this merging was a Judiciary of temerity and timidity.[104] Brought about by the emergency period of the 1970s, where the political situation of the country can be aptly described as in disarray, the President declared Martial Rule over the nation.[105]

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100. Avelino v. Cuenco, 83 Phil. 17 (1949).

101. Tañada v. Electoral Commission, 103 Phil 1051 (1957); for a similar ruling, see Alejandrino v. Quezon, 46 Phil 83 (1924); Ynot v. Intermediate Appellate Court, 148 SCRA 659, 665 (1987).

102. Angara v. Electoral Commission, 63 Phil 139 (1936).

103. Joaquin G. Bernas, *From One-Man Rule to "People Power,"* 46 ATENEO L.J. 44, 48-49 (2001).

104. C. Neil Tate and Panu Sittiwong, *The Supreme Court and Justice in the Marcos Era, in* PILIPINAS: A JOURNAL OF RESTORATION, A TIME OF RENEWAL 1-19 (1986); C. Neil Tate, *Temerity and Timidity in the Exercise of Judicial Review in the Philippine Supreme Court,* in COMPARATIVE JUDICIAL REVIEW AND PUBLIC POLICY (Jackson and Tate eds., 1992).

105. Proclaiming a State of Martial Law in the Philippines, Proclamation No. 1081, Sept. 21, 1972. (The President cited several reasons, first of which was the threat

One of the most memorable challenges to the Judiciary's disposition happened in *Lansang v. Garcia*[106] where the Supreme Court was sharply divided where one side held to the political question in deference to the Executive and the other, arguing for the limited justiciable position.[107] The decision was in favor of the President's discretion in suspending the writ of *habeas corpus*.[108] In the exercise of the judicial review powers, the function of the Court is:

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of insurrection and insurgency of leftist groups "...on the basis of carefully evaluated and verified information...definitely established that lawless elements who are moved by a common or similar ideological conviction, design, strategy and goal and enjoying the active moral and material support of a foreign power and being guided and directed by intensely devoted, well trained, determined and ruthless groups of men and seeking refuge under the protection of our constitutional liberties to promote and attain their ends, have entered into a conspiracy and have in fact joined and banded their resources and forces together for the prime purposes of, and in fact they have been and are actually staging, undertaking and waging an armed insurrection and rebellion against the Government of the Republic of the Philippines in order to forcibly seize political and state power in this country, overthrow the duly constituted government, and supplant our existing political, social, economic and legal order with an entirely new one whose form of government, whose system of laws, whose conception of God and religion, whose notion of individual rights and family relations, and whose political, social, economic, legal and moral precepts are based on the Marxist-Leninist-Maoist teachings and beliefs;" as well as the spread of these beliefs in the rural areas and the discredit to the government done by publications and propaganda and the massive proselytization and rebellious activities which has caused "widespread massive and systematic destruction and paralization of vital public utilities and services, particularly water systems, sources of electrical power, communication and transportation facilities, to the great detriment, suffering, injury and prejudice of our people and the nation and to generate a deep psychological fear and panic among our people...").

106. Lansang v. Garcia, 42 SCRA 448 (1971). (This case is a consolidation of several complaints docketed as G.R. Nos. L-33964, L-33965, L-33973, L-33982, L-34004, L-34013, L-34039, L-34265 and L-34339, as a consequence of the suspension of the privilege of the writ of habeas corpus by the President in Proclamation No. 889, dated Aug. 21, 1971.).

107. BERNAS, *supra* note 7, at 862.

108. *Lansang,* 42 SCRA at 450. ("Considering that the President was in possession of data - except those related to events that happened after August 21, 1971 - when the Plaza Miranda bombing took place, the Court is not prepared to hold that the Executive had acted arbitrarily or gravely abused his discretion when he then concluded that public safety and national security required the suspension of the privilege of the writ, particularly if the NPA were to strike simultaneously with violent demonstrations staged by the two hundred forty-

> merely to check — not to supplant — the Executive, or to ascertain merely whether he has gone beyond the constitutional limits of his jurisdiction, not to exercise the power vested in him of to determine the wisdom of his act. To be sure, the power of the Court to determine the validity of the contested proclamation is far from being identical to, or even comparable with, its power over ordinary civil or criminal cases elevated thereto by ordinary appeal from inferior courts, in which cases the appellate court has all of the powers of the court of origin.[109]

Subsequent cases showed the temerity of the Supreme Court in checking the acts of the Presidency (a consolidated Executive-Legislative rule). Hence, a Presidency that is characterized by strength and an imposing temperament and a Judiciary that is weak. The Classical-Restrictive Theory of judicial review has been abysmally used in the many applications of prudential political question doctrine.[110]

4. 1986 Onwards, The *Grave Abuse Clause*: Paving the Way for a Strong Supreme Court

The Martial Law Supreme Court used the Classical-Restrictive Theory on judicial review so many times that its frequency has consolidated a tapestry of political question doctrine application. After the 1986 Freedom

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> five (245) KM chapters, all over the Philippines, with the assistance and cooperation of the dozens of CPP front organizations, and the bombing of water mains and conduits, as well as electric power plants and installations - a possibility which, no matter how remote, he was bound to forestall, and a danger he was under obligation to anticipate and arrest. He had consulted his advisers and sought their views. He had reason to feel that the situation was critical - as, indeed, it was - and demanded immediate action. This he took believing in good faith that public safety required it. And, in the light of the circumstances adverted to above he had substantial grounds to entertain such belief.").

109. *Id.* at 449.

110. *See* Javellana v. Executive Secretary, 50 SCRA 30 (1973) (where a majority of the Supreme Court held that the 1973 Constitution had been ratified in accordance with the 1935 Constitution and the effectivity of the former was not a justiciable question); *see also* Aquino, Jr. v. Enrile, 59 SCRA 183 (1973), with the effectivity of the 1973 Constitution came subsequent Transitory Provisions which gave extensive powers to the sitting President, which the Supreme Court also accepted and in fact, used as a basis to justify the further imposition of martial law.

