The Province and Duty of the Courts: Law and Policy

*José Victor V. Chan-Gonzaga**

INTRODUCTION 175
I. JUDICIAL REVIEW 176
II. SELECTED JURISPRUDENCE 190
A. Freedom of the Press
B. Free Speech
C. Jurisprudence and Economics
D. The Presidency
E. Congress and the Courts
III. JUDICIAL FUNCTION IN THE 21ST CENTURY: A FRAMEWORK 217
A. Social Conditions and the Court
B. Constitutional and Statutory Construction
C. Courts and Enforcement of Decisions
D. The Judicial Function
CONCLUSION 225

The very considerations which the courts most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. We mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practices and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to public policy in the last analysis.

Oliver Wendell Holmes
Common Carriers and the Common Law (1879)

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* A.B. '93, J.D.'97 (St. Thomas More Awardee and Dean's Award for Writing and Defending the Best Thesis), Ateneo de Manila University. The author was sworn in as a career member of the Philippine foreign service on June 26, 1997 by then President Fidel V. Ramos, and is presently a Director at the Office of United Nations and Internatonal Organizations of the Department of Foreign Affairs. In November of 1998, he joined the Faculty of Law of the Ateneo de Manila, and has since been teaching the Law on Succession, Legal Profession and Legal Writing. He holds the Justice José B.L. Reyes Professorial Chair for Law and Humanities for School Year 2001-02.

His previous works published by the *Ateneo Law Journal* include: *The Legal Profession in a World of Globalization and Electronic Commerce*, 45 ATENEO L. J. 325 (2001); *Provisional Remedies in the World Court: The ICJ in the 21st Century*, 45 ATENEO L. J. 129 (2001); *UNCLOS and the Philippine Territorial Seas: Problems, Perspectives and Options*, 42 ATENEO L. J. 1 (1997).

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INTRODUCTION

None who deal with law, however defined, can escape policy when policy is understood as the making of important decisions that affect the distribution of social values.[1] This statement is as true for those making jurisprudence as it is for those engaged in legislative work.

Unfortunately, the common understanding of the judicial function is limited to deciding actual controversies between parties by the mere application of the law. Conventional wisdom regarding jurisprudence does not favor recognition of the policy implications of decided cases; moreover, there is much emphasis on proscribing judicial legislation and the issue of political questions.

Nevertheless, it is undeniable that for the greater part of the Court's one hundred years (1901-2001), in addition to the times they made policy under the pretext of judicial review, the Court has been making policy determinations in the process of interpreting statutes and in deciding cases. Through the years, the "instinctive preferences and inarticulate convictions," as well as vital policy considerations have been important elements contributing to how jurisprudence partook in the establishment of social policy. Yet tradition and widely-accepted constitutional underpinnings makes it seem almost taboo in the legal profession to speak of the judiciary as an institution that is as important as the President and Congress in building the national edifice of policy and cohesion.

It may thus be crucial to confront the policy-making role of the courts. It is possible that they will actually be legislating less or better as opposed to the established conception of the judicial function, forcing them to realize the social importance of debatable issues and the imperative need for justification and acceptance of any policy laid down in jurisprudence. It should be emphasized, however, that this is far from an argument for judicial legislation; nor is it an apology for the illusion that the traditional theory of judicial function may have foisted on the members of the bar and bench.

This is really only an attempt to bring to light what Mr. Justice Holmes called the "secret root from which the law draws all the juices of life." It shall be endeavored to situate the judicial function in 21st century Philippine republicanism; and how in the exercise of its province and duty to say what the law is, the Court is sometimes actually prescribing what the law should be.

The issue of judicial review, therefore, becomes a threshold concern for this essay. It is in determining the meaning and intent of constitutional and

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1. *See* Harold D. Laswell and Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203-95 (1943).

legal precepts or provisions where the Court is sometimes faced with the need to make a decision from amongst choices that occupy the various broad of policy options.

In a case involving judicial review, the final decision of the Court for either party is, in actuality, a decision against the other – whether it is the Government, a public official, or a private person. This may seem harmless if the parties represent only their private interests but in most cases we see that the implications of constitutional law cases, for example, invariably reach out into the realm of public policy and societal interest. Normally, therefore, such cases become the center of competition and even friction between or amongst competing social interests.

Clearly, when a governmental act or conduct is challenged in the courts, the latter may inevitably engage in policy-making when they interpret statutes, the Constitution, or the reasonableness of such act or conduct. Here, by policy, we refer to the authoritative standard of action that is applied as the solution of a perceived problem.[2] In deciding the constitutionality or reasonableness of any act or conduct, the courts must choose the meaning they wish to ascribe to the Constitution or the social objectives they want to achieve.[3]

Being burdened with the ultimate responsibility for judicial legislation, the Court faces the challenge of acquainting itself not only with what the learned have thought and with the historical trends of the times, but also with the long-term interests of all whom it serves and the appropriate means of securing such interests.[4]

It would be in order, however, to first examine briefly the jurisprudential attitude towards the exercise of the power of judicial review. For notwithstanding the awesome potential of the judicial function as a critical tool in the establishment of national policies, it may be that the judiciary chooses to limit itself to the traditional conception of its role in the life of the nation. It may exclude itself from playing the part of reformer, content with the duty of interpreting the law as it is.[5]

I. Judicial Review

We begin on February 5, 1924. Early on in the life of this young Republic, a resolution was adopted by the Philippine Senate depriving the Hon. Jose Alejandrino, a Senator appointed by the Governor-General to represent the

2. Joel B. Grossman & Richard S. Wells, Constitutional Law and Judicial Policy Making 36 (1972).
3. *Id.* at 39.
4. *See* Laswell and McDougal, *supra* note 1.
5. Elihu Root, *The Importance of an Independent Judiciary*, 72 The Independent 704 (1912).

Twelfth Senatorial District, of all the prerogatives, privileges, and emoluments of his office for a period of one year. The suspension came after a finding by the Senate that Senator Alejandrino was guilty of disorderly conduct and flagrant violation of the privileges of the Senate for "treacherously assaulting" Senator Vicente de Vera in the course of a debate on the credentials of Senator Alejandrino.

Without discussing any of the "other interesting questions raised and argued,"[6] the Court ruled on the primary issue put squarely before it: may the Supreme Court of the Philippine Islands, by *mandamus* and injunction, annul the suspension of Senator Alejandrino and compel the Philippine Senate to reinstate him in his official position?

Speaking through Mr. Justice Malcolm, the Court declined jurisdiction to consider the petition, arguing that "no court has ever held and [we apprehend] no court will ever hold that it possesses the power to direct the Chief Executive or the Legislature or a branch thereof to take any particular action."[7] He went on to warn that "if a court should ever be so rash as to thus trench on the domain of either of the other departments, it will be the end of popular government as we know it in democracies."[8]

The refusal of the Court to be seized of jurisdiction in this case may seem surprising, considering its statement at the very outset that "it is peculiarly the duty of the judiciary to say what the law is, to enforce the Constitution, and to decide whether the proper constitutional sphere of a department has been transcended."[9] Mr. Justice Malcolm defined the sphere of judicial review as encompassing not only the validity of legislative enactment, but even the legality of all private and official acts. To this extent, he argued that the courts are able to restrain the other departments.

Nevertheless, Mr. Justice Malcolm immediately continued to say that *mandamus*, as a general rule, does not lie against a coordinate branch of government for the very obvious reason that neither branch is inferior to the other. He wrote that *mandamus* would not lie against the legislature to compel the performance of duties purely legislative in their character which, therefore, pertain to their legislative functions and over which they have exclusive control.

The Court then made a disconcerting statement that "where a member has been expelled by the legislative body, the courts have no power, irrespective of whether the expulsion was right or wrong, to issue a mandate to compel his

6. *See* Alejandrino v. Quezon, 46 Phil. 83, 88 (1924).
7. *Id.* at 94.
8. *Id.*
9. *Id.* at 88.

reinstatement."[10] Mr. Justice Malcolm then cited a long list of cases which support the foregoing thesis and quoted from the *ponencia* of Mr. Justice Shaw in *French v. Senate of the State of California,* "Under our form of government the judicial department has no power to revise even the most arbitrary and unfair action of the legislative department, or of either house thereof, taken in pursuance of the power committed exclusively to that department by the Constitution."[11]

This case is especially relevant and revealing for the purposes of this essay because of two interesting assertions by Mr. Justice Malcolm. First, the *ponencia* asserted that "no *consideration of policy* or convenience should induce this court to exercise a power that does not belong to it or to surrender a power which is its duty to exercise."[12] Thus, the said conclusion of the Court, notwithstanding a clear disquisition from Mr. Justice Malcolm on why the Senate does not have the power to suspend an appointive member is, *to wit*:

> Punishment by way of reprimand or fine vindicates the outraged dignity of the House without depriving the constituency of representation; expulsion, when permissible, likewise vindicates the honor of the legislative body while giving to the constituency an opportunity to elect anew; but suspension derives the electoral district of representation without being afforded any means by which to fill the vacancy. By suspension, the seat remains filled but the occupant is silenced. Suspension for one year is equivalent to qualified expulsion or removal.[13]

Second, the Court betrayed its deepest fear when Mr. Justice Malcolm declared that *mandamus* should not issue where it would not prove to be effectual and beneficial. The Court said in what some may well consider a damning admission of surrender that "judgment should not be pronounced which might possibly lead to unseemly conflicts or *which might be disregarded with impunity*."[14]

The Malcolm *ponencia* drew two very vigorous dissents from Justices Johnson and Ostrand. Mr. Justice Johnson strongly argued that it could not be the doctrine that the different departments are absolutely independent and that one branch could never interfere to control or restrain the action of the other. If it were so, then the very purpose of the checks and balances would be defeated. Thus, in the proper cases, Mr. Justice Johnson required that the courts should inquire into the legality or illegality of the acts of the other departments of the Government and to declare what the law is and what the rights of the parties are.[15] He stated that the will of the people, as expressed in

10. *Id.* at 89.
11. French v. Senate of the State of California, 146 Cal. 604, 614 (1905).
12. *Alejandrino*, 46 Phil. at 95 [emphasis added].
13. *Id.*
14. *Id* [emphasis added].
15. *Id.* at 114.

the Constitution, is the paramount law. Hence, where the acts of the Executive or Legislative departments violated the Constitution, it was the sworn duty of the Judiciary to interpret and to declare that the will of the people and the right of a citizen have been violated and transgressed.[16]

Mr. Justice Johnson asserted that the question of disciplining a member of the House is not an internal concern of the Legislature, particularly if there are allegations that constitutional rights have been violated. He reminded the majority that a citizen does not divest himself of his cherished freedoms under the Constitution by the mere fact of becoming a member of the Legislature. Here, of course, it is important to distinguish this case from one where the issue is what constitutes "disorderly behavior" as a ground for disciplinary action by the Legislature.[17]

Mr. Justice Johnson could not agree with the proposition that the Legislature is the final arbiter of its powers and prerogatives, without the restraint of judicial review. He contended that the legality of their action may always be examined and determined by the courts. Conceding that *mandamus* would not lie in all cases, Mr. Justice Johnson, however, distinguished between requiring a particular act (specially confided to a department) to be done, and from a pronouncement upon the legality of that act after it is performed by the relevant department.

On the other hand, Mr. Justice Ostrand wrote that he could not agree with the holding of the majority that "because the respondents are members or officers of another department the courts have no power to restrain or prohibit them from carrying into effect an unconstitutional and therefore void act of that department."[18]

Fifteen years later, in 1939, another important case came before the Court – *Planas v. Gil.*[19] But this time, a unanimous Court speaking through Mr. Justice Laurel took cognizance of a petition for prohibition against the Commissioner of Civil Service.

The factual antecedents are as follows: Carmen Planas, a member of the municipal board of the City of Manila criticized the acts of certain government officials in connection with the general election for members of the National Assembly in 1938. Planas was subsequently asked by the Executive Secretary, by authority of the President of the Philippines, to appear before the Commissioner of Civil Service in order to "prove the statements" made by her.

16. *Id.* at 118.
17. *See* Osmena v. Pendatun, 109 Phil. 863 (1960).
18. *Alejandrino*, 46 Phil. at 126.
19. Planas v. Gil, 67 Phil. 62 (1939).

Planas questioned the supposed investigation that was with a view to initiating disciplinary action against her on the grounds that the Civil Service Commission did not have jurisdiction, and that she was merely exercising her freedom of speech and expression. Thus, the petition for prohibition was brought before the Court.

Mr. Justice Laurel began his scholarly disquisition by positing that the Court is not precluded from inquiring into the validity or constitutionality of executive acts when properly challenged by interested or affected parties. He wrote that the classical separation of governmental powers is a relative theory of government. As far as the Judiciary was concerned, Mr. Justice Laurel wrote that while it holds "neither the sword nor the purse," it is, by constitutional placement, the organ called upon to allocate constitutional boundaries. As to the Supreme Court, it was entrusted expressly or by necessary implication with the obligation of determining, in appropriate cases, the validity of any legislative or executive action.[20]

Yet, after a survey of relevant law and jurisprudence on the totality of the powers conferred upon the President, the Court found itself unable to rule that the President did not have the power to order the investigation of the petitioner in this case.[21]

Note, however, that three years earlier, in the case of *Angara v. Electoral Commission*,[22] likewise speaking for a unanimous Court, Mr. Justice Laurel had already spoken of "judicial supremacy," which properly is the power of judicial review under the Constitution.[23] In that case, there was an apparent conflict between the National Assembly confirmation of Angara's election on December 3, 1935, and the Electoral Commission's resolution setting December 9, 1935 as the last day for the filing of electoral protests. Declining the temptation to divest itself of jurisdiction over a case involving the Legislature and a Constitutional body, Mr. Justice Laurel argued that the Court had jurisdiction over the subject matter of the controversy. It ruled that it had the power to determine the character, scope, and mission of the Electoral Commission as "the sole judge of all contests relating to the election of the members of the National Assembly."

