volume XII 2014-2015

Judicialized Governance and Populist Democracy: Majoritarian Adjudication in the Philippines and Selected Asian Countries

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> [The current debate on judicial review results in a] chronic fetishism of the constitution, [the] extravagant if not obsessive reverence for the icons, liturgies, and orthodoxies of constitution, to which quasi-natural powers, beyond ordinary human agency, are commonly attributed."[1]

From a Legalistic Toward an Institutional View

We have long debated the problem of judicial overreach where unelected judges decide matters better left to the elected branches of government, and we ask courts to act on the basis not of fixed rules but of broad policy concerns. However, we debate as if it were purely a philosophical choice over competing theories of judicial review: should we "let justice be done though the heavens fall,"[2] or hearken what Oliver Wendell Holmes calls "the felt necessities of the time"[3]?

We adopt almost entirely the American rhetoric on the "counter-majoritarian difficulty,"[4] the irony that when courts strike down laws in the name of high constitutional principle, judicial review is inherently undemocratic because it overrides the will of the political branches elected by the people.

Even if the immediate result were desirable, the process—the constitutional shortcut, if you may—erodes republican institutions. "The tendency of a common

and easy resort to this great function … is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility. "[5] "[T]he people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way . . . ."[6] In the words of a populist critic of judicial review, it feeds upon a "disdain for the political energy of ordinary people… [and is] politically condescending and repressive, frequently humiliating, even suffocating…."[7]

This paper proposes that, in the Philippines, when we cast the debate in the language of judicial review, we cloak the real issue because what we really want to say has less to do with law and more to do with politics, namely, the flaws of of our post-Marcos democracy. Judicial review is the answer to our search for a mode of democratic governance sufficiently insulated from the follies of raw populism.

That mode confronts two factors. One, the norms that we have constitutionalized are still highly contested, unsupported by a genuine national consensus. Two, we constitutionalized them precisely to place them beyond the reach of the political compromise that occurs in electoral democracy.

But this actually brings us back to the countermajoritarian rationale. We would prefer to entrust these norms to unelected judges, theoretically free to do what is right rather than what is popular, rather than elected legislators in thrall of a fickle public opinion. We thus depoliticize decision-making by asking unelected judges to apply the law mechanically as it were, rather than submit to the cheap politics of backslapping, horsetrading politicians. We would rather avoid open-ended of ideological debate because we do not trust the Filipino voter.

The Pinoy Twist: Countermajoritarian Rhetoric, Majoritarian Politics

But that is where the countermajoritarian influence ends. In the Philippines today, when courts overreach, they actually purport to be more genuinely democratic than the elected branches of government.

The underlying logic is that people's voice can be heard in many ways in a flawed democracy like the Philippines, and the courts merely hearken the people's true voice, not the distorted sounds we hear during elections. At one level, the

reasoning goes, the Congress is elite-dominated, ideologically opportunistic and mercenary, and when the courts strike down legislative acts, they actually carry out a "General Will" to which judges above anyone else are privy. At another level, the voters are seen as unwise, shallow ("the non-intellective faculties of a passive audience"[8]), easily manipulated, and intellectually barren[9], who need to be protected against themselves by, you guessed it, the learned, lofty magistrates.

In the Philippines today, when courts overreach, they actually purport to be more genuinely democratic than the elected branches of government.

And, in a final argumentative twist, they actually purport to act in behalf of an amorphous nation by enforcing the Constitution, which begins with the words, "We, the sovereign Filipino people . . ."[10] This was captured in the rhetorical question posed by the Court when it nullified a decision by Congress to impeach the Supreme Court Chief Justice, citing a constitutional time-bar against a second impeachment within a one-year period.

> [T]hey call upon this Court to exercise judicial statesmanship [saying] that whenever possible, the Court should defer to the judgment of the people expressed legislatively, recognizing full well the perils of judicial willfulness and pride. … *But did not the people also express their will when they instituted th[ose] safeguards in the Constitution?*[11]

Stated plainly, confronted with the majoritarian dilemma, the Court did not flinch. Instead asked: What countermajoritarian difficulty? We *are* being truly democratic because we are beholden to the true and ultimate sovereign!

Indeed, the Court didn't stop with channeling the sovereign people. In a case, involving the "right to a clean and healthful ecology,"[12] the Court purported to act in behalf of the human race, the height of either institutional ambition or messianic conceit! "While th[is] right … is to be found under the Declaration of Principles and State Policies and not under the Bill of Rights, it does not follow that it is less important than any of the civil and political rights enumerated in the latter. Such a right belongs to a different category of rights altogether for it concerns nothing less

than self-preservation and self-perpetuation … the advancement of which may even be said to predate all governments and constitutions."

