Legal Education Reform Act of 1993: Permissible Delegation or Judicial Veto?

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I. Introduction

Cardinal Anthony Bevilacqua once said that, "[l]egal education is more than memorization of facts, figures, and rote recitation of cases, rulings, precedents and appeals. In order to promote and uphold the common good of society, the study and practice of law must encompass moral and ethical principles that not only inform but transform the human community."[1] Indeed, the Philippines has been a society based on law and forged by lawyers. Law, the cornerstone of legal education, is a tool by which social order is maintained. For Filipinos, the rule of law has been the great authority, embodying the development of a nation over the years. The development of law never stops, for it is a dynamic force that continually adapts to a changing society. In our society, lawyers are and must be the conscience of both the legal system and the client—for if they are not, no one will be. Additionally, the Supreme Court has always stressed that the lawyer's conduct ought to and must always be scrupulously observant of law and ethics. The lawyer, like the Court, is an instrument or agency to advance the ends of justice.[2]

In order to create the ideal mold of a lawyer, legal education, being the foundation upon which lawyers are based, must be shaped properly. Consequently, the importance of legal education cannot be overemphasized. According to a report of the American Bar Association,[3] any recommendations on professionalism should begin with the law schools, "not because they represent the profession's greatest problems but because they constitute our greatest opportunities."[4] Moreover, one of the goals of legal education is the empowerment of the masses of people who are less advantaged in society.[5] The foundation upon which the legal profession stands is the education provided by law schools throughout the country. In the Philippines, the basis

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1. *Faith and Law: Can they coexist in your Practice?*, Columbus School of Law General Information Site, *at* http://law.cua.edu/alumni/CUALawyer/issues/contact/wintercontact/FaithLaw.cfm (last accessed February 27, 2004).
2. *In re* Wenceslao Laureta, 148 SCRA 382, 422 (1987), (citing Surigao Mineral Conservation Board v. Cloribel, 31 SCRA 1 (1970); Castaneda v. Ago, 65 SCRA 505 (1975)).
3. American Bar Association Commission on Professionalism, *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism*, *at* http://www.abanet.org/cpr/pubs/561-0081.html (last accessed February 27, 2004).
4. Harry T. Edwards, *The Role of Legal Education in Shaping the Profession*, 31 S.B.L.J. 1, 2 (1990).
5. Augusto Caesar Espiritu, *Reforms in Graduate Legal Education*, 56 P.L.J. 199, 200 (1981).

for judging the performance of law schools is obvious: their respective passing percentages in the annual Bar Examinations conducted by the Supreme Court. Dean Fortunato Gupit, Jr., observed that based on the annual passing percentages, the annual examination appears to be a continuing tragedy of our times.[6] In the results of the 1987 Bar Examinations, those who obtained a passing grade of seventy-five percent were a mere 10.6% of the total examinees. In order to increase the number of examinees passing the examinations, an additional 15% were added to the scores of the examinees in Political Law, thereby raising the passing percentage to 18.88%, one of the lowest passing percentages in the history of the examinations.[7] Dean Gupit then quoted Justice Delfin H. Batacan in his book, *The Bar Candidates' Guide* (1976):

> [W]ere the 3,098 candidates in 1957 so inadequately prepared or academically ill-equipped that in the subject of civil law...only 316 candidates or 7% of the total number got passing marks of 75% or over? And in commercial law...only 324 of the 3,098 candidates were able to obtain satisfactory ratings, or only 10.53%.[8]

Looking back forty-five years ago, the numbers were already woeful. Justice Batacan noted that quite a number of law schools failed to produce a single candidate, certified or otherwise, who could survive the 1957 tests. Pointing to one of the obvious reasons for the dismal results, Justice Batacan went on to state that, "certainly such a record serves as evidence clear and convincing that something must be wrong with the method of legal instructions in the institutions concerned."[9] The present statistics do not show any marked improvement.[10]

There are some groups, however, that place the blame for the continually disastrous results on the examinations itself, pointing out that the same are fatally flawed. These groups insist that the form, style and content, as well as the manner of correction and grading of the bar examinations are faulty.[11] Though there may be some truth to these arguments, their plausibility should not divert one's attention from the objective of the examinations. The Bar Examinations are meant to make certain that only those qualified shall have the privilege of entering the legal

6. Fortunato Gupit, Jr., *The State of Legal Education*, 2 LAW. REV. 5 (1988).
7. *Id.*
8. *Id.*
9. *Id.*
10. Statistical Data from the Supreme Court in connection with the passing rates of each law school for the years 1991-2001 (on file with the Supreme Court, Office of the Bar Confidant).
11. Antonio R. Bautista, *Image and Reality in Philippine Legal Education*, 2 LAW. REV. 2 (1998).

profession. This indeed is the very reason for requiring aspirants to take the examination; it is to separate the fit from the unfit, thus fulfilling the vital goal of promoting the quality of the members of the legal profession.

Ultimately, proper regulation of law schools may provide the answers to the problems facing law students and examinees today. Presently, law schools in the Philippines are faced with the truth that their predicament is, by and large, economically induced.[12] Financial problems plague most law schools. Schools and colleges of law exist primarily to educate their students. In pursuing this purpose to educate students, law schools necessarily must have competent teachers and adequate facilities. There is a direct relation between the financial status of a law school and the ability to provide the students with competent teachers. Furthermore, the facilities of the law school are directly affected by the amount of funding it receives. The greater the funding, the better the facilities it can offer to its student population. This scenario creates a tension between the desire to educate and make a profit. In many instances the law school exists because of the law students that pay tuition and not for the purpose of training quality lawyers.[13] Unfortunately, the focus is not on the quality of education and the students produced by the school. Thus, it is highly unlikely that such law schools will continuously screen its students in order to remove those undeserving. It is understandable then why the Supreme Court remains as the ultimate authority on the admission to the Bar and not the law schools. The reason behind difficulty and strictness of the examinations administered by the highest court of the land is clear in view of the mistrust of the Court on the ability of law schools to produce competent graduates of law.[14] Dean Gupit opined that if such trust did exist, the requirement that one must undergo an examination should be done away with. In countries where bar examinations do not exist, law schools screen prospective students, and carefully train the same as prospective members of the Bar.[15] Professor Marita Lopez-Campos, a former bar examiner, summed it best by stating that bar candidates have the innate intellectual capacity, but the poor basic education has not allowed them to develop this capacity to the fullest. Interestingly, she adds that the candidates may have been "hoodwinked" into believing that they were sufficiently prepared after four years of law school and months of review.[16]

However, law schools alone should not be blamed. From a broader perspective, the entire educational system of the country is in need of reform. At present, the quality of students has continuously deteriorated. The

12. *Id.* at 3.
13. *Id.*
14. Gupit., *supra* note 6, at 6.
15. *Id.*
16. *Id.*

underdevelopment of communication and comprehension skills is patent from the tests conducted. Unfortunately, communication and comprehension skills form the basis of a successful law student and law practitioner. The ability to communicate and comprehend is essential. Thus, the enhancement and advancement of these skills must already begin at the lower levels of education.

Nevertheless, the regulation of law schools is of prime importance in order to improve the quality of legal education. The proper training of law students by law schools also constitutes a great opportunity to improve the legal profession. Schools and colleges of law must be well supervised and regulated so that the quality of students will not be compromised. Consequently, the State must create a body, composed of members who belong to the profession and thus are intimately connected with the challenges and issues revolving around such, so as to improve the foundation of all present and future members of the Bar.

A. *Issues*

Currently the body claiming the power to exercise jurisdiction over Philippine law schools is the Commission on Higher Education (CHED). Initially, the Department of Education, Culture and Sports (DECS) was mandated by Batas Pambansa Blg. 232 to oversee the acts of schools at all levels. Under said law, the authority of DECS encompasses both public and private institutions of higher education as well as degree-granting programs in all post-secondary educational institutions, public and private. Pursuant to this mandate, the DECS promulgated DECS Order No. 27, Series of 1989, outlining the policies and standards specifically for legal education.

On 23 December 1993, however, Congress enacted Republic Act No. 7662 entitled as the "Legal Education Reform Act of 1993" (Legal Education Reform Act). The law called for the creation of the Legal Education Board (Board) composed of members of the Bar and a representative from the student's sector.[17] Members of the Board were to be appointed by the President from a list of nominees to be prepared by the Judicial and Bar Council (JBC) with the prior authorization from the Supreme Court. By requiring prior authorization, the Legislature apparently required the Judiciary to participate in the implementation of the law. Under the law, said Board has several functions and powers, among which is to administer the legal education system in the country in a manner consistent with the provisions of the law.[18] Furthermore, the law is to apply to all schools and colleges of law which were then under the supervision of the DECS.

17. Legal Education Reform Act of 1993, Republic Act No. 7662, § 4 (1993).

18. *Id*, § 7.

Unfortunately, it appears that the Supreme Court has yet to authorize the JBC to prepare the list of nominees from which appointments of the President are to be made. Apparently the Court has likewise not made a call for the JBC to prepare such list. The reasons for this inaction remain ambiguous, in view of an absence of any official pronouncement by the Court asserting its stance concerning the law.

In 1994, Congress passed a law which created the CHED[19] and granted it regulatory powers. Since the Board had not been constituted, the CHED assumed jurisdiction over all institutions of higher learning, including all schools and colleges of law through a Technical Panel for Legal Education. However, the Philippine Association of Law Schools (PALS) questioned the CHED's authority. In fact in 1995, the PALS drafted a resolution addressed to the Supreme Court, requesting that the latter immediately give its authorization to the JBC in order to constitute the Board pursuant to the Legal Education Reform Act. It was the stand of PALS that all private law schools are not subjected to any governmental supervision because of the non-constitution of the Board, creating a pressing need for the Court to take the necessary steps to implement the Legal Education Reform Act. Notwithstanding such resolution, the Supreme Court did not give any authorization, much less make a call for the JBC to prepare a list of nominees. It appeared that the Court ignored the resolution because the PALS once again filed another resolution, dated 1 December 2001, reiterating the need for the Court to execute the law and directing the CHED to desist from regulating legal education.

As a result of the inaction, many issues come to the forefront. The first is the issue of which body had jurisdiction over schools and colleges of law. Does the non-constitution of the Board empower the CHED to assume jurisdiction in the interim? Second, there is a need to determine whether Congress can allow the judicial branch of government, specifically the Supreme Court, to participate in the implementation or execution of a law. Is there a violation of the doctrine of separation of powers? Moreover, is the President's power to appoint curtailed by the law when it prescribes that the President must choose from a limited list of four nominees? If there is no violation of the separation of powers principle, can the Supreme Court prevent the law's implementation through inaction, or what may be termed as "judicial veto?" Third, granting that the Judiciary may be called to assist in the execution of a law, what then is the remedy of the public in case the Court refuses or stalls in its duty to implement a law? Is there an action that can be filed against the Supreme Court since it is the body mandated by law to participate in its implementation, and in what venue?

19. Higher Education Act of 1994, Republic Act No. 7722 (1994).

B. *Objective, Scope and Limitations*

This paper seeks to examine, among other things, the acts of the CHED *vis-à-vis* law schools since its creation in 1994. The absence of the Board has left a void as to which body has jurisdiction over law schools. The basis upon which the CHED exercises jurisdiction over said law schools shall be examined, with emphasis on the provisions of law creating the Commission. Moreover, the idea that the Commission can exercise such jurisdiction despite the clear provisions of the Legal Education Reform Act will be discussed. Pursuant to such discussion will be an examination of the pertinent laws, including the law specifying the powers of the Department of Education, Culture and Sports, and the Legal Education Reform Act.

An assessment of the doctrine of separation of powers *vis-à-vis* the right of Congress to command the Judiciary to implement a law will also be undertaken. Discussion of the issues will thus be limited to delegation of powers to the Judiciary. The crux of the problem lies with Republic Act No. 7662, whereby Congress sought to address the problems facing law schools in the Philippines by creating a Board, and granting such Board with sole jurisdiction over schools and colleges of law. By inserting a phrase which requires the prior authorization of the Supreme Court, it gives rise to the issue of whether the Judiciary will have to perform a function outside the province of its judicial powers. The powers of the Judiciary must necessarily be examined to ascertain whether the duty imposed by the law upon the Supreme Court is constitutionally permissible. In addition, the executive power to appoint shall be scrutinized in order to determine whether the Legal Education Reform Act has violated the "limitless" power to appoint.

Assuming that it is indeed proper for the Judiciary, specifically the Supreme Court, to perform its role under R.A. No. 7662, there remains for discussion the novel concept of a "judicial veto," a tool which the Judiciary seems to be employing to paralyze the actions of Congress. The next issue would concern the procedure by which to compel the Supreme Court to carry out its duty. The difficulty of the problem is apparent because the body which must be compelled is the highest court of the land and the ultimate authority of what the law is. The author, therefore, will discuss solutions that may pave the way for the appropriate implementation of the law.

C. *Relevancy*

The amount of time that has passed without a unanimously recognized regulatory body has hindered the growth, progress and development of legal education throughout the country. The avowed policies of the law to uplift the standards of legal education, to impress upon law students the importance,

nobility and dignity of the legal profession, and the development of socially-committed lawyers with integrity and competence[20] cannot be met if the present controversy is not settled. Without recognition and acceptance from all law schools of which body shall regulate legal education, the quality of legal education cannot possibly be uniform and fair to all who aspire to become members of the Bar. Instead of unifying law schools to achieve a common goal, the absence of the Board or a body similar to it will only have negative repercussions. The standards followed by law schools are not consistent, and unfortunately, schools or so-called "diploma mills" prey dangerously on individuals enticing them with a law degree but disregarding the duty to prepare them for the Bar examinations. Thus, now is the time to resolve the issue, one that has been lingering for close to a decade.

II. LAWS REGULATING LEGAL EDUCATION

A. *The Education Act of 1982*

Prior to the enactment of Republic Act No. 7662, otherwise known as the Legal Education Reform Act, the governmental body exercising jurisdiction and supervision over colleges and schools of law was the Ministry of Education and Culture,[21] later renamed as the Ministry of Education, Culture and Sports (MECS),[22] currently the Department of Education, Culture and Sports

20. Legal Education Reform Act of 1993, R.A. 7662, § 2.

21. Education Act of 1982, Batas Pambansa Blg. 232 (1982), IV, Ch. 1, § 54, provides:

> *Declaration of Policy.* - The administration of the education system and, pursuant to the provisions of the Constitution, the supervision and regulation of educational institutions are hereby vested in the Ministry of Education, Culture and Sports, without prejudice to the provisions of the charter of any state college and university.

22. *See* Abolishing the Ministry of Youth and Sports Development, Transferring its Functions to a Ministry of Education, Culture and Sports, and for other purposes, Executive Order No. 805 (1982), §1, which provides:

> The existing Ministry of Youth and Sports Development established pursuant to Presidential Decree No. 604, as amended, is abolished together with its services, bureaus and similar agencies, regional offices, and all other entities under its supervision and control. Except as may otherwise be provided for hereinafter, its functions, including records, equipment, property, and such applicable appropriations and personnel as may be necessary are hereby transferred to the Ministry of Education and Culture, which is renamed the Ministry of Education, Culture and Sports and hereinafter referred to as the Ministry. The Ministry

(DECS).[23] The law governing all educational institutions was Batas Pambansa Blg. 232, otherwise known as the Education Act of 1982. The Ministry was composed of: (a) the Ministry Proper composed of the immediate Office of the Minister, and the Services of the Ministry, (b) the Board of Higher Education, (c) the Bureau of Elementary Education, the Bureau of Secondary Education, the Bureau of Higher Education, the Bureau of Technical and Vocational Education, and the Bureau of Continuing Education, among others.[24]

The law outlines the powers and functions of the Ministry of Education, Culture and Sports (MECS):

> Functions and Powers of the Ministry. - The Ministry shall:
>
> 1. Formulate general education objectives and policies, and adopt long-range educational plans;
>
> 2. Plan, develop and implement programs and projects in education and culture;
>
> 3. Promulgate rules and regulations necessary for the administration, supervision and regulation of the educational system in accordance with declared policy;
>
> 4. Set up general objectives for the school system;
>
> 5. Coordinate the activities and functions of the school system and the various cultural agencies under it;
>
> 6. Coordinate and work with agencies concerned with the educational and cultural development of the national cultural communities; and
>
> 7. Recommend and study legislation proposed for adoption. [25]

The MECS, therefore, had sole authority over the educational system in the Philippines by virtue of the Education Act of 1982. Included within the organizational structure of the MECS was the Board of Higher Education.

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shall be headed by a Minister of Education, Culture and Sports, hereinafter referred to as the Minister.

23. Reorganization of the Ministry of Education, Culture and Sports, Prescribing its Powers and Functions and for other purposes, Executive Order No. 117, § 27, (1987), provides:

    Change of Nomenclatures. - In the event of the adoption of a new Constitution which provides for a presidential form of government, the Ministry shall be called Department of Education, Culture and Sports and the titles Minister, Deputy Minister, and Assistant Minister shall be changed to Secretary, Undersecretary and Assistant Secretary, respectively.

24. Education Act of 1982, B.P. Blg. 232, IV, Ch. 1, § 54.

25. *Id.* Ch. 1, § 57.

Evidently, the said Board was to aid the MECS in its duty to supervise and regulate educational institutions beyond secondary schooling. It was composed of a Deputy Minister of Education, Culture and Sports, and four other members of who have distinguished themselves in any field of higher education.[26] The Board's main function was to act as an advisory body to the MECS to attain the policies of the law concerning higher education.[27] Apart from the Board of Higher Education, the law provided for the creation of several bureaus, particularly the Bureau of Higher Education. Principally, said Bureau was to develop standards for higher education and assist the Board of Higher Education.[28]

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26. *Id.* Ch. 2, § 60, provides:

    Organization of the Board of Higher Education. -The Board of Higher Education is reconstituted as an advisory body to the Minister of Education, Culture and Sports. The Board shall be composed of a Deputy Minister of Education, Culture and Sports designated as Chairman and four other members to be appointed by the President of the Philippines upon nomination by the Minister of Education, Culture and Sports for a term of four years. The four members shall have distinguished themselves in the field of higher education and development either in the public or private sector. In the initial appointment of the non-ex officio members, the first appointee shall serve for a term of four years; the second for a term of three years; the third for a term of two years; and the fourth for a term of one year. The Director of the Bureau of Higher Education shall participate in the deliberation of the Board but without the right to vote. The Bureau of Higher Education shall provide the Board with the necessary technical and staff support: Provided, That the Board may create technical panels of experts in the various disciplines as the need arises.

27. *Id.* § 61, provides:

    Function of the Board of Higher Education. - The Board shall:

    1. Make policy recommendations regarding the planning and management of the integrated system of higher education and the continuing evaluation thereof.
    2. Recommend to the Minister of Education, Culture and Sports steps to improve the governance of the various components of the higher education system at national and regional levels.
    3. Assist the Minister of Education, Culture and Sports in making recommendation relatives to the generation of resources and their allocation for higher education.

28. Education Act of 1982, IV., Ch. 3, § 65, provides:

    Bureau of Higher Education. - The Bureau of higher Education shall perform the following functions:

In addition to the enumerated powers above, the MECS had the power to accredit educational institutions of all levels. As part of its power to supervise and regulate the educational system of the nation, the MECS had authority to issue permits recognizing the privilege of a particular school to operate as an educational institution.

> Sec. 27. Recognition of Schools. - The educational operations of schools shall be subject to their prior authorization of the government, and shall be affected by recognition. In the case of government operated schools, whether local, regional, or national, recognition of educational programs and/or operations shall be deemed granted simultaneously with establishment.
>
> In all other cases the rules and regulations governing recognition shall be prescribed and enforced by the Ministry of Education, Culture and Sports defining therein who are qualified to apply, providing for a permit system, stating the conditions for the grant of recognition and for its cancellation and withdrawal, and providing for related matters.
>
> Sec. 28. Effects of Recognition; Punishable Violations. –
>
> Operation of schools and educational programs without authorization, and/or operation thereof in violation of the terms of recognition, are hereby declared punishable violations subject to the penalties provided in this Act.[29]

After the EDSA Revolution of 1986 and the ensuing establishment of the Freedom Constitution, Executive Order No. 117 was enacted by then President Aquino, in the exercise of her special legislative powers. E.O. No. 117 reorganized the MECS and prescribed its functions. An important provision left unchanged the exclusive power of the MECS to regulate all educational institutions.

