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Supreme Court of the Philippines
Philippine Judicial Academy
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present the

Chief Justice Reynato S. Puno
First Distinguished Lecture
Series of 2009

May 7, 2009, Thursday, 2:30 p.m.
Court of Appeals Auditorium
G/F Court of Appeals Centennial Building
Maria Orosa Street, Manila

and

via Video Conferencing
Supreme Court Session Hall
Baguio City

Royal Mandaya Hotel
Davao City

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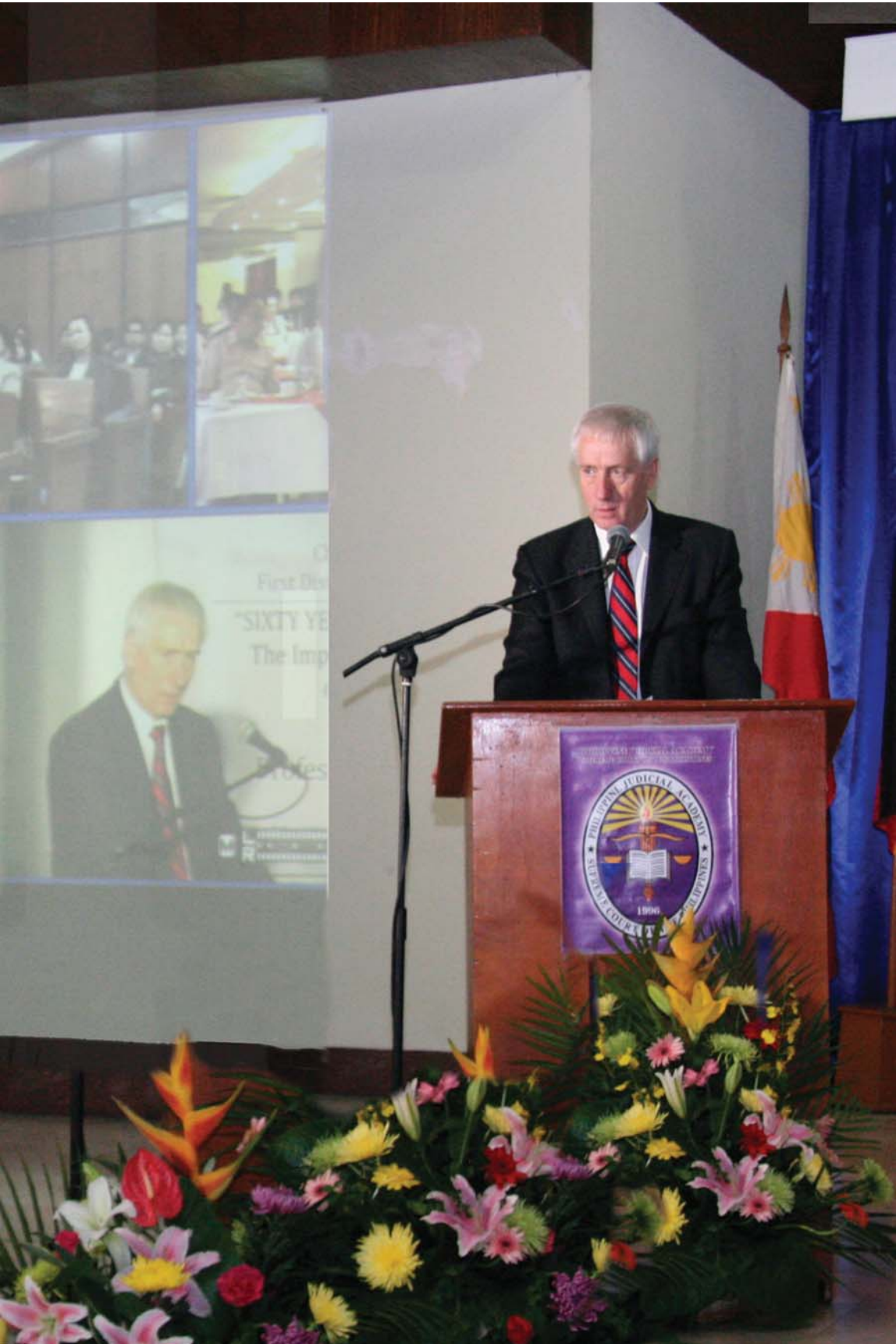

*Sixty Years Basic Law in Germany: The Impact of the Constitutional Court**

Professor Dr. Rudolf Dolzer

Dr. Dolzer is the Director and a Professor at the Institute of International Law, University of Bonn, Germany. He is a member of the following: Argentinean Academy for Social Sciences; International Board of the Instituto de Empressa in Madrid, Spain; Board of Directors, International Development Law Institute, Rome, Italy; Directorate of the German Society; and Advisory Boards of the Drager-Foundation, Lubeck Foundation, and Biodiversity and Genetic Resources of the German Federal Ministry of Food, Agriculture and Consumer Protection. He was also a Member of the German Parliament, Commission of Enquiry, in 1990 and in 2000.

Dr. Dolzer obtained his Bachelor and Doctor of Laws degrees from the University of Heidelberg and a Doctor of Laws on International Economic Law from Harvard Law School. He was a Research Fellow at the Max-Planck-Institute of Comparative Public Law and International Law focusing on Economic and Environmental Laws. He was a Professor of Law at the University of Heidelberg and a Visiting Professor at the Massachusetts Institute of Technology, U.S.A.; University of Paris I (Sorbonne); Southern Methodist University, Texas; Cornell Law School, New York, and Instituto de Madrid, Spain.

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* Delivered at the *Chief Justice Reynato S. Puno First Distinguished Lecture, Series of 2009*, on May 7, 2009, at the Court of Appeals Auditorium, Court of Appeals Centennial Building, Ma. Orosa St., Manila, via video conferencing at the Supreme Court Session Hall, Baguio City, and Royal Mandaya Hotel, Davao City.

Chief Justice
Members of the judiciary
Colleagues of the academia
Esteemed audience,

It is a great honor for me to be the first speaker in the Chief Justice Reynato Puno Distinguished Lecture Series.

I am aware of the high esteem in which the Chief Justice is rightly held in the judiciary and in civil society in general. In demanding times of change and transition, each society depends on the voices of conscience, virtue and courage. The calling of the legal profession, with its emphasis on justice and balance, is to contribute to the process of orderly and equitable social change.

Mr. Chief Justice, you have been kind enough to invite me to speak about the impact of the German Constitutional Court on our Constitution, the **Basic Law**. This is not a task that can be addressed with mathematically precise weighing. Evaluating the effect of the Court's jurisprudence depends on a considerable extent to extrajudicial temperament and judgment. In any event, to paraphrase the former U.S. Chief Justice Charles Evan Hughes, the Basic Law is today what the Court says it is. Since 1952, the Official Collection of the Decisions of the Court have been published, so far 121 volumes. Issues from virtually every field of law have been before the Court, from tax law to matters of social security, from matters of German reunification to the development of German armed forces abroad, from the legal status of universities to the role of political parties and their financing.

In all areas of the law, the Constitutional Court has to rule on the emanations of constitutional law, including in particular the significance of individual rights and the competences of the governmental units, within the confines of the separation of powers and the federal system. The Court's jurisdiction is limited to constitutional issues. When a tax matter, for instance,

is brought before the Court, the Court may rule on the implications of the equal protection clause in Article 3 or the clause protecting the family in Article 6, but not on the interpretation and application of the tax issue itself. Below the Constitutional Court, the German judicial system consists of five separate branches: ordinary courts (civil and criminal law), administrative law, social law, and tax law**.**

Looking at the breadth and depth of the jurisprudence of the Constitutional Court, it is appropriate not just to conclude that the Basic Law is what the Constitutional Court says it is, but one may go further and say that the German State and German society today are to a considerable extent what the Court has ruled that they should be.

In spite of the current severe recession in Europe and in Germany, the year 2009 is a very special year to look at the past and to reflect on the role and setting of the Court in the 20th century and the 21st century in general. To get a sense of this setting, of the historical significance and the transformative dimension of the Basic Law adopted in 1949, it is appropriate to recall other key dates of Germany's chequered history in the 20th century, all of these dates being very different in nature and not all of them being a source of national joy or pride.

To start with a retrospective of 90 years ago, in 1919 a new Constitution was adopted after the resignation of the various monarchies in Germany and Germany's military defeat at the end of World War I. Called the *Weimar Constitution,* the new Constitution evoked the world of culture, of poetry and novels, as they were written in the small city of Weimar in the 18th century by our famous writers Johann Wolfgang von Goethe and Johann Christoph Friedrich von Schiller. Parliamentary democracy was introduced, for the first time, with the right to now extend [the right] to vote [to] all segments of society. A short 20 years later, in 1939, the Weimar Constitution was already abandoned, replaced six years earlier by the dictatorship of the Hitler Government which built its order on a perversion of the

rule of law. In 1939, Germany attacked Poland, thereby violating international law and starting World War II, bringing suffering and grief to all corners of the world, including the Philippines.

In 1949, 10 years later, the Federal Republic of Germany came into existence and the Basic Law was adopted as an interim constitution which turned out to be a long-term constitution. In the same year, a Socialist state, the German Democratic Republic, was set up in Eastern Germany, with the result of a divided Germany. Another 40 years later, in 1989, the Berlin Wall fell down after a peaceful revolution, and Germany thereafter was again united after 45 years of painful division between the West and the East. Berlin was made the German capital again after Bonn had served as its interim alternative.

Looking back in the context of all these historic transformational events to be commemorated in 2009 from the constitutional perspective, the year 1949 that saw the adoption of the Basic Law stands out. It stands out as the beginning of the most lasting constitutional era which has brought Germany sustained peace, freedom and unity. More than any other German Constitution, the Basic Law has brought prosperity and social justice to the German people.

In 1949, the Basic Law was drafted against the direct historical experience of a Germany of a 12-year Hitler regime during which terror and fear reigned instead of law and justice. When the war ended in 1945 and Germany was defeated by Japan, it was far from clear how and when Germany would be reconstituted. Four years later, in 1949, the Basic Law emerged literally out of ruins and ashes. Politically, Germany was an occupied State in 1949 until 1955, divided up in four zones, with the Eastern Zone separated from the new Federal Republic, as the Communist German Democratic Republic. The German economy was still destroyed in 1949. Germany paid reparations in kind, and many people struggled to find enough food and proper housing. Socially, the traditional German fabric was largely torn apart by the Nazis and the war. German soldiers were still held as political prisoners. In the Federal Republic,

about 10 million German people had to be integrated, who were refugees from the East and who had mostly crossed the borders into the West Germany with all their belongings lost.

Obviously, this setting in 1949 was not conducive to deliberate in serenity and peace on a new Constitution as a foundation for the new German polity. But political activities on the local level had already been allowed in 1949 by the Allied Occupation Powers and, more importantly, the Allied Powers themselves had decided on the political level that a new German Government should be set up in the zones of the Western powers, because a Western German State would be useful in a broader strategy of containing the spread of communism. Thus, the Allied Powers suggested that Germany should consider to enact a new Constitution, albeit with the advice and consent of the Occupation Powers. The Germans were not immediately sure whether it was appropriate under the circumstances to follow this advice and to adopt a new Constitution, the concern being that such a step might cement the division of the country. Nevertheless, German parties were now formed and the process to frame a new Constitution was started. Within eight months the deliberations led to its adoption on May 8, 1949, exactly four years after Germany's military defeat. On May 23, the Basic Law entered into force.

The Basic Law was understood by its drafters as an interim document, supposed to last only until the unification of Germany which was anticipated within a decade or so. To express their concern that the adoption of the Constitution should not be seen as a silent agreement to the division of Germany, the new Constitution was not called a Constitution, but the Basic Law, and Bonn, a small idyllic town, was made the provisional capital. As is sometimes the case, the document in 1949 proved to be more robust than its authors assumed, and it subsequently turned out to be suitable as Germany's Constitution for the long-term. It has led Germany through a successful economic recovery in the 1950s and 1960s and also through a period of social unrest, including terrorist activities

in the 1970s. When Germany was reunited in 1990, contrary to the original expectation, the Basic Law did not come to its end, but (with minor amendments) it now became the Constitution for the enlarged united Germany. Its territorial reach was simply extended, and five federal States in East Germany were added to the originally 11 States, with no formal referendum, but with the *de facto* consent of the people in East Germany.

The fact that the Basic Law with its 146 articles has served as the Constitution during all phases since 1949 and was never seriously challenged in its substance by any major political group indicates that its values are widely shared among the political groups and also that its content is sufficiently flexible to allow for changing circumstances and necessities. To a large extent, the longevity, the stability and the flexibility of the Basic Law reflect not just the wisdom of the authors, but also the quality of the jurisprudence of the Court. The manner in which the Court was designed in 1949 is the most innovative part, if you wish the boldest experiment embodied in the Basic Law, a clear departure from all earlier Constitutions with no precedent in Germany. To a limited extent, the U.S. Supreme Court served as a model for the Constitutional Court, with significant difference.

In a shorthand formula, the Constitutional Court has been made the jealous guardian, the protector and promoter of the Constitution and of the rule of law embodied in the Constitution. A fundamental underlying concept was that the existence of a written constitution in itself will not guarantee its operational hierarchy on top of the entire legal order, and that a special Constitutional Court at the apex of the judicial system would have special expertise in legal matters directly connected with the political process. Such a Court would also have special authority vis-à-vis the political branch, and the hope was it might find strong acceptance by the people and thus be largely immune from the day-to-day vagaries of the political process.

Of course, it was also recognized in 1949 that the existence of a very strong Constitutional Court would reduce the freedom of action of the legislative and also of the executive branch. Would this lead to a "government by judges," a scenario painted before 1933 in negative terms by leading German constitutional specialists?

Whatever the details, on balance the potential downsides of a strong Court were not deemed decisive. The Constitutional Court as guardian of the Constitution was to be the main institutional pillar for the rule of law, and the rule of law as characterized by the Constitution was to serve as the foundation and the limitation to the democratic process. In the words of the German Constitution (Article 20), Germany is a democratic state based on the rule of law. Democracy is tempered by the rules of Constitution. Thus, the fear of a judicial usurpation of power was not prevalent and it had no major impact on the drafting of our Basic Law.

In essence, an extraordinary belief in the rule of law, secured by a Constitutional Court, underlies the Basic Law. Thus, we have come to think in Germany of the Constitutional Court as a neutral power which is a part of our larger governmental fabric but which has no political agenda of its own. The Court is deemed to serve as the permanent active memory of the values underlying the Constitution. It is seen among all other branches, as "the least dangerous branch"; in this sense, Germany has perfected the idea of the U.S. scholar Alexander Bickel. The Court exercises power when adjudicating cases, but it does so in the manner of a court of law.

How broad are the powers of the Court? The Court has wider competence than any other court around the globe. Its basic task is to ensure the consistency of laws passed by Parliament with the rules of Constitution and also to ensure that the executive branch respects the Constitution. The Court has further powers in addition to reviewing laws adopted by Parliament. In particular each organ of the Government may refer a dispute over its own powers with another organ of the

Government to the Court, and also each dispute between a state and the federal Government may be decided by the Court. In a comparative perspective, these powers as well illustrate the point that the powers of the German Court are extraordinarily wide. Also, the Court is given the power to prohibit political parties with an extremist agenda inconsistent with the Constitution, and it has special powers with regard to the identification of customary international law.

The Court has not refrained from fully exercising the jurisdiction which the Basic Law confers upon it. Concepts such as the "political question doctrine" or the notion of an "act of government" not subject to judicial review did not find their way into the Court's jurisprudence. The facet response by the Court to occasional critique of judicial overreach was often that the Court does no less and no more than fulfilling its constitutional mandate.

The broad powers of the Court emanate mainly from the diversity of procedures before the Court and the diversity of parties with standing before the Court. Whenever a doubt exists as regards the constitutionality of a law, there are so many procedures and applicants that the issue will likely end up before the Constitutional Court, in one or the other procedural form.

Essentially, a review of a statute in terms of its constitutionality can take place in three ways. Firstly, an individual affected by a law or an executive measure can bring what we call a "constitutional complaint," after exhausting the procedures before regular courts. The claim will be that the law is unconstitutional or that its application was unconstitutional. Second, any judge who has to apply a statute and has doubts regarding its constitutionality of the statute will have to refer to the Constitutional Court to render a decision on the point of constitutionality; in practice, courts have made considerable use of this power to test a law before the Constitutional Court. A third type of procedure before the Constitutional Court concerns applications for review to the Court either by the

Federal Government, or by any one of the State Governments, or by a group of deputies in the First Chamber making up for one third of the plenary, in certain cases also the Second Chamber and the Governments of the federal state.

The Constitutional Court is a court of law, part of the judiciary (Article 92 of the Basic Law), but it is also different from the other courts, of which we have five branches. The decisions of the Constitutional Court are binding upon all organs of the State and have the force of law. Dissenting opinions exist in Germany only in the Constitutional Court.

The Court consists of two separate Chambers, one of them with jurisdiction mainly for individual rights, the other for all other matters for which the Court is competent. In a typical setting, both Chambers consist of eight justices, and any motion or application to be granted requires five votes. The term of the judges is limited to a single term 12 years, with a mandatory retirement at the age of 65.

The nomination process is different from those for judges of the other courts. As is well-known, the nomination process for judges always deserves special attention, particularly for a Court with broad powers. In Germany, half of the judges of the Constitutional Court are elected by the First Chamber of Parliament, being the Chamber of Deputies, whereas the second half is elected by the Second Chamber consisting of representatives of the Federal State. The First Chamber has delegated this power to a Committee of twelve, with eight votes required for a successful candidate. The individual votes of the members of the Chamber are not published, and no public hearing or debate is held with the candidates. In practice, the main political parties divide up their right to propose, and each of the two main parties takes into account the existence of the small parties by allowing candidates of these parties as well. Most proposals by the political parties are accepted by the other party, thus securing the necessary majority of eight. Occasionally, however, such proposals are rejected, and a new candidate must then be proposed.

Once in a while, this process of electing our justices is criticized, but so far no better scheme has been found which would command a broad political consensus. So, for the time being, this procedure remains.

The key justification for the election procedure is not theoretical in nature; it is simply that the procedure has, by and large, led to good results. The Court mainly consists of a mixture of former professors, judges, and politicians or people from the wider political context. Remarkably, former practicing lawyers play no prominent role on the Court. Three out of the eight judges of each Chamber of eight must be former judges from lower courts.

When I say that the result is generally considered to be "good," I refer to the following. The members of the Court have had the required high legal skills, and they usually come without a political agenda of their own. We do have the very occasional vote which reflects the nomination by the political parties. However, that is far from typical, and very often, the decision is unanimous or, if not, the votes cannot be allocated along any party line.

How has the Court approached the main substantive features of the Constitution? In the time available, let me address briefly the strong emphasis on individual rights (as a reaction to the Nazi period), the economic-social dimension of the Constitution, the parliamentary system of government, and the rules governing the federal system in Germany.

For the first time in German history, individual rights are recognized by the Basic Law as legally enforceable by individual citizens, and a special type of procedure was introduced for citizens to allow a "constitutional complaint" before the Court. The 19 articles on individual freedom are located at the beginning of the Basic Law and, as interpreted mainly by the Constitutional Court, provide for a high level of individual freedom. In case of doubt, the Court has often preferred freedom over regulation and freedom over security. This was

also true in the wake of terrorist threats after September 2001 when the Court overturned a number of laws intended to strengthen security.

As regards modern technologies and their impact upon personal liberty, the Court has "invented" two new freedoms, the right to individual informational self-determination and the right of integrity of informational systems. Freedom of expression and freedom of the press was and is seen as a fundamental condition for a functioning democracy, and in principle preferred over other values of order, of decency and regulation. Also, the courts emphasized the right of each person to express her or his own personality, while recognizing that we do not live in isolation but as members of a society.

The high rank accorded to individual rights by the Court corresponds to the location of the rights in the Constitution. Prefaced by a general right to human dignity, individual rights stand at the very beginning of the Basic Law. This was a deliberate radical departure from previous constitutional practice, as a future barrier for developments such as those during the Hitler episode. One may refer to the Constitution in this respect as a Constitution for the citizens. The acceptance by the German people of the Basic Law has its explanation in large part in the emphasis on individual rights by the text of the Constitution, by the availability for the individual of a "constitutional complaint," and by the jurisprudence itself of the Constitutional Court.

As to economic and social matters, the Basic Law contains only a few specific provisions. In their sum, individual rights provide for an order based on economic freedom. However, this economic freedom has limits which are exemplified in the provision on the right to hold private property. The shortest sentence of the Constitution literally translated reads, in two words: "Property obliges," and the Court has referred to these words in a number of decisions which limit the rights of ownership.

Altogether, under the roof of the Basic Law, post war Germany has embraced what we call a "social market economy," combining economic freedom with the recognition that the weaker segments of society will be recognized as such and also to some extent protected by the State. Thus, the German model does not reflect a pure market economy, which is important in economic phases accompanied by globalization and during periods of economic and financial crises. Also, the same concept of the social market economy had allowed, in the years after 1949, to integrate millions of refugees from the East into the West German economy. After Germany's unification in 1991, about 200 billion dollars were transferred from the wealthier West Germany into the former Communist part, without currently achieving full economic equality between the two former parts.

While it will be primarily the task of the legislature and not of the Court to balance individual freedom and social justice, we consider that the recognition of the constitutional principle of a social market economy so far has served Germany well and presumably is, for our purposes, a more attractive social model than a strict concept of a free market. The Constitutional Court has deliberately refrained from playing a major role in the shaping of the economic-social sector. It has spelled out that the concept of the social state laid down in Article 20 is a legal and not a political concept. However, it has also emphasized that its implementation lies primarily with the two political branches and is in principle not enforceable by the Courts except in rare circumstances when the two branches would ignore the existence of the principle.

The parliamentary system of government established by the Basic Law focuses on the election of the Federal Chancellor not by the people, but by the Parliament. Under certain conditions Parliament may also recall the Chancellor and elect a new one at any time; so far, such a recall happened twice. Our parliamentary system is built upon a special recognition in the Basic Law of the strong role of political parties for the

functioning of the political system. Parties in Germany are generously supported by public financing, based on their relative strength.

A special feature of the German system since 1949 has been the so-called 5 percent rule: a party will not be represented in Parliament unless it gets 5 percent of the popular vote. Again, this provision in the election law reflects historical experience. In the 1920s, Germany was often on the brink of being ungovernable, with more than 20 parties constantly competing and fighting against each other, sometimes literally. The Constitutional Court has upheld the 5 percent clause in view of the need for a stable government. Today, we have five political parties in our federal parliament; for decades it had been three parties only, and it remains to be seen how the evolving situation will affect the forming of coalition majorities in the future.

Let me turn to Germany as a federal state under the Basic Law. There is wide agreement in Germany that our approach to federalism is seen as a successful design of government which has contributed to stability and prosperity of post-war Germany. The main areas of competence for the States concern (only) educational matters and internal security. In practice, and this feature is peculiar to Germany, the influence of the States upon the legislative process on the federal level may be seen as significant as the exercise of power within the States. For a number of areas, a law on the federal level can only be passed with the consent of the Second Chamber (being "the Federal Council"); this part of the Parliament consists only of representatives of the States who are nominated by the executive branch of each State. The political majority in the Federal Council may not be identical with the majority in the First Chamber of the elected deputies, and the result may be the need for a complex procedure of coordination leading to a broad agreement among parties, with the danger of a stalemate. Another special element of our federal structure concerns the dominant role of the individual States in the execution of laws.

Altogether, the relatively weak power of States as regards their own internal competence is, therefore, compensated by the participatory power on the federal level and their important role in the execution of laws.

The jurisprudence of the Constitutional Court on the distribution of powers in the federalist system has not been straightforward. For decades, the Court has supported an approach allowing an expansion of rights of the federal government. In the past decade, I would say relatively late, the tide has turned. The Court now has become very suspicious of any effort to recognize broad federal powers and has recently strengthened the autonomy of the State within its territory, at the expense of the federal state.

Let me briefly also turn to the role of the Court in the context of the existing European Courts. I refer in particular to the European Court of Human Rights in Strasbourg and to the Court of Justice of the European Community in Luxembourg. These two Courts are legally entirely distinct and separate. As regards the European Court of Human Rights, its rank within the German domestic legal order is below that of the Constitution. The German Constitutional Court accordingly considers that the decisions of the European Court of Human Rights will not affect the constitutional order of Germany, but the German Constitutional Court has said that its jurisprudence will take into account the rulings of the European Court.

The matter is much more complex when it comes to the effect of judgments by the Court of Justice of the European Community in Luxembourg. This is so because in principle the rank of each rule of the European Community is deemed superior to each rule of the domestic legal order of Germany as a member state. This ranking arises out of the jurisprudence of the European Court of Justice (ECJ) and is now widely accepted. However, the German Constitutional Court has not fully adopted this principle when it comes to an effect of a European rule on the German Constitution. The current state of affairs is that the German Court will accept the priority to a European rule if and

to the extent that the European rule is consistent with the basic tenets of the German Constitution. The reasoning is that the German Parliament intended to transfer rights to the European Community when ratifying the European Treaty, but that it did not intend thereby to alter the German Constitution. In other words, a degree of tension has arisen, and the German Constitutional Court seems intent to defend the basic tenets of the German Constitution against any erosion resulting from the European integration.

Let me come to the way in which the Constitutional Court has used its powers broadly speaking. Has the Court been an activist Court or has it been more deferential toward the political branch? There is no simple answer of yes or no. So far, I would say that the Court has not overturned a measure by the political branch which those branches would have deemed to be fundamental for the fabric of our society or the political process. Nevertheless, time and again, politicians complain about the intrusiveness of the Court which allegedly second-guesses the elected representatives. Konrad Adenauer, our first Chancellor, and Chairman of the group which adopted the Constitution in 1949, famously made a statement after a Court decision which struck down a law sponsored by the Chancellor: "This is not how we had imagined that this Court would work." The current Minister of the Interior, a highly respected and experienced politician, has repeatedly admonished the Court not to upset the proper functioning of the political process. A major reason for these admonitions being that, in a number of legislation against terrorism, the Court struck down new laws supposed to strengthen the powers of the executive to protect society. The Court's answer was, in principle, that it remains the task of the Court to protect personal freedom and human dignity, especially in periods of instability and change.

Among the German people as a whole, the Court has been in high esteem far higher than the legislative or the executive branch, and this has been so for decades. The possibility of an individual constitutional complaint has contributed in large

measure to the popular sense that this is a Court of and for the people, even though less than 3 percent of such complaints are successful. Criticism of individual decisions has not led to a broad perception that the Court is conservative or progressive or ideological in any sense detached from the Constitution. Essentially, the Court is seen by the public as the guardian of the Constitution and of the rights of the individual, and certainly is seen as the least dangerous branch. One central political effect of this strong perception by the public is that, so far, the Court is shielded from any direct political attack which would question its legitimacy and its integrity as a central institution of the Basic Law.

In my view, it is important to point out that the Court's power is not just to invalidate laws and measures. One of the main effects of the Court has been to confer the stamp of legitimacy to those political decisions which the Court has declared constitutional. When a constitutional challenge is denied by the Court, and the law is declared constitutional, the practical effect has very often been that the political debate surrounding that law is ended or, at least, that it becomes much more tempered. By way of illustration, this was the case for the constitutional decision to allow deployment of German armed forces abroad for a peacekeeping mission made in 1994 even in the absence of a specific relevant clause in the Constitution on this point. The legitimacy, in principle, of such peace missions as such is today no longer in question and, very likely, this would be different absent such a decision by the Court. In this broader sense, as well, the Court has considerably contributed to channel and stabilize the political process.

At the end, let me turn briefly to the influence of the German Constitutional Court as a separate, specialized type of a constitutional Court. Spain, Italy, and Greece have opted for similar models, and so have most of the Eastern European States after the downfall of communism. Comparative constitutional lawyers today speak of the European model of a Constitutional Court as it was first embodied in the German Constitutional

Court. However, this movement toward such a Court is not limited to Europe, but also has spread beyond Europe, for instance to South Korea and to South Africa. In this sense, the German Court stands at the origin of a new era of constitutionalism in which the will to secure the rule of law as enforced by a Constitutional Court has acquired a new dimension.

The fundamental assumption was and is that the rank of a Constitutional Court at the apex of the judicial system calls for a special focus of a Court – if you wish, with a special devotion to the Constitution and a special expertise, with special sensitivity towards constitutional law as being the law for the political process, with a special dignity of the Court, and with special recognition by the public and ultimately by the political actors. Those, then, are the practical considerations on which the creation and existence of a separate Constitutional Court has been based.

Let me conclude. Whoever compares laws, institutions and courts must not jump quickly to value judgments. The history, the values and the fabric of each society are different, and each society and people must accordingly shape its own legal and constitutional order. Having said this, I conclude by way of saying that the German Constitution, as it has been interpreted and applied by the Constitutional Court in the past decades, was the best ever adopted in Germany and is worthwhile to be considered in a comparative international search for a modern constitutional approach that promotes a stable, free, and just society.

APPENDIX

TEXT OF THE BASIC LAW (excerpt)

Promulgated by the Parliamentary Council on May 23, 1949, as amended by September 2009.
(English text as published by the German Bundestag)
(Articles 1 – 21, 92, 93, 94, 100)

Preamble

Conscious of their responsibility before God and man, inspired by the determination to promote world peace as an equal partner in a united Europe, the German people, in the exercise of their constituent power, have adopted this Basic Law. Germans in the *Länder* of Baden-Württemberg, Bavaria, Berlin, Brandenburg, Bremen, Hamburg, Hesse, Lower Saxony, Mecklenburg-Western Pomerania, North Rhine-Westphalia, Rhineland-Palatinate, Saarland, Saxony, Saxony-Anhalt, Schleswig-Holstein and Thuringia have achieved the unity and freedom of Germany in free self-determination. This Basic Law thus applies to the entire German people.

I. Basic Rights

Article 1 – [Human dignity – Human rights – Legally binding force of basic rights]

(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.

(3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.

Art. 2 – [Personal freedoms]

(1) Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.

(2) Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law.

Art. 3 – [Equality before the law]

(1) All persons shall be equal before the law.

(2) Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.

(3) No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavoured because of disability.

Art. 4 – [Freedom of faith and conscience]

(1) Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable.

(2) The undisturbed practice of religion shall be guaranteed.

(3) No person shall be compelled against his conscience to render military service involving the use of arms. Details shall be regulated by a federal law.

Art. 5 – [Freedom of expression, arts and sciences]

(1) Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures, and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of

reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.

(2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour.

(3) Arts and sciences, research and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution.

Art. 6 – [Marriage – Family – Children]

(1) Marriage and the family shall enjoy the special protection of the state.

(2) The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall watch over them in the performance of this duty.

(3) Children may be separated from their families against the will of their parents or guardians only pursuant to a law, and only if the parents or guardians fail in their duties or the children are otherwise in danger of serious neglect.

(4) Every mother shall be entitled to the protection and care of the community.

(5) Children born outside of marriage shall be provided by legislation with the same opportunities for physical and mental development and for their position in society as are enjoyed by those born within marriage.

Art. 7 – [School system]

(1) The entire school system shall be under the supervision of the state.

(2) Parents and guardians shall have the right to decide whether children shall receive religious instruction.

(3) Religious instruction shall form part of the regular curriculum in state schools, with the exception of non-denominational schools. Without prejudice to the state's right of supervision, religious instruction shall be given in accordance with the tenets of the religious community concerned. Teachers may not be obliged against their will to give religious instruction.

(4) The right to establish private schools shall be guaranteed. Private schools that serve as alternatives to state schools shall require the approval of the state and shall be subject to the laws of the *Länder*. Such approval shall be given when private schools are not inferior to the state schools in terms of their educational aims, their facilities, or the professional training of their teaching staff, and when segregation of pupils according to the means of their parents will not be encouraged thereby. Approval shall be withheld if the economic and legal position of the teaching staff is not adequately assured.

(5) A private elementary school shall be approved only if the educational authority finds that it serves a special pedagogical interest or if, on the application of parents or guardians, it is to be established as a denominational or interdenominational school or as a school based on a particular philosophy and no state elementary school of that type exists in the municipality.

(6) Preparatory schools shall remain abolished.

Art. 8 – [Freedom of assembly]

(1) All Germans shall have the right to assemble peacefully and unarmed without prior notification or permission.

(2) In the case of outdoor assemblies, this right may be restricted by or pursuant to a law.

Art. 9 – [Freedom of association]

(1) All Germans shall have the right to form corporations and other associations.

(2) Associations whose aims or activities contravene the criminal laws, or that are directed against the constitutional order or the concept of international understanding, shall be prohibited.

(3) The right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual and to every occupation or profession. Agreements that restrict or seek to impair this right shall be null and void; measures directed to this end shall be unlawful. Measures taken pursuant to Article 12a, to paragraphs (2) and (3) of Article 35, to paragraph (4) of Article 87a, or to Article 91 may not be directed against industrial disputes engaged in by associations within the meaning of the first sentence of this paragraph in order to safeguard and improve working and economic conditions.

Art. 10 – [Privacy of correspondence, posts and telecommunications]

(1) The privacy of correspondence, posts and telecommunications shall be inviolable.

(2) Restrictions may be ordered only pursuant to a law. If the restriction serves to protect the free democratic basic order or the existence or security of the Federation or of a *Land*, the law may provide that the person affected shall not be informed of the restriction and that recourse to the courts shall be replaced by a review of the case by agencies and auxiliary agencies appointed by the legislature.

Art. 11 – [Freedom of movement]

(1) All Germans shall have the right to move freely throughout the federal territory.

(2) This right may be restricted only by or pursuant to a law, and only in cases in which the absence of adequate means of support would result in a particular burden for the community, or in which such restriction is necessary to avert an imminent danger to the existence or the free democratic basic order of the Federation or of a *Land*, to combat the danger of an epidemic, to respond to a grave accident or natural disaster, to protect young persons from serious neglect, or to prevent crime.

Art. 12 – [Occupational freedom]

(1) All Germans shall have the right freely to choose their occupation or profession, their place of work and their place of training. The practice of an occupation or profession may be regulated by or pursuant to a law.

(2) No person may be required to perform work of a particular kind except within the framework of a traditional duty of community service that applies generally and equally to all.

(3) Forced labour may be imposed only on persons deprived of their liberty by the judgment of a court.

Art. 13 – [Inviolability of the home]

(1) The home is inviolable.

(2) Searches may be authorised only by a judge or, when time is of the essence, by other authorities designated by the laws, and may be carried out only in the manner therein prescribed.

(3) If particular facts justify the suspicion that any person has committed an especially serious crime specifically defined by a law, technical means of acoustical surveillance of any home in which the suspect is supposedly staying may be employed pursuant to judicial order for the purpose of prosecuting the offence, provided that alternative methods

of investigating the matter would be disproportionately difficult or unproductive. The authorisation shall be for a limited time. The order shall be issued by a panel composed of three judges. When time is of the essence, it may also be issued by a single judge.

(4) To avert acute dangers to public safety, especially dangers to life or to the public, technical means of surveillance of the home may be employed only pursuant to judicial order. When time is of the essence, such measures may also be ordered by other authorities designated by a law; a judicial decision shall subsequently be obtained without delay.

