

# THE CONSTITUCIONAL BASIS OF SOCIAL RIGHTS IN THE PHILIPPINE\*

## *Bases constitucionales de los derechos sociales en Filipinas*

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### **Resumen**

La aprobación de la Constitución de 1973 supuso un gran salto en la regulación de la justicia social y los derechos sociales con respecto a los anteriores textos constitucionales, si bien los derechos civiles y políticos continúan teniendo un carácter preeminente.

La Constitución de 1973 prevé siete áreas sociales que deben gozar de especial prioridad: el trabajo, la agricultura y los recursos sociales, la salud, la mujer, entre otros. Es verdad que el Congreso ha aprobado numerosas normal en esta materia, pero ello no ha sido suficiente.

### **Palabras clave**

Filipinas; Constitución de 1973; derechos sociales; insuficiente.

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***Abstract***

The adoption of the 1973 Constitution supposed a great improvement in the regulation of social justice and social rights in comparison to the previous constitutional texts, but civil and political rights continue having a preeminent character.

The 1973 Constitution provides seven key areas for prioritization: labor, agriculture and natural resources, health, women, among others. It is true that Congress has enacted a good number of social legislation in with with these priority areas, but this has not been enough.

***Keywords***

Philippines; 1973 Constitution; social rights; insufficient.

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## I. PRE-1987 PHILIPPINE CONSTITUTIONAL LAW: HISTORICAL CONTEXT AND INFLUENCES

The 1896 Philippine Revolution gave birth to the First Philippine Republic of 1898, with “a full-dress civil government and a republican Constitution”.<sup>1</sup> It was short-lived however because hardly had a breath been taken in the Philippine islands after the Spanish colonial authorities left when the Americans came marching in. By 1901, Manila saw the American civil government firmly entrenched.

In his keynote at the Third Scientific Congress on the Law of the Philippines and Spain, Professor Ruben Balane noted that the linguistic shift in the Philippines from Spanish to English was “cataclysmic for legal scholarship”, especially in civil law. As the author is a child of that cataclysm, it is perhaps fortunate that the topic of this paper is more public than private law. The Philippine experience, as far as early constitutional law is concerned, is decidedly American.

Prior to becoming a territory of the United States of America, the Philippines saw what might be considered the indigenous drafting of charters: (1) the *Cartilla* and the *Sangguniang-Hukuman*, the Charter and Code of Laws and Morals of the Katipunan, drawn up by Emilio Jacinto; (2) the “*Constitucion Provisional de la Republica de Filipinas*” which the revolutionary Republic of Biak-na-Bato came up with in 1897; and (3) “*Constitucion politica*” or the Malolos Constitution drawn up and approved by the Malolos Congress in 1899.<sup>2</sup>

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<sup>1</sup> Ruben F. Balane, Professor, Ateneo de Manila University School of Law, University of the Philippines College of Law, and University of Santo Tomas Faculty of Civil Law, Keynote Address at the Third International Scientific Congress on the Law of the Philippines and Spain: The Spanish Roots of Philippine Law (11 May 2017, Universidad de Malaga, Spain).

<sup>2</sup> *The Philippine Constitution: Sources, Making, Meaning, and Application* 7 (Jose M. Aruego, et al., eds., 1969); see also Rufus B. Rodriguez, *Constitutionalism in the Philippines* 7-8, 11 (1997).

These early attempts at a governing document however were symbolic and limited at best, both as to the period within which they were supposed to have been in effect, as well as the reach of their authority. These were never fully implemented throughout the Philippines, nor did they obtain recognition on the part of other sovereign states.<sup>3</sup> In any case, by 1899, the Spanish-American War had ended and the Philippines ceded to the United States.<sup>4</sup>

American occupation, at the turn of the 20<sup>th</sup> century, is when Philippine constitutionalism, as we know it today, began. It grew from the early constitutional documents enacted by the United States government, namely: (1) President McKinley's Instruction to the Second Philippine Commission of 1900; (2) the Philippine Bill of 1902; and (3) the Philippine Autonomy Act of 1916.

Since the early organic documents were transplants from the American constitutional experience, it was the most natural thing therefore to rely and bank on the jurisprudence of the United States [federal] Supreme Court when it came to interpreting and construing the documents mentioned, as they applied to our own situation and our own governance. American jurisprudence therefore became the most authoritative source of elucidation and enlightenment for our fledgling courts. Even today, American case law is regarded as persuasive by Philippine courts.<sup>5</sup> For instance, in a case dealing with mandatory drug testing among students of secondary and tertiary schools, the Court turned to the cases of *Vernonia School District 47J v. Acton* (1995) and *Board of Education of Independent School District No. 92 of Pottawatomie County, et al. v. Earls, et al.* (2002) and observed that American case law is "a rich source of persuasive jurisprudence."<sup>6</sup>

<sup>3</sup> Noted historian, Dr. Gregorio F. Zaide, actually lists more constitutional documents during the Revolutionary Period of 1892-1898, i.e., (1) the Katipunan Constitution (1892), the Evangelista Constitution (1896), the Biak-na-Bato Constitution (1897), Emilio Jacinto's *Pakatatag ng Pamahalaan sa Hukuman ng Silangan* (1898), the Makabulos Constitution (1898), the Ponce Constitution (1898), Paterno's Autonomous Program (1898), the Organic Decree of June 23, 1898, Apolinario Mabini's Constitutional Programme of the Philippine Republic (1899), and the Malolos Constitution (1899). Gregorio F. Zaide, *Philippine Constitutional History and Constitutions of Modern Nations* (1989).

<sup>4</sup> Treaty of Peace between the United States of America and the Kingdom of Spain (Treaty of Paris), December 10, 1898.

<sup>5</sup> *Ang Ladlad LGBT Party v. Commission on Elections*, G.R. No. 190582 (S.C., April 8, 2010).

<sup>6</sup> *Social Justice Society v. Dangerous Drugs Board*, G.R. Nos. 157870, 158633 & 161658 (S.C., November 3, 2008).

What this meant was that in just a little over three decades since the ratification of the Treaty of Paris, the Philippines already had “constitutional jurisprudence” to speak of.<sup>7</sup>

By 1934, the United States Congress passed the Tydings-McDuffie Law and the establishment of the Commonwealth Government, under a constitution drafted and ratified by the Filipino people, was within reach. By March of 1935, President Franklin D. Roosevelt approved the draft of the Constitutional Convention and by May, the Filipino electorate ratified it by an overwhelming majority vote.<sup>8</sup> This was that Constitution which was supposed to serve for the transition period, envisioned to last for ten years, after which the Commonwealth of the Philippines would become the Republic of the Philippines.