> Sec. 4. Mandate. - The Ministry shall be primarily responsible for the formulation, planning, implementation and coordination of the policies, plans, programs and projects in the areas of formal and non-formal education at all levels, supervise all education institutions, both public and private, and provide for the establishment and maintenance of a complete, adequate and integrated system of education relevant to the goals of national development.[30]

From the foregoing, the unambiguous intent was to maintain the DECS as the sole regulatory body over all educational institutions, at all levels. The DECS then issued DECS Order No. 27, Series of 1989, to exclusively govern the operation of law schools in the country. DECS Order No. 27 was a precursor to the Legal Education Reform Act, and was the model for the latter's objectives. It prescribed standards in connection with the organization, faculty and curriculum for schools and colleges of law. At present, Order No. 27 is still in effect and implemented by the DECS in its pursuit to oversee legal education in the country. The situation remained the same until 1993 when the Legislature, noting the deterioration of legal education, enacted R.A. 7662.

B. *The Legal Education Reform Act*

The Legal Education Reform Act was enacted in December of 1993 in response to the need to introduce reforms in legal education. Recognizing the role and importance of legal education in shaping the legal profession, the Legislature saw fit to enact a law that would create a more specialized body denominated as the Board composed of members of the legal profession. In so doing, Congress sought to provide positive changes in the legal education of the country. A reflection of the positive reforms was embodied in the policies of the law declared in Section 2, in the following manner:

> Sec. 2. *Declaration of Policies.* - It is hereby declared the policy of the State to uplift the standards of legal education in order to prepare law students for advocacy, counselling, problem-solving, and decision-making; to infuse in them the ethics of the legal profession; to impress on them the importance, nobility and dignity of the legal profession as an equal and indispensable partner of the Bench in the administration of justice and, to develop social competence.[31]

Pursuant to the policies set out in Section 2, the Legislature outlined an important and detailed list of the objectives of the Board, among which were the following:

> a) Legal Education in the Philippines is geared to attain the following general objectives:

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1. Develop, formulate and evaluate programs, projects and educational standards for a higher education;
2. Provide staff assistance to the Board of Higher Education in its policy formulation and advisory functions;
3. Provide technical assistance to encourage institutional development programs and projects;
4. Compile, analyze and evaluate data on higher education; and
5. Perform other functions provided for by law.

29. Education Act of 1982, III., Ch. 3, §§ 27 and 28, (emphasis supplied).

30. Reorganizing the Ministry of Education, Culture and Sports, E.O. No. 117, §4, (1987) (emphasis supplied).

31. Legal Education Reform Act of 1993, § 2.

1) to prepare students for the practice of law;

2) to increase awareness among members of the legal profession of the needs of the poor, deprived and oppressed sectors of society;

3) to train persons for leadership;

4) to contribute towards the promotion and advancement of justice and the improvement of its administration, the legal system and legal institutions in the light of the historical and contemporary development of law in the Philippines and in other countries.

b) Legal Education shall also aim to accomplish the following objectives:

1) to impart among law students a broad knowledge of law and its various fields, and of legal institutions;

x x x

5) to inculcate in them the ethics and responsibilities of the legal profession; and

6) to produce lawyers who conscientiously pursue the lofty goals of their profession and to fully adhere to its ethical norms.[32]

To achieve the foregoing objectives, Congress explicitly provided for the creation of a Board, to be composed of the following regular members:

> [A] representative of the Integrated Bar of the Philippines (IBP); a representative of the Philippine Association of Law Schools (PALS); a representative from the ranks of active law practitioners; and, a representative from the law students' sector. The Secretary of Department of Education, Culture and Sports, or his representative, shall be an ex officio member of the Board.[33]

It is evident that Congress had the deliberate intent to constitute a body comprised of a majority of persons who are or will be members of the legal profession. To carry out the policies and accomplish the objectives of the law, the Legislature saw the need to create a regulatory body composed of members who are in a prime position to contribute to the development of legal education.

In order to become a member of the Board, the law provides for a process by which an individual, possessing the necessary requirements, can become a part of the Board. The law provides the manner of selecting members to the Board:

32. *Id.* § 3.

33. *Id.* § 4.

> The Chairman and regular members of the Board shall be appointed by the President for a term of five (5) years without reappointment from a list of at least three (3) nominees prepared, *with prior authorization from the Supreme Court*, by the Judicial and Bar Council, for every position or vacancy, and no such appointment shall need confirmation by the Commission on Appointments.[34]

The process for the Board to be constituted, therefore, begins with a positive act from the Supreme Court. A reading of the law shows that the JBC must, prior to any acceptance of applicants for the position of member of the Board, await authority from the Supreme Court. Preparation of the list of nominees cannot begin without "prior authorization from the Supreme Court." After the Supreme Court gives its authorization, the JBC can come out with an invitation to the public, informing the latter of the vacancies in the Board. Once the Council determines who the nominees are, the list will be transmitted to the President. The President shall then appoint the necessary number of individuals from the list submitted to him or her, thereby completing the implementation of the law.

Once constituted the Board has several important functions for the proper regulation and supervision of schools and colleges of law.

> Sec. 7. *Powers and Functions.* - For the purpose of achieving the objectives of this Act, the Board shall have the following powers and functions:
>
> a) to administer the legal education system in the country in a manner consistent with the provisions of this Act;
>
> b) to supervise the law schools in the country, consistent with its powers and functions as herein enumerated;
>
> c) to set the standards of accreditation for law schools taking into account, among others, the size of enrollment, the qualifications of the members of the faculty, the library and other facilities, without encroaching upon the academic freedom of institutions of higher learning;
>
> d) to accredit law schools that meet the standards of accreditation;
>
> e) to prescribe minimum standards for law admission and minimum qualifications and compensation of faculty members;
>
> f) to prescribe the basic curricula for the course of study aligned to the requirements for admission to the Bar, law practice and social consciousness, and such other courses of study as may be prescribed by the law schools and colleges under the different levels of accreditation status;
>
> g) to establish a law practice internship as a requirement for taking the Bar which a law student shall undergo with any duly accredited private

34. *Id.* § 5 (emphasis supplied).

or public law office or firm or legal assistance group anytime during the law course for a specific period that the Board may decide, but not to exceed a total of twelve (12) months. For this purpose, the Board shall prescribe the necessary guidelines for such accreditation and the specifications of such internship which shall include the actual work of a new member of the Bar.

h) to adopt a system of continuing legal education. For this purpose, the Board may provide for the mandatory attendance of practising lawyers in such courses and for such duration as the Board may deem necessary; and

i) to perform such other functions and prescribe such rules and regulations necessary for the attainment of the policies and objectives of this Act.[35]

As can be gleaned from the above provisions of law, specifically paragraphs (a) and (b) of Section 7, the Board is the sole body which can exercise jurisdiction over law schools. The law is more explicit when it provides in Section 12 that the provisions of the law shall apply to all colleges and schools of law, which are presently under the supervision of the DECS, and all that may be established afterwards.[36] It is also incumbent upon the Board "to prescribe the basic curricula for the course of study aligned to the requirements for admission to the Bar"[37] and "to accredit law schools that meet the standards of accreditation."[38] Hence, the powers and functions conferred upon the Board seek specifically to provide increased regulation of legal education. The powers and functions also confirm the recognition by the state of the importance of legal education and its goal to improve its administration and supervision over the same.

C. *Higher Education Act of 1994*

A year after the Legal Education Reform Act was enacted, the Legislature passed into law on 18 May 1994, Republic Act No. 7722, otherwise known as the "Higher Education Act of 1994." The legislation created the Commission on Higher Education (CHED) pursuant to the State's policy of ensuring and

35. *Id.* §7.

36. *Id.* § 12, provides:

Coverage. - The provisions of this Act shall apply to all schools and colleges of law which are presently under the supervision of the Department of Education, Culture and Sports. Hereafter, said supervision shall be transferred to the Board. Law schools and colleges which shall be established following the approval of this Act shall likewise be covered.

36. *Id.* § 7 (f).

37. *Id.* § 7 (d).

protecting academic freedom, promoting its exercise and observance for the continuing intellectual growth, the advancement of learning and research, the development of responsible and effective leadership, the education of high-level and middle-level professionals and the enrichment of our historical and cultural heritage.[39] The scope of the CHED's authority includes the general phrase, "both public and private institutions of higher education as well as degree-granting programs in all post-secondary educational institutions, public and private."[40] The law, though, does not refer specifically to schools and colleges of law.

As the sole body with the authority to regulate institutions of higher learning, Congress vested the CHED with the following powers and functions, to wit:

a) formulate and recommend development plans, policies, priorities, and programs on higher education and research;

b) formulate and recommend development plans, policies, priorities and programs on research;

c) recommend to the executive and legislative branches, priorities and grants on higher education and research;

d) set minimum standards for programs and institutions of higher learning recommended by panels of experts in the field and subject to public hearing, and enforce the same;

e) monitor and evaluate the performance of programs and institutions of higher learning for appropriate incentives as well as the imposition of sanctions such as, but not limited to, diminution or withdrawal of subsidy, recommendation on the downgrading or withdrawal of accreditation, program termination or school closure;

39. Higher Education Act of 1994, § 2 provides:

Declaration of Policy. - The State shall protect, foster and promote the right of all citizens to affordable quality education at all levels and shall take appropriate steps to ensure that education shall be accessible to all. The State shall likewise ensure and protect academic freedom and shall promote its exercise and observance for the continuing intellectual growth, the advancement of learning and research, the development of responsible and effective leadership, the education of high-level and middle-level professionals and the enrichment of our historical and cultural heritage.

State-supported institutions of higher learning shall gear their programs to national, regional or local development plans. Finally, all institutions of higher learning shall exemplify through their physical and natural surroundings the dignity and beauty of as well as their pride in, the intellectual and scholarly life.

40. *Id.* § 3.

f) identify, support and develop potential centers of excellence in program areas needed for the development of world-class scholarship, nation building and national development;

g) recommend to the Department of Budget and Management the budgets of public institutions of higher learning as well as general guidelines for the use of their income;

h) rationalize programs and institutions of higher learning and set standards, policies and guidelines for the creation of new ones as well as the conversion or elevation of schools to institutions of higher learning, subject to budgetary limitations and the number of institutions of higher learning in the province or region where creation, conversion or elevation is sought to be made;

i) develop criteria for allocating additional resources such as research and program development grants, scholarships, and other similar programs: *Provided*, that these shall not detract from the fiscal autonomy already enjoyed by colleges and universities;

j) direct or redirect purposive research by institutions of higher learning to meet the needs of agro-industrialization and development;

k) devise and implement resource development schemes;

l) administer the Higher Education Development Fund, as described in Section 10 hereunder, which will promote the purposes of higher education;

m) review the charters of institutions of higher learning and state universities and colleges including the chairmanship and membership of their governing bodies and recommend appropriate measures as basis for necessary action;

n) promulgate such rules and regulations and exercise such other powers and functions as may be necessary to carry out effectively the purpose and objectives of this Act; and

o) perform such other functions as may be necessary for its effective operations and for the continued enhancement, growth or development of higher education.[41]

The foregoing powers and functions are evidence of the authority of the CHED to exercise supervision and regulate institutions of higher learning. It was by virtue of R.A. No. 7722 that the power of the DECS over tertiary education was transferred to the CHED.[42]

41. *Id.* § 8.

42. *Id.* § 18, which provides:

Transitory Provisions. - Such personnel, properties, assets and liabilities, functions and responsibilities of the Bureau of Higher Education, including those for higher and tertiary education and degree-granting vocational and technical programs in the regional offices, under the Department of, Education Culture and Sports, and other government entities having functions similar to those of the Commission are hereby transferred to the Commission.

Under the Implementing Rules and Regulations (IRR) approved by the CHED, a list of terms is defined, including "Tertiary degree programs" and "Post-secondary programs." The definition of the aforementioned terms is important in determining the educational institutions over which the CHED can exercise jurisdiction. The IRR defines "Tertiary degree programs" as courses of study leading to an initial or higher bachelor's degree, as well as formal graduate studies leading to master's, doctor's or similar degrees. It also includes courses of study which by themselves may be only for one, two, or three-year courses of study leading to less than bachelor's program, but which can subsequently be credited in full bachelor's degrees.[43] "Post-secondary programs" is defined as, "courses of study which cannot be credited towards a bachelor's degree but which require the possession of a high school diploma for admission, which are terminal in nature, and which are general for obtaining technical and vocational skills."[44]

The IRR also provide the scope and application of the powers and functions of the CHED, and a delineation of its jurisdiction. The coverage of the CHED includes public and private institutions of higher education as well as degree-granting programs in all post secondary educational institutions, public and private.[45] In addition, the establishment, conversion, or elevation of degree granting institutions shall be within the responsibility of the Commission.[46] With respect to jurisdiction, the CHED shall exercise its powers and functions over institutions of higher learning primarily offering tertiary degree programs.[47]

III. JURISDICTION OVER LEGAL EDUCATION

Before the Legal Education Act of 1993 was enacted, it was undisputed that the DECS had sole jurisdiction over all educational institutions, including schools and colleges of law, except schools whose legislative charters provided otherwise. Hence the DECS Order No. 27 Series of 1989 was recognized by all the colleges and schools of law as the law governing their specialized field. The passage into law of the Legal Education Reform Act made clear the

43. Rules and Regulations Implementing the Higher Education Act of 1994, as amended, art. 5.

44. *Id.* art. 5.

45. *Id.* art. 6.

46. *Id.* art. 6.

47. *Id.* art. 7.

intent of the Legislature to transfer the power to supervise and regulate schools and colleges of law to the Board. Unfortunately, the Board had not been constituted when the law creating the CHED was enacted. The CHED, realizing that the Board had not been constituted, began and continues exercising regulatory powers over schools and colleges of law. Therefore the CHED in 1999[48] created a Technical Panel for Legal Education, a group the composition of which is similar to the Board, pursuant to Section 12 of R.A. 7722[49] in its pursuit to oversee the curriculum of law schools. As a sign of the Supreme Court's imprimatur, the members of the Technical Panel were sworn in by no less than the Chief Justice himself.[50] This action of the CHED, however, has not been looked upon with favor by law schools throughout the country, as well as the Philippine Association of Law Schools (PALS). Apart from the enforcement of the DECS Order No. 27, law schools do not recognize the acts of the CHED as valid and binding. These law schools, though, have signified their stance that the CHED is not recognized as the regulatory body which may lawfully exercise jurisdiction over schools and colleges of law. As evidence, the PALS drafted two resolutions, the first dated 2 December 1995 and the latest 1 December 2001, expressing this view and recommending to the Supreme Court to immediately begin the process of constituting the Board and directing the CHED to desist from conducting an assessment of the law courses or programs of law schools and colleges.[51] Playing deaf to the resolutions of the PALS, neither the Supreme Court nor the CHED has acted favorably to the aforementioned resolutions of the PALS. Thus, the CHED continues to exercise jurisdiction through the Technical Panel for Legal Education over law schools throughout the nation.[52]

48. Interview with Atty. Carmelita P. Yadao, Director III, Legal Affairs Service of the CHED (August 26, 2002) [hereinafter Yadao Interview].

49. Higher Education Act of 1994, § 12, provides:

> *The Technical Panels.* - The Commission shall reconstitute and/or organize technical panels for different disciplines/program areas. They shall assist the Commission in setting standards and in program and institution monitoring and evaluation. The technical panels shall be composed of senior specialists or academicians to be appointed by the Commission.

50. Yadao Interview, *supra* note 48.

51. Copies of these resolutions are annexed in the copy of the author's J.D. thesis on file with the Ateneo Professional Schools Library.

52. *See, e.g.*, Letter from Reynaldo T. Peña, Director of the Commission on Higher Education, to Rev. Fr. Jaime Belita C.M., President of the Adamson University informing him of the conduct of an assessment on the school's law program by the Technical Panel for Education (Oct. 16, 2001) (photocopy annexed in the copy of the author's J.D. thesis on file with the Ateneo Professional Schools Library).

The issue, therefore, is whether the CHED can lawfully continue exercising its regulatory powers over schools and colleges of law in the absence of duly appointed members to the Board. The position taken by PALS is that the CHED has no authority to exercise jurisdiction. The CHED, on the other hand, in implementing the law, believes that schools and colleges of law are included in the phrases "public and private institutions of higher education" as well as "degree-granting programs in all post-secondary educational institutions, public and private." This is pursuant to its mandate expressed in R.A. No. 7722 which created the CHED.[53] An examination, therefore, of the character of the two respective laws must be carried out, after which the acts of the CHED should be studied to determine if it is acting within its scope of authority.

A. *Special Law/General Law*

The Legal Education Reform Act is a special law, in that it deals particularly with regulation over schools and colleges of law. The title alone of the law is a clear indication of its special coverage. Such legislation is specifically aimed at creating a regulatory body to supervise and reform legal education by introducing improvements. On the other hand, the law creating the CHED is clearly a general law that deals with the supervision and regulation over all institutions beyond secondary schooling. The section on the creation and powers of the CHED, as discussed above, establishes the "general" character of the CHED's enabling law. Hence, reference is always made to "institutions of higher learning." Moreover, a perusal of the title suggests the generality of the legislation. Nowhere in the Higher Education Act of 1994 can one find a specific reference to schools of law. The general and special character of the respective laws becomes more evident upon a reading of both their corresponding texts in their entirety.

B. *Statutory Construction: Special Law prevails over a General Law*

It is a basic tenet in statutory construction that a general law, albeit later enacted, does not repeal a special law, because "the enactment of a later legislation which is a general law cannot be construed to have repealed a special law."[54] In addition, jurisprudence has pronounced the long-standing principle that, "a special provision or law prevails over a general one."[55] Clearly the two principles just recited are applicable to the present situation. There can be no implied repeal of the Legal Education Reform Act because it is not repugnant

53. Yadao Interview *supra* note 48.

54. Langkaan Realty Development, Inc. v. United Coconut Planters Bank, 347 SCRA 542, 558 (2000).

55. Bagong Alyansang Makabayan v. Zamora, 342 SCRA 449, 483 (2000); Leveriza v. IAC, 157 SCRA 282 (1988).

or repulsive to the Higher Education Act. The former distinctively covers a special branch of higher learning, namely legal education. All other institutions of higher learning are covered under the latter law. In any event, a long line of cases has held that implied repeals are not favored,[56] more so when the case involves a special and a general law.[57] More importantly, the Higher Education Act does not contain an express provision repealing the Legal Education Reform Act. Absent any express repeal, it is the inescapable conclusion that the Board is the sole body which should regulate colleges of law.

It is apparent that the CHED should refrain from any action that might intrude upon the power of the Board. Furthermore, there is no basis in law for the CHED to create technical panels that assess a particular law school's program and curriculum. The powers and functions of the CHED are spelled out clearly in its enabling law, in the same way as the very same powers and functions are laid down in the Legal Education Reform Act. While the CHED is mandated to generally promote development and introduce reforms in institutions of higher learning, the Board is tasked to do the same, particularly in the field of legal education. Undoubtedly, therefore, the CHED has jurisdiction over all institutions of higher learning except law schools.

C. *Vacuum created by the non-constitution of the Board?*

Concededly, the Board is not yet in existence, but does this fact give authority to the CHED to exercise supervision over law schools in the country? As a result of the persistent inaction by the Supreme Court, there exists at present, a vacuum in which no governmental body exists to regulate schools and colleges of law. Does the law so abhor a vacuum that the CHED can lawfully exercise the powers of the Board? It is the author's belief that the ensuing vacuum does not validate the actions of the CHED in usurping the powers of the Board.

