

# **JUDICIAL GLOBALIZATION<sup>1</sup>**

by

**Justice Artemio V. Panganiban**

I congratulate the Philippine Judicial Academy (Philja) -- led by its eminent chancellor, Madame Justice Ameurfina A. Melencio Herrera -- for spearheading the First Australasia Judicial Educators Forum (AJEC). This gathering provides judicial educators from 21 countries a venue for exchanging views and experiences.

## **Paradigm Shifts in Law and Legal Philosophy**

The topic assigned to me this morning is “Paradigm Shifts in Law and Changing Philosophical Perspectives.” This assignment requires a study of how the gigantic strides in other fields of

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<sup>1</sup> Lecture delivered by Supreme Court Justice Artemio V. Panganiban before the First Australasia Judicial Educators Forum (AJEF) on February 14, 2003 at the New World Renaissance Hotel, Makati City.

human knowledge have affected and continue to affect law in general and judicial doctrines in particular.

In turn, I believe that the major transformational shifts in the world have been brought about mainly by the informational and technological revolution unfolding even now as I speak. I refer to computerization, minuterization, digitization, satellite communications, fiber optics and the Internet – all of which, taken together, tend to integrate knowledge on a worldwide scale. This international integration of knowledge, technologies and systems is referred to as globalization.

According to Thomas L. Friedman in his current best seller, *The Lexus and the Olive Tree*,<sup>2</sup> “[t]he challenge in this era of globalization—for countries and individuals—is to find a healthy balance between preserving a sense of identity, home and community, and doing what it takes to survive within the globalization system.” Otherwise stated, the need of the hour is to balance national interest with international survival. And for all of

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<sup>2</sup> Anchor Books (April 2000), p. 42

us today, the specific task is to find out how globalization has affected judicial decision-making on the national level.

Let me begin with the well-known caveat that, traditionally, laws and judicial decisions are territorial in scope and are binding only within the country of the issuing authority. This concept flows from the centuries-old view that sovereignty is absolute within a state's boundary. However, the advances of science, the cross-pollination of technology, and the realities of our ever-shrinking world have gradually assaulted this doctrine. A new paradigm has emerged, demanding the universalization of laws and of the judicial rulings interpreting them.

Verily, issues concerning diverse subjects like international trade, banking, intellectual property, immigration, human rights, human dignity and criminal law enforcement have built up a burgeoning literature on the subject of judicial globalization. One of the leading academics in this field, Professor Anne-Marie Slaughter of Harvard Law School, says that modern judges should "see one another not only as servants or even representatives of a particular government or party, but as fellow professionals in a

profession that transcends national borders"<sup>3</sup> Justice Claire L'Heureux-Dube of the Supreme Court of Canada -- in a speech before the "First International Conversation on Enviro-Genetics Disputes and Issues" sponsored by the Einstein Institute for Science, Health and the Courts (EINSHAC) and held in Kona, Hawaii on July 1, 2001 -- opined that it is "no longer appropriate to speak of the impact or influence of certain courts on other countries but rather of the place of all courts in the global dialogue on human rights and other common legal questions."

***The Need for International  
Judicial Cooperation***

Judicial globalization, sometimes referred to as "world constitutionalism" or more simply as "international judicial cooperation," is necessitated by the basic similarities of issues facing many courts all over the world at present. Because of advances in communications, information is now more easily transmitted across borders. Almost all superior courts in the world

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<sup>3</sup> Anne-Marie Slaughter, "Judicial Globalization," 40 Va. J. Int'l L. 1103, 1124 (2000).

have websites<sup>4</sup> from which their latest pronouncements can be accessed easily. As a result, people have become more aware of the decisions of courts in other states and are encouraged to pursue similar suits in still other countries.

Consider also that many Constitutions contain similar invocations of basic human rights. Thus, interpretations of these fundamental aspirations in one jurisdiction necessarily influence others, resulting in the rise of an “international human rights law.” One shining example is the Universal Declaration of Human Rights, which the Philippines considers to be a set of generally accepted international law principles, and which it has incorporated into its national laws by express constitutional provision.

The frequent contacts amongst magistrates and judicial educators, like in the present forum, help crystallize this exchange of judicial wisdom and experience. I am sure that by this gathering, the cause of judicial globalization is promoted.

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<sup>4</sup> The Philippine Supreme Court website is [www.supremecourt.gov.ph](http://www.supremecourt.gov.ph).

To further explain the phenomenon of judicial globalization, let me analyze some mega-events in the world. The last century was dominated by an incessant global struggle amongst various ideologies and forces. Before the 20<sup>th</sup> century ended, however, the world had witnessed the collapse of colonialism and totalitarianism; and the victory of independence, freedom and nationalism. The Cold War and the balance of nuclear terror have ended as well. Only one super power dominates the earth now. Verily, Pax Americana has prevailed.

As we entered into the 21<sup>st</sup> century, we witnessed the arena for world preeminence shifting from conventional military warfare to a more subtle economic, informational and intellectual one-upmanship amongst great powers like the United States, Europe, Russia and the new economic giant, the Peoples' Republic of China. In this new race, attention has veered from government control to deregulation, from state ownership to privatization and from national sovereignty to liberalization.<sup>5</sup>

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<sup>5</sup> See Panganiban, *A Centenary of Justice* (2001), pp. 12-13; to quote Friedman again, "the slow, fixed, divided Cold War system that had dominated international affairs since 1945 has been firmly replaced by a new, very greased interconnected system called globalization."

*The Aberration  
of “9/11”*

In this transformational struggle, however, a new ingredient – call it an aberration or an anomaly if you will – has set in. The September 11, 2001 (9/11) attacks on the World Trade Center in New York and the Pentagon in Washington jarred Pax Americana. “American justice” was swiftly meted out. The Taliban regime in Afghanistan was toppled, while the disarming of Iraq is all but a done deal. In the process, the complexion of traditional warfare is undergoing a metamorphosis, and the rest of the world is getting a crash course on the new meaning of a “just war.”

The war on terror in Afghanistan was no longer confined to an external armed aggression launched for the purpose of annexing or occupying territories; it included a more subtle “search and destroy” operation against bands of terrorists wherever they might be found in the world. Indeed, terror supposedly knows no country and is undeterred by territorial boundaries.<sup>6</sup>

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<sup>6</sup> See Panganiban, *Reforming the Judiciary* (2002), pp. 374-375.

On the other hand, the Bush doctrine -- as played out in the isolation and the disarming of Iraq -- has revolutionized the traditional concept of a just war,<sup>7</sup> which is essentially a defense against an actual or imminent armed attack. Will the world and the United Nations, despite the intransigence of France, Germany, China and Russia, eventually accept this American theory of preemptive war?

This last query requires a grand paper by itself and, thus, I will not attempt any presumptuous answer, but will only say that I

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<sup>7</sup> “War may be defined as a relation of one or more governments to at least one other government, in which at least one such government no longer permits its relations with the other or others to be governed by the laws of peace.” Salonga and Yap, *Public International Law* (1966), p. 389, citing Stone, p. 304. The Charter of the United Nations prohibits war and the resort to force or threats; it obligates UN members “to settle their international disputes by peaceful means.” The use of armed forces is allowed under the charter only in cases of individual or collective self-defense, or in pursuance of a decision of the Security Council. Article 51 of the UN Charter provides:

**“Article 51**

“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

will await the world's verdict. In the meantime, let me return to today's topic: the shifting paradigms of law and judicial dispensation brought about by swirling international events and trends, elegantly encapsulated in the so-called "waves" of civilization.

**The "Waves"**  
**of Civilization**

The mega-shift in legal and judicial concepts from parochialism to internationalism and from isolationism to interdependence is consistent with the history of civilization itself. In his best seller entitled *The Third Wave*,<sup>8</sup> Alvin Toffler divides known civilization into three main parts: "a First Wave agricultural phase, a Second Wave industrial phase and a Third Wave [informational] phase x x x." He explains that "the First Wave of change -- the agricultural revolution -- took thousands of years to play itself out. The Second Wave -- the rise of the industrial civilization -- took a mere three hundred years. Today, history is even more accelerative, and it is likely that the Third

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<sup>8</sup> Bantam Books (1980), p. 4.

Wave will sweep across history and complete itself in a few decades. x x x. This new civilization x x x will topple bureaucracies, reduce the role of nation states, and give rise to semiautonomous economies in a post imperialist world. It requires governments that are simpler, more effective, yet more democratic than any we know today. It is a civilization with its own distinctive outlook, its own ways of dealing with time, space, logic and causality."<sup>9</sup>

Toffler wrote that earth-shaking prognosis 23 years ago in 1980. When I first read his book I could not imagine how the possession, the digitization and the distribution of information could become more valuable than the production and the sale of food and machines; and how intangibles like electronic data and the Internet could command higher stock prices than gold and real estate.

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<sup>9</sup> Id., pp. 10-11. *See also* John Naisbitt, *Megatrends*, Warner Books (1982), p. 11: "This book is about ten major transformations taking place right now in our society. None is more subtle, yet is more explosive, I think, than this first, the megashift from an industrial to an informational society."

But we now know that the advent of the information age, heralded by the personal computer and the cellular phone, has radically transformed the ways of the world -- from its mundane eating habits to electronic commerce to scientific research and even to judicial doctrines and tools.<sup>10</sup>

The Second Wave -- or the industrial revolution -- has produced new wealth and propelled mega-entrepreneurs like John Rockefeller, Cornelius Vanderbilt and Henry Ford. It has also caused profound changes in labor, as well as in constitutional and administrative law.

Likewise, during its comparatively short reign, the Third Wave -- or the computer age -- has inspired the rise of super billionaires like Bill Gates who became the richest man in the world at age 45; John Morgridge and John Chambers of Cisco Systems, Inc.; and Gordon Moore and Bob Noyce of Intel. It has also influenced the rapid development of international commercial law.

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<sup>10</sup> See Panganiban, *Transparency, Unanimity and Diversity* (2000), pp. 46-49.

And now, even as I speak, a Fourth Wave -- the bio-age -- is dawning upon the earth. The very recent phenomenal advances in bio-technology, especially in cloning, stem cell research and germline engineering have engendered new issues. These issues include not only the enhancement of health and longevity; but also the alteration and even the manipulation of human behavior, especially three higher forms with genetic roots: those linked to intelligence, crime and sexuality. In short, we are in the midst of a scientific and technological revolution that started in humanity's ability to decode DNA; and is careening towards the more mind-boggling power to manipulate human life, health, behavior, well-being and happiness. Serving as a bridge between these two stages of development is the comprehensive mapping of the human genome, a gargantuan project recently completed way ahead of schedule, in the year 2000.

**Two Questions  
for This Forum**

In this forum, as we contemplate these monumental transformations happening all around us, two questions arise:

(1) Are our judiciaries, especially our highest courts, ready to tackle the opportunities and legal problems wrought by the ongoing computer age and the dawning bio-age?

(2) What has so far been the track record of our judiciaries, especially our highest courts, in confronting the new paradigms brought about by these revolutionary changes?

This paper hopes to provide a Philippine answer to both questions.

**Judicial Independence**  
**and Prerogatives**

Let me preface my answer to the first question by saying that a year and a half ago, on June 11, 2001, the Philippine Supreme Court celebrated its 100<sup>th</sup> birthday. Our wide-ranging centenary celebrations commemorated the founding of our highest court in 1901. For almost 400 years prior to that year, our country had rudimentary courts established by the US military and the Spanish *conquistadores*. Nonetheless, we reckon the founding of our

present Supreme Court only in 1901, because it was only in that year when a tribunal that enjoyed *judicial independence*, as we understand the concept today, was established. Since then, the Court has functioned separately from the other branches of government -- the executive and the legislative.