As history will attest however, any roadmap or plan for timely independence was disrupted by the outbreak of the Second World War. During this period, a constitution – now rarely acknowledged – was approved by the so-called Preparatory Committee on Philippine Independence and ratified by the KALIBAPI Convention in September of 1943. KALIBAPI is the *Kapisanan ng Paglilingkod sa Bagong Pilipinas* or the Association for Service to the New Philippines. It was the sole political party during the Japanese occupation.<sup>9</sup>

After the relatively brief interlude under the Japanese, the Philippines returned to the Commonwealth arrangement, with the Philippine government operating under the auspices of the 1935 Constitution until (and beyond) independence in 1946. After independence however, this became the source of tension as there were many who felt that a sovereign state should function under a constitution fashioned independent of any foreign involvement or intervention; and that could hardly be said of the FDR-approved 1935 Constitution.<sup>10</sup>

<sup>7</sup> See *Churchill v. Rafferty*, G.R. No. 10572 (S.C., December 21, 1915) and *U.S. v. Toribio*, G.R. No. 5060 [January 26, 1910] which looked into the scope of inquiry in resolving questions of validity involving statutes as well as the nature and scope of police power; and *Cariño v. Insular Government of the Philippine Islands*, No. 72 (February 23, 1909), which went up on appeal to the US Supreme Court and dealt with the concept of native title and indigenous communities’ ancestral land.

<sup>8</sup> Renato R. Pasimio, *The Philippine Constitution (Its Evolution and Development) and Political Science* 102 (1991).

<sup>9</sup> *Id.* at 144; see also Rodriguez, *supra* note 4 at 35.

<sup>10</sup> Such approval was required by Section 3 (Submission of Constitution to the President of the United States) of the 1934 Philippine Independence Act (Tydings-McDuffie Act) or An Act to provide for the complete independence of the Philippine Islands, to provide for the adoption of a Constitution and a form of government for the Philippine Islands, and for other purposes.

By the 1960s, the Philippine Congress resolved to set up a Convention whose task it would be to propose amendments to the fundamental law. But before the elected 1971 Constitutional Convention (Con-Con) could even finish its task, then President Ferdinand Marcos imposed martial law on September 21, 1972. Considering the diverse composition of the Convention, it came as no surprise that among its numbers included opposition leaders who were very quickly the subject of arrests and detentions, such as [future Senator and Vice President] Teofisto Guingona Jr. A number of the delegates also chose to go into exile abroad, including vocal critics of Mr. Marcos such as [future Senator] Heherson Alvarez. The remaining members of the Convention however decided to continue their work, notwithstanding the trying and uncertain times. The result was a hasty and somewhat problematic draft<sup>11</sup> finalized and submitted to the President on November 30, 1972, just a little over two months after the declaration of Martial Law.<sup>12</sup> The very next day, and in compliance with the dictates of the 1935 Constitution which required a plebiscite for charter change, President Marcos then issued a decree “[s]ubmitting to the Filipino People, for ratification or rejection, the Constitution of the Republic of the Philippines proposed by the 1971 Constitutional Convention”, and setting the date of the plebiscite on January 15, 1973.<sup>13</sup>

A week before the scheduled date, however, Mr. Marcos – perhaps fearful that a NO vote would prevail – decided to issue a General Order directing that the national plebiscite be “postponed until further notice”.<sup>14</sup> It appeared that also just a week prior to said Order, he had created Citizens Assemblies through yet another of his infamous Presidential Decrees.<sup>15</sup> These Citizens Assemblies were allegedly being asked the question: “*Do you like the plebiscite on the proposed Constitution to be held later?*” and the president was

<sup>11</sup> Augusto Caesar Espiritu, *How Democracy was Lost: A Political Diary of the Constitutional Convention of 1971-1972* 125 (1993) (journal entry of November 18, 1972). Espiritu, a Con-Con member, writes: “*We now have a brand new Constitution. A Marcos Constitutional Authoritarianism has ben institutionalized. The lapdogs of the dictator were delirious with joy. I remember that the British Prime Minister Gladstone had called the American Constitution ‘the most wonderful work struck off at a given time by the brain and purpose of man.’ Our brand new Constitution is the opposite; it is the most despicable work struck off at a given time by the warped brain and purpose of man, to his lasting disgrace.*”

<sup>12</sup> The Convention adopted Resolution No. 5843 proposing to Mr. Marcos that a decree be issued calling a plebiscite for the ratification of the draft Constitution.

<sup>13</sup> Pres. Dec. No. 73 (December 1, 1972).

<sup>14</sup> General Order No. 20 (January 7, 1973).

<sup>15</sup> Creating Citizens Assemblies, Pres. Dec. No. 86 (December 31, 1972). These were created in each barrio in every municipality and municipal district, and in each district in every chartered city, “to broaden the base of citizen participation in the democratic process and to afford ample opportunities for the citizenry to express their views on important national issues”. They consisted of all citizens, at least 15 years old, residing in the area.

asserting in G.O. 20 that it was “necessary to hold the plebiscite in abeyance until the people’s preference has been ascertained”.

But while most people were still trying to come to terms with the postponement, Mr. Marcos – through Proclamation No. 1102 – issued only 10 days after the deferment of the plebiscite, announced that the proposed Constitution had been approved “by an overwhelming vote of the members of the Citizens Assemblies.” He said that, on January 5, 1973,<sup>16</sup> the Citizens Assemblies had been asked the questions: *Do you approve of the New Constitution? Do you still want a plebiscite to be called to ratify the new Constitution?* Allegedly, 14.5 million of all the Citizens Assemblies voted for the adoption of the proposed Constitution, as against approximately 750,000 who voted for its rejection. On the question of whether or not the people would still like a plebiscite, 14.3 million reportedly answered that there was no more need for one. Since that meant a reported 95% were in favor, Mr. Marcos certified and proclaimed that there had been ratification and the new Constitution had come into effect.<sup>17</sup>

Predictably, petitions for certiorari were very quickly filed by citizens with the Supreme Court. Then Chief Justice Roberto Concepcion declared that he could not “in good conscience, declare that the proposed Constitution has been approved or adopted by the people in the citizens’ assemblies all over the Philippines, when it is, to my mind, a matter of judicial knowledge that there have been *no* such citizens’ assemblies in *many* parts of Manila and suburbs, not to say, also, in other parts of the Philippines.”<sup>18</sup>

But to the question of whether the proposed Constitution was in force, four (4) Justices held that it was in force “by virtue of the people’s acceptance thereof”; four (4) cast no vote thereon on the premise that they could not state with judicial certainty whether the people have accepted the Constitution or not; and two (2) Justices voted that the Constitution was not in force – with the result therefore that there were not enough votes to declare that the new Constitution was not in force. So the very divided Court ruled that “there [was] no further judicial obstacle to the new Constitution being considered in force and effect.”<sup>19</sup> And for the next 14 years, the 1973 Constitution – amended along the way to solidify Mr. Marcos’ dictatorial powers<sup>20</sup> – reigned.

<sup>16</sup> Note that this is before the issuance of G.O. 20 which postponed the plebiscite.

<sup>17</sup> Announcing the Ratification by the Filipino People of the Constitution Proposed by the 1971 Constitutional Convention, Proclamation No. 1102, (January 17, 1973).

<sup>18</sup> *Javellana v. Executive Secretary*, G.R. Nos. L-36142, L-36164, L-36165, L-36236 & L-36283 (S.C., March 31, 1973). This was contained in the resolution Concepcion wrote but which particular point was not necessarily shared by the others on the Court.