In the case of *Mabanag v. Lopez Vito*,[24] a resolution of both houses of Congress proposing a constitutional amendment was questioned for not having

20. *Id.* at 74.
21. *Id.* at 78.
22. 63 Phil. 139 (1936). *See however* the separate concurring opinion of Justice Abad Santos, 63 Phil. at 184.
23. *Id.* at 158.
24. 78 Phil. 1 (1947).

included three senators and eight congressmen in the reckoning of the necessary three-fourths vote required by the Constitution. These lawmakers were either suspended formally or not allowed to take part in congressional deliberations because of alleged irregularities in their election.

The Court, through Mr. Justice Tuason, refused to take cognizance of this case saying that the validity of the ratification by Congress of any proposal for amendments to the Constitution was a political question and hence not justiciable. *Mabanag v. Lopez Vito*, however, had already been overturned by the later cases of *Gonzales v. Comelec*[25] and *Tolentino v. Comelec*,[26] both of which held that whether or not Congress or a Constitutional Convention had properly proposed amendments to the Constitution is a justiciable and not a political question.[27]

For the purposes of this paper, however, it may nevertheless be important to note the passionate dissent of Mr. Justice Perfecto in *Mabanag*. Insisting that the last bastion of democracy was in danger, Mr. Justice Perfecto decried what was, to him, a summons to "give up without the least resistance, as the banner of the Constitution is silently and meekly hauled down from its pole to be offered as a booty to the haughty standard bearers of a new brand of Fascism."[28]

Mr. Justice Perfecto could not accept the proposition that the Court could no longer review the computation of the actual membership of the Senate and the House of Representatives on the theory of the conclusive certification made by the presiding officers and secretaries of both Houses of Congress. He could not "accept unconditionally as a dogma, as absolute as a creed of faith, what [was shown] to be a brazen official falsehood."[29]

Calling the position of the majority as a "voluntary self-delusion," Mr. Justice Perfecto did not even accept the political question doctrine as good doctrine because it was a general proposition that benefits from no judicial discernment, thereby leaving everyone without full comprehension of its scope and consequences.[30]

Mr. Justice Perfecto wrote one stinging criticism after another regarding the political question doctrine in his very candid dissent. He characterized the issue as the absence of a doctrine, in view of the confessed difficulty in

25. 21 SCRA 774 (1967).
26. 41 SCRA 702 (1971).
27. *See* 2 JOAQUIN G. BERNAS, S.J., THE CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 283 (1988) [hereinafter 2 BERNAS].
28. *Mabanag*, 78 Phil. at 26 (Perfecto, J., dissenting).
29. *Id.* at 39.
30. *Id.* at 41.

determining the matters that would fall into the category of political questions. Said Mr. Justice Perfecto:

> [w]e irrevocably refuse to accept and sanction such a pseudo-doctrine which is based on the unsettled meaning of political question. The general proposition that "political questions are not within the province of the judiciary" is just one of the many numerous general pronouncements made as an excuse for apathetic, indifferent, lazy or uncourageous tribunals to refuse to decide hard or ticklish legal issues submitted to them. It belongs to the category of that much-vaunted principle of separation of powers, the handful of sand with which judicial ostriches blind themselves, as if self-inflicted blindness may solve a problem or may act as a conjuration to drive away a danger or an evil.[31]

Conceding that the proposal to amend the Constitution and the process to make it effective are political matters, Mr. Justice Perfecto nevertheless could not accept the conclusion that a litigation as to whether the Constitution was followed or violated, was beyond the jurisdiction of the Court. "Was there anything more political in nature than the Constitution?" asked Mr. Justice Perfecto. But more damning perhaps is another question also posited in the dissent: how could we accept a theory (the enrolled bill doctrine) which elevated a falsehood (number of members in the Congress) to the category of truth?

The battle royale on judicial review in our legal history took place in 1949 when the case of *Avelino v. Cuenco*[32] went before the Court. This case involved the historic, yet tumultuous, session of the Philippine Senate on February 21, 1949. Except for Senator Sotto, who was confined in a hospital, and Senator Confesor, who was in the United States, all the other twenty-two Senators were present, thus constituting a quorum to do business.

Senator Tañada, who had reserved his right to speak on the floor the previous session day in order to formulate his charges against the Senate President, wanted to rise and speak. He was never recognized by the Senate President, and some disorderly conduct subsequently broke out in the Senate gallery, as if by pre-arrangement. At about the same time, Senator David moved for adjournment. Over the objection of Senator Sanidad, then Senate President Avelino banged the gavel and abandoned the Chair, walking out with six fellow Senators.

Those left behind made it of record that the Chair was deliberately abandoned by Senator Avelino. Thereafter, those who remained continued with the business of the Senate. After Senator Tañada was finally able to deliver his privilege speech, the Senate Presidency was declared vacant and Senator Mariano J. Cuenco was elected as the new Senate President. Senator Cuenco

31. *Id.* at 41-42.

32. 83 Phil 17 (1949).

took his oath, and the next day, he was recognized by the President of the Philippines as Acting Senate President.

Invoking *Alejandrino v. Quezon, Vera v. Avelino,*[33] *and Mabanag v. Lopez Vito*, the Court, in an unsigned resolution on March 4, 1949, refused to take cognizance of the *quo warranto* petition of Senator Avelino. The Court said that the selection of the Senate President affected only the Senators themselves who were at liberty *at any time* to choose their officers, change or reinstate them. To the majority of the Justices, therefore, the remedy of Avelino was on the floors of the Senate, and not in the Supreme Court.

Brushing aside the argument that a political crisis was brewing, the Court ruled that it "will not sally into the legitimate domain of the Senate on the plea that our refusal to intercede might lead into a crisis, even a revolution."[34] The Court also noted that the President had already recognized the election of Cuenco, while the Avelino camp had not constituted itself into another Philippine Senate.

In fine, the Court concluded that with four of the six-Justice majority taking the position of being confronted with the practical situation, that twelve of the twenty-three Senators, who would participate in the Senate deliberations in the days immediately after this decision, would support Senator Cuenco, it would be most injudicious to declare Senator Avelino as the rightful President of the Senate.[35]

In a separate opinion, Chief Justice Moran argued that the crisis called for the intervention of the Court. He believed that the issue of a quorum was a constitutional question that could not validly be decided by either faction in the Senate. He also wrote that for as long as the anomalous situation continued, all laws, resolutions, and other measures passed by the Cuenco group would be open to doubt. Thus, Chief Justice Moran argued that a general situation of uncertainty, pregnant with grave dangers, would develop into confusion and chaos, with severe harm to the nation.[36]

Mr. Justice Perfecto found the political question argument untenable. He said that the questions raised in the petition, although political in nature, were justiciable because they involved the enforcement of constitutional precepts and the rules of the Senate. He wrote that the power and authority to decide such questions of law formed part of the jurisdiction, not only expressly conferred on the Supreme Court, but of which it could not be divested by

33. 77 Phil. 192 (1946).

34. *Avelino,* 83 Phil at 22.

35. *Id.* at 24 (Moran, J., sep. op.).

36. *Id.* at 25.

express prohibition of the Constitution.[37] He further contended that neither the recognition of the President of the Philippines deprived the Supreme Court of its jurisdiction over the matter. Mr. Justice Perfecto argued that when legal questions are raised, like in the case of *Avelino v. Cuenco*, the Court has the function, province, and responsibility to decide them.[38]

Reiterating his strong views on judicial power, as reflected in his dissent in *Mabanag*, Mr. Justice Perfecto alluded to the two alternatives of jurisdiction of the Court and revolution. From this, he said that to refuse jurisdiction could only invite a brand of judicial abdication and that such shirking of official responsibility could not expect acquittal in the judgment of history.[39] For to renounce jurisdiction in the case was to disappoint the believers in a philosophy and social order based on constitutional processes and on legal juridical settlement of all conflicts that could beset a democracy.[40]

Again, Mr. Justice Perfecto decried how the principle of separation of powers has so often been invoked to bind the hands of the courts of justice into futility. He argued that to make the principle inflexible would be to open the doors to irretrievable absurdity and to create three separate governments within a Government, and three independent states within a State.[41]

Indeed, Mr. Justice Perfecto's judicial thinking on the Court's power of review has been quite clearly articulated in *Mabanag* and *Avelino*. Judicial determination of all constitutional or legal controversies is the inherent function of courts, declared Mr. Justice Perfecto in *Avelino*. Calling on the Court to match the "judicial statesmanship" of Chief Justice Marshall in *Marbury v. Madison*,[42] Mr. Justice Perfecto asked the damning question: "[s]hall we, as Pontius Pilate, wash our hands and let the people bleed and be crucified in the Calvary of revolution?"[43]

On March 14, 1949, or barely ten days after the promulgation of the first unsigned resolution, the Court issued a second unsigned resolution assuming jurisdiction over the case, in the light of subsequent events which justified its intervention. Senator Cuenco was also declared duly elected Acting Senate President, in view of the Court's finding that a quorum had existed since one Senator was beyond the coercive powers of the Senate.

37. *Id.* at 36 (Perfecto, J., dissenting).
38. *Id.* at 38.
39. *Id.* at 51.
40. *Id.* at 55.
41. *Id.* at 56.
42. 1 Cranch (5 U.S.) 137, 2 L. ed. 60 (1803).
43. *Avelino*, 83 Phil. at 57.

It is interesting that in his concurring opinion, Mr. Justice Feria said that he was concurring with the majority with respect to the Court's jurisdiction over such cases, so as to establish judicial supremacy in this country. The Supreme Court, as the final arbiter, should see to it that no one branch or agency of the government transcends the Constitution, not only in justiciable, but in political questions as well.[44] Notably, Mr. Justice Feria dissented in both *Vera* and *Mabanag* on the question of jurisdiction, but concurred in the first resolution in *Avelino* because of *stare decisis*.[45]

On the other hand, in another concurring opinion, Mr. Justice Perfecto again took the opportunity to lambaste as futile the invocation of precedents in support of abnormal judicial abdication. He called the decision in *Alejandrino* absolutely devoid of any authority; a decision rendered by a colonial Supreme Court trying to suit the imperialistic policies of the masters. He also called frivolous the attempt to invoke *Vera* and *Mabanag*, saying that both cases were also patterned after the colonial philosophy behind *Alejandrino*.[46]

Judicial emancipation, wrote Mr. Justice Perfecto, should not lag behind the political emancipation of the Republic. The Judiciary ought to ripen into maturity if it has to be true to its role as a spokesman of the collective conscience of humanity.[47]

In 1957, the Court took cognizance of the case of *Tanada v. Cuenco*.[48] This case involved the election of the six Senators to sit in the Senate Electoral Tribunal. It appeared that at the time, the Senate of the Philippines consisted of twenty-three members of the Nacionalista Party, with only Senator Tanada coming from the minority Citizens Party. In the session of February 21, 1956, it was moved that Senator Tañada be given the privilege of nominating the three Senators who would sit in the Senate Electoral Tribunal on behalf of the party having the second largest number of votes in the Senate. What eventually happened was that the Nacionalista Party nominated three Senators, Senator Tañada nominated himself alone, and Senator Primicias nominated two other Nacionalista Senators, on behalf of the Committee on Rules, in order to "comply with the provision in the Constitution" that there be six Senators in the Tribunal. The validity of the election of the two additional Senators then became the issue before the Court.

Speaking through Mr. Justice Concepcion, the Court ruled that there is no political question because that doctrine, in legal parlance, connotes what it

44. *Id.* at 72 (Feria, J., concurring).
45. *Id.* at 71-72.
46. *Id.* at 77-78.
47. *Id.* at 78.
48. 103 Phil. 1051 (1957).

means in ordinary parlance, namely, a question of policy. In other words, it refers to those questions which, under the Constitution, are to be decided by the people in their sovereign capacity, or in regard to which full discretionary authority has been delegated to the Legislative or Executive branch of the government. The doctrine was concerned with issues dependent upon the wisdom, not legality, of a particular measure.[49]

Chief Justice Paras and Mr. Justice Labrador dissented not on the ground of jurisdiction, but on the interpretation accorded by the majority to the constitutional provision in question.

The Martial Law years brought on a number of cases that invariably raised the issue of a political question.[50] Fr. Joaquin G. Bernas, S.J., in his commentaries on the Constitution, gave us a flavor of the Court's jurisprudence during these very trying times:[51]

> In *Hidalgo v. Marcos*[52] the Supreme Court was asked to compel the President to convene the *interim* National Assembly mandated by the 1973 Constitution. By that time, however, the interim body had already been abolished by the 1976 amendments. In any event, the Court said that the 1973 Constitution had left the time of the convening of the interim body to the discretion of the President and he could not be compelled to perform a discretionary act. Similarly, when the Court was asked in *Dela Llana v. COMELEC*[53] to stop the President from calling a referendum where the question to be posed was whether the President should continue as President and Prime Minister even after the organization of the *interim* Batasang Pambansa, the Court said that this was not a question of legality but of wisdom and therefore was a political question. But when the President decided to propose amendments to the 1973 Constitution, following *Tolentino v. COMELEC,*[54] the Court said in *Sanidad v. COMELEC*[55] that the validity of the manner of proposing amendments were justiciable and not political questions. Thereupon, however, the Court proceeded to uphold the President's power.
>
> With the effectivity of the 1973 Constitution together with the extensive powers given by its Transitory Provisions to the President, it was predictable that the Supreme Court should uphold the validity of the imposition of martial law. This the Supreme Court did in *Aquino, Jr. v. Enrile.*[56] However, on whether the validity of the imposition of martial law was a political question, the Supreme Court was evenly divided, with one half holding to a political question position and the other half preferring the very limited justiciable position of *Lansang v. Garcia.*[57]
>
> Finally, mention must be made of the one application of the political question doctrine that more than any other has profoundly altered the Philippine political picture. In *Javellana v. Executive Secretary*[58] while a majority of the Supreme Court held that whether or not the 1973 Constitution had been ratified in accordance with the 1935 Constitution was a justiciable question, a majority also held that whether or not the 1973 Constitution was already in effect, with or without constitutional ratification, was a political question.