(5) If technical means are contemplated solely for the protection of persons officially deployed in a home, the measure may be ordered by an authority designated by a law. The information thereby obtained may be otherwise used only for purposes of criminal prosecution or to avert danger and only if the legality of the measure has been previously determined by a judge; when time is of the essence, a judicial decision shall subsequently be obtained without delay.

(6) The Federal Government shall report to the Bundestag annually as to the employment of technical means pursuant to paragraph (3) and, within the jurisdiction of the Federation, pursuant to paragraph (4) and, insofar as judicial approval is required, pursuant to paragraph (5) of this Article. A panel elected by the Bundestag shall exercise parliamentary oversight on the basis of this report. A comparable parliamentary oversight shall be afforded by the *Länder*.

(7) Interferences and restrictions shall otherwise only be permissible to avert a danger to the public or to the life of an individual, or, pursuant to a law, to confront an acute danger to public safety and order, in particular to relieve a housing shortage, to combat the danger of an epidemic, or to protect young persons at risk.

Art. 14 – [Property – Inheritance – Expropriation]

(1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws.

(2) Property entails obligations. Its use shall also serve the public good.

(3) Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute concerning the amount of compensation, recourse may be had to the ordinary courts.

Art. 15 – [Socialisation]

Land, natural resources and means of production may for the purpose of socialisation be transferred to public ownership or other forms of public enterprise by a law that determines the nature and extent of compensation. With respect to such compensation the third and fourth sentences of paragraph (3) of Article 14 shall apply mutatis mutandis.

Art. 16 – [Citizenship – Extradition]

(1) No German may be deprived of his citizenship. Citizenship may be lost only pursuant to a law, and against the will of the person affected only if he does not become stateless as a result.

(2) No German may be extradited to a foreign country. The law may provide otherwise for extraditions to a member state of the European Union or to an international court, provided that the rule of law is observed.

Art. 16a – [Right of asylum]

(1) Persons persecuted on political grounds shall have the right of asylum.

(2) Paragraph (1) of this Article may not be invoked by a person who enters the federal territory from a member state of the European Communities or from another third state in which application of the Convention Relating to the Status of Refugees and of the Convention for the Protection of Human Rights and Fundamental Freedoms is assured. The states outside the European Communities to which the criteria of the first sentence of this paragraph apply shall be specified by a law requiring the consent of the Bundesrat. In the cases specified in the first sentence of this paragraph, measures to terminate an applicant's stay may be implemented without regard to any legal challenge that may have been instituted against them.

(3) By a law requiring the consent of the Bundesrat, states may be specified in which, on the basis of their laws, enforcement practices and general political conditions, it can be safely concluded that neither political persecution nor inhuman or degrading punishment or treatment exists. It shall be presumed that a foreigner from such a state is not persecuted, unless he presents evidence justifying the conclusion that, contrary to this presumption, he is persecuted on political grounds.

(4) In the cases specified by paragraph (3) of this Article and in other cases that are plainly unfounded or considered to be plainly unfounded, the implementation of measures to terminate an applicant's stay may be suspended by a court only if serious doubts exist as to their legality; the scope of review may be limited, and tardy objections may be disregarded.

Details shall be determined by a law.

(5) Paragraphs (1) to (4) of this Article shall not preclude the conclusion of international agreements of member states of the European Communities with each other or with those third states which, with due regard for the obligations arising from the Convention Relating to the Status of Refugees and the Convention for the Protection of Human Rights and Fundamental Freedoms, whose enforcement must be assured in the contracting states, adopt rules conferring jurisdiction to decide on applications for asylum, including the reciprocal recognition of asylum decisions.

Art. 17 – [Right of petition]

Every person shall have the right individually or jointly with others to address written requests or complaints to competent authorities and to the legislature.

Art. 17a – [Restriction of basic rights in specific instances]

(1) Laws regarding military and alternative service may provide that the basic right of members of the Armed Forces and of alternative service freely to express and disseminate their opinions in speech, writing and pictures (first clause of paragraph (1) of Article 5), the basic right of assembly (Article 8), and the right of petition (Article 17) insofar as it permits the submission of requests or complaints jointly with others, be restricted during their period of military or alternative service.

(2) Laws regarding defence, including protection of the civilian population, may provide for restriction of the basic rights of freedom of movement (Article 11) and inviolability of the home (Article 13).

Art. 18 – [Forfeiture of basic rights]

Whoever abuses the freedom of expression, in particular the freedom of the press (paragraph [1] of Article 5), the freedom of teaching (paragraph [3] of Article 5), the freedom of assembly

(Article 8), the freedom of association (Article 9), the privacy of correspondence, posts and telecommunications (Article 10), the rights of property (Article 14), or the right of asylum (Article 16a) in order to combat the free democratic basic order shall forfeit these basic rights. This forfeiture and its extent shall be declared by the Federal Constitutional Court.

Art. 19 – [Restriction of basic rights – Legal remedies]

(1) Insofar as, under this Basic Law, a basic right may be restricted by or pursuant to a law, such law must apply generally and not merely to a single case. In addition, the law must specify the basic right affected and the Article in which it appears.

(2) In no case may the essence of a basic right be affected.

(3) The basic rights shall also apply to domestic artificial persons to the extent that the nature of such rights permits.

(4) Should any person's rights be violated by public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts. The second sentence of paragraph (2) of Article 10 shall not be affected by this paragraph.

II. The Federation and the *Länder*

Art. 20 – [Constitutional principles – Right of resistance]

(1) The Federal Republic of Germany is a democratic and social federal state.

(2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies.

(3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.

(4) All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available.

Art. 20a – [Protection of the natural foundations of life and animals]

Mindful also of its responsibility toward future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.

Art. 21 – [Political parties]

(1) Political parties shall participate in the formation of the political will of the people. They may be freely established. Their internal organisation must conform to democratic principles. They must publicly account for their assets and for the sources and use of their funds.

(2) Parties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall rule on the question of unconstitutionality.

(3) Details shall be regulated by federal laws.

IX. The Judiciary

Art. 92 – [Court organisation]

The judicial power shall be vested in the judges; it shall be exercised by the Federal Constitutional Court, by the federal courts provided for in this Basic Law, and by the courts of the *Länder*.

Art. 93 – [Jurisdiction of the Federal Constitutional Court]

(1) The Federal Constitutional Court shall rule:

1. on the interpretation of this Basic Law in the event of disputes concerning the extent of the rights and duties of a supreme federal body or of other parties vested with rights of their own by this Basic Law or by the rules of procedure of a supreme federal body;

2. in the event of disagreements or doubts concerning the formal or substantive compatibility of federal law or *Land* law with this Basic Law, or the compatibility of *Land* law with other federal law, on application of the Federal Government, of a *Land* government, or of one third of the Members of the Bundestag;

2a. in the event of disagreements whether a law meets the requirements of paragraph (2) of Article 72, on application of the Bundesrat or of the government or legislature of a *Land*;

3. in the event of disagreements concerning the rights and duties of the Federation and the *Länder*, especially in the execution of federal law by the *Länder* and in the exercise of federal oversight;

4. on other disputes involving public law between the Federation and the *Länder*, between different *Länder*, or within a *Land*, unless there is recourse to another court;

4a. on constitutional complaints, which may be filed by any person alleging that one of his basic rights or one of his rights under paragraph (4) of Article 20 or under Articles 33, 38, 101, 103 or 104 has been infringed by public authority;

4b. on constitutional complaints filed by municipalities or associations of municipalities on the ground that their right to self-government under Article 28 has

been infringed by a law; in the case of infringement by a *Land* law, however, only if the law cannot be challenged in the constitutional court of the *Land*;

5. in the other instances provided for in this Basic Law.

(2) At the request of the Bundesrat, a *Land* government or the parliamentary assembly of a *Land*, the Federal Constitutional Court shall also rule whether in cases falling under paragraph (4) of Article 72 the need for a regulation by federal law does not exist any longer or whether in the cases referred to in clause 1 of paragraph (2) of Article 125a federal law could not be enacted any longer. The Court's determination that the need has ceased to exist or that federal law could no longer be enacted substitutes a federal law according to paragraph (4) of Article 72 or clause 2 of paragraph (2) of Article 125a. A request under sentence 1 is admissible only if a bill falling under paragraph (4) of Article 72 or sentence 2 of paragraph (2) of Article 125a has been rejected by the German Bundestag or if it has not been considered and determined upon within one year, or if a similar bill has been rejected by the Bundesrat.

(3) The Federal Constitutional Court shall also rule on such other matters as shall be assigned to it by a federal law.

Art. 94 – [Composition of the Federal Constitutional Court]

(1) The Federal Constitutional Court shall consist of federal judges and other members. Half the members of the Federal Constitutional Court shall be elected by the Bundestag and half by the Bundesrat. They may not be members of the Bundestag, of the Bundesrat, of the Federal Government, or of any of the corresponding bodies of a *Land*.

(2) The organisation and procedure of the Federal Constitutional Court shall be regulated by a federal law, which shall specify in which instances its decisions shall have the force of law. The law may require that all other

legal remedies be exhausted before a constitutional complaint may be filed, and may provide for a separate proceeding to determine whether the complaint will be accepted for decision.

Art. 100 – [Concrete judicial review]

(1) If a court concludes that a law on whose validity its decision depends is unconstitutional, the proceedings shall be stayed, and a decision shall be obtained from the *Land* court with jurisdiction over constitutional disputes where the constitution of a *Land* is held to be violated, or from the Federal Constitutional Court where this Basic Law is held to be violated.

This provision shall also apply where the Basic Law is held to be violated by *Land* law and where a *Land* law is held to be incompatible with a federal law.

(2) If, in the course of litigation, doubt exists whether a rule of international law is an integral part of federal law and whether it directly creates rights and duties for the individual (Article 25), the court shall obtain a decision from the Federal Constitutional Court.

(3) If the constitutional court of a *Land*, in interpreting this Basic Law, proposes to deviate from a decision of the Federal Constitutional Court or of the constitutional court of another *Land*, it shall obtain a decision from the Federal Constitutional Court.

Main commentaries on the Basic Law:

- R. Dolzer / C. Waldhoff / K. Graßhof
  Bonner Kommentar zum Grundgesetz
  Loose-leaf collection (17 vol)

- Maunz/Dürig
  Kommentar zum Grundgesetz
  Loose-leaf-collection (6 vol)

- Merten/Papier
  Handbuch der Grundrechte (7 vol)

- Schlaich/Koriot
  Das Bundesverfassungsgericht
  7. Aufl. (2007)

*Closing Remarks**

*Chief Justice Reynato S. Puno***

Let me reiterate my gratitude to Dr. Rudolf Dolzer for delivering the first Distinguished Lecture sponsored by the Supreme Court and the Konrad Adenauer Stiftung for the year 2009. Yesterday, at the luncheon hosted by His Excellency, the Ambassador of Germany to the Philippines, I told the guests why we had chosen "Constitutional Courts" as the first subject of our Lecture Series this year. I said that, looking at the judicial landscape of the world, it would appear that most countries have adopted the Constitutional Court as the legal vehicle to resolve disputes involving breaches of the Constitution.

Indeed last year, we attended the 25th anniversary of the Constitutional Court of South Africa in Capetown, South Africa. They convened a global conference of Constitutional Courts attended by some 94 countries. The justices exchanged rare knowledge on the structure and the powers of their respective High Courts. It was demonstrably clear that constitutional courts were the favored structure of most of the democratic countries to resolve constitutional disputes.

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* Delivered at the *Chief Justice Reynato S. Puno First Distinguished Lecture, Series of 2009*, on May 7, 2009, at the Court of Appeals Auditorium, Court of Appeals Centennial Building, Ma. Orosa St., Manila and via video conferencing at the Supreme Court Session Hall, Baguio City, and Royal Mandaya Hotel, Davao City.

** Chief Justice Reynato S. Puno was appointed the 22nd Chief Justice of the Philippines by then President Gloria M. Arroyo on December 7, 2006. He is also the concurrent chair of the SC First Division and ex officio Chair of the Judicial and Bar Council (JBC) and the Presidential Electoral Tribunal (PET).

Over here in the Southeast Asian region, we do have a yearly conference of Constitutional Courts, hosted by the Konrad

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Prior to his appointment to the High Court in 1993 by President Fidel V. Ramos, he served as: Associate Justice of the Intermediate Appellate Court and the Court of Appeals (CA), Deputy Minister of Justice, acting Chair of the Board of Pardons and Parole, Solicitor in the OSG (1971), Assistant Solicitor General in 1974, and City Judge of Quezon City. He holds the distinction of being the youngest appointee to the CA at the age of 40 in 1980.

As Chief Justice, he chairs the Court's First Division, the *Court Systems Journal* Committee, and the Supreme Court Committee that digests the Court's decisions for distribution to members of the Judiciary. He also heads the Committee on Revision of the Rules of Court that drafted the Rules of Procedure in Election Contests Before the Courts Involving Elective Municipal and Barangay Officials, among many others.

Chief Justice Puno obtained his Bachelor of Science Degree in Jurisprudence and his Bachelor of Laws Degree from the University of the Philippines in 1962. He served as Editor in Chief of *The Philippine Collegian*. He pursued his post-graduate studies in the United States on a full scholarship. He obtained his Master of Comparative Laws degree at the Southern Methodist University, Dallas, Texas, with high distinction and as class valedictorian; his Master of Laws at the University of California, Berkeley; and completed all the academic requirements for the degree of Doctor of Juridical Science at the University of Illinois, Champaign, Urbana. In 2005, he became the first Filipino to receive the Distinguished Global Alumnus Award from the Dedman School of Law, Southern Methodist University, Dallas, Texas. He has been conferred honorary doctorates by five of our universities and by the Hannam University, South Korea.

While a post-graduate student, Chief Justice Puno received five American Jurisprudence Prize for Excellence awards given by the Lawyers Cooperative Publishing Co. of New York and the Bancroft Whitney Publishing Co. of California.

In 1962, he started professional practice at the Gerardo Roxas and Sarmiento Law Office as Assistant Attorney. Upon his return from

Adenauer Foundation. Again, it is obvious to the eye that, in our region, most countries have also adopted the Constitutional Court, to decide questions involving violations of their fundamental law. We are one of the few countries without a separate Constitutional Court for we have a Supreme Court that performs the traditional role of a Constitutional Court. Over the years, we hear clamors for a reexamination of our Constitution. Some quarters are pushing the idea that it is time to study the Constitutional Court model and examine its adaptability to our distinct legal setting.

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the United States in 1969, he joined his brother, the late Judge Isaac S. Puno, Jr., in law practice.

On August 1, 1986, Chief Justice Puno was reappointed to the Court of Appeals. In 1993, then President Fidel V. Ramos appointed him as Associate Justice of the Supreme Court. He was Chair of its Second Division.

He served as Bar Examiner in Criminal Law in 1970, Mercantile Law in 1989, and Taxation in 1993. He was also a Lecturer of the UP Law Center, Institute of Judicial Administration, and a Professor of Law at the Far Eastern University from 1969 to 1973. He now lectures at the Philippine Judicial Academy (PHILJA).

Among Chief Justice Puno's most prestigious awards are: Ten Outstanding Young Men Award (TOYM), Araw ng Maynila Award as Outstanding Jurist, UP's Most Outstanding Law Alumnus, Grand Cross of Rizal from the Order of the Knights of Rizal, Grand Lodge Gold Medal from the Grand Lodge of Free and Accepted Masons of the Philippines, and Centennial Awardee in the field of law given by the United Methodist Church on the occasion of its 100th anniversary.

The Chief Justice is active in civic and church activities as a lay preacher of the United Methodist Church and Chair of the Administrative Council of the Puno Memorial United Methodist Church.

Chief Justice Puno was married to the former Supreme Court Clerk of Court Atty. Luzviminda D. Puno with whom he has three children.

Without tilting our view one way or the other on the issue, we thought that the Supreme Court could enrich the different perspectives on the problem by sponsoring a lecture on the Constitutional Court of Germany. It was easy to pick on the German model for, doubtless, it is a very successful model and it is Germany that pioneered the concept in the judicial world.

Our second problem was the choice of the lecturer. It was a minor problem, for Germany is one country with a surplus of legal scholars. We chose Prof. Dr. Rudolf Dolzer, whose intellectual credentials are recognized not only in Germany, but also in Europe and the United States (U.S.). I think you will agree with me that Prof. Dr. Dolzer gave us an outstanding lecture on the powers of the Constitutional Court of Germany and the structure of rights under the Basic Law of Germany.

I like to believe, however, that the debate on the shape and type of judicial structure – whether through a Constitutional Court or a Supreme Court – that should resolve constitutional disputes is but a subset of a broader problem. This broader problem is historic – the age-old problem of how much power courts should be given in protecting the constitutional rights of the people. Historically, this power has been lodged with the Parliament, whose members are elected by the people. The classic model was provided by Great Britain, where acts of Parliament are not reviewed by its courts. Then came the American Revolution, which shook not only the political world, but the judicial world as well. For, as a consequence, the Americans broke away from the judicial system of England. They created the Federal Court System, with the Supreme Court at the apex.

In ***Marbury v. Madison***, the U.S. Supreme Court, speaking through Mr. Chief Justice Marshall, ruled that

> it is emphatically the power of the judiciary to say what the law is.

That pronouncement started the debate among policymakers, legal scholars, etc., on the role of courts and parliaments in protecting constitutional rights. The debate struck at the heart of democracy — whether to give the power to the elected representatives of the people or to an unelected but independent body of legal experts. In the continuum of the debate, the concept of Constitutional Courts emerged, notably in Germany and in Austria.

Again, history tells us that, for a long time, the parliaments, more than the courts, were favored with the power to protect the rights of the people. Such was the strength of parliaments that scholars warned of the politization of courts. In the second half of the last century, however, we saw the favor turning to the courts. More and more, courts were given the awesome power to review acts of parliament and to strike down acts that violated the Constitution. And more and more, the jurisdiction of courts was expanded to include even cases with dominant political strands. Several reasons are cited for this paradigm shift. One prominent reason given is the timidity of elected leaders to protect the rights of the minority for fear of losing the popular support of the people. Unelected judges do not have to fear loss of popular support in protecting human rights, for their job is not to be popular but to be correct; hence, they serve with guaranteed tenure of office.

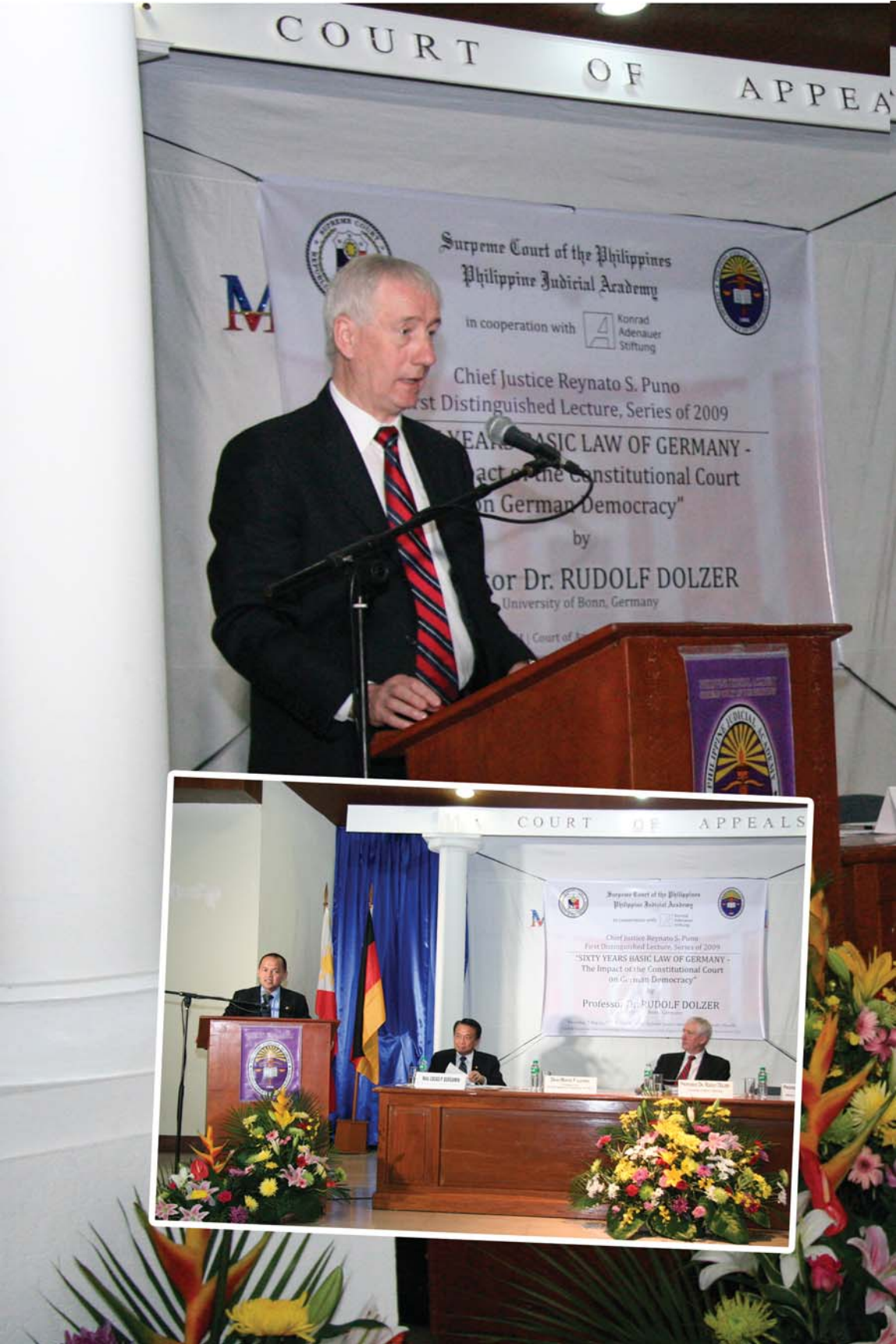
An offshoot of this paradigm shift is the reverse phenomenon called the "judicialization of politics." Supreme Courts and Constitutional Courts are being given expanded judicial powers. In the case of the Philippines, our Supreme Court was given the power to strike down acts of government done with grave abuse of discretion. The extent of that overarching phrase "done in grave abuse of discretion" can reach the doorstep of heaven if given an extreme, elastic reading.

So it is with the jurisdiction of some Constitutional Courts. For instance, the Constitutional Court of Hungary is known for its dominating presence in politics. Hungary is known not as a

parliamentary democracy, but as a judicial democracy. Its Constitutional Court does not only have the power to annul unconstitutional laws. It is also significantly involved in the Parliament's activities and has the power to direct Parliament to action. In one case, it held that the Parliament was acting unconstitutionally by omission in failing to pass certain legislation. So it is with the Constitutional Court of Italy. It can change the actual language of the challenged statute to conform to constitutional requirements.

It is never easy to strike a balance of powers in government – between and among the executive, the legislative and the judiciary – in protecting constitutional rights. This afternoon, we learned from Prof. Dr. Rudolf Dolzer how this delicate balance was struck in Germany, and how its maintenance contributed to the country's political stability and economic progress. There is no magic formula in striking this balance, for the balance will be influenced by our own history, by our political maturity and by our economic needs and development. Let us not be imprisoned by the past; let us open our eyes to the best practices of the present, so we can look to a better constitutional future.

I thank all for attending this Distinguished Lecture Series.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Supreme Court of the Philippines
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in cooperation with
Konrad Adenauer Stiftung
Chief Justice Reynato S. Puno
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"SIXTY YEARS BASIC LAW OF GERMANY -
The Impact of the Constitutional Court
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Supreme Court of the Philippines
Philippine Judicial Academy
Ateneo de Manila Law School
United Nations Development Programme
and the
Office of the Presidential Adviser
on the Peace Process

present the

Chief Justice Reynato S. Puno
Second Distinguished Lecture
Series of 2009

September 30, 2009, Wednesday, 2:00 p.m.
Ateneo Professional Schools Auditorium
Ateneo de Manila Law School
Rockwell Drive, Rockwell Center, Makati City

and

via Video Conferencing
Ateneo de Davao University
Davao City

University of St. La Salle
Bacolod City

Program

Doxology

Philippine National Anthem
Supreme Court Choir

Greetings
Dean Cesar L. Villanueva
Chair, PHILJA Department of Commercial Law
Dean, Ateneo de Manila Law School

Opening Remarks
Honorable Renato C. Corona
Associate Justice, Supreme Court

Welcome Remarks
Secretary Avelino I. Razon, Jr.
Presidential Adviser on the Peace Process, OPAPP

Musical Intermission
Supreme Court Choir

Introduction of the Resource Speakers
Honorable Consuelo Ynares-Santiago
Associate Justice, Supreme Court

LECTURE

COMPARATIVE PEACE PROCESSES AND THEIR RELEVANCE TO THE PHILIPPINE SETTING

Mr. Kelvin Ong
Senior Political Affairs Officer, Mediation Support Unit
Department of Political Affairs, United Nations

Professor Edmundo G. Garcia
Senior Policy Advisor, International Alert
Member, 1986 Constitutional Commission

OPEN FORUM

Presentation of Plaques of Appreciation

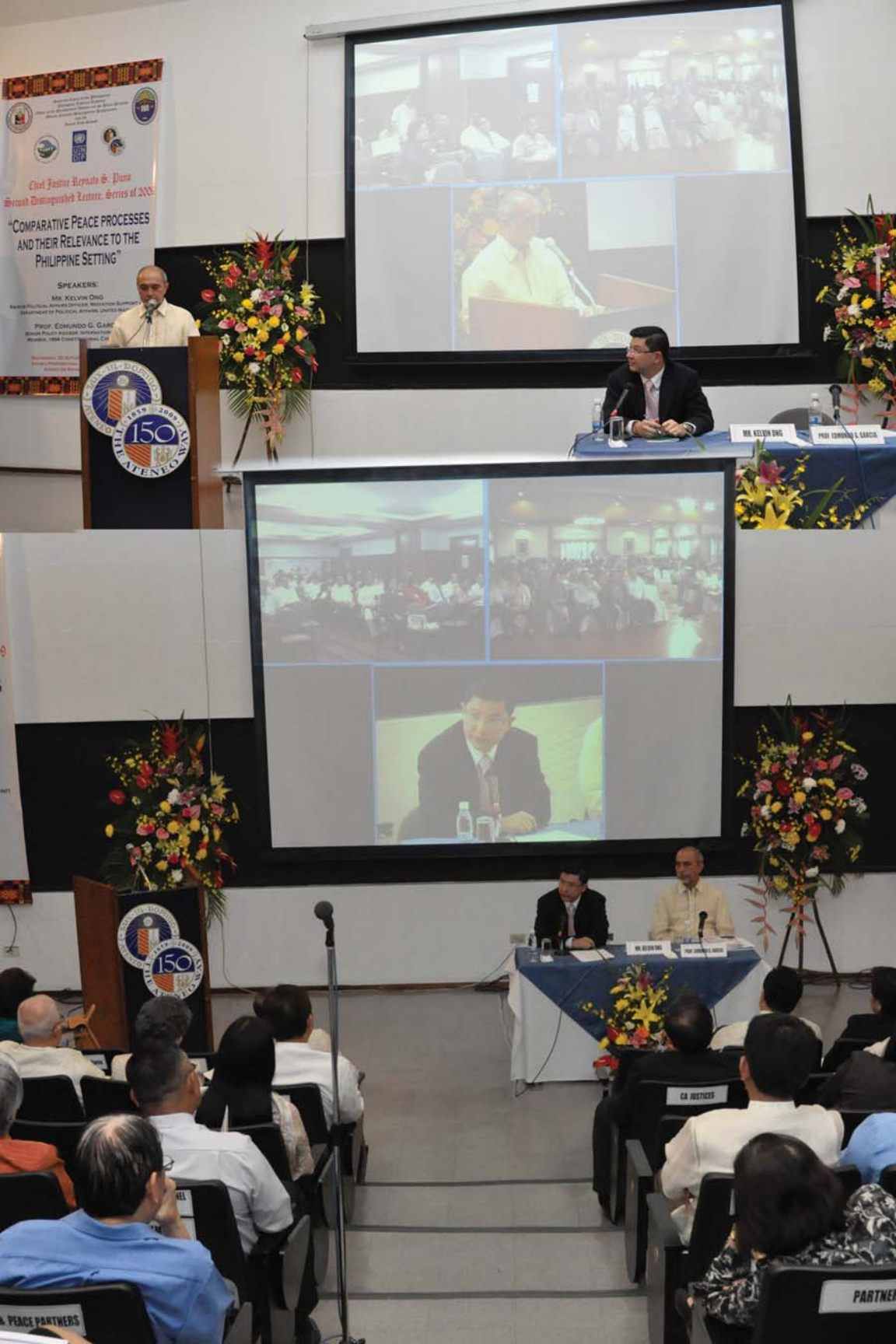
by

Chief Justice Reynato S. Puno
Justice Antonio T. Carpio
Justice (Ret.) Adolfo S. Azcuna
Secretary Avelino I. Razon Jr.
Dean Cesar L. Villanueva

Closing Remarks
Honorable Reynato S. Puno
Chief Justice

Supreme Court Hymn

Master of Ceremonies
Professor Sedfrey M. Candelaria
Chair, PHILJA Department of Special Areas of Concern
Associate Dean, Ateneo de Manila Law School


Chief Justice Renato S. Puno
Second Distinguished Lecture, Series of 2009
"COMPARATIVE PEACE PROCESSES AND THEIR RELEVANCE TO THE PHILIPPINE SETTING"
SPEAKERS:
MR. KELVIN ONG
PROF. EDMUNDO G. GARCIA
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PROF. EDMUNDO G. GARCIA
CA JUSTICES
PEACE PARTNERS
PARTNER

*Greetings**

*Dean Cesar L. Villanueva***

Chief Justice Reynato S. Puno,
the other justices of the Supreme Court as well as the justices from the Court of Appeals, Sandiganbayan, Court of Tax Appeals, and other members of the judiciary
Secretary Avelino Razon,
and other delegates from the executive department
Our distinguished guest speakers
Other distinguished delegates from the Ateneo Law School, Ateneo de Davao and University of St. La Salle
Ladies and gentlemen,

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** Professor Villanueva is the present Dean of the Ateneo Law School, Chair of PHILJA Department of Commercial Law, Professorial Lecturer at PHILJA training programs, governor of the MCLE Board, and member of the legal education panel of the CHED.

He obtained his Bachelor of Laws degree (1981) from the Ateneo de Manila University, graduating *cum laude* and class valedictorian, and ranked second in the bar exams that year. In 1982, he ranked sixth in the CPA board examinations. He earned a Master of Laws degree from the Harvard University Law School (1989), and was conferred a Diplomate in Juridical Science (2005) by the San Beda Graduate School of Law.

He is a senior partner in the law firm Villanueva Gabionza and De Santos; a member of the Makati Medical Center board of directors, the Clark Electric Distribution Corporation, the Board of Trustees of the Institute of Corporate Directors, and the Kapampangan Development Foundation; and a fellow of the Australian Institute of Corporate Directors.

On behalf of the Ateneo Law School, the Ateneo de Davao and the University of St. La Salle, we extend to you our greetings this afternoon. We thank the Supreme Court and the Philippine Judicial Academy for allowing all three institutions to be co-sponsors for this very important lecture series. Unfortunately, we apologize that we meet today when classes are suspended in the Ateneo Law School not only because it was so declared by both the CHED and our President but also because many of our students and faculty are deeply involved in the relief program and they have located themselves not only here but also at the La Salle forum.

Although we already had the doxology, I would like to read to you, with due indulgence into the records of this forum, what we feel would be the situation now in which we hold this peace forum today. I think the message is that our country is faced with so much trial and tribulation that if we cannot get along and be at peace with one another then we will not be in a position to meet the challenges to our nation. Allow me to read this prayer that has been going around and which most of must have received:

> Our Father in heaven, we humbly pray to you as a nation. We plead for your merciful heart that you may look upon us with compassion. We pray for our brothers who have lost their lives; receive them in your heavenly kingdom. We pray for those who are lost and those trying to get home to their families; make their way easy. We pray for those who have lost their homes; give them comfort. We pray for those who are still exposed to the bad conditions and awaiting help; give them strength. Everything we do for our unfortunate brethren, we do it for you and your glory. All these we pray, in the most holy name of our Lord. Amen.

Welcome to all.

*Opening Remarks**

*Justice Renato C. Corona***

A warm and pleasant good afternoon again to all of you.

Shortly after the end of World War II, President Franklin Roosevelt asked Prime Minister Winston Churchill what the recently concluded war ought to be called. Churchill quickly suggested "The Unnecessary War." In the preface to the Second World War, the Gathering Storm, Churchill wrote:

> There never was a war more easy to stop than that which has just wrecked what was left to the world from the previous struggle. The human tragedy reaches its climax in the fact that after all the exertions and sacrifices of hundreds of millions of people and the victories of the righteous cause, we have still not found peace or security. And that will lie in the grip of even worse perils than those who have surmounted. It is my earnest hope that pondering on the past may give guidance in days to come, enable a new generation to repair some of the errors of the former years and thus govern in accordance with

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** Associate Justice Renato C. Corona is one of the youngest brilliant law experts to be named to the Supreme Court. He was appointed Associate Justice on April 12, 2002 – his first stint with the Judiciary.

A consistent honor student, Justice Corona ranked fifth in his Ateneo Law School Class of 1974. This, he accomplished while working as Executive Assistant to the Deputy Executive Secretary, Office of the President.

the needs and glory of man the awful unfolding scene of the future.

Previously, Justice Corona had held several positions in the Executive Department. He was Presidential Spokesman, Acting Executive Secretary, and Presidential Chief of Staff at the Office of the President, and in 2001, Chief of Staff in the Office of the Vice President.

While serving as Chief Presidential Legal Counsel in 1998, he held concurrent positions: vice-chairman, Presidential Anti-Crime Commission; member, Presidential Committee on Bail, Release and Pardon of the Cabinet Consultative Committee on the Government of the Republic of the Philippines – National Democratic Front (GRP-NDF) Peace Talks, and of the Cabinet Committee on National Security. He was Deputy Executive Secretary (1996–1998), and Assistant Executive Secretary for Legal Affairs (1992–1998).

He was distinguished as a legal specialist in various banks as tax counsel during his private practice (1975–1991). He was Special Counsel to the Supervising Governor of the Industrial Projects Department, Development Bank of the Philippines; Senior Vice President/General Counsel and Corporate Secretary, Commercial Bank of Manila; and member, Tax and Corporate Counseling Group, Tax Division of Sycip Gorres Velayo & Co.

Justice Corona is a Doctor of Civil Law candidate at the UST Graduate School where he was awarded Most Outstanding Graduate School Student in 2001. He received his Master of Laws degree from Harvard Law School with concentration on foreign investment policies and the regulation of corporations and financial institutions under the Vivian B. Allen Scholarship in 1992. He also holds a Master of Business Administration degree from the Ateneo de Manila University Professional Schools.

In 1970, he received his Bachelor of Arts degree from the Ateneo School of Arts and Sciences. He was president of the Order of Utopia Law Fraternity, and the Editor in Chief of *The Guidon*, the student newspaper of the Ateneo School of Arts and Sciences (1968–1969).

A recipient of a special award for achievements in the public service, given by the Harvard University/Kennedy School of Government Alumni Foundation of the Philippines (April 1993), he holds the rank of lieutenant colonel, as a reservist – with basic parachutist's badge – at the Judge Advocate General's Service, Armed Forces of the Philippines.