In the case of *Vergara v. Sandiganbayan*,[58] the Supreme Court *en banc* faced a controversy involving the power of the Presidential Commission on Good Government (PCGG) to extend immunity to a party who turns state witness. The Sandiganbayan insisted that its power to examine the validity of the grant of immunity is plenary and thus empowers it to reverse the grant of

56. *See generally* De Jesus v. People, 120 SCRA 760 (1983); Philippine American Management Co. v. Philippine American Employees Association, 49 SCRA 194 (1973); Villegas v. Subido, 41 SCRA 190 (1971); Valdez v. Tuason, 40 Phil. 943 (1920).

57. *See* Valera v. Tuason, 80 Phil. 823 (1948); Lichauco & Co. v. Apostol, 44 Phil 138 (1922).

58. 231 SCRA 783 (1994).

immunity made by the PCGG by supplanting the latter's judgment. The High Court did not find merit in the contention of the Sandiganbayan when it ruled the following:

> We are not prepared to concede the correctness of this proposition. Neither the text nor the texture of E.O. No. 14, as amended, lends color to the suggested interpretation. Section 5 of E.O. No. 14, as amended, vests no such role in respondent court. In instances, where the intent is to endow courts of justice with the power to review and reverse tactical moves of the prosecution, the law confers the power in clear and certain language. Thus, under section 9 of Rule 119, the prosecution in the exercise of its discretion may tactically decide to discharge an accused to be a state witness but its decision is made subject to the approval of the court trying the case. It has to file a proper motion and the motion may be denied by the court if the prosecution fails to prove that it has satisfied the requirements of the rule on discharge of a witness.
>
> The rule is crafted as to leave no iota of doubt on the power of the court to interfere with the discretion of the prosecution on the matter. In the case at bench, E.O. 14, as amended, is eloquently silent with regard to the range and depth of the power of the respondent court to review the exercise of discretion by the PCGG granting a section 5 immunity. *This silence argues against the thesis that the respondent court has full and unlimited power to reverse PCGG's exercise of discretion granting a section 5 immunity. Legitimate power can not arise from a vacuum.*[59]

From the foregoing discussion by the Court, it is evident that the specific governing law was silent as to a situation where the Sandiganbayan could exercise the same powers enjoyed by the other courts of justice pursuant to Rule 119 of the Rules of Court. The law specifically governing the case was E.O. No. 14, Section 5, and not the general provisions found in Rule 119, Section 9. Therefore, despite the vacuum created by E.O. No. 14, the Court could not subscribe to the argument that the Sandiganbayan had similar broad powers expressed in Rule 119, section 9. Applying the doctrine laid down by the Court in the aforementioned case, it is clear that the vacuum created by the inaction of the Supreme Court cannot grant the regulatory powers and validate the CHED's actions. The CHED's persistence will not legitimize its actions, for "legitimate power can not arise from a vacuum."

Although there also exists the principle of *natura vacuum abhorret*,[60] such principle cannot be given primacy over the doctrine that legitimate power cannot arise from a vacuum. Generally, the principle that nature, as well as the law, abhors a vacuum applies when a law already implemented inadvertently creates the vacuum. When faced with such a controversy, courts

59. *Id.* (emphasis supplied).

60. Nature abhors a vacuum.

do not presume that the Congress intended such an absurd situation and will, therefore, construe the laws to avoid such a situation. To illustrate, in the case of *De Lagadameo v. La'O*,[61] the petitioner commenced guardianship proceedings with the Court of First Instance of Manila (CFI). Respondent therein opposed the petition on the ground that the CFI had no jurisdiction over the case, citing Section 1 of Republic Act No. 1401, which conferred upon the Juvenile and Domestic Relations Court "exclusive original jurisdiction to hear and decide...cases involving custody, guardianship, adoption, paternity and acknowledgment." The Supreme Court, in ruling for the petitioner, invoked Section 2 of the same law, which stated that "[u]pon the organization of the Juvenile and Domestic Relations Court, the Secretary of Justice shall cause all cases and proceedings pending before the municipal court and the court of first instance of Manila properly cognizable by the court herein created to be transferred thereto." Agreeing with the petitioner, the high court declared that the effect of Section 2 has been to defer the operation of the grant of authority, made in Section 1, in favor of the Juvenile and Domestic Relations Court, until the organization thereof. The Court went on to state:

> Indeed, otherwise, the result would be that, from September 9, 1955 to June 1, 1956, there would have been in Manila no judicial body competent to hear the cases specified in Section 1 of Republic Act No. 1401. We cannot assume that, in enacting the same, Congress intended to create such vacuum in the very capital of the Republic, where precisely the biggest number of said cases exist. *Such vacuum would surely be inimical to public interest and we must not assume that Congress intended to bring about such result. On the contrary, the assumption should be that, to avoid that result, Congress intended no such vacuum*, and, accordingly, meant the grant of jurisdiction to the Juvenile and Domestic Relations Court to be operative only upon the establishment or organization of that court.[62]

In the illustration above, the Court realized that the law, R.A. No. 1401, had created a vacuum when it transferred jurisdiction over guardianship proceedings to the Juvenile and Domestic Relations Court. The high tribunal construed the law in such a manner as to avoid the ensuing vacuum.

Another example of the law creating a vacuum is the case of *Santiago v. Ramos*.[63] In this case, petitioner Santiago had filed an election protest with the Presidential Electoral Tribunal, and while the protest was pending, she ran and was elected in 1995 to serve as Senator of the Republic of the Philippines. The majority opinion held that Santiago was deemed to have

61. 12 SCRA 626 (1964).

62. *De Lagadameo*, 12 SCRA at 627-28 (emphasis supplied).

63. 253 SCRA 559 (1996).

abandoned her protest for having been elected as Senator. According to the majority, Santiago entered into a political contract with the electorate that if elected, she would assume the office of Senator, discharge its functions and serve her constituency as such for the term for which she was elected. In his concurring opinion, Justice Padilla, in no uncertain terms, echoed the sentiments of the majority stating that allowing Santiago to pursue the protest would create a vacuum in the office of Senator. If Santiago emerged victorious in her protest, she would be forced to vacate her office of Senator and assume the Presidency.

> There would likewise be a void, a hiatus or vacuum in her term of office as Senator from the time she assumes the presidency to 30 June 1998 (assuming she were to win the present protest). Thus, by continuing this protest, there could result an ensuing vacuum in the office of Senator, to which position protestant has been duly elected subsequent to the filing of her present protest. And yet, *natura vacuum abhorret*.[64]

Once again the Court adopted a particular interpretation of the laws to avoid a vacuum created by the same laws.

The present case must be distinguished from the cases of *La'O* and *Santiago* where the vacuum ensued as a result of laws already implemented. The reason for not applying the principle is precisely on the basis that an implemented law did not create the vacuum. What is involved in the present controversy is a law that has never been implemented. The vacuum is a creation of the Judiciary because of the Supreme Court's inaction.

There is more reason to state that the acts of the CHED cannot be regarded as lawful. The Civil Code states, "violation or non-observance [of the law] shall not be excused by disuse, or custom or practice to the contrary."[65] Despite the lack of implementation of the Legal Education Reform Act, the same must not be violated by the CHED.

Having determined that the CHED cannot exercise the supervisory role granted to the Board, the next issue that must be resolved is that concerning the implementation of the law. The principle of separation of powers states that it is the executive arm of government which possesses the power to implement or execute laws.[66] However, the law is phrased in a manner whereby the Judiciary must perform an act that is necessary to the implementation of the law. Is there now a violation of the separation of powers doctrine?

64. *Santiago*, 253 SCRA at 586 (Padilla, J., dissenting).

65. Republic Act No. 386 [CIVIL CODE] art. 7.

66. PHIL. CONST. art. II, § 17, which provides: "The President shall have control of all the executive departments, bureaus and offices. He shall ensure that the laws be faithfully executed."

IV. SEPARATION OF POWERS

A. Underpinnings

Most consider the French philosopher Charles Louis de Secondat Baron de Montesquieu as the author of the doctrine of separation of powers and the system of checks and balances.[67] The founding fathers of the United States of America repeatedly cite his work *Spirit of the Laws* as the authority on the issue. Madison himself proclaimed, "the oracle who is always consulted and cited on this subject is the celebrated Montesquieu." Nevertheless, while Montesquieu may have presented the framers of the Constitution with the principle of separation of powers, he borrowed too heavily from Polybius and the ancient theory of the mixed constitution to be credited accurately as its originator.[68]

Polybius believed that Republican Rome established a mixed constitution, a single state with elements of all three forms of government at once— monarchy (in the form of its executives, the consuls), aristocracy (as represented by the Senate), and democracy (in the form of the popular assemblies, such as the *Comitia Centuriata*). In the Roman mixed constitution, each of the three branches of government checked the strengths and balanced the weaknesses of the other two. Since absolute rule rested in no single body but rather was shared among the three, the corrupting influence of unchecked power was abated.[69]

Polybius, however, was not the sole proponent of mixed government. Plato, Aristotle and Cicero all stressed the supremacy of a mixed constitution and the need for separation of powers within the government.

Similar to the Romans, the Americans found separation of powers within a mixed constitution. The framers of the 1987 Constitution, in turn, borrowed heavily from the United States Constitution. Thus, the discussion hereunder will necessitate the aid of both Philippine and American jurisprudence on the basis that the provisions relating to the principle of separation of powers are derived from the United States Constitution.[70]

67. RUFUS RODRIGUEZ, INTRODUCTION TO LAW 19 (2001).

68. Marshall Davies Lloyd, *Polybius and the Founding Fathers: the Separation of Powers, available at* http://www.sms.org/mdl-indx/polybius/intro.htm (last accessed on July 1, 2002).

69. *Id.*

70. *See generally* Arnault v. Nazareno, 87 Phil. 29 (1950). Decision penned by Justice Ozaeta stated that the Court therein relied on American precedents to support the decision because the Philippine form of government was patterned after the American system.

B. Introduction

> *The reasons on which Montesquieu grounds his maxim are further demonstration of his meaning. "When the legislative and executive powers are united in the same person or body ... there can be no liberty, because apprehensions may arise lest THE SAME monarch or senate should ENACT tyrannical laws to EXECUTE them in a tyrannical manner .... Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for THE JUDGE would then be THE LEGISLATOR. Were it joined to the executive power, THE JUDGE might behave with all the violence of AN OPPRESSOR."*
>
> *-James Madison*[71]

The principle of separation of powers is an essential component in a presidential system of government. The Constitution does not provide a definition for this concept; the division of government into three branches is what gives life to it. Authorities in Constitutional Law such as Fr. Joaquin Bernas, S.J., have attempted to define it, however. According to Fr. Bernas, separation of powers essentially means that legislation belongs to Congress, execution of laws to the Executive, settlement of legal controversies to the Judiciary. One branch of government is not allowed to invade the domain of another.[72] Jurisprudence has attempted to provide an understanding of the principle:

> Under our constitutional system, the powers of government are distributed among three co-ordinate and substantially independent organs: the legislative, the executive and the judiciary. Each of these departments of the government derives its authority from the Constitution, which, in turn, is the highest expression of the popular will.[73]

In another case, the Court has held that:

> [T]he principle of separation of powers — characteristic of the presidential system of government — the functions of which are classified or divided, by reason of their nature, into three categories, namely, 1) those involving the making of laws, which are allocated to the legislative department; 2) those concerning mainly with the enforcement of such laws and of judicial decisions applying and/or interpreting the same, which belong to the executive department; and 3) those dealing with the settlement of disputes, controversies or conflicts involving rights, duties or prerogatives that are legally demandable and enforceable, which are apportioned to courts of justice. Within its own sphere — but only within such sphere — each department is supreme and independent of the others, and each is devoid of authority not only to encroach upon the powers or filed of action assigned to any of the other departments,

71. THE FEDERALIST NO. 47, 329.

72. JOAQUIN G. BERNAS, S.J., THE 1987 CONSTITUTION OF THE PHILIPPINES: A COMMENTARY 603 (1996 ed.).

73. People v. Vera, 65 Phil. 56 (1937).

> but also to inquire into or pass upon the advisability or wisdom of the acts performed, measures taken or decisions made by the other departments — provided that such acts, measures or decisions are within the area allocated thereto by the Constitution.[74]

Furthermore:

> From this cardinal postulate, it follows that the three branches of 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 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.[75]

Therefore, recognition that each department of government should be given exclusive control within its realm is a cornerstone of the presidential system of government.[76] However, a system of "checks and balances" is also in place to prevent an unbridled exercise of power by any department. The effect of checks and balances is that no one branch is able to act without the cooperation of at least one of the other departments.[77] To illustrate the twin principles of separation of powers and checks and balances, Fr. Bernas provides the following example:

> Thus, for instance, legislation needs the final approval of the President; the President cannot act against laws passed by Congress and must obtain concurrence of Congress to complete certain significant acts; money can be released from the treasury only by authority of Congress. The Supreme Court can declare acts of Congress or of the President unconstitutional.[78]

The system of checks and balances was patterned after that of the United States Constitution. The concept afforded an essential safeguard against tyranny: "The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power."[79] In the same manner, the framers of the Philippine Constitution, aware of the history of the U.S. Constitution, sought to evade the evil brought about by tyranny. However, by ensuring such a system, the people also faced the drawback that inefficiency might sneak into the government. The case of *Myers v. United States*[80] is instructive on this point.

74. Javellana v. Executive Secretary, 50 SCRA 30, 84, 87, (1973).
75. Bengzon v. Drilon, 208 SCRA 133, 142 (1992).
76. Angara v. Electoral Commission, 63 Phil. 139 (1936).
77. BERNAS, *supra* note 72, at 603.
78. *Id.*
79. Jonathan L. Entin, *Separation of Powers, the Political Branches, and the Limits of Judicial Review*, 51 OHIO ST. L.J. 175, 178 (1990).
80. 272 U.S. 52 (1926).

The United States Supreme Court stated that, "[t]he doctrine of separation of powers was adopted...not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of governmental powers among the three departments, to save the people from autocracy."[81]

To achieve the abovementioned purposes, it is not necessary, however, to apply the principle with "pedantic rigor."[82] In the case of *Planas v. Gil*,[83] the eminent Justice Laurel referred to the inherent interdependence rather than independence among the powers of government:

> The classical separation of governmental powers, whether viewed in the light of the political philosophy of Aristotle, Locke, or Montesquieu, or of the postulations of Mabini, Madison, or Jefferson, is a relative theory of government. *There is more truism and actuality in interdependence than in independence and separation of powers*, for as observed by Justice Holmes in a case of Philippine origin, we cannot lay down "with mathematical precision and divide the branches into watertight compartments" not only because "the great ordinances of the Constitution do not establish and divide fields of black and white" but also because "even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other."[84]

Former Supreme Court Justice Isagani Cruz, echoed such sentiment when he stated that "[w]hile it is desirable that there be a certain degree of independence among the several constitutional agencies, it is not in public interest for them to deal with each other at arms' length or with a hostile jealousy of their respective rights as this might result in frustration of the common objectives of the government."[85] American President Franklin D. Roosevelt appropriately described the interrelation of the principles of separation of powers and checks and balances maintaining that "[t]he letter of the Constitution wisely declared a separation, but the impulse of common purpose declares a union."[86] Chief Justice Fernando added that "never was

81. Entin, *supra* note 79, at 293.
82. Luzon Stevedoring Corp. v. Social Security Commission, 34 SCRA 178, 184 (1970). *See also* Samar Mining Co., Inc. v. Workmen's Compensation Commission, 38 SCRA 337, 348 (1971) (Fernando, J., concurring). Justice Fernando stated that the decision therein exemplified the traditional flexibility associated with the principle of separation of powers, which must not be enforced with pedantic rigor.
83. 67 Phil. 62 (1939).
84. *Id.* at 73-74 (citing Springer v. Government, 277 U. S. 189; 72 Law. Ed. 845, 852 (1928)).
85. ISAGANI CRUZ, CONSTITUTIONAL LAW 71 (1995 ed.).
86. *Id.*

such a principle followed with rigidity oblivious of considerations that preclude an inflexible adherence to the apparent dictates of its logic."[87]

Not surprising, therefore, is the existence of situations when powers are not limited to one branch of government. Such situations are called "blending of powers." Powers of the three great branches are not compartmentalized in clear-cut divisions. Borne out of necessity, there exists the situation where powers are conferred upon more than one branch in order that each concerned will collaborate in a more efficient manner, and in the process check each other for the public good.[88] Justice Cruz provides three illustrations of the "blending of powers:"

> An illustration of such coordination is the enactment of the general appropriations law, which begins with the preparation by the President of the budget, which becomes the basis of the bill adopted by Congress and subsequently submitted to the President, who may then approve it. Another is the grant of amnesty by the President which requires the concurrence of a majority of all the members of the Congress. To take a third example, the Commission on Elections does not alone deputize law-enforcement agencies and instrumentalities of the government for the purpose of ensuring free, orderly and honest elections but does so with the consent of the President.[89]

C. *The 1935 Philippine Constitution*

The kindred principles of separation of powers and checks and balances seemingly made its Philippine appearance in the 1935 Constitution. Having as its basis the United States Constitution, the provisions of the 1935 Constitution concerning the same were similar to the former. The provisions with respect to the three branches read in the following manner:

> The Legislative power shall be vested in a Congress of the Philippines which shall consist of a Senate and a House of Representatives.[90]

> The Executive power shall be vested in a President of the Philippines.[91]

> The Judicial power shall be vested in one Supreme Court and in such inferior courts as may be established by law.[92]

87. ENRIQUE M. FERNANDO, THE CONSTITUTION OF THE PHILIPPINES 156 (2d ed. 1974).
88. *Id.*
89. CRUZ, *supra* note , at 72-73.
90. 1935 PHIL. CONST. art. VI, §1.
91. 1935 PHIL. CONST. art. VII, §1.
92. 1935 PHIL. CONST. art. VIII, §1.

Justice Laurel, one of the framers of the 1935 Constitution, envisioned the principle of separation of powers as part of the system of government about to be created:

> The separation of powers is a fundamental principle in our system of government. It obtains not through express provision but by actual division in our Constitution. Each department of the Government has exclusive cognizance of matters within its jurisdiction and supreme within its own sphere. But this does not follow from the fact that the three powers are to be kept separate and distinct that the Constitution intended them to be absolutely unrestrained and independent of each other. The Constitution has provided for an elaborate system of checks and balances to secure coordination in the workings of the various departments of the Government.[93]

The principle, however, was in place prior to the 1935 Constitution. This was recognized by the Supreme Court in the case of *United States v. Ang Tang Ho*:[94]

> By the organic law of the Philippine Islands and the Constitution of the United States, all powers are vested in the Legislature, Executive and Judiciary. It is the duty of the Legislature to make the law; of the Executive to execute; and of the Judiciary to construe the law. The Legislature has no authority to execute or construe the law; the Executive has no authority to make or construe the law; and the judiciary has no power to make or execute the law.[95]

D. *The 1973 Constitution*

With the proclamation of Martial Law, the system of government in the Philippines took a dramatic turn when then President Marcos sought to merge the powers of the legislative and executive. Under the 1973 Constitution a semi-parliamentary form of government replaced the presidential form created by the previous Constitution.[96] The semi-parliamentary form weakened the Legislature, subordinating the same in many respects to the President. Such was the power of the President over the Legislature, that the former had the power to dissolve the latter at its option.[97]

In spite of the change in the form of government, a modified principle of separation of powers, nevertheless, existed.

93. Angara v. Electoral Commission, 63 Phil. 149, 156 (1936).
94. 43 Phil. 1 (1922).
95. *Id.* at 6.
96. CRUZ, *supra* note 84, at 70.
97. *Id.*

The doctrine of separation of powers still exists under the 1973 Constitution though in a modified form made necessary because of the adoption of certain aspects of the parliamentary system in the amended 1973 Constitution. The major powers of the Government have been distributed by the Constitution to the President, who is the head of the State and chief executive of the Republic, the Batasan Pambansa and the Judiciary. Under the doctrine of separation of powers as interpreted by the decisions of this Court, mandamus will not lie from one branch of the government to a coordinate branch to compel performance of duties within the latter's sphere of responsibility.[98]

E. *The 1987 Constitution*

After the EDSA Revolution, a Constitutional Commission was tasked to draft a new Constitution. The parliamentary system of government was transformed once again into a presidential system, thereby reinstating a true separation of powers among the three branches of government.