<sup>19</sup> *Id.*

<sup>20</sup> An amendment in 1976 allowed Mr. Marcos to continue exercising legislative powers until martial law shall have been lifted. But even beyond such lifting of martial law (which happened in 1981), another amendment allowed him to continue exercising

When the 1986 People Power Revolution<sup>21</sup> saw the Marcoses deposed and fleeing into Hawaiian exile, Corazon Aquino came into power, not through the apparent auspices of the 1973 Constitution, but in defiance thereof. On March 25, 1986, or a month after the revolution, President Aquino established a Provisional Constitution, fittingly and fondly known as the “Freedom Constitution.”<sup>22</sup> A key provision therein required that a Commission be appointed to draft a new Charter with utmost speed so that this could be presented to the people, “consistent with the need both to hasten the return of normal constitutional government and to draft a document truly reflective of the ideals and aspirations of the Filipino people.”<sup>23</sup>

The Aquino-appointed Constitutional Commission (Con-Com) started work on the 1<sup>st</sup> day of June 1986 and finished its work in October, less than 20 weeks since it commenced.<sup>24</sup> A campaign was launched to inform the people of the proposed draft and a plebiscite on February 2, 1987 then saw the overwhelming ratification of the new Constitution.

## II. CONSTITUTIONAL AND LEGISLATIVE INSTALLATION OF SOCIAL RIGHTS AND SOCIAL JUSTICE

### 1. *Precursors to the current roster of provisions*

Social justice and social rights did not figure very prominently in the earlier charters. The 1899 Malolos Constitution alluded to public instruction

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legislative fiat should there be, *inter alia*, a grave emergency or a threat or imminence thereof “in his judgment”.

<sup>21</sup> The revolution, also popularly known as the EDSA Revolution after the main thoroughfare in the capital where the masses of people gathered, was the culmination of mounting protests against Mr. Marcos and occurred a week after he was proclaimed president in the February 7 snap elections which was marred by massive cheating. The Marcoses fled on February 25, 1986.

<sup>22</sup> Declaring a National Policy to Implement Reforms Mandated by the People Protecting Their Basic Rights, Adopting a Provisional Constitution, and Providing for an Orderly Transition to a Government Under a New Constitution, Proclamation No. 3 (March 25, 1986).

<sup>23</sup> CONST. (Freedom), Art. V, § 2.

<sup>24</sup> While it is the author’s opinion that President Aquino would have preferred an elected commission instead of an appointed one, the need for “complete reorganization of the government, restoration of democracy, protection of basic rights, rebuilding of confidence in the entire government system, eradication of graft and corruption, restoration of peace and order, maintenance of the supremacy of civilian authority over the military, and the transition to government under a New Constitution in the shortest time possible” – as seen in the preambular clause of Proclamation No. 3, s. 1986, prevailed.



being obligatory and free of charge in state schools,<sup>25</sup> but it did not mention much else. The organic documents of American extraction were understandably more concerned with political matters and governmental processes; and while there was indeed mention of civil and political rights, there were none regarding the economic or social kind.

This lack was noted during the discussions of the drafters of the 1935 Constitution. A 1924 case, *People vs. Pomar*,<sup>26</sup> was particularly bannered in the Con-Com as an example of a stubborn adherence to the concept of *laissez faire* which should not be countenanced under the charter. One of the delegates, Jose P. Laurel, asserted that the decision in that case could no longer be tolerated in light of the “social provisions” of the new Constitution.<sup>27</sup>

Section 5 of the Declaration of Policies of the 1935 Constitution therefore admonished the State to be concerned with “the promotion of social justice to insure the well-being and economic security of all the people.”<sup>28</sup> It also contained other provisions on public education, as well as labor and agrarian matters. The 1943 Constitution simply replicated – almost entirely – what there was in the 1935 version.<sup>29</sup>

The 1935 provisions did prove useful in constitutional litigation when, on many occasions, the judiciary chose to be guided by these in exercising judicial review. The aforementioned Section 5 “revolutionized judicial attitude to the right of property and to the powers of government in relation to the regulation of property”.<sup>30</sup>

<sup>25</sup> CONST. (Malolos), Art. 23.

<sup>26</sup> *People v. Pomar*, 46 Phil. 440 (1924). *People v. Pomar* chose to uphold freedom of contract over a social justice measure that mandated an expanded maternity leave, with the Court arguing that the liberty to contract is part of what’s guaranteed by the due process clause.

<sup>27</sup> 3 JOURNAL OF THE 1935 CONSTITUTIONAL CONVENTION 1073 (Francisco ed.), as cited in Joaquin G. Bernas, *The 1987 Constitution of the Republic of the Philippines: A Commentary* 45 (2008 ed.)

<sup>28</sup> CONST. (1935), Art. II, § 5.

<sup>29</sup> The earlier Constitution provides in part “... The Government shall establish and maintain a complete and adequate system of public education, and shall provide at least free public primary instruction, and citizenship training to adult citizens...” Except for changing the word “public” to “national” in qualifying “education”, the 1943 version is the same.

On the matter of labor and agrarian matters, the 1935 and the 1943 Constitutions had the exact same provision: “The State shall afford protection to labor, especially to working women and minors, and shall regulate the relations between landowner and tenant, and between labor and capital in industry and in agriculture. The State may provide for compulsory arbitration.”

<sup>30</sup> Bernas, *supra* note 29 at 20.

The 1973 Constitution had a more extensive repertoire of provisions that dealt with social rights<sup>31</sup> and had a fairly strong statement on social justice: “*The State shall promote social justice to ensure the dignity, welfare, and security of all the people. Towards this end, the State shall regulate the acquisition, ownership, use, enjoyment and disposition of private property, and equitably diffuse property ownership and profits.*”<sup>32</sup>

While this was a significant improvement, there was still no question that these provisions were not to be considered on the same level, even in theory, as the enshrined civil and political rights. Writing in his journal during this time, Con-Con member Augusto Espiritu recounts an attempt to advance the status of social rights in the draft charter:

This was what differentiated prewar Constitutions from the modern Constitutions of democratic nations, I said. The ideas of social progress and of social and economic rights find emphasis in postwar democratic Constitutions.... Bengzon intervened: These ideas are spread in the different provisions in the new Constitution. My response was that they are so scattered as to be ineffective.<sup>33</sup>

Civil and political rights were considered self-executory guarantees that could, by themselves, be considered as giving an individual a cause of action against the State. Not so with the social and economic rights. The predominant thought was that the State had to legislate in order to give them flesh. The tricky part then, of course, was that the dictator *was* legislator. Be that as it may, the Court persistently appealed to the social justice clause in the 1973 Constitution and noteworthy cases included ones which involved labor rights.<sup>34</sup>

<sup>31</sup> Article II of the 1973 Constitution included the following:

SEC. 7. The State shall establish, maintain, and ensure adequate social services in the field of education, health, housing, employment, welfare, and social security to guarantee the enjoyment by the people of a decent standard of living.

SEC. 9. The State shall afford protection to labor, promote full employment and equality in employment, ensure equal work opportunities regardless of sex, race, or creed, and regulate the relations between workers and employers. The State shall assure the rights of workers to self-organization, collective bargaining, security of tenure, and just and humane conditions of work. The State may provide for compulsory arbitration.