Sixty years thenceforth, that awful future is still unfolding in pockets of conflict and strife all over the world. Two of the oldest and bloodiest conflicts are raging right here, right now. Ideology-based armed conflicts involving the Moro Islamic Liberation Front (MILF), the Moro National Liberation Front (MNLF), and the New People's Army (NPA) affect 91 percent of the provinces of the country. The most conflict-ridden of these provinces languish at the bottom 10 of every dimension of human development. In Tawi-Tawi, the average life expectancy is only 51 years, shorter by 10 to 15 years than the national average. In Sulu, there are more child combatants than high school graduates because only 21 percent of its 18-year old population ever reach high school. In Basilan, the real per capita income is among the lowest at P13,000 per annum or roughly 35 measly pesos per day.

In terms of human lives lost and disrupted, the figures are stark. More than 100,000 Filipino combatants and civilians have perished in the Mindanao conflict since the '70s while more than a million people have been displaced by the AFP-NPA conflict. The cost of these conflicts has spilled over to the economy. The foregone earnings of all casualties have been estimated at P2.13 billion. Output loss over 20 years of conflict has reached a staggering P158 billion while investments deflected are estimated to reach P10 billion every year. Indeed, too many lives and opportunities have been lost and yet peace and security have remained elusive.

Today, we put our collective imagination to work to conceptualize a framework for peace which will be most relevant to our people. We in the judiciary join you in this endeavor because our stake in its success is enormous. And because in any armed conflict the rule of law is always the first casualty, respect for the law should be the first item in the agenda of any peace process and no framework for peace can call itself that unless it hews closely to the Constitution.

Ladies and gentlemen, we pose the challenge to you today.

Thank you.

*Welcome Remarks**

*Secretary Avelino I. Razon, Jr.***

Chief Justice Reynato S. Puno
The Honorable Justices of the Supreme Court
and Court of Appeals
Distinguished men and women of the judiciary
Dean Cesar Villanueva of the Ateneo de Manila Law School
Officials and personnel of the
Office of the Presidential Adviser on the Peace Process
Members of the diplomatic corps
Our partners in the peace process
Our distinguished speakers,
Mr. Kelvin Ong and Mr. Ed Garcia
Ladies and gentlemen,

Good afternoon.

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** Ret. Gen. Avelino "Sonny" Ignacio Razon, Jr. is currently the Presidential Adviser on the Peace Process. He belongs to the elite Philippine Military Academy "Marangal" Class of 1974. He received early education from the UP, and earned Master's degrees in Management from the PCU and in Public Administration from the MLQU.

A three-star General, he was former Chief of the Philippine National Police; Head of Task Force *Usig*, a special investigation unit for unexplained killings; and held various positions in the NCR and Visayas that earned him recognition for his dedication and professionalism as a police officer. He was Special Assistant on

By revisiting the past, looking back on how the previous as well as the present government dealt with the problem of armed conflict would reveal how our government had worked hard to address the structural causes of violent conflict and negotiated for a peace settlement with the rebels. The Office of the Presidential Adviser on the Peace Process (OPAPP), which is at the forefront of the comprehensive peace policy, is proof of the government's earnest and steadfast effort to put an end to the armed conflict in our country. But the foremost manifestation of government's commitment to peace through peaceful means is the government's affirmation of the primacy of the peace process in spite of legal setbacks, the cycle of violence and political opposition specially during the MOA-AD debacle last year. Our peace policy was an offshoot of a nationwide and multi-sectoral consultation spearheaded by the National Unification Commission chaired by the late Atty. Haydee Yorac to determine the root causes of the armed conflict and to formulate policy measures to address them.

I want to highlight the fact that our peace policy is a product of consultation and dialogue with our people, from the northernmost part to the southernmost part of the Philippine archipelago. The consultation and dialogue included the rebels themselves, the CPP-NPA-NDF, the MNLF, the MILF, and the RAM-SFP-YOU. Therefore, our peace policy emanated from the sovereign will of our countrymen.

Security to acting Chief of Staff Fidel V. Ramos (February 1986); and his Senior Aide-de-Camp at the Philippine Constabulary (1978–1981). He was Commanding Officer of the 224th Company in Laguna (1981–1983), and of the 563rd Philippine Constabulary (1974); Chief, National Capital Region Narcotics Field Unit (NARCOM); Deputy Group Commander, Special Operations of the Presidential Security Group; and Group Commander, Presidential Protection Group.

He ranked number one in the Infantry Officer's Advance Course and the Officer's Senior Executive Course, and received the Distinguished Conduct Star (second highest military award) and Cavalier Award for Command and Administration (PMA Alumni Association). He is a member of the Most Worshipful Grand Lodge of Free and Accepted Masons of the Philippines, the Lion's Club, and the Toastmasters Club.

The Philippine peace policy is amplified by the so-called The Six Paths to Peace. The Six Paths to Peace are broad, interrelated and mutually inclusive measures to address the armed conflict. The six paths is what OPAPP, as the premier government institution for peace, adheres to, pursues, and implements. The six paths are: first, pursuit of economic and political reforms; second, consensus building and empowerment for peace; third, peaceful negotiated settlement in the different rebel groups; fourth, programs for reconciliation, reintegration into mainstream society and rehabilitation of former rebels; fifth, addressing concerns arising from the continuing armed hostilities; and sixth, building and nurturing a climate conducive to peace.

Indeed, the road to peace is protracted and an exacting journey. That is why in OPAPP and among the peace communities, we term this whole gamut of interrelated, dynamic and multi-track approaches directed towards the resolution of armed conflict as peace process. The Philippine peace framework has the elements of peacekeeping, peacemaking, peace-building and conflict prevention. While in other context, peace process in practice and in theory is narrower and simpler. It needs negotiation, secession of hostilities and signing of the peace accord, reconciliation and state building and democratic consolidation. It is because of these differences of peace frameworks, peace tools and varied contexts that we are having this lecture-forum with the subject "Comparative Peace Process and Its Relevance to the Philippines."

Hopefully, at the end of this event, we will have new ideas on how to advance peace in our country in our own creative way and in our respective spiels to the delightful lectures of our speakers from the United Nations, Mr. Kelvin Ong, and from the International Alert, Prof. Ed Garcia. Mr. Kelvin Ong will talk about the role of the United Nations in the ongoing peace process in different regions around the world. He will be focusing on development norms, standards, and strategies which may help member-states in their conduct of the peace

process; while Mr. Ed Garcia will discuss the lessons learned by other countries in peace processes and how these would apply to the ongoing peace negotiations in the Philippines, particularly, with the CPP-NPA-NDF and the MILF. However, I believe that the conduct of this event alone which is jointly undertaken by OPAPP and the Supreme Court through the Philippine Judicial Academy has an intrinsic value, has a wisdom in itself. The reflection I have of this first ever OPAPP-Supreme Court-Philippine Judicial Academy activity is that war, with other forms of violence, in spite of its omnipresence in human history is not inevitable. Through interdisciplinary and multi-perspective methods, much can be learned about the causes of conflict and conditions of peace. Knowledge to promote peace must include that on violent conflict and that must be transmitted and be made available for the use of decision makers and leaders. Ideas for peace, like any great ideas that advance human civilization, should be integrated into the realm of policy because ideas have the greatest impact when they are embraced by institutions which formulate, adopt and implement policies for the common good. I commend in advance the OPAPP-PHILJA project team headed by Justice Adolfo Azcuna for coming up with this activity. I sincerely thank also the Hon. Chief Justice for giving us this privilege, this avenue to present and discuss the issue of peace and conflict in our country before the distinguished members of the Philippine judiciary.

Before I end, let me quote John F. Kennedy on peace:

> But peace does not rest on charters and covenant alone. It lies in the hearts and minds of all people. So let us not rest all our hope on parchments or on papers. Rather, let us strive to build a desire for peace, the willingness to work for peace in the hearts and minds of all our people. I believe that we can. I believe the problems of human destiny are not beyond the reach of human beings.

With that, I welcome you all. *Nawa'y masiyahan kayo sa ating talakayan. Maraming salamat at isang mapayapang hapon sa inyong lahat.*

*Comparative Peace Process and Their Relevance to the Philippine Setting**

Mr. Kelvin Ong

Mr. Ong is the Senior Political Affairs Officer of the Mediation Support Unit, Department of Political Affairs, UN, that provides support to some 18 peace processes globally. He was Chief of the Disarmament, Demobilization and Reintegration Section in the Department of Peacekeeping Operations (DPKO) (2003-2007), that oversaw the DDR programmes in UN Peacekeeping Missions. In 2006, he was seconded to the UN Development Programme to head the Justice and Security Sector Unit, and was responsible for providing technical advisory services on rule of law and security sector reform to UNDP Country Offices. Since joining the UN in 2001, he has held headquarters and field positions: planning officer, Office of the Assistant-Secretary General for Mission Support, DPKO; Special Assistant, UN Assistance Mission in Afghanistan; Special Assistant to the Special Representative of the Secretary-General in Liberia and to the Assistant-Secretary General for the Rule of Law and Security Institutions in the DPKO. Previously, he was with the International Peace Academy in New York, directing a research programme on the UN and on regional organizations; and had served in the Singapore Armed Forces.

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Good afternoon everyone here in the auditorium, in Davao, and in Bacolod.

After listening to that wonderful Supreme Court choir I am almost apologetic that my presentation is not coming in four-part harmony, but I will do my best.

Let me first express my thanks to the Supreme Court and OPAPP for inviting me to address this lecture. It truly is an honor to be able to contribute a small part to your search for durable peace in the Philippines.

Your request for the UN to share its experiences with you on mediation is actually quite timely. In the last three years, the UN has undertaken a series of efforts to consolidate its own capacity and knowledge on mediation. We have taken several steps to review the lessons of our mediation work in different parts of the world. Consultations were held with member-states, regional organizations and non-governmental organizations in Asia, Africa, Europe, Latin America; and these reflections and consultations culminated in the 2009 Report of the Secretary-General to the Security Council entitled "Enhancing Mediation and its Support Activities." In this lecture, I would like to share with you some of our findings and the principles that underpin our mediation effort. The organizers of this lecture series also requested that I touch on the issues of disarmament, demobilization and reintegration (DDR), and the issue of transitional justice and their relevance to the peace process.

Let me first start with two preliminary thoughts on these two issues, DDR and transitional justice. On DDR, the international community has accumulated significant experience, do not reinvent to it, make new mistakes, not only ones that we have done before. The UN has in effect codified much of its experience into strategic, normative and operational guidelines. The UN Integrated DDR Standards have benefited from the experiences of member-states and 16 UN departments,

agencies, funds and programs. We have provided OPAPP with copies and can continue to assist with its highly political and technical issues. On transitional justice, the field continues to evolve in rather interesting and practical ways. To my analysis, the debate on peace and justice is moderating. There is now a better understanding between human rights and security communities, that peace and justice are not opposite ends of the pole but are interdependent. You cannot achieve sustainable peace unless justice is served. And mediators are now exploring new ways to integrate transitional justice components into peace processes and agreements. Advocates for transitional justice now also take a much broader approach to the issue. Peace cannot be secured only through prosecution. More is required. By making no mistake, there are serious challenges in striking the right balance amongst the needs and rights of combatants, communities and victims. That is the real challenge for both DDR programs and transitional justice programs.

Let me first turn to our experience in mediation. The UN remains a leading actor in the field of mediation and conflict resolution. We, however, do not assume or pretend to have a monopoly of the knowledge or the action. We have committed to lead, if requested and conditions are right. But beyond mediation, the UN through its peacekeeping missions, special political missions, peace-building offices and UN country teams have also played supportive roles in the implementation of peace agreements. We are, however, committed to supporting other mediators if that is the most viable road to peace.

Just to give you a snapshot of where we are today, today the UN plays a key role in Somalia, Central African Republic, the Democratic Republic of Congo, Central Asia, Georgia, Nepal, Iraq, to name a few. We have also provided support to mediation efforts led by others, primarily regional organizations, the African Union in Kenya, and Comoros. And in certain situations, we have also been comfortable in working in joint efforts with regional organizations like the African Union in Darfur, Sudan,

and Madagascar. Two years ago, the Mediation Support Unit of the UN was established. The establishment of the Mediation Support Unit was a recognition by the heads of states and the World Summit in 2005 that the UN needed to strengthen and professionalize mediation. There was simply too much what I would call talented amateurism on our part and we had to change that. The Mediation Support Unit provides three key functions. The first, it provides technical, financial and light logistical support to current and future peace processes. We want to strengthen the mediation capacities of the UN and regional organizations and any other partner that requires our support. And as you have heard, we are also a repository of knowledge. Interestingly, we are a system-wide asset to all of UN entities, member-states, regional organizations, non-governmental organizations and this interesting category that the Secretary-General gave to us called "others." So in that regard, we are here to serve just about everyone who asks for our help. The kind of mediation expertise that we have covers areas such as process design and management, power sharing, natural resources and conflict security arrangements and constitution making.

In our experience, we have drawn up six principles that have guided our mediation efforts. These are seemingly straightforward in theory but exceedingly complex in application. Let me just run through them with you. The first is that context trumps everything. A mediator must understand the real causes of the conflict, with all its complexities. Premium must be accorded to culture, tradition, and national pride in all phases of the process. On one hand, every country and region is unique. But there are also transferrable lessons and practices that can and should be looked at and adopted to your local context. Second, conflicts are better resolved earlier than later. The longer a conflict festers, the more complicated the issues become, positions harden, armed groups splinter, more damage is sustained in life and property and grievance increases. In the not too distant past, some argue that a conflict can only be

resolved when conditions are right or if there is a mutually hurting stalemate, particularly on the battlefield. But this approach is too costly for all concerned especially civilians. Mediators have to resist the evil of being egoistical. If they are not contributing or no longer contributing constructively, if they have lost the trust or consent of the parties, or if they are no longer honest brokers with the leverage to make a difference, they should bow out. This is because there is a high cost for failure of mediation processes. The conflict can become more intractable, options may narrow, and the credibility and legitimacy of the peace processes will be shut. Fourth, mediation processes must be well-supported. To be effective, mediators require a highly skilled team to assist in the design and management of the process. Experts on substantive issues, legal issues, process and procedural design, agreement drafting, logistics, communication strategy and media relations are all needed to the mediator and his team but will have to be available to peace panels, to parties to the conflict, so that they are prepared in order to negotiate. Groups of friends, contact groups can play an important role. They can encourage parties to be flexible and creative, reinforce progress, provide financial assistance and level the playing field between parties. Experience shows that groups of friends are best kept small, believe that peace is possible and have the leverage to influence the parties constructively through negotiation as well as implementation. A well-prepared and supported peace process is better able to include all parties to the conflict and those who will be affected by the negotiated outcome. Mr. Brahimi, a well-known UN mediator and peace advocate, has often said: If you want to go fast, you need to go slowly. Hastily concluded agreements that do not address the needs of all the people are likely to be resisted. Make no mistake in successful peace processes, painful compromises are required by all, hence, putting a premium on the consultation process with all stakeholders all the time. Again, a difficult balance to strike between confidentiality of a peace process and the need to be transparent and consultative. No amount of good planning on

the part of the mediator can solve the problem, which brings me to my fifth point, the mediation must address the causes of the conflict. Framework agreements, pre-negotiation agreements, secession of hostilities are all important and part of the process. They set the scene for serious discussions, define who should be involved, contain information on the venue, timelines, agenda items. However, the conflict can only be solved when key issues are resolved. The fundamental causes of the conflict may be marginalization, policy sharing, inequitable wealth sharing, non-implementation of past agreements has to be resolved. The question of what would change after the agreements is fundamental to its success. Finally, one more no-brainer, the agreement needs to be implemented. Non-implementation is a great threat to a peace process. Looking at history, and you can think of many countries around the world, a failure to address marginalization and the protection of minority rights leads to cold autonomy. Unfulfilled autonomy arrangements that have been promised then leads to declaration of independence. To stand the test of implementation, parties must not only negotiate in good faith, they must undertake the required changes to implement agreements. Sometimes, these changes take the form of constitutional amendments, changes to electoral systems or even the reform of security sector. To facilitate implementation, mediators must ensure that all relevant stakeholders have been consulted on the substance and procedures of potential changes proposed by the agreement. Once this is done, there also has to be a strong dispute resolution mechanism to support and monitor implementation. Attention must be given to the right mix of local, regional and international actors in these mechanisms to support implementation. Those are the six lessons you should have learned.

In applying these lessons, you and mediators are guided by the purposes and the principles of your charter and has sustainable peace as your objective. You and mediators will advocate for commitment to UN rights, humanitarian principles,

justice and international law. We recognize that states have a primary duty to guarantee these rights and we cannot support a peace agreement with an amnesty clause for war crimes, crimes against humanity, and genocide, and gross violation of human rights. In addition to these principles and legal frameworks, we are also guided by the thematic mandate of the Security Council on gender, the well-known 3025; on the prevention of sexual violence, 1820; the protection of civilians. There has been 10 years debate on this issue and peace building.

Let me turn to the issue of DDR, which has gotten recent prominence here in the Philippines. Again, I mentioned the UN has some 28 years of experience in negotiating and implementing in supporting DDR programs both in a peacekeeping as well as a non-peacekeeping context. Here is what we know. First and foremost, DDR is a political exercise. Combatants, arms, and the ability to inflict violence give power and leverage to fighting forces in a negotiation process. Therefore, they are likely to hang on to these until they are confident that the peace process will deliver the goods for them. This is why significantly DDR is unlikely to proceed until the final peace agreement is signed. It can, however, be discussed, agreed upon as a necessary element in implementation. Commitment to a possible DDR program is a sign of commitment to the peace process and its implementation a sign of confidence. Once its implementation commences, DDR facilitates implementation of other dimensions of your peace process by enhancing security and stability. So DDR is first and foremost political. Second, DDR is incomplete if it is not complemented by broader security arrangements programs. DDR contributes to security by removing some weapons, demobilizing and breaking down the command structures of the armed groups, and providing them with some economic alternatives. However, in most cases there will still be other armed elements in society. Illegal weapons, fully governed or functioning security forces that need to be addressed. To truly change the security landscape, other interventions like weapons

control programs, regulation of private security, companies, entities, criminal elements and security sector reform may be required. DDR is one component of a broader security arrangement continuum.

If we think about DDR in your peace process, I would like to draw your attention to a couple of misperceptions about DDR. There are four important misperceptions. The first is that DDR is only for a defeated army, and therefore, very often armed groups say, we are not the defeated army, it was a negotiated outcome, therefore, DDR does not apply to us. Our experience is DDR can be helpful even in those conditions and situations. The second misperception is that the DDR program is some kind of cash cow, that it is a weapons for cash program. That when you have a program called DDR, you are essentially buying back weapons. That is another misperception. Third, that DDR can be a substitute for longer term development. You take an ex-combatant then you transform him into an economically stable and viable individual and he lives the rest of his life in relative prosperity. And the fourth misperception, that DDR is essentially a military operation. Those are misperceptions. DDR is certainly not for defeated army, DDR is not a cash for weapons program, it is intended to deal with the individual but DDR cannot be a long-term development program; it is essentially a short-term stabilization program that needs to be complemented by other longer term recovery program. And DDR is not a military operation, it is actually largely a civilian-run program that brings together development actors, psychologists, and other civilian planners. Which puts again a premium on communication to deal with these misperceptions.

Next, DDR while political is highly technical. It has to be planned and it needs to include attention to the eligibility criteria of the program, who's in and who's out. It needs to understand what the weapons ratio is: if someone comes with a grenade and two rounds of ammunition, is he allowed in the program? Or does he need to bring a bazooka or a couple of machine guns? What is the verification method? How do we

know who is a combatant and who is not? How do we vet the combatants for human rights violation? How will it be financed? How will it be coordinated with the many civilian and military implementing entities? And how will it be monitored to odd results? Talking about odd results, I found DDR programs to be highly imperfect. On its own, disarmament is unlikely to be complete. You will get something when you run a DDR program. But you will not be fighting worthy weapons, at least not initially. A lot of the weapons will remain buried. That is what I would do. Demobilization might start but it takes a long time to demobilize the mind, not just giving someone an ID card that says, now you're demobilized. And reintegration is generally overpromised and underdelivered. Reconciliation lags behind efforts on the economic front, which now takes me to transitional justice.

Given this focus on the victims of conflict, it appears that a transitional justice program should be a natural part of the peace agreement and a logical complement to a DDR program that focuses on the perpetrators. Yet, the statistics are daunting. There is a 2007 study by a university in Barcelona. They reveal that there were about 22 countries with ongoing DDR programs in 2007 involving some 1.25 million beneficiaries, primarily combatants. And not one of those were complemented with reparation program. This is interesting. It is ironic that there should be a case because, unlike DDR programs, transitional justice has an even clearer normative framework, legal instruments, guidelines that establish the right of victims to justice, the right to know the truth, the right to remedies and guarantees that crimes will not be repeated. These instruments run from the UN Charter itself, the declaration of human rights, international humanitarian, and criminal and refugee law, and updated sets of principles for the protection and promotion of human rights through actions to combat impunity. More recently, we have the Secretary-General's Report on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Countries 2004. In all these instruments, the responsibility of

the state is stressed. In the immediate aftermath of conflict, these principles say that the state must take all necessary measures, including legislative and administrative reform to ensure that public institutions, particularly security, are organized in a manner that ensures respect for the rule of law and protection of human rights. These instruments go on to say that the state shall provide for reparations to victims for acts or omissions which can be attributed to the state and constitutes gross violation of international human rights. The state shall also endeavor to establish national programs for reparations and other assistance to victims in the event that the parties responsible for the harm are unable or unwilling to meet their obligations. So the state has a heavy responsibility.

Taking the step forward in integrating the theory and the practice of transitional justice, the Report of the Secretary-General in 2004 proposes that transitional justice strategies must be comprehensive and must include judicial, mainly prosecution, and non-judicial measures such as truth telling, reparations and institutional reform. Notwithstanding this broad comprehensive approach, combining DDR and transitional justice programs continue to face some real severe challenges and I will list a few for you. Firstly, there is often a lack of any kind of formal connection between the two programs throughout negotiation to implementation. This is so because in part they are often on two different timelines. Security interventions like DDR tend to be fairly early in the peace process implementation. Issues like transitional justice takes a lot longer to legislate if it is a truth commission or to gather evidence if you need to gather that information from victims. It goes on for years. Interestingly and not unexpectedly, transitional justice can be perceived as a threat by combatants, especially their commanders, if they are responsible for a fair amount of the crimes. Fourth, these programs tend to be implemented by different agencies. Coordination is always a problem, at least in our system. And more importantly, they tend to have different funding sources which drives all of us

crazy. In short and at best, they co-exist along somewhat parallel tracks. The result is lost opportunities and unbalanced outcomes. There are no easy solutions in establishing viable connections between these two important programs. Some possible steps include, for your consideration: prepare the mediators, peace panels and civil societies on these issues, ensure that your negotiation processes are inclusive; include victims in the process, not necessarily even at the same table and time, but their voices must be heard. Third, re-source reparation programs earlier in the peace process. Fourth, complement formal processes such as institutional reforms with other easier to move forward measures such as locally based transitional justice processes. And fifth, plan together, even if they may not be implemented together, and monitor implementation carefully.

In conclusion, I hope these reflections on the dynamics of peace processes as well as the focus on DDR and transitional justice have been helpful. We should be assured that help is available in all these issues even if there are no easy answers or complete ones.

Thank you.

*Peacemaking Requires a Marathon Mentality: Reflective Peace Practice from a Filipino Perspective**

Professor Edmundo G. Garcia

Prof. Garcia has served since 1994 as the Senior Policy Advisor of International Alert, an organization working for the peaceful resolution of conflicts worldwide. He studied at the Ateneo de Manila University, earned a Master's degree in Philosophy at the Loyola House of Studies, took post graduate studies at the Universidad Nacional Autonoma de Mexico, and advanced graduate studies at the Uppsala University in Sweden and at the University of Oslo, Blindhern, Norway. He taught at the Ateneo de Manila High School, University of the Philippines, and Ateneo de Manila University. He was a founding convenor of Amnesty International-Philippines; a senior researcher at the Latin American Department of Amnesty International in London, UK; and a member of the 1986 Constitutional Commission which drafted the 1987 Philippine Constitution. He supports peace processes in the Philippines, and contributes to peace efforts in South Asia, Southeast Asia, and the Pacific. He conducted workshops on peace processes in Africa, Latin America, Europe/ Eurasia, and the Middle East and published papers, one of which is "Consolidating Peace. Nepali Constitution Making: A Filipino Peace Practitioner's Perspective."

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I. Introduction

I am grateful to the organizers of this gathering from the Supreme Court and the Philippine Judicial Academy, the Office of the Presidential Adviser on Peace Processes, the United Nations Development Programme and the Ateneo Law School for this rare and humbling privilege to address the distinguished participants in this hall today, joined by colleagues via video link assembled at the Saint La Salle University in Bacolod in the Visayas and the Ateneo de Davao University in Mindanao.

A. Today's Critical Juncture

We live through times of peril confronted by immense challenges, around the world and here at home: war on several fronts and violence inflicted on innocent victims, the economic downturn causing the loss of countless jobs driving more families below the poverty line, and the impact of climate change and pandemic disease on vulnerable communities. These challenges, though global in character can only be ignored – here and now – at our own peril.

Take our experience during the weekend. Flood waters hit our homes in Marikina and San Mateo, Pasig, Antipolo, Cainta, not to mention the perpetually high risk areas of Malabon and Navotas, the provinces of Rizal, Pampanga, Bulacan, Laguna and Nueva Ecija and the outlying areas of Luzon still unable to make their voices heard. Nature unleashed its wrath, and in just twelve hours, more rain fell from the heavens than we normally receive in a month.

A deluge of horrifying images then filled our TV screens as we watched in awe and anguish. But there is one enduring image etched in my mind. Bound by a common disaster, a band of neighbors hung on for dear life on top of remnants of roofing that had been torn apart from their homes. The roof had now become a life-saving raft swirling on the rampaging waters of the Marikina River as it approached the San Mateo Bridge.

Hundreds of helpless onlookers surged on the bridge, one of them throwing a line to the people on the fast-moving roof that had become a makeshift ark. I heard Mang Eric, subsequently, one of the survivors on that raft, recalling how grateful he was to be alive and how blessed he was, though he lost practically everything, that not all his loved ones had perished.

Because it happened in Metro Manila, and the voices of people like Christine Reyes, on the rooftop of her home in Provident Village, repeatedly crying for help for some nine hours, were heard on the airwaves, the whole country had been forewarned.

B. Test of Our People's Character

We cannot afford to be unprepared. There will be a next time, but ***this time*** it is how we respond that will test our character as a people.

This great flood of 2009 has brought us together, thanks in part to the anchor persons of competing networks and radio stations, but more so because we knew of people who were in distress. And since most roads were impassable we mobilized via text or mobile phones as Filipinos know best, across social, economic and political divides, it offered an opportunity even for parties in conflict to work together or perish apart. On Monday, September 28th, the Communist Party of the Philippines declared a halt to attacks in areas in Southern Tagalog and Central Luzon devastated by tropical storm "Ondoy," ordering its guerrillas to help in relief efforts instead.

I submit, Your Honors, that the social resilience our society needs to adapt to the impact of the forces of nature requires the same attitudes and ways of doing things that peacebuilding demands to overcome the reality of armed conflicts confronted by our people in places as diverse and equally vulnerable to the elements such as Bicol, Samar, the Negros provinces, and countless coastal municipalities in Mindanao.

We thus confront two challenges, requiring a similar set of responses: consultations and creating safe spaces for dialogue, shared analysis and strategies, networking, bridging divides, and focusing on common threats while harnessing particular strengths and capacities. This line of thought is developed in the Alert publication entitled *Climate of Conflict. The Links Between Climate Change, Peace and War*, available in your resource packs.

C. Court's Initiatives on Rights Communal in Character

It is no coincidence that in 2009, the Supreme Court has convened a forum on environmental justice to put more flesh into our constitutional "right to a balanced and healthful ecology" found in our declaration of state principles. This time, it has co-convened a conference on peace processes to give more relevance to our people's right to peace that is given substance in the Article on human rights and social justice – which the revered Justice Cecilia Muñoz Palma, then president of the Constitutional Commission described as the heart of our Constitution. Both rights are communal in character, forming a third generation of rights which follow your 2007 initiative on civil and political rights dealing with extrajudicial killings and your initiative last year focusing on the poor's access to justice responding to the realm of socio-economic rights.

D. Impact of Armed Conflict

To focus on the theme you have assigned to me today, I must confess that it is a source of deep distress that a people such as ours, largely hospitable and helpful, mostly gentle and kind, have confronted protracted armed conflicts for some four decades.

During all this time, the violence in many parts of the country, particularly in Mindanao, has undermined our economic development, derailed our social services, weakened our capacity to deal with the consequences of global warming and deadly diseases, and poisoned our politics. Violent conflicts

cause deep divisions and bitterness, devaluing lives and debasing the human dignity that our fundamental charter protects.

E. Working In Contexts of Conflict

In my work for peace through several decades in diverse settings, I have always been reminded that *text without context is pretext*. Although similar factors come into play in most conflict cases, nevertheless each situation is unique.

In the context of my personal journey in the pursuit of peace, it was my father, Paulino J. Garcia, who served as a public health doctor who opened my eyes to the social realities in our country, particularly, in visits to hospitals in urban and rural areas in Luzon, Visayas and Mindanao.[1]

In the early seventies in the period prior to the imposition of martial law, I recall a last conversation with the late Senator Ninoy Aquino. He enjoined me then to study comparative socio-political experiences in Latin America, since he believed that they were relevant to the challenges we then confronted.[2]

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[1] The values I learned from my father guided me in a journey, which led me to spend time in urban poor communities in Sapang Palay and in summers of service in Mindanao. Together with other concerned citizens, I joined advocates for a non-partisan constitutional convention and participated in the so-called "first quarter storm" of the 70s, and marched in the "parliament of the streets" in the 80s in the struggle to restore and enlarge democratic space.

[2] It was my sojourn as a student in the Latin American continent then largely ruled by generals and *caudillos* in the mid-70s where I reaffirmed my commitment to human rights, working subsequently at Amnesty International and returning as the convenor of Amnesty-Philippines in the period of martial rule.

In the aftermath of the first people's power experience I served in the Commission which drafted our Constitution and travelled the country to explain the Charter; and both in the public hearings

It was at Alert, in the last decade and a half that I have grown to understand the meaning of reflective peace practice working in diverse conflict areas with different stakeholders. In the crucible of conflict, I acquired learning accompanied by pain, understanding tempered by human suffering, recognizing the people's feelings of rage but never failing to retrieve a sense of hope. After all this time, I continue to believe that at the end of the day, people can bridge divides and communities can learn to live side by side, giving and earning respect, while celebrating the dignity of difference.[3]

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across the country and as a teacher at the University of the Philippines, the questions most often posed by young people and students dealt with the factors that fuelled the protracted armed conflicts in the country. These concerns led me to further studies and research at peace institutes in Oslo, Norway, and Uppsala in Sweden.

Fortified by insights gained from peace research, I threw myself subsequently, heart and soul, in the work for peace with civil society organizations such as the Coalition for Peace, the National Peace Conference, the Multi-Sectoral Peace Advocates, and the GZO Ortigas Peace Institute before being seconded to International Alert, a non-governmental organisation working to understand conflict better in order to build peace more effectively in diverse regions of conflict.

[3] For 15 years, from 1994–2009, I participated in Alert peace missions. Among the memorable ones were missions to South Africa at the time of the National Peace Accord in the early 90s, in the formation of the peace network in Kenya and in the peace negotiations in Sierra Leone in the mid-90s, in work with the Justice and Peace Commissions in Burundi, and in workshops with the members of the Transitional National Assembly in Rwanda in the aftermath of the genocide.

I learned from my experience in accompanying peace advocates in Colombia over a period of several years and in working with the Latin American Conference of Bishops in meetings held in Antigua, Guatemala and Sincelejo, Colombia, to explore the role of religious leaders building peace in the mid-90s. In Europe, I consulted with peace workers in Eurasia (in particular, Georgia/Abkhasia) and in Belfast, Northern Ireland, on the theme of reconciliation.

II. Drawing Lessons from Diverse Experiences on the Ground

And what have I learned as a Filipino peace practitioner working on peace processes in diverse regions of conflict? Permit me to share learning on four areas,[4] which I have further broken down into a dozen insights, after which I will reflect on the link between peace processes and the rule of law, and conclude by sharing a relevant experience and making an appeal.

A. On the primacy of people and the protection of human rights

1. Put people at the heart of the peace process!

The most salient lesson I have learned in my work for peace is this: put people at the heart of the process, and recognize their aspiration to be authors of their own destiny. "*Meterle pueblo al proceso*" was the way they put it in the complex contexts of

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Closer to home in Asia, I was involved in the early consultations on the conflict in Fiji and the involvement of citizens in the work to draft a multi-cultural charter. Recently, I facilitated consultations on constitution-making in Nepal, discussed peace issues with confreres in Sri Lanka and Aceh, Indonesia, and am currently involved in helping to build a peace constituency in the Philippines around a peace covenant involving leaders from civil society and political formations in the run-up to the forthcoming national elections in support of peace negotiations and advancing the peace processes in the country.

[4] In this present work, I have relied principally on direct experience on peace processes, and the reflections I have written on these experiences. On the 20th anniversary year of International Alert, I compiled a monograph composed of six essays I had written entitled, *Alert-Asia. Comparative Learning on Peace Practice*, November 2006. I also relied on a 54-page monograph of personal reflections on work in Burundi entitled, *Accompanying Peace Advocates in Burundi: Working With Religious Leaders and the Justice and Peace Commission,* 2004.

Colombia and Central America.[5] Bring people into the process, consult them, listen to their concerns, for those who live through the conflict can often offer valuable insights and propose viable ways forward.

2. Demonstrate deeds of peace. Protect human rights to advance the process.

I believe that there can be *no meaningful peace without at the same time protecting the human rights of people*, addressing their needs, improving their lives, securing their safety, and healing the wounds of war. "*Hechos de paz, menos de palabras*," as the local people put it in Latin America. Show deeds of peace, not more or mere words to forge a peace that is both just and durable.[6] I recall conversations at Alert's offices with Christine Bell then doing research for her book on peace agreements and human rights;[7] sharing with her a fundamental tenet at Alert:[8]

> peace and human rights work do not contradict, but in fact complement each other.

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5 *Accompany Peace Advocates in Colombia: Working Towards a Just Peace*, International Alert, 2004. A 94-page monograph I had written at the end of my work on Colombia, which spanned for nearly a decade.

6 Confer also "Striving to Sustain Peace Efforts," Bogota, Colombia, September 2001 and "Supporting the Work of Citizen Peacemakers in Colombia, 1999-2001, in a monograph I put together, *Building Justpeace: Beyond the Global War on Terror*, December 2002.

7 Christine Bell, *Peace Agreements and Human Rights*, Oxford University Press, 2000, written while she was with the Centre for International and Comparative Human Rights Law at the Queen's University of Belfast.

8 International Alert, *Code of Conduct for Conflict Transformation Work*, London: Alert, 1998.

3. Avoid shortcuts to nowhere. There are no shortcuts to a justpeace.

Addressing unresolved issues and historic grievances – real or imagined – opens the way to a more durable peace.[9] The work for peace is littered with good intentions or attempts at making peace that are either flawed or incomplete. "*La ciencia de la paz es la paciencia*," they intone in Central America. Patience, persistence and perseverance are essential ingredients in the brew. Conflict issues cannot be left unresolved, and peacemaking requires rigorous and painstaking efforts not "shortcuts to nowhere."