49. *Id.* at 1067.
50. This writer has decided not to dwell on the martial law cases for two reasons, namely: (1) it is hoped and desired that the Martial Law jurisprudence should soon be examined in its entirety to determine if the Justices were indeed conscious of the "future verdict of history," *Aquino, Jr. v. Enrile*, 59 SCRA 183, 234 (1974), and whether Senator Diokno was right to lose faith in the capacity of the Supreme Court then to render him justice; and (2) the jurisprudence of the period may not necessarily reflect the collective judicial thinking of the men and women on the Court at that time, perhaps operating as they had to, under severe stress, undue influence, and abnormal times.
51. 2 BERNAS, *supra* note 27, at 283-84.
52. 80 SCRA 538 (1977).
53. 80 SCRA 525 (1977).
54. 41 SCRA 702 (1971).
55. 73 SCRA 333 (1976).

In *Tolentino v. Secretary of Finance,*[59] where the constitutionality of the Expanded Value-Added Tax Law was questioned, many of the substantive issues were actually presented in abstract, hypothetical form because of the lack of a concrete factual record.[60] While the Court eventually voted to dismiss the claims that the law was regressive, oppressive, and confiscatory for being premature, it bears noting that Mr. Justice Mendoza did recognize that the power of judicial review is a duty imposed on the Court, citing the Constitution and the case of *Angara v. Electoral Commission.*[61]

Finally, in *Estrada v. Desierto, et al.*[62] private respondents Leonard de Vera and Dennis Funa raised the political question doctrine as a threshold issue for the Supreme Court to resolve. They argued that the oath-taking and assumption to office of Gloria Macapagal-Arroyo as the 14TH President, the exercise of her powers and duties as President, and the recognition accorded by foreign governments, constituted a "political thicket which the Court cannot enter."[63]

The Court, through Mr. Justice Reynato S. Puno, rejected the claim of non-justiciability, and then continued to lay down what may be one of the most recent and authoritative jurisprudential pronouncements on judicial review. Mr. Justice Puno began by quoting extensively from the "most

56. 59 SCRA 183 (1973).
57. 42 SCRA 448 (1971).
58. 50 SCRA 30 (1973).
59. 235 SCRA 630 (1994).
60. *Id.* at 686.
61. 63 Phil. 139 (1936).
62. G.R. No. 146710-15, 146738 (Mar. 2, 2001), *reprinted in* 15 LAW. REV., Apr. 30, 2001, at 22.
63. *Id.* at 48.

authoritative guidelines to determine whether a question is political, [as] spelled out by Mr. Justice Brennan in the 1962 case of *Baker v. Carr*,"[64] *viz*:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department or a lack of judicially discoverable and manageable standards for resolving it, or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretions; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of Government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on question. Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence. The doctrine of which we treat is one of political questions, not of political cases.

The *ponencia* then quoted from the leading case of *Tanada v. Cuenco*[65] where Chief Justice Concepcion held that political questions were those "concerned with the *wisdom*, not the *legality* of a particular measure."[66] Calling EDSA 1986 an extra-constitutional transfer of power, the Court characterized EDSA 2001 as *intra-constitutional* where the alleged resignation of the President and the succession of the Vice President in his place, were matters well within the ambit of judicial review. The Court said that where EDSA I presented a political question, EDSA II involved legal questions.

Dismissing the claim of non-justiciability, Mr. Justice Puno said that the proper interpretation of certain provisions in the 1987 Constitution, notably Section 1 of Article II, and Sections 7 and 8 of Article VII, were the principal issues for resolution. Consequently, the Court reiterated the doctrine laid down as early as the 1803 case of *Marbury v. Madison* that "it is emphatically the province and duty of the judicial department to say what the law is."[67] Indeed, the respondents' invocation of the doctrine of political question was but a foray in the dark.[68]

In a separate opinion in *IBP v. Zamora*,[69] again Mr. Justice Reynato S. Puno contributed to legal literature a brief but compact survey of judicial review decisions in an attempt to draw the contours of the political question doctrine. And he concluded that the Court has tended to brush aside the political question doctrine and assume jurisdiction whenever it found

64. 369 U.S. 186 (1962).

65. 103 Phil. 1051 (1957).

66. *Id.* at 1067 [emphasis added].

67. 1 Cranch (5 U.S.) 137, 2 L ed. 60 (1803).

68. *Estrada*, 15 LAW. REV., Apr. 30, 2001, at 49.

69. G.R. No. 141284 (2000), *reprinted in* 14 LAW. REV., Sept. 30, 2000, at 27.

constitutionally-imposed limits on the exercise of powers conferred upon the Legislature and the Executive.

Moreover, Mr. Justice Puno wrote that the two lessons of Martial Law were not lost on the members of the Constitutional Commission that drafted the 1987 Constitution;[70] one of these lessons being the importance of compelling the Court to be more pro-active. Consequently, stronger judicial review language found its way into Section 1, Article VIII of the Constitution, in that the Court is now vested with the power to strike down acts amounting to grave abuse of discretion on the part of any branch or instrumentality of the Government.

The breadth and scope of the judicial function under the 1987 Constitution is explained by former Chief Justice Concepcion thus:

> In other words, the judiciary is the final arbiter on the question of 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. This is not only a judicial power but a duty to pass judgment on matters of this nature.
>
> This is the background of paragraph 2 of Section 1, which means that the courts cannot hereafter evade the duty to settle matters of this nature, by claiming that such matters cannot be any clearer.[71]

In a thoughtful commentary on the Supreme Court and the Constitution, Professor Carmelo Sison noted that notwithstanding the anti-majority objection, the power of judicial review is expressly granted in the Constitution and accepted without question in this jurisdiction.[72] But he also noted that, until recently, the Supreme Court had, on the whole, exercised the policy of judicial self-restraint, recognizing the principle of separation of powers and respecting the independence of the other branches of government.[73]

As Mr. Justice Bengzon observed in *Vera*, "judicial interpretation has tended to the preservation of the independence of the three [branches of Government] and a zealous regard of the prerogative of each, knowing fully well that one is not the guardian of the others."[74]

It is quite apparent that the 1987 Constitution has substantially altered the role of the Supreme Court in our scheme of Government.[75] And with this

70. *Id.* at 40.

71. I RECORD OF THE CONSTITUTIONAL COMMISSION 436 (1987).

72. Carmelo V. Sison, *The Supreme Court and the Constitution*, 67 PHIL. L.J. 308, 316 (1993) [hereinafter Sison].

73. *Id.*

74. 77 Phil. 192 (1946).

75. Sison, *supra* note 72, at 319.

change comes greater flexibility for the Court, in terms of influencing and contributing policy towards the building of a national edifice. The legacy of that influence and contribution, if there be any, will be recorded and perpetuated in the books of jurisprudence.

The following survey of the Court's actual exercise of judicial review is a preliminary collage of critical decisions that may have contributed to policy-making. It is by no means comprehensive, and it undoubtedly hews to the policy areas to which this writer has a bias for. But it should have served its purpose if these cases give the reader a sense of the policy issues that go before the Court, and a reflection of past and current judicial thinking and philosophy.

II. SELECTED JURISPRUDENCE

In his 18TH century lectures, James Wilson argued that the "business and design of the judicial power is to administer justice according to the law of the land. [But] when the question occurs – What is the law of the land? – it must also decide this question."[76] And it must be pointed out that any determination of what the law is, involves a concurrent attempt to determine what is desirable.[77] The case will always entail a competition of societal values, "which are for the time being matters of justice."[78]

Following are some cases of first impression, but of lasting and deep importance to the nation and to Philippine constitutional law. A thread that cuts across the diverse issues and the years that separate these cases has been the opportunity for the Court to decide what the law of the land is, and establish some fundamental policy in respect to crucial aspects of governance, such as freedom of the press, economic policy, and local autonomy.

To the mind of the writer, these cases were simply an exercise by the Court of judicial function. But in so doing, the Court, rightly or wrongly, for better or for worse, has participated in the creation of policy. These are only some samples of the potential and perhaps the dangers of jurisprudence.

A. *Freedom of the Press*

There are three fairly recent decisions of the Court that may be interesting to examine, for these cases establish a number of important policy principles in regard to the exercise and protection of the freedom of the press, and which have vital implications for the political life of the nation. The cases are *ABS-CBN Broadcasting Corporation v. COMELEC,*[79] *Social Weather Stations Incorporated v. COMELEC,*[80] *and Secretary of Justice v. Estrada.*[81] More importantly, as Mr. Justice Cruz had commented about the *Estrada* trial coverage case, these three cases were mostly of first impression, giving the Court the opportunity to "write on a clean slate," so to speak.

In *ABS-CBN v. COMELEC,* the Commission on Elections (COMELEC) issued an *en banc* resolution ordering ABS-CBN to desist from implementing a proposed project to conduct an exit survey of the vote for national and local officials in 1998, particularly for President and Vice-President, the results of which were to be publicized immediately. The electoral body believed that such project would conflict with the official COMELEC count as well as the unofficial quick count of the National Movement for Free Elections (NAMFREL).[82] It also noted that ABS-CBN was neither authorized nor deputized by the Commission to undertake such an exit survey.

The question before the Court was fairly simple: Was the COMELEC justified in ordering such a prohibition? Nevertheless, this case was of transcendental importance because it involved an alleged conflict between the freedom of the press and the Commission's constitutional mandate to promote clean, honest, orderly, and credible elections. The importance of the issue was underscored by the Court's decision to take on the case even if it was "technically moot," since the exit polls were actually conducted and reported, pursuant to a restraining order issued against COMELEC on 9 May 1998 (two days before election day). The Court resolved to settle, for the guidance of posterity, the issue of whether the fundamental freedom of speech and of the press protected the conduct of exit polls and the dissemination of the results thereof.

An exit poll is a species of electoral survey conducted by qualified individuals or groups of individuals for the purpose of determining the probable result of an election by confidentially asking randomly selected voters whom they have voted for, immediately after they have officially cast their ballots.[83] Issued upon the sole responsibility of the survey outfit, the polls are supposed to give an advance overview of how, in the opinion of the polling individuals or organizations, the electorate voted. In Philippine electoral history, exit polls had not been resorted to until the May 11, 1998 elections.[84]

ABS-CBN explained its survey methodology as follows: (1) communities are randomly selected in each province; (2) residences to be polled in such

76. JAMES WILSON, WORKS OF JAMES WILSON 416 (James DeW. Andrews ed., 1896).
77. EDWIN GARLAN, LEGAL REALISM AND JUSTICE 39 (1941).
78. *Id.* at 125.
79. 323 SCRA 811 (2000).
80. G.R. No. 147571 (2001), *reprinted in* 15 LAW. REV., June 30, 2001, at 18.
81. A.M. 01-4-03-SC (June 29, 2001).
82. 323 SCRA at 811-12 (2000).
83. *Id.* at 821.
84. *Id.*

communities are chosen at random; (3) only individuals who have already voted, as shown by the indelible ink on their fingers, are interviewed; (4) the interviewers use no cameras of any sort; and (5) the poll results are released to the public only on the day after the elections.[85]

The Court ruled that "the holding of exit polls and the dissemination of their results through mass media constitute an essential part of the freedoms of speech and of the press. Hence, the COMELEC cannot ban them totally in the guise of promoting clean, honest, orderly, and credible elections."[86] Speaking for the majority, Mr. Justice Panganiban emphasized that:

> The freedom of expression is a fundamental principle of our democratic government. It "is a 'preferred' right and, therefore stands on a higher level than substantive economic or other liberties. . . . [T]his must be so because the lessons of history, both political and legal, illustrate that freedom of thought and speech is the *indispensable condition of nearly every other form of freedom.*"[87]

The *ponencia* is a clear and unequivocal ruling about the vitality of "wide-open, uninhibited, and robust" enjoyment of the freedoms of expression and of the press in a democracy like ours. It also reiterates the fundamental thesis of the Court as embodied in the enduring decision penned by Mr. Justice Makasiar, *Philippine Blooming Mills Employees Organization v. Philippine Blooming Mills Corporation*.[88] While this case involved a conflict with the property rights of the employer, the Court was nevertheless quite categorical in stating that in the hierarchy of civil liberties, the rights of free expression and of assembly occupy a preferred position. They are essential to the preservation and vitality of our civil and political institutions; and such priority gives those liberties the sanctity and the sanction not permitting dubious intrusions.[89]

The foregoing jurisprudential attitude recently reaffirmed in the *ABS-CBN* case is most welcome in a world that is characterized by an ever-growing need for information and knowledge. More importantly, it is most consistent with the evolving thought that good governance demands transparency in government, freedom of the press, and accountability to the sovereign. Truly, the state of jurisprudence reflects the current thinking that recognizes the critical relationship of press freedom with the enjoyment of other freedoms and the maintenance of our social institutions. It brings to memory the thoughtful position of Mr. Justice Fernando that when it comes to the freedom of the

85. *Id.* at 830.

86. *Id.* at 817.

87. *Id.* at 822-23 [emphasis added].

88. 51 SCRA 189 (1973).

89. *Id.* at 203.

mind, the standards against which governmental acts will be measured are much more rigorous and exacting.[90]

What is important to note here, however, is the doctrinal ruling of the Court that because of the preferred status of the constitutional rights of speech, expression, and the press, any governmental measure resulting in prior restraint is vitiated by a weighty presumption of invalidity.[91] As it is to be considered with "furrowed brows,"[92] it is the government that has the burden of proving the consistency of any such governmental measure with the provisions of the Constitution. And even if the government's purposes are legitimate and substantial, they cannot be pursued by means that broadly stifle fundamental personal liberties, when the end can be more narrowly achieved.[93]

Mr. Justice Kapunan dissented from the majority. His main objection concerned the applicability of the doctrinal presumption of invalidity as regards the governmental act. Justice Kapunan opined that even if exit poll results were made public after the day of voting in the regular elections, their release would still be before the conduct of special elections in areas where regular elections were either postponed or cancelled. And in such cases, there is the potential threat of trending, bandwagon effect, and disruption of elections resulting from the release of exit poll results.