Moreover, Section 12 of the Article on the National Economy and Patrimony directed that the State formulate and implement an agrarian reform program aimed at tenant emancipations and the achievement of goals enunciated in the Constitution. As an aside, that didn't quite happen and the farmers and peasants were amongst the most disenfranchised during martial law.

<sup>32</sup> CONST. (1973), Art. II, § 6.

<sup>33</sup> Espiritu, *supra* note 13 at 114 (journal entry of November 27, 1972).

<sup>34</sup> Bernas, *supra* note 29 at 48.

The foregoing notwithstanding, the prevailing sentiment in 1986 was that past administrations and legislatures had come up short in effecting meaningful mechanisms to promote and evolve social justice for the ordinary Filipino. While the Con-Com was resolved to give it consequence and meaning, it was in a bind. Attempting to do what the others who had gone before had failed to do, i.e., providing detailed ways of guaranteeing the realization of social justice and the attainment of social rights, proved to be problematic. Mulling this problem barely two months into the process, Con-Com member Joaquin Bernas, wrote:

[T]he Commission must cope with two problems. First, the concerns of the Con-Com are myriad and the Con-Com has imposed on itself a time limit. A tremendous amount of time will be needed if it is to “legislate” on social justice, an admittedly complicated problem. Second, it cannot claim to be a “representative” group because it is not an elected body. It does not have a “popular” mandate. Should it therefore be satisfied with ensuring the establishment of a truly representative legislature, a legislature with a truly mass mandate, and entrusting to that legislature, in the strongest possible terms, the duty of giving meaning to social justice?<sup>35</sup>

The “time limit” he spoke of was in consonance with the directive of President Aquino for the Con-Com to act with “utmost speed”. Indeed they submitted the draft for ratification in under five months and left most of the responsibility of en fleshing the social provisions to Congress; but they did their best to pack a multitude of social rights in the draft. Provisions that may be viewed conservatively as merely authorization for the State to act but which could also be seen radically as command directives for the State to act.<sup>36</sup>

## 2. *A survey of relevant social provisions*

By far, the 1987 Constitution trumps all constitutions that came before it in sheer number of provisions which sally forth on social rights and social justice. These provisions can be seen mainly in two Articles of the Constitution: (a) Article II which provides the basic ideological principles and policies that the framers maintain underpin the Constitution; and (b) Article XIII entitled Social Justice and Human Rights.

Article II sets forth the Declaration of Principles and State Policies. The counterpart article in the 1935 Constitution had five (5) provisions, the 1973

<sup>35</sup> Joaquin G. Bernas, SJ, *A Living Constitution: The Cory Aquino Presidency* 55-56 (2000); first published in *Veritas* (July 6, 1986).

<sup>36</sup> Froilan M. Bacungan, *Universal Human Rights: A Reality in the Constitution of the Philippines* 300 (2012).

version had ten (10), and the 1987 incarnation has twenty-eight (28). Of these, the first 5 were denominated as “principles”,<sup>37</sup> while §6 to §28 were denominated as “policies”.<sup>38</sup> What sets the 1987 version apart from the earlier 1935 and 1973 ones is that there was an attempt to make a distinction between what ought to be considered as “principles” from what were mere “policies”. The distinction was material in that the former were supposed to be binding rules while the latter were merely “guidelines” for the State.

In actuality, however, the distinction is more apparent than real because not all of the six principles have been treated in jurisprudence as self-executory and the Court has ruled that these needed legislation since they did not as yet confer enforceable rights. And yet a few of the guiding “policies” have actually been deemed by the courts as anchoring justiciable rights. More on this in the next section.

Aside from the provisions in Article II, the 1987 Constitution also has Article XIII entirely devoted to social justice and human rights, separate and distinct from the Bill of Rights (Article III). The very first section of this Article mandates Congress to “give highest priority to the enactment of measures that protect and enhance the right of all the people to human dignity, reduce social, economic, and political inequalities, and remove cultural inequities by equitably diffusing wealth and political power for the common good.” To this end, the State is supposed to regulate the acquisition, ownership, use, and disposition of property and its increments.<sup>39</sup>

The Article identifies seven key areas for prioritization:

1. *Labor*. The constitutional directive on labor is couched in expansive language – mandating the State to afford “full protection” to labor and

<sup>37</sup> CONST. (1987), Art. XIII, § 1 (democratic and republic state); § 2 (renunciation of war; adoption of international law principles; policy of peace, freedom and amity); § 3 (civilian supremacy and the role of the armed forces); § 4 (compulsory military and civil service); § 5 (prerequisites for the enjoyment of the blessings of democracy); and § 6 (separation of Church and State)

<sup>38</sup> In this Article, all provisions which deal directly or indirectly with social rights belong to the “policies” cluster: § 9 (promotion of a just and dynamic social order); § 10 (promotion of social justice in national development); § 14 (recognition of the role of women in nation-building; fundamental equality); § 15 (protection and promotion of the right to health); § 16 (protection and advancement of the right to a balanced and healthful ecology); § 17 (priority to education, science and technology, arts, culture, and sports); § 18 (affirmation of labor as a primary social economic force; protection of the rights of workers); § 19 (development of a self-reliant and independent national economy); § 21 (promotion of comprehensive rural development and agrarian reform); § 22 (recognition and promotion of the rights of indigenous cultural communities); and § 23 (encouragement of non-governmental, community-based, or sectoral organizations).

<sup>39</sup> CONST. (1987), Art. XIII, § 1.

encompassing in its protection workers both “local and overseas” as well as “organized and unorganized”. It is also very detailed and guarantees a list of rights: self-organization, collective bargaining and negotiations, peaceful concerted activities, security of tenure, humane work conditions, a living wage, and participation in policy and decision making.<sup>40</sup>

2. *Agrarian and natural resources reform.* One of the more controversial issues of the constitutional debates involved a decades-old social problem – that of agrarian reform. The 1987 Constitution was not the first to tackle this issue and the ConCom members, painfully aware of the letdown previous attempts at reform became, provided more expanded provisions in the current Constitution than those found in previous ones. The directive of the mother provision in this part of Article XIII is for the State to undertake a program founded on the rights of farmers and regular landless farm workers to own the lands that they till or to receive a just share of the fruits of their labors. Not only that, but the State should also recognize the rights of the various stakeholders – including the farmers – to participate in the management of the reform program. Reforms are not only limited to land and agrarian resources but also to natural resources, with a special mention of the rights of indigenous cultural communities to their ancestral lands. Moreover, a novel addition to the 1987 Constitution is the mandated protection of the rights of subsistence fishermen to the preferential use of the communal marine and fishing resources – a commonsensical, albeit belated, recognition that the maritime territory of archipelagic Philippines far outstrips her terrestrial area.<sup>41</sup>
3. *Urban land reform and housing.* While conceding that efforts had been made in the past to try and address the subhuman conditions of the urban poor’s housing, the Chairperson of the Con-Com’s Committee on Social Justice, Ma. Teresa F. Nieva, nevertheless argued that efforts were far from satisfactory.<sup>42</sup> Article XIII directs the State to undertake a continuing program of urban land reform and housing while also promoting sufficient employment opportunities to the underprivileged and homeless citizens in the urban centers as well as the resettlement areas. This program, the relevant provision adds, must be undertaken in cooperation with the private sector. Moreover, in reaction to the violence and damage which often marked demolitions and evictions in the past, a separate

<sup>40</sup> CONST. (1987), Art. XIII, § 3.