B. On reaching and implementing peace agreements

1. Rethink peace agreements. Points of departure, not final destinations.

Peace agreements are but moments in a wider process. Though significant, they must be seen as part of a broader endeavor. They provide opportunities but not ironclad guarantees to achieve lasting peace. The peace accord in Nepal[10] and the 2005 Memorandum of Understanding on Aceh,[11] for example, were not meant to be final destinations but points of departure that unleashed energies, resources, and the political imagination to address the sources of violence. At the same time, people's lives can be improved even during or outside negotiations since the quality of their lives and the safety of their communities can be enhanced taking into account the

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9 "No Shortcuts to a JustPeace: An Asian Pacific Perspective," an address I delivered at the Asian Peace Alliance Founding Assembly, University of the Philippines, September 2002, in *Building Justpeace*, author's monograph, 2002.

10 "Revisiting the People's Power Experiences and Rethinking the Peace Processes in the Philippines and Nepal," in *Alert Asia Comparative Learning on Peace Practice*, Alert monograph, 2006.

11 "Underscoring Strategic Joined-Up Efforts to Sustain Aceh's Historic Momentum for Peace," *ibid.*, pp. 20–25.

mandate of government to be at the service of the people. It must be worth noting that Nepal's Comprehensive Peace Accord of 2006 precisely mandated the formation of a constituent assembly to deal with a number of intractable issues such as the transition from a constitutional monarchy to a secular federal republic to consolidate the peace by means of more inclusive processes.[12]

2. Re-imagine peace agreements. No guarantees of overnight change; only opportunity for work ahead.

Peace agreements, moreover, cannot automatically guarantee overnight change or the creation of more peaceful societies. They cannot ensure improvements in the areas of governance, the economy, or institutions. *However, they can lay the ground for transforming societies in more peaceful ways*, to offer more inclusive political options and socio-economic priorities, to generate resources for social concerns such as health, housing, education and employment, and to work towards more resilient and reconciled societies. In brief, they can serve as some form of roadmaps,[13] requiring sacrifices as the rubber hits the road to peace, so to speak.

3. Remember: When the ink is dry, the harder part begins. Implementing peace accords is at least as challenging as negotiating them.

The period after the signing of an agreement is often when the harder part begins. The fact that in West Africa more agreements break down even before their mid-term compliance attests to

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[12] I shared insights on the Nepali process in *Consolidating Peace: Nepali Constitution-Making: A Filipino Peace Practitioner's Perspective,* Alert Publication, September 2008.

[13] I first articulated these ideas in the aftermath of the signing of the Abidjan Peace Accord found in "Now the Harder Part Begins! Rebuilding and Reconciliation," in *A Time of Hope and Transformation. Sierra Leone Peace Process: Reports and Reflections,* edited by Ed Garcia, Alert publication, 1997.

the importance of monitoring and verification. I witnessed the breakdown of the 1996 Abidjan Accord on Sierra Leone even before the ink was dry. I was appalled at more than a dozen failed agreements in Liberia that resulted from the inability to deal decisively with human rights violations leading to the resumption of war. On the other hand in Northern Ireland, the building of cross border institutions and shared structures of governance with multi-party support, though difficult and tedious, has led to more sustainable processes with greater chances of success.[14] Implementing agreements requires both the will and the imagination, the capacity and the tenacity to think thoroughly and to act decisively to make and build durable peace.

C. On restoring relationships, tackling power and bringing about social change

1. Restore broken relationships. Bridge differences to reconcile peoples.

I recall a statement made to me by a member of the Government Panel Negotiating with the Moro Islamic Liberation Front (MILF) in the aftermath of the Supreme Court decision on the memorandum of agreement on ancestral domain. In talking with people in Mindanao and the rest of the country, he realized how deep the fissures were in our society, how deep the prejudices, how deep the social divides, how far and difficult the road that lies ahead, and most of all, how urgent the work has become!

Restoring broken relationships is an essential end goal of peace processes. Among the first casualties of violent conflict are truth and trust resulting in the breakdown of relationships and the capacity to communicate. Inevitably, this vicious cycle leads to the inability to work with those who are either distant or different. To regain the capacity to work well with others,

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[14] Confer the Conciliation Resources' Accord Series special issue on the Northern Ireland peace process.

relationships have to be restored. In Northern Ireland, representatives from across the sectarian divide gradually learned together[15] to nurture a process aimed at overcoming antagonisms of a recurring past. In the end, healing broken relationships enabled the process to come to grips with the real issues.[16] I recall addressing the Transitional National Assembly in Rwanda,[17] where we discussed the role of parliamentarians in building peace. Identifying principal hurdles in the process, we explored ways to heal relationships in the aftermath of the genocide that deepened divisions between Hutus and Tutsis.

More recently, I attended a gathering of Asian parliamentarians in Phnom Penh[18] on the eve of the international tribunal dealing with the killing fields of the mid-70s. It was a most humbling experience to exchange views with members of the Cambodian parliament on the conditions required to restore relationships in the anguished efforts to overcome a nightmare the Khmer people lived through.

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[15] Among the leading negotiators were John Hume, David Trimble, Gerry Adams, Martin McGuiness and Ian Paisley who sat at first uncomfortably and did not withdraw from the negotiating table with the firm and affable third-party facilitation of American envoy George Mitchell.

[16] "Bridging Memory and Hope: Reflections on Reconciliation," address delivered in Belfast, Northern Ireland, later published in Democratic Dialogue, Belfast, 2005.

[17] Workshop on the role of parliamentarians building peace for members of the Rwandan Transitional National Assembly in Kigali, Rwanda, facilitated by Alert in 1998.

[18] A meeting on peace negotiations and reconciliation sponsored by the Inter-Parliamentary Union for the Asian Parliamentary Union held in Phnom Penh in Cambodia, February 2009. The other Filipino resource speaker, among the resource persons, was Senator Nene Pimentel from Mindanao.

The past can cast its shadow over the present, and as one writer puts it:

> the past continues to torment because it is not past.

Reconciling peoples with deep differences who are burdened by collective pain or guilt involves a painstaking process that may require work across generations.

2. Transform power relations. Peace requires a different way of doing politics, putting premium on principles and moral courage.

Peace processes, at the end of the day, are about *transforming power relations, and* dealing unflinchingly with *the question of power – which involve the capacity to make decisions transforming the equation of power as in South Africa or Nepal, redistributing them as in Aceh, or sharing them as in Northern Ireland*. This undertaking cannot be achieved without *moral courage.* It takes character and inspired leadership to transform power. The building of peace requires a new brand of politics and a different quality of leadership: one that is courageous, competent and caring, combining excellence and depth, analytical mind and inner spirit. Significant advances in peace processes have taken place as demonstrated in the largely peaceful though painful experience of overcoming apartheid in South Africa when the *power of principles trumped the principle of power* – for *power over* must become *power for the people,* that is to say, power put *at the service of the most vulnerable*, the disadvantaged, those who literally had less in life and lesser in law.[19] In other words, to empower those at the margins of society and to *address their historic grievances*, *leaders must bear in mind that theirs is a vocation of service*, which calls for coherence between the words, deeds and the lives of servant leaders.[20]

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[19] To paraphrase former President Ramon Magsaysay.

[20] In *Journey of Hope: Essays on Peace and Politics*, Ed Garcia, Claretian Publications, 1994.

3. Change mind-sets and social structures. Peace requires profound social change.

Peace processes can lead to *profound social change,* and they become durable if there is a capacity to *change mind-sets* as well as *social structures* so that they become more just and inclusive. Peace, moreover, is the work of many hands from diverse sectors of society across generations, often requiring the magnanimity to acknowledge that even conflict partners have contributions to make to bring about meaningful social change.[21]

D. On owning the process, eliminating exclusion and transforming risks into opportunities

1. Own and trust the process. It is the surest way for people to bear the costs of peace and make sacrifices required by the outcome.

If you trust the process, you will trust the outcome. *Ownership of the process contributes to a more viable outcome and* provides the key to sustainability. Meaningful consultations with the local peoples in different communities are necessary if the intent is to meet or at least approximate their aspirations. If people own the process and its outcome, arguably they will be ready to bear the costs and the sacrifices required to build a more just and peaceful society.[22]

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[21] In "Addressing Social Change in Situations of Violent Conflict: A Peace Practitioner's Perspective," an article I prepared for the Berghof Foundation's Dialogue Series on *Social Change and Conflict Transformation*, 2006.

[22] Confer the Conciliation Resources' Accord 2005 Issue on people's participation on peace processes and the public ownership of processes, which was published after a series of consultations with peace workers from different regions of conflict.

2. Eliminate exclusion. Inclusive peace provides solid foundations to overcome socio-economic inequality and ineffective governance, particularly, in asymmetric conflicts.

Exclusion from the levers of power and the rewards of work are among the main hurdles to achieve peaceful co-existence; *inclusion* in the process of making decisions which affect their lives and in the process of sharing the benefits of the economy, therefore, go a long way in resolving the underlying causes of violent conflict. An *inclusive peace can provide solid foundations* for efforts to help overcome unequal and uneven development while accelerating effective and accountable governance.[23]

3. Transform risks into opportunities for peace. Recognize the opportune moment. Be not surprised by serendipity.

Seize the moment, and *recognise "kairos" – the moment of grace* even in situations of violent conflict. *Welcome serendipity*. In my experience of processes of peace, serendipity has meant *the unexpected ways in which preparedness has met or matched opportunity*. The key is learning to recognize those rare moments or occasions. Events external to the peace process led to game-changing efforts in the aftermaths of the devastation caused by the *tsunami* in Aceh and in the political aftershocks caused by the tragic earthquake in Kashmir.[24] As a

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[23] Confer the Alert Publication, *Inclusive Peace in Muslim Mindanao: Revisiting the Dynamics of Conflict and Exclusion*, by Phil Champain and Francisco Lara, Jr., 2009. Another Alert publication which broadens the thematic understanding of peace involves the inclusion of the environment in *A Climate of Conflict. The Links between Climate Change, Peace and War*, by Dan Smith and Janani Vivekananda, November 2007. A Philippine version has been published in 2008 by the AIM Policy Center with a joint preface by Prof. Neric Acosta, former Senator Bobby Tanada and Prof. Federico Macaranas.

[24] "Transforming Humanitarian Crisis into Opportunities for Peace in Kashmir," and "Underscoring Strategic Joined-Up Efforts to Sustain Aceh's Historic Momentum for Peace," in *Alert Asia Comparative Learning on Peace Practice*, 2006.

Norwegian peace diplomat referring to a process closer to home has put it, "We are prepared and ready to be surprised."[25]

By way of rounding out a baker's dozen, allow me to share a compelling truth that I have learned in the course of my work through several decades:

4. Prepare! Peacemaking requires a marathon mentality.

In our journey, we are often nearly there; or, seem to be, but in the work for peace *nearly there* is not good enough. A deep reservoir of faith is required to re-start the process and resume negotiations in a task that never seems to end. The work for peace requires the mentality and the stamina of a marathon runner,[26] the perseverance of a Job, the boldness of a prophet and the belief that hope is "finding meaning in one's work and one's life," as Vaclav Havel once wrote from prison.[27]

III. Linking Peace Processes with the Rule of Law, the Administration of Justice and the Protection of Human Rights

I would be remiss in my task, given the nature of the participants in this gathering today if I did not attempt to share a few thoughts on peace building and its particular linkage to the rule

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[25] Norwegian official facilitator, Ambassador Vegar Brynildssen, as expressed to author, in conversations during his August 2009 visit to the Philippines.

[26] "No Shortcuts to a Justpeace," September 2002 in *Building Justpeace*. This thought has been a recurrent theme in a number of reflections through the years.

[27] The writings of Vaclav Havel, the dissident turned president of the Czech Republic, and Daw Aung San Suu Kyi's thoughts in *Freedom from Fear* published in 1992 and her life since have become inspirations in the quest for peace.

of law, the administration of justice, and the respect for human rights.[28]

A. Exploring the Peace Dividend for the Judiciary

A Haitian proverb underscores the difference between law and reality: "Laws are made of paper; bayonets are made of steel![29]" However, in our particular Filipino experience we have also learned that tyrants cannot long sit on a throne of bayonets – thus, we have seen our people unleash their collective efforts to restore democracy based on the respect for human rights and to establish the rule of law where justice is administered fairly according to recognized standards and not by the power of patronage or the force of arms.[30]

The stakes are high in putting an end to the protracted armed conflicts in the country. In relation to the judiciary,[31] for example,

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[28] Besides convening the "National Consultative Summit on Extrajudicial Killings and Enforced Disappearances," the Supreme Court has initiated the Writ of Amparo and the Writ of Habeas Data, and its pro-active position in addressing the phenomenon of extrajudicial killings. The UN Special Rapporteur has likewise acknowledged these initiatives of the Supreme Court in his April 2009 Review.

[29] "Reform of Law Enforcement Agencies and the Judiciary," William G. O'Neill, in a review meeting on Peace Agreements: The Role of Human Rights in Negotiations, published by the International Council on Human Rights Policy, March 2005, p. 7.

[30] "Taking Power Seriously," lecture delivered by Dame Sian Elias, New Zealand's Chief Justice, the University of Cambridge, May 16, 2008.

[31] Ateneo Law Journal, June 2009, Volume 54, Number 1, dedicated to the theme, "The Peace Process and National Development," deals with critical themes relevant to the peace processes in the Philippines. In particular, the article of Sedfrey Candelaria and Ma. Luisa I. L. Rosales, "Consultation and the Courts: Reconfiguring the Philippine Peace Process," and the section on the concept of

the peace dividend can be immense. Court dockets have become "catch basins," so to speak, for cases arising out of the vicious spiral of violence we have witnessed as a result of the decades-old counter-posing strategies of armed struggle and counter-insurgency. Because of the killings and disappearances related to the armed conflict, our courts confront cases, which have become more intense as well as more complex. The Supreme Court, in the exercise of its constitutional powers, has in fact taken laudable initiatives such as the *writ of amparo* and *habeas data*, putting itself in the frontline of fire.

B. Putting Priority on the Rule of Law in the Building of a Credible Peace

The rule of law is the bedrock of democratic societies, and you who preside over the administration of justice in our country play a critical role in peacefully resolving disputes. Your institutions, practices and decisions provide the building blocks of a more peaceful society.

The *rule of law,*[32] *the administration of justice and judicial reform*, and the *respect for rights are indispensable in building a durable peace, and consolidating the construction of peaceful democratic societies*.

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the peace process, the challenges of peace negotiations, civil society and stakeholders and new paradigms in the Philippine peace process. Two other valuable articles worth noting: "Constitutional Challenges of Philippine Peace Negotiations," by Soliman Santos, Jr., and "Postscript to the Supreme Court MOA-AD Judgment: No Other Way But to Move Forward," by Sedfrey Candelaria.

[32] Confer the 6th David Williams Lecture delivered by Lord Bingham of Cornhill, at the University of Cambridge, entitled, "The Rule of Law," on November 17, 2006. In the fourth sub-rule, which Lord Bingham lays down, he states: "the rule of law must afford adequate protection of fundamental human rights."

In conflict situations the following thus become relevant priorities:[33]

- First, putting a premium on truth-seeking that leads to justice and reconciliation;
- Second, taking initiatives based on the commitment to combat impunity, to undertake serious investigations and effective prosecutions and to adequately protect witnesses;
- Third, meeting the needs of victims and providing reparation to them and their families;
- Fourth, bringing about judicial and institutional reforms in the justice and security sectors; further clarifying the limits of power and the role of the state, and the relationship between the individual citizens and their government.[34]

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[33] Confer the recent United Nations Human Rights Council High Commissioner Annual Report on "Analytical Study on Human Rights and Transitional Justice," August 6, 2009. Also, the above cited article of O'Neill especially the section on "Reforming the Judiciary: Challenges and Prospects," and "Comprehensive Judicial Reform: Some Lessons Identified." Moreover, see the UNDP Practice Note of 9/3/2004 entitled, "Access to Justice."

[34] UN special rapporteur on extrajudicial executions Philip Alston produced an excellent report with recommendations after his February 2007 visit to the Philippines. This report was followed up with a Review published on April 29, 2009, which still remains a relevant human right roadmap for the country. He stresses the need for "reforms directed at institutionalizing the reduction of killings of leftist activist and others, and in ensuring command responsibility for abuses." He also restates the need to improve witness protection and the imperative to eliminate impunity for unlawful killings. In section VI of the same Review, he enjoins the Communist Party of the Philippines and the New People's Army, moreover, to end other "extrajudicial executions for which they bear responsibility."

In doing so, we help provide the conditions conducive to a more peaceful society where people trust due processes and the institutions that dispense justice. We can thus effectively respond to one of the main justifications why people take up arms in the first place addressing one of the rationales that explain why protracted armed conflicts in the country have lasted for some four decades – more than most other countries in the world.

C. Dispensing Justice Effectively in More Comprehensive and Inclusive Ways

To dispense justice in ways that can help consolidate peace could mean a broader and more integrated understanding of the ways to protect not only the civil and political rights but also the economic, social, cultural and ecological rights of vulnerable communities and populations, especially rural workers and indigenous peoples, particularly women and children.[35]

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[35] Before the UN Reports, Amnesty International had published a groundbreaking report linking the political killings to the counter-insurgency efforts, arguing that the respect for human rights was intricately tied up to the building of peace in the country — the rights of people understood in a comprehensive and inclusive manner. It also put out a more recent report, "Philippines: Witnessing Justice – Breaking the Chain of Impunity," August 28, 2008. There have been a number of relevant human rights reports from international fact finding bodies such as Human Rights Watch, "Report on Extrajudicial Killings and Enforced Disappearances in the Philippines – Fact Finding Mission of Human Rights Now," April 2008 and its *World Report: 2009*. Other monitoring groups have looked into the rights of indigenous peoples, trade unionists, farmers, journalists, women and other sectors of society. Women's rights, moreover, are human rights, and the role of empowered women who build peace in Burundi, Kenya, South Africa and Colombia, not to mention the Philippines, has become a formidable force that has helped weave the tapestry of peace in different settings. A compilation of significant contributions by "peace women" recounts the achievements of Filipinas in advancing the peace in the country who have been collectively nominated for the Nobel peace prize in the mid-2000s.

This entails a recognition of the informal rules, norms, customs, and laws that obtain within Muslim societies and indigenous peoples. For example, in many parts of Muslim Mindanao, the institution of *"rido*" has become a form of conflict resolution – despite the vindictive nature of this institution.[36] Addressing this issue requires a strong local state and judicial system that will compel parties to address contentious issues without resorting to violence.

D. Tackling Rules and Traditions, and Learning from Local Experience

But it needs to do more by setting new rules that recognize local customs and traditions and creating mechanisms to enable convergence of both formal and informal rules especially at the village, community, or at the town level. Lessons can be learned from local experience, such as in North Upi, Maguindanao, where a local tri-peoples council has incorporated Muslim, indigenous peoples, and other local customs in the settlement of disputes and the enforcement of laws.[37]

Meanwhile, several reform initiatives have been identified along the above mentioned lines, including the strengthening of local *shari'a* courts, and the integration of customary law in the barangay system of justice.[38]

It must be stated moreover that our judicial system faces two other questions in relation to the major ongoing processes

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[36] Francisco Lara and Phil Champain (2009), *Inclusive Peace in Muslim Mindanao: Revisiting the dynamics of conflict and exclusion*. International Alert, London, UK.

[37] North Upi is a municipality in Maguindanao, ARMM. Mayor Ramon Piang instituted a tri-people approach to conflict resolution which acts as a quick-response mechanism to local, community-based conflict.

[38] Asia Foundation, *Taking Rido Seriously: Understanding Clan and Community Conflict*, Powerpoint Presentation, 2005.

in the country, dealing with National Democratic Front of the Philippines, the Communist Party and the New People's Army, on the one hand, and the Moro Islamic Liberation Front, on the other.

E. Raising the Issue of Applicable and Governing Rules, and Meta-Legal Approaches

First, the question of the "applicable and governing rules" in relation to cases arising out of demands by non-state parties or negotiating partners who represent entities operating outside the State party's legal and judicial processes by virtue of taking up arms against the constitutional order. The resolution of demands, for example, of the release of rebels in detention for the purpose of participating in peace negotiations might require "meta-legal approaches," an idea earlier articulated by the late Jose W. Diokno in the first people power period, that is to say, an approach putting a premium on creativity and flexibility in exploring and extending the limits of the letter of the law without at the same time stepping outside its spirit and taking care not to breach the State's obligation to comply with its own judicial and legal processes.

F. Reflecting on Special and Appropriate Legal Frameworks

Second, the question of *legis specialis;* the special legal regime which provides an appropriate framework for discussing issues, either political or processual in character, which arise from dramatically different paradigms. The parties to the conflict naturally have different points of views or even diametrically opposed perspectives on substantive issues such as sovereignty and self-determination, or legal authority, and on questions of style and language. At the same time, serious attention must be paid to the context and the time frame, that is to say, at which particular phase of the negotiating process or at what stage of the political process has the contentious issue arisen – for often agreements in peace negotiations represent an intent based on good faith, on capacity and resources, and above all on political will and imagination, and the reservoir of support of the sovereign people.

G. Taking into Account the Evolving Law of Peace Surrounding Peace Processes, Negotiations and Agreements

Moreover, and here I must confess that I am only in the early stages of my research, it might be worth looking into the developing *lex pacificatoria* or the "law of peace" or of the peacemakers which look at the evolution of legal norms governing the outcomes of peace negotiations, or issues surrounding peace processes and arising out of peace agreements.[39]

I submit that comparative experiences in peace processes such as those in South Africa and Northern Ireland critically analyzed, for example, by authors in the Ateneo Law Journal's recent special issue on "The Peace Process and National Development,"[40] and the accords forged nearer home and in our time in both Aceh and Nepal suggest that the collective wisdom of the courts of law and the legislature, of jurists, legislators and leaders can be put at the service of peace processes that must be pursued precisely to strengthen the rule of law, putting in place a regime of justice and peace[41] so enshrined in the Preamble to our basic Charter.[42]

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[39] Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria*, Oxford University Press, 2008. Prof Bell, now director of the Transitional Justice Institute at the University of Ulster.

[40] In particular, the article by A. Edsel C. Tupaz, "A Dialogical-Republican Revival: Respect-Worthy Constitutionalism in Post-Conflict Northern Ireland, South Africa and Southern Philippines," the *Ateneo Law Journal*, Volume 54, Number 1, June 2009, as well as inputs provided by resource persons whose contributions were reproduced in the second section of the *Journal*.

[41] Confer briefing notes entitled, "Peace as a Central Concept in the 1987 Constitution," which I drafted in April 2008 and "Crafting the Peace Character of the Basic Charter: Perspectives from a Filipino Peace Practitioner," outline notes for a workshop presentation in Kathmandu, Nepal, with members of the Nepali constituent assembly coming from different political formations in August 2008.

[42] Preamble, 1987 *Constitution of the Republic of the Philippines*.

IV. Constitution-Making to Consolidate Peace: Possible Paths

There is one final experience worth sharing before we listen and welcome your observations and questions from the floor. Just under a year ago today, I was invited by the friends of the peace process in Kathmandu to exchange views on peace-building and constitution-making.[43]

The Comprehensive Peace Accord signed by the seven political party alliance and the Communist Party of Nepal (Maoists) on November 21, 2006, after a decade of armed struggle, called for the election of a Constituent Assembly to draft a charter to consolidate the peace. It was an essential ingredient of their peace process to help navigate a delicate course in the midst of multiple transitions: from waging war to waging peace; from a constitutional monarchy to a secular federal republic with a working multi-party democracy; and from a situation characterized by discrimination at different levels of society to a more inclusive democratic order addressing the concerns of the minorities, the hill tribes, the "untouchables" (the *dalits*), and disadvantaged regions and classes.

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[43] *Consolidating Peace. Nepali Constitution-Making: A Filipino Peace Practitioner's Perspective*, by Ed Garcia, Alert publication, 2008. This piece was written after Alert's August 2008 consultation with civil society groups and members of the Constituent Assembly tasked to draft the basic charter in Nepal. The publication aimed to contribute to strengthen the peace character of the proposed basic charter. In Kathmandu, I made a presentation at a workshop for members of the Constituent Assembly entitled, "Crafting the Peace Character of the Basic Charter: Perspectives from a Filipino Peace Practitioner." Previously, I had written a modest note, "Peace as a Central Concept in the 1987 Constitution," as a contribution to a presentation by Prof. Miriam Ferrer who was involved in the production of a documentary on the same theme as part of the UP Centennial lecture series.

Nepal is currently undergoing this process, albeit with immense challenges and not without difficulty. There were several lessons that I have drawn from that memorable period of consultations with members of the Nepali Constituent Assembly and civil society organizations.

Today, however, I would like to recall just one which I feel most relevant: *the drafting of a constitution*, if taken seriously and with the preparation it deserves, can be *a privileged space and moment to help address unresolved issues* and contribute to the task of making and building peace. In this task, a key element was *inclusion* – the phrase, we discussed in Nepal,[44] I recall, was "proportional inclusion": inclusion was critical in the process of preparing for and crafting the charter,[45] and certainly in implementing the fundamental law of the land.

As we approach another period of possible transition in the aftermath of the scheduled 2010 national elections, I am convinced that what we face today is a rare "*kairos* moment" for our country – an opportune time – which we cannot once again afford to squander, not this time.

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[44] I recall discussing this concept with the chair of the drafting committee of the Nepali Interim Constitution. At his home library, the late Justice Laxman who passed away only two weeks ago, revealed to me that in the first attempt at constitution-making that he had been involved in Nepal that one of the principal sources of inspiration was the Philippine Constitution drafted in the aftermath of the first people's power revolution. He had spent time at the University of the Philippines law library and acknowledged the influence of the Philippine experience on his own involvement in the Nepali process. He also attended the Waging Peace Conference at the Ateneo University Campus in the Philippines in 2005 to exchange insights with conference participants.

[45] The term was incorporated into the Nepal 2008 Interim Constitution, which was crafted in preparation for the definitive charter envisioned in the comprehensive peace accord in Nepal.

V. Concluding Call to Character, Conscience and Courage

Honorable Justices, distinguished friends and co-workers for a just peace:

My mentor, the late historian Fr. Horacio de la Costa, the same Jesuit scholar who at the height of martial rule wrote and urged Ninoy Aquino to end his fast to death arguing that it was more heroic to continue to live and to stand up for one's rights,[46] once spoke of the crown jewels of the pauper; our country was the pauper and the crown jewels were our gifts of music, our laughter, and our faith. I beg to add a fourth, and that is our youth, the young people of our land, the successor generation.

Because of them – the Filipino youth — we need to nurture hope; in order to forge the character of our people and build a country without war despite the difficulties, and despite the burdens of history. If in the past we doubted or hesitated, this time we cannot be faint-hearted, discouraged or deterred. I am convinced that we can shape a future that can overcome the fears of the past – if this time we can lead with wisdom and character, coupled with conscience and courage, combining dreams and deeds of peace.

Finally, we cannot forget the sacrifices of our forbears and those who have bravely broken ground before us – illustrious men and women like Justices Cecilia Muñoz Palma, JBL Reyes, Roberto Concepcion, Claudio Teehankee and statesmen and women like Lorenzo Tañada, Jose Diokno, Ninoy and Cory Aquino, to name but a few who have fallen in the night or the break of early dawn taking the roads less travelled. They

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[46] One of the most memorable scenes in the film produced for the 2009 death anniversary of Ninoy Aquino entitled, "The Final Journey," produced by the Ninoy Aquino Foundation was Ninoy's allusion to the letter of Fr. Horacio de la Costa, SJ, who urged him to break his 40-day fast so that he could live and continue his heroic resistance to martial law.

prepared and pioneered the principled path, and because of them we can redouble our resolve in the marathon journey.

If we put our hands to the plough and persevere, I am certain that a fierce hope will spring to make peace possible; indeed, probable in our land. We will work this time so that one day our children, the next generation, our country's successor generation, in their time will inherit a more just, a more peaceful and prosperous country that God, Allah the All Merciful, in His infinite Goodness so abundantly blessed for our people.

This, I believe.

Together, we will prevail.

Another Path to Learning Lessons from Comparative Processes As Annex: Reflecting on the Phases and Priorities of the Marathon Journey

Negotiating peace in the midst of armed conflict often involves taking the road less travelled resulting almost always in imperfect outcomes and unfinished quests. I have discovered through the years that akin to politics, peacemaking is the art of imperfect creation. It is also the science of systematically cobbling together what is possible from elements that are improbable in at least *three critical stages of the journey: the periods of preparations and of negotiations in peacemaking, and the consolidation phase of peace-building.*[47]

In ***the period of preparations***, my experience tells me that certain steps are crucial:

- *Understanding the context*, which often consists of the following: consulting stakeholders at different levels of society, analyzing the factors which gave rise to the conflict, identifying the unresolved issues and most importantly, recognizing the costs of war while taking into account the possible dividends of peace – in other words, taking stock of the opportunity costs of war and peace;
- *Identifying the key stakeholders* as well as possible friends of the process, acceptable facilitators, potential spoilers – in other words, mapping the conflict and probable peace actors;
- *Creating spaces for dialogue*, allowing for a safe space for conflict parties or those who have access to them

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[47] "People's Participation in Peace Processes," joint paper by Ed Garcia and Sanam Anderlini, London, 1998, in relation to the work of a study group exchanging comparative peace then co-hosted by Alert.

and understand their issues to sit around the table, allowing for communication to take place.[48]

In ***the period of negotiations***, reflective peace practice suggests the following priorities:

- *Preparing the framework for negotiations*, preferably negotiations facilitated by credible third-parties, and crafting a peace agenda that deals with the underlying factors of the conflict; building confidence by demonstrating deeds of peace, while generating trust by acts of magnanimity especially in situations of asymmetrical conflict;
- *Addressing humanitarian concerns* affecting civilian populations; *dealing with the questions of impunity and exclusion* to remove principal roadblocks which often undermine the process; and above all, protect *human rights* – civil and political, as well as social, economic and cultural rights; and the rights to a balanced and healthful ecology;[49]
- *Building a peace constituency* from significant sectors of society as well as encouraging multi-partisan support for the peace process from diverse political formations so that the peace that is pursued does not become some

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[48] "Reflecting on Selected Experiences from Asia, Africa and Latin America: People's Participation in Peace Processes," convened by the Federal Ministry for Economic Cooperation and Development, Gateshaus Petersberg, Bonn, Germany, November 2000.

[49] One of the insights of the Alert publication, *A Climate of Conflict*, thus states: "The double-headed problem of climate change and violent conflict has a unified solution – peacebuilding and adaptation are effectively the same activity, involving the same kinds of methods of dialogue and social engagement x x x . Climate change could even reconcile otherwise divided communities by posing a threat against which to unite and tasks on which to cooperate."

kind of political football but rather one that is designed and owned by the relevant political formations in the country and the regions.[50]

In the ***period of consolidation***, the following lessons seem most relevant:

- *Strengthening institutions* and providing capacity building for people who will undertake the tasks of reconstructing communities and homes, designing and supporting mechanisms of monitoring and verification to ensure compliance with agreements. In brief, working to ensure that peace gains are advanced and sustained.
- *Reframing the security paradigm* and ensuring security sector reform while taking into account military mindsets; enlarging democratic space while working towards more effective and accountable governance and more inclusive socio-economic development;[51]

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[50] "Drawing Lessons from the Peace Processes in Mindanao Between the Government of the Republic of the Philippines, the Moro National Liberation Front, the Moro Islamic Liberation Front," in *Alert Asia Comparative Learning on Peace Practice*, 2006.

[51] I participated in a meeting on the challenges of terrorism, democracy and human rights in March 2005 in Madrid, which featured a presentation by UN Secretary General Kofi Anan who spoke of a comprehensive strategy to deal with terrorism in the aftermath of the Atocha train bombings in Madrid. After that gathering, I wrote my reflections under the rubric of "Reframing the Security Paradigm" advocating for a change of mindset to advance human security to address the underlying issues which spawned terrorist acts. The full 12-page monograph plus annexes was originally entitled, *"Reframing the Struggle Against Global Terrorism: Reflections on the March 2005 Madrid Summit and Related United Nations Initiatives*." April 2005.

- *Creating synergy* by linking local, regional, national and international efforts to rebuild and forge a more humane society while laying the foundations for a more sustainable and just peace focusing on "jobs and justice, food and freedom," in the succinct and powerful phrase of a most remarkable peace envoy, the late legal luminary, Jose W. Diokno.[52]

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[52] I consider the late Jose W. Diokno, "Ka Pepe," as one of the most insightful, articulate and courageous peace advocates the country has produced. I worked closely with him at KAAKBAY from 1983 till his death in early 1987, and witnessed first hand how he dealt with negotiators from the National Democratic Front of the Philippines who accepted his succinct and meaningful summation of the issues underlying the armed conflict and providing the peace process a promising starting point, "jobs and justice, food and freedom."

*Closing Remarks**

Chief Justice Reynato S. Puno

My colleagues in the judiciary and the other branches of government
Mr. Justice Adolfo Azcuna,
the Chancellor of the Philippine Judicial Academy
Let me also greet the past Chancellor,
Madame Justice Ameurfina Melencio Herrera
Secretary Avelino Razon
Mr. Kelvin Ong
Professor Edmundo Garcia
Excellencies from the different embassies
I especially greet our ambassador, Ambassador Teehankee
Dean Cesar Villanueva
Friends, ladies and gentlemen.

For a long time in our modern history, many considered war to be an inter-state affair. Erratic fluctuations of the balance of power brought about by invasion of territories resulted in many inter-state wars. Indeed, some of the regional and world wars between and among states change the course of the history of mankind. The establishment of the League of Nations and later the United Nations are the manifestations of man's longing for a lasting peace that has eluded mankind since time immemorial. In the last century, the world was never for a moment out of danger of a war that would end all wars. A nuclear

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* Delivered at the *Chief Justice Reynato S. Puno Second Distinguished Lecture, Series of 2009*, on September 30, 2009, at the Ateneo Professional Schools Auditorium, Ateneo de Manila Law School, Rockwell Center, Makati City, and via video conferencing at the Ateneo de Davao University and University of St. La Salle, Bacolod City. *Transcribed*.

war that would drive us back to the civilization of the cave man. But while we have been spared the spectre of a World War 3 mainly because of the balance of terror by the mighty nations, still many wars in different forms have played our planet. Today, world peace is threatened less by wars between or among states born by ideological disparities but more by separatist movements staged within states due to ethnic differences. Many of the conflicts are intra-state involving people of the same states and caused by failures to co-exist due to warring ethnic cultural and religious backgrounds. In Europe, Africa, and Asia, we behold the explosion of ethnic wars fought with incredible volume of venom and in defiance of the civilized norms of warfare. More and more, ethnic groups are demanding self-determination, crying for secession, demanding to be separate states with the use of force and violence. The struggles have resulted in charges of ethnic cleansing that brings back the lurid memories of the purging of the Jews. We see these bloody struggles in Kosovo, Sri Lanka, Turkey, Iran, and where else but the Philippines. These conflicts are people-specific, culturally customized, religiously rooted, and geographically defined. Hence, there is no one formula that can magically solve all of them.

