



# There and Back Again

## The Philippines' Struggle with Authoritarianism

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Except between 1972 and 1986, the Philippines maintained a republican and presidential system of government. Modelled after the United States ('US'), to which it was a former unincorporated territory, it subscribed to the separation of powers among the executive, legislative and judicial branches of government.<sup>1</sup> However, under Ferdinand Marcos' regime, the Philippines departed from this form of governance to a state of 'political, economic, and social havoc'.<sup>2</sup> In a bid to remain in power, Marcos placed the country under martial law, rushed the ratification of the 1973 Constitution and subjected the Philippines to dictatorship.<sup>3</sup> In 1986, after years of violence and corruption, the Filipinos finally deposed Marcos.<sup>4</sup> The Philippines then adopted its 1987 Constitution 'aimed at correcting the shortcomings' of previous laws and avoiding the rise of another authoritarian.<sup>5</sup> Into its text the framers baked liberal and democratic principles, and instituted safeguards against abuse.

However, after a third of a century, the Philippines finds itself in another struggle. The country, it appears, rode on a return trajectory towards authoritarianism under Rodrigo Duterte to whom much power and influence were centred. The subservience of the legislature and the deference of the judiciary left executive power unchecked, fundamental liberties unprotected and institutional mechanisms against abuse ineffective. To make matters worse, a majority of the populace seemed to have accepted this kind of rule as evinced by the recent election of the former dictator's son, Ferdinand 'Bongbong' Marcos Jr.

This paper provides a brief overview of the Philippines' struggle with authoritarianism. It discusses the Philippines' experience under Marcos and how it adopted constitutional measures to prevent this from recurring. Next, it delves into the apparent return to authoritarianism under Duterte. Finally, it identifies one factor, among many, that contributed to this relapse. It submits that although protections exist on paper, the system remains vulnerable without those who demand that safeguards be respected. Simply, legal norms alone do not safeguard the principles of liberal and democratic constitutionalism — it requires the concurrent development of social mores.

### I From Dictatorship to Democracy

Between 1972 and 1986, the Philippines, which once enjoyed a semblance of liberal and democratic tradition, experienced massive human rights violations, gross abuses of power and widespread corruption.<sup>6</sup> Marcos's campaign to eliminate opposition to his rule left an estimated 70,000 Filipinos arbitrarily detained, 35,000 tortured and 3,257 killed.<sup>7</sup> Further, his abuse of power allowed him, his family and his cronies, to accumulate ill-gotten wealth exceeding USD 10,000,000,000.<sup>8</sup> By the end of Marcos' rule, the Philippines was left in a state of trauma and poverty, saddled with foreign debt.<sup>9</sup>



All this was done under a semblance of legality that taxed executive power beyond its limits and rendered any safeguard ineffective. In 1973, Marcos placed the Philippines under martial law and granted himself emergency powers.<sup>10</sup> He then rushed through the 1973 Constitution that allowed him to remain in power.<sup>11</sup> Further amendments gave him virtually unbridled powers.<sup>12</sup> At the height of his rule, Marcos was free to enact laws in contravention of the separation of powers.<sup>13</sup> Legislative oversight was also absent as it was decimated of meaningful opposition.<sup>14</sup> Likewise, the judiciary catered to Marcos' 'political likings and personal convenience'.<sup>15</sup> He, after all, had the sole authority in the appointment of judges and justices, and control over their tenure.<sup>16</sup> In most cases, the Court granted much deference to him.<sup>17</sup> In other instances, Marcos resorted to outright corruption, subjecting judges to 'pressure which proved to be beyond their capacity to resist'.<sup>18</sup>

It was in the wake of this misfeasance, malfeasance and nonfeasance, sanctioned by the 1973 Constitution, that the 1986 Constitutional Commission, formed after the Marcos' ouster, began their revisions. Indeed, throughout the drafting process, its members consciously noted how the Marcos regime disregarded the principles of liberal and democratic constitutionalism.<sup>19</sup> Thus, determined to avoid another authoritarian regime, they crafted a Constitution that sought to rein in executive power with stronger safeguards against abuse.<sup>20</sup>

## II The Failure of Legal Reforms

However, the 1987 Constitution appears to have failed in warding off a repeat of autocratic rule. As in the case of Marcos' regime, the Philippines under Duterte suffered human rights violations and liberal and democratic deficit. Yet, the government faced no repercussions and minimal pushback.