There was also the concern that conflicting results will destroy the credibility and integrity of the electoral process. While this writer is not completely satisfied by the *ponencia's* refutation that such argument is purely speculative and clearly untenable, citing the random sampling of respondents and the fact that the survey result is not meant to replace the official Comelec count, it also does not appear that the fears of the petitioners were valid. For it has to be conceded that the public has not really gotten around to accepting the results of surveys, or exit polls for that matter, as reflective of the truth *ex cathedra*. In fact, majority of the voting population – regardless of their political maturity as discerning voters – are not naïve enough to fail to appreciate the reality that most of our survey outfits are engaged in an enterprise. The voters can be expected, therefore, to distinguish the unofficial random sampling of exit polls, from the official and complete tabulation of votes.

It must also be pointed out, as Mr. Justice Mendoza did in the subsequent *Social Weather Stations (SWS) v. COMELEC*,[94] that these forms of scientific

90. *See* Ermita-Malate Hotel and Motel Operators v. City of Manila, 20 SCRA 849 (1967).

91. *See ABS-CBN*, 323 SCRA 811 (2000); *Social Weather Stations*, G.R. No. 147571 (2001), *reprinted in* 15 LAW. REV., June 30, 2001, at 18; Iglesia ni Kristo v. Court of Appeals, 259 SCRA 529 (1996).

92. *See* Near v. Minnesota, 283 U.S. 697 (1931).

93. Gonzales v. Comelec, 27 SCRA 835, 871 (1969).

94. G.R. No. 147571.

surveys may be regulated more properly not by an *a priori* prohibition that sacrifices the right of expression, but by exercising the COMELEC's power under the Administrative Code "to stop any illegal activity, and misleading or false election propaganda, after due notice and hearing."[95]

A year and a half after the *ABS-CBN* case, the Court revisited the issues discussed therein. The Social Weather Stations, Inc. questioned a provision in Republic Act No. 9006 (Fair Election Act) prohibiting the publication of surveys[96] affecting national candidates and local candidates, fifteen days and seven days prior to an election, respectively. SWS argued that the restriction of the publication of election survey results constitutes a prior restraint on the exercise of freedom of speech without any clear and present danger to justify such restraint. On the other hand, the COMELEC argued that the prohibition is necessary to prevent the manipulation and corruption of the electoral process by unscrupulous and erroneous surveys just before the election.

To determine the constitutionality of the Fair Election Act prohibition, Mr. Justice Mendoza resorted to the test adopted by the United States Supreme Court in the *United States v. O'Brien ponencia* by Chief Justice Warren:

> [A] government regulation is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[97]

The studied examination by Mr. Justice Mendoza predictably focused only on the last two considerations. The Court then concluded that the statute failed both tests. On the third criterion, the Court stated that by prohibiting the publication of survey results, the statute has suppressed a whole class of expression. Furthermore, in allowing the continued expression of opinion concerning the same subject matter by newspaper columnists, radio and TV commentators, and armchair theorists, the statute actually shows a bias for a particular subject matter, if not viewpoint, by preferring personal opinion over statistical results. Therefore, notwithstanding that it is only incidental and limited in period, the Court noted that the prohibition is a total and absolute suppression of a category of speech and is not made less so merely because it is only for a limited period before an election.[98]

95. *See* Revised Administrative Code, E.O. 292, Bk. V, Tit. I, Subtit. C, Ch. I, § 3(1) (1987).

96. Section 5.1 of the law defined election surveys as the measurement of opinions and perceptions of the voters as regards a candidate's popularity, qualifications, platforms or a matter of public discussion in relation to the election, including voters' preference for candidates or publicly discussed issues during the campaign period.

97. United States v. O'Brien, 391 U.S. 367, 377 (1968) [bracketed numbers added].

98. *Social Weather Stations*, 15 LAW. REV., June 30, 2001, at 20.

Mr. Justice Mendoza continued to state that the statute also violates the fourth criterion, because the prevention of last-minute pressure on voters, junking, and resort to *dagdag-bawas*, are aims of the regulation that could be attained without the sacrifice of the fundamental right of expression.[99] The Court said that such aims could be more narrowly accomplished by punishing the unlawful *act*, rather than the *speech*, because of apprehension that such speech creates the danger of such evils.[100]

Therefore, the legal observers were surprised when the Court refused to allow the media to cover the Sandiganbayan trial of former President Joseph Estrada, *via* live television and radio broadcasts. In *Administrative Matter* 01-4-03-*SC*, the Court, speaking through the pen of Mr. Justice Vitug, ruled that "a trial is not a free trade of ideas nor is a competing market of thoughts the known test of truth in a courtroom."[101] Denying the petitions of the Secretary of Justice and other parties, the Court said that "a public trial is not synonymous with publicized trial; it only implies that the court doors must be open to those who wish to come, sit in the available seats, conduct themselves with decorum and observe the trial process."[102]

In the petition for live media coverage, the Court was requested to re-examine its October 23, 1991 resolution prohibiting live radio and television coverage of court proceedings. The 1991 resolution, based on the US Supreme Court case *Estes v. Texas*,[103] was ostensibly issued in order to protect the parties' right to due process, to prevent the distraction of participants in the proceedings, and to avoid a miscarriage of justice.

Consequently, Mr. Justice Vitug framed the fundamental issue in the case as a balancing of the constitutional guarantees of freedom of the press and the right to public information, on the one hand, and the basic rights of the accused, on the other, along with the constitutional power of a court to control its proceedings in ensuring a fair and impartial trial.[104]

In a concurring opinion, Mr. Justice Kapunan categorically stated that in "weighing the freedoms of speech and the press and the right to public information, on one hand, and the right of the accused to a fair trial, on the

99. *Id.* at 20-21.

100. *Id.* at 20.

101. Secretary of Justice v. Estrada, A.M. No. 01-4-03-SC, June 29, 2001, at 15, *citing* Bridges v. California, 314 U.S. 252, 283 (Frankfurter, J., dissenting). Note that in a recent resolution, the Court allowed the taping of the Estrada Trial, but only for documentation purposes. Said tapes cannot be shown until after the conclusion of the proceedings.

102. *Id.* at 9.

103. 381 U.S. 532 (1965).

104. *Secretary of Justice*, A.M. No. 01-4-03-SC at 6.

other, the balance is never weighed against the accused."[105] For indeed, he argued, a public trial is not to be equated with a "publicized trial," one characterized by pervasive adverse publicity that violates the accused's constitutional right to due process. Thus, Mr. Justice Kapunan concluded that the live broadcast coverage of the proceedings against respondent Estrada may undermine his right to a fair trial, because television is not only one of the most powerful sources of information and news in our society, but also one of the most manipulative.

On the other hand, Mr. Justice Puno contended that an open trial has great value because openness enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.[106] He also argued that an educated, enlightened, and vigilant citizenry is what makes democracy work.[107] Thus, Justice Puno concluded that the majority opinion strikes the balance too much in favor of the rights of the accused. He stated that "it has unduly sustained former President Estrada's *generalized grievance* that cameras in the courtroom will bring about the collapse of the rule of law and the *hypothetical fear* that they will psychologically intimidate witnesses."[108]

The dissent of Mr. Justice Panganiban was premised on the technological reality that it is now possible to enable more people to watch judicial proceedings in the privacy of their homes and offices without causing prejudice to the rights of the accused or to the integrity of orderly justice.[109]

Perhaps it may be amiss to equate the forthcoming trial of former President Estrada to his impeachment trial or to Senate investigations (in aid of legislation). Inevitably, the latter two are imbued with some political character. On the other hand, a court proceeding is purely a solemn process towards the discovery of the truth and the rendering of justice.

The Court did have the occasion to rule that it is important to consider the long investigative experience of criminal prosecutors, which may also be said of the Sandiganbayan, as a factor in determining whether they can easily be blinded by the klieg lights of publicity.[110] This ruling, however, was in the context of prejudicial publicity because of the pervasive barrage of news reports and commentaries in the media. It may well be a different situation when one's courtroom itself is invaded by the "klieg lights of publicity."

105. *Id.* at 5 (Kapunan, J., dissenting).

106. *Id.* at 11 (Puno, J., dissenting).

107. *Id.* at 12.

108. *Id.* at 17 [emphasis added].

109. *Id.* at 4 (Panganiban, J., dissenting).

110. Webb v. de Leon, 247 SCRA 652, 691-92 (1995).

The trial of the former President is indeed a first, and may validly be deemed of "transcendental importance," to borrow from the parlance of the Court. However, it is important not to lose sight of its more fundamental nature as a technical procedure of admitting and weighing of evidence, in accordance with the constitutional right to due process as guaranteed to every accused.

A "publicized trial," much like the impeachment proceedings, will mean that whatever evidence is presented to the Court will also be simultaneously submitted to the bar of public opinion. Clearly, therefore, it raises the concern that the "appreciation" accorded by media and the public to such body of evidence may unduly pressure the magistrates to be consistent with public opinion and/or trigger another round of chaotic events when people are unable to accept the judgment of the Court.

In the end, the ruling of the Court may only be consistent with another resolution that prohibits demonstrations within the vicinity of courthouses, so as to ensure that no one wittingly or unwittingly spoils the ideal of sober, non-partisan proceedings before a cold and neutral judge.[111]

B. Free Speech

A most relevant corollary issue to freedom of the press is the all-important freedom of expression, as also guaranteed by the Bill of Rights. One may perhaps want to begin by revisiting the case of *Planas v. Gil*[112] where Planas, a member of the municipal board of the City of Manila, criticized the acts of certain government officials in connection with the general election for members of the National Assembly in 1938.

When required to prove her charges or be administratively investigated, Planas argued that she was merely exercising her freedom of speech and expression. With the Court eventually upholding the President's power to investigate Planas, Mr. Justice Laurel ruled that the liberty to know, to utter, and to argue freely according to conscience, were above all other liberties.[113] But, said the Court, in the present case, Planas may not, on the plea of freedom of speech, impute violations of law and the commission of frauds, and thereafter fold her arms and decline to face an investigation on the truth or falsity of the charges.[114] Otherwise, the guarantee, which is at once the

111. *See* A.M. No. 98-7-02 (July 7, 1998).

112. Planas v. Gil, 67 Phil. 62 (1939)

113. *Id.* at 81 (quoting from John Milton's AREOPAGITICA).

114. *Id.* at 82.

instrument and the expression of all liberty, would degenerate into an unbridled license, and render the Government powerless to act.[115]

A decade later, *Primicias v. Fugoso*[116] was before the Court. In this case, Primicias, the campaign manager of the so-called Coalesced Minority Parties, sought to compel the City Mayor of Manila to issue a permit for the holding of a public meeting at Plaza Miranda on a Sunday afternoon, in order to petition the Government for redress of grievances. Primicias filed an urgent petition for *mandamus* against the Mayor of Manila when the latter refused to issue said permit citing "a reasonable ground to believe, that ... speeches will be delivered tending to undermine the faith and confidence of the people in their government, ... which might threaten breaches of the peace and a disruption of public order."[117]

Finding no reasonable objection to the use of Plaza Miranda, the Court ordered the issuance of the corresponding permit, arguing that comfort and convenience in the use of streets or parks is never the standard of official action.[118] The Court also ruled that the fear of serious injury cannot, on its own, be justification for the suppression of free speech, for "[t]o justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. [And] there must be reasonable ground to believe that the danger apprehended is imminent."[119]

In his vigorous dissent, Mr. Justice Hilado, *inter alia*, argued that when the use of public streets or places is involved, public convenience, public safety and public order take precedence over even particular civil rights.[120] But the Court would rebuff this claim in the *Philippine Blooming Mills* case.

Decided under Martial Law, Fr. Bernas characterizes the case of *Philippine Blooming Mills Employees Organization v. Philippine Blooming Mills Co. Inc.*,[121] as an indication that even in troubled times the Supreme Court, in theory at least, still stood four square behind the Constitution.[122]

Arising from an incident that took place three years before the imposition of Martial Law, the case started when the unions of Philippine Blooming Mills did not report for work in order to be able to stage a mass demonstration

115. *Id.*

116. 80 Phil. 71 (1948).

117. *Id.* at 86-87 (1948).

118. *Id.* at 87.

119. *Primicias*, 80 Phil. at 87.

120. *Primicias*, 80 Phil. at 114 (Hilado, J., dissenting).

121. 51 SCRA 189 (1973).

122. I JOAQUIN G. BERNAS, S.J., THE CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 210 (1988 ed.).

against the abuses of the local police force. Since the mass "leave" was against the orders of the management, the then Court of Industrial Relations found their "concerted act and the occurrence of a temporary stoppage of work" violative of the existing Collective Bargaining Agreement and approved the dismissal of union leaders.

Speaking through Mr. Justice Makasiar, the Court balanced the union's right of assembly and petition and the property rights of the company, and ruled:

> As heretofore stated, the primacy of human rights – freedom of expression, of peaceful assembly, and of petition for redress of grievances – over property rights has been sustained. Emphatic reiteration of this basic tenet as a coveted boon – at once the shield and armor of the dignity and worth of human personality, the all-consuming ideal of our enlightened civilization – becomes our duty, if freedom and social justice shall have any meaning at all for him who toils so that capital can produce economic goods that can generate happiness for all. To regard the demonstration against police officers, not against the employer, as evidence of bad faith in collective bargaining agreement and a cause for the dismissal from employment of the demonstrating employees, stretches unduly the compass of the collective bargaining agreement, are "a potent means of inhibiting speech" and therefore inflict a moral as well as mortal wound on the constitutional guarantees of free expression, of peaceful assembly and petition.[123]

The Supreme Court, thus, reversed the decision of the Court of Industrial Relations.

In *United States v. Bustos*,[124] a number of citizens from Pampanga signed a petition addressed to the Executive Secretary charging Roman Punsalan, a justice of the peace, with malfeasance in office and asking for his removal. The Executive Secretary referred the case to an investigating judge, who recommended the dismissal of Punsalan. However, a motion to reopen the case was granted, which led to the eventual acquittal of Punsalan. Consequently, Punsalan began a criminal action against the original complainants charging them of false, scandalous, malicious, defamatory, and libelous accusations against him. Most of the defendants were convicted.

Mr. Justice Malcolm, writing for a unanimous Court, turned to the pages of history in order to clear up misapprehensions about the basic right of free speech and expression. He declared that the absence of free speech was the prime cause for revolt before 1900, and is reflected in how the Revolutionary Congress in Malolos so zealously guarded such fundamental right. Therefore, a reform so sacred to the people of the Islands and won at expensive costs,

123. *Philippine Blooming Mills*, 51 SCRA at 205.