In summary, courts agree that the "democratic will" remains the fount of legitimacy, but merely quibble on what it means to be "majoritarian" in our dysfunctional democracy. Is the "voice of the people" heard through Congress or the President? Or through plebiscites and referenda? Or perhaps through "direct people's initiatives"? Or through scientific polling by the Social Weather Stations? Or for that matter, in a robust and free press? The courts have not been clear except that when they flex muscle, they purport to channel the democratic will. And voila, the Philippines' unique contribution to the debate on judicial review, namely, the use of countermajoritarian rhetoric for what is essentially a majoritarian purpose.

Misuse of Countermajoritarian Rhetoric

The irony is that countermajoritarian rhetoric originally served to insulate the Bill of Rights from the contingencies of day-to-day politics.

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[13]

It also installs the principle of legality as a safeguard against the biases and prejudices of political majorities.

> The great ideas of liberty and equality are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles.[14]

To this extent, Philippine countermajoritarian discourse conflates the rationale for constitutional supremacy with the idea of the rule of law.

Yet the cases discussed below do not aim to vindicate individual rights of individual minorities but rather social claims of a purported nation: saving the trees, cleaning up the seas, constricting the entry of foreign investors, deregulating the oil industry, overthrowing a corrupt president, or stopping a term-limited president from overstaying in power. The irony therefore is that the same rhetoric that was initially developed to protect the rights of political minorities is now deployed to advance the claims of either political majorities or those who purport to speak in their behalf.

The Philippine Rhetoric on Judicial Overreach

The Philippine debate on judicial review is highly legalistic, and tends to fixate on the scope of judicial review and on legal doctrine on "political questions," *locus standi,* or the "case and controversy" requirement.

This formalistic tendency by Philippine courts was long ago noted by Justice Oliver Wendell Holmes himself during the U.S. colonial era when Philippine decisions were still appealable to the United States Supreme Court. In 1928 Holmes rejected the mechanistic reasoning of the Philippine Supreme Court, which applied strictly the rule that the power to appoint is exclusively executive in character and may not be vested in the Congress. "The great ordinances of the Constitution do not establish … fields of black and white … with mathematical precision [nor] divide the branches into watertight compartments."[15]

I have elsewhere discussed the litany of Philippine examples of judicial overreach, its doctrinal roots in the 1987 Constitution, more specifically, in the expanded definition of judicial power, the codification of economic protectionism and claims to redistributive justice, and the expansion of petitioners' direct right of action to vindicate their claims. I have also traced the historical origins of these constitutional clauses in the democratic movement that led to the 1986 People Power uprising that ended the dictatorship of President Ferdinand Marcos.[16]

Allow me now to focus on the normative arguments for and against the aggrandizement of judicial power. In the case where the Supreme Court barred a foreign investor from moving his factory to a new site, the dissenters argued that the majority

had "made a sweeping policy determination and ha[d] unwittingly transformed itself into … a 'government by the judiciary', something never intended by the framers of the Constitution …."[17] The dissenters openly acknowledged the reasons why the Court should have kept out of the fray: they lacked the training, expertise, mandate, or legitimacy to carry out such non-law-based review of business discretion.

In another case where the Court held that the directive clause on a "right to a healthful and balanced ecology" gave rise to an actionable right to cancel timber licenses, a separate opinion—that actually sounded more of a dissent—lamented that, in the absence of any "specific, operable norms and standards" in the constitutional text, the case would "propel courts into the uncharted ocean of social and economic policy making."[18]

And when the Court struck down the Oil Industry Deregulation Law, it actually defended its countermajoritarianism and proceeded to explain why the law did not satisfy the anti-monopoly clauses of the Constitution. "With this Decision, some circles will chide the Court for interfering with an economic decision of Congress. [However, the Court strikes down the Oil Deregulation Law] *not because it disagrees with deregulation as an economic policy but because as cobbled by Congress in its present form, the law violates the Constitution.* [It is] *not for this Court to shirk its duty of striking down a law that offends the Constitution.…* Lest it is missed, the Constitution is a covenant that … guarantees both the political and economic rights of the people. The Constitution mandates this Court to be the guardian not only of the people's political rights but their economic rights as well."[19]

In contrast, in a highly controversial decision about the sale of the historic Manila Hotel (which the Court, in the absence of an executive determination, first had to declare as "historic"), the Court went out of its way to apply a protectionist ("Filipino First") clause to allow the losing bidder, a Filipino company, to match *post hoc* the winning bid of a Malaysian company, that is to say, to match the competitor's secret bid after the secret has been divulged.[20] The Court held that the Constitution's directive principle to protect the nation's cultural patrimony was directly enforceable by the courts in the absence of an implementing statute. It appealed to populist sentiments about nationalism but invoked the protectionist clauses in the Constitution. Referring to the policy of privatizing government assets, the Court confronted the countermajoritarian critique: "[*T*]*here is nothing so*

sacrosanct in any economic policy as to draw itself beyond judicial review when the Constitution is involved."[21]

In another case, the Court acted as if it were part of the executive branch and ordered the clean-up of the waters of Manila Bay "to make them fit for swimming, skin-diving, and other forms of contact recreation."[22] It was rather ineffective since the bay remains heavily polluted to this day.