<sup>41</sup> Sections 4-8, Article XIII CONST. (1987), Art. XIII, §§ 4 to 8.

<sup>42</sup> II RECORD OF THE CONSTITUTIONAL COMMISSION 607 (1986), as cited in Bernas, *supra* note 29 at 658.

- provision mandates that these can only be undertaken in accordance with law and always in a manner that is just and humane. Every relocation should also have prior consultation with those to be relocated as well as members of the community to which they are to be transferred.<sup>43</sup>
4. *Health.* The recognition of the people's right to health is secured by the adoption of an integrated approach to health development with the end goal of easing access to affordable health and other social services.<sup>44</sup> Certain marginalized sectors are ordered prioritized in these matters, such as those who are underprivileged, sick, elderly, women, children and the disabled.<sup>45</sup>
  5. *Women.* A distinct provision is also postulated for working women and the State is instructed to protect them by providing: (1) working conditions that do not lack for safety and health, and which take into account their "maternal functions"; and (2) facilities and opportunities for their welfare and the realization of their potential.<sup>46</sup>
  6. *Peoples' organizations.* Empowering the people would seem to be a natural part of a charter born of a "people power revolution" and Article XIII keeps faith with that expectation. Sections 15 and 16 talk of the role of independent (and voluntary) people's organizations within the democratic framework as well as the right of the people to participate – in an effective and reasonable manner at all levels of social, political, and economic decision-making.<sup>47</sup>
  7. *Structures for human rights protection and promotion.* This Article is also the birthing place of the Commission on Human Rights,<sup>48</sup> the independent national human rights institution of the Philippines, which has been considered by the present Administration (and most of the previous ones) as a critical thorn in the side. Had the Commission been of ordinary statutory creation, it would have possibly been more vulnerable, but since the Constitution itself mandates the Commission's creation and provides it with powers and functions,<sup>49</sup> it occupies a somewhat more favored position, albeit not one at par with the traditional independent and fiscally autonomous Constitutional Commissions.<sup>50</sup>

<sup>43</sup> CONST. (1987), Art. XIII, §§ 9 and 10.

<sup>44</sup> CONST. (1987), Art. XIII, §§ 11 to 13.

<sup>45</sup> The State is in fact mandated to establish an agency for persons with disabilities.

<sup>46</sup> CONST. (1987), Art. XIII, § 14.

<sup>47</sup> CONST. (1987), Art. XIII, §§ 15 and 16.

<sup>48</sup> CONST. (1987), Art. XIII, § 7.

<sup>49</sup> CONST. (1987), Art. XIII, § 18.

<sup>50</sup> The term "constitutional commissions" traditionally refers to the Commission on Elections, the Commission on Audit, and the Civil Service Commission.

### 3. The legislative “Follow Through”

Given all the foregoing, has enough been done? How has Congress tried to compass the grand constitutional plans?

The author does not discount the fact that for the most part, the objectives discussed above were meant to be legislative priorities. It is true that Congress has enacted a good number of social legislation in line with the Article XIII priority areas and a few are discussed below:<sup>51</sup>

1. *Labor*. Various laws have been passed to amend and enhance the 1974 Labor Code. Moreover, there have been other statutes covering different areas such as a law which established labor standards for domestic workers “towards decent employment and income, enhanced coverage of social protection, respect for human rights and strengthened social dialogue”<sup>52</sup>; a law which sought to improve workers’ conditions by instituting a scheme for the portability of social security benefits<sup>53</sup>; a law declaring sexual harassment unlawful in employment, education or training settings<sup>54</sup>; and a law which recognized migrant workers’ welfare as the subject of government priority, acknowledging their important contribution to the national economy.<sup>55</sup>
2. *Agrarian and natural resources reform*. The plight of the landless farmers and farmworkers has always been a difficult and divisive issue. It was, in fact, lengthily discussed in the public spaces of debate whether the issue was something that then President Aquino ought to address with her temporary legislative fiat, or if it was something that was better left to an elected Congress.<sup>56</sup> It was ultimately left to the Congress, which enacted the Comprehensive Agrarian Reform Law in June 1988.<sup>57</sup> The program is premised on the right of farmers to directly own the lands that they cultivate. The State’s declared policy was to encourage – subject to retention limits and just compensation – the equitable distribution of agricultural lands. The program was slated to be finished in 1998 but had been extended twice for being far

<sup>51</sup> The discussion does not presume to cover or enumerate all relevant legislation.

<sup>52</sup> The Domestic Workers Act (*Kasambahay Law*), Rep. Act No. 10361 (2013).

<sup>53</sup> The Portability Law, Rep. Act No. 7699 (1994).

<sup>54</sup> Anti-Sexual Harassment Act, Rep. Act No. 7877 (1995).

<sup>55</sup> Migrant Workers and Overseas Filipinos Act, Rep. Act No. 8042 (1995).

<sup>56</sup> Bernas, *supra* note 37 at 194-196; first published in *Inquirer* (May 29, 1987).

<sup>57</sup> An Act Instituting a Comprehensive Agrarian Reform Program to Promote Social Justice and Industrialization, Providing the Mechanism for its Implementation, and for Other Purposes (Comprehensive Agrarian Reform Law), Rep. Act No. 6657 (1988).

- from completing targets.<sup>58</sup> The last extension was allowed only for 5 years or until 2014, after which only land distribution to beneficiaries with already existing notices of coverage will continue.<sup>59</sup>
3. *Urban land reform and housing.* The Urban Development and Housing Act was passed in 1992 to provide for a program wherein the State undertook to, among other things, “uplift the conditions of the underprivileged and homeless citizens in urban areas and in resettlement areas by making available to them decent housing at affordable cost, basic services, and employment opportunities” and provide for the rational use and development of urban land in order to bring about “equitable utilization of residential lands in urban and urbanizable areas with particular attention to the needs and requirements of the underprivileged and homeless citizens and not merely on the basis of market forces”.<sup>60</sup> Rent control laws, primarily aimed at protecting poor and middle-income families, have also been passed periodically.<sup>61</sup>
  4. *Health.* An early measure to reinforce this social right was the Generics Act of 1988 which sought to require, among other things, the use and acceptance of medicines identified by their generic appellations.<sup>62</sup> Congress has also enacted the National Health Insurance Act which put up the Philippine Health Insurance Corporation.<sup>63</sup> A [relatively] recent landmark statute that was controversial and hard fought for many long years is the reproductive health law. Opposed by the traditional quarters of the Catholic Church, this law recognized, among other things, reproductive health rights and the right of choice in accordance with religious convictions, ethics, cultural beliefs, and the demands of responsible parenthood. It guaranteed universal access to

<sup>58</sup> It was first extended in 1998 by Rep. Act No. 8532, and then again in 2009 by Rep. Act No. 9700.

<sup>59</sup> An Act Strengthening the Comprehensive Agrarian Reform Program, Extending the Acquisition and Distribution of All Agricultural Lands, Instituting Necessary Reforms, Amending for the Purpose Certain Provisions of Republic Act No. 6657, Otherwise, Known as the Comprehensive Agrarian Reform Law of 1988, as amended, and appropriating funds therefor, Rep. Act No. 9700, § 30 (2009).