Like Marcos, Duterte sought to silence his opposition.<sup>21</sup> Members of the civic society such as activists, trade unionists and tribal leaders suffered threats, harassment and killings.<sup>22</sup> It was not uncommon for the government to label individuals and groups critical of the administration's policies as members of terrorist or communist organisations.<sup>23</sup> In some cases, this led to the questionable arrest and detention of human rights activists.<sup>24</sup> In others, this made way for operations that led to deaths.<sup>25</sup> The same is true for the media.<sup>26</sup> The government harassed journalists critical of the government through legal proceedings.<sup>27</sup> Duterte even went so far as to cause the closure of a major network that was critical of his policies by instructing Congress not to renew its franchise.<sup>28</sup> Duterte also went after government officials who opposed his policies. He caused the prosecution of a senator who called for an investigation of the extrajudicial killings through trumped-up charges of drug trafficking.<sup>29</sup> Likewise, he ousted the Chief Justice of the Supreme Court, who notably 'resisted some of Mr Duterte's policies on the grounds that they flouted human rights and the rule of law',<sup>30</sup> through a legally questionable proceeding initiated by the government's Office of the Solicitor General.<sup>31</sup>

These abuses occurred notwithstanding the safeguards and limitations on government power under the 1987 Constitution. Like Marcos, Duterte also resorted to circumventing and weakening the mechanisms designed to check the power of the president. Indeed, his tenure was marked by the employment of methods to remove limits on executive prerogative, provide legal fiat to otherwise illiberal policies and undermine the accountability of institutions.<sup>32</sup>

The framers of the Constitution envisioned a Congress that could rein in the executive. Yet, Duterte managed to gain control over Congress.<sup>33</sup> Political defections and the use of state machinery virtually decimated the opposition.<sup>34</sup> These victories translated to Duterte's consolidation of power.<sup>35</sup> It allowed him to push for laws that threatened the liberties of his opposition.<sup>36</sup> Worse, control over Congress permitted him to loosen legislative oversight, lessening the opportunities for congressional investigations, and precluding the filing of impeachment complaints.<sup>37</sup> Likewise, the framers of the Constitution also intended for a judiciary with broader powers of review.<sup>38</sup> However, the judiciary has demonstrated much deference to Duterte, giving his policies a semblance of legitimacy.<sup>39</sup> On the one hand, this may have been due to his threats. Duterte has frequently warned courts not to interfere with his policies and that should they do so, he will not respect their authority.<sup>40</sup> On the other, this may also be due to accommodation. With the majority of its members appointed by Duterte, the Court has been unwilling to exercise its broad powers of review.<sup>41</sup> Indeed, during his tenure, Duterte has won almost every

case that challenged his actions before the Supreme Court, with the latter usually deferring to the discretion of the executive branch.<sup>42</sup> Finally, Duterte also interfered with the constitutional institutions designed to provide safeguards against abuse of government powers. Duterte repeatedly warned the Ombudsman not to investigate cases involving the police and the military ‘without seeking his permission first’.<sup>43</sup> The same is true of the Commission of Human Rights, which was given a budget of a mere one thousand pesos, which effectively rendered it useless when it began investigating the extra-judicial killings committed during the government’s campaign against illegal narcotics.<sup>44</sup>

### **III The Rule of Law and the Liberal and Democratic Order**

It bears stressing that Duterte was not the first post-Marcos president to attempt to expand executive power and circumvent constitutional safeguards while claiming to adhere to the ‘rule of law’.<sup>45</sup> Fidel V Ramos, Joseph Estrada, Gloria Macapagal Arroyo and Benigno Aquino III attempted to do the same. Most managed, in different degrees, to exercise control over Congress.<sup>46</sup> A few gained the deference of the judiciary and independent institutions.<sup>47</sup>

These actions stand in stark contrast with the order based under the ‘rule of law’ that the framers of the 1987 Constitution hoped to ensure. Of course, stripped of its rhetoric, the concept is ‘just one of the virtues which a legal system may possess and by which it is to be judged’.<sup>48</sup> Taken broadly, it dictates that ‘the government shall be ruled by the law and subject to it’ — a ‘government by law and not by men’.<sup>49</sup> Hence, the only actions that the law allows are considered actions of the government as government. Otherwise, these acts would be void. ‘Rule of law’ does not amount to any conception of ‘democracy, justice, [or] equality’.<sup>50</sup> It ‘remains distinct from the scheme of justice established by any particular legal regime and is compatible with many rival accounts of social justice’.<sup>51</sup> What it requires is conformity to the ‘rule of law’ to ‘secure whatever purposes the law is designed to achieve’.<sup>52</sup> The rule of law, therefore, is the ‘specific excellence of law in the sense that it is the virtue of efficiency’.<sup>53</sup> Thus, ‘adherence to the rule of law enables the law to attain its ends, just as a sharp ... knife can more readily be used for cutting’.<sup>54</sup>

