

**LAW AND NEWLY RESTORED DEMOCRACIES:
THE PHILIPPINE EXPERIENCE IN RESTORING POLITICAL PARTICIPATION
AND ACCOUNTABILITY**

AN INTRODUCTION

by

Raul C. Pangalangan

This collection looks at the problems of emerging democracies and transition governments as they struggle to restore constitutional mechanisms for political participation and accountability. The Philippine experience presents an excellent test case. On one hand, in 1986, it emerged from fourteen years of Marcos rule, determined to restore democracy and human rights, while addressing the welfare and redistributive welfare claims of a people mired in poverty. Cory Aquino enshrined those aspirations in its 1987 Constitution, creating explicit guarantees in its Bill of Rights and social justice clauses; institutionalizing check-and-balance mechanisms; constitutionalizing “People Power”, the peaceful but extra-legal exercise of the sovereign power. That framework has been sorely tested over the years: by military *coup* attempts borne by impatience with the slowness of democratic decision-making; by politicians manipulating democracy itself and projecting their machinations as the people’s will; and, most recently, by “People Power” itself, as impatient multitudes demanded successfully the ouster of President Joseph (Erap) Estrada. These four essays look at the heroic struggle to translate democratic aspirations into workable frameworks, and the ironies of juridifying the political and freezing into formal institutions the free and ever flowing energies of a democratic people.

In the essay “*Anointing Power with Piety*”: *People Power, Democracy and the Rule of Law*, I examine the “classic tension between constitutionalism and the raw power of mass struggles”, using our experiences with “People Power” in ousting Marcos and restoring democracy, and in ousting Erap and testing our democratic institutions.

I begin with a brief survey of our constitutional history, and examine the dilemma of following the rules strictly *vis-à-vis* following the peoples' will. This dilemma was fully articulated in three episodes in our constitutional history, in which the democratic forces, significantly, took different positions. In the case involving the ratification of the Marcos constitution in 1973, the Supreme Court applied the political test, i.e., whether the people had accepted the new constitution, rather than the legal text, i.e., whether they ratified that constitution in a proper plebiscite – and the democrats vehemently objected. In the next episode, involving Cory Aquino's interim and "revolutionary" Freedom Constitution, the political prevailed over the legal, but this time the democrats loudly applauded. Next, when some politicians manipulated a bogus "people's initiative" to lift term-limits and thus extend themselves in power, the Court applied a strict legal standard, to the delight of Filipino democratic forces.

The most recent, by no means final, episode is the ouster of President Erap through "People Power" protests, which showcases most starkly the Filipino constitutionalist's dilemma. On one hand, a sitting President can be ousted only through his voluntary resignation, or his conviction after an impeachment trial. There was neither an express resignation nor a conviction in Erap's case. Yet widespread protests had made it impossible for him to govern, notwithstanding that his electoral mandate remained and that he continued to enjoy the support of a disorganized, largely inarticulate mass. The essay discusses how the Philippine constitutional order balanced the competing claims between the rule of law and democratic governance.

In the essay *Democratization of the Legislative, Executive and Judicial Departments of Government*, Professor Carmelo V. Sison examines how the principle that the Philippines is "a democratic and republican state" is actualized through both direct democracy and through representative government.

He traces the history of the legislature as "a barometer and an enabler of democracy", as antidote to the "despotic and unaccountable" governance. In response to

the excesses of presidential power under Marcos, the 1987 Constitution has strengthened Congress, and enhanced its power over the public purse and its investigative powers.

The Congress is made even more widely representative, by providing for the election of “party-list representatives”, who run not as candidates of the traditional political parties, but are voted upon as representatives of marginalized sectors who otherwise remain under-represented in the ordinary electoral process, e.g., sectors such as labor, the peasantry, urban poor, indigenous cultural communities, women and the youth.

Another set of reforms heightens the congressmen’s “fidelity to the public trust” and the fiduciary nature of their office. They are required to declare their wealth, and disclose conflicts of interest arising from pending laws. Their traditional power to dispense patronage through “pork barrel” is now constrained by accounting rules – the accounting books to be accessible to the public and to be audited by the independent Commission on Audit – to guard against abuse and the use of public moneys for private purposes. Finally, the legislature, a *representative* body, is subjected to the people’s *direct* power of “initiative and referendum” to propose laws.