124. 37 Phil. 731 (1918).

should be protected and carried forward as one would protect and preserve the covenant of liberty itself.[125]

Summarizing the lessons of great American and English constitutional cases that may be deemed carried in the language of the Philippine Bill of Rights, Mr. Justice Malcolm declared that the interest of society and the maintenance of a good government demands full discussion of public affairs. He maintained that there is complete liberty to comment on the conduct of public men. As such, a public officer should not be too thin-skinned with reference to comments on his public acts. Rising above all officials, processes, and institutions in Government, public opinion to the Court should well be the constant source of liberty and democracy.[126]

Consequently, Mr. Justice Malcolm wrote that public policy, the welfare of society, and the orderly administration of Government demand that public opinion be protected. The inevitable and incontestable result has been the development and adoption of the doctrine of privilege.[127]

The Court said that a communication is privileged if it is made *bona fide* upon any subject in which the party communicating has an interest, or in reference to which he has a duty. The Court said that personal injury is not necessary, for in fact all persons have an interest in the pure and efficient administration of justice and public affairs.

Here it should be noted that the Court made two very important pronouncements. First, Justice Malcolm said that, "it is true that the particular words set out in the information, if said of a private person, might well be considered libelous *per se*. Also, the charges might also under certain conceivable conditions convict one of libel of a government official."[128] Second, the Court reminded us that the privilege may be lost by proof of malice. However, "the onus of proving malice then lies on the plaintiff. The plaintiff must bring home to the defendant the existence of malice as the true motive of his conduct."[129] This is substantially the same ruling made thirty-six years later, in *New York v. Sullivan,*[130] a landmark case in American free speech jurisprudence.

It may be interesting to conclude this section by looking at the rule promulgated by the Court with regard to demonstrations within the vicinity of courts. The rule enjoins demonstrators, picketers, rallyists, and all other similar

125. *Id.* at 740.

126. *Id.* at 740-41.

127. *Id.* at 742.

128. *Id.* at 744.

129. *Id.* at 743.

130. 376 U.S. 254 (1964).

persons from holding any activity on the sidewalks and streets adjacent to, in front of, or within a radius of 200 meters from the outer boundary of the Supreme Court building, any Hall of Justice, and any other building housing at least one court sala.[131]

The Court has justified the rule thus: "[i]t is sadly observed that judicial independence and the orderly administration of justice have been threatened not only by contemptuous acts inside, but also by irascible demonstrations outside the courthouses. They wittingly or unwittingly spoil the ideal of sober, non-partisan proceedings before a cold and neutral judge."[132]

C. *Jurisprudence and Economics*

There are three major decisions of the Court that may be characterized as economic jurisprudence, namely: *Garcia v. Board of Investments,*[133] *Manila Prince Hotel v. GSIS,*[134] *and Tanada v. Angara.*[135] The interface of law and economics is probably one of the more controversial areas of Philippine jurisprudence because of the perception that, in some cases, the courts have substituted their judgment over the decisions of the Legislative and Executive branches of government. As such, there was even a proposal floated during the work of the Presidential Commission on Constitutional Reforms to modify the language of Section 1, Article VIII of the Constitution, to expressly prohibit the courts from intervening in economic policy decision-making.[136]

In the case of *Garcia v. Board of Investments,* Taiwanese investors in a petrochemical project formed the Bataan Petrochemical Corporation (BPC) and applied with BOI for registration as a new domestic producer of petrochemicals. Its application specified Bataan as the plant site.[137] A joint venture with the Philippine National Oil Corporation, the BPC received its BOI Certificate of Registration on February 25 1988. Aside from the normal incentives granted to pioneer industries by the BOI, BPC was also accorded a legislative exemption, on the initiative of Bataan Representative Enrique T. Garcia, from the 48% *ad valorem* tax on naptha, if and when it would be used as raw material in the petrochemical plant.

However, early in 1989, BPC requested for the amendment of its original registration certificate by changing the job site from Limay, Bataan to Batangas.

131. *See* A.M. No. 98-7-02 (July 7, 1998).

132. *Id.*

133. 177 SCRA 374 (1989).

134. 267 SCRA 408 (1997).

135. 272 SCRA 18 (1998).

136. Anonymous inputs on file with the author.

137. 177 SCRA at 379.

Major newspapers attributed the relocation to the insurgency and unstable labor situation in Bataan. They also reported that another consideration was the huge liquefied petroleum gas depot in Batangas, owned by Pilipinas Shell Corporation.[138]

Despite opposition from Congress and the stated preference of President Aquino for the Bataan site, BPC officially requested BOI for an amendment of its certificate of registration, thus increasing in the process its investment from US$220 million to US$320 million. On May 25,1989, the BOI approved the revision of the registration of BPC's petrochemical project. Hence, the petition before the Supreme Court.

From the outset, the Court made it clear that it was not concerned with the economic, social and political aspects of this case for it did not possess the necessary technology and scientific expertise to determine whether the transfer of the proposed BPC petrochemical complex from Bataan to Batangas, and the change of fuel from naphtha only to "naphtha and/or LPG" was best for the project and for the Philippines. Mdme. Justice Girino-Aguino declared that the Court was not about to delve into the economics and politics of this case. The *ponencia* claimed, therefore, that it was going to constrain itself to examining the alleged violation of due process and the extra limitation of power and discretion on the part of the BOI.[139]

In the main decision, the majority ruled that the right to due process of petitioner Garcia was violated when BOI failed to publish the amended application for registration of BPC. The Court further ruled that the matter of publication was one of public concern on which the public had a right to be heard. It said that when the BOI approved BPC's application to establish its petrochemical plant in Bataan, the petitioner and the inhabitants of that province, particularly the affected community in Limay, acquired an interest in the project that they had a right to protect. The Court said that "their interest in the establishment of the petrochemical plant in their midst is actual, real and vital because it will affect not only their economic life but even the air they will breathe."[140]

The Court did acknowledge that it could not require BOI to decide the controversy in a particular way; but it also said that interested parties had a right to "be consulted" on a proposal to transfer an investment from one site to another.[141]

138. *Id.* at 380.

139. *Id.* at 382.

140. *Id.* at 383.

141. *Id.*

The Court also ordered the BOI to allow the petitioners to have access to certain documents filed by BPC together with its original application, and its amended application for registration, citing the access to information provision in Article III, Section 7 of the Constitution. It also disregarded the confidentiality of records provision in Article 81 of the Omnibus Investments Code,[142] saying that this could not prevail over the orders of a court of competent jurisdiction. The Court, however, did exclude from public access trade secrets and confidential, commercial, and financial information of BPC.[143]

Mdme. Justice Melencio-Herrera dissented, raising some valid objections to the conclusions of law embodied in the majority opinion. Emphasis must be given to two statements made by Justice Melencio-Herrera in her lone dissent in *Garcia*. First, she asserted that "the matter of determining whether the transfer of the plant site and change of feedstock will be best for the project and the country lies with the BOI as the administrative body specifically tasked with such matters."[144] Second, she stated, by way of ending her dissent, that the holding of hearings "will serve no purpose other than unnecessarily delay the implementation of the Philippines' biggest foreign project, representing a major step towards industrialization. Further delay can only produce a chilling effect on foreign investments in the country."[145]

In another opinion in 1990,[146] the Court agreed to resolve the basic issue of whether the foreign investor had the right of final choice as to the plant site, since, they would, in the end, provide the funding or risk capital for the project. The Court found, *inter alia*, that there was no proof on the deteriorating peace and order situation in Bataan. It also noted that the PNOC would be a partner in the venture if the plant site is maintained in Bataan, and that there was nothing to justify the transfer except the near absolute discretion given by BOI to the investor.[147]

The Court concluded that a petrochemical industry is not an ordinary investment opportunity. Such an industry could not be treated like a garment firm where the BOI, reasoning on investor prerogative, could be given fuller faith and credit. The petrochemical industry was essential to the national interest. As such, the Court said that BOI could not approve the transfer solely on the basis of the reasoning that "the final say is in the investor all other circumstances to the contrary notwithstanding." The Court required that there

142. P.D. 1789 (1989)

143. *Garcia*, 177 SCRA at 384.

144. *Id.* at 392 (Melencio-Herrera, J., dissenting).

145. *Id.* at 297.

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

147. *Id.* at 246.

be a showing of some cogent advantage to the Government. A contrary rule would repudiate the independent policy of the Government in running its own affairs the way it deems best for the national interest.[148]

Clearly, it should come as no surprise that the petrochemical case forms the crux of the briefs of those who have advocated the curtailment of the Court's power of judicial review over in economic policy. Particularly, in the second decision of the Court, it was very apparent that the investment site did not have any constitutional significance notwithstanding the attempt of the majority to distinguish a petrochemical project from a garment manufacturer. From a pragmatic perspective, the factors in the choice of investment site is not for the Court, or even for the Government, to ultimately decide, but for the investor, in view of the risks and potentials of one site over the other. At the end of the day, it is a discretion left to the project proponent who would in the final analysis provide the funding or risk capital for the project, provided it would not be prejudicial to important national interests."[149]

What is more damning is the fact that the *ponente* of the first decision on the matter found herself joining the dissent in the second case. Mdme. Justice Grino-Aquino said:

> Only the BOI or the Chief Executive is competent to answer the question, for the matter of choosing an appropriate site...is a political and economic decision which, under our system of separation of powers, only the Executive branch, as implementor of policy formulated by the Legislature (in this case, the policy of encouraging foreign investments into our country), is empowered to make.[150]

The "Filipino First" policy said to be enshrined in the Constitution became an issue in the case of *Manila Prince Hotel v. GSIS.*[151] The controversy arose when GSIS decided to sell through public bidding 50% to 51% of the issued and outstanding shares of Manila Hotel Corporation. In a closed bidding held on September 18, 1995, only two bidders participated: Manila Prince Hotel Corporation, a Filipino corporation, which offered to buy 51% of the Manila Hotel Corporation at PhP 41.58 per share; and Renong Berhad, a Malaysian firm, which bid for the same number at PhP 44.00 per share, or PhP 2.42 more than the bid of petitioner.[152]

Pending the declaration of Renong Berhad as the winning bidder or strategic partner, Manila Prince offered to match the bid price of PhP 44.00 per

148. *Id.* at 297.

149. *Id.* at 293, *citing* Testimony of BOI Vice Chair Tomas Alcantara before the Senate Committee of Ways and Means.

150. *Id.* at 299.

151. 267 SCRA 408 (1997).

152. *Id.* at 426.

share tendered by Renong Berhad. When the GSIS refused to recognize their second offer, Manila Prince went to the Supreme Court.

In the main, Manila Prince argued that the Manila Hotel has been identified with the Filipino nation and was practically a historical monument that reflects the vibrancy of Philippine heritage and culture. It also argued that the hotel business of GSIS, being a part of the tourism industry, is unquestionably a part of the national economy. As such, Manila Prince invoked the second paragraph of Section 10, Article XII of the Constitution, and insisted that it should be given preference after it had matched the bid offer of the Malaysian firm.

On the issue of whether the Manila Hotel could be considered a part of national patrimony, the Court concluded that as explained by Commissioner Nolledo during the 1986 Constitutional Commission's deliberations, the term patrimony pertains to heritage.[153] It ruled that the Manila Hotel had "become a landmark – a living testimonial of Philippine heritage."[154]

Chiding the Executive Branch for trying to "whittle away the mandate of the Constitution by arguing that the subject provision is not self-executory,"[155] the Court then ruled that the second paragraph of Section 10, Article XII of the Constitution is "a mandatory, positive command which is complete in itself and which needs no further guidelines or implementing laws or rules for its enforcement."[156]

Nevertheless, Fr. Bernas pointed out that it is not clear from the decision if any doctrine with regard to national patrimony was established.[157] In a later decision, the Court said that the power to classify a piece of property into a historical landmark subject to special restrictions had been given by law to the Director of the National Museum.[158]

Consequent to its ruling that the Manila Hotel was integral to the Philippine heritage, the Court found the "Filipino First" policy as applicable, arguing that the sale of 51% of the equity in Manila Hotel would give to the buyer the actual control and management of the hotel. The Court explained that the "Filipino First" policy should not be viewed as a mandate for pampering or as preferential treatment to Filipino citizens who are

153. *Id.* at 437.

154. *Id.*

155. *Id.* at 442.

156. *Id.* at 436.

157. *See* Joaquin G. Bernas, S.J., *Constitutionalism and the Narvasa Court*, 43 ATENEO L.J. 325, 358 (1999) [hereinafter Bernas, *Narvasa and Constitutionalism*].

158. *See* Army Navy Club v. Court of Appeals, 271 SCRA 36 (1997). Note that Manila Hotel had not been so classified.

incompetent or inefficient, "since such an indiscriminate preference would be counterproductive and inimical to the common good."[159] All it means is that preference shall be given to those citizens who can make a viable contribution to the common good, because of credible competence and efficiency.

Thus, Mr. Justice Bellosillo ratiocinated, the mere tending of the highest bid by the Malaysian firm does not guarantee its eventual declaration as winning bidder. Consistent with the dictates of the Constitution, all parties were presumed to know that the Filipino firm would have the opportunity to match the bid of a foreign entity. The majority opinion said that this could be so if they were to give meaning to the "Filipino First" Policy in the Constitution. For, "while this may neither be stated nor contemplated in the bidding rules, the constitutional fiat is omnipresent to be simply disregarded. To ignore it would be to sanction a perilous skirting of the basic law."[160]

While the Court recognized that the policy it enunciated in the *Manila Prince Hotel* case may discourage foreign investors, it nevertheless justified its opinion as one aimed at discouraging the "veritable alienation of a nation's soul for some pieces of foreign silver."[161]

> Privatization of a business asset for purposes of enhancing its business viability and preventing further loss regardless of the character of the asset, should not take precedence over non-material values. A commercial, or even a budgetary objective should not be pursued at the expense of national pride and dignity. For the Constitution enshrines higher and nobler non-material values. Indeed the Court will always defer to the Constitution in the proper governance of a free society. After all, there is nothing sacrosant in any economic policy as to draw itself beyond judicial review when the Constitution is involved.[162]

The separate opinions of those in the majority are no less revealing of their juristic thinking on the major issues that formed the heart of the controversy in *Manila Prince Hotel*. They embraced the broader concept of national patrimony as inclusive of the cultural heritage of our people,[163] and considered "preference" under the "Filipino First" policy as allowing a qualified Filipino to match the higher bid of a non-Filipino.[164]

While it may not be difficult to agree with the Court's ruling that "national patrimony" – regardless of what office has the authority to classify historical landmarks – is now to be broadly interpreted as including the national or

159. *Manila Prince Hotel*, 267 SCRA at 441.