Constitution[111] and the 1986 Constitutional Commission, the political picture soon changed.

Commissioner Roberto Concepcion observed that the political question doctrine gave the Supreme Court a veil within which it could hide itself, much to the detriment of civil liberties.[112] This observation prompted him to argue for the inclusion of another clause to be added to the powers of the Supreme Court. Section 1 of Article VIII included the *Grave Abuse Clause* — "to determine whether or not there has been grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government."[113]

Although this clause was added because of the "frequency with which the Supreme Court had appealed to the political question doctrine during the period of martial law,"[114] it was not meant to do away with the political question doctrine. "It definitely does not eliminate the fact that truly political questions are beyond the pale of judicial review."[115]

Such intent, however, though expressed well, depends upon the application of the text of the law.

There have been so many applications of the *Grave Abuse Clause* since 1987. The most disturbing use of it, however, is when the Judiciary checks the acts of Congress, in which political conflicts could become possible. In *Santiago v. Guingona, Jr.*[116] the Supreme Court ruled that it is well within the power and jurisdiction of the Court to inquire whether the Senate or its officials committed a violation of the Constitution or grave abuse of discretion in the exercise of their functions and prerogatives. In *Tanada v. Angara,*[117] in seeking to nullify an act of the Philippine Senate on the ground that it contravened the Constitution, it held that the petition raises a justiciable controversy and that when an action of the legislative branch is seriously alleged to have infringed the Constitution, it becomes not only the

111. Proclamation No. 3 (promulgated March 25, 1986) providing for a Provisional Constititution, pursuant to Proclamation No. 1, (promulgated Feb. 25, 1986) Proclaiming that President Corazon C. Aquino and Vice-President Salvador H. Laurel are Taking Powers of the Government in the Name and by the Will of the Filipino People.

112. 1 RECORD OF THE 1986 CONSTITUTIONAL COMMISSION 434-435 (1987) [hereinafter 1 RECORD].

113. 1987 PHIL. CONST. art. VIII, §1.

114. 1 RECORD, at 443.

115. *Id.* at 475.

116. Santiago v. Guingona, 8 SCRA 756 (1998).

117. Tañada v. Angara, 272 SCRA 18 (1997).

right but in fact the duty of the Judiciary to settle the dispute. In *Bondoc v. Pineda*,[118] the Supreme Court declared null and void a resolution of the House of Representatives withdrawing the nomination, and rescinding the election, of a congressman as a member of the House Electoral Tribunal for being violative of Section 17, Article VI of the Constitution. In *Coseteng v. Mitra*,[119] it held that the resolution of whether the House representation in the Commission on Appointments was based on proportional representation of the political parties as provided in Section 18, Article VI of the Constitution is subject to judicial review. In *Daza v. Singson*,[120] it held that the act of the House of Representatives in removing the petitioner from the Commission on Appointments is subject to judicial review.

B. *Judicial Supremacy Towards Judicial Rule: The Decline of the Interpretative Roles of Congress and the Executive and the Instability of Politics*

A textual analysis of the wording of the *Grave Abuse Clause* provides would show that it is the "*duty*" of the Supreme Court to "to settle actual controversies involving rights which are legally demandable and enforceable, and *to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the government.*"

Being in the nature of a "duty," it cannot be helped that an analysis of the text of the *Grave Abuse Clause* would arrive at a conclusion that it is an active responsibility that the sitting magistrates actually invoke the *Grave Abuse Clause* where they deem it necessary.

As Commissioner Concepcion explained:

> The first section starts with a sentence copied from former Constitutions.
>
> It says: The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.
>
> I suppose nobody can question it.
>
> The next provision is new in our constitutional law. I will read it first and explain.
>
> > 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.

118. Bondoc v. Pineda, 201 SCRA 792 (1991).

119. Coseteng v. Mitra, 187 SCRA 377 (1990).

120. Daza v. Singson, 180 SCRA 496 (1989).

> Fellow Members of this Commission, *this is actually a product of our experience during martial law*. As a matter of fact, it has some antecedents in the past, but *the role of the judiciary during the deposed regime was marred considerably by the circumstance that in a number of cases against the government, which then had no legal defense at all, the solicitor general set up the defense of political questions and got away with it*. As a consequence, certain principles concerning particularly the writ of *habeas corpus*, that is, the authority of courts to order the release of political detainees, and other matters related to the operation and effect of martial law failed because the government set up the defense of political question. And the Supreme Court said: 'Well, since it is political, we have no authority to pass upon it.' *The Committee on the Judiciary feels that this was not a proper solution of the questions involved. It did not merely request an encroachment upon the rights of the people, but it, in effect, encouraged further violations thereof during the martial law regime…Briefly stated, courts of justice determine the limits of power of the agencies and offices of the government as well as those of its officers. In other words, the judiciary is the final arbiter on the question whether or not a branch of government or any of its officials has acted without jurisdiction or in excess of jurisdiction, or so capriciously as to constitute an abuse of discretion amounting to excess of jurisdiction or lack of jurisdiction. This is not only a judicial power but a duty to pass judgment on matters of this nature.*
>
> This is the background of paragraph 2 of Section 1, which means that *the courts cannot hereafter evade the duty to settle matters of this nature, by claiming that such matters constitute a political question.*[121]

Hence, as a duty, it is expected of the courts to be ever vigilant in its vanguardian role. Once a government action, be it an order, a directive, or a contract, is shown to have been abused gravely, the courts have no choice but to invalidate them as a matter of constitutional duty.[122]

This modern view of the Supreme Court's role in governance falls squarely with the liberal theory on the use of the *Grave Abuse* power. This "duty" theory has been rightly observed and contradistinguished from the nature of judicial review in the United States. "The major difference between the judicial power of the Philippine Supreme Court and that of the U.S. Supreme Court is that while the power of judicial review is only *impliedly* granted to the U.S. Supreme Court and is discretionary in nature, that granted to the Philippine Supreme Court and lower courts, as *expressly provided for in the Constitution*, is not just a power but also a *duty*, and it was *given an expanded definition* to include the power to correct any grave abuse of discretion on the part of any government branch or instrumentality."[123]

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121. 1 RECORD 434-36 (emphasis supplied).