This afternoon we thank Mr. Kelvin Ong and Prof. Edmundo Garcia for their enlightening lectures on the topic, Comparative Peace Processes and Their Relevance to the Philippine Setting. Their lectures opened our eyes to the diversity of dimensions of every peace process. It is our hope that these comparative models will give us new ideas that could help us attain a meaningful breakthrough in our efforts to strike peace with the Communist Party of the Philippines on one hand and the Moro Islamic Liberation Front (MILF) on the other. We need new ideas, for as Mr. Justice Holmes emphasized:

> Man's mind when stretched by new ideas never goes back to its original dimension.

These different models also tell us how difficult it is to search for peace but they also teach us that we can find peace if we do not stop seeking it. These models show the importance

of transparency in the conduct of any peace process, of the need to inform the people, of the essence of the efforts towards peace. They show necessity of consulting all the different and significant stakeholders, for if there is anything you cannot force down the throats of people, it is peace that does not satisfy their needs and aspirations. Our efforts to have peace with the local rebels and the MILF have spanned decades of frustrations when the Supreme Court struck down the MOA-AD between the Republic and the MILF as unconstitutional. Some predicted that all is lost for peace in Mindanao and some hot heads proposed a military solution to put a period to the seemingly interminable strife. They conveniently forgot the truism that people who fight fire with fire usually end up in ashes. They overlooked the advice of the Rev. Martin Luther King, Jr.:

> Let us forbid from using the old law of an eye for an eye. For the eye for an eye settlement of dispute leaves everybody blind.

We are still groping in darkness. For the key to peace in our countryside is in Mindanao. I am confident, however, that this darkness will disperse in due time for there is nothing that will prevent us from succeeding if we are determined to succeed. History tells us that success belongs to souls who have will, not to souls who only have wishes. Charles Beard, the famous historian, was once asked if he could summarize the most important lessons of history. Beard gave four:

1. Whom the gods would destroy, they first make mad with power;
2. The mills of the gods grind slowly but they grind exceedingly fine;
3. The bee fertilizes the flower it robs; and
4. When it is dark enough, you can see the stars.

The fourth, he said, is the most important for it carries the message of hope.

Friends, it is dark enough in the Philippine sky. But history assures us that soon the stars will be visible and history does not err. So let me conclude by saying "blessed are the peacemakers" and God bless the Philippines.

Supreme Court of the Philippines
Philippine Judicial Academy
and the
ASEAN Law Association

present the

Chief Justice Reynato S. Puno
Third Distinguished Lecture

February 19, 2010, Friday, 9:00 a.m.
En Banc Session Hall, New Supreme Court Building
Padre Faura Street, Manila

and

via Video Conferencing
Waterfront Hotel
Cebu City

Royal Mandaya Hotel
Davao City

Program

Doxology

Philippine National Anthem
ALA Anthem
Supreme Court Choir

Opening Remarks
Honorable Antonio T. Carpio
Senior Associate Justice, Supreme Court

Welcome Remarks
Atty. Avelino V. Cruz
President, ASEAN Law Association of the Philippines

Musical Intermission
Supreme Court Choir

Introduction of the Lecturer
Honorable Adolfo S. Azcuna
Chancellor, Philippine Judicial Academy

LECTURE
THE ASEAN CHARTER

Ambassador Rosario Gonzalez-Manalo
Senior Foreign Service Adviser to the Secretary of Foreign Affairs
Philippine Representative to the
ASEAN Intergovernmental Commission on Human Rights
Philippine Governor to the
Board of Governors of the Asia-Europe Foundation

Panel of Reactors

Mr. Jeffrey Chan Wah Teck, S.C.
Deputy Solicitor-General
Attorney-General's Chambers of Singapore

Ambassador Alistair Bell MacDonald
Head of Delegation
European Commission to the Philippines

OPEN FORUM

Presentation of Plaques of Appreciation

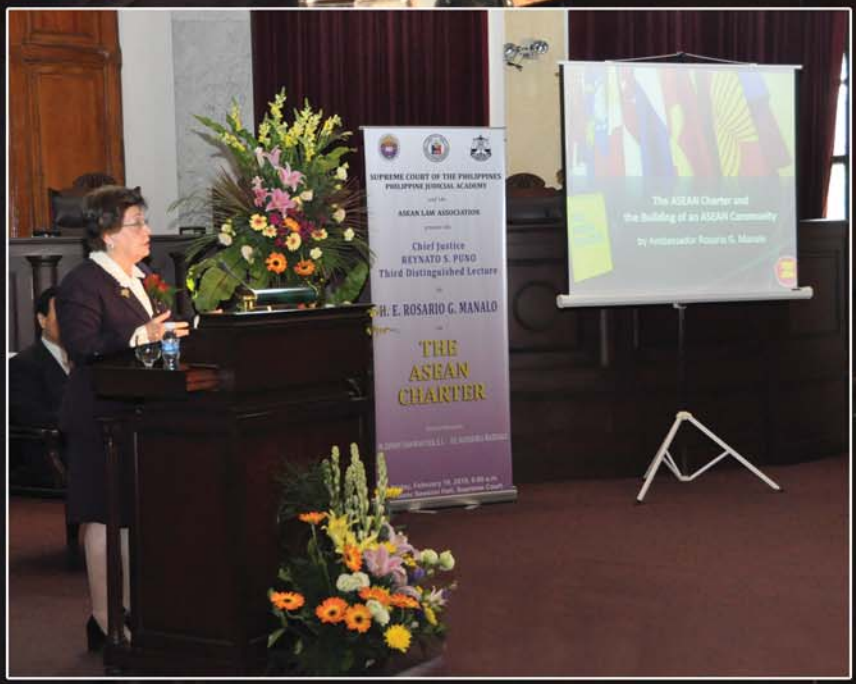
by

Chief Justice Reynato S. Puno
Justice Antonio T. Carpio
Justice (Ret.) Adolfo S. Azcuna
Atty. Avelino V. Cruz

Closing Remarks
Honorable Reynato S. Puno
Chief Justice

Supreme Court Hymn

Master of Ceremonies and Open Forum Moderator
Honorable Renato C. Corona
Associate Justice, Supreme Court


SUPREME COURT OF THE PHILIPPINES
PHILIPPINE JUDICIAL ACADEMY
and the
ASEAN LAW ASSOCIATION
Chief Justice
REYNATO S. PUNO
Third Distinguished Lecture
H. E. ROSARIO G. MANALO
THE ASEAN CHARTER
The ASEAN Charter and the Building of an ASEAN Community
by Ambassador Rosario G. Manalo

*Opening Remarks**

*Justice Antonio T. Carpio***

Chief Justice Reynato S. Puno
My esteemed colleagues on the Court
President Pham Quoc Anh
of the ASEAN Law Association
Our Distinguished Lecturer Ambassador Rosario Manalo
Mr. Jeffrey Chan and Ambassador Alistair MacDonald
of the Panel of Reactors
Chief Justice Dato Seri Paduka Hj. Kifrawi bin Kifli
of Brunei Darussalam
Chief Justice Sobchok Sukharomna of Thailand
Other justices and judges from the ASEAN countries
Chancellor Adolfo S. Azcuna
and other officials of the Philippine Judicial Academy
President Avelino Cruz
of the ALA Philippines National Committee
Ambassadors and members of the diplomatic community
The heads and members of delegations from the member countries of the ASEAN Law Association
My co-workers in the Philippine Judiciary and in government
Distinguished guests and friends:

A pleasant morning to you all.

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* Delivered at the *Chief Justice Reynato S. Puno Third Distinguished Lecture* held on February 19, 2010, at the En Banc Session Hall, New Supreme Court Building, Padre Faura Street, Manila, and via video conferencing at the Waterfront Hotel, Cebu City, and Royal Mandaya Hotel, Davao City.

** Born in Davao City, Philippines, Justice Antonio T. Carpio was sworn in as member of the Supreme Court on October 26, 2001. Justice Carpio obtained his law degree from the College of Law of the University of the Philippines where he graduated valedictorian and cum laude in 1975. He placed sixth in the 1975 Bar

On behalf of the Supreme Court of the Philippines, I warmly welcome all of you to this Chief Justice Reynato S. Puno Distinguished Lecture, the first for the year 2010. This lecture is jointly sponsored by the Supreme Court, the Philippine Judicial Academy, and the ASEAN Law Association.

Examinations. He earned his undergraduate degree in Economics from the Ateneo de Manila University in 1970.

While a student, Justice Carpio was Chair of the Editorial Board of the Philippine Law Journal of the U.P. College of Law. He was Editor in Chief of The Guidon, the school paper of the Ateneo de Manila University. He also served as Managing Editor of the Philippine Collegian, the school paper of the University of the Philippines.

Fresh out of law school, Justice Carpio went into private practice and founded the Carpio Villaraza and Cruz Law firm. He was a Professorial Lecturer of the U.P. College of Law from 1983 until 1992 when he was appointed Chief Presidential Legal Counsel, Office of the President of the Philippines.

Justice Carpio was a member of the Board of Regents of the University of the Philippines from 1993 to 1998. He was a member of the Technology Transfer Board of the Department of Industry from 1978 to 1979. He served as Special Representative of the Department of Trade for textile negotiations from 1980 to 1981. He was elected President of the Integrated Bar of the Philippines, Pasay-Makati Chapter (1985–1986), Director of the U.P. Law Alumni Association (1984–1989), and Director of the Philippine Bar Association (1989–1990).

For his "distinguished and exemplary service" to the Republic, Justice Carpio was awarded in 1998 the Presidential Medal of Merit by then President Fidel Ramos. In 1991, Justice Carpio received the Outstanding Achievement Award in Law from the Ateneo de Manila Alumni Association. In 2002, he was also the recipient of the Distinguished Alumnus Award from the Ateneo de Davao Alumni Association. In 2009, he was conferred a Doctorate of Laws, honoris causa, by the Ateneo de Davao University.

Justice Carpio is the Chair of the Second Division and Chair of the Senate Electoral Tribunal.

The Distinguished Lecture Series, which is named after the incumbent Chief Justice of the Philippines, is the most prestigious law and public policy lecture in the Philippines. The lecturers are Chief Justices or members of the highest court of various countries, well-known legal scholars, and public policy experts in fields related to law.

The Distinguished Lecture Series started in 2001 when the Supreme Court celebrated its centennial anniversary. The Supreme Court has continued the Distinguished Lecture as one of its knowledge sharing activities under its judicial reform initiatives. The Lecturers are invited to address a select audience of jurists, academics, policy makers, practicing lawyers, and law students.

In the past, the Distinguished Lectures covered topics such as judicial reforms, the judicial legacies of our Chief Justices, Shari'a law in the modern age, comparative studies on Philippine and foreign laws, and international humanitarian law. This morning, we continue this unique academic tradition with a discourse on a landmark and evolving regional community law – the ASEAN Charter.

This morning's Lecture is part of the 30th Anniversary Celebration of the ASEAN Law Association (ALA). The ALA was organized 30 years ago in 1979 as the professional grouping of lawyers from the ASEAN countries. One of the principal objectives of ALA, as stated in its Charter, is to encourage the harmonization of laws within ASEAN as may be required for the economic development of the ASEAN region.

The ASEAN Charter, signed in November of 2007, requires, as one of its founding Principles, adherence to multi-lateral trade rules and a rules-based regime to implement the economic goals of ASEAN. Trade rules implement trade and economic laws. Harmonizing trade rules means harmonizing trade and economic laws.

For the last 30 years, ALA members studied, researched, and debated on how to harmonize trade and economic laws within ASEAN. However, all this was purely academic discussion. There was no treaty, binding as domestic law in ASEAN countries, requiring the standardization or harmonization of trade rules. This has suddenly changed with the adoption of the ASEAN Charter, which expressly requires a rules-based regime on trade and economic matters within ASEAN. There is now renewed interest for ALA members to assist their governments in the harmonization of trade rules within ASEAN. Ultimately, this will realize ALA's goal of harmonizing trade and economic laws within ASEAN.

I am personally happy that our distinguished lecturer this morning is Ambassador Rosario Manalo who served as the Philippine Ambassador to the European Community from 1979 to 1987. As a young lawyer, I served as the Philippine trade representative for textile negotiations. Whenever I had negotiations in Brussels, the capital of the European Community, I would report to Ambassador Manalo before and after the negotiations. Even then, Ambassador Manalo was already steeped into the trade and economic rules that govern a regional economic community. Like everyone here, I look forward to this lecture of Ambassador Manalo.

Once again, on behalf of the Supreme Court of the Philippines, a warm welcome to everyone.

*Welcome Remarks**

*Atty. Avelino V. Cruz***

Mr. Chief Justice Puno and the
Honorable Members of the Supreme Court
ASEAN Law Association (ALA) President, Mr. Pham Quoc Anh, our Secretary General, Ms. Le Thi Kim Thanh, both from Vietnam
The distinguished Chairs of the various ALA National Committees and members of their delegations, among them, Chief Justice Dato Seri Paduka Hj. Kifrawi bin Kifli of Brunei and Chief Justice Sobchock Sukharomna of Thailand
Justices of the highest Courts in the ASEAN region
Distinguished judges, lawyers and teachers of Law, who have journeyed from their respective countries to be present here today.

That said, I would also like to particularly extend, in behalf of ALA Philippines, our grateful appreciation to the entire Philippine Supreme Court and its

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* * Atty. Avelino V. Cruz is the Founding Partner of Angara Abello Concepcion Regala & Cruz (ACCRALAW), one of the Philippines' largest and most prestigious law firms. He is the incumbent President of the ASEAN Law Association of the Philippines.

Mr. Cruz served as Chair of the Working Committee of the first ALA General Assembly in Manila in 1980, working closely with the first ALA Secretary General Teuku Radhie and first ALA President, Edgardo Angara. In 1992, he was elected ALA Secretary General. During his term, ALA initiated the region-wide study "ASEAN Legal Systems"

members whose steadfast support of ALA activities through the years has been incalculable. Our own Chair is none other

published in 1995 by Butterworths Asia. Mr. Cruz represented ALA in 1999 at the Singapore Conference held by the American Law Institute, the US Supreme Court think tank and, shortly thereafter, was the first Filipino elected to membership in that prestigious society. In 2002, at the Singapore ALA Governing Council meeting, Mr. Cruz initiated the organization of the ALA Golf Chapter which has since heightened mutual cooperation among ALA members. Mr. Cruz had served as President of the Manila Golf Club in its centennial year in 2001, Asia's oldest and the Philippines' most prestigious club.

Mr. Cruz is a respected and experienced lawyer in Philippine corporate law and litigation, having served in the boardrooms of major Philippine companies, and is a recognized expert in the Philippine oil industry. On various occasions, he had assumed leadership positions in the Philippines' principal law societies such as the Integrated Bar, the Legal Management Council, the Citizens Legal Aid Society and, recently, as National Chair of the Lawyers for Electoral Advancement and Democracy (LEAD).

He holds a degree of Bachelor of Laws, magna cum laude, from the San Beda College of Law; a Master of Laws degree from the University of Michigan; and was a Ford Fellow at the University of California, Berkely. At the age of 20, he received a special permit from the Philippine Supreme Court to take the national Bar Examinations and placed first, the youngest candidate in the history of the tests to assume that honor. In 1986, following the EDSA revolution, he served as legal adviser to then Vice President and Secretary of Foreign Affairs Salvador H. Laurel. In that capacity, he served as head of the Working Committee (composed of Supreme Court Justices Reynato Puno and Minerva Reyes and Secretary Fulgencio Factoran, Jr., as members) which drafted the "Freedom Constitution" that governed the Philippines from March 1986 to February 1987 when the 1987 Constitution took effect. In 2001, he was conferred the "Bedan of the Century" award on the occasion of the Centennial celebration of San Beda College in the Philippines.

Mr. Cruz is an accomplished classical pianist, and has composed the music for the "ALA Hymn" which was presented at the 25th anniversary celebration of ALA.

than the Chief Justice of this Honorable Court; Chief Justice Artemio V. Panganiban, with ALA from its inception, and is a pillar of our Governing Council. Justice Antonio T. Carpio, ALA veteran, founded the first ASEAN Business Law program at UP in 1996 and Justice Renato C. Corona, ALA Philippines' premier paper writer for the Judiciary at the last two General Assemblies in Thailand and Vietnam. They are the two most senior justices of the Court. Likewise, Justices Leonardo A. Quisumbing and Presbitero J. Velasco, Jr. who have served in the Philippine National Committee for quite a while. Justice Adolfo S. Azcuna of the Philippine Judicial Academy (PHILJA), who collaborated to produce today's program is another ALA veteran. For making this morning's Distinguished Lecture Series possible, let us all give them and the members of the Philippine Supreme Court a warm round of applause, please.

If your honors please – that is how we Filipino Lawyers would begin to address this honorable Court En Banc in this august Session Hall. Indeed, for one senior moment, I was wondering what the docket number and caption title was of the case to be heard this morning. We are, in fact, in the midst of a colloquium of select speakers, distinguished for their expertise in the newly minted ASEAN Charter.

The Distinguished Lecture Series, in fact launches the three-day celebration of ALA's 30th Anniversary and the first Governing Council Meeting in Manila in five years. Thirty years ago, the words of Mr. Teuku Mohamed Radhie, our first Secretary General, resonates on the shared vision of ALA, which is:

> to organize the legal community of ASEAN as an institution and leave a deep and lasting impact on greater ASEAN cooperation.

Underscore "Legal Community." It thus appears that the ASEAN legal community antedated the declared goal of "ASEAN community" in the ASEAN Charter. Rising from the seeds of that shared vision, ALA grew to a vibrant and strong institution bringing under one umbrella, members of the judiciaries, the

legal profession and the Academe of the ASEAN. Its rolls were filled with the most distinguished names in the ASEAN legal community. ALA has since regularly published a Law Journal and over the years has published the 8-volume ASEAN Law series culminating in the 1995 authoritative volume *ASEAN Legal Systems* produced under past ALA President Chief Justice Marcelo B. Fernan.

For the past 30 years, therefore, ALA has been most successful in promoting a better understanding of our respective Laws and legal systems and in ascertaining how legal problems are solved. There being no copyright in Law, we are able to copy freely what is workable, thus profiting from that experience.

That journey is now on its 30th year. It is a milestone year for ALA and ASEAN. It was not until late last year however, in Hanoi, when ASEAN Secretary General Surin Pitsuwan, speaking before the ALA General Assembly, sounded the clarion call for ALA to actively participate in the roadmap to a full ASEAN community by 2015.

ALA responded by creating a high level task force that would assist the Governing Council achieve these goals. We have become energized to study the Charter to answer questions such as the implication of ASEAN legal identity, the codification of ASEAN norms, rules and values to guide member-states, appropriate and effective dispute settlement mechanisms and for the legal profession, a protocol on enforcement of arbitration judgments, the promotion of ASEAN identity and solidarity and so on, that will form a base for the ASEAN community.

Thus, the Governing Council meeting this week in Manila, is the first ever ASEAN Assembly of top-ranked members of the Judiciary, the Bar societies, and the Academe to gather as a focus group for legal cooperation vis-à-vis the new ASEAN Charter.

ALA's institutional framework has transcended its conference rooms, workshops, and legal publications and has spilled over to such fellowships as golf competitions and musical presentations. Because ALA has forged enduring bonds of friendship and seamless modes of legal cooperation amongst its members, then, without doubt, a full ASEAN legal community would be achieved ahead of the 2015 target date for the ASEAN community itself.

On this note, I would like to reiterate warm words of welcome, in behalf of ALA Philippines and the Philippine National Committee, to our foreign guests and brother lawyers, judges, and teachers of Law from the ASEAN countries, our special guests, and specially my colleagues who have worked in cooperation with the Supreme Court and the Philippine Judicial Academy in putting together this milestone Lecture Series.

Thank you.

*The ASEAN Charter and the Building of an ASEAN Community**

Ambassador Rosario Gonzalez-Manalo

Ambassador Manalo is Senior Foreign Service Adviser to the Secretary of Foreign Affairs; Director of the European Studies Program, AdMU; Professorial Lecturer, Asian Center Graduate Studies, UP; Program Director/ Lecturer, National Defense College of the Philippines; and Philippine representative to the Board of Governors, Asia-Europe Foundation, Singapore. She obtained her Bachelor of Science in Jurisprudence and Foreign Service, Bachelor of Laws, and Master of Arts in Public Administration degrees from the UP, and a Master's degree in International Studies and Diplomacy from Long Island University, New York.

She was Special Envoy of the President to the High Level Panel to negotiate the ASEAN Human Rights Body and was Chair, Task Force to draft the ASEAN Charter. She was Philippine Ambassador to many European countries; Permanent Delegate to UNESCO, to the Kingdom of Belgium and the European Economic Community; Special Envoy to Latin America; Secretary-General, UNESCO National Commission of the Philippines; and Chair, UN Committee on the Elimination of Discrimination Against Women. She was DFA Undersecretary for International Economic Relations and Chair of the DFA's Board of Foreign Service Exams. She received numerous awards, among which is The French National Order of Merit, "Grand Officer" rank, by President Francois Mitterand.

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The Honorable Chief Justice
The Honorable Justices of the Supreme Court of the Philippines
Excellencies
Distinguished Guests
Friends
Ladies and Gentlemen.

I wish to convey my appreciation to the Supreme Court of the Philippines, the Philippine Judicial Academy and the ASEAN Law Association for their kind invitation for me to address this august gathering on a topic which is highly significant to our country and the Asia-Pacific region.

I started working on issues relating to the then newly organized Association of Southeast Asian Nations (ASEAN) in this very hall, as a junior Foreign Service Officer, when this majestic building was the home of the Department of Foreign Affairs.

It is with a feeling of homecoming that I render this presentation on ASEAN as it passes the 41st year of its existence.

I would have wanted to address this gathering of learned persons in the law and other disciplines as a practicing lawyer, arguing for a client. For the longest time, however, the client I serve is our government and the Filipino people. If I have accomplished some in the international arena, it is because I was able to draw on the skills of a lawyer and the knowledge of the law, initially obtained in the hallowed halls of my Alma Mater, the College of Law of the University of the Philippines, and where, I may add, the law is taught in the grand way.

A few members of this Court have made similar marks in the international arena — Cesar Bengzon and Florentino Feliciano as members of leading international tribunals, and Roberto Regala, Claudio Teehankee, and Hilario Davide in the frontlines of Philippine diplomacy. All were deeply aware that law has a large role in diplomacy, in that inter-state relations is most stable and mutually beneficial to all when based on amity and the law of nations.

For a developing country like the Philippines, there is no other path, as the Constitution itself states that the Philippines *"adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations."* We have been guided by this constitutional mandate in the various facets of the country's relations with the rest of the world and most especially with ASEAN.

We, the peoples of ASEAN, are journeying on a significant crossroad in our region's destiny. Our states and societies are together in a major regional effort towards greater integration to realize by 2015 the vision of an **ASEAN Community**.

ASEAN was established on August 6, 1967, out of an earnest desire of its five founding Members – **Indonesia, Malaysia, the Philippines, Singapore** and **Thailand** – to ensure stability and security in Southeast Asia, which at that time was besieged with tensions and conflicts arising from the Cold War. This common aspiration for regional peace and harmony found expression in the ASEAN Declaration of 1967. From a simple document consisting of merely five clear articles, the Association of Southeast Asian Nations, or ASEAN, was born and built, operating for a little more than 40 years to the present.

As ASEAN moved from strength to strength, coping with the many challenges posed by the political realities of changing times, more countries of the region joined ASEAN – **Brunei** in 1984, **Viet Nam** in 1995, **Lao PDR** and **Myanmar** in 1997, and **Cambodia** in 1999. Well before the start of a new century, ASEAN emerged as a concert of 10 peace-loving Southeast Asian States cooperating and strengthening relations among themselves, and relating to friendly states outside its region.

In 1989, with the end of the Cold War and the outset of globalization, the world order and the dynamics of international life were drastically altered. New actors and elements beyond the traditional nation-states, with their challenges, have turned the conduct of international relations and diplomacy more complex. The evolving global challenges of the 21st century

compelled the ASEAN of 1967 to rethink its vision, its objectives, its approach, and its structure and operations.

I. The ASEAN Charter: The Way Forward

After surveying the region's prospects for the future, and preoccupied in maintaining the Organization's credibility and relevance, the Member States concluded that ASEAN had to become increasingly integrated to be able to better respond to the demands and needs of the region.

Under the 1967 Declaration, ASEAN suffered from the absence or the presence of idiosyncrasies described as follows:

1. It had no legal personality.
2. Its decisions were not legally binding.
3. Its meetings were quite informal.
4. It had no political legal framework, nor a set of principles and purposes attuned to the times.
5. It was in need of an updated machinery, and more efficient processes to formulate policies and decisions as a region.

Considering all the foregoing, the ASEAN Charter had to come into being.

Thus, on November 20, 2007, the ASEAN Charter was signed by the 10 Heads of States and Governments of the Member States. It comprises 13 Chapters, 55 Articles, and 4 annexes.

More than a year after, on December 15, 2008, the Charter entered into force, ratification by respective national processes having been completed before said date by each of the 10 Member States!

The Charter is brief yet written in clear unequivocal statements. It is comprehensive yet flexible. The Charter was formulated as such to allow it to endure and to adapt with the

mutating circumstances and dynamic conditions, regionally and internationally.

From this Charter, as the political legal framework of the Organization, implementing protocols and other legal and political instruments are to be derived and will bind all Member States to comply. This framework codifies the Organization's fundamental principles which have consistently bound the Member States as a group, and the most outstanding of these principles being:

a. decision making by consultations and consensus; and

b. non-interference in the internal affairs of the Member States.

The Organization will remain intergovernmental.

Recognized in the Charter itself as integral to the creation of an **ASEAN Community** is *"the need to strengthen existing bonds of regional solidarity ... that are **politically cohesive, economically integrated** and **socially responsible.**"* Hence, the setting up of three community pillars, which are essential parts of the institutional structure of the Organization, as is the ASEAN Human Rights Body presently established with its Terms of Reference and now officially known as the ASEAN Intergovernmental Commission on Human Rights (AICHR).

Aside from the three community pillars and their respective councils, the other important institutional changes to ASEAN as a result of the Charter are:

- convening of two ASEAN Summits in a year, instead of just one;
- establishment of the ASEAN Coordinating Council composed of ASEAN Foreign Ministers;
- appointment of Permanent Representatives to form the Committee of Permanent Representatives to ASEAN in Jakarta;

- single Chairmanship in one year;
- strengthening the role of the Secretary-General of ASEAN; and
- provisions for dispute settlement mechanisms.

To summarize, ASEAN is to be served by the Charter in three interrelated ways:

1. formally accord ASEAN a legal personality,
2. establish greater institutional accountability and compliance system, and
3. reinforce the perception of ASEAN as a serious regional player in the future of the Asia-Pacific region.[1]

II. The Three Pillars of the ASEAN Community

The ASEAN Community's foundations are to be solidly built on three pillars which are all equally important, namely:

1. ASEAN Political-Security Community (APSC) pillar;
2. ASEAN Economic Community (AEC) pillar; and
3. ASEAN Socio-Cultural Community (ASCC) pillar.

To bolster efforts to realize these three community pillars, the ASEAN Charter provides the creation of their respective community councils.

The three pillars have developed their respective Blueprints, all incorporated in a program document entitled **"Roadmap for an ASEAN Community."** The Blueprints contain action points to deliver outputs during a period of six years, that is, from 2009 up to 2015.

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[1] *ASEAN Leaders Sign ASEAN Charter*, Media Release, ASEAN Secretariat, November 20, 2007 <http://www.aseansec.org/21085.htm>.

But the evolution towards an integrated **ASEAN community**, sustained by the political will of the Member States, will necessarily lead to the development of an ASEAN law regime. The creation of such a legal system will form part of ASEAN's own body of laws, apart from the municipal or national laws of each Member State, akin perhaps to what the European Union labels the EU Law built on an *acquis communautaire.* Standard setting activities and norms are at the core of a rules-based community, hence the role of an ASEAN law and its system to sustain the **ASEAN Community** will be crucial and indispensable.

A. The ASEAN Political-Security Community (APSC)

Political-security cooperation continues to be at the heart of ASEAN's existence.

Originally, this Community was known as the ASEAN Security Community. The inclusion of the term *political* in the nomenclature was an initiative of the Philippines. We believe that in recognizing the **comprehensive nature of security**, there exists equally, if not even more highly and more significant, the political dimension of state relations. The non-acknowledgement of this reality will not allow ASEAN to effectively address or resolve any security concern. We only have to remind ourselves that in the international arena, regardless of whatever the **sectoral** source of a dispute or conflict, the ultimate prevention or peaceful resolution of the crisis will always be political, for these solutions will be found only in the game called **the power politics of states**.

By its very nature, the APSC emphasizes the pivotal role of ASEAN in addressing both traditional military security concerns and non-traditional security issues, such as effective border controls so necessary in preventing and managing transnational crimes which involve military and/or police cooperation. It is obvious that the work of the APSC is directed towards realizing in concrete terms a peaceful, stable, safe, and secure **ASEAN Community**.

The important contribution in this Community by the legal sector of the region is hereby acknowledged and underscored. The APSC has linkages with the following ASEAN sectoral bodies dealing on legal matters, namely: the ASEAN Law Ministers Meeting (ALAWMM) and the ASEAN Senior Law Officials Meeting (ASLOM). In addition, the ASEAN Charter in its Annex 2 recognizes the ASEAN Law Association (ALA) and the ASEAN Law Student Association (ASLA) as entities associated with ASEAN.

In the Blueprint of the APSC, a major action point relates to the establishment of programs for mutual support and assistance among Member States to develop strategies that will strengthen the rule of law, the judiciary systems, and legal infrastructures of the member states. As a step towards this direction, it is proposed that a comparative university curriculum be established on the legal systems of each ASEAN Member State. This is, indeed, well and good. However, this effort is still nationally rather than regionally oriented, and the legal needs of an ASEAN Community, which is the region as such, is still not being addressed nor responded to by this strategy.

This therefore is a challenge I pose to all the legal luminaries in this distinguished audience. Please study and prepare for the role of an ASEAN law because it will have to be there in building a rules-based **ASEAN community**.

B. The ASEAN Economic Community (AEC)

The ASEAN Economic Community is most significant in that it touches on the wealth of the nations in ASEAN. Currently, the AEC pillar has crafted three major Agreements: the ASEAN Free Trade Area Common Effective Preferential Tariff (AFTA-CEPT), which is now metamorphosing into the ASEAN Trade in Goods Agreement, the ASEAN Framework Agreement on Services (AFAS), and the ASEAN Comprehensive Investment Agreement.

All these Agreements may be considered as being derived from the Charter's call for an ASEAN Community. The

commitment of each ASEAN Member State to the Charter and subsequent agreements will necessarily demand an alignment of domestic or national laws, regulations, policies and practices. It is an important task for all the branches of the Governments of ASEAN Member States to accept the reality that changes have to come nationally, albeit gradually, in their respective legal landscape and in the national policies of each Member State, if these Governments are truly serious to create the **ASEAN Community**.

For example, these trade engagements in ASEAN are instruments to stimulate change for the better in every ASEAN country's economic functions and the region as a whole. The judiciary of an ASEAN country concerned may be called upon to rule on an issue on any of these instruments, and its ruling may be pivotal to attain a proper settlement, bearing in mind the ASEAN Charter and its vision.

The Philippine Supreme Court, for its part, has exhibited a keen appreciation of trade liberalization and other developments in the world economy. In ***Wigberto Tañada v. Edgardo Angara*** (G.R. No. 118295, May 2, 1997) which dealt with the ratification of the World Trade Organization, the Court observed:

> *x x x Aside from envisioning a trade policy based on "equality and reciprocity," the fundamental law encourages industries that are "competitive in both domestic and foreign markets," thereby demonstrating a clear policy against a sheltered domestic trade environment, but one in favor of the gradual development of robust industries that can compete with the best in the foreign markets. Indeed, Filipino managers and Filipino enterprises have shown capability and tenacity to compete internationally. x x x*

C. The ASEAN Socio-Cultural Community (ASCC)

Primary in the goals of the third pillar of ASEAN is a people-oriented and sociallly responsible **ASEAN Community**, wherein development is to the exclusion of no one, and that the rights

and welfare of all, especially women, children, and the most vulnerable are promoted, protected, and upheld.

The ASEAN Socio-Cultural Community brings to the fore the conceptualization and eventual realization of:

1. human development
2. social welfare and protection
3. social justice and rights
4. environmental sustainability
5. building an ASEAN identity, and
6. narrowing the development gap.

The 17 sectoral ministerial bodies that compose the ASCC Council are challenged to meet the goal of a **One Caring and Sharing ASEAN Community** by 2015.

It is thus in this context that we look into ourselves as a Member State of the ASEAN and determine our role in the noble task of building the **ASEAN Community**. For the Philippines, we have contributed, among others:

- In ensuring environmental sustainability through the hosting of the ASEAN Center for Biodiversity in Los Baños, Laguna, and in the ratification of the ASEAN Agreement on Disaster Management and Emergency Response, which eventually led to the agreement's entry into force on December 24, 2009. Let it be known, too, by this highly esteemed body that this year, the Philippines takes chairpersonship of the ASEAN Committee on Disaster Management and is committed to ensuring that the ASEAN Community is prepared and ready to respond to disasters and manage risks within the region.
- In promoting social justice and mainstreaming people's rights as we take lead, together with Indonesia, in working towards an instrument to operationalize the

ASEAN Declaration on the Protection and Promotion of Rights of Migrant Workers. Perhaps this may call for an eventual ASEAN Agreement on Migration.

While thinking out of the box, **I would add my own proposal hoping to contribute to social justice, social cohesion and understanding in the ASEAN Community, and that is**: that the working masses of ASEAN must enjoy the coverage and benefit of **an ASEAN Social Charter**. This is perhaps another challenge to tackle and pass on to the political and legal luminaries of the region.

D. The Regional Mechanism to Promote and Protect Human Rights: The ASEAN Intergovernmental Commission on Human Rights (AICHR)

The topic most debated by the High Level Task Force (HLTF) charged with the Drafting of the ASEAN Charter was the establishment of a human rights body. Initially, there were some who believed that there is actually no need to establish a human rights body in ASEAN. Majority, however, thought otherwise. But even then, it was unclear what type of body will be established: will it be a "Commission," "Forum," "Board," "Body," "Agency," "Mechanism," etc. As such, the HLTF decided to recommend an enabling clause in the Charter towards the establishment of an ASEAN Human Rights Body. But in order to determine what this "body" would really be, the HLTF recommended that the nature of the "body" be defined in the terms of reference (TOR) that was to be adopted by the ASEAN Member States at a later date.

The TOR creating the ASEAN Intergovernmental Commission on Human Rights (AICHR), hereinafter called the Commission, is more of a political document than a legal one. It is still a legal document in a sense, since it is an extension of the Charter as far as the establishment of the Commission is concerned. And yet, it is more of a political document since it was crafted to be flexible, to accommodate the varying comfort

levels on human rights of the different ASEAN Member States with respect to human rights issues and concerns. This is only a starting point.

If there are some differences in the interpretation on the TOR, the Commission can rely on the summary records of the High Level Panel that drafted it. If still no consensus is achieved, then the solution is not a legal one but a political one. The Commission does not go to court but submits the question of interpretation to the Foreign Ministers to decide, also by consensus.