Arguably, the ‘rule of law’ to which Philippine leaders claim to adhere is formalistic.<sup>55</sup> If anything, it could be demonstrated that it is equally compatible with authoritarian rule. Their actions may be legal but whether they adhere to the principles of democratic and liberal constitutionalism is a different matter.<sup>56</sup> But the ‘rule of law’ presumably sought by the framers of the Philippine Constitution goes beyond mere legality or that which requires ‘only formal legal authorisation for governmental acts and decisions’.<sup>57</sup> What is sought is a conception that requires ‘more substantial requirements’, which is that of liberal and democratic constitutionalism.<sup>58</sup> As had been aptly put, ‘[s]acrificing too many social goals on the altar of the rule of law may make law barren and empty’.<sup>59</sup>

### **IV The Need for the Development of Social Mores**

Duterte, despite his authoritarian tendencies, enjoyed high satisfaction ratings during his tenure. Such approval notably comes from Filipinos who once cried ‘never again’ to dictatorship after the fall of Marcos.<sup>60</sup> Thus, apparent support for another ‘strongman’ begs examination.

Arguably, this may be explained through a gap in the ‘internalisation’ of constitutional principles.<sup>61</sup> To recall, the Philippines did not adopt its own system of government. Rather, it was a case of ‘transplanted constitutionalism’ from the US.<sup>62</sup> This ‘alien origin’ of the Constitution presents a problem for the populace it was meant to govern.<sup>63</sup> A constitutional order, after all, does not merely depend on the declarations of principles and legal instruments.<sup>64</sup> Rather, it involves an element of ‘normative compliance and institutional internalization of democratic values by all pillars of the state and society’.<sup>65</sup>

More importantly, it is also submitted that the Philippines, in its re-democratisation, heavily relied on institutional reform through constitutional change.<sup>66</sup> This is evident in the efforts of the Constitutional Commission, discussed above, to safeguard liberal and democratic principles and rein in executive power. Yet, this is problematic as a constitutional order does not solely depend on the constitutional

text but represents a ‘fundamental commitment to the norms and procedures of the constitution’ that manifest in the behaviour and practices that reinforce and safeguard these norms.<sup>67</sup>

Legal provisions, no matter how well-intended, cannot stand alone. Borrowing from the principles of transitional justice, reforms must embrace the ‘full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, ... to ensure accountability, serve justice, and achieve reconciliation’.<sup>68</sup> This is where the Philippine transition to justice failed. With a reform centred on the positivist pillar of institutional reform, the transition to democracy is found wanting. The failure to remember the experience under authoritarianism resulted in the populace becoming open to trade-offs and provided a fertile ground for the rise of Duterte.<sup>69</sup> Thus, ‘[c]itizens who once accepted democracy as the only legitimate form of government [became] more open to authoritarian alternatives’.<sup>70</sup> Simply, the importance of liberal order has been depreciated, the possibility of authoritarian rule has been floated and anti-liberal ideas have been accepted.<sup>71</sup>

## v Conclusion

The Philippine struggle with authoritarianism suggests that legal and institutional reforms alone do not suffice to sustain a liberal and democratic order. Legal and institutional reforms only form part of justice reforms. The return of a liberal and democratic order also needs societal interventions. After all, sustaining a liberal and democratic order ‘is not merely a matter of making changes in texts; [it] calls for changes in practice’.<sup>72</sup> Accordingly, reforms must entail not only legal but also societal interventions. It is said that ‘[l]iberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court’ can save it.<sup>73</sup>

The Philippines, in its re-democratisation, seems to have overlooked that legal formalisms are but a part of justice reforms. By solely relying on legal changes, it failed to instil in its populace the dangers of authoritarian rule. Three decades after the ouster of Marcos, many Filipinos indicated an acceptance of authoritarianism to the extent of electing the son of a former dictator.