Patterned after the US model, our country rigorously observes the tripartite separation of powers. Thus, the great powers of government -- to make laws, to enforce them and to interpret them -- are lodged in three distinct, independent and coequal branches of government. Many of our magistral colleagues in some other Asian countries are surprised to know that the Philippine Supreme Court can, and many times actually did, strike down and reverse actions of the President and of the Congress of the Philippines. Indeed, our Court has done so on the ground that their actions had violated the Constitution of the Philippines or were otherwise tainted with grave abuse of discretion. These reversals did not mean, however, that our Court was higher in authority than our own Chief Executive and our sovereign lawmaking body; rather, these reversals merely meant

that the Court was independently discharging its duties to uphold the Constitution and the rule of law in our country.

The independence of the highest judicial body in the Philippines is manifested in other ways, especially in the following:

(1) The Supreme Court of the Philippines, composed of one Chief Justice and 14 associate justices,<sup>11</sup> is one unified body, which not only reviews the decisions of lower courts and administrative agencies, but also decides with final authority all constitutional issues. In some other countries there exist, aside from the Supreme Court, the high court of arbitration and the constitutional court.

(2) Our Court exercises powers that are not reviewable or reversible by any other entity or agency of

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<sup>11</sup> Sec. 4 (1) Art. VIII, Constitution states: “The Supreme Court shall be composed of a Chief Justice and fourteen Associate Justices. It may sit *en banc* or, in its discretion, in divisions of three, five, or seven Members. Any vacancy shall be filled within ninety days from the occurrence thereof.”

government. Its decisions are final and binding on the entire Republic. And whether the President and Congress agree with those decisions or not, they are duty-bound to honor, recognize and enforce them. This is the essence of the rule of law – law as interpreted with finality by the Supreme Court.

- (3) Its fiscal autonomy is guaranteed by our Constitution. Thus, Congress is constitutionally prohibited from reducing judicial appropriations given the previous year which, once approved, are automatically and regularly released to it by the Executive Department.<sup>12</sup>
- (4) Members of the judiciary enjoy security of tenure up to age 70<sup>13</sup> and also security of compensation,<sup>14</sup> neither of

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<sup>12</sup> Sec. 3, Art. VIII, Constitution, states: “The Judiciary shall enjoy fiscal autonomy. Appropriations for the Judiciary may not be reduced by the legislature below the amount appropriated for the previous year and, after approval, shall be automatically and regularly released.”

<sup>13</sup> Sec. 11, Art. VIII, Constitution, states: “The Members of the Supreme Court and judges of lower courts shall hold office during good behavior until they reach the age of seventy years or become incapacitated to discharge the duties of their office.”

<sup>14</sup> Sec. 10, Art. VIII, Constitution, states: “The salary of the Chief Justice and of the Associate Justices of the Supreme Court, and of judges of lower courts shall be fixed by law. During their continuance in office, their salary shall not be decreased.”

which can be reduced by Congress or by the President.

Members of the Supreme Court may be removed from office only by a stringent process of impeachment.<sup>15</sup>

### **Powers and Responsibilities of the Philippine Supreme Court**

To meet the challenges of the Third and the Fourth Waves of civilization, our Supreme Court and our entire judiciary have been constitutionally granted not just independence, but also vast powers<sup>16</sup> and heavy responsibilities that can be classified into five general categories as follows:

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<sup>15</sup> Sec. 2, Art. XI, Constitution, states: “The President, the Vice-President, the Members of the Supreme Court, the Members of the Constitutional Commissions, and the Ombudsman may be removed from office, on impeachment for, and conviction of, culpable violation of the Constitution, treason, bribery, graft and corruption, other high crimes, or betrayal of public trust. x x x.

<sup>16</sup> Sec. 5, Art. VIII, states: The Supreme Court shall have the following powers:

- (1) Exercise original jurisdiction over cases affecting ambassadors, other public ministers and consuls, and over petitions for certiorari, prohibition, mandamus, *quo warranto*, and habeas corpus.
- (2) Review, revise, reverse, modify, or affirm on appeal or certiorari, as the law or the Rules of Court may provide, final judgments and orders of lower courts in:
  - (a) All cases in which the constitutionality or validity of any treaty, international or executive agreement, law, presidential decree, proclamation, order, instruction, ordinance, or regulation is in question.

*First.* Similar to most courts elsewhere, our Supreme Court exercises the power of judicial review; that is, the power to pass upon lower court judgments that have been appealed to it. In general, it also has the power to reject appeals that it considers unimportant; or those arising from lower court judgments that are, on their face, error-free.

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- (b) All cases involving the legality of any tax, impost, assessment, or toll, or any penalty imposed in relation thereto.
  - (c) All cases in which the jurisdiction of any lower court is in issue.
  - (d) All criminal cases in which the penalty imposed is *reclusion perpetua* or higher.
  - (e) All cases in which only an error or question of law is involved.
- (3) Assign temporarily judges of lower courts to other stations as public interest may require. Such temporary assignment shall not exceed six months without the consent of the judge concerned.
  - (4) Order a change of venue or place of trial to avoid a miscarriage of justice.
  - (5) Promulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts, the admission to the practice of law, the Integrated Bar, and legal assistance to the underprivileged. Such rules shall provide a simplified and inexpensive procedure for the speedy disposition of cases, shall be uniform for all courts of the same grade, and shall not diminish, increase or modify substantive rights. Rules of procedure of special courts and quasi-judicial bodies shall remain effective unless disapproved by the Supreme Court.
  - (6) Appoint all officials and employees of the Judiciary in accordance with the Civil Service Law.

*Second.* By the writ of certiorari, it has the extraordinary power to review and set aside *any* act of *any* agency of government including the Presidency and Congress, on the ground of grave abuse of discretion<sup>17</sup> which may consist of any of the following:

- (a) Violation of the Constitution, the law or judicial doctrine
- (b) Whimsical or arbitrary action arising from manifest bias or personal animosity, of such gravity as to have deprived the losing party of due process

*Third.* It administratively supervises all lower courts.<sup>18</sup> In many countries, this administrative responsibility is discharged by the executive department through the ministry of justice. But in our country, the executive power over magistrates ends with their appointment. Once they begin discharging their offices, judges

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<sup>17</sup> Sec. 1, Art. VIII, Constitution, states: “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 x x x 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>18</sup> Sec. 6, Art. VIII, Constitution, states: “The Supreme Court shall have administrative supervision over all courts and the personnel thereof.”

look up to the Supreme Court not only for *stare decisis*, but also for administrative leadership. Lower-court magistrates and court personnel can be fined, suspended or ousted from the service – after proper hearing and due process – only by the Supreme Court.<sup>19</sup>

Conversely, along with administrative supervision, the training of judges and the enhancement of their on-the-job education is a responsibility that resides in the Supreme Court. To accomplish this responsibility, it established the Philippine Judicial Academy, which is tasked with the continuing education of the entire judicial department of our government.<sup>20</sup>

*Fourth.* The Supreme Court also controls admission to the practice of law and the discipline of erring lawyers.<sup>21</sup> By

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<sup>19</sup> Sec. 11, Art. VIII, Constitution, states: “x x x. The Supreme Court *en banc* shall have the power to discipline judges of lower courts, or order their dismissal by a vote of a majority of the Members who actually took part in the deliberations on the issues in the case and voted thereon.”

<sup>20</sup> On February 26, 1998, Republic Act No. 8557 mandated the Philippine Judicial Academy to “serve as a training school for justices, judges, court personnel, lawyers and aspirants to judicial posts.”

<sup>21</sup> Sec. 5, Art. VIII, Constitution, states: “The Supreme Court shall have the following powers: x x x (5) Promulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts, the admission to the practice of law, the Integrated Bar, and legal assistance to the underprivileged. x x x.”

conducting the annual bar examinations, it ultimately determines the content and the direction of legal education.

Through its superintendence of the Mandatory Continuing Legal Education (MCLE) Program, it is able to elevate the standards of the legal profession by requiring lawyers to undergo periodic refresher seminars. Through this same power, it has required all lawyers to become compulsory members of one unified association -- the Integrated Bar of the Philippines.<sup>22</sup>

*Fifth.* The Constitution has also authorized the Supreme Court to prepare and promulgate rules of procedure for all courts in the country.<sup>23</sup> Consistent with this power, the Supreme Court has promulgated not only the regular Rules of Court in the Philippines; lately, to cover new subject matters spawned by the e-age, it has also issued special regulations such as the Rule on Electronic Evidence, which was specifically tailored to govern the

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<sup>22</sup> See Bar Matter 850, October 2, 2001.

<sup>23</sup> See footnote 18.

admissibility and the weight of electronic documents as functional equivalents of their paper-based counterparts.<sup>24</sup>

Alongside this rule-making power, the Court has been given constitutional authority to promulgate rules concerning the protection and the enforcement of constitutional rights. Normally, the work of issuing laws to enforce such rights is reserved for Congress. But as a special measure of protection for human rights, this additional power has been granted by the Constitution to our high court.

### **Jurisprudence on Judicial Globalization**

I will now take up the second question: during the last ten years, what has been the track record of the Philippine Supreme Court in promulgating decisions involving issues that have sprung from the new paradigms brought by the information age and the bio-age?

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<sup>24</sup> For an interesting discussion on this point, see Francisco Ed. Lim, "Litigation in E-Commerce: Proving a Case With Electronic Documents," 45 *Ateneo L.J.* 355 (2001).

To answer this question, I will discuss how, through specific cases brought before it, the Supreme Court has faced the globalization trend in different fields: economics, politics, elections, human rights, citizenship, criminal law enforcement, labor, environment protection and DNA testing.

### **The New Economy**

First, let me take up the new economy. Up to the end of the early 1980s, states – the Philippines included – depended on the protection of local industries as the main strategy of economic prosperity. To barricade local industries, they set up tariffs, currency controls, quantitative restrictions, preferential treatments, import quotas and tax incentives. The last two decades, however, witnessed the establishment, among others, of the European Community (EC), the North American Free Trade Agreement (NAFTA) and the Asean Free Trade Area (AFTA). Member states, gradually lifted protectionist barriers, on the theory that trade could be better promoted on a regional rather than on a national basis.

It is significant to note that in *Federation of Free Markets v. Bautista*,<sup>25</sup> the Philippine Supreme Court -- in an extended unsigned Resolution -- ruled that the “intent of the Philippines” to reduce tariff on rice as mandated by AFTA did not contravene the Constitution, the Agricultural Tariffication Act, or the Magna Carta for Farmers.

Soon enough, however, regionalism was deemed insufficient; economic globalization beckoned.<sup>26</sup> Thus, after much hesitation, the World Trade Organization (WTO) was born. It was the culmination of all efforts to eliminate tariffs and other traditional

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<sup>25</sup> GR No. 128502, July 13, 1999. “The mere statement of intent made by the public respondents would still be subject to confirmation after public consultations to be conducted by the concerned agencies and after the government would have complied with due process and other requirements mandated by law.”

<sup>26</sup> With globalization, liberalization, deregulation and privatization as new paradigms, how will the Philippines fare in the 21<sup>st</sup> century? An interesting answer is found in “A New Asian Century” by Ian Buruma (*Readers’ Digest*, July 2000, p. 54) as follows:

“In all likelihood, parts of Asia will do very well [in the e-age] but not for the reasons people were talking about a decade ago. The formula of state discipline, efficient workers, low wages and an absence of independent unions is fine in a country that needs to get heavy industries going. But for a country, a city or a region to thrive in the age of information technology, its citizens must be *flexible, creative, individualistic, cosmopolitan, free and, preferably, conversant in English.*” (italics supplied) Endowed with such people, the Philippines -- properly inspired and led -- should prosper in this new age.

protectionist barriers altogether; as well as to usher in free trade amongst members, not just of a regional bloc, but of the entire world community.<sup>27</sup>

**Tañada v. Angara**  
**on Economic Globalization**

The Philippine membership in WTO was concurred in by the Senate on December 14, 1994. The ink on the ratification documents had barely dried up when, on December 29, 1994, several Philippine legislators challenged the constitutionality of the Philippine adherence to the WTO Agreement. Thus was born *Tañada v. Angara*.<sup>28</sup>

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<sup>27</sup> For a discussion on the rise of the WTO, see Rufus Rodriguez, *The GATT and the WTO: An Introduction* (1998).