This ideological hodgepodge has resulted in doctrinal instability, exemplified by two cases. The first involves a strict reading effectively barring foreign mining firms under the Mining Law,[23] which the Court reversed within the year through a more relaxed reading of the same protectionist clause.[24] The second likewise involves the application of nationality requirements in protected industries, where the Court revised the settled interpretation of how to determine the extent of foreign control over a corporation.[25]

The debate on judicial overreach has also extended to explicitly political decisions. The Court has several times stopped the amendment of the Constitution, involving the exercise of the constituent power, the ultimate political power in a republican legal order: twice in 1997 to stop a direct people's initiative to lift term limits for the president,[26] and once again in 2006 to stop a people's initiative to shift from the presidential to a parliamentary government that would effectively lift term limits as well.[27] The Court has likewise validated the ouster of a duly-elected President, Joseph Ejercito Estrada, following widespread urban protests and a "withdrawal of loyalty" by the military.[28]

That is why when the Court asked rhetorically in 2003: "*But did not the people also express their will when they instituted th[ose] safeguards in the Constitution?*"[29], the Court was merely affirming that role as the "guardian … of the people's political [and] economic rights."[30]

Once again, the Court invokes the paramount democratic norm on which the Constitution rests, namely, its ratification by the people.

> An overwhelming majority … comprising 76.3 percent of the total votes cast approved our Constitution in a national plebiscite held on February 11, 1987. *That approval is the unmistakable voice of the people, the full expression of the people's sovereign will. That approval included the prescribed modes for amending or revising the Constitution.*[31] (emphasis in the original)

Selected Asian Cases

This dilemma is not unique to the Philippines. We actually share it with fledgling democracies in Asia just recovering from dictatorships, among them, Indonesia, Thailand, and South Korea. This paper identifies similar cases in these jurisdictions where courts have had to yield to democratic political pressures, and draws lessons relevant for Filipinos.

Indonesia: The Retroactive Application of Anti-Terror Amendment[32]

Just like the Philippines, Indonesia went through a period of anti-communist dictatorship. It began rebuilding its democracy after the fall of President Soeharto in May 1998 but did not discard its independence Constitution of 1945. Instead it carried out the post-Soeharto democratization through *inter alia* constitutional amendments: in 1999 to shift power away from the president and toward the parliament; in 2000 to codify human rights protection; once again in 2000 to create a Constitutional Court with the power of judicial review of legislation; and in 2001 to give the people the right to vote directly for the president.

Indonesia's Constitutional Court (Mahkamah Konstitusi, hereinafter MK), one of the institutions created after 1998, has in many ways followed the same model of the Philippine Supreme Court in rather aggressively using its judicial power to carry out the protectionist and human rights clauses in the constitution.

The MK has ruled on highly political issues, e.g., rehabilitating the political rights of former communist cadres; abolishing the anti-subversion law; diluting the punishment of the equivalent of *lese majeste* laws protecting the president from defamation; ordering an electoral recount in gubernatorial elections due to "systematic, structured and massive" cheating; and upholding a law banning "deviant" Muslim groups, citing public order and laws against blasphemy.

The MK has also ruled on highly economic and social issues, e.g., it has confined the privatization of state corporations; affirmed state control over natural resources, including mining and oil extraction; struck down an investment law that gave investors long-term concessions over land; secured tenure for what we in the Philippines recognize as "call center" employees; and protected indigenous peoples'

rights to their "customary forests," which the MK carved out from the "State Forests" in which private use of resources is prohibited.

One of the most highly charged cases resolved by the MK was on the execution of the 2002 Bali bombers,[33] which pitted its adherence to the principle of legality against the public outcry for justice.

The first anniversary of the September 2001 attack on the World Trade Center in New York was marked by the infamous Bali bombing in October 2002. Three simultaneous explosions hit Bali, Indonesia's top tourist draw: one inside a popular tourist bar and detonated by a suicide bomber with a backpack-mounted device; the second a car bomb inside a Mitsubishi L300 van parked across the pub; and a third outside the United States consulate. It left 202 people dead, 152 foreign and 28 Indonesian, and 240 people injured. Three members of the Jemaah Islamiyah, a violent Islamist group, were charged and found guilty under an anti-terrorism law.

However, there was a catch: that anti-terrorism law was passed only *after* the bombing had transpired. The MK, by a 5-4 vote, held that the retroactive application of that law violated the Bill of Rights prohibition on the ex post facto legislation. The Indonesian Constitution did not create any exceptions, and the prohibition "cannot be limited under any circumstances." The minority believed that the International Covenant on Civil and Political Rights created an exception "in the prosecution of crimes against humanity."[34]

The Indonesian government had adopted its anti-terrorism law in April 2002 in response to the September 11 attacks. However, six days after the October 2002 Bali bombing, then President Megawati reinforced the anti-terror law through two *perpu*, executive enactments authorized by the Constitution in emergency situations but subject to subsequent parliamentary enactment into law. The two *perpu* eventually became law, expressly stating that they can be applied retroactively to the Bali bombings.