- 1 Joaquin G Bernas, *The 1987 Constitution of the Republic of the Philippines: A Commentary* (Rex Bookstore, 2nd ed, 2009) 52. See *Maquera v Borra*, Supreme Court of the Philippines, GR No L-24761, 7 September 1965 reported in 112 Philippine Reports 412 (1965).
- 2 *Ocampo v Enriquez*, Supreme Court of the Philippines, GR No 225973, 8 November 2016 reported in 798 Philippines 227, 261 (2016) (Carpio J dissenting) (*‘Ocampo’*); *Mijares v Ranada*, Supreme Court of the Philippines, GR No 139325, 12 April 2005 reported in 495 Philippine Reports 372 (2005) (*‘Mijares’*); *Heirs of Licaros v Sandiganbayan*, Supreme Court of the Philippines, GR No 157438, 18 October 2004 reported in 483 Philippine Reports 510 (2004); *Olague v Military Commission No 34*, Supreme Court of the Philippines, GR No 54558, 22 May 1987 reported in 234 Philippine Reports 144 (1987) (Teahankee CJ dissenting).
- 3 Patricio N Abinales and Donna Amoroso, *State and Society in the Philippines* (Rowman & Littlefield, 2005) 198; Stanley Karnow, *In Our Image: America’s Empire in the Philippines* (Random House, 1989) 439.
- 4 Isagani A Cruz and Carlo L Cruz, *Philippine Political Law* (Central Books, 2014) 12.
- 5 Ibid. See also *Re Umil v Ramos*, Supreme Court of the Philippines, GR No 81567, 9 July 1990 reported in 265 Philippine Reports 325 (1990) (Padilla J dissenting) (*‘Umil’*); Paul Hutchcroft and Joel Rocamora, ‘Strong Demands and Weak Institutions: The Origins and Evolution of the Democratic Deficit in the Philippines’ (2003) 3(2) *Journal of East Asian Studies* 259, 278.
- 6 See *Human Rights Victims Reparation and Recognition Act 2013* (Philippines); Raphael Lorenzo A Pangalangan, Gemmo Bautista Fernandez and Ruby Roselle L Tugade, ‘Marcosian Atrocities: Historical Revisionism and the Legal Constraints on Forgetting’ (2018) 19(2) *Asia-Pacific Journal on Human Rights and the Law* 140; Mark Thompson, ‘Bloodied Democracy: Duterte and the

- Death of Liberal Reformism in the Philippines’ (2016) 35(3) *Journal of Current Southeast Asian Affairs* 39, 39; David T Johnson and Jon Fernquest, ‘Governing through Killing: The War on Drugs in the Philippines’ (2018) 5(2) *Asian Journal of Law and Society* 359; Julio C Teehankee, ‘Was Duterte’s Rise Inevitable?’ in Nicole Curato (ed), *A Duterte Reader: Critical Essays on Rodrigo Duterte’s Early Presidency* (Ateneo de Manila University Press, 2017) 37, 42.
- 7 Alfred W McCoy, *Policing America’s Empire: The United States, the Philippines, and the Rise of the Surveillance State* (University of Wisconsin Press, 2009) 403. See *Mijares* (n 2); Abinales and Amoroso (n 3) 207; *Re Estate of Marcos Human Rights Litigation*, 910 F Supp 1460 (D Haw, 1995).
  - 8 Republic of the Philippines Constitutional Commission, *Record of the Constitutional Commission: Proceedings and Debates* (1986) vol 5, 516 (*‘Volume 5’*). See *Tabuena v Sandiganbayan*, Supreme Court of the Philippines, GR No 103501-03, 17 February 1997 reported in 335 Philippine Reports 795 (1997); *Marcos v Manglapus*, Supreme Court of the Philippines, GR No 88211, 27 October 1989 reported in 258-A Philippine Reports 547 (1989) (*‘Marcos’*); *Philippines v Sandiganbayan*, Supreme Court of the Philippines, GR No 152154, 15 July 2003 reported in 453 Philippine Reports 1059 (2003); *Marcos Jr v Philippines*, Supreme Court of the Philippines, GR No 189434, 25 April 2012 reported in 686 Philippine Reports 980 (2012); *Presidential Commission on Good Government v Peña*, Supreme Court of the Philippines, GR No 77663, 12 April 1988 reported in 243 Philippine Reports 93 (1988); *Chavez v Presidential Commission on Good Government*, Supreme Court of the Philippines, GR No 130716, 9 December 1998 reported in 360 Philippine Reports 133 (1998); *Presidential Ad Hoc Fact-Finding Committee on Behest Loans v Desierto*, Supreme Court of the Philippines, GR No 135715, 13 April 2011 reported in 664 Philippine Reports 16 (2011); Republic of the Philippines Constitutional Commission, *Record of the Constitutional Commission: Proceedings and*