Undoubtedly, WTO serves well the interests of developed countries and supranational corporate behemoths. However, developing countries and their fledgling industries can hardly cope with borderless competition. Hence, the last two WTO summits (1999 in Seattle and 2000 in Melbourne) have been disrupted by rioting and protest actions, as well as by a more sober reassessment of new trade talks. See "Lessons After Five Years of WTO" by Amando Doronila, *Philippine Daily Inquirer*, September 15, 2000, p. A9. *Asiaweek*, in its December 29, 1999 issue, pp. 34-35, heralded Vandana Shiva's books, essays and speeches educating people on the evil effects of "free-trade logic."

<sup>28</sup> 272 SCRA 18, May 2, 1997, per Panganiban, *J.* To be able to write the *ponencia* in this case, I had to read not only the 36-volume *Uruguay Round of Multilateral Trade Negotiations*, which contained the WTO Treaty and the various detailed commitments of each member-state in regard to specific schedules of tariff reductions, but also books and treatises on the new paradigm of economic globalization.

The Court en banc unanimously ruled that in affirming Philippine membership in the WTO, the Senate was not violating the economic nationalism or “Filipino First” provisions of the fundamental law.<sup>29</sup> These provisions, which are included in the “Declaration of Principles and State Policies of the Constitution,” are not self-executing.<sup>30</sup> They are merely guides for the exercise of

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<sup>29</sup> On the petitioners’ theory that the Constitution did not contemplate a “borderless world of business,” the Decision I wrote for the Court reads:

“No doubt, the WTO Agreement was not yet in existence when the Constitution was drafted and ratified in 1987. That does not mean however that the Charter is necessarily flawed in the sense that its framers might not have anticipated the advent of a borderless world of business. By the same token, the United Nations was not yet in existence when the 1935 Constitution became effective. Did that necessarily mean that the then Constitution might not have contemplated a diminution of the absoluteness of sovereignty when the Philippines signed the UN Charter, thereby effectively surrendering part of its control over its foreign relations to the decisions of various UN organs like the Security Council?

“It is not difficult to answer this question. Constitutions are designed to meet not only the vagaries of contemporary events. They should be interpreted to cover even future and unknown circumstances. It is to the credit of its drafters that a Constitution can withstand the assaults of bigots and infidels but at the same time bend with the refreshing winds of change necessitated by unfolding events.” (citations omitted)

<sup>30</sup> In the controversial *Manila Prince Hotel v. GSIS* (267 SCRA 408, February 3, 1997, per Bellosillo, *J.*), the Court by a vote of 11 (*JJ* Padilla, Regalado, Davide, Romero, Bellosillo, Vitug, Kapunan, Mendoza, Francisco, Hermosisima and Torres) to 4 (Narvasa, *CJ*; *JJ* Melo, Puno and Panganiban, with the last two writing separate Dissents) ruled that Section 10, Article XII of the Constitution, was “self-executing.” Thus, “in public biddings concerning the grant of rights, privileges and concessions covering the national economy and patrimony,” like the ownership of the controlling shares of the Manila Hotel, a losing Filipino bidder “will have to be allowed to match the bid of the [winning] foreign entity. And if the Filipino [thereafter] matches the bid of a foreign firm, the award should go to the Filipino.” In *Tañada*, the Court clarified that the Manila Hotel ruling “is enforceable only in regard to the grant of rights, privileges and

judicial review and for the enactment of laws. More important, such provisions should be read *together with* other constitutional pronouncements, in order to attain a balanced development of the economy.<sup>31</sup>

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concessions covering the national economy and patrimony and not to every aspect of trade and commerce. It refers to exceptions rather than the rule.”  
 On the issue of whether the WTO Agreement impaired the congressional power to legislate, the Court declared:

“x x x [W]hile sovereignty has traditionally been deemed absolute and all-encompassing on the domestic level, it is however subject to restrictions and limitations voluntarily agreed to by the Philippines, expressly or impliedly, as a member of the family of nations. Unquestionably, the Constitution did not envision a hermit-type isolation of the country from the rest of the world. In its Declaration of Principles and State Policies, the Constitution ‘adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation and amity with all nations.’ By the doctrine of incorporation, the country is bound by generally accepted principles of international law, which are considered to be automatically part of our own laws. One of the oldest and most fundamental rules in international law is *pacta sunt servanda* -- international agreements must be performed in good faith. ‘A treaty engagement is not a mere moral obligation but creates a legally binding obligation on the parties x x x. A state which has contracted valid international obligations is bound to make in its legislations such modifications as may be necessary to ensure the fulfillment of the obligations undertaken.’

“By their inherent nature, treaties really limit or restrict the absoluteness of sovereignty. By their voluntary act, nations may surrender some aspects of their state power in exchange for greater benefits granted by or derived from a convention or pact. After all, states, like individuals, live with coequals, and in pursuit of mutually covenanted objectives and benefits, they also commonly agree to limit the exercise of their otherwise absolute rights. Thus, treaties have been used to record agreements between States concerning such widely diverse matters as, for example, the lease of naval bases, the sale or cession of territory, the termination of war, the regulation of conduct of hostilities, the formation of alliances, *the regulation of commercial*

The Court ruled: “While the Constitution has a bias in favor of Filipino goods, services, labor and enterprises, at the same time, it recognizes the need for business exchange with the rest of the world on the bases of equality and reciprocity, and limits protection of Philippine enterprises only against foreign competition and trade practices that are unfair.”

At bottom, the Court upheld the constitutionality of the Philippine adherence to the WTO Agreement because of petitioners’ failure to show grave abuse of discretion on the part of the Senate. The Decision concluded:

“That the Senate, after deliberation and voting, voluntarily and overwhelmingly gave its consent to the WTO Agreement thereby making it ‘a part of the law of the land’ is a legitimate exercise of its sovereign duty and power. We find no ‘patent and gross’ arbitrariness or despotism ‘by reason of passion or personal hostility’ in such exercise. It is not impossible to surmise that this Court, or at least some of its members, may even agree with petitioners that it is more advantageous to the national interest to strike down Senate Resolution No. 97. But that is *not a legal reason* to attribute grave abuse of discretion to the Senate and to nullify its

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*relations*, the settling of claims, the laying down of rules governing conduct in peace and the establishment of international organizations. The sovereignty of a state therefore cannot in fact and in reality be considered absolute. Certain restrictions enter into the picture: (1) limitations imposed by the very nature of membership in the family of nations and (2) limitations imposed by treaty stipulations. As aptly put by John F. Kennedy, ‘Today, no nation can build its destiny alone. The age of self-sufficient nationalism is over. The age of interdependence is here.’” (citations omitted)

decision. To do so would constitute grave abuse in the exercise of our own judicial power and duty. Ineludibly, what the Senate did was a valid exercise of its authority. As to whether such exercise was wise, beneficial or viable is outside the realm of judicial inquiry and review. That is a matter between the elected policy makers and the people. x x x.” (citations omitted)

As an aftermath of the Philippine membership in the WTO, specifically in connection with the annexed “Agreement on Trade-Related Aspects of Intellectual Property Rights” or TRIPs, Congress enacted the Intellectual Property Code of 1998<sup>32</sup> “to strengthen the intellectual and industrial property system in the Philippines.” More interestingly, in *Mirpuri v. Court of Appeals*<sup>33</sup> which was decided in 1999, the Court ruled that the “Paris Convention for the Protection of Industrial Property,” to which the Philippines was a signatory, was a self-executing treaty that did not “require legislative enactment to give it effect.” It used that Agreement (the Paris Convention) to strike down the application for registration of a local trademark, “Barbizon International,” which had essentially usurped the goodwill of a well-known brand of ladies’ garments known worldwide by the same name, “Barbizon.”

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<sup>32</sup> RA 8293 took effect on January 1, 1998.

<sup>33</sup> 318 SCRA 516, 543, November 19, 1999, per Puno, *J.*

Because of the Philippine membership in the WTO as well as the digitization and expansion of legal services, some foreign lawyers are asking whether they will now be allowed to practice their profession in this country. While there is no explicit decision on the matter yet, let me however assure you that the Supreme Court, which has jurisdiction over admission to the practice of law, should be able to discharge its national and global responsibilities as it has always done in the past.<sup>34</sup>

**Tatad v. Secretary of Energy**  
**on Deregulation**

Let me now move to a companion paradigm of the new economy; namely, deregulation. In essence, this norm shifts the burden of price control from government to “market forces,” with the ultimate goal of producing the best goods and services at the cheapest prices possible. This policy, however, is not an infallible cure, because the evil sought to be avoided -- government abuse -- may well pass on to market players, particularly when they combine to restrain

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<sup>34</sup> For some insights on this point, see Jose Victor Chan-Gonzaga, “The Legal Profession in a World of Globalization and Electronic Commerce: Rules, Issues and Complications,” 45 *Ateneo L.J.* 325 (2001).

trade or engage in unfair competition. “The market is motivated by price and profit (and sadly not by moral values). The market does not automatically supply those who need (no matter how badly they need it) but only those who have the money to buy.”<sup>35</sup>

In *Tatad v. Secretary of Energy*,<sup>36</sup> the Court – by a vote of 9<sup>37</sup> in favor and 2<sup>38</sup> against – invalidated Republic Act (RA) No. 8180, the Oil Deregulation Law, because it had allowed the Big Three Oil companies in the Philippines – Petron, Shell and Caltex – to act as a monopoly or, more precisely, an oligopoly. Declared the Court: “The Constitution mandates this Court to be the guardian not only of the people’s political rights, but their economic rights as well.”

Big business immediately reacted by accusing the Court of undue interference in economics, a subject allegedly beyond the

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<sup>35</sup> Romulo L. Neri, *Economics and Public Policy* (1999), p. 23. Parentheses in original.

<sup>36</sup> 281 SCRA 330, November 5, 1997, per Puno, *J.*

<sup>37</sup> *JJ* Regalado, Davide Jr., Romero, Bellosillo, Puno, Vitug, Kapunan (*see* Separate Opinion), Mendoza (who concurred in the result) and Panganiban (with Concurring Opinion).

<sup>38</sup> *JJ* Melo and Francisco (*CJ* Narvasa was on leave and there were three vacancies in the Court).

latter's competence and authority to decide on.<sup>39</sup> In flailing the Court, some of its critics even clamored for a constitutional amendment to deprive the judiciary of jurisdiction over economic questions. They ignored the express caveat in the Decision that “the Court did not condemn the economic policy of deregulation as unconstitutional. It merely held that, as crafted, the law [ran] counter to the constitutional provision [on] fair competition.”

Indeed, the legislative and the executive departments may adopt any policy, subject to one indispensable condition: it must conform to the Constitution. When such policy and its implementing laws violate the Charter, the Supreme Court shall, in appropriate proceedings, strike them down. In the words of the

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<sup>39</sup> The business community's anxiety might have been aggravated by an earlier controversial Decision in *Garcia v. Board of Investments* (191 SCRA 288, November 9, 1990, per Gutierrez, *J.*), in which the Court ruled that the Board of Investments “committed grave abuse of discretion in approving the transfer of the petrochemical plant from Batangas to Bataan x x x.” The 7 (Gutierrez, Cruz, Gancayco, Padilla, Bidin, Sarmiento and Medialdea) to 4 (Narvasa, Regalado, Melencio-Herrera and Griño-Aquino who wrote the main Dissent; Fernan, *CJ*, and Paras took no part; and Feliciano was on leave) Decision was heavily criticized, because “the majority ha[d] actually imposed its own views on matters falling within the competence of a policy-making body of the government,” to quote Justice Herrera's Dissent. “It decided upon the wisdom of the transfer of the site of the proposed project x x x, the desirability of the capitalization aspect of the project x x x, and injected its own concept of the national interest as regards the establishment of a basic industry of strategic importance to the country x x x.”