122. *See* Panganiban, *Gravely Abusive Contracts, supra* note 24, at 4.

123. Francisco v. House of Representatives, 415 SCRA 44 (emphasis supplied).

This perspective gives the Supreme Court a more active mode, in the sense that it becomes the magistrates duty to safeguard the Constitutional precepts by arguing for *judicial statesmanship*. Judicial statesmanship has no sound basis in law and jurisprudence. It is a subjective principle that sitting magistrates may only check by self-made dicta and prudence.

In *Francisco v. House of Representatives*,[124] the issue was whether the House of Representatives may initiate a "second" impeachment complaint against the sitting Chief Justice Hilario Davide. The Decision was a controversial application of the Modern-Liberal Theory where the Court made a long discussion on the nature of its Grave Abuse powers. The Court in *Francisco,* relied on textual commitment to the "duty" of the Supreme Court to check branches of the government for *grave abuse of discretion*.[125] It made a construction of the constitutional policy of impeachment and ruled that based on the internal rules of the House of Representatives, there had already been initiated, two impeachment[126] complaints against Chief Justice Davide that warrants the Supreme Court invoking the Constitutional prohibition on two impeachment proceedings per annum. This Decision had been criticized by many political and legal analysts as being in the form of judicial intervention over a political prerogative.[127] This case rendered the issue of the validity of initiating impeachment against sitting justices as well-within the power of the Supreme Court to judge upon. This case quelled a politically-divided Congress and promoted judicial statesmanship — a proactive call for a Modern Theory application of the *Grave Abuse Powers*.

1. The Supreme Court as the Guardian of Public Interest and Public Policy

The Supreme Court is no longer a passive bystander in policy promulgations or at least in the case of Judicial Decisions — policy constructions. Its proactive construction of issues raised before it as a matter of public policy has rendered it virtually within the power of the Supreme Court to determine what public policy is and what it is not, even in the absence of a

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124. *Id.*

125. *Id.*

126. The first impeachment case came about from the Estrada Trials where defense attorney Alan F. Paguia, charged the Supreme Court of actively participating in partisan political activity in the 2001 upstaging of President Estrada. The second impeachment case initiated was in the same year of 2003 where the issue was whether or not the Judicial Development Funds were misused. *See* Carlos P. Medina, *Social, Ethical and Conflict Resolution Aspects of the Davide Impeachment Case,* 48 ATENEO L.J. 885 (2004).

127. Maricris C. Ang et al., Comment, *The Davide Impeachment Case: Restating Judicial Supremacy over Constitutional Questoins,* 48 ATENEO L.J. 806 (2004).

law that defines what a public policy is.[128] It has been held decades ago that "[e]very really new question that comes before the courts is in the last analysis determined by the application of public policy as a *ratio decidendi*. In balancing conflicting solutions that one is perceived to tip the scales which the court believes will best promote the public welfare in its probable operation as a general rule or principle."[129] After all, "[t]he judiciary, alive to the dictates of the national welfare, can properly incline the scales of their decisions in favor of that solution which will most effectively promote the public policy."[130] The Supreme Court, has had a history in a host of cases where it checked the acts of the other branches of the government as to whether their acts were indeed made in accordance with public policy considerations.[131] In many cases prior to Martial Law, the Supreme Court

128. *See* Rodrigo Moreno, *Establishing Judicially Manageable Standards in Order to Determine When Public Policy is a Bar to the Enforcement of a Foreign Judgment* (2005) (unpublished J.D. thesis, Ateneo De Manila University School of Law), where the proponent discussed the different aspects by which the Supreme Court had to rely on very fluid, hence arbitrary, definitions of "public policy" and the substantive contents of such in ruling on issues submitted to it.

129. Rubi v. Provincial Board of Mindoro, 39 Phil. 660, 708 (1919).

130. Smith Bell & Co. v. Natividad, 40 Phil. 136, 137 (1919).

131. *Cf.* United States v. Toribio, 15 Phil. 85 (1910); United States v. Villareal, 28 Phil. 390 (1914); United States v. Gomez Jesus, 31 Phil. 218 (1915); Churchill and Tait v. Rafferty 32 Phil. 580 (1915); Rubi v. Provincial Board, 39 Phil. 660 (1919); Smith Bell and Co. v. Natividad, 40 Phil. 136 (1919); Lorenzo v. Director of Health, 50 Phil. 595 (1927); People of the Philippines v. Abad Lopez, 62 Phil. 835 (1936); People of the Philippines v. Lagman, 66 Phil. 13 (1938); People of the Philippines v. Cayat, 68 Phil. 12 (1939); People of the Philippines v. Rosenthal, 68 Phil. 328 (1939); Pampanga Bus Co. v. Pambusco Employees Union, 68 Phil. 541 (1939); Manila Trading and Supply Co. v. Zulueta, 69 1 Phil. 485 (1940); Pangasinan Trans. Co. v. Public Service Commission, 70 Phil. 221 (1940); Antamok Goldfields Mining Co. v. Court of Industrial Relations, 70 Phil. 340 (1940); International Hardwood and Veneer Co. v. Pangil Federation of Labor, 70 Phil. 602 (1940); Calalang v. Williams, 70 Phil. 726 (1940); Tapang v. Court of Industrial Relations, 72 Phil. 79 (1941); Laurel v. Misa, 76 Phil. 372 (1946); People of the Philippines v. Carlos, 78 Phil. 535 (1947); Primicias v. Fugoso, 80 Phil. 71 (1948); Co Chiong v. Condemn, 83 Phil. 242 (1949); People of the Philippines v. Isnain, 85 Phil. 648 (1950); Ongsiako v. Gamboa, 86 Phil. 50 (1950); Tolentino v. Board of Accountancy, 90 Phil. 83 (195 1); People of the Philippines v. Do In Cruz, 92 Phil. 906 (1953); People of the Philippines v. Chu Chi, 92 Phil. 977 (1953); Rutter v. Esteban, 93 Phil. 68 (1953); Ichong v. Hernandez, 101 Phil. 1155 (1957); King v. Hernaez, 4 SCRA 792 (1962); De Ramas v. Court of Agrarian Relations, 11 SCRA 171 (1964); Vda. de Macasaet v. Court of Agrarian Relations, 11 SCRA 521 (1964); Uichanco v. Gutierrez, 14 SCRA 231 (1965); Gamboa v. Pallarca, 16 SCRA