The Commission is an intergovernmental and consultative body. It reflects the nature of ASEAN itself: an intergovernmental organization. As such, the membership of the Commission consists of the Member States of ASEAN, each appointing a representative.

With regard to the Commission being a consultative body, the drafters of the TOR agreed that the term "consultative" is not the same as the context of "consultative status" under the United Nations system. Unlike in the UN system where a non-governmental organization with a consultative status is not a part of the UN body concerned, but can be consulted on matters within its competence, the Commission is part and parcel of ASEAN as one of its principal organs. The AICHR as being a "consultative body" merely relates to its decision making process which is by **consultations and consensus**.

III. Towards a Rules-Based Organization

The ASEAN Charter formally accorded the ASEAN a distinct legal personality which is separate from those of its Member States as well as established a system for greater institutional accountability and compliance.

The ASEAN Foreign Ministers established a High Level Legal Experts' Group (HLEG) to work on the legal issues arising from the ASEAN Charter which required implementation, namely:

a. Legal personality of ASEAN in accordance with Article 3;

b. Privileges and immunities of ASEAN pursuant to Articles 17, 18 and 19; and

c. Dispute settlement mechanisms in accordance with Articles 25 and 26.

After extensive negotiations, the experts group submitted the following agreements for adoption:

a. The Agreement on the Privileges and Immunities of ASEAN; and

b. Protocol on Dispute Settlement Mechanisms and its attached Rules of Arbitration, Rules of Conciliation, Rules of Mediation and Rules of Good Offices.

A. A Legal Personality for ASEAN

The *Agreement on Privileges and Immunities of ASEAN* was signed on October 25, 2009, by the Foreign Ministers of ASEAN Member States. It is awaiting the ratification of the Member States before it enters into force.

The Agreement will operationalize two important aspects of the ASEAN Charter. The first concerns the legal personality of ASEAN as an intergovernmental organization under Article 3 of the ASEAN Charter. Accordingly, ASEAN will have relevant legal capacities both under the domestic laws of the ASEAN Member States and under international law. These pertain to its capacities to enter into contracts, to acquire and dispose of movable and immovable property, to institute and defend itself in legal proceedings, and to conclude agreements with other countries or sub-regional, regional, and international organizations.

Secondly, the Agreement lays down the harmonized minimum standards of privileges and immunities to be conferred upon ASEAN (Article 3) and entities mentioned in the ASEAN Charter, namely, the Secretary-General of ASEAN

and staff of the ASEAN Secretariat (Article 4), experts on missions for ASEAN (Article 5), Permanent Missions (Article 6), Permanent Representatives and officials on ASEAN duties (Article 7), staff of the Permanent Missions (Article 8) and officials of the Member States (Article 9).

B. Dispute Settlement Mechanisms

The ASEAN Foreign Ministers also approved the proposed *Protocol on Dispute Settlement Mechanisms* and its relevant Rules on January 14, 2010. It is expected to be signed shortly, and thereafter ratified according to the national laws of the Member States.

In accordance with Article 25 of the ASEAN Charter, the Protocol establishes appropriate dispute settlement mechanisms, where such mechanisms are not otherwise specifically provided, for disputes which concern the interpretation or application of the ASEAN Charter and other ASEAN instruments.

The Protocol encourages the Parties to the dispute to make every effort to mutually agree on a solution to their dispute. If the Parties are unable to do so, including through the dispute settlement mechanisms specified in the Protocol, the Protocol provides for a procedure whereby the Parties may bring the dispute to the attention of the ASEAN Coordinating Council, composed of ASEAN Foreign Ministers. The ASEAN Coordinating Council may then direct the Parties to the dispute to resolve their dispute through good offices, mediation, conciliation, or arbitration.

Attached to the Protocol as an integral part are rules of procedure for good offices, mediation, conciliation, and arbitration.

Arbitration will take place in two instances:

a. when there is mutual consent by the disputing Parties to proceed to arbitration; and

b. when there is a direction by the ASEAN Coordinating Council for the disputing Parties to proceed to arbitration, provided that both disputants go along with the Council's decision.

An important feature of the Rules of Arbitration is the provision of an indicative list of arbitrators to be maintained by the ASEAN Secretary-General. Each ASEAN Member State may nominate 10 individuals to the list. The list is only an indicative one, in recognition of the right of sovereign states to choose their own arbitrators, and considering the eventuality that there might be no one in the list with expertise on the subject matter of a particular dispute. Disputing parties may therefore choose arbitrators from outside the list.

The Protocol and its attached Rules is an important step towards realizing the dream of the ASEAN leaders to transform ASEAN into a rules-based organization.

C. Other Instruments

Besides the Agreement and the Protocol, other instruments are necessary to address important legal issues under the ASEAN Charter. However, HLEG was unable to finalize said instruments due to time constraints and the complexity of issues to address. These instruments are the following:

1. Procedures for ASEAN to exercise its legal capacities at international and domestic levels;
2. Rules of procedure for referring unresolved disputes to the ASEAN Summit;
3. Rules of procedure for requesting the ASEAN Secretariat to interpret the Charter; and
4. Comprehensive Agreement on Privileges and Immunities of ASEAN *(to be proposed to Dialogue Partners and other parties).*

Perhaps, the legal community in ASEAN may wish to make contributions in the development of these instruments.

IV. Conclusion

Honorable Chief Justice and Associate Justices
Excellencies
Guests
Ladies and Gentlemen,

I have laid before you the ASEAN Charter and its ramifications. We have worked hard for all of these in the last four years together with our counterparts from the other ASEAN capitals. As ASEAN's stakeholders yourselves, you Honorable Justices, judges and distinguished lawyers in ASEAN, I now invite you to do your share in the building of this immense political edifice and, as partners, we shall be the architects of an **ASEAN Community** as set out in the ASEAN Charter.

I am certain that together, we will succeed in contributing to our region's peace, prosperity, and solidarity.

Thank you all for your kind attention.

The ASEAN Charter and the Building of an ASEAN Community
*Reaction**

*Mr. Jeffrey Chan Wah Teck, S.C.***

The governing council of the ASEAN Law Association
Distinguished guests
Excellencies
Ladies and gentlemen.

Let me first begin by saying that I am honored to be invited here to address you all this morning and to participate as a reactor to the excellent presentation made by Ambassador Manalo. I did not quite understand what the term "reactor" meant. So they explained to me, I am supposed to react to the points made by her.

I should mention at this time that Ambassador Manalo's presentation was superb in the sense that in the short time that she had, she was able to provide all of us with her comprehensive tutorial on the ASEAN Charter. Anybody

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* Delivered at the *Chief Justice Reynato S. Puno Third Distinguished Lecture* held on February 19, 2010, at the En Banc Session Hall, New Supreme Court Building, Padre Faura Street, Manila, and via video conferencing at the Waterfront Hotel, Cebu City, and Royal Mandaya Hotel, Davao City. *Transcribed.*

** Mr. Jeffrey Chan Wah Teck, S.C., Deputy Solicitor-General of Singapore, read law at the then University of Singapore. He graduated in 1973 as the Gold Medalist of his class. He subsequently obtained his LL.M. from Harvard University, USA. He joined the Singapore Legal Service in 1973 and has held a wide range of appointments including as a judicial officer and Director of the Legal Services in the Ministry of Defense.

listening to or reading the presentation will know in some detail what the ASEAN Charter is all about. When I heard Ambassador Manalo's presentation, as a lawyer, a number of significant points struck me. Firstly, to use her own words, ASEAN suffered from a number of idiosyncrasies and of course as a lawyer, the major points that struck me under this heading would be the fact that ASEAN has no legal personality, its decisions are not binding, its meetings are informal and so on. Then she made the other point which is the ASEAN Charter is designed to better integrate ASEAN and enable it to meet the needs of the future. And that the importance of the legal sector has been underscored by those who drafted the charter. Finally, as a lawyer, the most important point that struck me–and this point was emphasized in some forums by Ambassador Macdonald–was the fact that ASEAN has to be a rules-based community or organization. I prefer the term community than organization because an organization is merely an organization of people; a community is a community of states in our context. What do you mean by this? It means that the structure and functions of ASEAN should be established by rules. It should have legal personality. Its officials and rules should work for it, should be

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Prior to his present appointment, he headed the Civil and then the International Affairs Division of the Attorney-General's Chambers of Singapore. In 2009, in recognition of his extensive experience in litigation, he was appointed as Senior Counsel. His extensive experience in international matters included attending to all matters involving the ASEAN Law Ministers and Senior Officials Meeting on behalf of Singapore. In 2008, he was appointed as a member of the ASEAN High Level Legal Experts' Group (HLEG) to follow up on the ASEAN Charter. He represented Singapore at the deliberations of HLEG until the completion of its work in December 2009. Mr. Chan has spoken extensively at numerous legal and other forums on a wide range of legal subjects, including the legal aspects of ASEAN.

Apart from his legal work, Mr. Chan is also the President of the Medico-Legal Society of Singapore, Adviser to the National Archives Board, Vice Chair of Singapore Red Cross and an active Rotarian.

entitled to privileges and immunities in the same way as officials of states are entitled to privileges and immunities in other states. And more importantly, the disputes among its members are to be resolved through legal processes.

But before we go further, it might be useful for us to step back in time and cast our eyes back to the origins of the ASEAN charter. ASEAN, as Ambassador Manalo mentioned, has been operating since 1967. But it was established, unlike the European Community, not by a treaty but by a declaration. There was no treaty, there are no legally binding rules that establish ASEAN since 1967. So why is it that we have now an ASEAN charter? Well, the origins of the ASEAN charter hops back to Vientiane, Laos, at the ASEAN Summit of 2004, where as part of the Vientiane Action Plan, the VAP, the leaders of ASEAN stated that: we recognize the need to strengthen ASEAN and work towards the development of an ASEAN charter. The thinking was, at that time, that ASEAN has achieved a certain level of integration. There is time for ASEAN to be more than what it was and move to a higher level of integration. This idea was picked up the next year in the ASEAN Summit in Kuala Lumpur which established the Eminent Persons Group (EPG).

And we learned just a moment ago that Ambassador Manalo was special adviser to President Fidel Ramos, who was the Philippine representative to the EPG of ASEAN. The EPG was a group of eminent persons; they were the eldest statesmen of ASEAN but they held extensive consultations with various stakeholders of ASEAN internally and externally. It drafted a landmark report which was submitted and accepted by the 2006 ASEAN Summit which was held here in the Philippines in Cebu City.

A few words about the Eminent Persons Group – as I mentioned, it comprises the eldest statesmen of ASEAN. These are persons who were there when ASEAN began: I mentioned Pres. Fidel Ramos; in the case of Singapore, we have our Foreign Affairs Minister, my professor, Prof. S. Jayakumar; in the case of Malaysia, I believe it was H.E. Tun Musa Hitam; and there were

other luminaries from other ASEAN countries in this EPG. They were the persons who knew ASEAN best and yet they held extensive consultations. What was their task? Their task is to make whole and visionary recommendations on what should go into the ASEAN charter. They are to think of the future but think out of the box as to what the ASEAN charter should be. And of course, what goes into the ASEAN charter would define ASEAN for posterity. What then did the EPG conclude after its many deliberations and consultations? Please recall they took one year to complete the work. The EPG made a number of observations and conclusions. But they recognized the deficiencies of ASEAN and they expressed it in these terms which I quote verbatim:

> ASEAN's problem is not one of lack of vision, ideas or action plans. The problem is one of ensuring compliance and effective implementation. ASEAN must have a culture of commitment to honor and implement decisions, agreements and timelines.

That was a critical observation and recommendation made by the EPG.

Following this, a number of critical recommendations to meet and from the point of view of a lawyer looking at the recommendations, the ones that struck me were, as mentioned by Ambassador Manalo and reiterated by Ambassador MacDonald, that ASEAN should have legal personality and that member states shall ensure to give effect to the separate legal personality of the ASEAN within their respective legal systems. It is a moot point whether at that point in time ASEAN had or did not have legal personality because legal personality does not depend on international law on the state declaring itself to be a legal personality. It depends very often on how other people treat you. If other people or states treat you as a legal person, then the understanding is that you have legal personality. But until you yourself declare that you have legal personality, there is always a possible challenge that whatever you do, it is non-enforceable because you do not have legal personality. So it is crucial that the legal personality of ASEAN

be documented. Why is legal personality important? Well, without legal personality, you are a ghost; you do not exist in law; you cannot enter into agreements; for example, you cannot enter into contracts, you cannot own property, you cannot sue and be sued in the courts, and of course, if you are not a legal person, you cannot enjoy privileges and immunities. So, the recommendation of the EPG was that ASEAN should have the capacity to own property, enter into contracts and to sue and be sued.

What about the other observation of the EPG about the culture of the ASEAN where the EPG had very strong words to give. Well, the EPG stated very clearly that ASEAN must establish a culture of honoring and implementing its decisions and agreements and carrying them out in time. And how is this to be achieved? Well, to achieve this, a critical factor must be the establishment of dispute settlement agreements in all fields of ASEAN cooperation. Why is there a necessity to ensure that disputes must be resolved? Well, if disputes are not resolved, then one dispute can only lead to other disputes and disputes can fester until the integration of the factors that hold the community together are weakened and that can lead to catastrophe for the community as a whole. Therefore, it is important that disputes be resolved. Disputes also need to be resolved for another important factor and that is to ensure that the community itself takes whatever its individual member states commit itself to do seriously. Because the member states do not take seriously what they commit themselves to do, then other states in the world and those other stakeholders who deal with the community as a whole will not have any confidence in that community. So it is important that those who create conditions for agreements for others to rely on, give assurance to others that they will or are committed to observing what they themselves have agreed. And to further this, the EPG recommended that the dispute settlement mechanisms should not just be dispute settlement mechanisms but should also include compliance monitoring, advisory consultations, as

well as enforcement mechanisms. And for rules to be given effect, enforcement is, of course, necessary.

What then about the ASEAN charter? How would the recommendations of the EPG translate into the ASEAN charter? We have Ambassador Manalo's information that it was formulated by a high level task force and they sought to give effect to EPG's recommendations. The charter, as Ambassador Manalo has elucidated, provided the structural framework and the directions for ASEAN. It does not go into details. Mention was made about the Lisbon Treaty, how detailed it is. The Treaty of Rome, which established the European community, was also a very heavy document. The charter, on the other hand, and for those of you who have not seen the charter, this is the official version of the ASEAN charter. It is a very small document, the font is very large, it is easy to read, it is short. So obviously, the charter cannot deal with every aspect that needed to be addressed in order to establish ASEAN as a functioning regional organization. So to achieve this, all that are needed are rules to govern ASEAN that would put in place the legally binding agreements among ASEAN member states. And basically, the High Level Legal Experts' Group (HLEG) was appointed to address the legal means of addressing ASEAN as a rules-based community.

And here I would like to acknowledge the presence in this room today of two other HLEG members; Mr. Eduardo Malaya from the Philippines and Hjh Nor Hashimah binti Hj Mohd Taib from Brunei who is also a member of HLEG from Brunei. The three of us, together with the others in the HLEG, actually worked very hard to try to work through the legal means of giving effect to the ASEAN charter.

Central to the ASEAN charter is its framework which has been used several times by both Ambassador Manalo and Ambassador MacDonald and that is a rules-based community. What is meant by a rules-based community? It is a community of nations established through legal processes whose

governance, structures and processes are governed by legally binding rules. A rules-based community also means that agreements among member states are legally enforceable as these ensure certainty and confidence for those who rely on that community or on the agreements under the auspices of that community. And as I mentioned and emphasized earlier and I emphasize again, basic to legal enforceability is a mandatory process for the resolution of disputes.

ASEAN looked at a number of other international organizations for inspiration as to what a rules-based community should be. There are two that come to mind right away: one of course is the European Union and I assume that is the reason why Ambassador MacDonald is here today, to let us know more how the European Union works. The European Union is very much a rules-based community, it was established by a treaty and the various agreements create rights not just for the states who are members of the community, but also individuals who are in the states of the community. And these rights are claimable rights, many of these are claimable rights. There are rights that are recognized and are enforceable by individuals in national courts and now even in European courts. So it is very much a rules-based community in that sense. It is a supranational organization; in other words the rules of the organization in certain areas take precedence over national laws. I should also mention that part of the works of the ASEAN charter, the high level task force visited Brussels to study the model of the European community. The other organization that comes to mind is the World Trade Organization. Let us recall that the World Trade Organization is a rules-based community. The rules that have been established are enforceable and there is a mandatory process for the enforcement of those rules. Even if state parties who are a party to those who do not wish those rules to be enforced against them, there is a mandatory process. And this is provided for in the dispute settlement understanding of the World Trade Organization.

What about ASEAN as a rules-based community? Firstly, the ASEAN is not a supranational organization. To date, most ASEAN agreements have not entered into force. In a recent seminar in Singapore, it was discussed that several hundred ASEAN agreements were discussed. When we talk about ASEAN agreements, we are talking of agreements that have actually come into force in the sense that they have been accepted and ratified by the member states of ASEAN. Of all these agreements, only 30 percent have been implemented. The rest have just been ignored. This 30 percent has been attributed to Rod Severino, the former Secretary-General of ASEAN, who is from the Philippines; I believe many of you know him personally. Rod has actually denied making the statement. He said, "I never said it was 30 percent," and those at the seminar jokingly said that, well, it is actually because the true figure is less than 30 percent. Less than 30 percent of ASEAN agreements that have come into force have not been implemented. That does not all go well for ASEAN but ASEAN is actually moving towards a rules-based community in at least economic matters.

The main example of this is what is known as the Vientiane Protocol or the ASEAN Enhanced Dispute Settlement Mechanism (EDSM). This mechanism is based on the World Trade Organization Dispute Settlement Understanding. Like the World Trade Organization, it is a balance between the need for a rules-based regime and also political reality. So there is a mechanism whereby if there is a dispute which cannot be resolved consensually and one of the parties wishes it be resolved in a very certain and determinative manner and the only way to do that is through arbitration or litigation, then that party can refer the matter to the ASEAN senior economic officials meeting.

Ambassador MacDonald mentioned that the approach in the ASEAN is somewhat minimalist. He is correct because the approach in the EDSM is different. In the EDSM which is based on the World Trade Organization Dispute Settlement Understanding (DSU), the approach is that when a dispute is referred by one party to the senior economic officials meeting,

this is a meeting of all ASEAN countries, then unless there is a consensus not to refer the dispute to mandatory arbitration, mandatory arbitration will take place. This is known as a negative consensus. So unless there is a negative consensus, unless everybody agrees not to go through arbitration, not to go through a determinative process, the dispute will go through a determinative process and will be resolved because arbitration will certainly resolve the dispute and nothing more because unless a dispute is resolved and there is no work, the arbitrators will not get paid. So that is one way to ensure that dispute is resolved.

So we only held that ASEAN is moving slowly towards a rules-based community. But in the deliberations of HLEG I noticed that there were actually different understandings on what a rules-based community is or should be. How then did we fare in HLEG? As I mentioned, in HLEG we tried to address its use to establish ASEAN as a rules-based community. Ambassador Manalo has mentioned the outcomes of HLEG – the two main outcomes were the agreement on privileges and immunities of ASEAN. It has already been accepted by ASEAN countries. And the next one which is even more important is the draft protocol on the ASEAN charter on dispute settlement mechanism. Let me first briefly deal with the agreement on privileges and immunities of ASEAN. It is based on the 1946 UN Convention on privileges and immunities but there were major deviations to provide for specific interests in ASEAN. It provides ASEAN the same level of legal personality and the same level of privileges and immunities for all ASEAN member states. In other words, it provides harmonization of practice in ASEAN member states in relation to the privileges and immunities in ASEAN. But these are agreements between states. It must be given legal effect in domestic law. So it is crucially important that the necessary domestic legislation be promulgated in every ASEAN member state in order to give effect to this agreement in its totality. If the necessary domestic regulations are not promulgated or there are divergences in the domestic

regulation promulgated in order to give effect to this agreement, then the goal of achieving ASEAN as a rules-based regime of harmonized laws would be negated.

Let me now come quickly to the protocol on the ASEAN charter on dispute settlement mechanisms. Firstly, I can repeat what Ambassador MacDonald said that the approach is rather minimalist because it has rather limited application. It is only to agreements; they are not subject to other dispute settlement mechanisms. Many ASEAN agreements have, as a clause, that any dispute arising from that particular agreement would be resolved through mutual consultations. Now, there was an understanding in HLEG that this means that that is a separate dispute settlement mechanism for that agreement. So it is crucially important that for future ASEAN agreements that that clause not be present but any dispute should be referred for resolution under this protocol to the ASEAN charter. I mentioned that this protocol has taken inspiration from various rules-based regimes but, as Ambassador MacDonald has underscored, it is deviated from the other regimes in the sense that the negative consensus is not there. If the dispute cannot be resolved consensually, and one party wishes to take the other party to mandatory and determinative dispute resolution process, they must go first to the ASEAN coordinating council. There is no negative consensus so it means that everybody must agree that the dispute be resolved through determinative process. Otherwise, a determinative process would not apply. So that is a major deviation from the models that you are looking at.

There is also a major deviation from the Enhanced Dispute Settlement Mechanism which provides for positive consensus. Mandatory arbitration will result in the resolution of the dispute but without arbitration, the dispute may not be resolved. Under the protocols, the main emphasis is for the dispute to be resolved consensually and that arbitration is only one mechanism for the ACC to direct; it can direct other mechanisms. The choice is entirely up to the ASEAN coordinating council, this is a somewhat minimalist approach. So it means that

disputes may not be resolved even under the protocol. The EDSM protocol is not quite aligned with the intentions of the EPG and the ASEAN charter. The disputes should be resolved with certainty. And the reason for this is that there were different understandings among us HLEG members over the intent on the line that the dispute settlement provisions of the ASEAN charter was quite clear, that many of them prefer a political resolution over the legal process for resolution. And therefore there was a clear preference that the disputes that cannot be resolved consensually should be referred to the ASEAN summit.

What can we do in order to establish a rules-based ASEAN? Firstly, there is a personal culture. The EPG has noted that there is this culture of not honoring agreements. I think it is most important that we have a cultural mindset change so that officials who negotiate agreements take seriously the agreements that they produce. And to ensure that they take it seriously, it is important that mechanisms be put in place to ensure the obligations entered into by ASEAN member states can be enforced and this is even if the defaulting party does not wish to be exposed to be directed to carry out what it has bound itself to do. Failure to ensure this would mean that ASEAN cannot be relied upon by stakeholders and will mean that the goal that ASEAN be taken as a serious regional organization by stakeholders, which include other states as well as the people of ASEAN, may end up being negated.

What then are the obstacles to a rules-based ASEAN? Firstly, there are inconsistent understandings among politicians and bureaucrats about what is meant by rule of law. This is beyond HLEG forces endemic in ASEAN. There is also fear of the legal process partly because of unfamiliarity and partly because the legal process may mean abdication of control or the outcome of the process. The outcome is determined by some other party not by yourself. There is this discomfort with losing control over the outcome of the process. There is also some resistance to change. ASEAN has been this way for years and so why the need

to change? There is always a preference for what has been described by the ASEAN Secretariat as the ASEAN way. If we have a problem let us have a cup of tea and talk about it, let us not go to the lawyers. So we need to put in place processes and systems to remove these obstacles. There is a need to sensitize governmental leaders and bureaucrats as to the rule of law. There is a need for a common understanding of what a rules-based community means. We need to underscore to them the necessity and advantages of a rules-based culture as opposed to the uncertainties of the ASEAN way where a chat over a cup of tea may not result in a satisfactory or certain outcome to a problem.

And we need to underscore that with the ASEAN charter, there is a whole new thinking that has come into place in ASEAN and that the ways of the past need to be placed fairly where they are which is in the past. In this context, it is my view and the view of many of my friends that the ASEAN Law Association has an important role to play in removing obstacles to rules-based ASEAN. Why? Because the ASEAN Law Association is the only ASEAN-wide organization focused on the rule of law in ASEAN. Its importance is recognized in that it is one of the entities associated with ASEAN which is explicitly set out in Schedule 2 of the Charter. It has a unique membership profile– it comprises judges, including the most senior judges of ASEAN; government lawyers, private lawyers, and law teachers. Its present focus according to the Charter is more on cooperation and development of mutual understanding. But in order for the ASEAN Law Association to carry out its role as one of the engines for the implementation of the ASEAN charter, there is a need for the ASEAN Law Association to refocus, to highlight, to refocus its activities from just transporting cross-border activities, cooperation, creating understanding among ASEAN lawyers to even a domestic agenda. To highlight the importance of the rule of law and the rules-based ASEAN, this may require a constitutional amendment to the ASEAN Law Association. Domestically, it is my view that to achieve this important role

that only the ASEAN Law Association can play, it must work with society generally.

Mention was made in the side discussion we just had that ASEAN at present is rather elitist. A lot of our people on the ground, the grass roots, do not have much sensitivity to ASEAN or patronize its cause. Probably the only ASEAN process that has really impacted on our people is the fact that most of them now get visa-free entry to ASEAN-member countries, and even they are not all ASEAN-member countries. There is a need to sensitize, to bring down to the grass roots what ASEAN is all about. And frankly, the ASEAN law association is the only organization that can do this. Then, in ASEAN itself within the region, ALA should work with the various ASEAN bodies especially the ASEAN senior official meeting, the ASEAN coordinating committee, the ASEAN Senior Law Officials Meeting (ASLOM), and the ASEAN law ministers meeting.

Ambassador Manalo, in the early part of her paper, mentions the possible development of ASEAN law. What better organization to lead in the development of ASEAN law, to meet the development of ASEAN jurisprudence, than the ASEAN Law Association and especially its members to include judges, government lawyers, and even private lawyers in ASEAN. I should say that if the ALA does not take up this task, then this task will mean largely undone, to the detriment of the ASEAN charter, because the ALA is the only association presently in ASEAN that is capable to take up this particular role.

In conclusion, may I once again thank the Supreme Court of the Philippines and the ASEAN Law Association for giving me this opportunity to react to Ambassador Manalo's excellent paper. Let me once again thank the Ambassador for an excellent paper. And let me reiterate the theme of my reaction which is "Making the ASEAN Charter Meaningful" and likewise reiterate the call for all of us to make the ASEAN charter truly meaningful.

Thank you very much.

The ASEAN Charter and the Building of an ASEAN Community
Reaction[*]

Ambassador Alistair Bell MacDonald[**]

Honorable Chief Justice and Justices from across the Association of Southeast Asian Nations (ASEAN)
Excellencies
Distinguished guests
Friends and colleagues
Ladies and gentlemen.

Good morning, *magandang umaga*, to you all.

I must say that I was really pleased to be invited to take part in this morning's discussion, partly because the building of ASEAN is an extremely important topic, both regionally and globally; partly because it is an area that I have been working on myself for more than 30 years, in one way or another; and partly because it gives me the pleasure of listening to one of the key experts on ASEAN, in the person of Ambassador Rosario Manalo.

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* Delivered at the *Chief Justice Reynato S. Puno Third Distinguished Lecture* held on February 19, 2010, at the En Banc Session Hall, New Supreme Court Building, Padre Faura Street, Manila, and via video conferencing at the Waterfront Hotel, Cebu City, and Royal Mandaya Hotel, Davao City.

** Ambassador Alistair Bell MacDonald of the Delegation of the European Union to the Philippines worked as a First Counsellor in this Delegation from its opening in 1990 until 1995 (and was awarded the Order of Sikatuna, rank of Lakan, on his departure in 1995). He had also worked closely with the Philippines during an earlier posting in the Delegation in Bangkok, from 1985 to 1990, at a time when that office also covered the Philippines and several other countries in the region.

I have had the pleasure of working with Ambassador Manalo for more years than I, or perhaps she, would care to remember. I was a junior desk officer in the European Commission (EC) in Brussels, when she was the Philippine Ambassador to the European Communities. I still remember when we talked about possible EC-funded rural development projects in the Philippines, and I first learned that there was a province in the Philippines called Antique, and another called Aurora. She was able to persuade the EC to carry forward the project in Aurora, while I believe she was able to persuade the Netherlands to take up the Antique project. Since then, our careers have intersected at different times, and I was absolutely delighted when I returned to the Philippines three years ago to find that she was not only the Dean of European Studies at Ateneo de Manila University, but also (at that time) the Chair of the High Level Task Force (HLTF) working on the ASEAN Charter. In any case, it is always a pleasure to hear her profound insights into ASEAN as it has evolved, and her very pertinent, certainly innovative, and even courageous suggestions as to how ASEAN might further evolve in the future.

Ambassador MacDonald joined the European Commission in 1978, and worked initially as Desk Officer in the Directorate General for Development (dealing with Southeast Asian countries and ASEAN). This was followed by postings in Bangkok (1985–1990) and in Manila (1990–1995). Since returning to Brussels in 1995, he held several management positions in the European Commission's Directorate General for External Relations – in the Asia Directorate, dealing *inter alia* with the ASEM process, then in the Eastern Europe Directorate and most recently in the Directorate for European Neighbourhood Policy Coordination (dealing with the EU's neighbours to both the East and the South).

He was born in Scotland in 1949, is a graduate of Glasgow University, and started his professional career as an academic, teaching political economy, economic history, and European Studies at La Trobe University, Melbourne, Australia, and at Loughborough University in England.

His wife, Brigitte Marie Revol, is French, and they have two adult children, Eve and Gregor.

1) One often hears, within ASEAN, the suggestion that ASEAN is by definition very different from the European Union (EU) – that ASEAN is not Europe. Which of course is true – but at the same time, I believe that the similarities actually outweigh the differences.

It is often overlooked that the origins of the EU and of ASEAN were in fact very similar. Both were ostensibly economic integration efforts – reducing tariffs, building towards free trade, gradually moving into questions of standards and other superficially boring technical issues. But the underlying motive was in fact very deeply political, in both cases:

- in Europe, putting an end to almost a century of fratricidal conflict, of European civil war, by working for the integration of the commanding heights of our economies, at the same time as we worked to protect our security, in the context of the Cold War, by building a stronger and more cooperative economy.
- in ASEAN, creating an economic smokescreen behind which Indonesia and Malaysia could bring an end to Konfrontasi, and in working to protect Southeast Asia's security in the context of the conflict in Indochina.

There are also similarities in our basic statistics, though I would not spend too long on these, beyond noting that the population of the EU is just under 500 million, while that of ASEAN is some way above 500 million, or that ASEAN is the EU's third-largest trading partner, just as the EU is the third-largest trading partner of ASEAN. Nor will I put too much emphasis (though this is something which is perhaps too easily overlooked) on the fact that the EU and ASEAN are roughly similar in age – the EU founded in 1957 (if one goes by the Treaty of Rome), and ASEAN in 1967 – both of us could be considered to be middle-aged – perhaps with a few aches and pains, perhaps with more wisdom than we had when we were younger.

I would note also that both the EU and ASEAN formally adopted our new charters, or treaties, within weeks of each other – the ASEAN Charter was adopted in November of 2007, the Lisbon Treaty in December of that year though ASEAN was rather quicker off the mark in ratifying the Charter, so that it entered into force 50 weeks before the Lisbon Treaty did – ASEAN on December 15, 2008, the EU on December 1, 2009.

Of course there are differences, important ones:

- ASEAN, and most ASEAN countries, have lower income levels than the EU, and poverty remains a key issue for too many people across the region
- ASEAN is also more diverse than the EU, with Laos and Singapore being at opposite ends of the spectrum in terms of per capita income, and I might add Burma and the Philippines likewise being at opposite ends of the spectrum in terms of human rights, press freedom, etc.

Even there, I would have to qualify both these points:

- the EU is more diverse than you might think, particularly since 2004: Poland is not Denmark, just as Finland is not Spain, and Bulgaria is not the United Kingdom (UK). And we do have 23 official working languages across the EU, which means that the EC is one of, if not the, world's greatest source of expertise on machine translation.
- and poverty is, I am afraid, something which is always with us, in Europe also – not for nothing is 2010 the European Year of Combating Poverty and Social Exclusion.

So for the moment, I would just say that yes, ASEAN is not Europe and vice versa, but the challenges facing us are more similar than these differences might suggest, and

therefore it is not surprising that the solutions which we are finding are not so dissimilar.

2) One other similarity, of course, is that both ASEAN and the EU have fundamentally overhauled their institutions at roughly the same time, and in both cases with the intention of ensuring that our respective institutions are "fit for purpose" for the 21st century:

- in the case of ASEAN, the entry into force of the ASEAN Charter in 2008 needs little further comment from me, after Ambassador Manalo's excellent presentation.

- in the case of the EU, the Lisbon Treaty entered into force just 10 weeks ago, and is already producing very significant changes in the way that we work. By the way, might I ask if anyone here has read the Lisbon Treaty? I have to admit that I have not – for the very simple reason that it is completely unreadable. The Lisbon Treaty as such is an amending treaty, and a typical article in the Lisbon Treaty might read as follows (and I quote, from Article 12 of Lisbon in its entirety):

> *Article 3(1) shall be repealed. Paragraph 2 thereof shall become Article 8; it shall be amended as set out below in point 21.*

Eighty pages of that is not really very inspiring, I am afraid. So in fact what you have to look at are the consolidated texts, post-Lisbon, of the Treaty on European Union (TEU) and Treaty on the Functioning of the European Union (TFU) (what used to be called the TEU and Treaty establishing the European Community [TEC]).

Let me say a few words about what the Lisbon Treaty actually does. I would begin by mentioning that one simple result of Lisbon is the abolition of the European Community – or, more precisely, the EU (which previously was only a political concept) has taken on the legal personality of the

EC. So there is no more need now to wonder about when you should say EC and when EU (the only EC which remains is the European Commission, as the executive arm of the EU).

More fundamentally, though, the Lisbon Treaty builds a **more democratic and transparent Europe**, and **a more efficient Europe**. And it aims to **strengthen the EU's global voice**, and enhance our capacity to respond to the regional and international challenges of the 21st century:

- In terms of *democracy and transparency*, the European Parliament and the national parliaments now have a stronger role in decision making. We've also introduced a right of citizens' initiative – though one million signatures are required for such a proposal to be made. We also now have a legally binding European Charter of Fundamental Rights, setting out clearly the principles of a Europe of rights and values, freedom, solidarity and security.

- In terms of building a *more efficient Europe*, the Treaty introduces simplified working methods and voting rules, including a considerably expanded use of majority voting across most policy areas. We've also created the new post of President of the European Council, with Herman Van Rompuy, former Prime Minister of Belgium, as the first President, chairing our quarterly Summits, and representing the EU at international Summits. The six-month rotating Presidency will continue, though, for matters other than Common Foreign Security Policy (CFSP) – for example in chairing the Council of Ministers in relation to all the internal policy areas such as energy, environment, justice, agriculture, regional development and so on. Spain currently holds the Presidency of the Council of Ministers, and for the second semester of this year it will be Belgium.

- And *on the global stage*, the EU now has a new High Representative for Foreign and Security Policy. Catherine Ashton, as High Representative and Vice President of the Commission, will also head the new European External Action Service, the diplomatic service of the EU. This has also had a direct impact on my own job, since already from the 1st of December, all Delegations of the European Commission in third countries have become "Delegations of the European Union," and I will no longer have to correct you if you refer to me as the EU Ambassador.