160. *Id.* at 445.

161. *Id.* at 448.

162. *Id.* at 447.

163. *See* Separate Opinions of Justices Padilla, Vitug, Mendoza, and Torres. *See even* Dissenting Opinion of Mr. Justice Puno.

164. *See* Separate Opinions of Justices Padilla, Vitug, and Mendoza.

cultural heritage, what has been criticized about the *Manila Prince* ruling is the Court's conclusion that a losing bidder may be allowed to increase his bid to an amount at least equal to that of the winning bidder. This has a veritable impact on transparency and predictability in a relevant bidding process.

The *Manila Prince Hotel* decision is to be read together with *Tañada v. Angara*[165] involving the Senate ratification of the GATT-WTO Agreements in 1994. In this case, the arguments of the petitioners were mainly that the World Trade Organization (WTO) required the Philippines to place nationals and products of member countries on the same footing as Filipino nationals and products. They further alleged that the WTO intruded, limited and/or impaired the constitutional powers of both Congress and the Supreme Court. The petitioners also argued that the WTO Agreement violated the constitutional mandate to develop a self-reliant and independent national economy effectively controlled by Filipinos, to give preference to qualified Filipinos when it came to the national economy, and to promote the preferential use of Filipino labor, domestic materials, and locally produced goods.

Simply stated, wrote Mr. Justice Panganiban in a *ponencia* concurred in by the Chief Justice and other Associate Justices of the Court: does the Philippine Constitution prohibit Philippine participation in worldwide trade liberalization and economic globalization? Does it proscribe Philippine integration into a global economy that is liberalized, deregulated and privatized?

Anent the first issue, the petitioners characterized the so-called *parity or national treatment provisions* in the WTO Agreements as violative of the letter, spirit, and intent of the Constitution mandating economic nationalism. In resolving this issue, the Court applied a "totality test"[166] that read the economic nationalism provisions together with the basic goals of national economic development as identified by the Constitution as well, *to wit*: equitable distribution of opportunities and wealth, increasing amount of goods and services for the people, and expanding productivity in order to raise the quality of life.[167]

The Court, then reiterated its ruling in *Manila Prince* that the "Filipino First" policy was already a judicially enforceable norm. However, Mr. Justice Panganiban said that the policy is applicable only "in regard to the 'grants of rights, privileges and concessions covering national economy and patrimony' and not to every aspect of trade and commerce."[168] This particular ruling has

165. 272 SCRA 18 (1997).

166. Akin to the test they will apply in the EDSA Dos cases four years later.

167. *Tañada v. Angara*, 272 SCRA at 57.

168. *Id.* at 38.

been criticized by a keen professor of constitutional law as giving the impression that some aspects of trade and commerce do not form part of the national economy.[169]

What is probably most interesting of the Court's thinking in this case is the epilogue of Mr. Justice Panganiban. At the outset, it should be pointed out that the Court took pains to emphasize that the wisdom and viability of WTO membership was a question outside the realm of judicial inquiry and review.[170] Calling it a matter between the elected policy makers and the people, the Court ends the *ponencia* with this: Let the people, through their duly authorized elected officers, make their free choice.

But then, is there really a viable choice? The Court referred to the bestseller *Megatrends* by John Naisbitt, and quoted his assertion that the free market espoused by the WTO would be the catalyst in a coming Asian ascendancy in this century.[171] And Mr. Justice Panganiban wrote: "Notwithstanding objections against possible limitations on national sovereignty, the WTO remains as the only viable structure for multilateral trading and the veritable forum for the development of international trade law. *The alternative to WTO is isolation, stagnation, if not economic self-destruction.*"[172]

The increasing interface of law with other fields like economics, technology, media, and social science, will soon underscore the so-called complexity issue in the Philippines. Mr. Justice Panganiban, during the Manila Overseas Press Club Judiciary Night on March 10, 2000, already acknowledged that Mount Olympus (referring to the Court) "has been invaded by microchips, modems and media, and the lives of the gods have irreversibly been altered."[173] The cyber and space age – along with fiber optics, outer space exploration, genetic engineering, e-commerce, in-vitro fertilization, paperless communication, and DNA advances – will definitely necessitate new ways of coping.[174]

Note also that the complexity issue is already under extensive discussion by relevant groups like the legislative task force in Maryland, which studied the possibility of having a special court for high-technology cases.[175]

169. *See* Bernas, *Narvasa and Constitutionalism*, *supra* note 157, at 359.

170. *Tañada v. Angara*, 272 SCRA at 71.

171. *Id.* at 81.

172. *Id.* at 82 [emphasis added].

173. *Microchips, Modems, and Media Invade Mount Olympus*, 14 LAW. REV., Mar. 31, 2000, at 68.

174. ARTEMIO V. PANGANIBAN, LEADERSHIP BY EXAMPLES 60-61 (2000).

175. Michael Brick, *Technology Cases Raise Issues of Competence* (Sept. 11, 2000), *available at* http://findlaw.com/news.

This concept developed from the commercial division of the Supreme Court of New York County, which hears complex commercial and business disputes involving sums of more than $125,000 and which already had 5,884 cases filed last year alone. Other states with specific judges or special divisions to handle business cases are Illinois, Massachusetts, North Carolina, Pennsylvania, and Wisconsin. Delaware has its 208-year old Court of Chancery, which is specially equipped to handle legal cases involving the many businesses that incorporate in the state.

However, a number of legal commentators have objected to the special consideration being accorded to high technology cases. Joseph Angland, a partner in the anti-trust group of the New York law firm of Dewey Ballantine opines that "the Microsoft case is aberrational in terms of how complicated these cases get ... and there is almost an argument that there should be a special court to handle really complex cases *of all sorts, not just technology cases.*"[176]

In California, for example, after nearly ten years of debate on whether to create special business courts, the Complex Civil Litigation Task Force recommended the creation of courts for complex litigation in general, regardless of the field of law. The courts were created in January of last year. Furthermore, the recommendation of the Task Force stemmed from the argument of lawyers in non-business matters that the proposed special business courts could take away the best and more competent judges from non-business cases.

Even Mr. James L. Thompson, a former President of the Maryland State Bar Association who favors creation of a technology court, acknowledges that granting special status to certain kinds of cases could be harmful to other kinds. He was quoted to have likened the issue to the argument used against school voucher programs, adding that the ultimate question could be: "What happens to the rest of the kids?"[177]

D. *The Presidency*

There are a number of very important cases that delve into the powers and privileges of the presidency. However, force will be given to only four of them, which appear to have laid down very important doctrines or rulings that touch on the heart and essence of presidential power.

First, there is the case of the former first family who wanted to return to the Philippines early on during their exile in the United States. Concerns have been raised, however, about the Court's approval of the Aquino administration's ban on the return of the Marcoses. The case of *Marcos v.*

176. *Id.* [emphasis added].

177. *Id.*

Manglapus[178] addressed the issue of the Marcoses' right to return to the Philippines, as an essential corollary of the right to travel.

Speaking for the Court *en banc*, Mdme. Justice Cortes belied the assertion that the President was limited only to the specific powers enumerated in the Constitution. She underscored the reality that there might be times when the situation calls for the exercise of the President's power as protector of the peace.

Then, in one broad stroke, ringing alarm bells all over the legal profession, she declared that the prohibition on the return of the Marcoses was "*appropriately addressed to those residual unstated powers of the President which are implicit in and correlative to the paramount duty residing in that office to safeguard and protect general welfare.*"[179]

The *ponencia*, which found the prohibition consistent with the national interest, relied largely on "pleadings, oral arguments, and closed-door briefings of the AFP" to prove that there existed factual basis for the President's action.

While concerns of responsible citizens may be reasonable, it seems that there is no basis for such worries. The principle of "checks and balance" continues to be alive at the very heart of our system of law and democracy. There can never be a return to that ancient and feudal refuge of arbitrariness that the king can do no wrong. The Court will forever remember its grave responsibility as the last bulwark of constitutionality and liberty.

Marcos v. Manglapus, therefore, may serve to give the President a certain degree of flexibility in the discharge of his duty of "*safeguarding and protecting general welfare.*" But in the end, his actions remain subject to the Court's power of judicial review and to the test of reasonableness.

Second, the case *Pimentel v. Aguirre*[180] defines the President's power of supervision over Local Government Units (LGUs) as not including the authority to withhold a portion of their internal revenue allotments. In this case, what was at issue was the constitutionality of President Ramos' Administrative Order No. 372 requiring local government units to reduce their expenditures by 25% of their authorized regular appropriations for non-personal services, and withholding from them 10% of their Internal Revenue Allotments (IRA). In December 1998, while adopting the policy embodied in said Administrative Order, then President Estrada reduced the withheld amount to 5% of the internal revenue allotments.

The local government units claimed that the Order violated local autonomy since the President exercised only the power of general supervision,

178. 177 SCRA 668 (1989).

179. *Id.* [emphasis supplied].

180. G.R. No. 132988 (2000).

and that the withholding of a portion of the IRA was violative of the Local Government Code. On the other hand, the Government argued that the Order was issued to alleviate the "economic difficulties brought about by the peso devaluation" and constituted a valid exercise of the President's power of supervision over local government units. The Solicitor General also argued that local autonomy was not violated since the Order merely *directs* local governments to identify reduction measures.

Since the Solicitor General assured the Court that A.O. 372, despite the commanding language and tone, was merely directory with no legal sanction for non-compliance, A.O. 372 was found to be consistent with local fiscal autonomy insofar as the directive to identify reduction measures was concerned.

The withholding of the IRAs, however, was deemed unconstitutional. The Court said that a basic feature of local fiscal autonomy is the *automatic* release of the shares of LGUs in the national internal revenue, mandated by no less than the Constitution. While the Court recognized that the President may have been well-intentioned in issuing his Order in view of the budget crisis, the rule of law required that even the best intentions must be carried out within the parameters of the Constitution and the law.

The Constitution guarantees that the territorial and political subdivisions of the Philippines shall enjoy local autonomy.[181] Primarily, local autonomy means that local governments should be made more responsive and accountable through a system of decentralization,[182] and that their just share in the national taxes shall be automatically released to them.[183] It is relevant to note, however, that the Court has not yet evolved a progressive meaning of local autonomy.[184]

In *Magtajas v. Pryce Properties*,[185] while it recognized the autonomy provisions in the Constitution, the Court ruled that, "Congress retains control of the local government units although in significantly reduced degree now than under our previous constitutions. By and large, the national legislature is still the principal of the local government units, which cannot defy its will or modify or violate it."[186] Quoting an American state decision, the Court characterized local government units as mere tenants at will of the Legislature.

The *Pimentel* case, therefore, is welcome for upholding the letter and spirit of the Constitution on the automatic release of the internal revenue allotments

181. PHIL. CONST. art. X, § 2.

182. *Id.* § 3.

183. *Id.* § 6.

184. Bernas, *Narvasa and Constitutionalism*, *supra* note 157, at 362.

185. 234 SCRA 255 (1994).

186. *Id.* at 273.

due the local government units. It is also an important ruling because it bolsters not only local fiscal autonomy, but also local autonomy in general. It results in giving the local governments a certain degree of autonomy and independence from the national government in view of the flexibility that its operations will now enjoy with the automatic release of the said allotments. Together with other powers to create revenue under the Local Government Code,[187] the *Pimentel* ruling should go a long way in enhancing the local autonomy of local governments.

Third, in *IBP v. Zamora*,[188] the Integrated Bar of the Philippines (IBP) questioned the order of then President Estrada commanding the Philippine Marines to join the Philippine National Police in visibility patrols around the metropolis. The order stemmed from the alarming increase in violent crimes in Metro Manila like robberies, kidnappings, and carnappings. Invoking his powers as Commander-in-Chief, under Section 18, Article VII of the Constitution, the President ordered the marines and the police to conduct so-called joint visibility patrols, in what was known as Task Force *Tulungan*. The Task Force was placed under the command of the Police Chief of Metro Manila. The selected areas for deployment were: Monumento Circle, SM City North EDSA, Araneta Shopping Center, Greenhills, SM Megamall, Makati Commercial Center, LRT and MRT stations, and the international and domestic airports.

Assailing the order, the IBP argued that there was no emergency that justified the deployment of marine forces in civilian population areas. It contended that there was no lawless violence, invasion, or rebellion, as required by the Constitution, which warranted the calling of the marines. As such, the IBP asked the Court to review the sufficiency of the factual basis for said troop [marine] deployment. On the other hand, the Solicitor General insisted that the factual issues of the resolution were beyond the review powers of the Court, due to the existence of a political question.

At the very outset, the Court decided to adopt a "creative approach that goes beyond the narrow confines of the issues raised."[189] Mr. Justice Kapunan said:

> Thus, while the parties are in agreement that the power exercised by the President is the power to call out the armed forces, the Court is of the view that the power involved may be no more than the maintenance of peace and order and promotion of the general welfare. For one, the realities on the ground do not show that there exist a state of warfare, widespread civil unrest or anarchy. Secondly, the full brunt of the

187. *See* Local Government Code, R.A. 7160, § 129 (1991).

188. G.R. No. 141284 (2000), *reprinted in* 14 L. REV., No. 9, at 27 (Sept. 30, 2000).

189. *Id.* at 41 (2000).