The 1987 Constitution has fully restored the separation of powers of the three great branches of government. To recall the words of Justice Laurel in Angara v. Electoral Commission, "the Constitution has blocked but with deft strokes and in bold lines, allotment of power to the executive, the legislative and the judicial departments of the government." Thus, the 1987 Constitution explicitly provides that "[t]he legislative power shall be vested in the Congress of the Philippines," "[t]he executive power shall be vested in the President of the Philippines," and "[t]he judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law."

These provisions not only establish a separation of powers by actual division but also confer plenary legislative, executive and judicial powers subject only to limitations provided in the Constitution. For as the Supreme Court in Ocampo v. Cabangis pointed out "a grant of the legislative power means a grant of all legislative power; and a grant of the judicial power means a grant of all the judicial power which may be exercised under the government."[99]

Accordingly, the present Constitution provides that, "[t]he legislative power shall be vested in the Congress of the Philippines which shall consist of a Senate and a House of Representatives, except to the extent reserved to the people by the provision on initiative and referendum,"[100] "[t]he executive power shall be vested in the President of the Philippines"[101] and "[t]he judicial

98. Romulo v. Yniguez, 141 SCRA 263, 269 (1986) (citing Resolution promulgated September 3, 1985) (emphasis supplied).

99. Marcos v. Manglapus, 177 SCRA 668, 688-89 (1989) (citations omitted).

100. PHIL. CONST. art. VI, § 1.

101. PHIL. CONST. art. VII, § 1.

power shall be vested in one Supreme Court and in such lower courts as may be established by law."[102]

V. THE POWERS OF THE THREE BRANCHES

A. *Legislative Branch*

Congress derives its authority directly from the people.[103] Article VI, Section 1 of the 1987 Constitution provides that the legislative power shall be vested in Congress. The question though is what exactly is legislative power? A discussion of the duties and powers of Congress had been presented in the early case of *Government v. Springer*[104] where the ponente, distinguished Justice Malcolm, made the following observations:

Judge Cooley says he understands it "to be authority, under the constitution, to make laws, and to alter and repeal them." President Wilson in his authoritative work, "The State," emphasizes by italics that legislatures "are *law making bodies* acting within the gifts of charters, and are by these charters in most cases very strictly circumscribed in their action." The Philippine Legislature may nevertheless exercise such auxiliary powers as are necessary and appropriate to its independence and to make its express powers effective.[105]

Furthermore, the essence of legislative function is to determine legislative policy, formulate and promulgate the same, as a defined and binding rule of conduct. Legislative power has also been described as the vital function which animates, directs, and controls the whole operation of civil authority; it is the most important of all the powers of government, being that in which the supremacy of the government itself consists.[106]

B. *Executive Branch*

The Executive power is lodged with the President of the Philippines.[107] Essentially, the Executive department is tasked with the duty to execute laws. With the obligation to carry laws into effect, it has been said that Executive power is more limited than legislative power, because the latter can stipulate what actions Executive officers shall or shall not perform.[108] In the Philippines,

102. PHIL. CONST. art. VIII, § 1.

103. Barcelona v. Baker, 5 Phil. 87 (1905).

104. 50 Phil. 259 (1927).

105. *Id.* at 276 (*citing* COOLEY, CONSTITUTIONAL LIMITATIONS (7th ed. 1927)).

106. 16 AM. JUR. 2D *Constitutional Law* § 318 (1979).

107. PHIL. CONST. art. VII, § 1.

108. 16 AM. JUR. 2D *Constitutional Law* § 303 (1979).

the Supreme Court had the occasion to discuss the extent of Executive power when it was faced with the issue of whether the powers of the President were limited to what the Constitution enumerated. The lengthy, yet exhaustive, discussion by Justice Cortez provides greater insight as to the true power of the Executive:

> As stated above, the Constitution provides that "[t]he executive power shall be vested in the President of the Philippines." However, it does not define what is meant by "executive power" although in the same article it touches on the exercise of certain powers by the President, i.e., the power of control over all executive departments, bureaus and offices, the power to execute the laws, the appointing power, the powers under the commander-in-chief clause, the power to grant reprieves, commutations and pardons, the power to grant amnesty with the concurrence of Congress, the power to contract or guarantee foreign loans, the power to enter into treaties or international agreements, the power to submit the budget to Congress, and the power to address Congress.
>
> *The inevitable question then arises: by enumerating certain powers of the President did the framers of the Constitution intend that the President shall exercise those specific powers and no other? Are these enumerated powers the breadth and scope of "executive power?"*
>
> We do not say that the presidency is what Mrs. Aquino says it is or what she does but, rather, that the consideration of tradition and the development of presidential power under the different constitutions are essential for a complete understanding of the extent of and limitations to the President's powers under the 1987 Constitution. The 1935 Constitution created a strong President with explicitly broader powers than the U.S. President. The 1973 Constitution attempted to modify the system of government into the parliamentary type, with the President as a mere figurehead, but through numerous amendments, the President became even more powerful, to the point that he was also the *de facto* Legislature. The 1987 Constitution, however, brought back the presidential system of government and restored the separation of legislative, executive and judicial powers by their actual distribution among three distinct branches of government with provision for checks and balances.
>
> *It would not be accurate, however, to state that "executive power" is the power to enforce the laws, for the President is head of state as well as head of government and whatever powers inhere in such positions pertain to the office unless the Constitution itself withholds it. Furthermore, the Constitution itself provides that the execution of the laws is only one of the powers of the President. It also grants the President other powers that do not involve the execution of any provision of law, e.g., his power over the country's foreign relations.*
>
> On these premises, we hold the view that although the 1987 Constitution imposes limitations on the exercise of specific powers of the President, it maintains intact what is traditionally considered as within the scope of "executive power." *Corollarily, the powers of the President cannot be said to be limited only to the specific powers enumerated in the Constitution. In other words, executive power is more than the sum of specific powers so enumerated.*[109]

C. *Judicial Branch*

The authority to hear and settle disputes concerning rights and duties between persons or between government and private individuals is referred to as judicial power. Particularly, it has been described as the authority to determine the rights of persons or property by arbitrating between adversaries in specific controversies at the instance of a party thereto; the authority exercised by that department of government which is charged with the declaration of what the law is and its construction so far as it is written law; the authority vested in some court, officer or persons to hear and determine when the rights of persons or property or the propriety of doing an act is the subject matter of adjudication; the power conferred upon a public officer, involving the exercise of judgment and discretion in the determination of questions of right in specific cases affecting the interest of persons or property, as distinguished from ministerial power or authority to carry out mandates of judicial power or the law; the power exercised by courts in hearing and determining cases before them, or some matter incidental thereto, and of which they have jurisdiction; the power of a court to decide and pronounce a judgment; the power which adjudicates upon and protects the rights and interests of individual citizens, and to that end construes and applies the law.[110] Philippine Jurisprudence similarly defines it as, "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 violation of rights."[111] Judicial power implies the construction of laws and adjudication of legal rights. It includes the power to hear and determine, but not everyone who may hear and determine is imbued with judicial power. The term "judicial power" does not necessarily include the power to hear and determine a matter that is not in the nature of a suit or action between the parties.[112]

The power of the judicial branch in the Philippines, which includes the Supreme Court and all other inferior courts, is granted by the Constitution. Judicial power, as worded in the Constitution, is explained in Section 1, Article VIII:

> Section 1. The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.

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109. *Marcos*, 177 SCRA at 689-92 (emphasis supplied) (citations omitted).

110. Jose Agaton R. Sibal, *The Power of Judicial Review*, 148 SCRA 219, 221 (1987).

111. Lopez v. Roxas, 17 SCRA 756, 761 (1966).

112. Santiago v. Bautista, 32 SCRA 189 (1970).

> 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.[113]

The first paragraph is a representation of the traditional concept of judicial power which involves the settlement of conflicting rights as conferred by law.[114]

The second paragraph of the foregoing provision made its debut in the 1987 Constitution. The insertion results in the broadening of the powers of the courts because it enabled the same to review what was previously impermissible, that is, the discretion of the political departments of the government.[115]

Unlike or previous constitutions, the 1987 Constitution is explicit in defining the scope of judicial power. The present Constitution now fortifies the authority of the courts to determine in an appropriate action the validity of the acts of the political departments. It speaks of judicial prerogative in terms of duty, *viz*:

> Judicial power includes the duty of the court 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.[116]

Explaining the above-quoted clause, former Chief Justice Concepcion, who was a member of the 1986 Constitutional Commission, said in part:

> [T]he powers of government are generally considered [to be] divided into three branches: the Legislative, the Executive and the Judiciary. Each one is supreme within its own sphere and independent of the others. Because of that supremacy, [the] power to determine whether a given law is valid or not is vested in courts of justice.
>
> 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.*

113. PHIL. CONST. art. VIII, § 1.

114. CRUZ, *supra* note 85, at 232.

115. *Id.*

116. Santiago v. Guingona, 298 SCRA 756, 774 (1998).

> 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.[117]

What is grave abuse of discretion has already been resolved by jurisprudence:

> By grave abuse of discretion is meant such capricious and whimsical exercise of judgment as is equivalent to lack or jurisdiction. The abuse of discretion must be patent and gross as to amount to an evasion of a positive duty or a virtual refusal to perform a duty enjoined by law, or to act at all in contemplation of law, as where the power is exercised in an arbitrary and despotic manner by reason of passion or hostility.[118]

Fr. Bernas, however, pointed out that the introduction of the second paragraph did not do away with the political question doctrine.[119]

Apart from Section 1 of Article VIII of the Constitution, the same article enumerates other powers of the Supreme Court:

> Section 5. The Supreme Court shall have the following powers:
>
> (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.

Section 5 provides the Supreme Court with auxiliary powers[120] which are incidental to its judicial functions stated in Section 1 of Article VIII. Accordingly, the Court has the sole prerogative to draft binding rules concerning admission to the practice of law.

117. *Santiago*, 298 SCRA at 783 (emphasis supplied).

118. Sinon v. Civil Service Commission, 215 SCRA 410, 416-17 (1992).

119. BERNAS, *supra* note 72, at 831. *See also* Bengzon v. Senate Blue Ribbon Committee 203 SCRA 767, 776 (1991).

120. *See* JOAQUIN G. BERNAS, S.J., THE 1987 PHILIPPINE CONSTITUTION: A COMMENTARY Ch. 5 (2d ed. 2002).

D. "Formalists" v. "Functionalists"

Debates over the subject of the doctrine of séparation of powers have created two groups—the formalists and the functionalists. Ara Lovitt describes the modern debate between the two groups in the following manner:

> Formalists are guided almost exclusively by textual arguments. They focus primarily on the first sentence of each of the first three Articles of the Constitution, which respectively grant "all legislative" powers to the Congress, "the executive power" to the President, and "the judicial power" to the Supreme and lower courts. *According to formalists, these clauses vest each type of federal power exclusively in one of the three branches of government—that is, there are no legitimate shared or overlapping powers except where explicitly laid out elsewhere in the Constitution's text.* And while formalists will concede that there may be genuine dispute over whether or not a particular power is, for example, "executive," once it has been characterized as executive, then formalists contend that it must only be exercised by the President himself, or by someone under his exclusive control.
>
> *In contrast, functionalists reject this categorical view of the federal government. To a functionalist, deviations from the strict separation of powers are legitimate, perhaps always, but at least when justified by some form of interest balancing. [F]unctionalists are united in opposing to the principle that every exercise of federal power that can appropriately be characterized as "executive" must be exercised only and unconditionally by the President or his direct subordinates.* [121]

Thus, Lovitt distinguishes the two groups based on the view of each with respect to the powers of the three branches of government and their respective limits. "Formalist" precepts consider legislative, executive, and judicial powers, which mark the proper domains of their respective branches, to be readily identifiable. Once granted to a particular branch, the other two branches are precluded from exercising the power.

On the other side of the spectrum lies the "functionalist" approach. This group advocates the belief that the branches of government can legitimately share powers, especially when required to balance competing interests. The functional approach acknowledges, nevertheless, that the Constitution sets forth certain fundamental boundaries among the three branches. Discussing further the effects of the debate, Lovitt explains that the United States Supreme Court has, through its decisions, leaned towards the view espoused by the functionalists.

> Whichever side of this debate has the upper hand, the controversy has been rendered largely academic by a series of Supreme Court decisions that appear decisively to reject the strict formalist approach. In particular, Morrison v. Olson and Mistretta v. United States are the two most recent cases to reject the formalist conception of the separation of powers. Both cases upheld deviations from the formal separation of powers, both opinions justified those deviations by pragmatic balancing, and both cases were decided by lop-sided majorities. As one believer in the formalist model described, these opinions are "nail[s] in the coffin of a rigorous view of the separation of powers." It, therefore, seems extremely unlikely that in the near future the Supreme Court will ever adopt a purely formalist approach grounded entirely in the Constitution's text. Instead, formalists will have their views heeded—outside of academia—only if they yield at least some ground in this debate.[122]

121. Ara Lovitt, Note, *Fight for your Right to Litigate: Qui Tam, Article II, and the President*, 49 STAN. L. REV. 853, 865 (1997) (emphasis supplied).

The Philippine Supreme Court similarly accepts the functionalist principles, as will be discussed in the succeeding portion of this essay.[123]

V. CONSTITUTIONALITY OF THE LEGAL REFORM EDUCATION ACT

> *While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.*
>
> *- Justice Jackson*[124]

A. Interdependence

The Philippine Supreme Court, from decisions to be discussed in the succeeding portions, has embraced functionalist's precepts and has rejected the rigid formalist view in interpreting the division of powers among the branches of government. Reinforcing the functionalist principles is the idea presented by Justice Isagani Cruz of the "blending of powers" among the three branches. The "blending of powers" is not an antithesis to the principle of separation of powers. In the United States, from which the Philippine Constitution has been patterned, it has been opined that it does not necessarily follow that an entire and complete separation is either desirable or was ever intended.[125] As a consequence, despite the demarcations among the departments, there lies difficulty in determining the point where the power of one department ends and the other begins. There is recognition among the best modern writers on political science that it is practically impossible to define distinctly the line of demarcation between the branches of

122. *Id.* at 866 (citations omitted) (emphasis supplied).

123. Part VI discusses cases decided by the Philippine Supreme Court which espouse the idea of interdependence among the three branches of government.

124. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring in the judgment).

125. 16 AM. JUR. 2D *Constitutional Law* §299 (1979).

government.[126] Thus, American courts and authorities have come to the conclusion that the modern view of separation of powers rejects the metaphysical abstractions and revert instead to a more pragmatic, flexible, functional approach, giving recognition to the fact that there may be a certain degree of blending or admixture of the three powers of government.[127] In addition, it is the opinion of U.S. courts that the doctrine of separation of powers has never been strictly or rigidly applied, and indeed could not be, to all the ramifications of state or national governments. Government would prove abortive if it were attempted to follow the policy of separation to the letter.[128] Accordingly, decisions of American courts have laid down guidelines to determine the propriety or impropriety of acts of the different branches of government:

> The correct principle deducible from the better-reasoned cases dealing with the separation of powers seems to be that even the primary function of any of the three departments may be exercised by any other governmental department or agency so long as (1) the exercise thereof is incidental or subsidiary to a function or power otherwise properly exercised by such department or agency, and (2) the department to which the function so exercised is primary retains some sort of ultimate control over its exercise, as by court review in the case of the exercise of a power judicial in nature.[129]

Thus, there are several instances where there is a legitimate sharing or blending of powers. In the case of the Executive branch, its prosecutors are mandated to conduct a preliminary investigation as a consequence of the necessary collaboration by the different branches. The Executive department, through its prosecutors, makes a preliminary determination of which cases shall be prosecuted before the courts. To ascertain which cases shall be brought to trial, it is indispensable that prosecutors perform a judicial function in the form of a preliminary investigation, which requires the application and construction of the applicable laws to a given controversy. Without action on the part of the prosecutors, no case will ever be prosecuted by the Executive. Through such acts, the Executive department can carry out its mandate to ensure the faithful execution of laws. Even in the determination of the probable cause for the issuance of an arrest warrant, a function which is essentially judicial,[130] the judge can rely on a report of the prosecutor to determine the

126. *Id.* §297.

127. *Id.* §299.

128. *Id.*

129. *Id.* (emphasis supplied).

130. PHIL. CONST. art. III, §2, provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures of whatever nature and for any purpose shall be inviolable, and no search warrant or

same.[131] On the other hand, the Judiciary has rulemaking powers, similar to Executive agencies, to implement laws enacted by the Congress. Executive agencies, in turn, exercise quasi-judicial functions to settle matters which require their respective expertise.

B. *Judicial Functions*

Several cases decided by the Supreme Court of the Philippines are of proper application to the issue at hand. These challenges have afforded the Supreme Court the opportunity to clarify the appropriate division and blending of functions among the branches, particularly with respect to the power of the Judiciary. Moreover, these cases have given the Supreme Court the opportunity to illustrate the aforementioned guidelines enunciated by United States courts and authorities.

1. Santiago v. Bautista

One case that stands out in the forefront is the case entitled *Santiago v. Bautista.*[132] The dispute involved a set of disgruntled parents who wanted their son's academic achievement in grade school to be recognized properly by the school in its commencement exercises. The parents of the pupil, Teodoro Santiago, claimed that the "Committee On The Rating Of Students For Honor," constituted for the purpose of selecting the "honor students" of the graduating class, had committed grave abuse of discretion in giving their child a rank of "Third Honors." The Court of First Instance dismissed the case filed by Santiago, Jr.'s parents, but the latter appealed to the Supreme Court. The high tribunal narrowed the issues to a single issue: Did the "Committee On the Rating Of Students For Honor" fall within the category of the tribunal board, or officer exercising judicial functions contemplated by Rule 65? Answering in the negative, Justice Barredo at the outset cited cases decided by the United States courts to elucidate the phrase "judicial functions:"

> In this jurisdiction *certiorari* is a special civil action instituted against "any tribunal, board, or officer exercising judicial functions." *A judicial function is an act performed*

> warrant of arrest shall issue except upon probable cause to be determined personally by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched and the persons or things to be seized.

131. *See* Soliven v. Makasiar, 167 SCRA 393 (1988).

132. 32 SCRA 188 (1970).

by virtue of judicial powers; the exercise of a judicial function is the doing of something in the nature of the action of the court.[133]

[T]he distinction between legislative or ministerial functions and judicial functions is difficult to point out. What is a judicial function does not depend solely upon the mental operation by which it is performed or the importance of the act. In solving this question, due regard must be had to the organic law of the state and the division of power of government. *In the discharge of executive and legislative duties, the exercise of discretion and judgment of the highest order is necessary, and matters of the greatest weight and importance are dealt with. It is not enough to make a function judicial that it requires discretion, deliberation, thought, and judgment. It must be the exercise of discretion and judgment within the subdivision of the sovereign power which belongs to the judiciary, or, at least, which does not belong to the legislative or executive department. If the matter, in respect to which it is exercised, belongs to either of the two last-named departments of government, it is not judicial. As to what is judicial and what is not seems to be better indicated by the nature of a thing, than its definition.*[134]

The precise line of demarcation between what are judicial and what are administrative or ministerial functions is often difficult to determine. The exercise of judicial functions may involve the performance of legislative or administrative duties, and the performance of administrative or ministerial duties, may, in a measure, involve the exercise of judicial functions.[135]

The Court, therefore, was unanimous in stating that judicial functions are determined by the nature of the act and the body exercising the particular function. What would characterize a function as judicial would necessarily demand that it be exercised by a body belonging to the Judiciary. It, however, would not be improbable, according to the Court, that a branch other than the Judiciary could validly exercise an act, which by nature involves judicial functions. The Court, recognizing the blurred division of powers, admitted that it in practice, there is a valid blending or sharing of powers.