The MK struck down the laws as ex post facto legislation, but it was widely criticized locally and internationally for doing the victims and their families a grave injustice. Soon after, the Justice Minister and MK Chief Justice announced to the press their interpretation of the decision, namely, that the MK decision itself could not operate retroactively and would bind only future prosecutions. In other words, the Bali bombers' conviction remained valid. Accordingly, at midnight

on November 9, 2008, they were executed by firing squad. The bombers remained unrepentant till the end, affirming their participation in the crimes and their commitment to their cause.

The MK had been created as one of the post-dictatorship institutions to uphold the human rights guarantee enshrined in the Constitution. Yet for it to keep faith with the constitutional text would diminish its legitimacy before a nation that rejected impunity for terrorists and that wanted justice for their victims. To its credit, the MK stood its ground. But the sudden parsing of the decision by its own Chief Justice and the president's Justice Minister, and through mere press statements, merely highlight the historical context within which courts incessantly seek to keep themselves relevant and legitimate.

What would a Philippine court have done in the same situation? Would it have yielded to public pressure just to get the press and the protesters off its back, and then convict, even if to do so would compromise the Constitution? Or would it "damn the torpedoes," keep faith with the letter of the law, and allow the guilty to go scot-free on a technicality, however serious?

Thailand: Counter-Majoritarian Devices to Oust a Populist Leader[35]

Thailand went through a period of military rule, a "tug-of-war between authoritarianism and democratization" starting from the 1930s. The constitutional high water mark was the 1997 Constitution that ended the military dictatorship and secured civilian rule. It was the culmination of student-led protests that began in 1992 when King Bhumipol chastised the military's use of violence against civilian protesters.

It was under the 1997 Constitution that Thaksin Shinawatra became Prime Minister in 2001. He was the first elected prime minister to complete his term and be re-elected into office. He adopted populist measures for the poor, including the 30 baht medical subsidy for all people, low-cost universal access to anti-retroviral HIV medication, the 1 million baht fund for every village, and a moratorium on debt collections from peasants. His Thai Rak Thai ("Thais love Thais") political party rode on the crest of these populist pro-poor measures.

However, Thaksin soon faced corruption charges after his family sold its entire US$1.88 billion stake in its telecommunications company to a Singaporean firm,

while enjoying tax benefits after the Thaksin-dominated parliament amended the rule on capital gains taxes.

This triggered massive protests by the urban middle classes, forcing Thaksin to seek a fresh mandate by calling for general parliamentary elections in April 2006. Once again, Thaksin swept the elections, but the King called on the judiciary to step in "to move democracy forward." Accordingly, in May 2006 the Constitutional Court set-aside the parliamentary elections on technical grounds and suspended the by-elections needed to fill seats that did not meet the required minimum 20 percent of the vote. The new elections, set for October 2006, were overtaken by the bloodless military coup of September 2006 that ousted Thaksin, abolished parliament and the Constitutional Court, and set aside the 1997 Constitution.

The 2006 coup was not the first attempt to oust Thaksin. In 2001, after Thaksin had won a historic majority, his opponents tried to have him disqualified from office for five years for having filed an incomplete statement of assets and liabilities. The Constitutional Court upheld Thaksin's defense of an honest clerical error. In early 2006 the Administrative Court rejected a petition to impeach Thaksin for conflict of interest and improprieties in the sell-off of the telecommunications company, saying the petitioners had failed to present sufficient grounds.

In May 2007 the Constitutional Court dissolved Thaksin's political party and banned its officers from politics for five years. In December 2007 new elections were held under the new Constitution, but again it was won by the Thaksin-allied People Power Party. However, by September 2008 the Constitutional Court dismissed Prime Minister Samak Sundaravej for a minor breach of a conflict of interest rule (for hosting two episodes of a cooking show while he was Prime Minister). Three months later the same Court effectively ousted Samak's party-mate and successor—and Thaksin's own brother-in-law—Somchai Wongsawat, by disbanding the People Power Party for electoral fraud.

In 2011 Thaksin's sister, Yingluck Shinawatra, was elected Prime Minister. In 2013 the Thai Constitutional Court rejected the pro-Thaksin party's proposal to make the Senate fully elective. The 2007 Constitution made half the Senate seats appointive rather than elective, a move to insulate it from the popular vote that invariably favored Thaksin. The pro-Thaksin legislators rightly saw this as undemocratic, but the Court rejected this. In his analysis of this news in the British

Broadcasting Network's website, Jonathan Head said: "In few other countries have a handful of judges played such a decisive role in reshaping politics as those sitting in Thailand's Constitutional Court."[36]

In December 2013, protests by the "democratic" forces forced the Prime Minister to dissolve the lower house of Parliament and hold elections in February 2014. The "democratic forces" rejected the proposed elections, and proposed an unelected "people's council" to take over.