Professor Sison also examines the challenge of democratizing the executive branch, where power is in its essence reposed in “just one person, the President of the Philippines”, and who is alone is elected, everybody else in the executive branch theoretically acting solely on his behalf. The president’s power encompasses the “awesome responsibility” and the “plenitude of authority” actually reposed in the executive’s power “to enforce and administer the laws.” Having stated earlier that the 1987 Constitution was a response to executive excesses under Marcos, Professor Sison identifies the “structural limitations” placed on the president’s powers: *first*, the term-limit confiding him to a single six-year term; *second*, clearer rules on presidential succession, including disclosure of the incapacitating illness of the president; *third*, a ban on multiple positions by the President and his Cabinet; *fourth*, rules to preclude conflicts of interests, arising from outside professional, business or financial interests by the President and his Cabinet; *fifth*, an anti-

nepotism rule which bans the President from appointing his relatives to powerful and lucrative offices; *sixth*, and most significantly, strict substantive and procedural constraints on the commander-in-chief clause and the President's power to declare a state of emergency.

Finally, Professor Sison examines the place of judicial power in democratic governance. He begins with the expanded scope of judicial power, i.e., to review just about any grave abuse of power by government, an obvious response to judicial timidity, if not complicity, during the Marcos years. He also examines the structural mechanisms for judicial independence from the political branches of government. The new Constitution provides for the courts' fiscal autonomy from the Congress (which controls the purse) and the executive (which drafts the budget and disburses funds). It further insulates the courts from partisan politics by vetting judicial appointments through an appointive Judicial and Bar Council, in place of congressional confirmation hearings.

In the essay *The Revolution After EDSA: Issues of Reconstruction and People Empowerment*, Professor Florin T. Hilbay builds upon this framework in "re-scaling [] the balance of power between the people and their representatives." In his conceptual framework, there are horizontal and vertical axes in structuring the mechanisms of political accountability. Horizontally, the tripartite division of power among co-equal branches of government was restored, producing a weaker president and a strengthened judiciary. Vertically, however, democracy was institutionalized *first*, through clauses which allow the people to exercise political power more directly, and *second*, through a powerful Ombudsman – "champion of the citizen, eyes and ears of the people, super lawyer-for-free of the oppressed and the downtrodden" – side-by-side with an enhanced Code of Conduct for Public Officials, a law adopted by the first Congress after the fall of Marcos.

Professor Hilbay looks at the thorny problems arising from the "party-list" system of ensuring sectoral representation in Congress. He looks at Supreme Court decisions

which define the proper ratio between the party-list representatives of marginalized sectors, on one hand, and the regular congressman elected by political majorities, on the other. He also looks at another decision laying down the principle that the only bona fide party-list representatives are those who represent the marginalized and under-represented groups.

He further looks at how local governments have brought political power closer to the affected communities. The Constitution has strengthened local autonomy, whereby state functions are devolved to local governments. It further enables these constituencies to exercise the direct power to recall public officials, that is to say, to unseat the people they have elected.

In the essay *Human Rights in the Philippines: Restoration, Recognition and Institutionalization*, Professor Ibarra Gutierrez III examines how President Corazon Aquino harnessed both international and domestic law to ensure that the democratic gains of the newly restored democracy will endure. Fresh from the human rights nightmare under the heavily militarized years under Marcos, Cory Aquino ratified key international treaties on human rights, as it were, a virtual insurance policy for liberty during that turbulent season when Aquino was under siege from periodic *coup* attempts. Aquino also called for the drafting of a new constitution to institutionalize democracy. The result, the 1987 Constitution, showcases what Professor Gutierrez calls “innovations” in democratic experimentalism. It contained a strong Bill of Rights, protecting rights traditionally called “civil and political”, and a completely new article on “Social Justice and Human Rights”, protecting rights traditionally called “economic, social and economic.” Finally, it created a new, independent Commission on Human Rights.

Professor Gutierrez discusses the strengths and weaknesses of such a Commission. He recognizes the creation of a national human rights commission as a “milestone” in human rights advocacy. On the other hand, he also speaks of “the limits of hope”, as he

examines the Supreme Court decisions which have constricted the scope of the Commission's work.

Finally, Professor Gutierrez discusses the "broader guarantees" for human dignity, which address the needs of the marginalized sectors, e.g., labor, farmers and the urban poor, which entail a legal framework for economic redistribution.