<sup>60</sup> Urban Development and Housing Act, Rep. Act No. 7279, § 2 (a) and § 2(b) (1) (1992).

<sup>61</sup> The Rent Control Act, Rep. Act No. 9653 (2009).

<sup>62</sup> The Generics Act, Rep. Act 6675 (1988).

<sup>63</sup> National Health Insurance Act, Rep. Act 7875, § 2 (1995). The program emphasizes the government prioritization of health to bring about faster economic development and improved quality of life. The express guiding principles of the program set out in the law include equity, social solidarity, and care for the indigent.



- reproductive health care services and sought to give preferential access to those identified as marginalized.<sup>64</sup>
5. *Women.* Congress has also passed the comprehensive *Magna Carta of Women*<sup>65</sup> which integrated provisions of international human rights treaties such as the Convention on the Elimination of All Forms of Discrimination against Women and the International Covenant on Economic, Social and Cultural Rights. Its Declaration of Policy reads in part: “Recognizing that the economic, political, and sociocultural realities affect women’s current condition, the State affirms the role of women in nation building and ensures the substantive equality of women and men. It shall promote empowerment of women and pursue equal opportunities for women and men and ensure equal access to resources and to development results and outcome.”<sup>66</sup>
  6. *Peoples’ organizations.* “[To harness] people power towards the attainment of economic development and social justice” – this is the avowed value behind the Cooperative Code, passed in 1990. Defining “cooperative” as an autonomous and duly registered association of persons, with a common bond of interest, who have voluntarily joined together to achieve their social, economic, and cultural needs and aspirations – the law adopted universally accepted principles of cooperation including voluntary and open membership, economic participation, and concern for community.<sup>67</sup>
  7. *Structures for human rights protection and promotion.* Approximately three months after the ratification of the 1987 Constitution, President Aquino, exercising legislative fiat, declared the constitutionally created Commission on Human Rights (CHR) effective, citing the urgency in giving effect to the State policy that “the State values the dignity of every human person and guarantees full respect for human rights.”<sup>68</sup> Ever since the Paris Principles were adopted by the United Nations in 1993, the CHR has strived to be compliant with the international yardstick for national human rights institutions.<sup>69</sup>

<sup>64</sup> The Responsible Parenthood and Reproductive Health Act, Rep. Act 10354 (2012).

<sup>65</sup> The Magna Carta of Women, Rep. Act No. 9710 (2009).

<sup>66</sup> *Id.*, § 2.

<sup>67</sup> The Cooperative Code of the Philippines, Rep. Act 6938 (1990), as amended by Republic Act No. 9520 (2009).

<sup>68</sup> Exec. Ord. No. 163, series of 1987.

<sup>69</sup> Under these principles, NHRIs are mandated to “protect human rights, including by receiving, investigating and resolving complaints, mediating conflicts and monitoring activities; and “promote human rights, through education, outreach, the media, publications, training and capacity building, as well as advising and assisting the Government.” <<https://nhri.ohchr.org/EN/AboutUs/Pages/ParisPrinciples.aspx>>

So there have been quite a number of developments which seem to reflect active congressional support for social rights, including the 1998 *Social Reform and Poverty Alleviation Act* which institutionalized a social reform agenda and directs – as policy of the State – an active pursuit of asset reform or redistribution of economic resources to basic sectors.<sup>70</sup>

Of course the reality is that there are areas where the legislative directives, no matter how well-meant and beautifully phrased, do not go far enough to matter. Indeed, there are areas where there are gaps in the legislation. Moreover, the poor and marginalized sectors have also experienced the impoundment of social legislation when the policies of whatever executive leadership happens to be in power, do not appear to be aligned with the pertinent legislative directives. Lobbying representatives to pass legislation with more teeth and executive leaders to give priority to the implementation of social laws will, of course, be important undertakings; but what other avenues have been considered? Is there any recourse to the third main branch of government to “aid the cause”, so to speak?

### III. SOCIAL RIGHTS AND THE EMPOWERED COURT

To which side has the Supreme Court leaned on matters within the scope of social rights?

Writing about judicial review regarding the protection of human rights, former University of the Philippines Law Dean Froilan Bacungan remarked that – on a scale of 1 to 10, the Philippines would perhaps score an 8 in the protection of civil and political rights, but that when it comes to economic and social rights, the Philippines would probably have an under par score of 5.<sup>71</sup>

#### 1. *Judicial review and the expanded powers of the supreme court*

While the characterization and assessment may be debatable, there is indeed a sense of frustrated discontent among ECOSOC rights advocates who believe that the Court could do more. In the Philippines, the Constitution trumps everything. Every governmental act that goes against the Constitution – be it executive or legislative – is considered invalid or illegitimate. And, as a noted Constitutionalist in the Philippines – the Jesuit Joaquin Bernas – is fond of cheekily observing, “the Constitution means what the Supreme Court says it means at any given time”.

<sup>70</sup> Social Reform and Poverty Alleviation Act, Rep. Act 8425 (1998).

<sup>71</sup> Bacungan, *supra* note 38: 305, 307.

Similar to its American counterpart, the Philippine Judiciary makes up one of the three “co-equal” branches of government. The 1987 Constitution provides that judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law. Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable.<sup>72</sup> This is a fairly straightforward definition, and not particularly original. But this constitutional provision also expands and gives the judiciary the power “to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of *any* branch or instrumentality of the government.”<sup>73</sup>

This last clause was added in the 1987 incarnation of the Constitution because of the tendency of the Marcos Supreme Court to hide behind the “political question” doctrine during the dictatorship. How it has been wielded by the Court since then has proved, arguably, to be a game-changer as far as many areas of Philippine law and jurisprudence are concerned, including social rights.

While it does not mean the complete doctrinal abandonment of the political question, because – as former Chief Justice Concepcion wryly pointed out – “truly political questions (e.g., those matters which have been textually and constitutionally committed to the political departments) are beyond the pale of judicial review”, it does allow the Court to go where it has not gone before.<sup>74</sup> To top it off, Article 8 of the New Civil Code of the Philippines states that decisions handed down by the Supreme Court form part of the law of the land.

## 2. *Justiciability issues and the court’s treatment of social rights*

It can be argued that the Court has remained considerably firm in its position that the social justice provisions are not judicially enforceable principles but ones that require legislation. In the case of *BFAREU v. COA*, the petitioners invoked the provisions on social justice to justify the grant of the Food Basket Allowance but the Court made short shrift of this argument, stating that: “Time and again, we have ruled that the social justice provisions of the Constitution are not self-executing principles ready for enforcement through the courts. They are merely statements of principles and policies. To give them effect, legislative enactment is required.”<sup>75</sup> This terse statement, or

<sup>72</sup> CONST. (1987), Art. VIII, § 1.

<sup>73</sup> *Id.*

<sup>74</sup> Bernas, *supra* note 29: 500.