On May 7, 2014, after six months of political unrest, the Constitutional Court removed Prime Minister Yingluck Shinawatra for having "abused" her powers in appointing a police chief. On May 22, 2014 the Thai military staged a coup against the caretaker government appointed by Yingluck and established a junta called the National Council for Peace and Order. They set aside the 2007 Constitution and proceeded to detain political leaders from both camps, but were met with resistance from anti-coup activists.

There are uncanny resemblances between the Thai and Filipino dilemma with political leaders tainted by corruption and abuse of power charges, but who remain popular with the masses, namely, Prime Minister Thaksin Shinawatra in Thailand and former President Joseph Ejercito Estrada in the Philippines. In both cases there is an underlying class element in that the anti-Thaksin and anti-Estrada forces were identified with the urban and educated middle classes, while followers of both leaders belonged to the lower classes. Likewise, there is in both countries the phenomenon of dynastic families, though in Thaksin's case, his sister seemed a reluctant—though eventually effective—substitute for her brother.

On the other hand, the Thai experience is more complicated in that there is an underlying layer of tension between the royalists (embodied in the "yellow" forces opposed to Thaksin) and the Thaksin loyalists (embodied in the "red" forces), with suggestions—safely suppressed by their strict *lese majeste* laws—of an even deeper layer of intrigue among the royalists themselves.

One advantage of the Philippine situation is that the judicial intrusion into patently political matters has not been as frequent nor as blatant. While in the Philippines democracy remains the source of legitimacy, whichever way the democratic will is ascertained, in contrast in Thailand the monarchy remains the ultimate source of legitimacy and, derivatively, the regime of "rule by law."

South Korea's Constitutional Court: Ending Impunity for Human Rights and Anti-Corruption Offenses[37]

Korea went through an eighteen-year military dictatorship under Park Chung Hee, the general who led a coup d'etat in May 1961 and ruled until his assassination by his own Central Intelligence Agency director in 1979 amid widespread pro-democracy protests. A few days after his death, Generals Chun Doo-Hwan, Roh Tae Woo, and their allies staged a coup. Besieged by the democracy movement, Chun proclaimed martial law in May 1980, which triggered off what is now known as the Gwangju massacre of protesting students that resulted in 200 deaths and 850 injuries. Chun became president in September 1980.

The tensions continued, but after the "People's Uprising of June 1987" consisting of nationwide peaceful protests, a new Constitution was adopted providing for direct election of the president. Chun's anointed successor, Roh Tae Woo, was elected president in the first general election for a national leader in sixteen years.

When Roh Tae Woo completed his term in 1993, opposition leader Kim Young-sam was elected president, the first civilian to occupy the office since Park seized power in 1963. It was under Kim's presidency that, reflecting popular demands, former presidents Chun and Roh were charged and convicted of bribery, illegal seizure of government power, and, in the case of Chun, responsibility for the Gwangju massacre. The constitutionality of their prosecution was brought before the Constitutional Court, one of the institutions created under the 1987 constitutional reforms.

The first constitutional challenge was brought by the victims of the 1979 coup. In 1993, they filed criminal complaints against Chun and Roh for treason, mutiny, and other crimes, but the prosecutors dismissed the complaints. The Kim Young-sam government preferred to leave the fate of both men to the judgment of history lest the president be accused of political vendetta. The prosecutors had found sufficient evidence to indict, but acknowledged that this would be politically divisive and cause political strife. The Constitutional Court held that the prosecutors had not abused their discretion in refusing to prosecute, but likewise clarified the application of the statute of limitations on the charges against the two former presidents. The Court held that since the accused enjoyed immunity from prosecution for all offenses "[e]xcept for treason, or for waging a foreign war" while

they were in office, their immunity tolled the running of the statute of limitations for mutiny and other crimes. This effectively lifted the prescriptive bar on the prosecution of the two presidents.

The second constitutional challenge was brought by the victims of the 1980 Gwangju massacre, who filed their criminal complaints in 1994. The prosecutors dismissed their complaints, saying that a successful coup had formed a new constitutional order from which the prosecutor derived its powers. They challenged the dismissal before the Constitutional Court, but withdrew their complaint before final judgment. The Court, in dismissing the case, managed to issue obiter dicta that a successful coup does not establish a new constitutional order. At that time, the people's demand for justice and punishment had grown stronger, and the Kim Young-sam government was poised to sponsor in parliament a law lifting the prescriptive bar on charges of treason.

The third was after the National Assembly actually passed that special law, which suspended the statute of limitations for "crimes destructive of the constitutional order" committed during the 1979 coup and the 1980 Gwangju massacre. The prosecutors reopened their investigation. When they applied before the trial courts for arrest warrants, the trial court referred to the Constitutional Court the special law's validity.