> military is not brought upon the citizenry, a point discussed in the latter part of this decision.[190]

Reiterating the words of Mdme. Justice Cortes, the Court said that "wide discretion, within the bounds of law, in fulfilling presidential duties in times of peace is not in any way diminished by the relative want of an emergency specified in the commander-in-chief provision."[191]

However, the Court pronounced that, "nonetheless, even if it is conceded that the power involved is the President's power to call out the armed forces … the resolution of the controversy will reach a similar result." In what may be technically a mere *obiter dictum*, the Court said that the President had made a determination as to the necessity and factual basis for calling the armed forces, some of which the Court took judicial notice of. Thus, the Court concluded that absent proof that the President gravely abused his discretion, the President's exercise of judgment deserved respect from the Court.[192]

Side-by-side with *Marcos v. Manglapus*, the *ponencia* of Mr. Justice Kapunan provides another element that the Court deems constitutive of the President's duty of safeguarding and protecting general welfare. However, it should be warm comfort for pessimists amongst us that the Court refused to consider the issue a political question. It also bears noting that the separate opinions of Justices Puno and Vitug dwelt on the power of judicial review and emphasized that the "historic role of the Court is the foundation stone of a government of laws and not of men,"[193] and that the Court must "not wither under technical guise on its constitutionally ordained task to intervene."[194]

What may have compelled the Court to uphold the President's action was really the recognition of policy imperatives at a time of so much uncertainty and apprehension. As Mr. Justice Kapunan put it, "freedom and democracy will be in full bloom only when people feel secure in their homes and in the streets, not when the shadows of violence and anarchy constantly lurk in their midst."[195] After all, it was also crucial that since the institution of the patrols in January 2000, "not a single citizen ha[d] complained that his political or civil rights have been violated as a result of the deployment of the marines."[196]

190. *Id.* at 30.

191. *Id.*

192. *Id.* at 33.

193. *Id.* at 41 (Puno, J., sep. op.).

194. *Id.* at 41 (Vitug, J., sep. op.)

195. *Id.* at 36.

196. *Id.* at 35-36.

Fourth, very recent jurisprudence has given us the case of *Estrada v. Desierto, et al.*[197] where former President Estrada claimed immunity from all kinds of suit, whether criminal or civil.

Writing for the Court, Mr. Justice Puno began his disquisition on the issue with a brief visit to the legal history of executive immunity in the Philippines. The *ponencia* then quoted with apparent approval the seminal ruling of Mr. Justice Johnson in the 1910 case of *Forbes v. Chuoco Tiaco and Crossfield:*

> The principle of non-liability, as herein enunciated, does not mean that the Judiciary has no authority to touch the acts of the Governor General; that he may, under cover of his office, do what he will, unimpeded and unrestrained. Such a construction would mean that tyranny, under the guise of the execution of the law, could walk defiantly abroad, destroying the rights of person and of property, wholly free from interference of courts or legislature.[198]

Clearly, therefore, incumbent presidents are immune from suit or from being brought to court only during the period of their incumbency and tenure.[199] In the *Estrada* case, Mr. Justice Puno said that it cannot be argued in law or reason that a non-sitting president remains immune from suits involving criminal acts during his tenure. Criminal acts being *ultra vires*, the Court said that it would be anomalous to hold that immunity is an inoculation from liability for unlawful acts and omissions.[200]

The Court also reminded public officials that the scope of executive immunity cannot be stretched under the present Constitution because one of the greatest and most paramount themes in the Constitution is that public office is a public trust. Clearly, as Mr. Justice Puno wrote, these constitutional policies will be devalued if one sustains the claim that a non-sitting president enjoys immunity from suit for criminal acts committed during his incumbency.[201]

Responsibility must always be the necessary cornerstone of public service. Impunity will only breed contempt, further wrongdoing, and engender injustice. It is suggested that punishing those who commit a crime against the State and the people will somehow lead to peace and stability. Rather, it will only lend itself to a social structure that remains inherently imbalanced and unstable, because the framework of societal relations cannot but be consistent with the truth, justice, and the concept of *retribution.*

197. G.R. No. 146710-15, 146738 (Mar. 2, 2001), *reprinted in* 15 LAW. REV., Apr. 30, 2001, at 22.

198. 16 Phil. 534 (1910).

199. *See In re* Saturnino Bermudez, 145 SCRA 160 (1986).

200. *Estrada,* 15 LAW. REV., Apr. 30, 2001, at 22.

201. *Id.*

The decision of the Court on the immunity claim of the former President is a step towards giving flesh to a policy of responsibility in public service. This clear ruling can also be expected to contribute towards building a legal system that is truly reflective of the most basic human yearnings for justice and fairness. And regardless of what form retribution will eventually take, what is important is that those who are guilty must *always* be brought to the bars of justice, in order to account for their actions and ensure that no one can enjoy impunity ever again.

E. Congress and the Courts

One final interesting area to examine is in regard to the tenuous relationship between the Congress and the Courts as reflected in the so-called *legislative journals* and *enrolled bill* cases.

A good case to begin with is *United States v. Pons,*[202] where Pons was punished under the penal provisions of Act No. 2381. While not questioning the substantive validity of the law, Pons sought to prove that it was nevertheless invalid because it was approved only on March 1, 1914, the day after the special session of the legislature was to have terminated.

It appeared that the Commission Journal, which the Secretary was supposed to keep, reflected that the Commission adjourned *sine die* on February 28, 1914. The journal of the Philippine Assembly, which it was also mandated to keep, reflected the same date of adjournment. Pons, however, wanted to introduce extrinsic evidence that the clock was in fact ordered stopped at midnight, and so the law was actually approved in the early hours of March 1, 1914.

The Court ruled that it had the duty to take judicial notice of the legislative journals of the special session of the Philippine Legislature in 1914. Invoking separation of powers, Mr. Justice Trent wrote that to inquire into the veracity of the journals will be to violate the letter and spirit of the organic laws of the Philippine Government, by invading a coordinate and independent department of government, and to interfere in its legitimate powers and functions.[203] Indeed, concluded Mr. Justice Trent, imperative public policy considerations demand that the authenticity of laws should rest upon public memorials of the most permanent character.[204] Consequently, the Court declined to go behind the journals.

202. 34 Phil. 729 (1916).

203. *Id.* at 734.

204. *Id.*

In the 1974 case of *Astorga v. Villegas*,[205] the issue centered on the fact that what ultimately became the enrolled bill duly signed by the essential officials of Government did not reflect the version actually passed by the Senate. It was further complicated by the subsequent withdrawal by the Senate President and, later, by the President of the Philippines of their signatures on the enrolled bill.

Here, the Court would have likely upheld the enrolled version of the bill had the Senate President and the President not withdrawn their signatures. But in the absence of the Senate President's attestation, the Court found that there was no longer an enrolled bill to speak of. As such, it became necessary to consult the entries of the legislative journal.

Finally, twenty years later, in *Tolentino v. Secretary of Finance*,[206] the Court was asked to nullify Republic Act No. 7716, or the Expanded Value Added Tax Law. Among the issues raised were procedural matters like the requirement that the law should have originated from the lower house, that the proposed bill did not pass three readings on separate days, and that there were surreptitious insertions during the bicameral conference.

Applying the *enrolled bill theory*, the Court said that the enrolled copy of the bill was conclusive not only of its provisions but also of its due enactment.[207] Citing *Mabanag v. Lopez Vito* and *Astorga v. Villegas*, the Court said that it would not look behind the proceedings of a co-equal branch of the government.[208] For to disregard the "enrolled bill" rule would be to disregard the respect due the other two departments of our government.[209]

Reading all these cases in totality, it would seem that what really results from the adherence to the journal and enrolled bill theories is inevitably a sacrifice of truth to a mere legal fiction. Mr. Justice Puno is more blunt in characterizing the enrolled bill theory as a historical relic continuously ruling us from the fossilized past.[210] He also emphasized that this theory originates from England where, in contrast to the Philippines, the Constitution is unwritten and Parliament is considered supreme.

Mr. Justice Puno's extensive quotation from Professor Sutherland's volume on *Statutory Construction* is instructive:

> The doctrine of separation of powers was advanced as a strong reason why the court should treat the acts of a coordinate branch of government with the same respect it treats the action of its own officers; indeed, it was thought that it was entitled to even

205. 56 SCRA 714 (1974).

206. 235 SCRA 630 (1994).

207. *Id.* at 672.

208. *Id.*

209. *Id.*

210. *Id.* at 818 (Puno, J., dissenting).

> greater respect, else the court might be in the position of reviewing the work of a supposedly equal branch of government. When these arguments failed, as they frequently did, the doctrine of convenience was advanced, that is, that it was not only an undue burden upon the legislature to preserve its records to meet the attack of persons not affected by the procedure of enactment, but also that it unnecessarily complicated litigation and confused the trial of substantive issues.[211]

But as also pointed out by Professor Sutherland in his work, the tendency today is for courts to avoid the flawed presumptions of the enrolled bill theory and to measure the acts complained of against whatever relevant evidence may be admissible. As such, Mr. Justice Puno concluded in his dissenting opinion in *Tolentino* that the rulings on the enrolled bill theory are no longer good law.

It is also clear that the enrolled bill theory rests on nothing but a legal fiction that can only tempt unscrupulous congressional leaders or officials into exploiting the opportunity to insert foreign elements or provisions into what was the approved version of any legislation. It advances no vital social interest whatsoever. Neither can its proponents take refuge in the separation of powers argument because judicial review of the enactment of laws cannot be said to be violative of the sovereignty of the Legislature as a branch of government. In fact, it would be more inconsistent with separation of powers if the mere attestation of the enrolled bill deprives the Court of its constitutional duty of judicial review.

To recall the dissent of Mr. Justice Perfecto in the case that enshrined the enrolled bill theory in Philippine jurisprudence, one cannot just "accept unconditionally as a dogma, as absolute as a creed of faith, what [was shown] to be a brazen official falsehood."[212] That is exactly what the enrolled bill theory wants the Court to do.

III. Judicial Function in the 21st Century: A Framework

Therefore, in the context of governance and policy, judicial function acquires a vitality that dims with restraint and carries an opportunity that disappears with the imposition of unreasonably high limitations. The clear challenge for the Court in this century is to create a balanced framework for the exercise of judicial function. The Court will be required to grapple with the inherent juridical contradictions and compromises that come with the traditional theory of judicial function as rooted in the principle of separation of powers; on the other hand, the Court will need to reflect on the limits of its ability to weigh one course of action over another.

At the very outset, however, it is important for the judiciary to bring the judicial function up front in the discussion agenda, and to recognize it and

211. *Id.* at 819.

212. *Mabanag*, 78 Phil. 26 (Perfecto, J., dissenting).

its role in national life for what it really is. This writer would even dare say that it will not involve a radical change in tradition and judicial philosophy; as stated earlier, this is not a case for judicial legislation but only one for the recognition of the inescapable reality that jurisprudence establish policy whether the courts are conscious of it or not.

Present society lives in a world that is increasingly interdependent and globalized, leading to more linkages amongst almost all kinds of social activity. The *Tanada v. Angara* case is a classic example. This case involved a question on the interpretation of some constitutional provisions in the context of the Philippines' WTO commitments. Of course the Court validated the Senate's ratification of the WTO agreements, but what is important to remember here is that while the Court was deliberating on the case, they had before them (consciously or unconsciously) a case of far-reaching economic and trade implications. One can only imagine the fall-out if the Court decided to interpret the Constitution very restrictively.[213]

Here it is thus important to recognize the environment in which the Court will henceforth be operating. It is an environment where seemingly innocuous cases will increasingly have political, economic, or social repercussions. In a world that will change so fast and with a legislature that may be unable to cope, the judiciary will have to adjust. And it is also important for society in general, and the legal profession in particular, to concede the inevitable interplay of our laws and their application, with what may seemingly be purely extraneous matters like economics.

It should be emphasized that when the Court, for example, decides a case today that impacts on trade policy, it does so neither in disregard of the separation of powers, nor in disrespect of its co-equal branches of government. Rather, it is merely discharging its judicial duty as the final arbiter of constitutional and legal issues; the political, economic, or social implications of its decisions are merely necessary consequences, but not the ultimate objectives of the judicial function.

All criticism, therefore, of political, economic, or social decisions of the Court may do well if these are directed at the soundness or the policy foundations of the outcome, and not on the fact that the Court did not decline to be seized of jurisdiction. Rather than be nothing but shrill demagoguery and doomsday scenarios of a runaway judiciary, these criticisms should be insightful and studied objections to the policy premises and directions of the Court's conclusions.

To this writer's mind, the principle of separation of powers is not a legal straightjacket that requires the Court to disengage itself from the making of

213. Recall *Manila Prince Hotel.*

policy. On the contrary, the Court is also a policy institution. Fr. Bernas, in his lecture on *Constitutionalism and the Narvasa Court*, put it quite fairly:

> Because the key provisions of the Constitution [and sometimes laws] are couched in grand ambiguities and because the key provisions concern the larger issues of our life, of our liberties, and of our happiness, the Supreme Court, by the exercise of judicial review, wields tremendous political power. Hence, each Justice bears a special burden – that of exercising great political power and still acting as a court, or if you prefer, that of exercising judicial power while remaining concerned, realistic and alert to the political and social and even economic significance of what it is doing.[214]

That perceptive comment may perhaps be a good starting point for an examination of judicial power in the 21ST century, and for us to segue into a discussion of an appropriate policy framework.

At the very outset, it should be stressed that any study of constitutional law jurisprudence is more effective if the cases are read in their social and political context, because these decisions are normally central events in the current political dynamics.[215] Jurisprudence is, therefore, an important medium through which judicial public policy so to speak is established.

A. Social Conditions and the Court

An important requirement on the judicial function in the fast-changing and often uncertain world of today is for the courts to reflect and be conscious of the social conditions.[216] In the exercise of judicial review, particularly in cases where the constitutional or legal provisions are ambiguous or when there is an allegation of abuse of discretion, absolute standards of right or wrong may have no relevance at all. In such cases, therefore, it is important for the courts to respond to the actual feelings and demands of the community that they serve.