Decision, “Combinations in restraint of trade and unfair competition are absolutely proscribed, and the proscription is directed against both the State as well as the private sector x x x. Monopolistic or oligopolistic markets deserve our careful scrutiny and laws [that] barricade the entry points of new players should be viewed with suspicion.”

In any event, in an exemplary display of obedience to the rule of law, both the executive and the legislative departments of our government grudgingly relented and bowed to the Supreme Court’s Decision. The Congress thereafter enacted a new Oil Deregulation Law, RA 8479, which eliminated the objectionable features of the old law that had been struck down by our Decision.

In *Garcia v. Corona*<sup>40</sup> promulgated on December 17, 1999, the Court unanimously<sup>41</sup> upheld the validity of the new law. It ruled:

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<sup>40</sup> GR No. 132451, December 17, 1999, per Ynares-Santiago, *J.*

<sup>41</sup> Although I voted to invalidate the first oil deregulation statute, I concurred with the rest of the justices that the second deregulation law, RA 8479, could not be constitutionally faulted. In my Separate Concurring Opinion, I wrote in part:

“In sum, I make no secret of my sympathy for petitioner’s frustration at the inability of our government to

“x x x [W]hat constitutes reasonable time is not for judicial determination. Reasonable time involves the appraisal of relevant conditions, political, social and economic. They are not within the appropriate range of evidence in a court of justice. It would be an extravagant extension of judicial authority to assert judicial notice as the basis for the determination.”<sup>42</sup>

### **Decentralization of Political Power**

While the e-age idolizes globalization, deregulation and privatization as new economic paradigms, at the same time it urges decentralization of political and fiscal powers. In our country, this effort to vest more authority in basic political units is not more remarkable than in the 1987 Constitution<sup>43</sup> itself and in the Local

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arrest the spiraling cost of fuel and energy. I hear the cry of the poor that life has become more miserable day by day. I feel their anguish, pain and seeming hopelessness in securing their material needs.

“However, the power to lower petroleum prices through the adoption or the rejection of viable economic policies or theories does not lie in the Court or its members. Furthermore, absent sufficient factual evidence and legal moorings, I cannot vote to declare a law or any provision thereof to be unconstitutional simply because, theoretically, such action may appear to be wise or beneficial or practical. Neither can I attribute grave abuse of discretion to another branch of government without an adequate showing of patent arbitrariness, whim or caprice. Should I do so, I myself will be gravely abusing my discretion, the very evil that petitioner attributes to the legislature.”

<sup>42</sup> Citing *Coleman v. Miller*, 307 US 433; 59 S. Ct. 972; 83 L. Ed. 1385 (1939).

<sup>43</sup> Art. X, §3.

Government Code. In *Ganzon v. Court of Appeals*,<sup>44</sup> the Supreme Court hailed decentralization as a “more responsive and accountable local government structure.” *Drilon v. Lim*<sup>45</sup> emphasized that the President had the power of supervision only, not control, over local governments. Thus, the Chief Executive does not lay down the laws and the rules, but merely sees to it that local officials follow them. The President may not agree with such laws and rules, but he or she does not have the discretion to modify or reverse actions made in accordance with them.

Consistent with these tenets, *Pimentel v. Aguirre*<sup>46</sup> upheld the fiscal autonomy of local government units (LGUs) and ordered “the automatic release of the shares of the LGUs in the national internal revenues.” Declared void by the Court was Section 4 of Administrative Order No. 372, which had withheld a portion (10 percent, later amended to 5 percent) of their share in internal revenue allotments (IRA).

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<sup>44</sup> 200 SCRA 271, 286 August 5, 1991, per Sarmiento, *J.*

<sup>45</sup> 235 SCRA 135, 142, August 4, 1994, per Sarmiento, *J.*

<sup>46</sup> GR No. 132988, July 14, 2000, per Panganiban, *J.*

Earlier, *Meralco v. Province of Laguna*<sup>47</sup> had upheld the power of provincial governments “to impose a tax on businesses enjoying a franchise.” The rationale was “to safeguard the viability and self-sufficiency of local government units.” Lately, *Republic v. Manila Electric Company*<sup>48</sup> ruled that an electric utility company could not pass to its customers the payment of its income tax by including such amount in the computation of its operating expenses.

### **Automated Elections**

Let me turn your attention to an even more interesting topic, elections. An effect of globalization is the worldwide move towards democratization, one of the prerequisites of which is the holding of clean and honest elections. A step we have taken to improve the conduct of elections is the automation of the counting of votes -- something novel in the Philippines, where we still *manually* count them.

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<sup>47</sup> 306 SCRA 750, May 5, 1999, per Vitug, *J.*

<sup>48</sup> GR No. 141314, November 15, 2002, per Puno, *J.*

The last presidential election in the United States, characterized as the “closest” in history, was finally decided in favor of George W. Bush when the US Supreme Court disauthorized a manual count of automated ballots in the State of Florida. A number of issues<sup>49</sup> were decided in that celebrated case, *Bush v. Gore*,<sup>50</sup> but what is probably of immediate interest to us is the ruling that “the use of standardless manual recounts violates the equal protection clause.”

Florida voters indicated their choice of candidates through “ballot cards designed to be perforated by a stylus but which either through error or deliberate omission, have not been perforated for a machine to count them. In some cases a piece of the card -- a chad -- is hanging say by two corners. In other cases there is no separation at all, just an indentation.” Because the voters did not write the names of their chosen candidates, the US Court held that it was extremely difficult to determine the “intent of the voter x x x

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<sup>49</sup> There was a “tangle of six different majority, concurring and dissenting opinions.” (*Time* magazine, December 25, 2000, p. 30)

<sup>50</sup> No. 00-949, December 12, 2000, per curiam.

in the absence of specific standards to ensure [the clause's] equal application.”<sup>51</sup>

Earlier, in 1999, we faced a similar problem in *Loong v. Comelec*,<sup>52</sup> in which the Philippine Supreme Court, as distinguished from its US counterpart, validated the *manual* recount of *automated* ballots cast during the gubernatorial race in Sulu province. (Please note that RA 8436 had mandated an automated election in the Autonomous Region in Muslim Mindanao, or ARMM, during the 1998 elections.)

After the balloting had taken place, the Commission on Elections (Comelec) stopped the ongoing automated count in response to a complaint that three ballots in one precinct in one

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<sup>51</sup> Ibid., p. 7. Ruled the US Court:

“The law does not refrain from searching for the intent of the actor in a multitude of circumstances; and in some cases the general command to ascertain intent is not susceptible to much further refinement. In this instance, however, the question is not whether to believe a witness *but how to interpret the marks or holes or scratches on an inanimate object, a piece of cardboard or paper which, it is said, might not have registered as a vote during the machine count. The factfinder confronts a thing, not a person. The search for intent can be confined by specific rules designed to ensure uniform treatment.*” (emphasis supplied)

<sup>52</sup> 305 SCRA 832, April 14, 1999, per Puno, *J.*

municipality of the province had not been reflected in the machine count for the mayoralty post. Without much ado and admittedly without any express statutory authority, the Comelec -- despite its own Resolution to conduct simultaneous automated *and* manual counts of all the ballots in the province -- made only a manual tabulation and, on this basis, proclaimed Abdusakur Tan as the provincial governor of Sulu. The Supreme Court upheld the Comelec and ruled in favor of the manual count. There were several issues raised, but I will not have time to discuss all of them today.<sup>53</sup> May I just say that the

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<sup>53</sup> The Court upheld the manual count for the following reasons:

1. "Since the automated machine 'failed to read correctly the ballots in the Municipality of Pata,' and since the 'machines rejected and would not count the local ballots' in four other towns due to printing errors in the local ballots, 'it is plain that to continue with the automated count in these five (5) municipalities would result in a grossly erroneous count.'"

2. "These failures of automated counting created post-election tension in Sulu x x x. Its aftermath could have been a bloodbath. Comelec avoided this imminent probability by ordering a manual count of votes. It would be the height of irony if the Court condemns Comelec for aborting violence in the Sulu elections."

3. "Petitioner Loong and Intervenor Jikiri were not denied due process, because "they were given every opportunity to oppose the manual count of the local ballots in Sulu."

4. "The evidence is clear that the integrity of the local ballots was safeguarded when they were transferred from Sulu to Manila, and when they were manually counted."

5. "The evidence also reveals that the result of the manual count was reliable. x x x. When the Comelec ordered a manual count of the votes, it issued special rules, as the counting involved a different kind of ballot, albeit more simple ballots."

6. "Because the errors in counting "were not machine related," it was "inutile for the Comelec to use other machines to count the local votes in Sulu."

7. "Since RA 8436 did not provide a remedy for errors that were not machine-related, Comelec cannot be prevented "from levitating above the

bottom line of my Dissent<sup>54</sup> was that automated ballots cast during an automated election could not be counted manually with the use of rules governing the appreciation of manual ballots as ordained by the Omnibus Election Code.<sup>55</sup>

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problem,” since said law “did not prohibit manual counting when machine count did not work.”

8. “A special election cannot be ordered because there was no failure of election, as defined in Section 6 of the Omnibus Election Code. ‘The grounds for failure of election -- force majeure, terrorism, fraud or other analogous causes -- clearly involve questions of fact’ that are beyond the Supreme Court’s province. Besides, to hold a special election for the position of governor only ‘will be discriminatory and will violate the right of private respondent to equal protection of the law,’ inasmuch as the candidates for other positions (vice-governor, congressman, mayor, etc.) will not be subject to this special election.”

9. “The Court should decide this case “in cadence with the movement towards empowering the Comelec in order that it can more effectively perform its duty of safeguarding the sanctity of our elections.”

<sup>54</sup> My Dissent held that the Comelec gravely abused its discretion basically in the following:

1. “In peremptorily stopping the *ongoing* automated counting of ballots in the Municipality of Pata and in the entire Province of Sulu, on the flimsy ground that three ballots for a mayoralty candidate in said municipality were not tallied by the counting machine assigned to the town

2. “In changing the venue *and* the mode of counting from automated to manual due to alleged imminent danger of violence

3. “In violating its own Resolution ordering both an automated count and a parallel manual count by actually holding only a manual count, without giving any reason for completely abandoning the automated system, which was already 65 percent complete in the entire province

4. “In counting and appreciating the automated ballots with the use of the rules peculiar to manual elections, not to the automated election system; that is, in manually tallying the ballots differently from how the automated machines would have counted them, thus ending up with manually appreciated results that substantially differed from the machine-generated ones

5. “In issuing, without due process of law, its assailed Minute Resolutions relating to the change in the manner and the venue of counting”

<sup>55</sup> For an extended discussion, see Panganiban, *Leadership by Example* (1999), pp. 193-249.

Although new in our country, automated elections are prevalent in the US. In this light, *Bush v. Gore*, even if ordained by a closely divided US Court, is likely to influence our own Tribunal's ruling next time a similar case is brought up for review.

### **Party-List System of Representative Democracy**

In our already democratic republic, the trend towards representative democracy has been further strengthened by a novel and interesting “people power” feature introduced in the 1987 Philippine Constitution: the party-list system of representation.<sup>56</sup> To implement the constitutional mandate, RA 7941 was enacted by

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<sup>56</sup> Section 5, Article VI of the 1987 Constitution, introduced the party-list system of representation in our country as follows:

“Sec. 5. (1) The House of Representatives shall be composed of not more than two hundred and fifty members, unless otherwise fixed by law, who shall be elected from legislative districts apportioned among the provinces, cities, and the Metropolitan Manila area in accordance with the number of their respective inhabitants, and on the basis of a uniform and progressive ratio, and those who, as provided by law, shall be elected by a party-list system of registered national, regional, and sectoral parties or organizations.