The Court faced two constitutional challenges. The first was the constitutional prohibition on ex post facto legislation. It held that a prosecution under the special law would be valid if, at the time the law was enacted, the offense had not yet been prescribed. It would be unconstitutional only if the period had already expired before the special law purported to revive it. The prevailing justices held that the overwhelming public interest in prosecuting justified an exception to the ban against retroactive legislation. The second was the case-specific nature of the law, or as we in the Philippines would say, that the special law was a bill of attainder directed at specific individuals. Again, the Court held that the public had an overriding interest in settling constitutional accounts, justifying exceptions to the bill of attainder principle.

In 1996 both men were convicted, with Chun sentenced to death, but later commuted to life imprisonment, and Roh to a 22-year jail sentence, which was reduced to 17 years on appeal. Both were released from prison in December 1997, pardoned by President Kim Young-sam under an agreement with the new President-elect Kim Dae-jung.

Compared to the Philippine, Indonesian, and Thai experiences, the Korean example shows the most sophisticated maneuvers in this subtle, almost ballet-like dynamic among the Constitutional Court, the elected politicians in parliament and their Prime Minister, and popular outrage and the claim for justice. It maintained the formal separation of powers, while allowing the court to respond with broad hints or suggestions to the political branches so that the Court, acting properly as a court, can be responsive to the massive outpouring of public outrage. For instance, the Court deferred to prosecutorial discretion to dismiss the charges in the early stages, while laying the basis for future prosecutions by reinterpreting the statute of limitations. But when the statute was lifted retrospectively by parliament, which in turn was responding to popular pressures, the Court felt at liberty to carve out exceptions to the constitutional prohibition against ex post facto legislation.

Why the Continuing Appeal of Countermajoritarianism for Filipinos?

In American legal discourse, countermajoritarianism has been reconciled with democracy by the "process-perfecting" rationale, exemplified in what is often called "the most famous footnote" in U.S. jurisprudence. The U.S. Supreme Court was deferential to the legislative power to regulate commerce, but in this footnote to the case of the United States v. Carolene Products Co. (304 U.S. 144) in 1938,[38] would disavow that deerence and apply "more exacting judicial scrutiny" when "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" or "prejudice against discrete and insular minorities may … tend seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."

In American legal discourse, countermajoritarianism has been reconciled with democracy by the "process-perfecting" rationale.

In this framework, "those political processes ordinarily relied upon" are democratic processes, and the plain assumption is that they usually work. Unelected courts step in only when those democratic processes are "seriously curtailed" by either the law itself which is being

reviewed, or by racial or other prejudices. In both cases, it is assumed that the democratic majority has used its numbers to oppress the minority, and the courts position themselves as a check upon that majority.

In contrast, however, Philippine rhetoric positions the courts as the guarantor of the primacy of the democratic will, as the channel of the "voice of the people." If in U.S. theory the courts were checks upon the tyranny of the majority, in the Philippines, they serve as handmaidens to the majority, or, at best, crutches for weak institutions struggling to reflect the true will of the people.

In all the Philippine and Asian examples discussed above, the holding of free and fair elections was the litmus test of the transition from military dictatorship to democracy. But there is a parallel growth of countermajoritarian bodies like constitutional courts, anti-corruption or audit commissions, and human rights bodies, which are unelected and deliberately insulated from elections and politicians. This paper now asks why, at the critical moment of democratic transition, these struggling democracies have placed their hopes not in popular politics but in unelected courts.

Methodologically, I recognize most of the cited material as "hard cases" subject to Holmes' critique that "[g]reat cases, like hard cases, make bad law. For great cases are called great, not by reason of their importance... but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment."[39] But that is precisely the point: why indeed do these fledgling democracies turn to unelected judges to decide the "great cases" of their time, when democratic politics may provide better or more nuanced solutions?

That corrective function is assumed by the courts because the political branches are attuned to "immediate results" when "emotions ride high enough" and "men will ordinarily prefer to act on expediency rather than take the long view." In contrast, courts have the "capacity to appeal to men's better nature, to call forth their aspirations, which may have been forgotten in the moment's hue and cry" and are better suited to "support and maintain enduring general values."

The language of the law is useful in legitimizing hard social choices, what Holmes called the "logical method and form" that disguise "competing legislative grounds."[40]

> A principled decision … is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved.[41]

In the clash of naked partisanship, it helps to invoke neutral principles to make the painful verdict acceptable to the loser in the bargain. Thus the search for "neutral principles" upon which to ground substantive causes, lest the "constitution, instead of embodying only relatively fundamental rules of right … would become the partisan of a particular set of ethical or economical opinions."[42]

> [The Court's] opinions may … sometimes be the *voice of the spirit*, reminding us of *our better selves.* [I]t provides a stimulus and quickens moral education [f]or the power of the great constitutional decisions rests upon the accuracy of the Court's perception of this kind of common will and *upon the court's ability … ultimately to command a consensus.*[43] (emphases added)

Finally, the Court cites the systemic role of judicial review in maintaining stability in what appears to be a return to the countermajoritarian rationale, namely, of insulating certain fundamental norms from *ad hoc* changes. In one of the cases to stop a people's initiative to amend the constitution, the Court said:

> To allow such change in the fundamental law is to set adrift the Constitution in unchartered waters, to be tossed and turned by every dominant political group of the day. If this Court allows today a cavalier change in the Constitution outside the constitutionally prescribed modes, tomorrow the new dominant political group that comes will demand its own set of changes in the same cavalier and unconstitutional fashion. A revolving-door constitution does not augur well for the rule of law in this country.[44]

If the classic model of the American court is that they are countermajoritarian, the idealized Asian court is majoritarian.