C. Impermissible Delegation (Imposition of non-judicial functions on judicial officers)

There have also been occasions when a law enacted by the Legislature has delegated to the Judiciary the performance of additional functions outside of its judicial scope and without relation to its primary function, and which

133. *Id.* at 195 (citing *In re* Saline County Subscription, 100 Am. Dec. 337, 338, *cited in* Southeastern Greyhound Lines v. Georgia Public Service Commission, 181 S. E. 836-37 (1935)) (emphasis supplied) (citations omitted).

134. *Id.* at 197 (citing Whealing & Elm Grove Railroad Co. Appt. v. Town of Philadelphia, et al., 4 L.R.A. (N. S.), 321, 328-29 (emphasis supplied)).

135. *Id.* (citing State *ex rel.* Board of Commrs. vs. Dunn, 86 Minn. 301, 304) (emphasis supplied) (citations omitted).

were argued as being violative of the principle of separation of powers. These controversies afforded the Supreme Court opportunities to enlighten the public of the functionalist view on the separation of powers.

1. Manila Electric Co. v. Pasay Transportation Co.

As early as 1932 in the case of *Manila Electric Co. v. Pasay Transportation Co.*,[136] the high tribunal was faced with a controversy where a law contained a provision allegedly repugnant to the separation of powers. Such legislation stated in part:

> Whenever any franchise or right of way is granted to any other person or corporation, now or hereafter in existence, over portions of the lines and tracks of the grantee herein, the terms on which said other person or corporation shall use such right of way, and the compensation to be paid to the grantee herein by such other person or corporation for said use, *shall be fixed by the members of the Supreme Court, sitting as a board of arbitrators, the decision of a majority of whom shall be final.*[137]

The Court declared the aforementioned provision as being unconstitutional in the ensuing manner:

> The Supreme Court of the Philippine Islands represents one of the three divisions of power in our government. It is judicial power and judicial power only which is exercised by the Supreme Court. Just as the Supreme Court, as the guardian of constitutional rights, should not sanction usurpations by any other department of the government, so should it as strictly confine its own sphere of influence to the powers expressly or by implication conferred on it by the Organic Act. The Supreme Court and its members should not and cannot be required to exercise any power or to perform any trust or to assume any duty not pertaining to or connected with the administering of judicial functions.
>
> Confining the decision to the basic question at issue, the Supreme Court holds that section 11 of Act No. 1446 contravenes the maxims which guide the operation of a democratic government constitutionally established, and that it would be improper and illegal for the members of the Supreme Court, sitting as a board of arbitrators, the decision of a majority of whom shall be final, to act on the petition of the Manila Electric Company. As a result, the members of the Supreme Court decline to proceed further in the matter.[138]

The ponente, Justice Malcolm, to support the above conclusion cited a decision of the United States Supreme Court penned by Chief Justice Taney.

136. 57 Phil. 600 (1932).

137. *Id.* at 601 (emphasis supplied).

138. *Id.* at 605 (emphasis supplied).

> Its jurisdiction and powers and duties being defined in the organic law of the government, and being all strictly judicial, Congress cannot require or authorize the court to perform any other duty. And while it executes firmly all the judicial powers entrusted to it, the court will carefully abstain from exercising any power that is not strictly judicial in character, and which is not clearly confided to it by the Constitution.[139]

2. Noblejas v. Teehankee

Several years later, the Court once again had an opportunity to discuss the prohibition of members of the Judiciary from performing functions not connected with its judicial functions. *Noblejas v. Teehankee*[140] presented such opportunity involving as it did an investigation of a member of the Executive branch. The law in question was Republic Act No. 1151, which provided that the Commissioner of Land Registration was "entitled to the same compensation, emoluments and privileges as those of a Judge of the Court of First Instance." Noblejas, as Commissioner of Land Registration, therefore sought the privilege, enjoyed by Judges of the Courts of First Instance, of being investigated and suspended only by the Supreme Court. In deciding against Noblejas, the Court reiterated the necessity of upholding the separation of powers among the three branches of government, especially between the Executive and Judiciary.

> But the more fundamental objection to the stand of petitioner Noblejas is that, if the Legislature had really intended to include in the general grant of "privileges" or "rank and privileges of Judges of the Court of First Instance" the right to be investigated by the Supreme Court, and to be suspended or removed only upon recommendation of that Court, *then such grant of privileges would be unconstitutional, since it would violate the fundamental doctrine of separation of powers, by charging this court with the administrative function of supervisory control over executive officials, and simultaneously reducing* pro tanto *the control of the Chief Executive over such official.*[141]

Additionally, the Court quoted from Justice Cardozo's opinion in *In re Richardson et al., Connolly v. Scudder,*[142] which stated that, "[t]here is no inherent power in the Executive or Legislature to charge the Judiciary with administrative functions except when reasonably incidental to the fulfillment of judicial duties."[143] Following Justice Cardozo's line of thinking, the Court concluded by stating that "the Supreme Court of the Philippines and its

139. *Id.* at 606 (citing Gordon v. United States, 2 Wall. 561 (1864)).

140. 23 SCRA 405 (1968).

141. *Id.* at 408-09 (emphasis supplied).

142. 247 N.Y. 401, 160 N.E. 655.

143. *Id.* at 409.

members should not *and can not* be required to exercise any power or to perform any trust or to assume any duty not pertaining to or connected with the administration of judicial functions...."[144]

Noblejas, nevertheless, argued that under Republic Act No. 1151, Section 4, his position as Commissioner of Land Registration was endowed with judicial functions. Section 4 of the law provided the parties with the opportunity to refer a dispute between an individual and the Register of Deeds to the Commissioner. The high court was not convinced by such reasoning, likening Noblejas' functions to the administrative process. However, the Court extended its discussion by assuming that the functions of Noblejas under said section of the law as judicial in nature. Despite its judicial character, the Court ruled that the resolution of the consultas provided in Section 4 was but a minimal portion of the Commissioner's administrative or executive functions and merely incidental to the latter.[145] Impliedly, the Court therein recognized that a specific branch of government may perform functions or exercise a power of another branch, provided that such performance or exercise is incidental to or connected with its principal power.

3. Young v. United States.

The case of *Young v. United States ex rel. Vuitton et fils s. a. et al.*[146] is illustrative of the lawful exercise by the Judiciary of a power incidental to its primary function. The case involved an agreement settling a suit in which the Klaymincs had been named as defendants. Under this agreement, the Klaymincs agreed to pay Vuitton (respondent) $100,000 in damages, and consented to the entry of a permanent injunction prohibiting them from, *inter alia*, "manufacturing, producing, distributing, circulating, selling, offering for sale, advertising, promoting or displaying any product bearing any simulation, reproduction, counterfeit, copy, or colorable imitation."

Afterwards Vuitton attorney J. Joseph Bainton requested that the District Court appoint him and his colleague Robert P. Devlin as special counsel to prosecute a criminal contempt action for violation of the injunction against infringing Vuitton's trademark. Thereafter, the District Court upon finding of probable cause to believe that petitioners were engaged in conduct contumacious of the court's injunctive order, granted the request Attorney Bainton for appointment as special counsel to represent the Government in the investigation and prosecution of a criminal contempt action against petitioners. Ultimately, a jury convicted the petitioners of either criminal

144. *Id.* (emphasis supplied).

145. *Id.* at 409-10.

146. 481 U.S. 787 (1987).

contempt or of aiding and abetting that contempt. Affirming the contempt convictions, the Court of Appeals rejected petitioners' contention that the appointment of respondent's attorneys as special counsel violated their right to be prosecuted by an impartial prosecutor. The Court stated, *inter alia*, that the judge's supervision of a contempt prosecution is generally sufficient to prevent the danger that the special prosecutor will use the threat of prosecution as a bargaining chip in civil negotiations.

In their appeal to the Supreme Court, the petitioners argued that the District Court lacked authority to appoint any private attorney to prosecute the contempt action against them, and that as a result, only the United States Attorney's Office could have permissibly brought such a prosecution. The Supreme Court admitted that there was no specific provision in the Federal Rule of Criminal Procedure authorizing a court to appoint a private attorney. The admission, however, was followed by an explanation of the well-settled doctrine that courts possess inherent authority to initiate contempt proceedings for disobedience to their orders, authority which necessarily encompasses the ability to appoint a private attorney to prosecute the contempt.[147] To support this doctrine, Justice Brennan cited jurisprudence:

> The Rule's assumption that private attorneys may be used to prosecute contempt actions reflects the longstanding acknowledgment that the initiation of contempt proceedings to punish disobedience to court orders is a part of the judicial function. As this Court declared in *Michaelson v. United States ex rel. Chicago, St. P., M., & O. R. Co.:*
>
> "That the power to punish for contempts is inherent in all courts, has been many times decided and may be regarded as settled law. It is essential to the administration of justice. The courts of the United States, when called into existence and vested with jurisdiction over any subject, at once became possessed of the power."
>
> *The ability to punish disobedience to judicial orders is regarded as essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches.* "If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls 'the judicial power of the United States' would be a mere mockery." (*Gompers v. Bucks Stove & Range Co.*) As a result, "there could be no more important duty than to render such a decree as would serve to vindicate the jurisdiction and authority of courts to enforce orders and to punish acts of disobedience." Courts cannot be at the mercy of another Branch in deciding whether such proceedings should be initiated. The ability to appoint a private attorney to prosecute a contempt action satisfies the need for an independent means of

147. *Id.* at 795

> self-protection, without which courts would be "mere boards of arbitration whose judgments and decrees would be only advisory."[148]

The Supreme Court, however, recognized the doctrine that prosecuting an individual for perpetrating a crime is a task of the Executive branch:

> The fact that we have come to regard criminal contempt as "a crime in the ordinary sense," does not mean that any prosecution of contempt must now be considered an execution of the criminal law in which only the Executive Branch may engage. Our insistence on the criminal character of contempt prosecutions has been intended to rebut earlier characterizations of such actions as undeserving of the protections normally provided in criminal proceedings. See, e. g., In re Debs, (no jury trial in criminal contempt actions because a court in such a case is "only securing to suitors the rights which it has adjudged them entitled to"). That criminal procedure protections are now required in such prosecutions should not obscure the fact that these proceedings are not intended to punish conduct proscribed as harmful by the general criminal laws. Rather, they are designed to serve the limited purpose of vindicating the authority of the court. In punishing contempt, the Judiciary is sanctioning conduct that violates specific duties imposed by the court itself, arising directly from the parties' participation in judicial proceedings.[149]

In acknowledging the fact that the prosecution of a law is a power of the Executive branch, the high court, nevertheless, sustained the principle of overlapping or sharing of powers. This overlapping or sharing was necessary to preserve the respect due the Judiciary.

> This principle of restraint in contempt counsels caution in the exercise of the power to appoint a private prosecutor. We repeat that the rationale for the appointment authority is necessary. If the Judiciary were completely dependent on the Executive Branch to redress direct affronts to its authority, it would be powerless to protect itself if that Branch declined prosecution. *The logic of this rationale is that a court ordinarily should first request the appropriate prosecuting authority to prosecute contempt actions, and should appoint a private prosecutor only if that request is denied. Such a procedure ensures that the court will exercise its inherent power of self-protection only as a last resort.*[150]

The above case reveals the notion that the three branches of government, particularly the Judiciary, retain powers that are necessary and intimately connected with its primary function. In said case the Supreme Court was quick to point out that the power the District Court had exercised was deemed to be inherent in the judicial branch—a necessary intrinsic power to preserve the respect due the courts of the nation. Notwithstanding the argument that

148. *Id.* at 796 (emphasis supplied) (citations omitted).

149. *Id.* at 799-800 (emphasis supplied) (citations omitted).

150. *Id.* at 801.

the exercise of the power to appoint a prosecutor to prosecute the contempt charge encroached upon the powers of the Executive, the Justices saw fit to emphasize that some powers are indeed conferred upon more than one branch of government because of each branch's role in the functioning of the Government. Thus, it was rendered conclusive that a strict interpretation of the separation of powers cannot be tolerated without doing harm to an efficient and just government. The decision further validates occasions where one branch may exercise a power more fit for another, in order to carry out its primary function.

E. Permissible Delegation

Additional cases decided in the United States offer additional insight to buttress the idea that the Judiciary can perform a "non-judicial" function, or a function more appropriately exercised by either of the remaining branches. The constitutionality of statutes has been questioned based on the improper delegation of powers by the legislative to the Judiciary.

1. In re Public Hearing

In the case of *In re Public Hearing on Vacancies in Judicial Positions in Fifth Judicial Dist.*,[151] the State Supreme Court of Minnesota was faced with an argument that a state statute which permits the Supreme Court to terminate a judicial position, constitutes an unlawful delegation of legislative authority to the Judiciary, thus infringing upon the doctrine of separation of powers. The Minnesota State Supreme Court laid down the premise that it was constitutionally permissible for the Legislature to delegate judicial or quasi-judicial authority to the Judiciary. Citing precedent and foreshadowing its ultimate resolution of the case, the court gave examples of lawful delegation of authority by the Legislature to the judicial branch.

> In the case of *In re Gillard*, this court held that legislative delegation to the Supreme Court of the power to remove a judge for misconduct, pursuant to Minn. Stat. 490.16, subd. 3, is constitutional. *See also Kalscheuer v. State* (valuation of property for tax purposes properly delegated to the courts because of its quasi-judicial nature); and *State v. Koochiching Realty Co.*, (reduction of tax assessed on property when found to be overvalued properly delegated to the judiciary, on the grounds that such action involves a commingling of administrative and judicial functions.)[152]

The Court then went into a discussion of the various powers of the Supreme Court inherent in its duty to administer justice in an orderly and effective fashion. Upon a study of the same, the Court concluded that it was

151. 375 N.W.2d 463.

152. *Id.* at 470 (citations omitted).

proper for the State Legislature to delegate the power to remove a judge to the Judiciary, the same being an inherent power of the latter. The Court said the following:

> *Minn. Stat. § 2.722*, subd. 4 recognizes the legitimate role of the Supreme Court in the orderly and effective administration of justice. As noted in *Gillard*, a statute which authorizes the removal of judges under certain circumstances, acknowledges the legitimate role of the judiciary in supervising the conduct of judges. This role is also reflected in other statutes which grant the court broad residual powers. See Minn. Stat. §§ 2.722, subd. 2 (Supreme Court may alter judicial district boundaries); 2.724 (Chief Justice may assign temporarily any judge of any court to a court in a judicial district not his own and may assign retired justices and judges to certain courts); 480.22 (Supreme Court may designate location of chambers for judges of all courts); and 487.01, subd. 6 (Supreme Court may combine county court districts and terminate judicial positions). We conclude that, on the basis of case law and statutory authority, the legislature has properly delegated the authority to terminate judicial positions to the Supreme Court.[153]

2. Mistretta v. U.S.

The case of *Mistretta v. U.S.*[154] was another case where the constitutionality of a statute was questioned based on a violation of the principle of separation of powers. In *Mistretta* the Federal Legislature enacted a law creating the Sentencing Commission (Commission). The Commission was established as an independent commission in the judicial branch of the United States. It had seven voting members (one of whom was the Chairman) appointed by the President by and with the advice and consent of the Senate and at least three of the members being Federal judges.

The Commission was created as a result of the existing indeterminate sentencing system which resulted in serious disparities among the sentences imposed by federal judges upon similarly situated offenders. It was, therefore, the duty of the Commission to promulgate determinative-sentence guidelines, and to periodically review and revise the guidelines. It was also tasked to consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system. According to petitioner Mistretta, the legislation was unconstitutional for violating the principle of separation of powers. Mistretta argued that there was a violation of this principle by placing the Commission in the judicial branch, and granting the same with rule-making power, a power which Mistretta claimed was executive in nature. The United States Supreme Court in resolving the

153. *Id.* (emphasis supplied).

154. 488 U.S. 361 (1989).

argument of Mistretta began with a discussion of the origin and purpose of the principle of separation of powers.

> This Court consistently has given voice to, and has reaffirmed, the central judgment of the framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty.
>
> In applying the principle of separated powers in our jurisprudence, we have sought to give life to Madison's view of the appropriate relationship among the three coequal Branches. *Accordingly, we have recognized, as Madison admonished at the founding, that while our Constitution mandates that "each of the three general departments of government [must remain] entirely free from the control or coercive influence, direct or indirect, of either of the others,"* (Humphrey's Executor v. United States), *the Framers did not require—and indeed rejected—the notion that the three Branches must be entirely separate and distinct.*
>
> Accordingly, we have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch. *For example, just as the Framers recognized the particular danger of the Legislative Branch's accreting to itself judicial or executive power, so too have we invalidated attempts by Congress to exercise the responsibilities of other Branches or to reassign powers vested by the Constitution in either the Judicial Branch or the Executive Branch. Bowsher v. Synar,* (Congress may not exercise removal power over officer performing executive functions); *INS v. Chadha,* (Congress may not control execution of laws except through Art. I procedures); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,* (Congress may not confer Art. III powers on Art. I judge). *By the same token, we have upheld statutory provisions that to some degree commingle the functions of the Branches, but that pose no danger of either aggrandizement or encroachment.*
>
> *In cases specifically involving the Judicial Branch, we have expressed our vigilance against two dangers: first, that the Judicial Branch neither be assigned nor allowed "tasks that are more properly accomplished by [other] branches,"* (Morrison v. Olson), *and, second, that no provision of law "impermissibly threatens the institutional integrity of the Judicial Branch,"* (Commodity Futures Trading Comm'n v. Schor.)[155]

Mistretta insisted that by delegating the duty to promulgate sentencing guidelines to the Sentencing Commission, an agency within the Judiciary, Congress unconstitutionally has required the latter to exercise not only their judicial authority, but legislative authority—the making of sentencing policy—as well. The Commission's rule-making authority, according to Mistretta, may be exercised by Congress or delegated by Congress to the Executive, but may not be delegated to or exercised by the Judiciary. Unfortunately for petitioner, the Supreme Court did not see the value in his arguments. Justice

155. *Id.* at 382-83 (emphasis supplied).

Blackmun, on behalf of the court, pronounced that the act of Congress in creating the Sentencing Commission did not violate the principle of separation of powers.

> [W]e observe that Congress' decision to create an independent rulemaking body to promulgate sentencing guidelines and to locate that body within the Judicial Branch is not unconstitutional unless Congress has vested in the Commission powers that are more appropriately performed by the other Branches or that undermine the integrity of the Judiciary.
>
> As a general principle, we stated as recently as last Term that "executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Art. III of the Constitution."
>
> Nonetheless, we have recognized significant exceptions to this general rule and have approved the assumption of some nonadjudicatory activities by the Judicial Branch. In keeping with Justice Jackson's Youngstown admonition that the separation of powers contemplates the integration of dispersed powers into a workable Government, we have recognized the constitutionality of a "twilight area" in which the activities of the separate Branches merge.[156]

Justice Blackmun went on to point out that the court had held in a line of cases that rule-making *per se* was not exclusively legislative, executive or non-judicial in character. Furthermore, the decision reiterated the permissible stance of the Supreme Court in connection with the distribution of non-adjudicatory activities and bodies to the Judiciary.

> That judicial rulemaking, at least with respect to some subjects, falls within this twilight area is no longer an issue for dispute. *None of our cases indicate that rulemaking per se is a function that may not be performed by an entity within the Judicial Branch, either because rulemaking is inherently nonjudicial or because it is a function exclusively committed to the Executive Branch. On the contrary, we specifically have held that Congress, in some circumstances, may confer rulemaking authority on the Judicial Branch.*[157]
>
> We observed: "Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or constitution of the United States." This passage in *Sibbach* simply echoed what had been our view since *Wayman v. Southard*, decided more than a century earlier, where Chief Justice Marshall wrote for the Court that rulemaking power pertaining to the Judicial Branch may be "conferred on the judicial department."
>
> Our approach to other nonadjudicatory activities that Congress has vested either in federal courts or in auxiliary bodies within the Judicial Branch has been identical to our approach to judicial rulemaking: *consistent with the separation*

156. *Id.* at 385-86 (citations omitted).