“(2) The party-list representatives shall constitute twenty *per centum* of the total number of representatives including those under the party-list. For three consecutive terms after the ratification of this Constitution, one half of the seats allocated to party-list representatives shall be filled, as provided by law, by selection or election from the labor, peasant, urban poor, indigenous cultural communities, women, youth, and such other sectors as may be provided by law, except the religious sector.”

Congress.<sup>57</sup> Under this system, a voter is in effect given two votes for the House of Representatives – one to elect a district congressman; the other, a party-list representative.

In *Veterans Federation Party v. Comelec*,<sup>58</sup> the Court observed that the Filipino party-list system had some unique features. It ruled that, to determine the winners in the Filipino party-list system, four parameters were required by the Constitution and by RA 7941, as follows:

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<sup>57</sup> Acting on its mandate to “provide by law” the “selection or election” of party-list solons, Congress enacted Republic Act (RA) No. 7941 which prescribed, among others, the entitlement to a party-list seat in this wise:

“Sec. 11. *Number of Party-List Representatives.* -- The party-list representatives shall constitute twenty *per centum* (20%) of the total number of the members of the House of Representatives including those under the party-list.

“For purposes of the May 1998 elections, the first five (5) major political parties on the basis of party representation in the House of Representatives at the start of the Tenth Congress of the Philippines shall not be entitled to participate in the party-list system.

“In determining the allocation of seats for the second vote, the following procedure shall be observed:

‘(a) The parties, organizations, and coalitions shall be ranked from the highest to the lowest based on the number of votes they garnered during the elections.

‘(b) The parties, organizations, and coalitions receiving at least two percent (2%) of the total votes cast for the party-list system shall be entitled to one seat each; Provided, That those garnering more than two percent (2%) of the votes shall be entitled to additional seats in proportion to their total number of votes; Provided, finally, That each party, organization, or coalition shall be entitled to not more than three (3) seats.’”

<sup>58</sup> GR Nos. 136781, 136786 and 136795, October 6, 2000, per Panganiban, *J.*

*“First, the twenty percent allocation* – the combined number of *all* party-list congressmen shall not exceed twenty percent of the total membership of the House of Representatives, including those elected under the party list.

*“Second, the two percent threshold* – only those parties garnering a minimum of two percent of the total valid votes cast for the party-list system are ‘qualified’ to have a seat in the House of Representatives.

*“Third, the three-seat limit* – each qualified party, regardless of the number of votes it actually obtained, is entitled to a maximum of three seats; that is, one ‘qualifying’ and two additional seats.

*“Fourth, proportional representation* – the additional seats which a qualified party is entitled to shall be computed ‘in proportion to their total number of votes.’”

In the 1998 elections, the Commission on Elections did not follow these parameters, particularly the two percent threshold. It proclaimed 39 political parties as winners, despite their failure to gather the minimum two percent of the total valid votes cast for the party-list system during the 1998 elections. Thus, the Court invalidated the assailed Comelec Resolution.<sup>59</sup>

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<sup>59</sup> Reasoned the Court:

“x x x. The poll body is mandated to enforce and administer election-related laws. It has no power to contravene or amend them. Neither does it have authority to decide the wisdom, propriety or rationality of the acts of Congress.

x x x

x x x

x x x

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

While the Court was unanimous in reversing the Comelec, it was divided on how to determine the winners in a party-list election. More pointedly, it was divided on how to convert the four parameters, which I mentioned earlier, into a mathematical formula.<sup>60</sup>

For lack of time, I will not be able to take up the detailed mathematical discussion that occupied the Court's attention. Suffice it to say that the formula used by the majority was "homegrown" in the sense that it was original, and it was conceived so that all the four parameters would be observed meticulously. The Decision pointed out: "The Philippine style party list system is a unique paradigm which demands an equally unique formula."<sup>61</sup> While globalization urged us to apply tested

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<sup>60</sup> Twelve justices supported my *ponencia* in this case: *CJ* Hilario G. Davide Jr.; *JJ* Josue N. Bellosillo, Jose A. R. Melo, Reynato S. Puno, Jose C. Vitug, Fidel P. Purisima, Bernardo P. Pardo, Arturo B. Buena, Minerva P. Gonzaga-Reyes, Consuelo Ynares-Santiago and Sabino R. de Leon Jr. *J.* Puno wrote a Separate Concurring Opinion, while *JJ* Bellosillo, Melo and Vitug concurred "in the result."

<sup>61</sup> This formula is expressed in a complex fraction as follows:

$$\text{Additional seats for concerned party} = \frac{\text{No. of votes of concerned party}}{\text{Total no. of votes for party-list system}} \times \frac{\text{No. of additional seats allocated to the first party}}{\text{No. of votes of}}$$

doctrines used by parliamentary democracies elsewhere, our Supreme Court nonetheless refused to import those principles, because our party-list concept had marked differences from those practised in Germany, France and other countries.

Thus, our Court rejected the so-called Niemeyer formula used by the German Bundestag in determining the winning candidates. Said the Court:

“The Niemeyer formula, while no doubt suitable for Germany, finds no application in the Philippine setting, because of our three-seat limit and the non-mandatory character of the twenty percent allocation. True, both our Congress and the Bundestag have threshold requirements -- two percent for us and five for them. There are marked differences between the two models, however. As ably pointed out by private respondents,<sup>62</sup> one half of the German Parliament is filled up by party-list members. More important, there are no seat limitations, because German law discourages the proliferation of small parties. In contrast, RA 7941, as already mentioned, imposes a three-seat limit to encourage the promotion of the multiparty system. This major

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first party  
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Total no. of votes  
for party list system

In its simplified form, it is written as follows:

Additional seats for concerned party	=	$\frac{\text{No. of votes ofconcerned party}}{\text{No. of votes offirst party}}$	x	No. of additional seats allocated to the first party
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<sup>62</sup> In fairness, the Group of 38 explains these differences in the context of its concluding plea to dilute the two percent threshold. *See* Memorandum for private respondents, pp. 44-46.

statutory difference makes the Niemeyer formula inapplicable to the Philippines.

“Just as one cannot grow Washington apples in the Philippines or Guimaras mangoes in the Arctic because of fundamental environmental differences, neither can the Niemeyer formula be transplanted in toto here, because of essential variances between the two party-list models.”

Let me now shift to the Decisions of the Court involving new paradigms in basic human rights: the right to life, the right to privacy and the right to free expression.

### **The Death Penalty Law and the Right to Life**

Let me discuss first the most basic of all human rights -- the right to life.

The Philippine Constitution<sup>63</sup> prohibits the imposition of the death penalty “unless for compelling reasons involving heinous

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<sup>63</sup> §19, Art. III of the 1987 Constitution, reads:

“SEC. 19. (1) Excessive fines shall not be imposed, nor cruel, degrading or inhuman punishment inflicted. Neither shall death penalty be imposed, unless, for compelling reasons involving heinous crimes, the Congress hereafter provides for it. Any death penalty already imposed shall be reduced to *reclusion perpetua*.

“(2) The employment of physical, psychological, or degrading punishment against any prisoner or detainee, or the use of substandard or inadequate penal facilities under subhuman conditions shall be dealt with by law.”

crimes, the Congress hereafter provides for it.” The legislature provided for it by enacting RA 7659, the Death Penalty Law, which became effective on December 31, 1993. In *People v. Echegaray*,<sup>64</sup> its constitutionality was upheld by the Supreme Court. The Court reasoned thus:

1. The death penalty is not a “cruel, unjust, excessive or unusual punishment.” Rather, it is an expression of the prerogative of the state to “secure society against threatened and actual evil.”

2. The offenses for which RA 7659 prescribes death satisfy “the element of heinousness.” This law specifies the “circumstances that generally qualify a crime x x x to be punished x x x [by] death.”

3. RA 7659 “is replete with both procedural and substantial safeguards that ensure [its] correct application.”

4. The Constitution gave Congress the discretion to determine the presence of the elements of heinousness and compelling reasons, and the Court would exceed its authority if it questions the exercise of that discretion.

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<sup>64</sup> 267 SCRA 682, February 7, 1997, per curiam.

I should hasten to add that a subsequent companion case, *Echegaray v. Secretary of Justice*,<sup>65</sup> ruled that lethal injection, like the electric chair, was a valid means of carrying out the death penalty; and was not cruel, degrading or inhuman, because it did not involve “torture or a lingering death.”

In my Dissent, however, I pointedly lamented the failure of Congress to satisfy the constitutional requirements of “heinousness” and “compelling reasons.”<sup>66</sup>

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<sup>65</sup> 297 SCRA 754, October 12, 1998, per curiam.

<sup>66</sup> I summed up my arguments in the Epilogue of the Dissent, as follows:

“(1) The 1987 Constitution abolished the death penalty from our statute books. It did not merely suspend or prohibit its imposition.

“(2) The Charter effectively granted a new right: the constitutional right against the death penalty, which is really a species of the right to life.

“(3) Any law reviving the capital penalty must be strictly construed against the State and liberally in favor of the accused because such a statute denigrates the Constitution, impinges on a basic right, and tends to deny equal justice to the underprivileged.

“(4) Every word or phrase in the Constitution is sacred and should never be ignored, cavalierly treated or brushed aside.

“(5) Congressional power to prescribe death is severely limited by two concurrent requirements:

(a) First, Congress must provide a set of attendant circumstances which the prosecution must prove beyond reasonable doubt, apart from the elements of the crime itself. Congress must explain why and how these circumstances define or characterize the crime as ‘heinous.’

(b) Second, Congress has also the duty of laying out clear and specific reasons which arose after the effectivity of the Constitution, compelling the enactment of the law. It bears repeating that these requirements are inseparable. They must

In spite of the death penalty, government statistics show that the incidence of these so-called “heinous crimes,” particularly rape, has continued to rise even up to the present, several years after RA 7659 had taken effect.<sup>67</sup>

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both be present in view of the specific constitutional mandate – ‘for compelling reasons *involving* heinous crimes.’ The compelling reason must flow from the heinous nature of the offense.

“(6) In every law reviving the capital penalty, the heinousness and compelling reasons must be set out for each and every crime, and not just for all crimes generally and collectively.

“‘Thou shall not kill’ is a fundamental commandment to all Christians, as well as to the rest of the ‘sovereign Filipino people’ who believe in Almighty God. While the Catholic Church, to which the vast majority of our people belong, acknowledges the power of public authorities to prescribe the death penalty, it advisedly limits such prerogative only to ‘cases of extreme gravity.’ To quote Pope John Paul II in his encyclical *Evangelium Vitae* (A Hymn to Life), ‘punishment must be carefully evaluated and decided upon and ought not go to the extreme of executing the offender, except in cases of absolute necessity: in other words, when it would not be possible otherwise to defend society x x x (which is) very rare, if not practically non-existent.’

“Although not absolutely banning it, both the Constitution and the Church indubitably abhor the death penalty. Both are pro-people and pro-life. Both clearly recognize the primacy of human life over and above even the state which man created precisely to protect, cherish and defend him. The Constitution reluctantly allows capital punishment only for ‘compelling reasons involving heinous crimes,’ just as the Church grudgingly permits it only for reasons of ‘absolute necessity’ involving crimes of ‘extreme gravity,’ which are very rare and practically non-existent.

“In the face of these evident truisms, I ask: Has Congress, in enacting RA 7659, amply discharged its constitutional burden of proving the existence of ‘compelling reasons’ to prescribe death against well-defined ‘heinous’ crimes?

“I respectfully submit it has not.”