Transplanted to Southeast Asia, the countermajoritarian rationale has become the intellectual vehicle to strengthen republican institutions against essentially feudal elites who manipulate the democratic framework to perpetuate old, family-based or mafia-type power networks. In its original Western milieu, the role of countermajoritarian institutions was to help minorities assert themselves against majorities. In our Asian milieu, the role is the opposite: to help the true but unorganized political majorities expose the organized elites purporting to speak in their behalf ("political ventriloquism"). The goal is to insulate decision-making from politicians and invoke to a popular power beyond the command of politicians.

This brings to question the true place of democracy as the fount of legitimacy, and the role of the people as the authors of that democracy. In the Philippines today, the people speaking through the voting booth can be outshouted by the people speaking through organized protests. Stated otherwise, it is not a question of who are more but of who is better organized and more articulate.

If elections are not the sole measure of the democratic will, then suddenly the unelected judge is actually on the same footing as the elected president, senator, or congressman in trying to divine the sovereign will. But why stop with the politicians? Why not the unelected generals and colonels as well? Indeed, was not that their self-appointed role during the dictatorship eras in the Philippines, Indonesia, and Korea as the guardians of "the Nation" and "the people"?

This merely brings us back to the preference for the courts as the new guardians. Unlike the old military guardians with a record of human rights abuses, the new guardians are hedged in by constitutional text and tradition, and are truly "the least dangerous branch."[45]

Countries that have gone through periods of dictatorship are loathe to return to dictatorship and military-dominated government, but having shifted to electoral politics, realize that democracy is no panacea, that voters cannot be relied upon to vote wisely, and that elected rulers may betray the democracy from which they draw their power. Unelected courts are the acceptable middle ground: they are not dictatorial, are sufficiently civilian, and yet somewhat insulated from shifting political alliances and at least nominally draw their legitimacy from a democratic constitution.

Perhaps too it is a longing by our people for that "one brief shining moment" in 1986 when we recaptured our democracy for ourselves, and a resignation that thenceforth democracy will henceforth shrivel through many small and quiet compromises in electoral politics. Thus the preference to anchor democracy upon the foundational moment of constitution making when "We, the sovereign Filipino people" acted our noblest selves, rather than the periodic vote when we succumb and pander to the baser animals in our beings.

Notes

1 R. Parker, *Here the People Rule: A Constitutional Populist Manifesto*, Val. U. L. Rev. 27 (1993): 564.
2 From the Latin *fiat justitia ruat caelum.*
3 O. W. Holmes, *The Common Law* (Cambridge, MA: Harvard University Press, 1963): 1.
4 A. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis, IN: Bobbs-Merrill, 1962): 16-17. P16 re root difficulty is that judicial review is a counter-majoritarian force in our system…When the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now…That, without mystic overtones, is what actually happens… It is the reason the charge can be made that judicial review is undemocratic.").
5 J. B. Thayer, John Marshall, in *James Bradley Thayer, Oliver Wendell Holmes, and Felix Frankfurter on John Marshall* (Chicago, ILL: University of Chicago Press, 1967): 86,
6 *Ibid*, at 85.
7 R. Parker, *Here the People Rule: A Constitutional Populist Manifesto* Val. U. L. Rev. 27 (1993): 558.
8 Supreme Court of the Philippines, National Press Club v. Commission on Elections, G.R. No. 102653, March 5, 1992.
9 See R Parker, *Here the People Rule*, (see n. 7); L.D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review,* (New York, NY: Oxford University Press): 239. ("creatures without reason, ever in thrall to irrational emotions")
10 1987 Constitution of the Republic of the Philippines.
11 Supreme Court of the Philippines, Francisco v. House of Representatives, G.R. 1602261, November 10, 2003 (The author was a court-designated *amicus curiae* in this case.).
12 Supreme Court of the Philippines, Oposa v. Factoran, G.R. No 101083, July 30, 1993.
13 Supreme Court of the United States, West Virginia Board of Education v. Barnette, 319 U.S. 624, June 14, 1943).
14 B. Cardozo, *The Nature of the Judicial Process* (New Haven, CT: Yale University Press, 1921): 92.:
15 Supreme Court of the United States, Springer v. Philippine Islands, 277 U.S. 189, May 14, 1928.
16 R. Pangalangan, "Government by Judiciary in the Philippines: Ideological and Doctrinal Framework," in *Administrative Law and Governance in Asia: Comparative Perspectives,* ed. T. Ginsburg and A. H. Y. Chen (New York, NY: Routledge, 2009): 313-328.
17 Supreme Court of the Philippines, Garcia v. Board of Investments, G.R. 92024, November 9, 1990.
18 Supreme Court of the Philippines, Oposa v. Factoran, G.R. 101083, July 30, 1993.
19 Supreme Court of the Philippines, Tatad v. Secretary of Energy, G.R. No. 124360, December 3, 1997.
20 Supreme Court of the Philippines, Manila Prince Hotel v. Government Service Insurance System, G.R. No. 122156, February 3, 1997.
21 Ibid.
22 Supreme Court of the Philippines, *Metropolitan Manila Development Authority v. Concerned Residents of Manila Bay,* G.R. Nos. 171947-48, February 15, 2011.
23 La Bugal-B'laan Tribal Association Inc. v. Victor O. Ramos, G.R. No. 127882, January 27, 2004.
24 La Bugal-B'laan Tribal Association, Inc. v. Victor O. Ramos, G.R. No. 127882 (Motion for Reconsideration), December 1, 2004.