Here again one can easily identify a number of similarities and differences between Lisbon and the ASEAN Charter. Ambassador Manalo mentioned three key purposes of the Charter, namely the creation of a formal legal personality (just as Lisbon gives to the EU), the establishment of greater institutional accountability (we have increased the powers of Parliaments, both EP and national), and the reinforcement of perceptions of ASEAN as serious regional player (here, I think, we might differ – in the EU, we want to enhance the reality of EU's global role, building a global political voice more commensurate with our economic and social weight).

And of course there are very many other institutional and political differences which remain – ASEAN remains intergovernmental (the EU is in many respects supra-governmental); ASEAN continues to work by consensus (the EU has further increased the scope of qualified majority voting [QMV]); and the EU has a Parliament, a Supreme Court as well as a Court of Appeals, and other essential institutions to which ASEAN may or may not yet aspire.

But I would like to suggest that the underlying institutional challenges which both ASEAN and the EU must continue to face are, I believe, very easily comparable. To take just one example, the EU has had a long-standing problem of its public image, not helped by what is often

referred to as our " democratic deficit" – decisions taken by governments in Brussels, which may often seem remote to the ordinary voter, or a creation of faceless Eurocrats rather than a voluntary decision by their own elected governments. This was what lay behind the rejection of the Constitution by France and the Netherlands in 2005, and the initial rejection of Lisbon by Ireland in 2008, and every opinion poll conducted across Europe suggests a degree of disenchantment, a lack of familiarity, a lack of engagement, with the European project of which we in Brussels are so proud.

I hesitate to ask what public opinion within ASEAN has to say about public attitudes towards ASEAN – but I suspect that if there may be little evident disenchantment, that is because there is even less familiarity. But I will leave that for another discussion.

3) I should also say something about EU's relationship with ASEAN. Of course the EU was the first dialogue partner of ASEAN, and since we established a formal dialogue in 1978, we have worked hard, on both sides, to further strengthen this relationship.

- The EU therefore has a regular "bilateral" dialogue with ASEAN, at Foreign Ministers' and Senior Officials' level, in addition to taking part in "multilateral" fora such as the Post-Ministerial Conference (PMC) and ASEAN Regional Forum (ARF). The EU also looks forward to signing the Treaty of Amity and Cooperation, which I understand is likely to take place in the near future, once all the formalities have been completed.

- The EU is also a prime economic partner of ASEAN – both in trade (third largest trading partner, in both directions) and in investment (the EU being the largest single source of foreign direct investment (FDI) in ASEAN, well ahead of the US.

- And the EU is a long-standing cooperation partner of ASEAN. We have an extensive programme of cooperation with ASEAN as such (in addition to our bilateral programmes with many individual ASEAN countries), touching on such areas as capacity building and the exchange of expertise in areas such as support to ASEAN economic integration, statistics, intellectual property rights, economic and social issues, air transport, and of course biodiversity. I say "of course," since we have been a founding partner of the ASEAN Biodiversity Centre here in the Philippines.

Certainly there have been difficulties, including issues such as Burma, or the lack of progress towards the proposed European Union-Association of Southeast Asian Nations Free Trade Agreement (EU-ASEAN FTA), but I would not spend any time on these today – the issues are well-known.

Overall, though, you could say that the EU and ASEAN are sisters under the skin – similar challenges, similar solutions, similar basic approach. If one was looking for a metaphor, that of "birds of a feather" comes to mind – though given the difficulties we both face from time to time in working to promote regional integration, some might also say that "misery always looks for company."

4) Looking forward, what are the future challenges facing the EU and ASEAN?

For the EU, I might make a brief reference to:

- the search for competivity – the need to ensure that the EU is able to promote the livelihood, education, and employment of our citizens in the global economy of today and tomorrow;

- the need to better translate our economic/social weight into a real political weight on the regional and global stage, ensuring also that this translates into a positive contribution to our shared global futures;

- and lastly, I would refer to what I said earlier about public perceptions, and the need to convince our citizens that the EU is directly and positively relevant to our citizens.

For ASEAN, I might also offer three challenges – two of which were already picked out by Ambassador Manalo. I could, of course, easily extend this list, since I believe that the challenges I mentioned for the EU could easily be applied also in the case of ASEAN. But I'll stick with symmetry, and mention just three examples of issues which I believe will be important for ASEAN to address, sooner or later (and probably sooner):

- As Ambassador Manalo said, in her challenge to all the lawyers in the room, for ASEAN to work towards the establishment of a rules-based ASEAN Community, where legally binding procedures might gradually replace the rule of consensus. In this context, I was particularly struck by her reference to the dispute-settlement procedures currently being developed – where arbitration can take place when both parties agree, or if directed by the Coordinating Council (if both parties agree). To a European ear, this sounds remarkably minimalist.
- Second, Ambassador Manalo also suggested that it would be important to work towards creating an ASEAN Social Charter. It may be that many social issues must continue to be addressed by national governments (as remains the case in the EU), but a greater regional cooperation in these areas would be a major step forward towards the Caring and Sharing Community which ASEAN aspires to be.
- Thirdly, I would mention an idea which is close to my own heart – and one which I have discussed with Ambassador Manalo on a number of occasions. This is the question of ASEAN solidarity – not in relation to

foreign policy, where ASEAN has been very effective, but in relation to fighting poverty, and promoting competivity. The ASEAN Charter makes no reference whatever to any form of ASEAN financial resources (other than for the operational costs of the Secretariat). I would never suggest that the EU model, with a little over 1 percent of gross domestic product (GDP) going to EU activities, is appropriate for ASEAN. But to evade entirely the question of how to pay for ASEAN actions, how to contribute, within ASEAN and as ASEAN, to addressing the major challenges of the coming decades, to me was a major missed opportunity.

5) In conclusion, Mr. Chair, I do not want to end by focusing only on challenges and problems. Instead, I would like to conclude my remarks by confirming that just as I believe that the future of Europe lies with the further evolution of the EU, so also the future of Southeast Asia lies with ASEAN. And, in the broader view, our shared futures, in a context of globalization, are intrinsically bound up with one another.

Ambassador Manalo's presentation set out very clearly both the achievements of ASEAN and some of the issues which remain to be addressed, and it was a privilege to hear such an insider's view of ASEAN and its institutions.

*Closing Remarks**

Chief Justice Reynato S. Puno

Your Honors
Your Excellencies,

In behalf of our Supreme Court and the Philippine Judicial Academy as well as the ALA, let me thank our Ambassador, Her Excellency Rosario Manalo, for her most enlightening discourse on the ASEAN Charter. I wish also to express our gratitude to our resource speakers, Mr. Jeffrey Chan Teck, the Deputy Solicitor General of Singapore, and His Excellency Alistair Bell MacDonald of the European Commission for adding meaningful dimensions on the future of the ASEAN Charter. Likewise, I would like to manifest our thanks to all who attended this Distinguished Lecture Series of our Supreme Court specially our distinguished guests from the ASEAN Law Association.

It has been predicted that in this millennium, the attention of the world will shift to Southeast Asia. Certainly, the imperatives of geo-politics will drive this new attention. By a rough estimate, some 560 million people inhabit the Southeast Asia region. Its population alone is proof of its potential for good or for ill not only to the region but to the entire mankind. Likewise, the geographical location of some of its member-states is critical to the maintenance of the world's peace and prosperity. Some security experts give the opinion that control of the Southeast Asian region is a key factor in the incessant struggle for political and economic hegemony of the super powers today. And without further bloating the obvious, the

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rich natural resources scattered throughout the region make them objects to be coveted. For these reasons, the information and development of the ASEAN has been subjected to intense examination. Its birth in 1967 when Indonesia, Malaysia, Singapore, Thailand, and the Philippines signed the declaration in Bangkok was hailed as the dawn of the new age in the underdeveloped region. ASEAN further raised the bar of expectations when Brunei, Vietnam, Laos, Burma, and Cambodia joined the association. Several decades after its establishment, ASEAN is getting mixed reviews from the pundits. The turtle pace of its progress towards integration has strained the necks of its watchers. Some unforgiving comments have been made when it is compared with its counterparts in Europe, the Americas and even in Africa. Typical of these comments is that which downgraded if not ridiculed the ASEAN as a mouth with a tongue but without teeth. All bark but no bite, so the critics denounced the ASEAN. It is not difficult, however, to understand ASEAN's slow motion march towards integration. Arguably, the reason holding ASEAN from sprinting to its objective is its guiding philosophy. It chose to be guided by what we call as the ASEAN way to achieve goals. And the ASEAN way is the way of consultation, compromise, and consensus. To the impatient, the ASEAN way with its hops, steps, and pauses will take the region an eternity to reach its destiny.

I would like to believe, however, that the member states adopted this approach as a dictation of necessity. Consider the distinct history of most of its member-states; these states have long histories of colonial exploitation by western countries. These long years of exploitation have left scars in their subconscious which necessarily affect their trust level with foreigners. They will always greet other states with question marks, always with a suspicion that the plots to subjugate them politically or economically have not completely stopped. It is for this reason that these member states protect their sovereignty with extraordinary jealousy and protect them not only against the super powers but protect them even against

each other. They protect their sovereignty against assaults coming not only from other states but assaults coming even from transnational corporations specially those controlled by their former colonialists. And so they resist the slightest diminution of the policy of self-determination and non-interference in their internal affairs and this stiff resistance invariably slows down all efforts to integrate the socio-economic and political policies in the region.

Another factor that slows down the velocity of integration in the ASEAN is the ethnic, cultural, and religious heterogeneity in the region. This lack of homogeneity spawns irreconcilable viewpoints on human rights. Some states in the region want, first, to enhance economic, social, and cultural rights as a condition precedent to the realization of the other rights. They emphasize the right to food, right to education, right to shelter; and they emphasize the political rights of their people. Concomitantly, they give higher value to the security of the state without which they believe there can be no economic progress neither political stability. Again, the human rights issue is preventing the quicker integration of the member states within the ASEAN region. Indeed, it is the most contentious issue in the ongoing debate about the efficacy of the ASEAN charter for, as well-observed, the ASEAN charter on human rights lacks an enforcement mechanism as it concerns itself more with the promotion and less with the protection of individual rights. Even then, ASEAN has reasons to be celebratory. ASEAN has overcome its birth pains. ASEAN is no longer an informal arrangement. ASEAN now has a charter and it is now endowed with a legal personality. The ASEAN is now a full-fledged legal construct. The principles of the ASEAN charter are no longer mere political sound bites. And so the challenge to us here is how the principles so eloquently expressed in its charter can be put into practice by its member states.

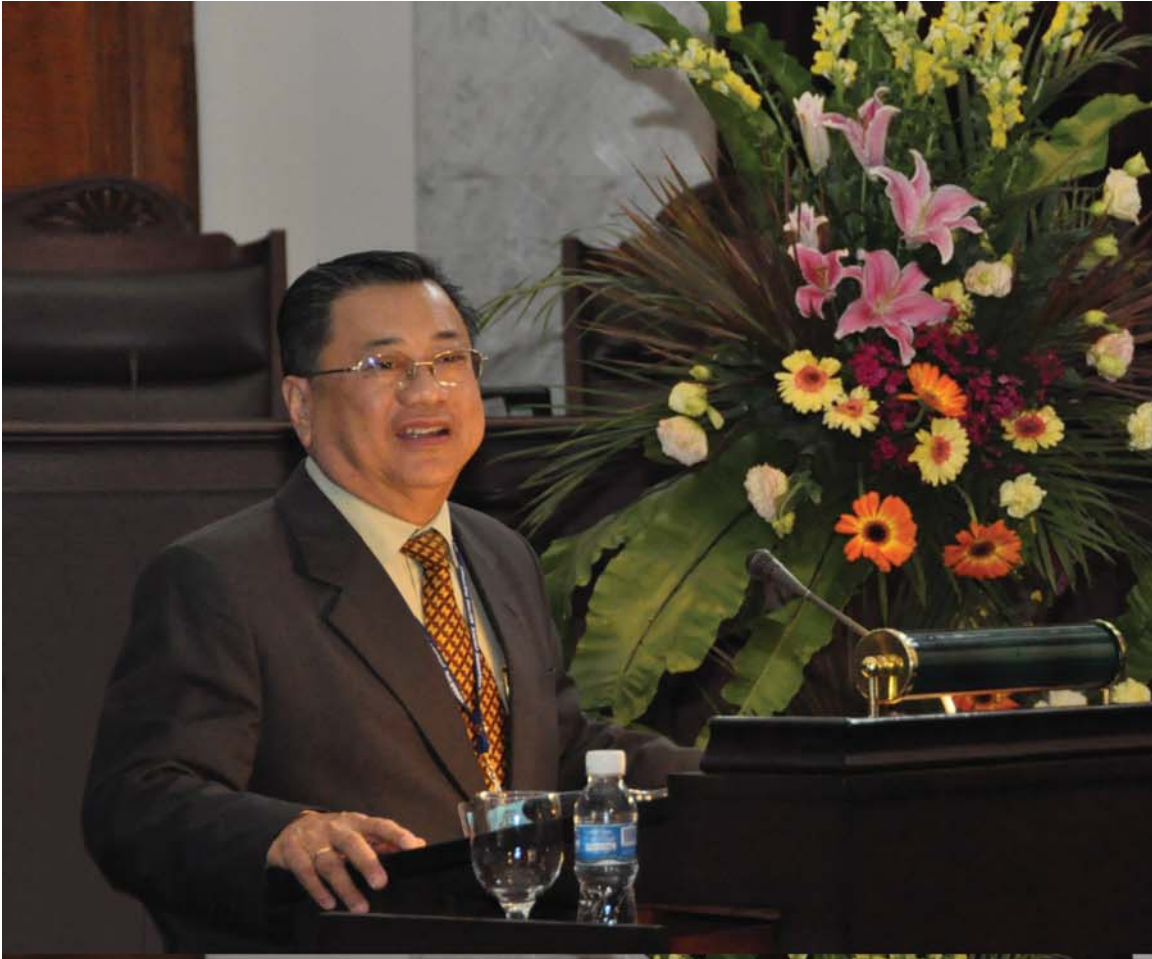
ASEAN is past the time of non-stop visioning. The time is over for borderless arguments. The need of the time is for compliance. The demand of the present is for the earliest

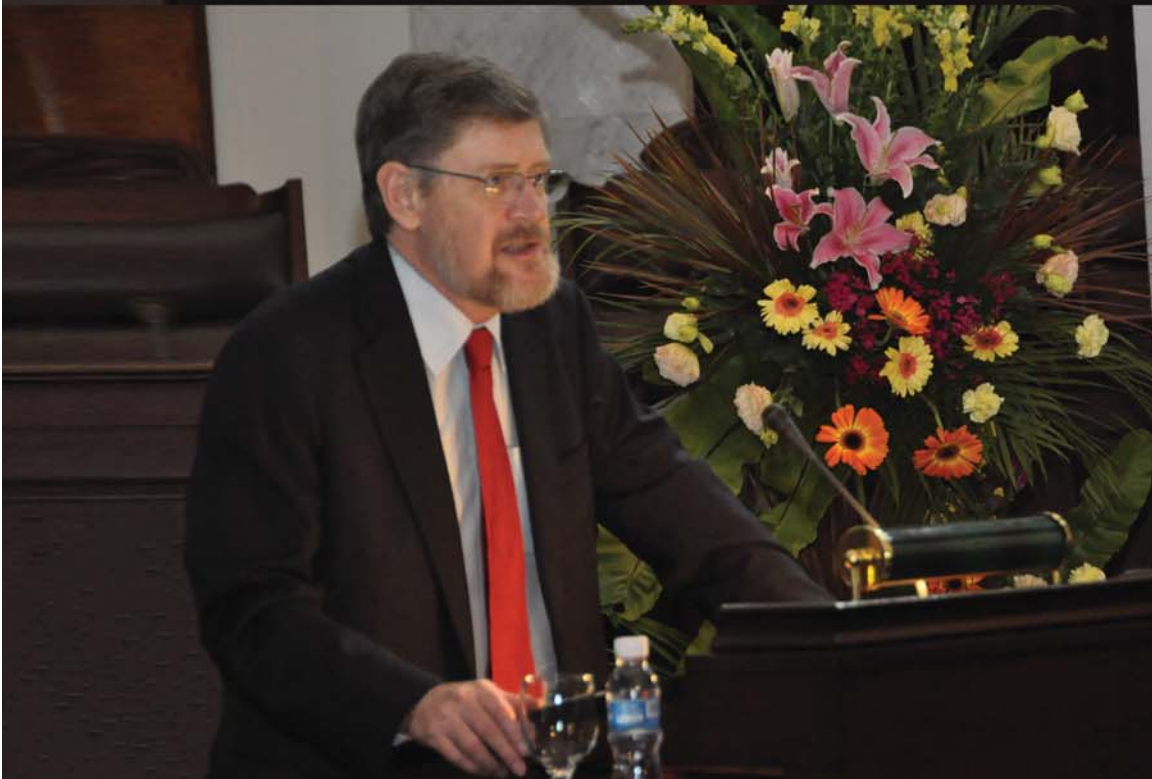
enforcement of the commitments of its member states. The ASEAN charter which is a blueprint of our destination gives us hope where we had none before. For, as accurately observed, the charter is moving from discretion-based to rules-based. And more importantly, for the first time, the charter can be described as more people-oriented. It has set out norms of behavior for member states to follow in dealing with their citizens in any language that will strengthen the universal right to human dignity of some one-half billion people in our region. I have no doubt that in the fullness of time, the dream of the UN Secretary-General, Kofi Annan, of human rights that are indivisible and what will come to pass. And let me quote the UN Secretary-General who said:

> There is no one set of European rights and another of African rights. Human rights assert the dignity of each and every individual human being and the inviolability of the individual's rights. They belong inherently to each person, each individual, and are not conferred by or subject to any governmental authority. There is no one law for one continent and another law for another. There should only be one single standard, a universal standard for judging human rights violations.

The ASEAN charter may not be a perfect charter, but its imperfection is no excuse for us not to move forward. Our challenge is to make it work, and it will work in accordance with our wish and depending on our will.

A pleasant day to all of you.





Supreme Court of the Philippines

Philippine Judicial Academy

present the

Chief Justice Reynato S. Puno Fourth Distinguished Lecture

May 7, 2010, Friday, 10:30 a.m.
Auditorium, PHILJA Training Center
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Program

Doxology

Philippine National Anthem
Supreme Court Choir

Opening Remarks
Honorable Mariano C. Del Castillo
Associate Justice, Supreme Court

Musical Intermission
Supreme Court Choir

Introduction of the Lecturer
Honorable Martin S. Villarama, Jr.
Associate Justice, Supreme Court

LECTURE

JUDICIAL PHILOSOPHY OF THE PUNO COURT

DEAN PACIFICO A. AGABIN
Chair, PHILJA Constitutional Law Department

Presentation of Plaque of Appreciation

by

Chief Justice Reynato S. Puno
Justice Antonio T. Carpio
Justice (Ret.) Adolfo S. Azcuna

Presentation of Metrobank Professorial Chair Lectures Publication to the Chief Justice

by

Justice (Ret.) Adolfo S. Azcuna and Mr. Aniceto M. Sobrepeña

Presentation of Testimonial of Appreciation to the Chief Justice

by

Justice (Ret.) Adolfo S. Azcuna
Justice (Ret.) Ameurfina A. Melencio Herrera

Closing Remarks
HONORABLE REYNATO S. PUNO
Chief Justice

Supreme Court Hymn

Master of Ceremonies
HONORABLE TERESITA J. LEONARDO-DE CASTRO
Associate Justice, Supreme Court

*The Judicial Philosophy of the Puno Court**

Dean Pacifico A. Agabin

Dean Pacifico A. Agabin has handled controversial constitutional law cases before the Supreme Court. An academic at heart, he continues to teach at the UP College of Law, from where he graduated in 1960. His career straddles the best in the academe and law practice. After finishing his JSD in Yale in 1965, he started practice in 1966 as legal counsel of the Malayang Samahan ng mga Magsasaka (MASAKA), a peasants' union, and of the National Federation of Labor Unions (NAFLU). He later joined the law office of Angel Cruz, after which he was appointed to the UP Law Faculty as Assistant Professor in 1969. He was corporate counsel of the UP (1969–1971), the Philippine Airlines (PAL) (1971–1980), and the National Development Company (1980–1986). He served as Dean of the UP College of Law from 1989 until 1995. In 1996, he put up a law office with some of his classmates, where he holds office to date. He was also College of Law Dean of the Lyceum University, President of the Philippine Association of Law Schools, and Chair of the Civil Liberties Union. He was appointed Professor of PHILJA in 1997.

Dean Agabin supplemented the old Philippine Digest with 17 volumes and the obsolete Philippine Annotated Laws with four volumes. He compiled his essays in the book, *Unconstitutional Essays*, which was chosen as Book of the Year in Law by the Manila Critics Circle in 1997.

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* Delivered at the *Chief Justice Reynato S. Puno Fourth Distinguished Lecture,* held on May 7, 2010, at the PHILJA Training Center Auditorium, Tagaytay City.

I must thank Chancellor Azcuna for giving me this assignment. Although it is a difficult one, I accepted it since this would be a golden opportunity for me to point out the errors of the Puno Court, especially in the big cases that I have lost. However, I realized that this approach would make it necessary for me to look at the major decisions of the Puno Court with preconceptions drawn from professional legal norms. So, on second thought, I decided to forego this opportunity. The more urgent problems of the country call for a different perspective, and there is hardly any time or place for rhetorical or analytical fencing based on narrow and legalistic standards.

So I will look at the Court from the perspective of the social sciences, or more specifically, "political science." Political science, as defined by Lasswell, is the study of the shaping and sharing of power. And since I am familiar only with the approaches to constitutional interpretation, I will limit my observations only to constitutional law cases. In other words, I will try to draw out the political philosophy of the Puno Court, focusing on decisions on constitutional and political law that have charted or changed the course of our ship of state. My focus on constitutional cases stems from my limitation as a narrow specialist. However, I also believe that political law decisions are a good gauge not only of the philosophy of the Court, but also of its legitimacy and institutional standing. I must issue an important *caveat*: My observations here are merely tentative, even speculative, and not free from bias, for we are much too near, and even involved, in the events that make up the facts of the leading cases. Only history will be the final arbiter.

I. Defining Terms

First, we have to define our terms. "Philosophy," for instance, has managed to escape clear definition even by philosophers. A noted philosopher and historian, Henry Adams saw

philosophy as "unintelligible answers to insoluble problems." This irreverent observation is particularly apt for constitutional law cases. If we proceed from this premise, defining the philosophy of the Puno Court would be like looking for a black cat in a dark room. It is neither here nor there. Sometimes, there is no cat at all.

How about the definition of "Puno Court?" It was Chief Justice Artemio Panganiban who made the very insightful observation in one of his columns that the people label a Supreme Court term on the basis of its perceived independence from the Executive Department. And their criteria for judicial independence naturally revolve around the legitimacy of the more significant and controversial decisions on political cases. So during the martial law period there was, from the hindsight of history, only a Marcos Supreme Court. It was only after the EDSA Revolution that the terms of the Supreme Court were reckoned by the names of the Chief Justices – thus, of late, we had the Narvasa Court, the Davide Watch, the Panganiban Court. In this connection, I must say that Chief Justice Panganiban's perceptive observation, or criteria, in assaying an appellation for a Supreme Court term, is supported by a number of legal commentators and sociologists. For instance, Richard Fallon, Jr., professor of constitutional law at Harvard, posits the view that a Supreme Court decision on constitutional law invites appeal to three distinct kinds of criteria that support distinct but overlapping concepts of legitimacy:

1. legal,
2. sociological, and
3. moral.[1]

As a legal concept, legitimacy and illegitimacy are gauged by legal norms. As a sociological concept, a decision on constitutional law is legitimate insofar as it is accepted as

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[1] Richard Fallon, "Legitimacy and the Constitution," 118 HARVARD LAW REVIEW 1789 (2005).

deserving of respect or obedience. And, as a moral concept, legitimacy inheres in the moral justification, if any, for a decision.[2] So, under Fallon's framework, a Supreme Court decision in a constitutional case may be legally legitimate, yet sociologically and morally illegitimate. Fallon's thesis is that the legal legitimacy of a constitutional law decision depends more on its sociological acceptance than on the questionable legality of its formal ratification.[3] Another legal commentator, Michael Klarman, a professor of law at the University of Virginia, considers the premise that the people's verdict in constitutional cases depends more on whether public opinion ultimately support the outcome than on the quality of legal reasoning or the craftsmanship of the Court's opinion.[4] This probably holds true for our Supreme Court. An example that comes to mind is the Court's decision in ***Oposa v. Factoran***, where, notwithstanding its flawed legal premises, the people have come to accept it because they agree with its moral justification. The United States (U.S.) Supreme Court emphasized the importance of the sociological dimension when it declared:

> But even when justification is furnished by apposite legal principle, something more is required. Because not every conscientious claim of principled justification will be accepted as such x x x, the court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.[5]

I suppose that there should not be much quibbling and doubting about the above propositions, considering that the constitution is not a lawyer's contract – it is the people's

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2 *Id.* at 1790–1791.

3 *Id*. at 1793.

4 Michael Klarman, "Bush v. Gore Through the Lens of Constitutional History," 89 California Law Review 1721 (2001).

5 *Planned Parenthood of SE Pennsylvania v. Casey*, 505 U.S. 833, 864–865 (1992).

covenant. They are as much entitled to interpret their constitution as the justices of the high court. And so we come to a defining moment, and ask: Is there a Puno Court? My answer is a resounding 'Yes.' There is a Puno Court beyond any shadow of doubt. It covers the period from December 2006 up to the present, but its philosophy will bear the stamp of the Chief Justice well before and long after his term.

A. Judicial Activism or Why There is No Separation of Law From Politics

From my perspective, it is easy to see, from a high vantage point, the philosophy of the Puno Court with regard to constitutional cases. The Court, like the other Supreme Court terms before Chief Justice Puno, thrives on judicial activism. This is based on the belief that there is no separation between law and politics. This should not be a cause for alarm, for I define "politics" in the Aristotelian or ideological sense, and not in the partisan meaning. Of course the second is not totally unrelated to the first meaning. But even in its Aristotelian sense, "politics" as defined is still ambiguous. And so I find it convenient to use Richard Posner's definition of "politics" that when the Court decides constitutional cases, it exercises the discretionary powers of a legislature.[6] When the Supreme Court decides constitutional cases, it becomes a political body. In brief, our Court performs two basic functions: it is an appellate court, and it is a constitutional court. There are two possible explanations for this: first, unlike most countries, we have no constitutional court. Thus, our highest tribunal performs this function and, when it does, it becomes a political organ. Richard Posner attributes this to four factors:

> First, because the federal Constitution is so difficult to amend, the Court exercises more power, on average, when it is deciding constitutional cases than when deciding statutory ones. Second, a constitution tends to deal with fundamental issues,

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6 Richard Posner, "The Supreme Court (2004 Term) Foreword: A Political Court," 119 Harvard Law Review 32, 40 (2005).

> and more emotion is invested in those issues than in most statutory issues, and emotion influences behavior, including the decisions of judges. Third, fundamental issues in the constitutional context are political issues: they are issues about political governance, political values, political rights, and political power. And fourth, constitutional provisions tend to be both old and vague. x x x The older and vaguer the provision at issue, the harder it is for judges to decide the case by a process reasonably described as interpretation rather than legislation.[7]

Second, the expanded definition of "judicial power" in the Constitution[8] has made the court a political organ by giving the judiciary the power to declare an act of the Congress or an action of the Executive "a case of grave abuse of discretion," even if such is perfectly within the province of the political branches. The old traditional barriers that made up the walls of the separation of powers doctrine, like the requirement of standing, ripeness, *lis mota*, have all been lowered, allowing the courts to intrude into the domains of the executive and legislative branches of government.

This expansion of judicial power into the domain of politics is called the "judicialization of politics"[9] by two authors who do not even live under an expanded definition of judicial power. Is this trend of judicialization consistent with the Lincolnian definition of democracy? Certainly, it goes against the majoritarian ideal, since members of the judiciary are not elected by the people. Thomas Jefferson would have none of it, for, according to him, this would result in a despotism of an oligarchy. But then Jefferson was assailing the U.S. Supreme Court after it handed down its ruling in ***Marbury v. Madison***.[10]

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7 *Ibid.*

8 Art. VIII, Sec. 1.

9 Chester Neal Tate and Torbjörn Vallinder, *"The Global Expansion of Judicial Power: The Judicialization of Politics,"* in The Global Expansion of Judicial Power, 2 (1995).

10 Peter Irons, **A People's History of the Supreme Court**, p. 107 (2006).

The laws of physics sometimes affect those of metaphysics. For every action, there is an equal and opposite reaction. So, if the judiciary intrudes into the domains of the executive and the legislative, there is always an equal and opposite reaction from the Congress or the President. If the latter knows that the Supreme Court can strike down Executive action because such is grave abuse, it is sheer naiveté or ineptitude to think that the Empire will not strike back. Or, even worse, the Executive, instead of striking, may resort to seduction. Under the Constitution, the President is always under the greatest temptation to seduce the Supreme Court. The present setup between the Executive and the judiciary is like marriage: it is an arrangement which combines the best of temptation with the best of opportunity. My point is, if the judiciary intrudes into politics, politics will also encroach on the judiciary. If there is judicialization of politics, there is also politicization of the judiciary.

B. Checking Grave Abuse of Political Power: The Court as Hinderer of Hindrances

The checking function is well within the function of an unelected judiciary, even under the principle of separation of powers contemplated by political philosophers. Sir Isaiah Berlin once referred to the government as "hinderer of hindrances," but that function more properly belongs to the judiciary. Referring to the judicial branch, for instance, Rousseau wrote –

> This body, which I shall call the *tribunate*, is the preserver of the laws and of the legislative power. It serves sometimes to protect the Sovereign against the government x x x sometimes to uphold the government against the people x x x and sometimes to maintain the balance between the two.[11]

And C. Neal Tate, who coined the term "judicialization of politics," explains why the sovereign people in a democratic

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[11] Rousseau, The Social Contract, 38 Great Books of the Western World, p. 423.

system willingly hand over to the courts the function of checking the political branches and thus making or negating policy decisions.

> When the public and the leaders of interest groups and major economic and social institutions view the majoritarian institutions as immobilized, self-serving, or even corrupt, it is hardly surprising that they would accord the policy-making of judiciaries, who have reputations for expertise and rectitude, as much or more legitimacy as that of executives and legislatures. This tendency should only be accelerated when judicial institutions are accorded *more* **respect or legitimacy** than other government institutions.[12]

The key words in the quotation above, it should be noted, are respect and legitimacy. In the Philippines, however, the checking function vested on the judiciary is obviously a reaction to our traumatic martial law experience. In the words of Chief Justice Roberto Concepcion, speaking as a constitutional commissioner:

> **The judicial power is meant to be a check against all powers of the government without exception**, except that the judicial power must be exercised within the limits confined thereto. A matter of national defense, national interest, national welfare is not necessarily beyond the jurisdiction of a judicial power.[13]

A student calls this "mutant" judicial power.[14] But we look at it as the guardian of our democratic values enshrined in the Constitution.

In the face of that constitutional mandate, any Court has to be an activist court. American legal historians use the term

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[12] Chester Neal Tate, *"Why the Expansion of Judicial Power?"* in The Global Expansion of Judicial Power, *supra*, pp. 31–32.

[13] RECORD, CONSTITUTIONAL COMMISSION, 645–646 (August 23, 1986).

[14] Skarlit Labastilla, "Dealing with Mutant Judicial Power: The Supreme Court and Its Political Jurisdiction," 84 PHILIPPINE LAW JOURNAL 2 (2009).

"activist," to describe the Warren Court in the U.S. during the tumultuous '60s, which followed a philosophy of progressive constitutionalism called a "living Constitution." Compared with the Puno Court, however, the Warren Court pales into a "restraintist" Court.

So, consistent with its duty to check unconstitutional exercise of political power, the Puno Court struck down a negotiated agreement between the Executive and the Moro Islamic Liberation Front. Upholding the democratic principle against Executive privilege, the Court, with the majority speaking through Justice Carpio Morales, justified this in the name of protecting the sovereignty of the people or of their representatives, and their right to make policy decisions:

> x x x Upholding such an act would amount to authorizing a usurpation of the constituent powers vested only in Congress, a Constitutional Convention, or the people themselves through the process of initiative, for the only way that the Executive can ensure the outcome of the amendment process is through an undue influence or interference with that process.[15]

A reading of the decision in this case highlights not only the democratic element in decision making but also the values of transparency and access to information which insure broad participation in the political process. Yet the Court has not been consistent in upholding the value of transparency and the right to be informed. In the consolidated cases of ***Garcillano v. House of Representatives***[16] and ***Ranada v. Senate***,[17] the Court ruled that the Senate could not proceed on its investigation of the "Garci tapes" scandal as it had not republished its rules of procedures. This is based on the tenuous premise that the Senate is no longer a continuing body. And in ***Neri v. Senate***

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15 *Province of North Cotabato v. GRP*, G.R. No. 183591, October 14, 2008, 568 SCRA 517-518.

16 G. R. No. 170338, December 23, 2008, 575 SCRA 170.

17 G. R. No. 179275, December 23, 2008, 575 SCRA 170.

Blue Ribbon Committee,[18] the Puno Court again blocked the Senate investigation of the NBN-ZTE bribery scandal, invoking executive privilege. In drawing the boundary line between the executive department and the legislature, the Court has drawn it more on the side of the President.

The Court has not been consistent in checking the legislative department. While it has gone to the extent of dissolving an entire province and overruling the judgment of Congress which gave the ARMM the power to create provinces in the case of ***Sema v. Comelec***,[19] it had initially blocked legislative creation of 16 cities,[20] then retreated in the same case one year later on a third motion for reconsideration even if judgment in the earlier decision had already been entered.[21] In ***Aldaba v. Comelec***,[22] the Court struck down RA No. 9591 creating a legislative district for Malolos City, on the ground that it failed to meet the minimum population requirement for a city to be represented in Congress. A few months later, the Court declared Republic Act No. 9716, creating another congressional district in the province of Camarines Sur by reconfiguring the first and second legislative districts of the province, notwithstanding doubts about the first district's population distortion, and raising allegations of gerrymandering and violation for the principle of proportional representation.[23] Doubtless, the legal distinctions made by the Court are valid from the vantage point of lawyers under the norms of

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18 G.R. No. 180643, March 25, 2008, 549 SCRA 77.

19 G.R. No. 177597, July 16, 2008, 558 SCRA 700.

20 *League of Cities of the Philippines v. Commission on Elections*, G.R. No. 176951, November 18, 2008, 571 SCRA 263.

21 *League of Cities v. Commission on Elections*, G.R. No. 176951, December 21, 2009, 608 SCRA 636.

22 G. R. No. 188078, January 25, 2010, 611 SCRA 137.

23 *Sen. Aquino, et al. v. Comelec*, G.R. No. 189793, April 7, 2010, 617 SCRA 623.

professional legal culture. However, the Court has yet to convince the skeptical public about the legitimacy of these decisions from a democratic perspective, e.g., the principle of one man, one vote. And even as the Puno Court has shown breadth of vision by disregarding legal niceties in order to assist the poor and the powerless by undertaking projects like "Justice on Wheels," mandatory aid, and prison visitations, it has also suffered from myopia by adopting more stringent rules on legal technicalities like those on certifications on forum-shopping, or service of pleadings, or notice to parties.