did, in fact, tilt the scales of justice in favor of the solution that will promote public policy. This was even to the extent of violating a clear mandate of the law, just so the Supreme Court can protect public interest — because the Supreme Court with the talismanic phrase, "in the interests of justice," stated that "we test a law by its results; and likewise, we may add, by its *purposes*. It is a cardinal rule that, *in seeking the meaning of the law, the first concern of the judge should be to discover in its provisions the intent of the lawmaker.* Unquestionably, the law should never be interpreted in such a way as to cause injustice as this is never within the legislative intent."[132]

Again, the question is who interprets the law so that the "legislative intent" should be obtained?

Public interest was meant to be subsumed by the well-established principles of the separation of powers and of the checks and balances. According to Mr. Justice Malcolm, the first principle operates in a broad manner to confine legislative powers to the executive, and those which are judicial in character to the Judiciary; and that is based upon the conception that arbitrary government often results when the same person or body of persons is to exercise all the powers of government.[133]

Again, going back to the constructionist perspective, it is the *Constitutional Supremacy* Principle that the Supreme Court has taken as a warrant to rule over the other two branches. The Constitution is the basic and fundamental law to which all persons, including the highest officials of this land, must defer. From this cardinal postulate it has been concluded that the three branches of the government must discharge their respective functions within the limits of authority conferred by the Constitution. Under the principle of separation of powers, neither Congress, the President, nor the Judiciary may encroach on fields allocated to the other branches of

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490 (1966); Ilusorio v. Court of Agrarian Relations, 17 SCRA 25 (1966); Rafael v. Embroidery and Apparel Control and Inspection Board, 21 SCRA 336 (1967); Phil. American Life Ins. Co. v. Auditor General, 22 SCRA 135 (1968); Morfe v. Mutuc, 22 SCRA 424 (1968); Malayan v. National Power Corp., 24 SCRA 172 (1968).

132. Alonzo v. IAC, 150 SCRA 259 (1987) (emphasis supplied) (where the co-heirs brought an action for redemption of hereditary right sold by another co-heir only after 13 years after having actual knowledge thereof, by their actuations, they are deemed to have lost their right to redeem. The Supreme Court declared a ruling in direct contravention of Art. 1623 of the Civil Code which provided for a right to redeem only after a written notice, which was clearly absent in this case. The Court ruled in favor of strong "public policy" considerations including "laches" and "substantial justice.").

133. GAUDENCIO GARCIA, QUESTIONS AND PROBLEMS IN PHILIPPINE POLITICAL LAW 340 (1948 ed.).

government. The Legislature is generally limited to the enactment of laws, the Executive to the enforcement of laws and the Judiciary to their interpretation and application to cases and controversies.[134] The Constitution itself has provided for the instrumentality of the Judiciary as the rational way. And when the Judiciary mediates to allocate constitutional boundaries, it does not assert any superiority over the other department, it does not, in reality, nullify or invalidate an act of the legislature, but only asserts the solemn and sacred obligation assigned to it by the Constitution and establishes for the parties in an actual controversy the rights to which that instrument secures and guarantees to them. But was it conceived in historical political theory to be that way?

In theory, it should be the Legislature that should have a higher stance because under the principle of separation of powers, as was poignantly described by the great jurist Apolinario Mabini, there is a "political trinity" in Government. And in this "trinity" the Legislature is the "soul" that ought to reign supreme. Mabini declared:

> Society, then, should have a soul — authority. The authority should have a brain to guide and direct it — the legislative power. A will that makes it work — the executive. A conscience to try and punish the bad — the judicial power. Those powers should be independent in the sense that one should not encroach upon the attributes of the other. But the last two should be made subservient to the first, just as will and conscience are subordinated to reason. The executive and the judiciary cannot separate themselves from the laws dictated by the legislature, any more than a citizen can violate them.[135]

This is *separation of powers* according to the great mind of the First Republic. But who defines the nature and scope of the separation of powers according to jurisprudence? It is the Judiciary. It is this power of interpretation which is not properly taken into account when measuring the powers allotted to the branches. The Executive, though possessed of the power of the sword like a valiant knight, and the Legislature, though possessed of the power of the purse like a monarch — both bow to the oracle who gives the interpretation of what the law should be.

The Judiciary establishes for the parties in an actual controversy the rights to which the law secures and guarantees to them. It is not only the political and civil rights that have been invoked since the development of the Bill of Rights, but economic rights have been invoked to justify public policy considerations in decision-making. And decision-making that may have been more proper to have been left with the policy-making branches

134. Bengzon v. Drilon, 208 SCRA 133 (1992)

135. GARCIA, *supra* note 133, at 348.

have been overruled by the Supreme Court. In *Garcia v. Board of Investments*,[136] in which the Court ruled that the Board of Investments committed grave abuse of discretion in approving the transfer of the petrochemical plant from Batangas to Bataan, "the majority ha[d] actually imposed its own views on matters falling within the competence of a policy-making body of the government," to quote Mr. Justice Herrera's dissent, "It decided upon the wisdom of the transfer of the site of the proposed project... the desirability of the capitalization aspect of the project...and injected its own concept of the national interest as regards the establishment of a basic industry of strategic importance to the country."