- Debates* (1986) vol 2, 164 ('Volume 2'); Republic of the Philippines Constitutional Commission, *Record of the Constitutional Commission: Proceedings and Debates* (1986) vol 4, 852.
- 9 Marcos (n 8) (Cortes J).
  - 10 Karnow (n 3) 678; Hutchcroft and Rocamora (n 5) 275.
  - 11 Cruz and Cruz (n 4) 6.
  - 12 Bernas (n 1) 58, 677. See *Aquino Jr v Commission on Elections*, Supreme Court of the Philippines, GR No L-400004, 31 January 1975 reported in 62 Philippine Reports 328 (1975); *Legaspi v Minister of Finance*, Supreme Court of the Philippines, GR No L-58289, 24 July 1982 reported in 62 Supreme Court Reports Annotated 275 (1982).
  - 13 Bernas (n 1) 58, 677.
  - 14 Republic of the Philippines Constitutional Commission, *Record of the Constitutional Commission: Proceedings and Debates* (1986) vol 1, 51 ('Volume 1'). See Cruz and Cruz (n 4) 185; Republic of the Philippines Constitutional Commission, *Volume 2* (n 8) 88; Abinales and Amoroso (n 3) 196, 211.
  - 15 Republic of the Philippines Constitutional Commission, *Volume 1* (n 14) 485. See, eg, Primitivo Mijares, *The Conjugal Dictatorship of Ferdinand and Imelda Marcos* (Ateneo de Manila University Press, 1976) 339–42.
  - 16 Republic of the Philippines Constitutional Commission, *Volume 5* (n 8) 357, 937. See Abinales and Amoroso (n 3) 207.
  - 17 See, eg, *Javellana v Executive Secretary*, Supreme Court of the Philippines, GR No L-36142, 31 March 1973 reported in 151-A Philippine Reports 34 (1975); *Sanidad v Commission on Elections*, Supreme Court of the Philippines, GR No L-44640, 12 October 1976 reported in 165 Philippine Reports 303 (1976); *Occena v Commission on Elections*, Supreme Court of the Philippines, GR No L-56350, 2 April 1981 reported in 191 Philippine Reports 370 (1981).
  - 18 *Galman v Sandiganbayan*, Supreme Court of the Philippines, GR No 72670, 12 September 1986 reported in 228 Philippine Reports 42 (1986).
  - 19 Bernas (n 1) 903; Cruz and Cruz (n 4) 131. See Republic of the Philippines Constitutional Commission, *Volume 1* (n 14) 105; Republic of the Philippines Constitutional Commission, *Volume 2* (n 8) 220, 495; Republic of the Philippines Constitutional Commission, *Volume 5* (n 8) 930; *Umil* (n 4) (Sarmiento J dissenting). See generally Bernas (n 1) 552; Cruz and Cruz (n 4) 14; Carl H Lande, 'The "Asian Values" Debate: A Partisan Assessment' (1998) 2(3) *Public Policy* 63, 66.
  - 20 Pangalangan, Fernandez and Tugade (n 6) 142; Republic of the Philippines Constitutional Commission, *Volume 2* (n 8) 734. Note that the Constitution limited the prerogatives of the President. It cut back on the President's power to impose martial law, reduced the instances in which the power may be used, and subjected its imposition to the review of both Congress and the judiciary: *Philippines Constitution 1987* art VI s 18, art VII ss 16, 18; Republic of the Philippines Constitutional Commission, *Volume 5* (n 8) 1010. It also granted broader powers of oversight to the other branches of government. Congress now possesses the prerogative to confirm presidential appointments: *Philippines Constitution 1987* art VII s 16; limit the use of discretionary funds: at art VI s 25(6); and inquire into the contracting of foreign debts: at art VII s 20. Further, it widened the judiciary's power of judicial review, giving it jurisdiction over matters involving 'grave abuse of discretion amounting to lack or excess of jurisdiction', which would otherwise have been considered a 'political question': at art VIII s 1; Bernas (n 1) 991. See *Marcos* (n 8). It also sought to ensure the independence of the judiciary through fiscal autonomy, security of tenure and protection from reorganisation: *Philippines Constitution 1987* art VIII ss 2–3. Moreover, considering the regime's gross violation of fundamental liberties, the Constitution established the Commission on Human Rights with the power, among others, to investigate all forms of violations of human rights: at art XIII s 17. Finally, given the widespread corruption under Marcos, it also created an independent Office of the Ombudsman, enjoying fiscal autonomy and removable only by impeachment, to investigate and prosecute cases of graft and corruption: at art XI ss 2, 5, 13–14.