<sup>67</sup>

In a letter dated June 27, 2000 addressed to *CJ Davide*, Secretary General Romulo A. Virola of the National Statistical Coordination Board cited the NSCB Statistics Series showing that rape cases “continued to rise reaching 3,177 in 1999 from a lower figure of 2,346 in 1995, an increase of 35

With due respect, I believe that RA 7659 and the Court's Decision to uphold it collide with the global crusade to abolish the death penalty, as shown in five major international treaties: (a) the 1948 Universal Declaration of Human Rights; (b) the 1966 International Covenant on Economic, Social and Cultural Rights; (c) the 1966 International Covenant on Civil and Political Rights (ICCPR)<sup>68</sup> and (d) the two Optional Protocols to

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percent. In 1999, on the average, nine women were raped in the Philippines daily."

<sup>68</sup> The Dissenting Opinion in *Echegaray v. Secretary of Justice*, supra, in part noted:

"R.A. No. 8177 Implementing The Death Penalty Violates International Norm.

"At the core of the issue of death penalty is the *inherent and inalienable right to life* of every human being. The recognition of this inherent right to life is one of the *self-evident* principles that inspired the adoption of *five (5) major international covenants*: the Universal Declaration of Human Rights in 1948; the International Covenant on Economic, Social and Cultural Rights in 1966; the International Covenant on Civil and Political Rights in 1966; and the two Operational Protocols to the latter Covenant. These legal instruments are collectively called the *International Bill of Human Rights*.

"The universal fight for the recognition of the right to life should never be lost in the mist of history. In December 1948, the United Nations General Assembly adopted *without dissent* the *Universal Declaration of Human Rights*. The Universal Declaration is a pledge among nations to promote rights inherent in each and every individual. These rights were distinguished from mere privileges that may be awarded by governments for good behavior and withdrawn for bad behavior. Thus, *Article 3 of the Universal Declaration decrees that "everyone has the right to life, liberty and security of the person."* The Philippines is a proud signatory to this document.

"On December 16, 1966, the United Nations General Assembly went on to adopt the *International Covenant on Civil and Political Rights (ICCPR)*. It was opened for signature on December 19, 1966 and entered into force on March 23, 1976. With respect to the death penalty, this Covenant provides:

the ICCPR.<sup>69</sup> All these treaties are collectively referred to as the International Bill of Human Rights. There is also the April

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‘1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

‘2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

x x x

x x x

x x x.

‘4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

‘5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

‘6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.’” (emphasis in the original)

<sup>69</sup>

The Dissent elaborated:

“The *Optional Protocol* to the Civil and Political Rights was adopted by the United Nations General Assembly on December 16, 1966. It entered into force on March 23, 1976. This Protocol provides for the mechanism for checking state compliance [with] the provisions of international human rights instruments such as a reportorial requirement among governments. *The Philippines signed this Protocol on December 19, 1966 and ratified it on August 22, 1989.* As of December 1996, this Optional Protocol ha[d] 89 state parties.

“The *Second Optional Protocol* to the ICCPR Aiming at the *Abolition of the Death Penalty* was adopted and opened for signing by the General Assembly on December 15, 1989. It entered into force on July 11, 1991. *The Philippines together with 58 other states voted in favor of the adoption of this document, while 26 voted against and 48 abstained. However, the Philippines has not ratified this Protocol.* Under this Protocol, States must take all necessary measures to abolish the death penalty. More specifically, it provides

x x x:

“1. No one within the jurisdiction of a State Party to the present Optional Protocol shall be executed.

3, 1997 Resolution (No. 1997/12) of the UN Commission on Human Rights, which calls on all UN members to abolish the death penalty.<sup>70</sup>

(In all fairness, I should add that while the Philippines voted in favor of the Second Protocol to the ICCPR, it has not ratified it.)

Furthermore, *Time* magazine<sup>71</sup> has reported that, in the United States, nearly 80 convicts by final judgments have later on been exonerated, because subsequent DNA evidence<sup>72</sup> had proven that they were completely innocent of the crimes attributed to

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"2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction."

"As of December 1996, 25 States ha[d] ratified this Optional Protocol.

*"From its inception, the United Nations has been steadfast in its view that like killings which take place outside the law, the death penalty denies the value of human life. In United Nations General Assembly Resolutions 2857 (XXVI) and 32/61 of 6 December 1977 and in Economic and Social Council Resolutions 1574(L), 1945 (LIV) and 1930 (LVIII), the abolition of the death penalty was marked as one of the high aims of the assembly of civilized nations."*

<sup>70</sup> See "Human Rights and Human Wrongs: Is the US Death Penalty System Inconsistent With International Human Rights Law?" *Fordham L. Rev.*, May 1999, in which all five panel discussants agreed that the US system violated international law; and Raissa Katrina Marie G. Ballesteros et al., "From Abolition to a Solution: A Real Alternative to Capital Punishment," *73 Phil. L.J.* (1990).

<sup>71</sup> November 13, 2000 issue, p. 47. For a more detailed nationwide review of the death penalty in the US, see Donna Lyons, "Capital Punishment on Trial," *State Legislatures* (May 2000).

<sup>72</sup> See also "Admissibility of DNA Evidence in Philippine Courts" by Dean Pacifico Agabin, *Court System Journal*, Vol. III, No. 2, June 1998.

them. They are now frantically suing the US government for compensation for their lost years in prison.

Be it noted that in the United States, 12 states abolished the death penalty in accordance with the worldwide trend. However, in the other 38 states, death is still in the penal statutes. In a much-applauded display of political will, Governor George Ryan of Illinois very recently commuted the sentence of all 167 death convicts in his state.<sup>73</sup> He said that the American “capital system is haunted by the demon of error: error in determining guilt and error in determining who among the guilty deserves to die.” After making his decision to commute all death sentences, he declared:

“I realize [my commutation of all death sentences] will draw scorn and anger from many who oppose this decision. x x x. Even if the exercise of my power becomes my burden I will bear it. x x x. There have been many nights where my staff and I have been deprived of sleep in order to conduct an exhaustive review of the system. But I can tell you this: I am going to sleep well tonight, knowing I made the right decision.”<sup>74</sup>

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<sup>73</sup> According to the CNN.com issue of January 13, 2003, “Ryan’s decision affects 156 inmates on death row in Illinois and 11 others who have been sentenced to death but who were not yet in the custody of the Department of Corrections x x x.”

<sup>74</sup> *International Herald Tribune*, January 13, 2003, p. 4

In my country, although our Supreme Court has upheld the death penalty law by majority vote, it has nonetheless been very meticulous in reviewing death sentences. As a result, only less than one third of all death penalties imposed by lower courts have been affirmed. The penalties in more than 66 percent of them have been reduced, or the accused acquitted, or the cases remanded to the lower courts for new proceedings because of violations of due process during the trial of such cases below. For the record, as of August 8, 2002, 143 cases imposing the death penalty have been affirmed by the Supreme Court.<sup>75</sup>

Even more important, after the first seven death convicts<sup>76</sup> had been executed by lethal injection from February 5, 1999 to January 4, 2000, two Presidents of the Philippines -- Joseph Ejercito Estrada and Gloria Macapagal Arroyo -- have since then either granted reprieves or commuted death sentences, and so none of the remaining convicts has been put to death.

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<sup>75</sup> See Panganiban, *Reforming the Judiciary* (2002), p. 242.

<sup>76</sup> Leo Echagaray for rape on February 5, 1999; Eduardo Agbagani for rape on June 25, 1999; Dante Piandiong, Jesus Morillos and Archie Bulan for robbery with homicide on July 8, 1999; Pablito Andan for rape with homicide on October 26, 1999; and Alex Bartolome for rape on January 4, 2000.

In the meantime, Congress is again seriously discussing the repeal of the law prescribing death. Bottom line: it is my fervent hope that the Philippines may yet join the global trend rejecting the death penalty.<sup>77</sup>

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<sup>77</sup> As a side result of our frequent discussions of the death penalty in the Supreme Court, especially in the light of Illinois Gov. Ryan's wholesale commutations, a distinguished colleague, Justice Leonardo A. Quisumbing, was inspired to write this poem on January 28, 2003:

“JUSTICE,  
in a Capital Case

*Death, thou shalt die!*  
- John Donne

“Like glass to cut the wind  
or grass the sages tend  
twin blades of hope you lend  
ten shards of fear you send.

“Blind you are but artless stone  
seeing reason rid of passion  
far beyond the buddha's bust  
thorny cacti bloom at last.

“Toll the vesper before the crow  
and cut loose the horses too  
for drug rape and murder proved  
tip the scale and draw the sword.

“Like fur given to wild caress  
light lethal shocks you tease  
old foxes of revenge and hate  
bolt tight their chain to fate.

“Now, beneath the law's scorn  
where no dew falls on sod  
and lotus cares not to bud  
once mercy dies you win a crown.

“But wait, in both your hands  
new science tracks the seedless son  
right and wrong in a dragon dance  
as grace whispers death is undone.”

*The National ID System  
and the Right to Privacy*

Another interesting constitutional paradigm recently upheld by the Court was the right to privacy. *Ople v. Torres*<sup>78</sup> ruled that Administrative Order (AO) No. 308, which established a “National Computerized Identification Reference System,” or a national ID card, was void for the following reasons:

1. It “involves a subject that is not appropriate to be covered by [a mere] administrative order,” but by a law enacted by Congress.

2. In any event, it would place “the right to privacy in clear and present danger.”<sup>79</sup> By providing for a Population Reference No. (PRN), this presidential issuance would open to government scrutiny the citizen’s “physiological and behavioral

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<sup>78</sup> 293 SCRA 141, July 23, 1998, per Puno, *J.*

<sup>79</sup> While the voting on the *ponencia* was 8 in favor (*JJ* Regalado, Davide Jr., Romero, Bellosillo, Puno, Vitug, Panganiban and Martinez) to 6 against (*CJ* Narvasa; *JJ* Melo, Kapunan, Mendoza, Quisumbing and Purisima), only 4 (*JJ* Romero, Bellosillo, Puno and Martinez) gave their unqualified concurrences. *J.* Regalado simply concurred “in the result.” *CJ* Davide joined my Separate Opinion that the Petition should be granted only on the ground that a legislative enactment, not merely an administrative order, was needed. *J.* Vitug said that “it was indispensable and appropriate to have the matter specifically addressed by Congress x x x.” Bottom line: the ruling on the violation of the right to privacy was not clear-cut.

characteristics” and generate “a comprehensive cradle-to-grave dossier on an individual” and would then transmit it over a national computer network. It “pressures the people to surrender their privacy by giving information about themselves on the pretext that it will facilitate the delivery of basic services.”

**The Right to Free Expression:**  
**Exit Polls and Libel**

One of the most revered rights of the people is free expression.<sup>80</sup> It began in the Middle Ages with free speech and the right to peaceful assembly for a redress of grievances.<sup>81</sup> When the printing press was invented, freedom of expression was expanded to include freedom of the press. Labor’s right to strike and to picket also became modes of protected expression when the Industrial Age flourished. Radio, television and cinema were then invented; these too were recognized as new modes of expression and thus given constitutional mantle.

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<sup>80</sup> To John Stuart Mill (*On Liberty*, Penguin Books Ltd., 1974), freedom of discussion is the prerequisite of truth (*see* pp. 48, 76 and 115-116).

<sup>81</sup> *See* Panganiban, *Transparency, Unanimity and Diversity* (2000), p. 376.

Indeed, as mankind pushes the frontiers of science and technology in mass communications, so must the scope of free expression expand. In line with these technological developments, the Supreme Court in *ABS-CBN v. Comelec*<sup>82</sup> deemed exit polls<sup>83</sup> to be part of free speech and, as such, entitled to constitutional protection. Hence, the Commission on Elections gravely abused its discretion when, during the 1998 elections, it totally prohibited the holding of exit polls and the dissemination of their results through mass media.