In *Tatad v. Secretary of Energy*,[137] the Court invalidated Republic Act No. 8180, the Oil Deregulation Law, because "it had allowed the Big Three Oil companies in the Philippines — Petron, Shell, and Caltex — to act as a monopoly or, more precisely, an oligopoly." Declared the Court: "The Constitution mandates this Court to be the guardian not only of the people's political rights, but their economic rights as well."[138]

Hence, public policy, involving not only political matters but largely including even that of economic matters, are well within the determination of the Supreme Court. What the proper public policy is, in any given case, depends upon the interpretation of the Court is.

2. *Salus Populi Est Suprema Lex* as a Doctrine

In *Estrada v. Desierto*,[139] the Supreme Court ruled on the issue of who should be the sitting president of the Philippines. In this case, the Supreme Court justified its intervention (and rule) with the maxim *salus populi est suprema lex* — the welfare of the people is the supreme law. If the welfare of the people is the supreme law, then such pronouncement is quite distressing, for who are the interpreters of the law?

Therefore, the welfare of the people is also within the judgment of the Supreme Court. Sovereignty resides in the people and all government authority emanates from them — but the welfare of the people, being the ultimate law, may also be determined by the Supreme Court. Such

136. Garcia v. Board of Investments, 191 SCRA 288 (1990).

137. Tatad v. Secretary of Energy, 281 SCRA 220 (1997).

138. *Id.* at 256.

139. Estrada v. Desierto, 353 SCRA 452, (2001); 356 SCRA 108 (2001). This case would be properly named as *Estrada v. Arroyo,* because the case involved a deposed president questioning the authority of another. Because of the technicality on numbering and consolidating cases, it was later renamed as *Estrada v. Desierto.*

ratiocination therefore grants the Supreme Court virtually limitless authority in deciding any issue that is submitted to it where the welfare of the people is concerned.

3. The Doctrine of Transcendentality

Transcendentalism is a relatively new concept. Admittedly, there is no doctrinal definition of transcendental importance but it has been applied in several cases. But its many applications lead one to conclude that there is an apparent doctrine, wittingly or unwittingly, consciously or unconsciously adopted by the Supreme Court even in the issue of adopting a case for justiciability.[140] The following determinants formulated by Mr. Justice Feliciano are instructive: (1) the character of the funds or other assets involved in the case; (2) the presence of a clear case of disregard of a constitutional or statutory prohibition by the public respondent agency or instrumentality of the government; and (3) the lack of any other party with a more direct and specific interest in raising the questions being raised.[141] In *Francisco*, the Court held that there was a transcendental issue where the fate of the stability of the Judiciary was concerned.

> Never before in the 102-year existence of the Supreme Court has there been an issue as transcendental as the one before us. For the time, a Chief Justice is subjected to an impeachment proceeding. The controversy cause people, for and against him, to organize and join rallies and demonstrations in various parts of the country. Indeed, the nation is divided which led Justice Jose C. Vitug to declare during the oral arguments in these cases, 'God save our country!'[142]

In not a few cases, the Supreme Court has in fact adopted a liberal attitude (following the Modern-Liberal Theory on judicial review) on the *locus standi* of a petitioner where the petitioner is able to craft an issue of transcendental significance to the people, as when the issues raised are of paramount importance to the public.[143] In *Chavez v. Presidential Commission*

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140. *See* Tatad v. Secretary of the Department of Energy, 281 SCRA 330 (1997); Santiago v. COMELEC, 270 SCRA 106 (1997); KMU v. Garcia, Jr., 239 SCRA 386 (1994); Joya v. PCGG, 225 SCRA 368 (1993); Carpio v. Executive Secretary, 206 SCRA 290 (1992); Osmeña v. COMELEC, 199 SCRA 750 (1991); Basco v. PAGCOR, 197 SCRA 52 (1991); Guingona v. Carague, 196 SCRA 221 (1991).

141. Kilosbayan v. Guingona, 232 SCRA 110 (1994).

142. Francisco v. House of Representatives, 415 SCRA 44 (Sandoval-Gutierrez, J., concurring).

143. Kilosbayan, Inc. v. Morato, 250 SCRA 130 (1995) (citing Civil Liberties Union v. Executive Secretary, 194 SCRA 317 (1991); Philconsa v. Giménez, 15 SCRA

on Good Government,[144] petitioner Chavez argued that as a taxpayer and a citizen, he had the legal personality to file a petition demanding that the PCGG make public any and all negotiations and agreements pertaining to the PCGG's task of recovering the Marcoses' ill-gotten wealth. Petitioner Chavez further argued that the matter of recovering the ill-gotten wealth of the Marcoses is an issue of transcendental importance to the public. The Supreme Court, citing *Tañada v. Tuvera,*[145] *Legaspi v. Civil Service Commission,*[146] and *Albano v. Reyes,*[147] ruled that petitioner had standing because the matter was of public concern because it was as regards something that may involve public funds. The Court, however, went on to elaborate that in any event, the question on the standing of petitioner Chavez was rendered moot by the intervention of the Jopsons who are among the legitimate claimants to the Marcos wealth. In *Chavez v. PEA-Amari Coastal Bay Development Corporation,*[148] wherein the petition sought to compel the Public Estates Authority (PEA) to disclose all facts on its then on-going negotiations with Amari Coastal Development Corporation to reclaim portions of Manila Bay, the Supreme Court said that petitioner Chavez had the standing to bring a taxpayer's suit because the petition sought to compel PEA to comply with its constitutional duties. The Court cited in the alternative that in requiring the disclosure, there was an issue of transcendental importance — the matter of "leveling the playing field" for the market, hence the observance of the policy of public auction.[149]

In *Information Technology Foundation v. Commission on Elections*[150] the Supreme Court took upon itself the authority to oversee the conduct of elections of the country based on the doctrine of transcendality. This case

479 (1965); Iloilo Palay and Corn Planters Association v. Feliciano, 13 SCRA 377 (1965); Araneta v. Dinglasan, 84 Phil. 368 (1949)).