  - 21 'Rodrigo Duterte Has Accelerated the Philippines' Slide Toward Authoritarianism', *The Washington Post* (online, 28 July 2019) <[https://www.washingtonpost.com/opinions/global-opinions/rodrigo-duterte-has-accelerated-the-philippines-slide-toward-authoritarianism/2019/07/28/b43e8d70-acb3-11e9-bc5c-e73b603e7f38\\_story.html](https://www.washingtonpost.com/opinions/global-opinions/rodrigo-duterte-has-accelerated-the-philippines-slide-toward-authoritarianism/2019/07/28/b43e8d70-acb3-11e9-bc5c-e73b603e7f38_story.html)>; Human Rights Council, *Report of the United Nations High Commissioner for Human Rights: Situation of Human Rights in the Philippines*, 44th sess, Agenda Item 2, UN Doc A/HRC/44/22 (29 June 2020) 12 ('*Situation of Human Rights in the Philippines*').
  - 22 *Situation of Human Rights in the Philippines* (n 21) 8–9, 14.
  - 23 Ibid 10–11; Phil Robertson, 'Philippine General Should Answer for "Red-Tagging"', *Human Rights Watch* (online, 10 February 2021) <<https://www.hrw.org/news/2021/02/10/philippine-general-should-answer-red-tagging>>.
  - 24 'Groups Decry "Illegal" Arrests of Activist Leaders in Central Luzon', *CNN Philippines* (online, 30 March 2021) <<https://www.cnnphilippines.com/news/2021/3/30/activist-leaders-central-luzon-arrested.html>>.
  - 25 United Nations, 'Philippines: UN Rights Office Appalled over Simultaneous Killings of "Red-Tagged" Activists', *UN News* (online, 9 March 2021) <<https://news.un.org/en/story/2021/03/1086782>>; Ted Regencia, 'Nine Killed after Duterte's Order to "Finish Off" Communists', *Al Jazeera* (online, 7 March 2021) <<https://www.aljazeera.com/news/2021/3/7/philippines-deadly-operation-after-order-to-kill-communists>>.
  - 26 Joanna Fuertes-Knight, 'Attacks on the Media Show Duterte's Philippines Is Heading for Despotism', *The Guardian* (online, 16 February 2019) <<https://www.theguardian.com/commentisfree/2019/feb/15/attacks-media-duterte-philippines-rappler-maria-ressa>>. See Rambo Talabong, 'Over 100 Attacks vs Journalists Since Duterte Assumed Office: Monitor', *Rappler* (online, 3 May 2019) <<https://www.rappler.com/nation/229611-over-100-attacks-vs-journalists-duterte-assumed-office>>.
  - 27 Alexandra Stevenson, 'Maria Ressa, Journalist Critical of Duterte, Is Arrested Again in Philippines', *The New York Times* (online, 28 March 2019) <<https://www.nytimes.com/2019/03/28/business/media/maria-ressa-arrested-philippines-rappler.html>>.
  - 28 'Independent Broadcaster ABS-CBN Shut Down by Philippines Government in "Crushing Blow" to Press Freedom', *ABC News* (online, 6 May 2020) <<https://www.abc.net.au/news/2020-05-06/philippines-news-outlet-closure-abs-cbn-duterte/12218416>>; Jason Gutierrez, 'Philippine Congress Officially Shuts Down Leading Broadcaster', *The New York Times* (online, 15 December 2020) <<https://www.nytimes.com/2020/07/10/world/asia/philippines-congress-media-duterte-abs-cbn.html>>; 'Duterte to ABS-CBN: Next Year, You're Out', *CNN Philippines* (online, 3 December 2019) <<https://www.cnnphilippines.com/news/2019/12/3/duterte-abs-cbn-franchise-out.html>>.
  - 29 Johnson and Fernquest (n 6) 366; Jayson S Lamchek, 'A Mandate for Mass Killings: Public Support for Duterte's War on Drugs' in Nicole Curato (ed), *A Duterte Reader: Critical Essays on Rodrigo Duterte's Early Presidency* (Ateneo de Manila University Press, 2017) 199, 201–9.
  - 30 Felipe Villamor, 'She Stood Up to Duterte. Now She Faces Impeachment', *The New York Times* (online, 2 March 2018) <<https://www.nytimes.com/2018/03/02/world/asia/philippines-chief-justice-duterte.html>>; Gemmo Fernandez, 'The Theory of Judicial Impartiality and the Case of *Republic v Chief Justice Sereno*' (2019) 19(2) *Australian Journal of Asian Law* 281, 282 ('Theory of Judicial Impartiality').