157. *Id.* at 387.

of powers, Congress may delegate to the Judicial Branch nonadjudicatory functions that do not trench upon the prerogatives of another Branch and that are appropriate to the central mission of the Judiciary. Following this approach, we specifically have upheld not only Congress' power to confer on the Judicial Branch the rulemaking authority contemplated in the various enabling Acts, but also to vest in judicial councils authority to "make 'all necessary orders for the effective and expeditious administration of the business of the courts.'"

These entities, some of which are comprised of judges, others of judges and nonjudges, still others of nonjudges only, do not exercise judicial power in the constitutional sense of deciding cases and controversies, but they share the common purpose of providing for the fair and efficient fulfillment of responsibilities that are properly the province of the Judiciary. Thus, although the judicial power of the United States is limited by express provision of Article III to "Cases" and "Controversies," we have never held, and have clearly disavowed in practice, that the Constitution prohibits Congress from assigning to courts or auxiliary bodies within the Judicial Branch administrative or rulemaking duties....

Because of their close relation to the central mission of the Judicial Branch, such extrajudicial activities are consonant with the integrity of the Branch and are not more appropriate for another Branch.[158]

The U.S. Supreme Court, therefore, reiterated the long repeated pronouncement that the Judiciary can be the subject of delegated duties which do not involve resolution of controversies or determination of rights, provided that such duties complement the inherent power of the judicial branch. In the case of *Mistretta*, the rule-making powers of the Sentencing Commission was properly within the province of judicial authority since it was related to the power of judges to sentence a convicted individual.

That Congress should vest such rulemaking in the Judicial Branch, far from being "incongruous" or vesting within the Judiciary responsibilities that more appropriately belong to another Branch, simply acknowledges the role that the Judiciary always has played, and continues to play, in sentencing.[159]

E. Synthesis of Case Law

The cases discussed above explain the doctrine of separation of powers, which makes certain that no branch of government may encroach on fields allocated to the other branches. Jurisprudence has, nonetheless, leaned towards the functionalist view, where powers of government are not monopolized and may be shared. The test to determine which branch may exercise the power is to examine the nature of the act being performed. There is no doubt that

158. *Id.* at 388-90 (emphasis supplied) (citations omitted).

159. *Id.* at 391.

the Legislature cannot confer a power to the Judiciary that is more properly accomplished by another branch under the principle of separation of powers.

In the two cases of *Manila Electric Co.* and *Noblejas*, the Court laid down the guiding principles for the permissible delegation of powers to the Judiciary and adopted the functionalist precepts. In both cases, the Court stressed that to fall under the exception to the general rule, there is a need to establish a connection between the power delegated and the duties of the Judiciary. Once established, the exercise of the delegated power, which may initially appear to be non-judicial, will be upheld as lawful and not inconsistent with the doctrine of separation of powers. Such exception apparently exists when an executive function is intimately connected with the performance of a power of the Judiciary.

The Philippine and American Supreme Courts have consistently affirmed the foregoing rules in their decisions. A summary of the case law has led to the crystallization of a two-fold guideline, which serves as a test to determine the branch of government that can exercise a particular power: (1) the exercise thereof is incidental or subsidiary to a function or power otherwise properly exercised by such department or agency; and (2) the department which exercises the primary function retains some sort of ultimate control over its exercise, as by court review in the case of the exercise of a power judicial in nature. Thus, it has been declared as constitutional for the Legislature to delegate to the Executive the power to make implementing rules and regulations to facilitate the execution of a law.

The delegation of the power of rule-making has also been upheld as constitutional, despite the fact that the Judiciary is the recipient of such delegation. The creation of administrative or quasi-judicial bodies by legislation has given rise to another branch of law identified as Administrative Law. These bodies have similar powers as courts of law, resolving controversies and ultimately declaring the rights and obligations of parties involved. Moreover, the Executive performs an essentially judicial function in conducting preliminary investigations arising from criminal complaints. In all these instances, there has been a delegation of a power essentially lodged in another branch, but the delegation has been permitted because of its intimate relation to the primary function of the branch exercising the same.

Bearing the abovementioned guidelines and the blending of powers in mind, it is appropriate to state that the wording of the Legal Education Reform Act is not a violation of the principle of separation of powers. Examining the statute in question, the Legislature required the Supreme Court to perform a function which inheres to its judicial duties.

The Chairman and regular members of the Board shall be appointed by the President for a term of five (5) years without reappointment from a list of at

least three (3) nominees prepared, *with prior authorization from the Supreme Court*, by the Judicial and Bar Council, for every position or vacancy, and no such appointment shall need confirmation by the Commission on Appointments.[160]

It must be remembered that the Judiciary, apart from the judicial power defined in Section 1, Article VII of the 1987 Constitution, has additional powers:

> Section 5. The Supreme Court shall have the following powers:
>
> *(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 enumerated powers above unmistakably show that the Judiciary, particularly the Supreme Court, is vested with powers which are necessary for its proper functioning. In addition, the powers specified in Section 5 are inherent in the judicial branch because they are essential to the fulfillment of judicial duties.

The specific power of the Supreme Court to promulgate rules concerning the admission to the practice of law finds application to the present issue. Admission to the bar is, without question, under the supervision of the Supreme Court. The Supreme Court has already exercised the power by promulgating rules governing the admission to the bar, which delineates the procedure to be followed by applicants to the bar.[161] Naturally the rule provides the subjects to be taken in the bar examination and the manner by which the bar examinations are to be conducted. These subjects, in turn, are the basis for the curriculum established by the various law schools in the country. The schools and colleges of law serve, therefore, as places that will prepare and guide students of law to achieve their ultimate goal of passing the bar examinations and practicing law.

Logically then, the Supreme Court should have a primary role in the creation of a regulatory body over these schools. The task of authorizing the JBC to prepare a list of nominees is corollary to the power of the Supreme Court to admit members to the Bar. It is evident that in the execution of the law, the Court is merely exercising an implied power incidental to its constitutional power to regulate admissions to the bar. The Legislature saw fit to include the Court in the formation of the Board because of the direct relation the Court bears with the schools and colleges of law. There would be no other branch of the sovereign power more equipped than the Judiciary to achieve the purposes of the law hence, the delegated power is not more appropriate for another Branch.

160. Legal Education Reform Act of 1993, § 5 (emphasis supplied).

161. *See* RULES OF COURT, Rule 138.

> It has long been understood that "[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution, "powers" which cannot be dispensed with in a Court, because they are necessary to the exercise of all others."
>
> Prior cases have outlined the scope of the inherent power of the federal courts. For example, the Court has held that a federal court has the power to control admission to its bar and to discipline attorneys who appear before it.... While this power "ought to be exercised with great caution," it is nevertheless "incidental to all courts."[162]

F. *Executive Power of Appointment*

1. Nature

The power to appoint is the act of an executive officer, body or board, designating the individual who is to exercise the powers of a given office.[163] Essentially, the appointing power is the choice of a person to fill an office.[164] Neither the imposition of additional duties upon an elective or appointive officer nor the election of an officer by popular vote constitutes an exercise of the power to appoint. The Philippine Supreme Court had the occasion to define this power in *Flores v. Drilon*,[165] with the following pronouncement:

> As may be defined, an "appointment" is "[t]he designation of a person, by the person or persons having authority therefor, to discharge the duties of some office or trust," or "[t]he selection or designation of a person, by the person or persons having authority therefor, to fill an office or public function and discharge the duties of the same." In his treatise, *Philippine Political Law*, Senior Associate Justice Isagani A. Cruz defines appointment as "the selection, by the authority vested with the power, of an individual who is to exercise the functions of a given office."
>
> Considering that appointment calls for a selection, the appointing power necessarily exercises a (sic) discretion. According to Woodbury, J., "the choice of a person to fill an office constitutes the essence of his appointment," and Mr. Justice Malcolm adds that an "[a]ppointment to office is intrinsically an executive act involving the exercise of discretion."[166]

All governmental authority emanates from the people. This authority, however, has been delegated, by the people, through a constitution. In a

162. Chambers v. Nasco, Inc., 501 U.S. 32, 44 (1991).

163. FLOYD MECHEM, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS 42 (1890).

164. 63 AM. JUR. 2D *Public Officers and Employees* §93 (1984).

165. 223 SCRA 568 (1993).

166. *Flores*, 223 SCRA at 578-79 (citations omitted).

presidential form of government, the powers of government are divided among three branches, namely the Legislative, Judiciary and Executive. The Legislature has the power to make laws, the Judiciary has the power to settle actual controversies and the Executive has the power to enforce or execute laws. Among the three branches of government, it is the executive department which enjoys the power, when called for, to select and place individuals into public office. The reason for this is that essentially, the filling up of an office created by law is the execution of a law.[167] Generally, therefore, the power is regarded as an executive function.[168] The particular executive officer who carries out the power is commonly the Chief Executive of the nation, state, province, city or municipality. In the Philippines, the power to appoint is lodged with the President of the nation.[169] The constitutional division of governmental power requires that the legislative department create the public office, with the Executive appointing the individual to such office.[170] The reason for the division of powers is that "the same persons should not both legislate and administer the laws." The principle of separation of powers, however, does not preclude the other two branches of government to appoint individuals to offices, which are necessary to the exercise of their respective functions.

2. Appointment v. Designation

Occasionally, the power to appoint and designation are considered synonymous. There is a distinction between the two, however, as was clearly expressed in the case of *Binamira v. Garrucho*.[171]

> Appointment may be defined as the selection, by the authority vested with the power, of an individual who is to exercise the functions of a given office. When completed, usually with its confirmation, the appointment results in security of tenure for the person chosen unless he is replaceable at pleasure because of the nature of his office. Designation, on the other hand, connotes merely the imposition by law of additional duties on an incumbent official, as where, in the case before us, the Secretary of Tourism is designated Chairman of the Board of Directors of the Philippine Tourism Authority, or where, under the Constitution, three Justices of the Supreme Court are designated by the Chief Justice to sit in the Electoral Tribunal of the Senate or the House of Representatives. It is said that appointment is essentially executive while designation is legislative in nature.

167. BERNAS, *supra* note 72, at 758.

168. 63A AM. JUR. 2D *Public Officers and Employees* §94 (1984).

169. *See* PHIL. CONST. art. VII, § 16.

170. 63A AM. JUR. 2D *Public Officers and Employees* §95 (1984).

171. 188 SCRA 154 (1990).

> Designation may also be loosely defined as an appointment because it likewise involves the naming of a particular person to a specified public office. That is the common understanding of the term. However, where the person is merely designated and not appointed, the implication is that he shall hold the office only in a temporary capacity and may be replaced at will by the appointing authority. In this sense, the designation is considered only an acting or temporary appointment, which does not confer security of tenure on the person named.[172]

Designation, therefore, may take two forms: first, it can be the imposition of additional duties upon an incumbent; or, second, it can be a temporary or acting appointment.

3. Discretionary power

Appointment of public officers is inherently discretionary. In other words, the exercise of the power involves the exercise of discretion, and absent any abuse, the Judiciary, namely the courts, will not make any attempt to control its exercise. The appointing official may choose to listen to the recommendation of others, but ultimately, the selection of the individual who will fill up the office is solely dependent upon the appointing officer, limited only to those who possess the required qualifications.[173] The Supreme Court described the discretionary character of the power to appoint in the following light:

> Appointment is an essentially discretionary power and must be performed by the officer vested with such power according to his best lights, the only condition being that the appointee should possess the qualifications required by law. If he does, then the appointment cannot be faulted on the ground that there are others better qualified who should have been preferred. Indeed, this is a prerogative of the appointing authority which he alone can decide: The choice of an appointee from among those who possess the required qualifications is a political and administrative decision calling for considerations of wisdom, convenience, utility and the interests of the service which can best be made by the head of the office concerned, the person most familiar with the organizational structure and environmental circumstances within which the appointee must function.[174]

It is apparent therefore that the power is inherently discretionary, the choice of the appointing body or individual enjoying the character of finality. Thus, the Supreme Court has definitively laid down the doctrine that the Civil Service Commission cannot revoke an appointment made by the proper appointing authority when the appointee has met all the qualifications

172. *Id.* (emphasis supplied).

173. 63 AM. JUR. 2D *Public Officers and Employees* §95 (1984).

174. Rimonte v. Civil Service Commission, 244 SCRA 498, 504-05 (1995).

prescribed by statute or the Constitution.[175] Substituting the judgment of the appointing authority would be tantamount to an encroachment on the appointing authority's discretionary power.

4. Appointments under the 1987 Constitution

The 1987 Constitution provides for the President to appoint individuals to several offices.

> Section 16. The President shall nominate and, with the consent of the Commission on Appointments, appoint the heads of the executive department, 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 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.
>
> The President shall have the power to make appointments during the recess of the Congress, whether voluntary or involuntary, but such appointments shall be effective only until after disapproval by the Commission on Appointments or until the next adjournment of the Congress.[176]

The foregoing provision reveals that the Constitution created two categories: the first, which requires the approval by the Commission on Appointments, and the second, which does not require the consent of said Commission. Further clarifying the categories created, the leading case of *Sarmiento v. Mison*,[177] enumerates the positions which require the consent of the Commission.

> It is readily apparent that under the provisions of the 1987 Constitution, just quoted, there are four (4) groups of officers whom the President shall appoint. These four (4) groups, to which we will hereafter refer from time to time, are:
>
> First, the heads of the executive departments, ambassadors, other public ministers and consuls, 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;
>
> Second, all other officers of the Government whose appointments are not otherwise provided for by law;
>
> Third, those whom the President may be authorized by law to appoint;

175. *See* Mauna v. Civil Service Commission, 232 SCRA 388 (1994).

176. PHIL. CONST. art.VII, § 16.

177. 156 SCRA 549 (1987).

> Fourth, officers lower in rank whose appointments the Congress may by law vest in the President alone.[178]

Examining similar provisions in the two previous constitutions, as well as the Records of the Constitutional Commission, the Court arrived at the conclusion that only appointments to offices belonging to the first group required the approval of the Commission on Appointments. All other appointments made by the President do not have to undergo confirmation by the Commission on Appointments.

5. Limitations on the Power to Appoint

A public office is a public trust, and therefore, the individual appointed to such office must possess the prescribed qualifications. Moreover, the person should be selected with a view towards the furtherance of public interest and welfare. It must be remembered that the power to appoint should be exercised in a manner consistent with the policy of the law to secure the utmost freedom from personal interest in such appointment.[179]

The Constitution sets down additional restrictions with respect to the power to appoint. Generally, these limits set by the fundamental law seek to eradicate or at least minimize the evils that arise from the exercise of the appointing power. Thus, there are provisions that prevent any favoritism, nepotism and the spoils system. These constraints are meant to serve public interest, since they ensure that only the fit and meritorious are chosen and appointed.

6. Flores v. Drilon

The Supreme Court had the occasion to discuss extensively the Presidential power to appoint in the case of *Flores v. Drilon*.[180] The controversy centered on a provision in Republic Act No. 7227, otherwise known as the Bases Conversion and Development Act of 1992, under which then Mayor of Olongapo City, Richard Gordon, was appointed as Chairman and Chief Executive Officer of the Subic Bay Metropolitan Authority (SMBA). The controversial provision of the law read:

> (d) Chairman/Administrator — The President shall appoint a professional manager as administrator of the Subic Authority with a compensation to be determined by the Board subject to the approval of the Secretary of Budget, who shall be the *ex officio* chairman of the Board and who shall serve as the chief executive officer of the Subic Authority: *Provided, however, That for the first*

178. *Sarmiento*, 156 SCRA at 553-54.

179. 63A AM. JUR. 2D *Public Officers and Employees* §93 (1984).

180. 223 SCRA 568 (1993).

year of its operations from the effectivity of this Act, the mayor of the City of Olongapo shall be appointed as the chairman and chief executive officer of the Subic Authority.[181]

The foregoing provision was challenged as being unconstitutional, among other things, for allegedly violating the power of the President to appoint. The petitioner contended that Section 13, paragraph (d), itself vested the President with the power to appoint the Chairman of the Board and the Chief Executive Officer of SBMA, although he really had no choice under the law but to appoint the Mayor of Olongapo City. In ruling for the petitioner therein, the Court, through Justice Bellosillo, initially defined the essence and character of the Presidential power to appoint and held that, clearly, the element of discretion is a necessity for the proper exercise of the power to appoint. Without it, the power would be rendered ineffective. Thus, the Court aptly summed up the nature of such power to appoint by stating:

> Indeed, the power of choice is the heart of the power to appoint. Appointment involves an exercise of discretion of whom to appoint; it is not a ministerial act of issuing appointment papers to the appointee. In other words, the choice of the appointee is a fundamental component of the appointing power.[182]

Applying the basic principles of the power to appoint to the case before them, the Court recognized the limits of the relationship between the grant by Congress of the power, and its exercise by the President.

Hence, when Congress clothes the President with the power to appoint an officer, it (Congress) cannot at the same time limit the choice of the President to only one candidate. Once the power of appointment is conferred on the President, such conferment necessarily carries the discretion of whom to appoint. Even on the pretext of prescribing the qualifications of the officer, Congress may not abuse such power as to divest the appointing authority, directly or indirectly, of his discretion to pick his own choice. Consequently, when the qualifications prescribed by Congress can only be met by one individual, such enactment effectively eliminates the discretion of the appointing power to choose and constitutes an irregular restriction on the power of appointment.[183]

Since the contested provision in the Bases Conversion and Development Act of 1992 effectively restricted the choice of the President to a sole individual, the Court struck down the provision and declared its nullity. By limiting the choice to the Mayor of Olongapo City, Congress had eliminated the necessary element of discretion.

181. Bases Conversion and Development Act of 1992, Republic Act No. 7227, §13, ¶ (d) (emphasis supplied).

182. *Flores*, 223 SCRA at 579.

183. *Id.*

> In the case at bar, while Congress willed that the subject posts be filled with a presidential appointee for the first year of its operations from the effectivity of R.A. 7227, the proviso nevertheless limits the appointing authority to only one eligible, i.e., the incumbent Mayor of Olongapo City. *Since only one can qualify for the posts in question, the President is precluded from exercising his discretion to choose whom to appoint. Such supposed power of appointment, sans the essential element of choice, is no power at all and goes against the very nature itself of appointment.*[184]

The ruling of the Court in the aforementioned case places absolute emphasis on the essential element of choice or discretion granted to the appointing power. The gathered principles from the case reveal that a total absence of such element would encroach upon the power to appoint. On the other hand, the presence of discretion on the part of the appointing power would validate the grant by Congress of such power.

7. Lopez v. Civil Service Commission

In *Lopez v. Civil Service Commission*,[185] the General Manager of the Philippine Ports Authority (PPA) appointed petitioner Lopez, to the position of Harbor Master of the South Harbor after considering the evaluation conducted by the Placement Committee of the PPA. Unfortunately for Lopez, the Civil Service Commission nullified his appointment, and instead directed the General Manager of the PPA to appoint Luz. Hence, Lopez sought relief with the Supreme Court.

In deciding in favor of Lopez, the high court affirmed that the General Manager of the PPA had the discretion to choose among the qualified individuals as to who will fill the vacant position. With the aid of the Placement Committee, the General Manager had the sole prerogative to determine and appoint the qualified individual for the position.

> On the other hand, the discretionary power of appointment delegated to the heads of departments or agencies of the government is not controverted by the respondents. *In the appointment, placement and promotion of civil service employees according to merit and fitness, it is the appointing power, especially where it is assisted by a screening committee composed of persons who are in the best position to screen the qualifications of the nominees, who should decide on the integrity, performance and capabilities of the future appointees.*[186]

The Civil Service Commission, therefore, did not have the power or authority to substitute its judgment over that of the PPA General Manager. For as long as the appointee of the General Manager possessed all the

184. *Id.* at 580 (emphasis supplied).

185. 194 SCRA 269 (1991).

186. *Id.* at 274.

prescribed qualifications, the Civil Service Commission had no alternative but to approve the appointment.