144. Chavez v. Presidential Commission on Good Government, 299 SCRA 744 (1998).

145. Tañada v. Tuvera, 136 SCRA 27 (1985).

146. Legaspi v. Civil Service Commission, 150 SCRA 530 (1987).

147. Albano v. Reyes, 175 SCRA 264 (1989).

148. Chavez v. PEA-Amari Coastal Bay Development Corporation, 384 SCRA 152 (2002).

149. In government contracts, the State's policy seems to be to hold public auctions and public biddings in the hope of minimizing corruption in governmental dealings with private contractors. The Supreme Court has adopted this policy and has incorporated this (or the lack of a public bidding) as an underlying reason for nullifying many governmental contracts. *See, e.g.,* Information Technology Foundation v. Commission on Elections, *infra.*

150. Information Technology Foundation v. Commission on Elections, 405 SCRA 614; Orosa, *supra* note 27.

relied heavily upon the Supreme Court's *duty* under the *Grave Abuse Clause.* The grave abuse of discretion in this case was premised on the infirmities of the requirements of the contract. There was grave abuse of discretion, said the Court, on the part of the COMELEC when they contracted with a non-entity. The question on entity-ship aside, the Supreme Court in this case made a digression from the common rules on judicial nullification of governmental acts. The Constitution provided the Supreme Court with the power to review the acts of the other branches and departments of the government. There is however no Constitutional provision violated here in this case. As Mr. Justice Tinga argued in his strong dissent, the Supreme Court ruled on an issue not within its competence to rule upon. Chief Justice Davide, in a more balanced perspective argued that there should be granted the COMELEC a certain leeway in the exercise of its mandates. After all, it is in pursuance of a law that the COMELEC entered into the Automated Election Contract.

The wisdom of the decision of the Supreme Court may be criticized for being in usurpation of jurisdiction. But under the Constitution, it is the Supreme Court that has a call on the definition of its own jurisdiction. In interpreting Section 1, Article X of the 1935 Constitution providing that there shall be an *independent* COMELEC, the Court has held that "[w]hatever may be the nature of the functions of the Commission on Elections, the fact is that the framers of the Constitution wanted it to be independent from the other departments of the Government."[151]

Previously in *Macalintal v. Commission on Elections,*[152] the Supreme Court granted the COMELEC a certain degree of latitude to perform its functions. Tracing the institutional evolution of the COMELEC as an independent body, the Court respected the role that COMELEC plays — namely, the administration of the conduct of the elections. In *Makalintal*, the issue presented was whether or not Republic Act No. 9189,[153] violated the Constitutional proscription on the separation of powers when Congress left for itself some exercise of authority over the disbursement of funds to be used for the administration of the Overseas Absentee Voting system. It was poignantly held that the Court has no general powers of supervision over COMELEC which is an independent body "except those specifically granted by the Constitution," that is, to review its decisions, orders and rulings. In the same vein, it is not correct to hold that because of its recognized

151. Nacionalista Party v. Bautista, 85 Phil. 101, 107 (1949).

152. *Macalintal v. Commission on Elections*, 405 SCRA 614 (2003).

153. An Act Providing for A System of Overseas Absentee Voting by Qualified Citizens of the Philippines Abroad, Appropriating Funds Therefor, and for Other Purposes, Republic Act No. 9189 (2003).

extensive legislative power to enact election laws, Congress may intrude into the independence of the COMELEC by exercising supervisory powers over its rule-making authority."

Once a law is enacted and approved, the legislative function is deemed accomplished and complete. The legislative function may spring back to Congress relative to the same law only if that body deems it proper to review, amend and revise the law, but certainly not to approve, review, revise and amend the Implementing Rules and Regulations (IRR) of the COMELEC. By vesting itself with the powers to approve, review, amend, and revise the IRR for The Overseas Absentee Voting Act of 2003, the Court found that Congress went beyond the scope of its constitutional authority. Congress trampled upon the constitutional mandate of independence of the COMELEC.

Hence, the Court deemed the said provisions unconstitutional while leaving the other portions of the law as valid. Congress had no right to interfere with COMELEC as much as the Court had none.

In *Makalintal*, the Court held that:

> The Commission on Elections is a constitutional body. It is intended to play a distinct and important part in our scheme of government. In the discharge of its functions, it should not be hampered with restrictions that would be fully warranted in the case of a less responsible organization. The Commission may err, so may this court also. *It should be allowed considerable latitude in devising means and methods that will insure the accomplishment of the great objective for which it was created — free, orderly and honest elections*. We may not agree fully with its choice of means, but unless these are clearly illegal or constitute gross abuse of discretion, this court should not interfere. Politics is a practical matter, and political questions must be dealt with realistically — not from the standpoint of pure theory. The Commission on Elections, because of its fact-finding facilities, its contacts with political strategists, and its knowledge derived from actual experience in dealing with political controversies, is in a peculiarly advantageous position to decide complex political questions.[154]

But why should the Court deny the same latitude given in *Makalintal* in *Information Technology Foundation*? Why should the Court not respect the independence of the COMELEC?