<sup>75</sup> *BFAR Employees Union, Regional Office No. VII vs. Commission on Audit, G.R. No. 169815 (S.C., August 13, 2008).*

something like it, can be seen in numerous cases like *Kilosbayan, Inc. vs. Morato and Tañada vs. Angara* involving Article II provisions, and in cases like *Agabon v. NLRC* and *Serrano v. Gallant Maritime Services, Inc.*<sup>76</sup>

Be that as it may, there are a few points worth considering as far as the Court's behavior is concerned.

*First*, there have been a couple of cases which have pushed the envelope. In the seminal case of *Oposa vs. Factoran*,<sup>77</sup> where the Supreme Court gave children legal standing to sue on behalf of themselves and future generations through the concept of "intergenerational responsibility", the Court also recognized that Section 16 of Article II (Declaration of Principles and State Policies) as a right-conferring provision because it speaks of "the right of the people."<sup>78</sup> In this case, the Court said that:

[T]he right of the petitioners (and all those they represent) to a balanced and healthful ecology is as clear as the DENR's [Department of Environment and Natural Resources'] duty under its mandate and by virtue of its powers and functions under E.O. No. 192 and the Administrative Code of 1987 to protect and advance the said right.

A denial or violation of that right by the other who has the correlative duty or obligation to respect or protect the same gives rise to a cause of action. Petitioners maintain that the granting of the TLAs, which they claim was done with grave abuse of discretion, violated their right to a balanced and healthful ecology; hence, the full protection thereof requires that no further TLAs should be renewed or granted.

\* \* \*

After a careful examination of the petitioners' complaint, We find the statements under the introductory affirmative allegations, as well as the specific averments under the subheading CAUSE OF ACTION, to be adequate enough to show, *prima facie*, the claimed violation of their rights.

Subsequent to *Oposa*, in a dispute involving an open garbage dumpsite and its harmful effects on the health of the residents and the possibility of

<sup>76</sup> *Kilosbayan, Inc. vs. Morato*, G.R. No. 118910 (S.C., July 17, 1995; on motion for reconsideration November 16, 1995); *Tañada vs. Angara*, G.R. No. 118295 (S.C., May 2, 1997); *Agabon v. NLRC*, G.R. No. 158693 (S.C., November 17, 2004); *Serrano v. Gallant Maritime Services, Inc.*, G.R. No. 167614 (S.C., March 24, 2009).

<sup>77</sup> G.R. No. 101083 (SC., July 30, 1993).

<sup>78</sup> Section 16 provides that the State shall "protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature." Section 16 was discussed in tandem with Section 15 which deals with the right to health and the State's duty to instill health consciousness.

pollution of the water content of the surrounding area, the Court again talked of how “the immediate response to the demands of ‘the necessities of protecting vital public interests’ gives vitality to the statement on ecology embodied in the Declaration of Principles and State Policies or the 1987 Constitution.” The Court went on to add:

As a constitutionally guaranteed right of every person, it carries the correlative duty of non-impairment. This is but in consonance with the declared policy of the state “to protect and promote the right to health of the people and instill health consciousness among them.” It is to be borne in mind that the Philippines is party to the Universal Declaration of Human Rights and the Alma Conference Declaration of 1978 which recognize health as a fundamental human right.<sup>79</sup>

Was this the manifest intent of the Constitution’s framers? Arguably not. The provision simply wanted environmental protection and ecological balance to be a conscious object of police power but it was deemed to be an enforceable right without need for further legislation.

Moreover, it bears noting that *Oposa vs. Factoran* is an *en banc* decision and under the 1987 Constitution, no doctrine or principle of law laid down by the Court in a decision rendered *en banc* may be modified or reversed except by the Court sitting *en banc*.<sup>80</sup>

*Second*, still in line with the objective of protecting and advancing the constitutional right of the people to a balanced and healthful ecology, the Court issued in 2010 the Rules of Procedure for Environmental Cases.<sup>81</sup> The most innovative aspect of these Rules was the grant of a new remedy – the Writ of *Kalikasan* – which is available to anyone (including a people’s organization), “on behalf of persons whose constitutional right to a balanced and healthful ecology is violated, or threatened with violation by an unlawful act or omission of [a public or private individual or entity], involving environmental damage of such magnitude as to prejudice the life, health or property of inhabitants in two or more cities or provinces”.<sup>82</sup> This development bears noting since the Court saw fit to wield its auxiliary administrative power to promulgate rules concerning the protection and enforcement of a constitutional right.<sup>83</sup> It is posited that this power of the Court has not been optimally employed.

<sup>79</sup> Laguna Lake Development Authority vs. Court of Appeals, GR. No. 110120 (S.C., March 16, 1994).

<sup>80</sup> CONST. (1987), Art. VIII, § 4(3).

<sup>81</sup> Rules of Procedure for Environmental Cases, A.M. No. 09-6-8-SC (April 13, 2010).

<sup>82</sup> *Id.*, Rule 7, § 1.

<sup>83</sup> CONST. (1987), Art. VIII, § 5(5).

*Third*, the author grants that where the letter of any law is clear and brooks no other explanation, it will be read in a straightforward manner; but the trend in case law has been one where the law – if capable of more than one interpretation – is interpreted in a manner that favors the marginalized and underprivileged. This appeared to be the case before the 1987 Constitution<sup>84</sup> and is a trend that was strengthened by the social justice provisions. Indeed, jurisprudence currently even allows separation pay to an employee legally terminated as “a measure of social justice”.<sup>85</sup>

*Fourth and lastly*, the Court has on occasion shown creativity and independence from influences such as American frameworks when these do not work for the Philippine context. An example of this would be the divergence from the American model of scrutiny in matters regarding the constitutionality of a classification embodied in law affecting labor.

There are three levels of scrutiny at which the Court normally reviews a classification embodied in a law. The most stringent of these is the strict judicial scrutiny in which a legislative classification which “impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class is presumed unconstitutional, and the burden is upon the government to prove that the classification is necessary to achieve a compelling state interest and that it is the least restrictive means to protect such interest.”

In US case law, this kind of scrutiny is only prompted by suspect classifications (e.g., race or gender) but not when the classification is drawn along income categories. In the Philippines however, the Court has employed this scrutiny in a case where the contested law carried a suspect classification based on salary grade and in a case where there was a contractual clause which contained a suspect classification prejudicial to overseas Filipino workers.

In *Central Bank Employee Association, Inc. v. BSP*,<sup>86</sup> the Court characterized labor as “accorded special protection by the Constitution” and no deference is to be shown to a congressional act if the assailed classification prejudices such sector. In such cases, judicial scrutiny ought to be strict. The Court conceded that this view “finds no support in American or English jurisprudence”.

Nevertheless, these foreign decisions and authorities are not per se controlling in this jurisdiction. At best, they are persuasive and have been used to support many of our decisions.

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<sup>84</sup> An example of this is the case of *Federation of Free Farmers v. Court of Appeals*, G.R. No. L-41161, L-41222, L-43153, L-43369, 28595 [S.C., September 10, 1981], where the Court upheld the validity of the questioned law, commending it as a social legislation founded not only on police power but more importantly on the social welfare mandates of the Constitution.