Continuing its discussion of the appointing power, the Court went on to describe the role of the Placement Committee *vis-à-vis* the appointing official with the following:

> The head of an agency who is the appointing power is the one most knowledgeable to decide who can best perform the functions of the office. He has a wide latitude of choice as to the person to appoint where the law does not impose rigid conditions. Section 6, Rep. Act No. 6656 on government reorganization merely provides that the selection or placement should be done through the creation of a Placement Committee the members of which are representatives of the head of the agency as well as representatives of the employees. The committee's work is recommendatory and does not fix a stringent formula regarding the mode of choosing from among the candidates. Thus, the respondents' arguments on the alleged inconsistencies and non-conformity with Rep. Act No. 6656 in rating the contenders are without merit.[187]

The Court merely pointed out the fact that the Placement Committee was to aid the appointing power in determining the choice for the vacant position. The Committee did not encroach upon the power because the appointing power ultimately decided whom to appoint.

8. Power to Appoint under the Legal Education Reform Act of 1993

According to the Legal Education Reform Act, the members of the Legal Education Board (Board) are to be appointed by the President.

> The Chairman and regular members of the Board shall be appointed by the President for a term of five (5) years without reappointment from a list of at least three (3) nominees prepared, with prior authorization from the Supreme Court, by the Judicial and Bar Council, for every position or vacancy, and no such appointment shall need confirmation by the Commission on Appointments.[188]

The phrase which requires the President to choose from a list of at least three nominees has been questioned as being violative of the executive power to appoint. The basis for questioning its validity is that it supposedly limits the "limitless" power to appoint. Recalling, however, the doctrines laid down by both local and foreign jurisprudence, the Legal Education Reform Act does not restrict the power of the Executive to appoint.

As discussed in the previous section, the Board is tasked with the supervision and regulation of legal education as administered by law schools

187. *Id.* at 276 (citations omitted).

188. Legal Education Reform Act of 1993, § 5 (emphasis supplied).

throughout the country. The Judiciary, through the Supreme Court, with the sole authority to admit members into the Philippine Bar, concededly and logically shares an intimate relationship with legal education. Therefore, it can be concluded that the Board itself is an extension of the Judiciary. When the Legal Education Reform Act requires that the President select the members of the Board from a list of at least three names prepared by the Judicial and Bar Council (JBC), another body under the supervision of the Court, there is no violation of the presidential power to appoint.

The powers of the Board are necessarily connected with the duties of the Supreme Court. In essence, the selection of the members of the Board is an appointment to a body performing functions related to the Judiciary. The intervention, therefore, by the JBC in submitting a list with a minimum of three names is essential, but nevertheless recommendatory. The President, consequently, still retains the discretion as to whom to appoint to the Board. The choice of who will fill the seats in the Board remains solely with the President. The case of *Flores v. Drilon* pronounced that the essential element of choice must be present to avoid the encroachment on the power to appoint. Provided that the choice of the appointing power is not impaired, the grant of the power is not illegal. In the case of the Legal Education Reform Act, the choice of the President is not in any manner limited by the recommendations of the Council. The list submitted by the JBC aids the proper appointment of qualified individuals. As can be gathered from the decision in *Lopez v. Civil Service Commission*, it is permitted that another body apart from the appointing official exist to aid or recommend prospective appointees, realizing the limits of the knowledge of an appointing official. Ultimately, according to the Legal Education Reform Act, it is still the President who determines the individual who will fill the vacancies.

Moreover, the selection from a list with a minimum of three names cannot be considered as a restraint on the power of appointment for the reason that it cannot actually be strictly considered a limit on the power. Once the Council submits the list of recommended individuals, the President is not duty bound to select from the names given by the Council. Theoretically, the President may require the Council to submit another list of names from which the appointees will be chosen.

VI. JUDICIAL VETO

A. Judicial Activism

Framers of the present Constitution had carefully constructed its provisions classifying and distributing governmental powers to divide the powers of government among the three branches. Without the limits established by the fundamental law, the power wielded by one branch may intrude upon the

independence of another. This intrusion would effectively undermine the other branches. Ultimately, arbitrariness and tyranny, two results so consciously abhorred by the framers, will rear its head in government.

These same divisions imposed by the Constitution have formed the foundation upon which the concept of "judicial activism" finds its genesis.

> The concept of judicial activism requires some careful elucidation. It falls under the rubric of what is commonly called judicial review.
>
> *At the broadest level, judicial activism is any occasion where a court intervenes and strikes down a piece of duly enacted legislation.* This is activism because it "impose[s] a judicial solution over an issue erstwhile subject to political resolution."[189]

Greg Jones points out that there is an improper and proper form of "judicial activism," and the fundamental factor that determines the form is on what basis the legislation is struck down.[190] As a result, the difference between the two forms is thus:

> Improper activism finds its roots in the "belief that law is only policy and that the judge should concentrate on building the good society according to the judge's own vision." Judge William Wayne Justice, a self-proclaimed activist, is illustrative when he describes his own thinking in a certain case: "Having found a constitutional violation by a state institution, I acted upon the belief that simply declaring a practice unconstitutional was not the limit of my duty as a judge. Judges are more than social critics. The power of law and justice lies in actions, not pronouncements." Thus, this kind of activism employs "natural law or basic notions of humanity, [and] the necessary consultation of extratextual source[s] for constitutional interpretation." It is the kind of activism Judge Skelly Wright called, when referring approvingly to the Warren Court, "judging in the service of conscience."
>
> In contrast, proper judicial activism stresses restraint, even when striking down duly enacted legislation.
>
> In this understanding of judicial review, the power to initiate policy remains with the [L]egislature or the [E]xecutive. The Court merely exercises a *judicial veto* in the event that an act of one of the other branches of government goes beyond the power granted to that branch by the Constitution, or is in conflict with some provision of the Constitution.[191]

The concept of a "judicial veto" thus comes to the forefront in the discussion of Jones. The "judicial veto" put forward by the latter, is a positive act of the Judiciary in striking down a law duly enacted by Congress for the simple reason that it was enacted in excess of the power granted to the same

189. Greg Jones, *Proper Judicial Activism*, 14 REGENT UNIV. L. REV. 141, 143 (2002).

190. *Id.*

191. *Id.* at 144 (emphasis supplied).

by the Constitution, or contravenes a provision therein. The Philippine Supreme Court has long recognized the proper form of "judicial activism," giving rise to the requirement that in the exercise of its power of judicial review, the Court will not touch on the issue of constitutionality unless it is unavoidable, or is the very *lis mota*.[192] This recognition was best expressed in the dissenting opinion of Justice Kapunan in *Kilosbayan v. Guingona*:[193]

> The idea that a norm of constitutional adjudication could be lightly brushed aside on the mere supposition that an issue before the Court is of paramount public concern does great harm to a democratic system which espouses a delicate balance between three separate but co-equal branches of government. It is equally of paramount public concern, certainly paramount to the survival of our democracy, that acts of the other branches of government are accorded due respect by this Court. Such acts, done within their sphere of competence, have been – and should always be – accorded with a presumption of regularity.
>
> When such acts are assailed as illegal or unconstitutional, the burden falls upon those who assail these acts to prove that they satisfy the essential norms of constitutional adjudication, because when we finally proceed to declare an act of the executive or legislative branch of our government unconstitutional or illegal, what we actually accomplish is the thwarting of the will of the elected representatives of the people in the executive or legislative branches of government. Notwithstanding Article VIII, Section 1 of the Constitution, since the exercise of the power of judicial review by this Court is inherently antidemocratic, *this Court should exercise a becoming modesty in acting as a revisor of an act of the executive or legislative branch.* The tendency of a frequent and easy resort to the function of judicial review, particularly in areas of economic policy has become lamentably too common as to dwarf the political capacity of the people expressed through their representatives in the policy making branches of government and to deaden their sense of moral responsibility.[194]

The concept was also articulated by the United States Supreme Court, which had the occasion to discuss the matter in the case of *Eastland v. U. S. Servicemen's Fund*.[195] In the said case, the petitioners were parents of school children of the Washington D.C. area. The parents filed suit seeking damages

192. Sotto v. Commission on Elections, 76 Phil. 516, 522 (1946). *See generally* Garcia v. Executive Secretary, 204 SCRA 516 (1991); Santos v. Northwest Orient Airlines, 210 SCRA 256 (1992); Fernandez v. Torres, 215 SCRA 489 (1992); Macasiano v. National Housing Authority, 224 SCRA 236 (1993); Joya v. PCGG, 225 SCRA 568 (1993).

193. 232 SCRA 110 (1994).

194. *Id.* at 190 (Kapunan, J., dissenting) (citing ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS, 16-17 (1962) and JOHN B. THAYER, JOHN MARSHALL, 106-07 (1901)) (emphasis supplied).

195. 421 U.S. 491 (1975).

and declaratory and injunctive relief for invasion of privacy that they claimed resulted from the dissemination of a congressional report on the D.C. school system that included identification of students in derogatory contexts. The defendants in the case included members of Congress. The petitioners insisted that the members of Congress could not raise the defense of immunity under the Speech and Debate clause. Regrettably for the petitioners, the Supreme Court decided against the former, affirming the right of the members of Congress to assert immunity. The high court held that it was precluded from examining the wisdom of the investigation out of which the assailed reports resulted:

> If the mere allegation that a valid legislative act was undertaken for an unworthy purpose would lift the protection of the Clause, then the Clause simply would not provide the protection historically undergirding it. "In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed." *The wisdom of congressional approach or methodology is not open to judicial veto.*[196]

It is easily discernible from the decisions above that the concept of "judicial veto" has long been an existing concept. The decisions presented demonstrate that "judicial veto" referred to the striking down of a law that is unconstitutional. As long as a court declares legislation as contrary to the Constitution or a law, the act is deemed to be a "judicial veto." This may be the concept most understood by members of the legal profession, but the same is not what is applicable to the current issue.

A broadening of the concept is necessary because of the circumstances present. Therefore, "judicial veto" may assume an active and a passive form. In the accepted view of "judicial veto," the Judiciary disallows an act of a co-ordinate branch of government through a positive act of the Court's. When faced with an actual controversy, the Court declares an act of a co-ordinate branch to be unconstitutional or invalid. Whereas, the "judicial veto" discussed hereunder involves a passive role on the part of the Judiciary since it is the inaction by the Judiciary that can amount to a "judicial veto."

The continued refusal by the Supreme Court to comply with its duty under the Legal Education Reform Act may set a dangerous precedent. Despite the Supreme Court's deceptively "minor" role in the law, which merely requires it to give its authorization to the JBC to prepare the list of nominees, the same is absolutely indispensable for the law to take effect. The act of the Court, therefore, can be characterized as a "judicial veto," because the Court has literally prevented the application of the law by declining to act on the matter.

196. *Id.* at 509 (emphasis supplied).

A scarcity of legislation mandating the Judiciary to perform an act coupled with a concomitant refusal by the Judiciary is reason for the uniqueness of a "judicial veto." Fortunately, there is an example of current and past legislation, which required the judicial branch to carry out a certain task necessary to the overall implementation of the law.

B. E-Commerce Act of 2000

Realizing the necessity for the law to adapt to the era of technological advancement, the Legislature enacted the Electronic Commerce Act of 2000 (E-Commerce Act),[197] essentially recognizing the validity of electronic documents. A main feature of the law is the recognition of electronically-generated documents as the equivalent of traditional written documents. To prove an electronic document's authenticity for the purpose of its admissibility in a judicial proceeding, the law provides the manner in doing so.

> SEC. 11. *Authentication of Electronic Data Messages and Electronic Documents.* - Until the Supreme Court by appropriate rules shall have so provided, electronic documents, electronic data messages and electronic signatures, shall be authenticated by demonstrating, substantiating and validating a claimed identity of a user, device, or another entity in an information or communication system, among other ways, as follows:
>
> The Supreme Court may adopt such other authentication procedures, including the use of electronic notarization systems as necessary and advisable, as well as the certificate of authentication on printed or hard copies of the electronic document or electronic data messages by electronic notaries, service providers and other duly recognized or appointed certification authorities.[198]

The foregoing provision of law states the manner of authenticating an electronic document and its contents. The Legislature provides a general approach for the authentication of an electronic document. However, emphasis must be placed on the opening sentence of the provision. The intention of Congress, to direct the Supreme Court to carry out the duty of promulgating rules concerning a more meticulous procedure of authentication, is unmistakable. The use of the word "shall" obviously reveals the intention of Congress to require the Court to subsequently furnish the public with its rules regarding the same topic. In contrast, the last paragraph contains the word "may" and thus, Congress merely proposed the creation of other rules complementary to authentication but not yet necessary.

197. Electronic Commerce Act of 2000, Republic Act No. 8792 (2000).

198. *Id.*

The implication of the abovementioned provision is that the Legislature appreciated the suitability of delegating to the Supreme Court the duty of "filling in" the details, much like the lawful delegation of rule-making to administrative agencies. It was most appropriate to require the Court to do the same because of its inherent relation to the rules on evidence. The rules could provide for a more exhaustive process in order to make the law more relevant and applicable. Similar to administrative agencies, the Supreme Court was tasked to execute a part of the law. Understandably so, the Court took notice of its duty and performed such without much delay. Hence, the Supreme Court *en banc* approved the Rules on Electronic Evidence in its Resolution.[199]

C. Judicial Veto

It is peculiar to see how promptly the Court acted pursuant to its duty under the E-Commerce Act, and in the case of Republic Act No. 1793 creating the Tribunal. Within the span of one year, the Court promulgated the rules required of it by the E-Commerce Act. The task of drafting the rules was, undoubtedly, not a simple undertaking. The aid of experts in the subject matter was usually sought and many hours were devoted towards the drafting of the rules. With regard to the creation of the Tribunal, the Court did not hesitate to fulfill its duty to execute the law when the proper protest was filed before it, sitting as the Tribunal. Interestingly, the duty commanded by the Legal Education Reform Act requires less effort. All that the Legislature requires of the Court is to authorize the JBC to prepare a list of nominees. After such authorization, the duty of the Court is accomplished. It is plausible to think that the Legislature inserted the duty to authorize the JBC out of courtesy to the Chief Justice of the Supreme Court, who is the head of both bodies, and that the Constitution empowers the Supreme Court to assign additional duties to the JBC.[200]

As stated earlier, the Supreme Court has not revealed its position with respect to the Legal Education Reform Act. The unofficial word is that the Court considers certain provisions of the law as unconstitutional, and is waiting for an amendment of the law before it acts. The foregoing rumor is strengthened by the swearing in, by the Chief Justice of the Supreme Court, of the members of the Technical Panel for Legal Education created by the CHED. Can the Supreme Court, therefore, on its own accord, decide that an

199. A.M. No. 01-7-01-SC, dated July 17, 2001, which took effect on 1 August 1, 2001.

200. PHIL. CONST. art. VIII, § 5(5), provides:

act of the Legislature is unconstitutional? It has been often stressed and repeated that the acts of the Legislature demand respect and enjoy a presumption of validity. Courts are cautious to strike down legislation as unconstitutional. Only when an actual controversy is brought before it, and resolving the issue of constitutionality is unavoidable or is the very *lis mota*,[201] will the court act as a revisor. The reason why courts display caution before revising an act of a co-equal branch is that whenever the courts declare an act of another branch as invalid, "what [they] actually accomplish is the thwarting of the will of the elected representatives of the people in the Executive or Legislative branches of government."[202] Prescinding from this principle, there is more reason to examine the present inaction by the Supreme Court. In the present case, there is no actual controversy before the Supreme Court, yet it appears that the Court has already struck down the legislative enactment.

Assuming that the Court finds nothing unconstitutional about the law, the continued inaction by the Supreme Court will nevertheless set a perilous precedent. Ignoring the mandate of the law appears to be tantamount to questioning the wisdom of the law. Courts know very well that the wisdom, efficacy or morality of laws is an exclusive concern of the other two branches of government. The role of the Judiciary is to apply or interpret the laws, not to inquire into its wisdom.[203]

Indeed there will be legislation that will command the Court to perform a specific function, sometimes necessary for its implementation. Regrettably, the public may fall prey to the whims of the Court. The Court may become selective and determine that one law should be preferred over another. As a result, it may choose to carry out the mandate of one law, and ignore the same in another. This would throw the whole balance of power into disorder. Respect and obedience to a law, or the rule of law, would likewise disappear. Would it not be ironic that the ultimate defender of the law be its violator?

VII. REMEDIES

It is the lawyer's duty to assure that respect for law is fostered throughout the land, to strive, by his professional conduct, to bring about the realization that the law equally binds the government as it does the governed, judges as well as litigants before them, officials in government as well as the ordinary citizens, that government action no matter how laudable or desirable its objective, is never above the law and must always respect its dictates.

- Chief Justice Andres R. Narvasa[204]

201. Philippine Constitution Association v. Enriquez, 235 SCRA 506, 518-19 (1994). *See generally* Drilon v. Lim, 235 SCRA 135 (1994).

202. *Kilosbayan*, 232 SCRA at 110.

203. Padilla v. CA, 269 SCRA 402, 431 (1997).

A. Mandamus

Since the Supreme Court persists in ignoring the mandate of the Legal Education Reform Act, requiring it to authorize the JBC to prepare the list of nominees, the necessity of a remedy is apparent. In situations where there is a need to compel an individual or body to perform an act, the remedy that comes immediately to mind is the judicial remedy of *mandamus*. The difficulty in the situation, however, lies in the fact that the body involved in the present situation is the highest court of the land, the Supreme Court. Therefore, it is readily observable that the situation presents a truly unique dilemma.

Rule 65 of the 1997 Revised Rules of Court of Civil Procedure provides an aggrieved party the opportunity to avail of the remedy of *mandamus*. Section 3 states:

> Section 3. Petition for mandamus. – When any tribunal, corporation, board, officer or person unlawfully neglects the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station...and there is no other plain, speedy and adequate remedy in the ordinary course of law, the person aggrieved thereby may file a verified petition in the proper court, alleging the facts with certainty and praying that judgment be rendered commanding the respondent, immediately or at some other time to be specified by the court, to do the act required to be done to protect the rights of petitioner, and to pay the damages sustained by the petitioner by reason of the wrongful acts of the respondent.[205]

The above provision presents an idea of the definition of the term "*mandamus*." Renowned jurist Justice Jose Feria has provided a more comprehensive and lucid description of the term in the following manner:

> *Mandamus* may be defined as a command issuing from a court of law of competent jurisdiction, in the name of the state or sovereign, directed to some inferior court, tribunal, or board, or to some corporation or person, requiring the performance of a particular duty therein specified, which duty results from the official station of the party to whom the writ is directed, or from operation of law.[206]

The duty mentioned to in Section 3 of Rule 65, refers to ministerial duty, and thus, the writ of *mandamus* will issue when necessary to compel the performance of such a duty. This is the chief function of the writ of *mandamus*.

204. Andres R. Narvasa, *The Rule of Law*, 8 LAW. REV. 66 (1994).

205. RULES OF COURT, Rule 65, § 3 (emphasis supplied).

206. JOSE Y. FERIA & MARIA CONCEPCION NOCHE, 2 CIVIL PROCEDURE ANNOTATED 486 (2001 ed.) (citing 34 AM JUR, *Mandamus* § 2).

Jurisprudence, however, has extended the application of the writ of *mandamus* to require the performance of a discretionary duty, or one involving judgment and discretion. In such a case, however, the court cannot direct the exercise of judgment or discretion in a particular way or the retraction or reversal of an action already taken in the exercise of the latter.[207] The court can only require the respondent to act, but cannot command it to act in a specific way. The distinction, consequently, between ministerial and discretionary duty is if the law imposes a duty upon a public officer and gives him the right to decide how or when the duty shall be performed, such duty is discretionary. The duty is ministerial, therefore, when the individual is not required to exercise judgment or discretion, but must act in a prescribed manner when presented a given state of facts.[208]

To avail of the special civil action for *mandamus*, the petitioner must possess a clear, legal right, or a direct legal interest in the right sought to be enforced.[209] The writ can never confer powers or impose duties. Hence, a writ of *mandamus* can only command the performance of a duty or exercise of a power already imposed or possessed respectively.[210] In cases involving a public right where one seeks to compel the performance of a public duty set forth in the Constitution, it is sufficient that the petitioner be a citizen.[211]

Lastly, a writ of *mandamus* will issue when administrative remedies have been exhausted. Stated otherwise, the writ will not lie, as long as the petitioner has not resorted to all the administrative remedies available. There are exceptions to the foregoing rule. The first of which is when the other party is in estoppel, as in a case where one party led the other to believe that immediate judicial recourse is available and acceptable.[212] Also, administrative remedies need not be exhausted when pure questions of law are raised.[213]

Thus, based on the foregoing discussion, there are three essential requisites before a court will issue a writ of *mandamus*. First, the duty must generally be

207. Angchangco, Jr., v. Ombudsman, 268 SCRA 301, 306 (1997).

208. Meralco Securities Corporation v. Savellano, 117 SCRA 804, 812 (1982), (citing Sanson v. Barrios, 63 Phil. 198 (1936); Lemi v. Valencia, 26 SCRA 203 (1968)).