In *Makalintal* the Court cautioned Congress not to overstep its authority and to divest COMELEC of its authority to administer elections. In *Information Technology Foundation,* the Court asserted its constitutional

154. Sumulong v. COMELEC, 73 Phil. 288, 294-295 (1941), *cited in* Espino v. Zaldivar, 129 Phil. 451, 474 (1967).

mandate to nullify acts in grave abuse of discretion, in disregard of the *independence* of COMELEC.

What Congress cannot do, the Supreme Court arguably can. The determination of both what it can do and when it can depends on the interpretation of the Court of an act in grave abuse of discretion. A pointed question was once posited by a professor of law, if the Supreme Court can declare an any act of a co-equal branch (including those of the independent Constitutional Commissions) as an act of grave abuse of discretion, under the Constitution, will the Supreme Court ever commit an act of grave abuse of discretion?[155] Perhaps it will, if it so deemed.

4. Other Areas of Potential Judicialization and Judicial Rule

Professor C. Neal Tate asserted that there is a whole host of potential areas for judicialization in the Philippines.[156] Professor Tate enumerated at least thirty-five (35) areas, all of which may be invoked by a proper petition in court. Some of those enumerated were the self-executing provisions of the Bill of Rights, as well as the limits of the executive and legislative powers.[157]

All these areas are well-within the shadow of Judicial Rule; potential areas that would only take a proper petition as a catalyst for kineticization. In *Oposa v. Factoran,*[158] the Supreme Court was petitioned by thirty-four (34) minors represented by their parents pleading for "inter-generational justice" to cancel all existing timber licenses and to order the Secretary of Natural Resources to cease and desist from approving new timber licenses. The petitioners invoked a non-self-executory provision in the Constitution.[159] Though the Court did not order the Secretary of Natural Resources to cancel the licenses and to desist from issuing new ones, the Court however took jurisdiction over the dispute. Subsequently, the Supreme Court would

155. *See* ALAN F. PAGUIA, ESTRADA V. ARROYO: RULE OF LAW OR RULE OF MEN? (2003).

156. C. NEIL TATE AND TORBJORN VALLINDER, THE GLOBAL EXPANSION OF JUDICIAL POWER 465, 469-71 (1995).

157. For example, the Supreme Court must determined the factual existence of grounds for existence of Martial Law. Hence, the power to nullify any declaration of the President to that effect. This provision is found under the provisions on the powers of the Executive.

158. Oposa v. Factoran, 224 SCRA 792 (1993).

159. 1987 PHIL. CONST. art. II, § 16 ("The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.").

disregard the political question nature of such issue and would rule on the substantive matter.[160]

V. Constitutional Kritarchy: Advantages, Disadvantages and Criticisms

The *Rule of Judges* is not an abhorrent idea. From the early ideas of Plato, there had been a space for rulers who dispensed justice in accordance with law. Political theory itself embraced legal notions of judicial decision-making and policy-making. Any idea is not without its advantageous aspects or its concurrent criticisms.

A. Magistracy Theory

John Locke once argued that in the design of the social contract, there must be judges who shall make sure that the laws that the legislative shall enact be non-arbitrary.[161] Men gave up their rights under the state of nature so that in a civil society they may be bound by the civil rights which are determined by fixed laws and administered by authorized judges. But he believed that the judges should be appointed by the legislative.[162] It is in this regard that modern political theory has come to a disagreement with the august political theorist. Unlike the common law system[163] of the United Kingdom of Great Britain and Northern Ireland, the United States of America followed the theories of Montesquieu in designing the horizontal powers of the tripartite of the Executive, Legislative and the Judiciary. Under a *constitutional kritarchy,* there is a triangular system where the two branches of the Legislative and the Executive are subsumed by the powers of the Judiciary.

B. The Rule of Judges as the Rule of Wise and Learned Men

In between the immense powers of the Government and the people are the sitting magistrates who interpret the law for the people. The Supreme Court and the lower courts are ennobled by this lofty purpose. Mr. Justice

160. Laguna Lake Development Authority v. Court of Appeals, 251 SCRA 42 (1995).

161. John Locke, Two Treatises in Government 137 (1689)

162. *Id.*

163. Rene David & John E.C. Brierly, Major Legal Systems in the World Today 339-61 (1978) (In common law systems there are a concentration of power, both legislative and judicial, in their House of Lords. This commixtion is not repugnant but is in fact well praised for its decisions in equity and ability to provide for judicial precedents.).

Lurton[164] once declared that between a government of laws and that of men, one must look to the law to destroy arbitrariness — hence the need for judicial review and the importance of those who sit in the judicial benches.

Of course, much is also desired for magistrates with imbued wisdom and learning – for as every case involves the life, liberty and property of individuals – every decision must be made in as prudent and gallant manner possible.

C. Representative Democracy in Judicial Rule

The Supreme Court, like the other two branches of government, does serve a purpose in democracy. After Martial Law, the main policy seemed to be that of democratization in many aspects of Philippine governance. The Judiciary is no exemption. It is in this regard that Eugene Rostow once declared that the power of the court to interpret the laws and their checking the other branches is part of a grand design for the Judiciary as a democratic institution.[165] The sitting magistrates "are inevitably teachers in a vital national seminar."[166] Democracy is an ideology and a legal system that is left with the interpretation of those who actually rule the Government. Though it is arguably a democratic institution, when left unchecked, the Supreme Court may turn antidemocratic when its Judicial Reign is unhampered. Albert Melone recently argued that there should be textual limits to what the Supreme Court can and cannot do.[167] However, as previously expounded on, there is no such limit in the Philippine Constitution.

It is, in such perspective, that the Judiciary must remember the importance of temperance in the use and exercise of one's powers. After all, who checks the Court's interpretation of a governmental principle? The appellate procedure certainly does not provide for an appeal to God or any deity for that matter.

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164. Horace H. Lurton, *A Government of Law or a Government of Men?, in* ALBERT P. MELONE & GEORGE MACE, JUDICIAL REVIEW AND AMERICAN DEMOCRACY 104 (2002).