  - 31 Fernandez, 'Theory of Judicial Impartiality' (n 30) 283. See Jim Gomez, 'Philippines' Chief Justice Expects Impeachment, Taking Leave', *Associated Press* (online, 28 February 2018) <<https://apnews.com/18401ab797a94c9aac3d60b291b84bdc/Philippines-chief-justice-expects-impeachment-taking-leave>>.
  - 32 See Kim Lane Scheppele, 'Autocratic Legalism' (2018) 85(2) *University of Chicago Law Review* 545, 547–8, 570; Susanne Baer, 'Rule of — and not by any — Law: On Constitutionalism' (2018) 71(1) *Current Legal Problems* 335, 350–1.
  - 33 Dante Gatmaytan, 'Philippines: The State of Liberal Democracy' in Albert Richard et al (eds), *2017 Global Review of Constitutional Law* (I\*CONnect-Clough Center, 2018) 220, 224 ('State of Liberal Democracy').
  - 34 See Miguel Syjuco, 'How to Get Ahead in Politics in the Philippines', *The New York Times* (online, 8 August 2017) <<https://www.nytimes.com/2017/08/08/opinion/the-philippines-contemptuous-politics.html>>; Thompson (n 6) 39.
  - 35 Gatmaytan, 'State of Liberal Democracy' (n 33) 220.
  - 36 See *Anti-Terrorism Act 2020* (Philippines) ss 4–10, 25, 29.
  - 37 Gemmo Bautista Fernandez, 'Rise of Illiberal Democracy, Weakening of the Rule of Law, and Implementation of Human Rights in the Philippines' (2021) 36(2) *American University International Law Review* 181, 183.
  - 38 *Philippines Constitution 1987* art VIII s 1; Bernas (n 1) 991.
  - 39 Dante Gatmaytan, 'Duterte, Judicial Deference, and Democratic Decay in the Philippines' (2018) 28(4) *Zeitschrift für Politikwissenschaft* 553, 554 ('Duterte, Judicial Deference and Democratic Decay').
  - 40 Alexis Romero, 'Duterte Pushes 2 Dams for Metro Manila, Warns Courts', *The Philippine Star* (online, 31 December 2019) <<https://www.philstar.com/headlines/2019/12/31/1980949/Duterte-pushes-2-dams-metro-manila-warns-courts>>; Jeffrey Damicog, 'Guevarra Backs President's Warning to Courts vs Issuing TROs, Injunctions', *Manila Bulletin* (online, 31 December 2019) <<https://mb.com.ph/2019/12/31/guevarra-backs-presidents-warning-to-courts-vs-issuing-tros-injunctions>>. See Villamor (n 30).
  - 41 See Gatmaytan, 'Duterte, Judicial Deference, and Democratic Decay' (n 39).
  - 42 See, eg, *Ocampo* (n 2); *Lagman v Medialdea*, Supreme Court of the Philippines, GR No 231658, 4 July 2017 reported in 812 Philippine Reports 179 (2017); *Pangilinan v Cayetano*, Supreme Court of the Philippines, GR No 238875, 16 March 2021 (2021).
  - 43 Irene Hadiprayitno, 'Deadlock and Denial: Domestic Challenges and the Institutionalization Human Rights in ASEAN' (2018) 19(1) *Global Jurist* 1, 10.
  - 44 'House Gives CHR ₱1,000 Budget for 2018', *CNN Philippines* (online, 14 September 2017) <<http://nine.cnnphilippines.com/news/2017/09/12/Commission-on-Human-Rights-CHR-House-budget.html>>; Joseph Hincks, 'In the Philippines, Human Rights Have a Precise Value: \$20', *Time* (online, 14 September 2017) <<https://time.com/4939044/philippines-human-rights-budget-rodrigo-duterte>>. Note that the budget of the Commission was restored after public outrage became 'clear and unrelenting': Gatmaytan, 'State of Liberal Democracy' (n 33) 220; Katrina Domingo, 'Gascon: CHR Budget Restored Due to Public Outrage', *ABS-CBN News* (online, 21 September 2017) <<https://news.abs-cbn.com/news/09/21/17/gascon-chr-budget-restored-due-to-public-outrage>>.
  - 45 See generally Scheppele (n 32) 547–8, 570.
  - 46 Note that presidents such as Ramos, Estrada, Arroyo and Aquino enticed members of Congress through pork-barrel politics in which they granted representatives and senators lump-sum discretionary funds. This allowed members of Congress to fund projects in their constituencies, thus potentially gaining votes during elections: see Eric Vincent C Batalla, 'Treading the Straight and Righteous Path: Curbing Corruption in the Philippines' (2015) 4(1)