Like any other right, the freedom to hold exit polls and to disseminate their results may be subjected to reasonable regulation. The purpose is not to stifle or diminish such freedom, but in fact to safeguard it and at the same time to ensure that it does not collide

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<sup>82</sup> GR No. 133486, January 28, 2000, per Panganiban, *J.*

<sup>83</sup> *Exit polls* is defined as follows:

“At the outset, the Court defined exit polls as "a species of electoral survey conducted by qualified individuals or groups of individuals for the purpose of determining the probable result of an election by confidentially asking randomly selected voters whom they have voted for, immediately after they have officially cast their ballots. The results of the survey are announced to the public, usually through the mass media, to give an advance overview of how, in the opinion of the polling individuals or organizations, the electorate voted. In our electoral history, exit polls had not been resorted to until the recent May 11, 1998 elections.”

with or overturn the rights of others. Hence, the Decision added that “narrowly tailored counter-measures may be prescribed by the Comelec so as to minimize or suppress incidental problems in the conduct of exit polls, without transgressing the fundamental rights of the people.”<sup>84</sup>

In a later case, *Social Weather Stations v. Comelec*,<sup>85</sup> the Court strengthened its doctrine that elections surveys formed part of the freedom of speech. It declared as unconstitutional a provision in a new law (Section 5.4 of RA 9006, the Fair Elections Act) that banned the publication of election surveys 15 days before a national, and 7 days before a local, election. Although the prohibition was for a limited period only, the curtailment of the right of free expression was held to be “direct, absolute and substantial” and therefore impermissible.

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<sup>84</sup> It should be noted that the Dissent of *JJ* Melo, Vitug, Kapunan and Mendoza centered largely on the mootness of the issue (the 1998 election was over when we promulgated the Decision) and the possible adverse effect “on the need to preserve the sanctity of the ballot.”

<sup>85</sup> 357 SCRA 496, May 5, 2001, per Mendoza, *J*.

The Court<sup>86</sup> held that the questioned provision “constitutes an unconstitutional abridgment of freedom of speech, expression and the press” for the following reasons:

1. It “lays a prior restraint on freedom of speech, expression and the press by prohibiting the publication of election survey results x x x.”

2. “x x x [T]he grant of power to the Comelec under Art. IX-C Section 4 of the Constitution is limited to ensuring ‘equal opportunity, time, space, and the right to reply’ as well as to prescribing uniform and reasonable rates of charges for the use of such media facilities for ‘public information campaigns and forums among candidates.’”

3. Citing the US case *United States v. O’Brien*,<sup>87</sup> the Court stressed that the “most influential test for distinguishing content-based from content-neutral regulations” is as follows:

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

Under the test, even if a law furthers an important or a substantial governmental interest, it should nonetheless be

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<sup>86</sup> Concurring with *J. Mendoza* were *CJ Hilario G. Davide Jr.*; *JJ Jose A. R. Melo, Reynato S. Puno, Jose C. Vitug, Artemio V. Panganiban, and Minerva P. Gonzaga-Reyes.* *JJ Melo, Puno and Panganiban* wrote separate concurrences. Dissenting were *JJ Josue N. Bellosillo, Santiago M. Kapunan, Bernardo P. Pardo, Consuelo Ynares-Santiago and Angelina Sandoval-Gutierrez*, with Justice Kapunan writing the Dissenting Opinion. Justices *Leonardo A. Quisumbing, Arturo B. Buena and Sabino R. de Leon Jr.* were on leave.

<sup>87</sup> 391 US 367, 377, 20 L. Ed. 2d 672, 680, May 27, 1968.

invalidated if that interest is related to the suppression of free expression. Moreover, even if it is not so related, the law should still be invalidated if the restriction on freedom of expression is greater than is necessary to achieve the government purpose in question.

In another landmark in free expression -- *Vasquez v. Court of Appeals*<sup>88</sup> -- the Court ruled that truth was a complete defense in a libel case in which a public official or public figure was the offended party. The *avant garde* Court explained that "even if the defamatory statement is false, no liability can attach if it relates to official conduct, unless the public official concerned proves that the statement was made with actual malice -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not x x x." In other words, conviction in libel suits filed by public officials may be obtained only by proving that the defamatory words were (1) false *and* (2) made with the knowledge of their falsity or with a reckless disregard for whether or not they were false. This landmark Decision reversed existing jurisprudence requiring the accused to prove the absence of malice in order to be entitled to an acquittal.

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<sup>88</sup> 314 SCRA 460, September 15, 1999, per Mendoza, *J.*

## Citizenship

Let me now discuss how the Court has resolved cyber problems in political law, starting with recent decisions on citizenship.<sup>89</sup>

Fifty years ago, Philippine jurisprudence stressed that the doors to Philippine citizenship must open on “reluctant hinges.” Recently, however, the information age has made the world one big global village. Thus, the rules on citizenship in most countries are slowly being relaxed, especially as they apply to election cases in which the popular will, as much as practicable, is upheld. Our country has followed this global relaxation of citizenship procedures.

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<sup>89</sup> In *Board of Commissioners v. Dela Rosa* (197 SCRA 853, May 31, 1991, per Bidin, J.), the Court by a close vote of 8 (JJ Gutierrez, Gancayco, Sarmiento, Bidin, Griño-Aquino and Medialdea; with CJ Fernan and J. Narvasa concurring only in the result) to 7 (JJ Melencio-Herrera, Cruz, Paras, Feliciano who wrote the main Dissent; JJ Padilla, Regalado and Davide with a Separate Concurring and Dissenting Opinion) may have uncomfortably loosened up the requirements to prove Philippine citizenship. It belabored doctrines on *res judicata*, prescription and factual assessments, in order to rule in favor of William Gatchalian’s Philippine citizenship.

In *Frivaldo v. Comelec*,<sup>90</sup> our Supreme Court ruled that petitioner, declared to be a non-Filipino by two earlier decisions,<sup>91</sup> had been validly repatriated when he took his oath of allegiance on June 30, 1995, pursuant to PD 725. Equally important, the Tribunal decreed that possession of Philippine citizenship was needed only upon the assumption of office of an elected official, not necessarily on the day of the election or at the time of the filing of the certificate of candidacy.<sup>92</sup>

In line with globalization, Congress approved Republic Act 8171, which has eased the requirements for the repatriation of Filipino women who have lost their citizenship by marriage to

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<sup>90</sup> 257 SCRA 727, June 28, 1996, per Panganiban, *J.*

<sup>91</sup> *Frivaldo v. Comelec*, 174 SCRA 245, June 23, 1989, per Cruz, *J.*; and *Republic v. Dela Rosa*, 232 SCRA 785, June 6, 1994, per Quiason, *J.*

<sup>92</sup> In reply to the Dissent of *J.* (now *CJ*) Hilario G. Davide Jr. railing against the Court's too liberal interpretation of election laws, my *ponencia* stated in part:

“At balance, the question really boils down to a choice of philosophy and perception of how to interpret and apply laws relating to elections: literal or liberal, the letter or the spirit, the naked provision or its ultimate purpose, legal syllogism or substantial justice, in isolation or in the context of social conditions, harshly against or gently in favor of the voters' obvious choice. In applying election laws, it would be far better to err in favor of popular sovereignty than to be right in complex but little understood legalisms. Indeed, to inflict a thrice rejected candidate upon the electorate of Sorsogon would constitute unmitigated judicial tyranny and an unacceptable assault upon this Court's conscience.”

aliens, as well as of natural-born Filipinos -- including their minor children -- who have lost their citizenship on account of political or economic necessity.<sup>93</sup>

More recently, *Mercado v. Comelec*<sup>94</sup> unanimously validated dual citizenship. It held that Filipinos will not lose their nationality by the mere fact that, without their application or intervention, the laws of another country consider them its own nationals. The Court differentiated dual allegiance, which is proscribed, from dual citizenship which is allowed. It explained that dual citizenship “arises when, as a result of the concurrent application of different laws of two or more states, a person is simultaneously considered a national by those states. For instance, such a situation may arise when a person whose parents are citizens of a state that adheres to the principle of *jus sanguinis* was born in a state which follows the doctrine of *jus soli*. Such a person, *ipso facto* and without any voluntary act on his part, is concurrently considered a citizen of both states.”

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<sup>93</sup> Under Sec. 2 of RA 8171, which lapsed into law on October 23, 1995, “[r]epatriation shall be effected by taking the necessary oath of allegiance to the Republic of the Philippines and registration in the proper registry and in the Bureau of Immigration.”

<sup>94</sup> 307 SCRA 630, May 26, 1999, per Mendoza, *J.*

**Extradition:**  
**Global Cooperation in**  
**Criminal Law Enforcement**

A matter that has long gripped the attention of the world legal community is cooperation in criminal law enforcement. Recently, there has been a surge of interest in this field, and judicial cooperation has been invoked in pursuing the extradition of fugitives who escape the jurisdiction of one state and hide in another. Due to the principles of territoriality and state sovereignty, an order of arrest issued by a foreign court cannot automatically be enforced in the forum, absent a treaty authorizing it.

In the Philippines, the subject of extradition captured the national attention when the United States government, citing the US-Philippine Extradition Treaty, sought the return of Mark Jimenez to its custody. He is a Filipino congressman, for whom an order of arrest was issued by the United States District Court for the Southern District of Florida. The arrest order was occasioned by indictments for conspiracy to defraud the United States, tax evasion, wire fraud, false statements and illegal campaign contributions.

Specifically, the question raised was whether Congressman Jimenez, as a prospective “extraditee,” was entitled to bail while the extradition proceedings in the Philippines were pending. In *Government of the United States v. Purganan*,<sup>95</sup> the Supreme Court answered that, in general, persons sought to be extradited were not entitled to bail and provisional liberty because of the flight risk involved. Having had a track record of avoiding the judicial processes of the requesting state, the prima facie presumption was that they would escape again if granted bail.

That the offenses for which Jimenez was sought to be extradited were bailable in the United States was not deemed to be an argument to grant him bail while the extradition proceedings in the Philippines were pending. He should apply for provisional liberty before the US court trying the criminal case against him, not before the Philippine extradition court.

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<sup>95</sup> GR No. 148571, September 24, 2002, per Panganiban, *J.* 8 justices (*CJ* Davide, *JJ* Mendoza, Carpio, Austria-Martinez, Corona, Morales and Callejo Sr.) voted for granting the petition; 3 (*JJ* Vitug, Ynares-Santiago and Sandoval-Gutierrez), for its denial, and 3 (*JJ* Bellosillo, Puno and Quisumbing) for its remand. In a Resolution dated December 17, 2002, the Motion for Reconsideration of the Decision was denied with finality on a vote of 9 (*J.* Azcuna, who had assumed office by that time, joined the original 8 justices in favor of granting the petition) to three.

That Jimenez was a congressman whose arrest would allegedly disenfranchise his constituency and deprive it of representation in Congress was also debunked by the Court on the ground of equal constitutional protection for all regardless of position in government or station in life.

Apart from the specific issue of entitlement to bail, this case is significant because it also laid down hallmarks of international judicial cooperation -- the so-called "five postulates of extradition" as follows:

- (1) Extradition is a by-product of the "era of globalization," because states need "to cooperate with each other to improve [their] chances of suppressing crime."
- (2) An extradition treaty presupposes that "both parties thereto have examined, and both accept and trust, each other's legal system and judicial process." A state's signature on the treaty signifies "its confidence in the capacity and willingness of the other state to protect the basic rights of the person sought to be extradited."
- (3) Extradition proceedings are not criminal in nature; thus, the constitutional rights of the accused are not applicable. "Extradition is merely a measure of international judicial assistance through which a person charged with or convicted

of a crime is restored to a jurisdiction with the best claim to try that person.”

- (4) Fulfilling obligations under an extradition treaty promotes comity. Thus, the principle of *pacta sunt servanda* binds the contracting parties.
- (5) Persons sought to be extradited are presumed to be flight risks. Having fled once, what is there to stop them, given the opportunity, from fleeing a second time?

In a related case, *Cuevas v. Muñoz*,<sup>96</sup> the Supreme Court ruled that a lower court judge had not erred in ordering the *provisional* arrest of the person sought to be extradited, on the basis of the Hongkong government’s outstanding warrant that contained a summary of the facts of the case against respondent; as well as the documents required by the Extradition Treaty and appended to the application, showing probable cause for the issuance of the warrant.