<sup>85</sup> *Claudia’s Kitchen, Inc. vs. Tanguin*, G.R. No. 221096 (S.C., June 28, 2017)

<sup>86</sup> *Central Bank Employees Association v. BSP*, G.R. No. 148208 (S.C., 2004)

We should not place undue and fawning reliance upon them and regard them as indispensable mental crutches without which we cannot come to our own decisions through the employment of our own endowments. We live in a different ambience and must decide our own problems in the light of our own interests and needs, and of our qualities and even idiosyncrasies as a people, and always with our own concept of law and justice.

In *Serrano vs. Gallant* which involved migrant workers, the Court also employed the standard of strict judicial scrutiny, imbued as it was with the obligation to afford protection to labor, a vulnerable sector.<sup>87</sup>

*Serrano* however made it clear that the 2009 Court was not approaching the case from “the lone perspective that the clause directly violates state policy on labor” under Section 3, Article XIII of the Constitution. It insists in the instant case that there are provisions in the Constitution which the Court has expressly declared to be *not* judicially enforceable and, citing the earlier case of *Agabon v. NLRC*, observes that the aforementioned section on labor is one such provision. But, *Serrano* opines, the section on labor does dress up the sector with special status for whom the Constitution presses “protection through executive or legislative action and *judicial recognition*.”

#### IV. A FINAL WORD

It is perhaps fair to say that social rights – ECOSOC rights in general – while still treated for the most part as programmatic and requiring congressional stimulus to be executory, are still decidedly and firmly entrenched in the constitutional firmament that it is inconceivable for any attempt at charter change to sideline them.

Moreover, it is argued that an activist Court can work within the bounds of the judicial borders to advance social rights; and the legal community can and should help, both in legal scholarship and, where possible, through test cases in constitutional litigation.

Social rights as an affirmative goal should be underscored in both judicial decisions and legal scholarship. In a speech before judges, former Supreme Court Associate Justice Ameurfina Melencio-Herrera observed that what was needed as far as ESC rights are concerned was focus on “awareness and consciousness” because while the Philippine law school tradition drills into students the elaborate case law associated with the civil and political guarantees in the Bill of Rights, ESC rights have not received the same kind of keen interest and excitement.<sup>88</sup>

<sup>87</sup> G.R. No. 167614 (S.C., March 24, 2009).

<sup>88</sup> Ameurfina A. Melencio-Herrera, Chancellor, Philippine Judicial Academy, Opening remarks delivered at Philippine Judiciary Workshop on Realizing Economic, Social,

Melencio-Herrera posits the question to the judges:

Should not the right to shelter, right to health, right to food, right to education, right to environment, be given as much attention and meaning? These rights belong to a different category of rights altogether because they concern nothing less than self-preservation and self-perpetuation.

This in fact echoes and recalls *Oposa vs. Factoran*:

As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind. If they are now explicitly mentioned in the fundamental charter, it is because of the well-founded fear of its framers that unless the rights to a balanced and healthful ecology and to health are mandated as state policies by the Constitution itself, thereby highlighting their continuing importance and imposing upon the state a solemn obligation to preserve the first and protect and advance the second, the day would not be too far when all else would be lost not only for the present generation, but also for those to come generations which stand to inherit nothing but parched earth incapable of sustaining life.<sup>89</sup>

The penultimate point of this paper deals with a recourse that has not been optimized but which is an approach worth developing both by lawyers engaged in public interest lawyering and jurists keen on the progressive realization of the justiciability and enforceability of social rights. The Philippines is a member of a community of nations with a system that allows the Court to look at and consider international and comparative law in decision-making. The Philippines adheres to the dualist view, i.e., that domestic law is distinct from international law. Since dualism holds that international law and municipal law belong to different spheres, international law becomes part of municipal law only if it is incorporated or transformed into municipal law. The 1987 Constitution provides for this in two ways: by incorporation under Article II, § 2 and by transformation under Article VII, § 21.

The doctrine of incorporation mandates the direct integration of generally accepted principles of international law as part of the law of the land. This is a specific declaration and aspects of international law that are considered

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and Cultural Rights (12 September 2001, Tagaytay City); published in 11:13 PhilJA Judicial Journal: Perspectives in Judicial Education: Selected Speeches and Writings by Ameurfina A. Melencio Herrera 254 (2009).

Ruben F. Balane, Professor, Ateneo de Manila University School of Law, University of the Philippines College of Law, and University of Santo Tomas Faculty of Civil Law, Keynote Address at the Third International Scientific Congress on the Law of the Philippines and Spain: The Spanish Roots of Philippine Law (11 May 2017, Universidad de Malaga, Spain).

<sup>89</sup> *Oposa*, *supra* note 79.



customary therefore arguably have the force of domestic law, and courts can make use of them directly. Generally accepted principles of international law can be used by Philippine courts to settle disputes in much the same way that they would use other statutes passed by the Legislature.

Aside from this, the Philippine Constitution also provides for the doctrine of transformation. Treaties become part of municipal law through a constitutionally outlined process – getting the Senate to approve the ratification of an instrument. The Philippines is a state party to most human rights covenants, including the ICESCR. The State signed it in 1966, and ratified it in 1974. And yet, while it is tangentially alluded to in a handful of cases, it hasn't really been used in judicial ratiocination to any appreciable extent. It is conceded though that treaties have usually been invoked in petitions and used in decisions, in conjunction with domestic legislation. Such municipal laws are usually the ones ultimately used to anchor legal arguments.

Because of this, international law as well as comparative study could be a rich source of ideas. Moreover, the General Comments and concluding observations of the ECOSOC Committee could be used to resist any claim against the justiciability of a right based on “vagueness”, the General Comments having enfolded many a right in the ICESCR which in turn may have found its way to our Constitution or domestic legislation.<sup>90</sup> While more recent cases have increasingly cited international – and to a much lesser degree, comparative – law, this is an area of judicial study that the Court may wish to consider enhancing.

One final rumination – perhaps there is value in embracing the fact that the Philippine legal system is a hybrid mutation of sorts, that we are children of two legal generations as Professor Balane has had the occasion to point out. That we belong to both civil law and common law and that it is perhaps in acknowledging this convergence that we are able to embrace the best in both and make use of it to suit our own special circumstances and context.

Yes, constitutional law is mainly based on the American common law tradition. But perhaps there is also merit in considering the civil law tradition of interpreting statutes – not in a strictly literal manner – but in a way that highlights good faith; to temper the attention to fact patterns and details so common in common law with an awareness of legal principles worthy of a civilist; to explore whether this path can bring social rights farther up the road.

Social rights, just like the so-called 1<sup>st</sup> generation rights, must be advanced seriously if the preambular promise of the 1987 Constitution – “to build a just

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<sup>90</sup> Gilbert V. Sembrano, *Mechanisms and Avenues for Judicial and Quasi-Judicial Implementation of ESC Rights: The Philippine Experience in JUSTICIABILITY OF ECONOMIC AND SOCIAL RIGHTS: EXPERIENCES FROM DOMESTIC SYSTEMS* 273-274 (Fons Coomans, ed., 2006).

and humane society and establish a Government that shall embody our ideals and aspirations, promote the common good, conserve and develop our patrimony, and secure to ourselves and our posterity the blessings of independence and democracy under the rule of law and a regime of truth, justice, freedom, love, equality, and peace” – is to be fulfilled.