25 Supreme Court of the Philippines, Gamboa v. Teves, G.R. No 176579, June 28, 2011.
26 Supreme Court of the Philippines, People's Initiative for Reform, Modernization and Action et al. v. COMELEC, G.R. No. 129754, September 23, 1997; and Defensor-Santiago v. COMELEC, G.R. No. 127325, March 19, 1997.
27 Supreme Court of the Philippines, Lambino v. COMELEC, G.R. No 174153, October 25, 2006.
28 Supreme Court of the Philippines, Estrada v. Desierto, G.R. No 146710-15, March 2, 2001.
29 Supreme Court of the Philippines, Francisco, Jr. v. House of Representatives, G.R. 160261, November 10, 2003.
30 Supreme Court of the Philippines, Tatad v. Secretary of Energy, G.R. 124360, December 3, 1997.
31 Supreme Court of the Philippines, Lambino v. COMELEC, G.R. No 174153, October 25, 2006.
32 T. Lindsey, "Indonesia: Devaluing Asian Values, Rewriting Rule of Law," in *Asian Discourses of Rule of Law, Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the U.S.,* ed. R. Peerenboom (New York, NY: Routledge, 2004): 286-323.
33 See N. Hosen, "Emergency Powers and the Rule of Law in Indonesia," in *Emergency Powers in Asia: Exploring the Limits of Legality,* ed. V. Ramraj and A. Thiruvengadam (New York, NY: Cambridge University Press, 2010): 267-293; H. Juwana, "Indonesia's Anti-Terrorism Law," in *Global Anti-Terrorism Law and Policy,* ed. V. Ramraj, M. Hor, and K. Roach (New York, NY: Cambridge University Press, 2006): 295-306; and S. Butt and D. Hansell, "The Masykur Abdul Kadir Case: Indonesian Constitutional Court Decision No 013," *Australian J. of Asian Law* (2004): 176-196.
34 Indonesian Constitution, art. 281 (1945 as amended).
35 A. Harding and P. Leyland, The Constitutional System of Thailand: A Contextual Analysis (Oxford, UK: Hart Publishing, 2011).
36 J. Head, "Analysis," , *BBC News*, November 20, 2013, http://www.bbc.co.uk/news/world-asia-24997184.
37 H. Chaihark, "Rule of Law in South Korea: Rhetoric and Implementation," in *Asian Discourses of Rule of Law, Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the U.S.,* ed. R. Peerenboom (New York, NY: Routledge, 2004): 385-416. See also T. Ginsburg, "Rule by Law or Rule of Law? The Constitutional Court of Korea," in *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (New York, NY: Cambridge University Press, 2003): 206-246.
38 Cited in J. Mendoza's concurring opinion in Supreme Court of the Philippines, Estrada v. Sandiganbayan, G.R. 148560, November 19, 2001.
39 Supreme Court of the United States, Northern Securities Co. v. United States, 193 U.S. 197, May 14, 1904.
40 O. Holmes, The Path of the Law, Harvard Law Review 10 (1897): 457.
41 H. Wechsler, Toward Neutral Principles of Constitutional Law, Harvard Law Review 73 (1959): 1.
42 Supreme Court of the United States, Otis v. Parker, 187 U.S. 505, January 6, 1903.
43 A. Cox, *The Role of the Supreme Court in American Government,* cited in V. V. Mendoza, *Judicial Review of Constitutional Questions: Cases and Materials* (Manila: Rex Book Store, 2004): .243-244.
44 Supreme Court of the Philippines, Lambino v. COMELEC, G.R. No 174153, October 25, 2006.
45 A. Bickel, *The Least Dangerous Branch* (see n. 4).