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<sup>96</sup> 348 SCRA 542, December 18, 2000, per De Leon Jr., *J.*

**The Internationalization of Labor:**  
**Equal Pay for Equal Work**

Let me now discuss some other Decisions of our highest court expressing adherence to globalization in labor relations.

In *International School v. Quisumbing*,<sup>97</sup> our highest court ruled that, by the doctrine of incorporation, the Philippines adopts the generally accepted principles of law that proscribe discrimination of any sort, as embodied in the Universal Declaration of Human Rights; the International Covenant on Economic, Social and Cultural Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention Against Discrimination in Education; and the Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation. Thus, it required the employer to give equal pay to locally hired teachers who had performed work equal in value to that performed by foreign hires. In short, equal pay for equal work finds support not only in our own laws, but also in international covenants.

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<sup>97</sup> 333 SCRA 13, June 1, 2000, per Kapunan, *J.*

*Bayan v. Zamora*<sup>98</sup> bravely opined that, “as a member of the family of nations, the Philippines agrees to be bound by generally accepted rules for the conduct of its international relations. x x x. Hence, we cannot readily invoke the Constitution as a convenient excuse for non-compliance with our duties and obligations under international law.”

**Protection of the Environment**

Another paradigm, one that would even qualify as an ideology<sup>99</sup> of the new age, is the protection of the environment. As early as 1993, *Oposa v. Factoran*<sup>100</sup> stressed the constitutional right to a balanced and healthful ecology,<sup>101</sup> which carried with it “the correlative duty to refrain from impairing the environment.” Accordingly, timber licenses, not being property or property rights protected by the due process clause, may be revoked or rescinded

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<sup>98</sup> 342 SCRA 449, October 10, 2000, per Buena, *J.*

<sup>99</sup> Environmentalism “is probably the single genuinely Western ideological creation of the last 150 years. Indeed, the environmentalist ethic and its vision of the human future run against the grain of three centuries of Western political thinking.” See Bernard Susser, *Political Ideology in the Modern World* (1999), pp. 253-255.

<sup>100</sup> 224 SCRA 792, July 30, 1993, per Davide Jr., *J.* (now *CJ.*)

<sup>101</sup> See Art. II, §16, 1987 Constitution.

by executive action. Similarly, in *Tano v. Socrates*,<sup>102</sup> the Court

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<sup>102</sup> 278 SCRA 154, August 21, 1997, per Davide Jr., *J.* (now *CJ*). Dissecting the minutiae of marine life in order to point out the evils of cyanide fishing, *J. Davide* wrote on p. 184:

“The destruction of coral reefs results in serious, if not irreparable, ecological imbalance, for coral reefs are among nature’s life-support systems. They collect, retain, and recycle nutrients for adjacent nearshore areas such as mangroves, seagrass beds, and reef flats; provide food for marine plants and animals; and serve as a protective shelter for aquatic organisms. It is said that ‘[e]cologically, ‘the reefs are to the oceans what forests are to continents: they are shelter and breeding grounds for fish and plant species that will disappear without them.’

“The prohibition against catching live fish stems, in part, from the modern phenomenon of live-fish trade which entails the catching of so-called exotic species of tropical fish, not only for aquarium use in the West, but also for ‘the market for live banquet fish [which] is virtually insatiable in ever more affluent Asia.’ These exotic species are coral-dwellers, and fishermen catch them by ‘diving in shallow water with corraline habitats and squirting sodium cyanide poison at passing fish directly or onto coral crevices; once affected, the fish are immobilized [merely stunned] and then scooped by hand.’ The diver then surfaces and dumps his catch into a submerged net attached to the skiff. Twenty minutes later, the fish can swim normally. Back on shore, they are placed in holding pens, and within a few weeks, they expel the cyanide from their system and are ready to be hauled. They are then placed in saltwater tanks or packaged in plastic bags filled with seawater for shipment by air freight to major markets for live food fish. While the fish are meant to survive, the opposite holds true for their former home as ‘[a]fter the fisherman squirts the cyanide, the first thing to perish is the reef algae, on which fish feed. Days later, the living coral starts to expire. Soon the reef loses its function as habitat for the fish, which eat both the algae and invertebrates that cling to the coral. The reef becomes an underwater graveyard, its skeletal remains brittle, bleached of all color and vulnerable to erosion from the pounding of the waves.’ It has been found that cyanide fishing kills most hard and soft corals within three months of repeated application.

“The nexus then between the activities barred by Ordinance No. 15-92 of the City of Puerto Princesa and the prohibited acts provided in Ordinance No. 2, Series of 1993 of the Province of Palawan, on one hand, and the use of sodium cyanide, on the other, is painfully obvious. In sum,

upheld the City of Puerto Princesa and the Province of Palawan, which had issued Ordinances to protect the environment. It emphasized the duty of the State “to protect the nation’s marine wealth” by upholding local measures “imposing appropriate penalties for acts which endanger the environment, such as dynamite fishing x x x.”<sup>103</sup>

### Validation of DNA Testing

Finally, let me bring your attention to a bio-age decision. In many countries, DNA has become a routine method of identification; for that purpose, it is considered to be more reliable than fingerprints. In *People v. Vallejo*,<sup>104</sup> promulgated last year, our high court expressly acknowledged the scientific soundness of DNA. Said the Court for the first time:

“DNA is an organic substance found in a person’s cells which contains his or her genetic code. Except for identical twins, each person’s DNA profile is distinct and unique.

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the public purpose and reasonableness of the Ordinances may not then be controverted.” (citations omitted)

<sup>103</sup> See also *Mustang Lumber v. CA*, which ruled that the terms “timber x x x or other forest products” include lumber as a prohibited article under PD 705.

<sup>104</sup> GR No. 144656, May 9, 2002, per curiam.

“When a crime is committed, material is collected from the scene of the crime or from the victim’s body for the suspect’s DNA. This is the evidence sample. The evidence sample is then matched with the reference sample taken from the suspect and the victim.

“The purpose of DNA testing is to ascertain whether an association exists between the evidence sample and the reference sample. The samples collected are subject to various chemical processes to establish their profile. The test may yield three possible results:

- ‘1) The samples are different and therefore must have originated from different sources (exclusion). This conclusion is absolute and requires no further analysis or discussion;
- ‘2) It is not possible to be sure, based on the results of the test, whether the samples have similar DNA types (inconclusive). This might occur for a variety of reasons including degradation, contamination, or failure of some aspect of the protocol. Various parts of the analysis might then be repeated with the same or a different sample, to obtain a more conclusive result; or
- ‘3) The samples are similar, and could have originated from the same source (inclusion). In such a case, the samples are found to be similar, [and] the analyst proceeds to determine the statistical significance of the similarity.’

“In assessing the probative value of DNA evidence, therefore, courts should consider, among others things, the following data: how the samples were collected, how they were handled, the possibility of contamination of the samples, the procedure followed in analyzing the samples, whether the proper standards and procedures were followed in conducting the tests, and the qualification of the analyst who conducted the tests.”

## **Epilogue**

When the e-age was just dawning and the consequences of what we now call information technology were initially being analyzed, George Orwell authored a book entitled *1984*. He predicted that the computer would presage a vast totalitarian empire, where a device called a telescreen would be put up in every home and public place. This huge two-way TV network would centralize social life, and privacy would be abolished because computers would be used to monitor every word and every act of everyone. Thus, there was considerable anxiety that the computer would end human freedom and phase out liberal democracy as the prevailing governmental system in the globe.

Now, as the e-age matures, we are realizing that such dire predictions have not and would not happen. Instead of becoming an instrument of centralization and oppression, the personal computer, linked to the Internet and the ubiquitous cellphone, has led to just the opposite: the facilitation of more information to the people, resulting in their greater participation in governance. Instead of Big Brother watching everyone, people have in fact

more effectively used the computer to demand more transparency in governance.<sup>105</sup>

As discussed earlier, the 21st century beacons a new age -- the bio-age. Again, many are uncertain about the future because of the many changes that biotechnology is bringing: the conception of children no longer in wombs but in vitro; surrogate motherhood; genetic engineering not only for the manufacture of spare human organs, but for the creation of made-to-order babies; and, eventually, the abolition of disease and social conflict, thereby guaranteeing life without depression or loneliness, a world where religion would become irrelevant, because wonder drugs would make everyone feel happy and contented; sex would always be good and available; and poverty would practically be abolished.

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<sup>105</sup> Dr. Fukuyama (*infra*, pp. 46-47) says that because of the “democratization of technology,” more and more people who are able to use more and more computers, modems, cellular phones, cable systems and Internet connections are “able to reach farther and farther into more and more countries, faster and faster, deeper and deeper, cheaper and cheaper, than even before in history.” Thus, hundreds of millions of people around the world get connected and exchange information, news, knowledge, money, family photos, financial trades, music or television shows in ways and to a degree never witnessed before (p. 50).

“NBC News President Laurence Grossman neatly sums up this democratization of technology: “Printing has made us all readers. Xeroxing has made us all publishers. Television made us all viewers. Digitization makes us all broadcasters.”

Indeed, as Dr. Francis Fukuyama explains in his new book, *Our Posthuman Future*,<sup>106</sup> biotechnology could make our

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<sup>106</sup> Published by Farrar, Straus and Giroux in New York; first issued in 2002; pp. 6-8.

grandchildren's lives longer, healthier and happier. But it could also make them cease to be human beings because they will "no longer struggle, aspire, love, feel pain, make difficult moral choices, have families, or do any of the things that we traditionally associate with being human. They [will] no longer have the characteristics that give us human dignity."<sup>107</sup>

In the face of all these, however, I am unfazed. Just as Orwell has been proven wrong in his *1984* prediction of the death of human freedom, I am confident that the human spirit will emerge triumphant, as humankind -- the judiciary in particular -- tackles the challenges posed by the bio-age.

As I have mentioned earlier in my lecture, paradigms, perspectives and philosophies of the computer age have merged with traditional concepts of governance and judicial dispensation. This merging has happened -- perhaps not in one seamless package but, just

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<sup>107</sup> Dr. Fukuyama opines that "the most significant threat posed by contemporary biotechnology is the possibility that it will alter human nature and thereby move us into a 'posthuman' stage of history." The solution to this possibility of adulterating the great benefits of biotechnology "with threats that are physical and overt or spiritual and subtle" is regulation not only statewide, but in fact on an international basis.

the same, in a manner that permits human rights, dignity and honor not merely to survive, but in fact to flourish.

Let me add that aside from issuing decisions that rule on computer age paradigms, our Supreme Court is now in the process of finalizing a five-year (2003-2007) Information System Strategic Plan or ISSP for short. Under this program, our entire judiciary would be totally computerized to deliver more speedily what I term “quality” justice. Specifically, the Supreme Court, with the help of Sen. Aquilino Pimentel Jr., is in the process of setting up four pilot e-courts in the country.

And to prepare our judges for the dawning bio-age, the Philippine Judicial Academy is sponsoring next month (March 2003) a seminar on the judicial uses of DNA. In October, also this year, Philja -- with the assistance of the Einstein Institute for Sciences, Health and the Courts (EINSHAC) of Washington, DC -- will hold a more extensive national seminar on the wider reaches of biotechnology including genome mapping, stem cells, cloning and germ line engineering.

As I end, let me finally articulate my hope that during the last one hour or so, I have demonstrated the capacity and the ability of the judiciaries of the world to keep pace with our economically, politically, technologically and scientifically shrinking world; and that judicial globalization has not stifled nationalism and individualism. It is my firm belief that the growing trend toward judicial globalization in my country has united us with the judiciaries of the rest of the world in our common aspirations to strengthen the rule of law and to uphold human dignity and human rights worldwide, without sacrificing our quest for national interest and our unique identity as a nation.

Thank you.

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