209. 1 FLORENZ D. REGALADO, REMEDIAL LAW COMPENDIUM 717 (6th ed. 1997).

210. Kapisanan ng mga Manggagawa sa Manila Railroad Company Credit Union, Inc. v. Manila Railroad Company, 88 SCRA 616, 621 (1979).

211. Joya v. Presidential Commission on Good Government, 225 SCRA 568, 578 (1993).

212. FERIA & NOCHE, *supra* note 206, at 493 (citing Vda. De Tan v. Veterans Backpay Commission, 105 Phil. 277 (1959)).

213. *See* Espanol v. Chairman, Philippine Veterans Association, 137 SCRA 314 (1985); Madrigal v. Lecaroz, 191 SCRA 20 (1990).

characterized as ministerial. Second, the petitioner must show that he possesses a clear legal right. Third, there must be a showing of exhaustion of administrative remedies, unless the exceptions to the rule are present. As will be seen hereunder, all the requisites are present in the instant controversy. The Legal Education Reform Act imposes a duty upon the Supreme Court to give prior authorization to the JBC before the latter may gather a list of candidates for the positions in the Board. This duty can be described as ministerial, because it gives no option as to how it shall be performed. Rather, it enjoins the Court to immediately perform its function. The Court need not exercise any discretion or judgment in doing the same. Thus, the first requirement can be met. A fulfillment of the second requirement can also be met because the petitioner can be any school of law. As the direct subject of the regulatory power conferred upon the Board, any school of law has a clear legal right to compel the Supreme Court to act and implement the law. Lastly, the necessity of exhausting administrative remedies is not applicable. In the first place, there is no administrative remedy that exists. Second, the issue involved is purely a question of law.

1. Venue of the Mandamus Suit

Having met all the requirements, it is essential to establish the venue for the case. The venue of a case is the place where the petition shall be filed. In Remedial Law, the Rules of Civil Procedure will provide a venue for specific cases. A reading of the Rules, therefore, reveals the following provision:

> Section 4. *Where petition filed.* – The petition may be filed not later than sixty (60) days from notice of the judgment order or resolution sought to be assailed in the Supreme Court or, if it relates to the acts or omissions of a lower court or of a corporation, board, officer or person, in the Regional Trial Court exercising jurisdiction over the territorial area as defined by the Supreme Court. It may also be filed in the Court of Appeals whether or not the same is in aid of its appellate jurisdiction, or in the Sandiganbayan, if it is in aid of its appellate jurisdiction.[214]

It is apparent from the provision regarding venue that the Supreme Court, Court of Appeals and Regional Trial Courts exercise concurrent original jurisdiction over cases for *mandamus*. Notwithstanding the existence of the concurrent original jurisdiction by the three courts, the Supreme Court has required the observation of the hierarchy of courts. In the case of *Santiago v. Vasquez*,[215] the Court had the occasion to expound on the hierarchy of courts.

214. RULES OF COURT, Rule 65, § 4.

215. 217 SCRA 632 (1993).

> One final observation. We discern in the proceedings in this case a propensity on the part of petitioner, and, for that matter, the same may be said of a number of litigants who initiate recourses before us, to disregard the hierarchy of courts in our judicial system by seeking relief directly from this Court despite the fact that the same is available in the lower courts in the exercise of their original or concurrent jurisdiction, or is even mandated by law to be sought therein. This practice must be stopped, not only because of the imposition upon the precious time of this Court but also because of the inevitable and resultant delay, intended or otherwise, in the adjudication of the case which often has to be remanded or referred to the lower court as the proper forum under the rules of procedure, or as better equipped to resolve the issues since this Court is not a trier of facts. We, therefore, reiterate the judicial policy that this Court will not entertain direct resort to it unless the redress desired cannot be obtained in the appropriate courts or where exceptional and compelling circumstances justify availment of a remedy within and calling for the exercise of our primary jurisdiction.[216]

Furthermore, in a controversy presented before the Supreme Court involving a special civil action for *mandamus*, the Court reiterated the need to abide by the foregoing pronouncement of observing the hierarchy of courts and avoiding the institution of suits for *mandamus* at the first instance with the high court.

> We turn now to the second question posed in the opening paragraph of this opinion, as to the propriety of a direct resort to this Court for the remedy of *mandamus* or other extra-ordinary writ against a municipal court, instead of an attempt to initially obtain that relief from the Regional Trial Court of the district or the Court of Appeals, both of which tribunals share this Court's jurisdiction to issue the writ. *As a matter of policy such a direct recourse to this Court should not be allowed. The Supreme Court is a court of last resort, and must so remain if it is to satisfactorily perform the functions assigned to it by the fundamental charter and immemorial tradition. It cannot and should not be burdened with the task of dealing with causes in the first instance. Its original jurisdiction to issue the so-called extraordinary writs should be exercised only where absolutely necessary or where serious and important reasons exist therefor.* Hence, that jurisdiction should generally be exercised relative to actions or proceedings before the Court of Appeals, or before constitutional or other tribunals, bodies or agencies whose acts, for some reason or another, are not controllable by the Court of Appeals. Where the issuance of an extraordinary writ is also within the competence of the Court of Appeals or a Regional Trial Court, it is in either of these courts that the specific action for the writ's procurement must be presented. This is and should continue to be the policy in this regard, a policy that courts and lawyers must strictly observe.[217]

216. *Santiago*, 217 SCRA at 641 (emphasis supplied).

217. Vergara, Sr. v. Suelto, 156 SCRA 753, 766 (1987) (emphasis supplied).

Accordingly, litigants must initially resort to the lower courts to obtain relief. If the ruling were to be followed, however, the present controversy would create an unprecedented situation. The filing in either the Court of Appeals or the Regional Trial Court of the petition and the subsequent issuance of a writ would result in an inferior court compelling a superior court to perform a duty. Such a situation would be unusual, and bordering on the absurd. It would run contrary to the becoming modesty that inferior courts must display, and would run afoul to the hierarchy of courts.

> It is elementary — so elementary, indeed, that even freshmen law students know it — that an inferior court has no legal authority to set aside a final and executory decision of this Court and grant a new trial. In *People, et al., v. Vera*, we said the following:
>
> "As already observed by this court in *Shioji vs. Harvey* ([1922], 43 Phil., 333, 337) and reiterated in subsequent cases, 'if each and every Court of First Instance could enjoy the privilege of overruling decisions of the Supreme Court, there would be no end to litigation, and judicial chaos would result.' *A becoming modesty of inferior courts demands conscious realization of the position that they occupy in the interrelation and operation of the integrated judicial system of the nation.*"[218]
>
> *A municipal trial judge, figuratively speaking, is "the low man in the totem pole" of the judiciary. He should, of necessity, defer to orders of the higher courts regardless of his personal opinion in the case. "A becoming modesty of inferior courts demands realization of the position that they occupy in the interrelation and operation of the integrated judicial system of the nation."* The appellate jurisdiction of a higher court would be meaningless if a lower court may disregard and disobey with impunity its final judgment or order.[219]

Instituting the suit for *mandamus* in an inferior court would run contrary to the becoming modesty that inferior courts must demonstrate. Often times the Supreme Court has reminded inferior court judges that the hierarchy of courts situates the latter in a lower position. Thus, the order of a superior court must always be obeyed. Assuming that the suit is filed with the Regional Trial Court or Court of Appeals, a contrary scenario will result. An inferior court will have to render judgment compelling a superior court, principally the Supreme Court, to obey its order. However, it would also be absurd if the petition is filed with the Supreme Court. The Supreme Court would be presented with a case involving itself as one of the parties. The Supreme Court, in issuing the writ of *mandamus*, would in effect be compelling itself to perform its duty. A potential solution to these problems would be to substitute the Supreme Court and place in its stead, the Clerk of the Supreme Court

218. Usaffe Veterans Association, Inc. v. The Treasurer of the Philippines, 18 SCRA 1091, 1093-094 (1966) (emphasis supplied).

219. Nique v. Zapatos, 219 SCRA 639, 642 (1993) (citations omitted) (emphasis supplied).

and file the action for *mandamus* with the Regional Trial Court or Court of Appeals.

2. Parties to the Mandamus Suit

The plaintiff to the suit shall be any school or college of law. The proper party against whom the suit shall be filed is the Clerk of the Supreme Court, in his or her capacity as Secretary *ex officio* of the JBC. The JBC is a constitutionally created body. In creating the Council, the Constitution provided the composition of its membership.

> Section 8. (1) A Judicial and Bar Council is hereby created under the supervision of the Supreme Court....
>
> x x x
>
> (3) The Clerk of the Supreme Court shall be the Secretary *ex officio* of the Council and shall keep a record of its proceedings.

As secretary of the JBC, the Clerk of the Supreme Court performs the task of scheduling the calendar of the JBC. In filling vacancies in the Judiciary, the JBC follows a certain procedure. First, the Supreme Court notifies the JBC of any vacancies. The JBC, in turn, makes an announcement that there is a vacancy in a particular court, and invites the public to submit applications or nominations.[220] When the Supreme Court informs the JBC of the vacancies, the Clerk must arrange the matter of the vacancy, and include it in the order of business during its regular meetings. Therefore, in a similar fashion, the suit for *mandamus* should seek to compel the Clerk to include in the calendar for consideration of the JBC, the task of publicly announcing the existence of vacancies in the positions in the Board. In so doing, the JBC will be in a position to prepare the list of nominees. Although the law requires prior authorization from the Supreme Court, there can be an implied authority if the Council takes up the matter because the Chairman of the JBC is the Chief Justice of the Supreme Court, and the JBC is under the supervision of the Supreme Court.

Another option would be to institute the *mandamus* case against the Clerk of the Supreme Court, in his or her capacity as such. The suit would then seek to compel the Clerk to include in the order of business, the matter of granting authority to the JBC when the Supreme Court *en banc* assembles during its weekly meetings. This manner would ensure an express authorization from the Supreme Court to prepare the list of nominees. Moreover, instituting the Clerk as the respondent in any of the two instances,

220. Aurora Rosario Oreta, Judicial Independence: An Evaluation of the Judicial and Bar Council 47 (1995) (unpublished J.D. thesis, Ateneo de Manila University, School of Law).

in place of the Supreme Court as a collegiate body, would contravene the long standing principle of hierarchy of courts and the becoming modesty required of lower courts will not result.

B. *Declaratory Relief*

A second remedy to consider would be to file a case for declaratory relief, under Rule 63 of the 1987 Revised Rules of Civil Procedure. Rule 63 provides a description of said special civil action.

> *Who may file petition.* - Any person interested under a deed, will, contract or other written instrument, or whose rights are affected by a statute, executive order or regulation, ordinance, or any other governmental regulation may, before breach or violation thereof, bring an action in the appropriate Regional Trial Court to determine any question of construction or validity arising, and for a declaration of his rights and duties, thereunder.[221]

Justice Regalado enumerates the requisites for filing an action for declaratory relief as the foregoing:

> 1. the subject matter of the controversy must be a deed, will, contract or other written instrument, statute, executive order or regulation, or ordinance;
> 2. the terms of said documents and the validity thereof are doubtful and require judicial construction;
> 3. there must have been no breach of the document in question, otherwise an ordinary civil action is the remedy;
> 4. there must be an actual justiciable controversy or the "ripening seeds" of one between persons whose interests are adverse;
> 5. the issue must be ripe for judicial determination...;
> 6. adequate relief is not available through other means or other forms of action or proceeding.[222]

Pursuant to the abovementioned, the fulfillment of the requirements is present if a case for declaratory relief was filed with the Regional Trial Court. First, the subject matter is a statute, clearly in compliance with the rule. Second, there is indeed a controversy, because law schools are at a loss as to which governmental body can regulate legal education. There is ripeness with respect to the issue, since almost ten years have passed from the enactment of the statute. The petitioner, any school or college of law, through its representative, shall request the court concerned to render a declaratory judgment concerning the rights and duties of law schools in connection with the Legal Education Reform Act.

221. RULES OF COURT, RULE 63 § 1.

222. REGALADO, *supra* note 209, at 693.

C. *Injunction*

A final solution would be to institute a case with the Regional Trial Court, praying for an injunction to prohibit the CHED from continuing with its regulation over legal education. Justice Regalado defined injunction as a judicial writ, process or proceeding whereby a party is ordered to do or refrain from doing a particular act. An injunction suit may take two forms. First it may be an action in itself to restrain or command the performance of an act, or it may be a provisional remedy for and as an incident in the main action which may be for other reliefs.[223] In the present controversy, the main action will seek a permanent injunction against the CHED, but will also apply for a preliminary injunction to prevent the CHED from further supervising schools and colleges of law. Rule 58 of the Rules of Court provides the grounds for issuance of a preliminary injunction.

> Sec. 3. Grounds for issuance of preliminary injunction. A preliminary injunction may be granted at any time after the commencement of the action and before judgment, when it is established;
>
> (a) That the plaintiff is entitled to the relief demanded, and the whole or part of such relief consists in restraining the commission or continuance of the acts complained of, or in the performance of an act or acts, either for a limited period or perpetually;
>
> (c) That a party, court, agency or a person is doing, threatening, or is attempting to do, or is procuring or suffering to be done, some act or acts probably in violation of the rights of the applicant respecting the subject of the action or proceeding, and tending to render the judgment ineffectual.

The plaintiff, any school of law, can base its application for a preliminary injunction on the grounds in the foregoing section. Essentially the prayer for the issuance of the preliminary injunction would be based on the fact that the CHED continues to supervise legal education through the Technical Panel for Legal Education that it has created. This continued action by the CHED is violative of the rights of a school of law arising from the mandate of the Legal Education Reform Act. As previously discussed in this essay, the insistence of the CHED to oversee law schools is without legal basis. The vacuum created by the inaction of the Supreme Court has not and will not validate the actions of the CHED because of the jurisprudential doctrine that "legitimate power can not arise from a vacuum."

The main action to perpetually enjoin the CHED from exercising regulatory powers over legal education shall be grounded on the fact that the CHED cannot refer to any provision of law to legally support its actions. The CHED's enabling law is couched in general terms, whereas the law creating the Board is specific. Being a special law, the Legal Education Reform Act

223. *Id.* at 637.

takes precedence over the law creating the CHED, by reason of the principles of statutory construction. Although the charter of the CHED is a later law, the principle that an implied repeal is not favored applies. Therefore, absent an express repeal in the law creating the CHED, the Legal Education Reform Act remains valid and existing. Thus, despite the lack of implementation of the Legal Education Reform Act, the continued violation by the CHED contravenes the Civil Code provision, which states that a violation of the law shall not be excused by reason of the law's disuse, custom or practice to the contrary.[224]

VIII. CONCLUSION

The seeming confusion, created by the inaction of the Supreme Court, over which body shall exercise jurisdiction over schools and colleges of law, continues to hamper the development of legal education in the country. Without a consensus among all the schools of law as to which body can rightfully regulate and supervise their acts, solutions to problems plaguing Philippine legal education will continue to be elusive. The most glaring evidence of the continuing decline of the quality of law schools is the annual passing percentage of examinees in the Bar examinations conducted by the Supreme Court. With the exception of the law schools of Ateneo de Manila University, San Beda, and the University of the Philippines, which produces more than an annual eighty percent passing rate, and the students of which consistently place in the top ten highest examination grades, the performance of the other law schools is deplorable. Ateneo de Manila University, San Beda and the University of the Philippines had a combined average passing rate of almost 80% for the period beginning 1991 and ending 2001, and the rest of the schools produced a combined average of nineteen percent (19%), a sixty percent disparity. Despite the dismal performance of a majority of the law schools in the nation, the number of law schools which send candidates to take the Bar examinations continues to increase. In 1991, a total of 59 schools and colleges of law had at least one representative taking the Bar examinations. The number rose to 60 in 1994, 61 in 1995, and 65 in 1996. In 1997, an additional eight schools were added to the total, bringing the number to 73 schools. The year 1998 saw another increase, with 77 schools represented. As recent as 2001, the number rose once again, bringing the total to 78 schools.[225] Within a span of 11 years, the total increased by 19 schools. The number of law schools operating continues to rise, yet it appears that the quality of education is being compromised. Fortunately, the Board is tailored to face the challenges brought about by the current state of legal education.

224. CIVIL CODE, art. 7.

225. *See* Statistical Data on Passing Rates, *supra* note 10.

Composed of members of the legal profession, the Board will be more proficient and attuned to the difficulties facing legal education. Moreover, with the office and staff support to be provided by the DECS, the Board will have resources at its disposal.

Not only would the Board be equipped to handle the regulation and supervision of legal education, but would also be the body lawfully mandated to exercise such authority. The general character of the law creating the CHED and providing for its powers and functions cannot take precedence over the special law establishing the Board. Well-established principles of statutory construction prevent the CHED from raising any legitimate or justifiable argument in defense of its actuations. Moreover, notwithstanding the absence of the Board, the lack of the execution of the law cannot form the basis of the validity of the acts of the DECS for the very reason that "legitimate power can not arise from a vacuum." It must also be remembered that the public's violation or non-observance of a law cannot be countenanced simply because of disuse, custom, or practice to the contrary.[226]

There is likewise no reason to doubt the constitutionality of the Legal Education Reform Act. The doctrines laid down by the cases decided in the Philippines and in the United States, from which the present Constitution is derived, have convincingly shown the propriety of the Legislature's delegation of the duty to participate in the implementation of the law. In connection with the Supreme Court's power of regulating admission into the Bar, the duty delegated by the Legislature to the former is necessarily inherent in such power.

With the foregoing in mind, the prolonged inaction by the Supreme Court has threatened the very principle that the citizens of the Philippine nation so gallantly fought to protect in both EDSA and EDSA II – the principle of the rule of law.

> Indeed, the function of the Supreme Court, as well as of all judicial and quasi-judicial agencies, is to apply the law as we find it, not to reinvent or second-guess it. Unless declared unconstitutional, ineffective, insufficient or otherwise void by the proper tribunal, a statute remains a valid command of sovereignty that must be respected and obeyed at all times. This is the essence of the rule of law.[227]

The rule of law cannot be sustained, when the very division of government tasked to uphold it ignores the same. Its primacy and importance cannot be overemphasized. To borrow the words of former Chief Justice Andres Narvasa,

226. CIVIL CODE, art. 7.

227. Veterans Federation Party v. Comelec, 342 SCRA 244, 270 (2000).

"[f]or the law is the lasting and secure guide of human conduct; it is not something to be manipulated, twisted or set side for goals, however high or desirable they may seem."[228]

228. Narvasa, *supra* note 204, at 67.

The Commercial Ends That Motivate the Legal Profession: An Alternative Model to Understanding the Rules that Govern the Practice of Law

Allan Verman Ong[*]

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"You cannot win a case unless you have a case. The day-long, the life-long struggle in your life will not so much to win cases... as to get cases."

- Vicente J. Francisco[1]

I. INTRODUCTION

The practice of law is governed by a myriad of precepts and regulations: the Code of Professional Responsibility, Rule 139-B of the Revised Rules of

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1. VICENTE J. FRANCISCO, PRACTICE OF LAW AND ADVICE TO YOUNG LAWYERS 41 (1973) [hereinafter FRANCISCO, ADVICE].