This one-step forward, one-step backward acts of the Court has adversely affected its ability to convince the relevant public that its rulings are based on legal principle rather than partisan preferences or even personal interests. The aggressive stance of the Court in retreating from overruling or modifying earlier decisions and precedents have cast doubts on the sociological and moral legitimacy of some of such decisions. To a behaviorist, it seems that the Puno Court, in the last year of its term, is destined to fulfill Rosseau's prophecy that there is a period of life when we go backwards as we advance.

The Supreme Court has said that we have adopted the doctrine of precedents to assure stability in legal relations and avoid confusion.[24] To do so, continued the Court, "it has to speak with one voice. It does so with finality, logically and rightly, through the highest judicial organ, this Court."[25] Speaking with one voice implies consistency, symmetry, and logic. If that one voice is reversed or changed with unusual frequency, it undermines the legitimacy of the Court's decisions and leads to a Babel of voices. As a noted American constitutionalist emphasizes, "if the Constitution predominates because it is law, its interpretation must be constrained by the values of the rule of law, which means that courts must construe

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[24] *Barrera v. Barrera*, G.R. No. L-31589, July 31, 1970, 34 SCRA 98.

[25] *Id.*, at p. 107.

it through a process of reasoning that is replicable, that remains fairly stable, and that is consistently applied."[26]

C. Rendering Advisory Opinions and the Perils of Counter-Majoritarianism

This brings us to the decision of the Court in the recent case of ***De Castro v. JBC***,[27] and the other consolidated cases. I will not delve into quality of the reasoning or the ingeniousness of its craftsmanship. From a political scientist's point of view, all I can say is that it is neither right nor wrong, but it certainly is counter-majoritarian. In the light of the realities behind the case, the Court has virtually denied the electorate the opportunity to influence, albeit indirectly, the choice of a Chief Justice. It is also nothing short of an advisory opinion, and I must admit that I agree with Justice Nachura's separate opinion. The decision here should be seen in the light of the Court's pronouncement in ***Roque, et al. v. Comelec***,[28] that it will not decide issues which are based on speculations and conjectures. From the perspective of the principle of separation of powers, advisory opinions have no place even in an activist judiciary. As Justice Frankfurter has warned,

> it is extremely dangerous to encourage extension of the device of advisory opinions to constitutional controversies, in view of the nature of the crucial constitutional questions and the conditions for their wise adjudication.[29]

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[26] Robert Post, Constitutional Domains: Democracy, Community and Management, 30, quoted in Tribe, **American Constitutional Law**, at 82 (2000 ed.).

[27] G. R. No. 191002, March 17, 2010, 615 SCRA 666; Motion for Reconsideration denied, April 20, 2010.

[28] G.R. No. 188456, February 10, 2010, 612 SCRA 178.

[29] Felix Frankfurter, "A Note on Advisory Opinions," 37 Harvard Law Review 1002 (1924).

He ends his note with a dire prophesy:

> It must be remembered that advisory opinions are not merely advisory opinions. They are ghosts that slay.[30]

In the case of ***De Castro v. JBC***, what are the ghosts that may arise from its philosophy? The popular opinion and newsmakers see a political ghost, namely, that it has been seized as a big issue in the current electoral campaign, and now is submitted to the electorate who will vote on its legitimacy this coming Monday. The most blatant is that raised by the acknowledged frontrunner, Benigno Aquino, who has threatened not only to ignore any appointment made by the outgoing administration, but also to impeach the Supreme Court justice who accepts any such appointment. This reminds us of ***Marbury v. Madison***,[31] which also involves midnight appointments of federal judges. After the U.S. Supreme Court had ruled that the appointment of Marbury was legitimate, Thomas Jefferson, then the newly elected President, publicly declared: "Mr. Marshall has rendered his decision. Now let him enforce it."

It is not unusual, however, in mature democracies, for the presidential candidates who disagree with the prevailing Supreme Court philosophy, to raise this as a campaign issue and pledge to change the ideological balance of the Court. In the U.S., Richard Nixon, in the heat of the 1968 campaign, repeatedly attacked the Warren Court for its decisions expanding the rights of the accused, and he pledged to appoint justices who hewed to his conservative philosophy. In the 2000 presidential campaign, George Bush, in the first TV debate with Albert Gore in October 2000, gored the justices who continued to uphold the individualist philosophy behind ***Roe v. Wade***.[32] So it seems that we are on our way towards political maturity by debating and putting on the line the philosophy of a Supreme Court decision.

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30 *Id.* at 1008.

31 5 U.S. (1 Cranch) 137 (1803).

32 410 U.S. 113 (1973).

It becomes clear, at this juncture, that the philosophy of counter-majoritarianism does not necessarily mean undemocratic. Judicial power, like most things in life, is double-edged; it may be used for good or for ill. Dean Eugene Rostow of Yale put it very well when he said that:

> separation of powers under the Constitution serves the end of democracy in society by limiting the roles of the several branches of government and protecting the citizen, and the various parts of the state, against encroachments from any source.[33]

The negative restrictions in our Bill of Rights protect the citizen from the tyranny of the majority, especially if he belongs to a powerless or dispossessed minority. And the judiciary performs the function of protecting the individual from the power of the state or from the wrath of the majority. It is the moral duty of judges to uphold the Constitution by affirming the fundamental liberties as the key to the enjoyment of life to the fullest, as the Puno Court put it.[34] This is specially true with respect to freedom from government coercion.

The Court acted as the "hinderer of hindrances" in ***Chavez v. Gonzales***,[35] where the Court blocked the government's disguised attempt at censoring broadcast media. The case involved an apparently defensible warning issued by the National Telecommunications Commission to radio and TV operators to observe the Anti-Wiretapping Law, in connection with the "Hello Garci" tapes, followed by a press briefing from the Department of Justice Secretary wherein he ordered the NBI to conduct a tactical interrogation of a TV network website which disseminated the contents of the illegally wire-tapped

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[33] Eugene Rostow, "The Democratic Character of Judicial Review," 66 Harvard Law Review 193, 1995 (1952).

[34] *White Light Corporation v. City of Manila*, G.R. No. 122846, January 20, 2009, 576 SCRA 416, ponencia of Justice Tinga.

[35] G.R. No. 168338, February 15, 2008, 545 SCRA 441.

conversation. In other words, it was a case which could have been decided either way. In fact, it divided the Court 8-6, the minority emphasizing that there was no chilling effect of the NTC and DOJ warnings, and that government authorities are duty-bound to prevent contemplated violations of the law. The majority, however, refuted in this wise:

> There is enough evidence of **chilling effect** of the complained acts on record. The **warnings** given to media **came from no less** the NTC, a regulatory agency that can cancel the Certificate of Authority of the radio and broadcast media. They also came from the Secretary of Justice, the alter ego of the Executive, who wields the awesome power to prosecute those perceived to be violating the laws of the land. **After the warnings**, the KBP inexplicably joined the NTC in issuing an ambivalent Joint Press Statement. x x x
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> x x x But in cases where the challenged acts are patent invasions of a constitutionally protected right, **we should be swift** in striking them down as nullities *per se*. **A blow too soon struck for freedom is preferred than a blow too late**.[36]

The Puno Court likewise advanced the frontiers of individual rights against the power of the state in the area of privacy and of criminal due process. It should be recalled that, with regard to the guarantee against unreasonable searches and seizures, the Panganiban Court made headway in the case of ***David v. Arroyo***,[37] where the Court invalidated the warrantless search and seizure of the office of an opposition newspaper in the name of national emergency. In the case of ***Bayan v. Ermita***,[38] the Court reaffirmed the essentiality of freedom of the press and of assembly in a democracy. The Panganiban Court, in short, was a hard act to follow in the area of political rights.

Nonetheless, the Puno Court did manage to push further the frontiers of individual freedom and the rights of the accused.

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[36] *Id.* at 510–511.

[37] G.R. No. 171396, May 3, 2006, 489 SCRA 160.

[38] G.R. No. 169838, April 25, 2006, 488 SCRA 226.

In ***White Light Corporation v. City of Manila***,[39] the Court recognized the right to privacy as an aspect of personal liberty of hotel and motel customers, effectively reversing the half-century old ruling in ***Ermita-Malate Hotel and Motel Operators Association, Inc. v. City Mayor of Manila***[40] holding that a city ordinance prohibiting the operation of hotels and motels is a valid exercise of police power. The Puno Court in the White Light case declared that prohibiting short-time admission violates the right to privacy of prospective customers. Our democracy is distinguished from non-free societies not with any more extensive elaboration on our part of what is moral or immoral, but from our recognition that the individual liberty to make the choices in our lives is innate, and protected by the state,[41] concluded the Court, speaking through Justice Tinga.

In ***Hong Kong Special Administrative Region v. Muñoz***,[42] the high tribunal reversed the old-standing rule that the right to bail is denied extraditees by the phraseology of the Constitution. The Court, noting the emerging emphasis on observance of human rights by democratic countries, held that the Constitution's guarantee of the right to bail does not distinguish between persons accused in the Philippines and those accused abroad.

In the case of ***People v. Webb***, the Court, taking into consideration the equities of the case which has dragged on for more than 14 years, set aside its orthodox rule of refusing to act as trier of facts, and ordered the re-examination of the DNA sample taken from the body of the victim, so as to settle the issue of the guilt or innocence of the accused.

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39 G.R. No. 122846, January 20, 2009, 576 SCRA 416.

40 G.R. No. L-24693, July 31, 1967, 20 SCRA 849.

41 *White Light Corporation v. City of Manila*, at 445.

42 *Government of Hong Kong Special Administrative Region v. Olalia, Jr.*, G.R. No. 153675, April 19, 2007, 521 SCRA 470.

The guarantee against unreasonable searches and seizures has been stretched to its outer limits by the Court, as shown in ***People v. Habana***,[43] which now requires the prosecution in "buy-bust" drug cases to present complete proof of the "chain of custody" of the prohibited drug from the moment of seizure up to the time when it is presented as evidence in court.

In the case of ***Newsounds Broadcasting Network, Inc. v. Dy***,[44] the Court had occasion to clamp down on a textbook case of prior restraint of press freedom. Applying the "strict scrutiny" test, the Court, through Justice Tinga, not only ordered the respondents to issue the mayor's permit to allow the petitioner radio station to continue its operations; it also ordered the respondents to pay more than P5 Million in damages for gross violation of petitioners' freedom of speech. It was in this case that the Court declared its non-partisan posture in political cases.

D. Redefining the Concept of Liberty in the Living Constitution

The notion of a "living constitution," associated with the Warren Court, supports the idea that the provisions of the Constitution should be interpreted in the light of economic, social and cultural developments, as seen by the members of the court. The Puno Court can be credited with perspicacity of vision in adapting the 1987 Constitution's broad provisions to the social and economic needs of a developing country like ours. It was able to do this by giving a new content to the meaning of liberty, that is, liberty as a positive concept.

The 1987 Constitution is a charter of both negative and positive liberty. Side by side with the negatively phrased Bill of Rights are provisions giving substance to the positive concept of liberty, even if these are mere statements of aspirations. Thus, the state is mandated to provide the basic necessities of

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[43] G.R. No. 188900, March 5, 2010, 614 SCRA 433.

[44] G.R. Nos. 170270 and 179411, April 2, 2009, 583 SCRA 333.

food, clothing, and shelter, as well as to render social and distributive justice. Ample discretion has been given the judiciary so that it will exercise this and protect the less privileged masses. Furthermore, the Constitution mandates the Supreme Court to check abuse and misuse of political power or in case there is a political malfunction on the part of the executive or legislative branch. And, most important, the Supreme Court has been given the power to "legislate" rules in order to preserve human rights.

Perhaps the most revolutionary contribution of the Puno Supreme Court to the concept of positive liberty is the adoption of the writs of *amparo* and of *habeas data*. It is revolutionary as it was the Supreme Court that decreed it into being by judicial fiat. In the Latin American countries that created *amparo*, it was brought into being by a constitutional ratification or by Congress. Here our Court gave a new twist to the common law idea of "judicial legislation." The same holds true for the writ of *habeas data*, imported from Western Europe. It is also revolutionary in the sense that it breaches the essentialist tradition of judicial restraint which marks the boundaries between law and politics. It is thus a revolution of new rights and of new remedies.

The adoption of the Court of *amparo* is the product of political dysfunction in the government which refused to act in the wake of massive extrajudicial executions. It is a testimony to the Court's attempt to ameliorate patterns of political persecution, harassment and assassinations. On this score, positive liberty is promoted by enabling political dissenters not only to be heard but also to be assured of personal safety and security. Thus, voices of the politically marginalized which have been silenced by the barrel of a gun all these years may now be heard and protected. The writ of *habeas data*, on the other hand, is a clear example of positive action taken by the Court to protect the citizen from the prying eyes and the remote-sensing ears of Big Brother.

Chief Justice Puno himself articulates the politics of the adoption of the writ of *amparo*. He believes that the main political branches of the government have failed to give any positive content to political liberty. According to him, it was the inability of the political branches of the government that prompted the constitutional commission to tilt the balance of power in favor of the judiciary:

> This new role given to courts both in developed and developing democracies is not difficult to understand. Heretofore, the protection of human rights has been entrusted to the political branches of government or to our electorally accountable officials and not to politically independent judiciaries. Over the years, however, the expectation that human rights could best be protected by the political branches of government has been diluted.[45]

Puno thus sees the judiciary as the vanguard of the liberties listed in the Constitution, with the rule-making power of the Court under Article VIII, Section 5.5 as its sword. Justifying the Court's promulgation of the rules on the writ of *amparo*, he speaks of 'unsheathing the sword' given by the Constitution. Back of this is the realization that, under the present political milieu, the political decision-making process works only if the right to dissent is protected by the judiciary. The negative aspect of political liberty for the individual under the Bill of Rights may not be adequate to challenge the power of the state's forces of violence. As an American federal court puts it,

> there is no constitutional right to be protected by the state against being murdered by criminals or madmen.[46]

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[45] Chief Justice Reynato Puno, *The View from the Mountaintop,* Keynote Address delivered during the National Consultative Summit on Extrajudicial Killings and Enforced Disappearances – Searching for Solutions held on July 16–17, 2007, Manila Hotel, in A Conspiracy of Hope: Report on the National Consultative Summit on Extrajudicial Killings and Enforced Disappearances, p. 41 (2007).

[46] *Bowers v. De Vito*, 686 F. 2d 616, at 618.

A much more positive force, like a sword-wielding judiciary, is necessary to counter the monopoly of irresponsible state violence and to destroy the entrenched safehouses of torture and summary executions.

But beyond perspectivism, the jurists' problem is how to reconcile the conflict of constitutional values protected by negative liberty, like freedom from unreasonable searches and seizures, with values sought to be promoted by judicial activism. Puno, a skillful craftsman, as the ponente in ***Secretary of National Defense v. Manalo***,[47] showed, in a judgment of deep textual analysis, how to mesh negative liberty with affirmative action. This case involves an appeal filed by the Secretary of National Defense to quash a writ of *amparo* granted by the Court of Appeals to protect the Manalo brothers. More specifically, the appellate court had required the Secretary of National Defense and the AFP Chief of Staff to furnish the Manalo brothers reports of the investigation in connection with their abduction, including medical reports and charts, and the official assignments of two soldiers involved in their case. This was part of the effort to protect two brothers who had managed to escape from a military detention center where they were illegally seized and detained as subversives. Ironically, the Secretary here had invoked the guarantee against unreasonable searches and seizures in his attempt to quash the writ of *amparo*.

Speaking for the Court, and affirming the Court of Appeals decision, Puno drew a distinction between the right to life under the due process clause,[48] and the right to security of person under the guarantee against unreasonable searches and

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[47] G.R. No. 180906, October 7, 2008, 568 SCRA 1.

[48] Philippine Constitution, Art. III, Sec. 1.

seizures.[49] He defined the latter in terms of the positive concept of liberty, declaring[50] –

> While the right to life under Article III, Section 1,[51] guarantees essentially the right to be alive[52] – upon which the enjoyment of all other rights is preconditioned – the right to security of person is a **guarantee of the secure quality of this life *viz.***:
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> > **The life to which each person has a right is not a life lived in fear that his person and property may be unreasonably violated by a powerful ruler. Rather, it is a life lived with the assurance that the government he established and consented to, will protect the security of his person and property.**

He listed the various permutations of the right to security of person in positive terms:

> First, freedom from fear;
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> Second, a guarantee of bodily and psychological integrity and security; and
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> Third, a guarantee of protection of one's right by the government.

Applying the above standards to the *Manalo* case, the High Court found that there was a continuing violation of the two brothers' right to security.

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[49] PHILIPPINE CONSTITUTION, Art. III, Sec. 2.

[50] *Secretary of National Defense v. Manalo*, *supra*, at 52

[51] 1987 PHILIPPINE CONSTITUTION, Art. III, Sec. 1 provides, *viz.*:

> **SEC. 1.** No person shall be deprived of life, liberty, or property without due process of law x x x.

[52] But *see* Bernas, **The Constitution of the Republic of the Philippines**, at p. 110.

> The constitutional protection of the right to *life* is not just a protection of the right to be alive or to the security of one's limb against physical harm.

The positive concept of liberty was also the approach taken by the Court in ***Serrano v. Gallant Marine Services, Inc.***,[53] penned by Justice Austria-Martinez, which relied on the reasoning of the Supreme Court in an earlier decision, ***Central Bank Employees Association, Inc. v. Bangko Sentral ng Pilipinas***,[54] a landmark precedent written by then Associate Justice Puno. The affirmative action of the Court here revolves around the notion of protected sectors under the Constitution. In that earlier case, the Court formulated the precept that when the challenge to a statute is premised on the perpetuation of prejudice against persons protected by the Constitution, the Court may recognize the existence of a suspect classification and subject the same to strict judicial scrutiny. Puno arrived at his conclusion or, rather, rather rationalized his conclusion by shifting from the traditional rationality test to the **strict scrutiny** standard. This test focuses on **suspect classifications** made by the legislature. He achieved this by seizing upon the concept of 'protected sectors' in the Constitution, like labor, landless peasants, marginalized minorities, overseas contract workers, marginal fishermen, and other disadvantaged sectors. Under this test, once a classification becomes 'suspect,' it triggers the most rigid scrutiny by the Supreme Court. Using this standard, the Court in the ***Serrano*** case found that a provision of RA No. 8042 (Migrant Workers and Overseas Filipinos' Act of 1995), which gave illegally-dismissed OFWs termination pay with a three-month cap for every year of service whereas no such limitation is imposed on local workers, is unconstitutional in violation of the equal protection clause and substantive due process.

The positive aspect of liberty was underlined in the ***Serrano*** case by Justice Carpio in his concurring opinion, who relied on earlier rulings of the Court that overseas contract workers are a disadvantaged and oppressed class, and concluded that the

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53 G.R. No. 167614, March 24, 2009, 582 SCRA 254.

54 G.R. No. 148208, December 15, 2004, 446 SCRA 299.

challenged provision of the statute infringed on the substantive aspect of due process. Justice Carpio declared:

> The right to work and the right to earn a living necessarily includes the right to bargain for better terms in an employment contract and the right to enforce those terms. If protected property does not include these rights, then the right to work and the right to earn a living would become empty civil liberties – the State can deprive persons of their right to work and their right to earn a living by depriving them of the right to negotiate for better terms and the right to enforce those terms.[55]

Another concept of "liberty" under the due process clause is what Justice Stephen Breyer calls "active liberty."[56] This is defined as the active and constant participation in collective power by the citizens.[57] According to the author, participation in government "is most forceful when it is direct, involving, for example, voting, town meetings, political party membership, or issue or interest-related activities."[58] Justice Breyer then stresses the function of courts:

> My thesis is that courts should take greater account of the Constitution's democratic nature when they interpret constitutional and statutory texts.[59]

On the whole, the Puno Court, with a few exceptions, has followed this philosophy. In 2009, for example, the Court opened the channel for wider participation of marginalized groups in the party-list system in the case of ***BANAT v. Comelec***,[60] by striking down the 2 percent threshold in relation to the distribution of additional seats for organizations representing

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[55] *Id.* at 306.

[56] Stephen Breyer, Active Liberty: Interpreting Our Democratic Constitution (2005).

[57] *Id.* at p. 4.

[58] *Id.* at pp. 15–16.

[59] *Id.* at p. 5.

[60] G.R. No. 179271, April 21, 2009, 586 SCRA 210.

the marginalized sectors to qualify for representation in the House of Representatives, while excluding the major political parties. Chief Justice Puno, with whom the majority concurred with regard to the exclusion of major political parties, justified the exclusion in terms of giving a chance for the underprivileged sectors to participate in the electoral process. He echoed Justice Breyer's notion of active liberty:

> We stand on solid grounds when we interpret the Constitution to give utmost deference to democratic sympathies, ideals and aspirations of the people. More than the deliberations in the Constitutional Commission, these are expressed in the text of the Constitution which the people ratified.[61]

This decision was followed in 2010 by the decision in ***Ang Ladlad LGBT Party v. Comelec***,[62] where the Court, through Justice Mariano del Castillo, reversed a Comelec order disallowing the party of lesbians, gays, bisexuals, and transgenders from taking part in the electoral process. Starting with the premise that our democracy is built on the genuine recognition of and respect for xdiversity and difference of opinion, the Court expressed its disagreement with the religious stereotypes relied on by the Comelec in terms of what it means to have a sexual identity, and why it is a fundamental human right which cannot justify exclusion from the political process:

> From the standpoint of the political process, the lesbian, gay, bisexual and transgender have the same interest in the party-list system on the same basis as the other political parties similarly situated. State intrusion in this case is equally burdensome. Hence, laws of general application should apply with equal force to LGBTs, and they deserve to participate in the party-list system on the same basis as other marginalized and under-represented groups.

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61 *Id.* at 257.

62 G. R. No. 190582, April 8, 2010, 618 SCRA 32.

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> Under our system of laws, every group has the right to promote its agenda and attempt to persuade society of the validity of its position through normal democratic means. It is in the public square that deeply-held convictions and differing opinions should be distilled and deliberated upon.[63]

This decision of the Puno Court attempts to make up for the democratic deficit of our dysfunctional political processes. This is premised on the philosophy that governmental action that burdens certain groups effectively excluded from the political arena requires heightened scrutiny from the courts, as Chief Justice Puno emphasizes in his concurrence. It also affirms one of the values respected in the Constitution. We have to remember that our Constitution is the only charter in the world that mentions the word "love." The Ladlad judgment is not only a representation reinforcing decision; it also teaches us to be democratic not only in politics but also in love. The Puno Court here shoots two birds with one stone: it enhances democracy, and at the same time, secures personal dignity. After all, as Laurence Tribe observes, –

> judicial power to enforce that ideal (of personal development and dignity) leads readily to judicial authority to protect effective political participation and meaningfully representative self-government as the only political structures genuinely compatible with the dignity of individuals and groups.[64]

The Puno Court likewise believes that rights are always a work in progress. Its revolution of rights and remedies extends to the field of environmental law. It has been innovative in dealing with new and emerging problems caused by degradation of the environment by evolving new remedies to deal with these. This is exemplified by the newly promulgated rule on the writ of *kalikasan*. The writ lays down a simplified

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63 *Ibid.*

64 Laurence Tribe, Constitutional Choices (1985) at 273, fr. 5.

and inexpensive rule of procedure for increased access to environmental justice. It upholds the right of the people to a balanced ecology. In the Philippine context, where local governments, small farmers, marginal fishermen, and indigenous communities have been waging a losing battle with multinational mining companies, big lumber firms, foreign fishing and canning enterprises, and giant oil exploration ventures, this innovation is not without any ideological undercurrents. The writ will be an important weapon to balance the playing field between the contending parties. The writ of *kalikasan* empowers a court not only to desist from undertaking activities which may degrade the environment; it can also order the respondent to take positive steps to rehabilitate or restore the environment. This is another example of the Puno Court's philosophy to stretch the positive concept of liberty.

And so I will end with the same **caveat** I began with: that this is not a final judgment on the Puno Court. History will be the final arbiter, as the Court itself had realized when it quoted Omar Khayyam's **Rubaiyat**:

> The Moving Finger writes, and having writ, moves on, nor all your piety nor your wit, can move it back, nor cancel half a line.

*Planting the Seeds of Hope**

Chief Justice Reynato S. Puno

Friends and colleagues in the Judiciary:

I thank Dean Agabin for his usual scholarly lecture, which looked over our decisions under both a forgiving and unforgiving lens. It is inevitable that some of the decisions of the Court will invite biting dissents. It ought to be, for striking the proper balance between the powers of government and the rights of the people and fixing the moving line that guarantees the independence yet interdependence of the great branches of our government will always be a difficult job. Disagreements on constitutional approaches to these problems will be sharper in ambiances where partisan politics pollute the air. In nations where a great majority of the people are exploited by a few, efforts to remedy the imbalance of rights, including those of the judiciary, will be greeted with raised eyebrows, if not more. Only posterity will decide whether we drew the proper line to meet, at the very least, the exigencies of our own time.

Aristotle once described hope as a waking dream. Our nation is in slumber, dreaming of better things — a strong government, a robust economy, a land of plenty for all. All these things may appear to us as a mirage, visions destined to be forever intangible. But we begin with seeds of hope, of taking things one step at a time, beginning with the things we hold in our hands and are able to control.

When I was sworn into office as Chief Justice, I knew I had to act swiftly if I wanted to institute meaningful and relevant programs in the Judiciary, bearing in mind that I would only

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* Closing Remarks delivered at the *Chief Justice Reynato S. Puno Fourth Distinguished Lecture* held on May 7, 2010, at the PHILJA Training Center Auditorium, Tagaytay City.

have three years and a few months to do so. I had many goals, but had to focus on a few: such as fortifying constitutionalism in our courts; bringing the courts closer to the people; and reducing the gap between rhetoric and reality in protecting the three generations of human rights: civil and political rights, social and economic rights, and community rights, especially environmental rights. There was so much to be done, so many needs to be addressed, in such a short span of time.

These areas crying for judicial action stared us in the face. In 2007, there was the rising toll of brazen and senseless extralegal killings and enforced disappearances of journalists and activists. The Court embarked on a journey through uncharted waters: the radical use of its expanded rule-making power under Article VIII of the Constitution. After a summit called for the purpose of helping solve these killings and disappearances, the Supreme Court studied the efficacy of the writs of *amparo* and of *habeas data* in Latin American and Western Europe jurisdictions to supplement our existing writ of *habeas corpus*. The writ of *amparo* was promulgated in 2007; and its twin peremptory writ, that of *habeas data*, was promulgated the year after. The facts and figures will show that these twin writs strengthened the protection of the first-generation rights — the civil and political rights of our people.

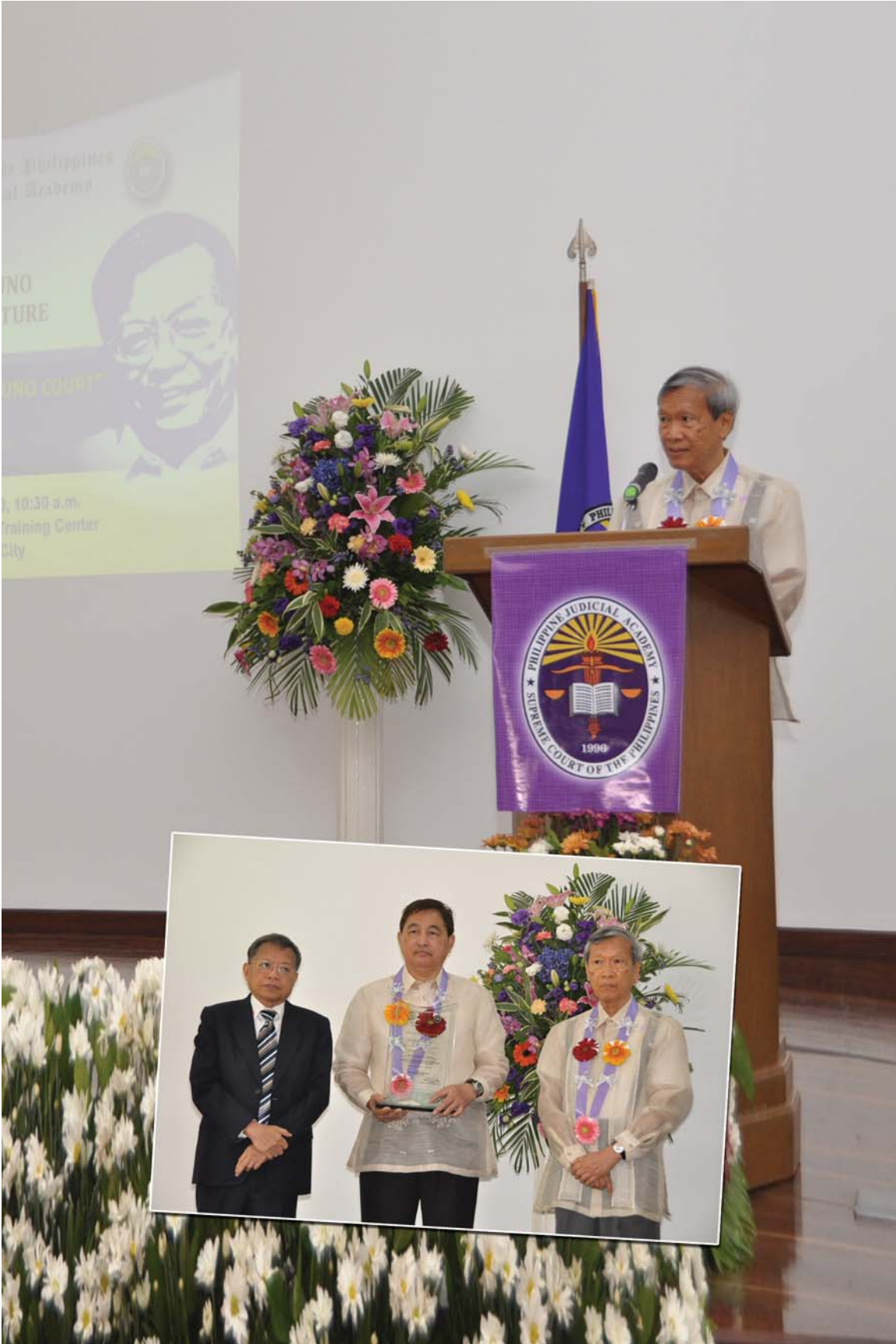
In 2008, we looked on the need to increase access to justice by our poor people. We launched the Enhanced Justice on Wheels project, which endeavored to help in the speedy disposition of the poor's criminal cases through our mobile courts. The Supreme Court also launched the Small Claims Court to facilitate the litigation of small civil cases of the poor. Through the Small Claims Court, poor Filipinos can litigate their own money claims of P100,000 or less, through an inexpensive, informal, and simple procedure without the need of counsel.

And in 2010, to complete the circle of protection of the human rights of our people, we addressed third-generation rights — community rights, chief among which is our right to a balanced and healthy environment. Thus was born our unique

contribution to the world, a world searching for remedies to protect the environment — the writ of *kalikasan*. We agree that the greatest threat to human rights does not come from modern-day terrorists but from those who degrade our environment.

I thank the PHILJA for its constant support of these programs to enhance the protection of the constitutional rights of our people. These policies and programs provide seeds of hope for our people. In their own perfect time, these seeds will blossom into buds, then into flowers that will brighten the life of every Filipino. The progress of a nation cannot be achieved in a single lifetime, and it becomes an intergenerational responsibility to cultivate the seeds that our predecessors have sown for our benefit. May the Court, with the help of PHILJA, continue the legacy of an ever-improving Judiciary, one more responsive to the needs of our people, ever on the side of the Constitution and of human dignity.

God bless our nation. God bless us all!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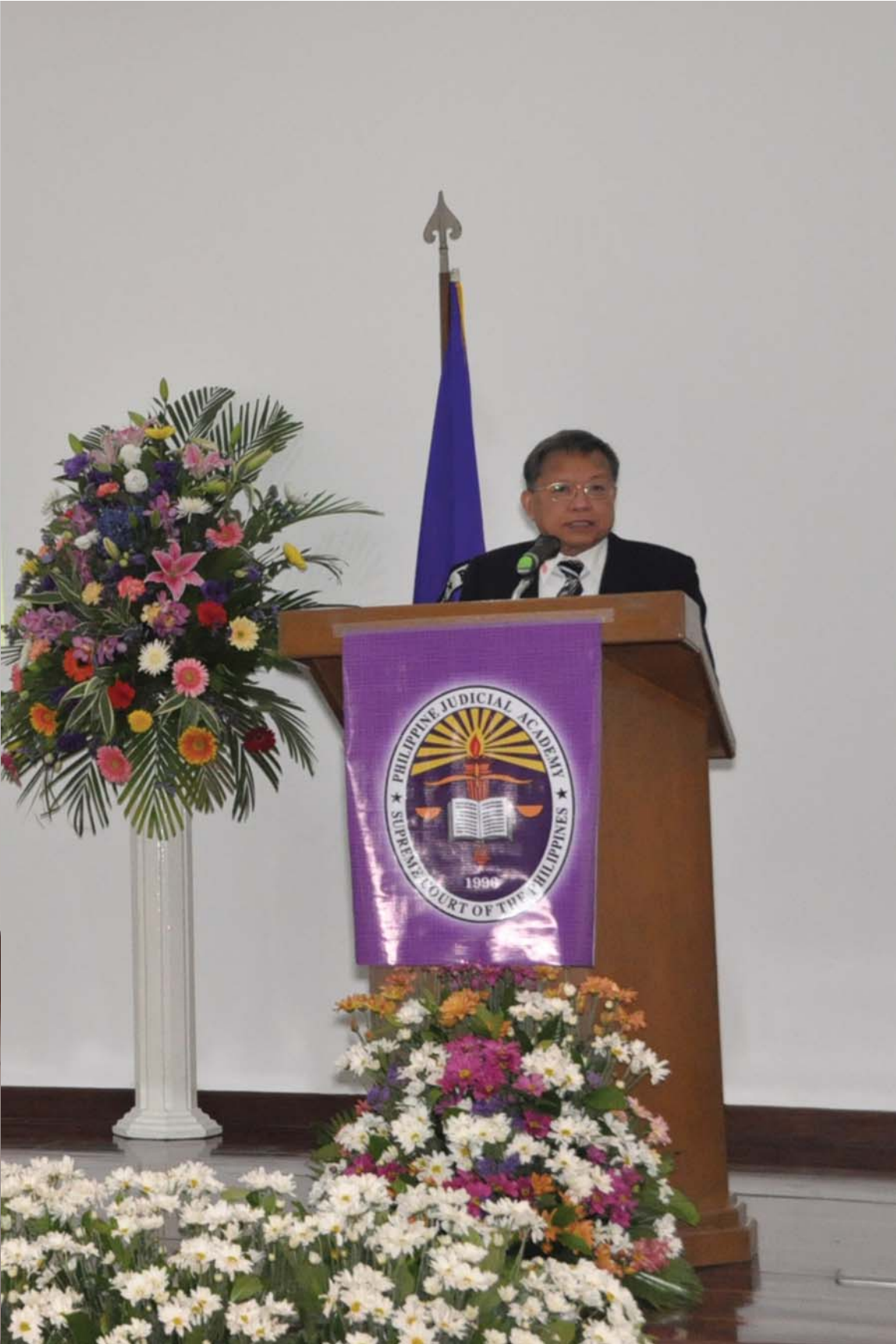
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