Particularly in the interpretation of the Constitution, the Court must remain aware not only of its sworn duty to uphold justice but also of its "special burden" towards interpreting the words of the fundamental charter in light of the sovereign's past intent and the realities of the present. The judiciary is not to function merely as an institutionalized dictionary or encyclopedia, which we are to consult when there are bickering over the meaning of constitutional provisions. Rather, the judiciary as embodied in one Supreme Court, over and beyond being arbitrators of controversies, should no less be a reflection of our aspirations, beliefs, needs, and desires as a people. Like the President and the Congress, the Court participates not only in the powers of government, but also in its responsibilities.

214. Bernas, *Narvasa and Constitutionalism, supra* note 157, at 366.

215. GROSSMAN & WELLS, *supra* note 2, at v.

216. Characterized by Holmes as the "felt necessities of the time."

In foraying into the province of saying what the law is supposed to be, the Court must consciously consider the competing policy values and interests that come into play. But more importantly, it must also be aware of the values and interests of the community, for whom the Court is not only an institution, but also a refuge; for whom the Court is not only an arbiter, but also a defender; for whom the Court is not only an aloof group of self-centered men and women, but ultimately the embodiment of their collective sense of justice.

But even when there are applicable provisions, this writer hazards to say that the courts should be prepared to exploit any flexibility available to them if only to do justice to the parties and society in general. The late Mr. Justice Jose B.L. Reyes always loved to remind the legal profession of an important lesson from the lawyers of antiquity that not everything that is permitted is honorable.[217] Technicalities and plays of words cannot frustrate the inevitable because there is an immense difference between legalism and justice.

B. Constitutional and Statutory Construction

When we speak of the difference between legalism and justice, we also necessarily touch on an important aspect of the judicial function, and this is constitutional or statutory construction. Interpretation rules are fairly established and can generally be considered to be fair and just. But as the Court looks forward in the year 2001, having just celebrated its 100TH year anniversary last June, it may do well to listen to one of its Members.

In what is described as a "most insightful, if progressive, proposition of constitutional construction,"[218] Mr. Justice Vitug advances a bold theory that in interpreting the Constitution, "it may not always be the most promising of enterprises to fathom the intention and the understanding of its framers."[219]

Mr. Justice Vitug wrote in a very passionate and candid concurring opinion to the *Estrada v. Arroyo* case:

> The Constitution cannot be permitted to deteriorate into just a petrified code of legal maxims and hand-tied to its restrictive letters and wordings, rather than be the pulsating law that it is. Designed to be an enduring instrument, its interpretation is not to be confined to the conditions and outlook which prevail at the time of its adoption; instead, *it must be given flexibility to bring it in accord with the vicissitudes of changing and advancing affairs of men. It has been said that the real essence of justice does not emanate from quibblings over patchwork legal technicality, but proceeds from the spirit's gut consciousness of its dynamic role as a brick in the ultimate development of social edifice.* Anything else defeats the spirit and intent of the Constitution for which it is formulated and reduces its mandate to irrelevance and obscurity.[220]

217. *Non omne quod licet honestum est.*

218. Ranhilio C. Aquino, *Estrada v. Desierto and Estrada v. Arroyo: The Decision that wrote Finis*, 15 LAW. REV., Mar. 31, 2001, at 2.

219. *See id.*

It is indeed to be considered a most noble and worthy endeavor if the Court were to clearly pursue its responsibility as a contributor of policy towards the ultimate development of our nation's social edifice. The Court must, therefore, be willing and ready to read in the Constitution, or even in the laws, a meaning not anticipated or even imagined by the framers, if only to effectively respond to the demands of contemporary realities and horizons.[221]

In constitutional construction, there is the criticism sometimes that the case is a public manifestation of the Court's partisanship. On the contrary, it may be more appropriate to characterize controversial jurisprudence as merely giving voice to basic assumptions and postulates, which result from the "deep-seated personal convictions and attitudes of the justices that may have little relation to partisan views or political affiliations."[222]

Thus, when one has a Supreme Court decision before him, it is actually possible to go beyond the finely spun points of fact and law on the surface, and, cutting through all the dialectics, discover the actual group of men and women behind the decision; pondering their choices through the differentiated activity and philosophy of each justice.[223]

C. The Court and Enforcement of Decisions

A source of apprehension, however, on the part of the judiciary is their lack of influence over the 'sword and the purse' of the community, both of which are controlled by the executive and the legislative, respectively. Alexander Hamilton once wrote that the "judiciary will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or infuse them."[224]

Thus, it would be understandable to read of Mr. Justice Malcolm's deepest fear in *Alejandrino* that "judgment should not be pronounced which might possibly lead to unseemly conflicts or *which might be disregarded with impunity*."[225]

It would also seem that in *Estrada*, even the present government tried to play on such fears understandably inherent in the courts when they cited the

220. *Estrada*, 15 LAW. REV., Apr. 30, 2001, at 61-63 (Vitug, J., concurring) [italics supplied].

221. *See* Aquino, *supra* note 218, at 2.

222. Robert A. Dahl, *Decision Making in a Democracy: The Supreme Court and National Policy Making*, 6 J. PUB. L. 279 (1967).

223. ARTHUR F. BENTLEY, THE PROCESS OF GOVERNMENT 205 (1908).

224. Alexander Hamilton, *quoted in* A. BICKEL, THE LEAST DANGEROUS BRANCH 25 (1962).

225. Alejandrino v. Quezon, 46 Phil. 83, 95 (1924).

"virtual impossibility of undoing what has been done, namely, the transfer of constitutional power to Gloria Macapagal-Arroyo as a result of the events starting from the exposé of Ilocos Governor Luis 'Chavit' Singson in October 2000."[226] It was like toothpaste, the government argued: once squeezed out of the tube, it cannot be put back.

As discussed earlier, the Court took cognizance of the case and rendered a full-length judgment on the critical constitutional issues. To a certain extent, *Estrada* may rightly be characterized as an exorcism of the ghosts and fears of early cases like *Alejandrino* and a vindication of the gallant dissents therein of Justices Johnson and Ostrand, who believed in the sworn duty of the judiciary to interpret and to declare that the will of the people had been violated or transgressed.[227]

It is noteworthy though that an eminent constitutionalist-member of the Court assailed the "toothpaste-tube" analogy. Mr. Justice Mendoza, during oral arguments and in his concurring opinion, pointed out that the argument was literally[228] and figuratively untenable.

More importantly, disregarding what may have been valid fears of disobedience for a contrary ruling, Mr. Justice Mendoza said that a writ can ultimately be issued ordering respondent President Macapagal-Arroyo to vacate the Office of President of the Philippines and reinstate former President Estrada. Wrote Mr. Justice Mendoza further: "*Whether such writ will be obeyed will be a test of our commitment to the rule of law.* [But] as far as the political question argument of respondents is anchored on the difficulty or impossibility of devising effective judicial remedies, this defense should not bar inquiry into the legitimacy of the Macapagal-Arroyo Administration."[229]

D. The Judicial Function

This writer recognizes the danger of lowering further the barriers that separate the three great branches of our government. He is also aware not only of the rationale for the principle of separation of powers, but also of the ancient traditions on which that separation rests. Nevertheless, this writer posits that the Court must seriously consider a more effective and responsible vision of its role in the new millennium. There must be established in this country an acceptable form of judicial supremacy, to see that no one branch or agency of

226. Joint Memorandum of the Secretary of Justice and the Solicitor General, at 15.

227. *Alejandrino*, 46 Phil. at 98 (Johnston, J. & Ostrand, J., dissenting).

228. He said that the toothpaste can be put back in the tube by opening the bottom of the tube. That, after all, is how toothpaste is put in the tubes at manufacture in the first place.

229. *Estrada*, 15 LAW. REV., Apr. 30, 2001, at 65 (Mendoza, J., concurring) [emphasis supplied].

the government transcends the Constitution, not only in justiciable, but political questions as well.[230]

A paramount element of that vision must be the acceptance that the "historic role of the Court is the foundation stone of a government of laws and not of men."[231] Therefore, while the Court is not unconstrained in striking down an act of its two co-equal branches of government, neither must it shirk its constitutional responsibility of intervening and nullifying any act that is attended by grave abuse of discretion or is patently done without any legal authority. Also, the President and the Congress can no longer be allowed to seek refuge from the "inviolate recitals of [congressional] journals"[232] or political thickets.

Early on in the 20TH century, scholars like Dean Roscoe Pound had already contended that it is imperative for legal thinking to be more comprehensive in scope so as to include an understanding and appreciation of the actual effect that law and jurisprudence would have on the social life.[233]

When private or community interests are involved, the Court must never decline jurisdiction even if questions of tremendous political, economic, or social importance are concerned. The political question doctrine can no longer be tenably interpreted in that very narrow light under the 1987 Constitution. For in fact, in such cases, the Court must depart from the broad principle of separation of powers that disallows an intrusion by it in respect to the purely political decisions of its independent and coordinate agencies of government.[234]

Especially when the Constitution is involved, the Court should not hesitate to go beyond respecting the prerogatives of the other departments, and require their full compliance with the charter.[235] There is no loftier principle in our democracy than the supremacy of the Constitution, to which all must submit.[236]

Consequently, the Court must be more conscious of its policy role in the national life. As seen earlier, most of their judicial review decisions will have policy implications that go beyond the rights and interests of the parties. For example, in allowing ABS-CBN's exit polls, the Court demonstrated an almost

230. Avelino v. Cuenco, 83 Phil. 17 (1949) (Feria, J., concurring). *See also* Defensor-Santiago v. Guingona, Jr., 298 SCRA 756 (1998).

231. IBP v. Zamora, G.R. No. 141284 (Sept. 30, 2000), *reprinted in* 14 LAW. REV., Oct. 31, 2000, at 41.

232. *Tolentino*, 235 SCRA at 705 (Cruz, J., sep. op.).

233. FRED V. CAHILL, JUDICIAL LEGISLATION 73 (1952).

234. Estrada v. Macapagal-Arroyo, G.R. No. 146738 (Vitug, J., concurring).

235. *Tolentino*, 235 SCRA at 708 (Cruz, J., sep. op.).

236. *Id.*

absolute preference for uninhibited speech;[237] in requiring proof of malice in cases involving libel against public persons, the Court has allowed journalists and citizens greater flexibility in criticizing the former;[238] in validating the WTO agreements, the Court gave a constitutional *imprimatur* to the liberalization and globalization policies of the Philippine Government;[239] in proscribing the President's power to withhold the release of a portion of the internal revenue allotments, the Court gave ascendancy to local autonomy;[240] and in declining to go behind legislative journals, the Court may likely perpetuate the smoke-screens in Congress and accept as final the mere attestation by its officers.[241]

The judicial function, by its very nature, may then be an instrument for social adjustment. Every case decided by the courts would be positive in the sense that it gives state protection or sanction to any interest that seeks the support of the state. In fact, in one of his sermons to the king, Bishop Hoadly argued that "whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the law-giver to all interests and purposes, and not the person who first spoke or wrote them."[242]

This proposition necessarily moves toward a re-examination of the nature of the judicial function, and "renders the law liable to evaluation in terms of its social policy in a way that was not formerly possible."[243]

There should be no implication here that the judiciary is being asked to usurp the prerogatives of the legislature, or of the executive for that matter. Rather, it is proposed that they consciously pursue a necessary task that would either go undone, or given the realities, will not be well done. And the first step forward would be to recognize the extent and breadth of the judiciary's involvement in policy-making.

Thus, of significant importance will be the efficiency and readiness of the courts to engage in policy-making. It brings to the fore the need for some strategy to make sure that the judiciary has a continuous and objective source of information and data. Pound and Cardozo had argued that the responsibility of keeping the law up to date is a highly specialized undertaking, where the expert knowledge of a trained judiciary is imperative.[244]

237. *See* ABS-CBN v. Comelec, 323 SCRA 811 (2000).

238. *See* United States v. Bustos, 37 Phil. 731 (1918).

239. *See* Tañada v. Angara, 272 SCRA 18 (1997).

240. *See* Pimentel v. Aguirre, G.R. No. 132988 (2000).

241. *See Tolentino*, 235 SCRA at 630.

242. JOHN C. GRAY, NATURE AND SOURCES OF THE LAW 102 (1920).

243. CAHILL, *supra* note 233, at 73.

244. *Id.* at 158.

The Philippine Judiciary will do well by keeping abreast of the complex issues in the world today, as well as of the radical changes that take place at the speed of the modem. It is, thus, commendable that the Supreme Court is now in the process of making its Rules more responsive to the requirements of modern-day litigation, the first, bold step of which was the promulgation recently of the new Rules on Electronic Evidence.[245]

However, the Court must exercise the judicial function with the appropriate restraint and prudence. For, after all, the Court is the ultimate judicial tribunal, not a super legal-aid bureau.[246] It is also important to remember that the Justices of the Court are not the main architects of policy. While jurisprudence has policy implications, the Court is incapable of fashioning its own solutions for all social problems.[247]

Ultimately, what is essential is to have a sense of the more poignant and more human nature of the judicial function. Regardless of the technical definition of judicial power, including the power of judicial review, a better appreciation of the judiciary's role in the national life can only be had if we see jurisprudence from the prism of the people's experience. The Constitution and the law's commands are not to be equated with life itself, because their true meaning can only be found in our experience as a nation. And the Constitution and statute, as documents, are only a part of that greater experience.

CONCLUSION

At the beginning of a new century, however, more than being an active influence on political, economic, or social policy, the Court must recognize its more fundamental responsibility as the keeper of the Constitution. More than anything else, the Court must defend the democracy and republicanism of the Philippine State, and ensure that, at all times, sovereignty truly resides in the Filipino people.

A well-respected Philippine jurist once asserted that nowhere but in the Philippines has martial law been implemented with benignity and grace. And yet, those old enough to remember those "interesting times" will tell the young that martial law was neither benign nor graceful.

It is not urged that the Court be characterized as "vested with the awesome power of overseeing the entire bureaucracy, let alone of institutionalizing

245. Note that the Securities and Exchange Commission has also modified its rule requiring a Board of Directors to meet in person, when it decided that teleconferencing facilities can now be used in Board Meetings provided there are adequate safeguards.

246. Uveges v. Pennsylvania, 335 U.S. 437, 449-450 (1948).

247. FELIX FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 26 (1938).