165. Eugene V. Rostow, *The Democratic Character of Judicial Review,* 66 HARV. L. REV. 193, 208 (1952) reprinted in ALBERT P. MELONE & GEORGE MACE, JUDICIAL REVIEW AND AMERICAN DEMOCRACY (2002).

166. *Id.*

167. Albert P. Melone, *Limiting Supreme Court Jurisdiction*, in ALBERT P. MELONE & GEORGE MACE, JUDICIAL REVIEW AND AMERICAN DEMOCRACY 253 (2002).

D. The Downside of Judicial Reign (Judicial Rule-Making)

Judges decide not only on juristic theories and not purely from textual rules. Their motivations are not just derived from legalistic frameworks. "Actual judicial motivations are complex and judicial behavior results from more than just motivations."[168] This is because judges are motivated in part by the desire to render what they deem as just and to do not just what the law requires.[169] This realism mixed with individualist tendencies render judicial reign with the most debilitating negativity. However, the same argument works for the importance of flexibility in rule-making. The notion of "fairness" is after all, a matter that is also a relative concept that needs a particular sociological context to be based upon.[170]

GENERALIZATION

The independence of the Judiciary, particularly of the Supreme Court, allows it to guard the Constitution and the rights of the individual from improper actions of the other branches. Decisions must be governed by the Constitution, rather than by any contrary statute or quasi-statute. The intent of the Constitution is to safeguard civil liberties in the most pervasive manner as possible. The tone of the Constitution gave the Supreme Court the power to nullify acts of the other branches as well as the Constitutional Commissions. The text of the Constitution, was explicit, for reasons unbeknownst to textual interpreters, that it has such powers under the *Grave Abuse Clause*. The only limitation that the Court may so act is its own interpretation of its role — either as a dormant and reactive body upon a proper petition of a party in legal standing where prudence dictates self-restraint or as proactive body which awaits petitions where prudence sits beside ideals, prejudicial norms and presuppositions together with noble intentions.

The rule of the judges is apparent in its power to interpret what the law is or what it should be. The Constitution left the issue as an undertone where the Supreme Court itself has the sole authority (or so it said) to determine what is due to each branch of Government. The only saving graces for this *Constitutional Kritarchy* are virtues that are to be desired from the sitting magistrates — virtues embedded in the judicial ethics. Virtues of

168. Hugo N. Mialon, et al., *Judicial Hierarchies and Rule-Individual Tradeoff* in Social Science Research Network, *available at* http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID637564_code389408.pdf?abstractid=637564&mirid=1 (last accessed Aug. 1, 2004).

169. *See* JOHN C. ANDERSON, WHY LAWYERS DERAIL JUSTICE: PROBING THE ROOTS OF LEGAL INJUSTICES 32-47 (1998).

170. *Id.* 34-38.

judicial modesty, brought forth by tempered wisdom, and the well-established character and competence of the sitting magistrates.

However multifarious the issues are, the Supreme Court, it may be argued, has the sole authority to determine whether it has jurisdiction on any given issue.[171] This authority, like all authority, may be used for acts both positively and negatively. Where the power is used for good, as for example a *transcendental cause* such as in *Information Technology Foundation*, we have an example of judicial rule over a constitutional commission acting "arbitrarily" when it failed to observe its own rules. However, it is left to mind as to whether an act for a good intention will always be good *per se*. That perhaps, good intentions can also lead to some form of tyranny left unchecked. After all, President Marcos may have acted out of good intentions when he declared Martial Law. It may be enlightening to remember what a good justice once said: "we fear to grant power and we are unwilling to recognize it when it exists."[172]

Mr. Justice Holmes further wrote:

> When legislatures are held to be authorized to do anything considerably affecting public welfare it is covered by apologetic phrases like police power, or the statement that the business concerned has been dedicated to a public use. The former expression is convenient to be sure, to conciliate the mind to something that needs explanation...police power is used in a wide sense to cover and... apologize for the general power of the legislature to make a part of the community uncomfortable by a change. *I do not believe in such apologies. I think the proper course is to recognize* that a State legislature can do whatever it sees fit unless it is restrained by some express prohibition in the Constitution...[173]

When the Supreme Court was knighted with a role (and power) and a duty (and authority) to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government. The Constitution should have defined when an act is one that is of grave abuse of discretion. When it remained silent on the matter — only one entity can determine whether

171. *See* Joaquin G. Bernas, *Separation of Powers: The Supreme Court and the Political Departments*, 11 ATENEO L.J. 8-29 (1961); *see also* Jose L. Sabio, *This is Judicial Tyranny, Plain and Simple*, 30 ATENEO L.J. 78 (1986); Anna Leah Fidelis Castañeda-Anastacio, *Making Sense of* Marbury, 46 ATENEO L.J. 107 (2001); and Anna Leah Fidelis Castañeda-Anastacio, *The Origins of Philippine Judicial Review*, 46 ATENEO L.J. 107 (2001).

172. Tyson Bros. v. Banton, 273 U.S. 418, 445 (1927) (Holmes, J., dissenting).

173. *Id.* at 446.

such is an act of grave abuse of discretion. The entity charged with its exercise.

Perhaps it is time to recognize it — that our system is not one of co-equal branches — that the Philippine Legal System is a *Constitutional Kritarchy*. Paraphrasing Justice Holmes, perhaps the proper recourse is not to temper the system with apologetic statements that leave much room for vague interpretations but to recognize that the power is textually granted to the Supreme Court. Just as the Delphic laws of Greece were handed down to the philosopher-kings and their subjects, not by the gods themselves but by the oracles who represented the Delphic Law,[174] the Philippine Constitution is given life, not by the ruling administration but by the interpreters of it.

174. PLATO, THE LAWS 220 (Penguin Classics, 1985 reprints); GLENN R. MORROW, THE CRETAN CITY ch. 8 (2002).