- Asian Education and Development Studies* 51, 59; Wilfrido V Villacorta, 'The Curse of the Weak State: Leadership Imperatives for the Ramos Government' (1994) 16(1) *Contemporary Southeast Asia* 67, 78; Cathy Yamsuan, 'Estrada's Aborted Impeachment Trial Haunts Senate', *Inquirer* (online, 25 December 2011) <<https://newsinfo.inquirer.net/117133/estrada-s-aborted-impeachment-trial-haunts-senate>>; Karol Ilagan, 'Bailiwicks, Not Poor Towns, Grab Slabs of House PDAF', *Philippine Centre for Investigative Journalism* (online, 18 July 2012) <<https://pcij.org/article/2559/bailiwicks-not-poor-towns-grab-slabs-of-house-pdaf>>; Tetch Torres, 'Aquino Hit for "Pork Bribe" to Convict Corona', *Inquirer* (online, 12 January 2012) <<https://newsinfo.inquirer.net/126953/aquino-hit-for-pork-bribe-to-convict-corona>>; Julliane Love De Jesus, 'Aquino's Men Deny P50-M "Incentive" to Oust Corona', *Inquirer* (online, 26 September 2013) <<https://newsinfo.inquirer.net/495583/aquinos-men-deny-p50-m-incentive-to-oust-corona>>; Amita O Legaspi 'Aquino: We Didn't Deprive Any Lawmaker of "Pork"', *GMA News* (online, 21 March 2011) <<https://www.gmanetwork.com/news/news/nation/215809/aquino-we-didn-t-deprive-any-lawmaker-of-pork/story/>>.
- 47 Note that Arroyo, like Duterte and Marcos, also obtained the deference of the judiciary. While in office, most of the cases that concerned the limits of executive prerogative were decided in her favour: see, eg, *Lacson v Perez*, Supreme Court of the Philippines, GR No 147780, 10 May 2001 reported in 410 Philippine Reports 78 (2001); *Sanlakas v Executive Secretary*, Supreme Court of the Philippines, GR No 159085, 3 February 2004 reported in 466 Philippine Reports 482 (2004); *David v Macapagal-Arroyo*, Supreme Court of the Philippines, GR No 171396, 3 May 2006 reported in 522 Philippine Reports 705 (2006). But see *Biraogo v Philippine Truth Commission*, Supreme Court of the Philippines, GR No 192935, 7 December 2010 reported in 651 Philippine Reports 374 (2010).
- 48 Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press, 1979) 211; Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' (2002) 21(2) *Law and Philosophy* 137, 140.
- 49 Raz (n 48) 212. See F A Hayek, *The Road to Serfdom: Text and Documents*, ed Bruce Caldwell (Routledge, 2014) 55; HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71(4) *Harvard Law Review* 593, 593; Lon L Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71(4) *Harvard Law Review* 630, 630, 643; Paul Craig, 'Substantive Legitimate Expectations in Domestic and Community Law' (1996) 55(2) *Cambridge Law Journal* 289, 290; John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 1980) 270; Lon L Fuller, *The Morality of Law* (Yale University Press, rev ed, 1969) 107.
- 50 Raz (n 48) 211. See Miro Cerar, 'The Ideology of the Rule of Law' (2001) 97(3) *Archives for Philosophy of Law and Social Philosophy* 393, 401.
- 51 TRS Allan, 'The Rule of Law as the Rule of Reason: Consent and Constitutionalism' (1999) 115(Apr) *Law Quarterly Review* 221, 224 ('Rule of Law as the Rule of Reason'). See Judith N Shklar, *Political Thought and Political Thinkers*, ed Stanley Hoffmann (University of Chicago Press, 1998) 270.
- 52 Allan, 'Rule of Law as the Rule of Reason' (n 51) 227.
- 53 Ibid.
- 54 TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2001) 54.
- 55 See Shannon C Stimson, 'Constitutionalism and the Rule of Law' in John Dryzek, Bonnie Honig and Anne Phillips (eds), *The Oxford Handbook of Political Theory* (Oxford University Press, 2008) 317.
- 56 Raz (n 48) 219.
- 57 Allan, 'Rule of Law as the Rule of Reason' (n 51) 223.
- 58 Ibid. Note that constitutionalism imposes limitations on the state, 'particularly in its relations with citizens, based on a clearly defined set of core values': Dante Gatmaytan, 'Lost in Transmission: Rule of Law Challenges in the Philippines' (2017) 8 *Impunity Watch Law Journal* 6, 21 ('Lost in Transmission'). See Yasmin Dawood, 'The Antidomination Model and the Judicial Oversight of Democracy' (2008) 96(5) *Georgetown Law Journal* 1411, 1434; Charles M Fombad, 'Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa' (2007) 55(1) *American Journal of Comparative Law* 1, 7; Walter F Murphy, 'Constitutions, Constitutionalism, and Democracy' in Douglas Greenberg et al (eds), *Constitutionalism and Democracy: Transitions in the Contemporary World* (Oxford University Press, 1993) 3; Vicki Jackson, 'What's in a Name? Reflections on Timing, Naming, and Constitution-Making' (2008) 49(4) *William and Mary Law Review* 1249, 1254. Constitutionalism requires the existence of 'limitations on the government [that] can be legally enforced': Gatmaytan, 'Lost in Transmission' (n 58) 21. In this sense, constitutionalism and democracy may exist in tension when 'what the people want at any given moment is over-ridden by constitutional principles that thwart that desire': Scheppele (n 32) 557. See Samuel Issacharoff, 'Constitutionalising Democracy in Fractured Societies' (2004) 82(7) *Texas Law Review* 1861, 1861. Nevertheless, democratic constitutionalism resolves this tension 'baking into constitutionalism the requirement of a self-sustaining democracy, a system in which the people can continue over time choosing their leaders, holding them to account, and rotating power when leaders disappoint': Scheppele (n 32) 557 (emphasis in original). See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980) 101-4, 116-20. Similarly, liberal constitutionalism reinforces democracy because it requires the state to 'protect and defend the dignity and liberty of individuals so that they may sustain, among other things, the capacities to be democratic citizens': Scheppele (n 32) 558. Constitutionalism mandates that 'all sources of public power be subject to binding legal checks that, among other things, ensure that leaders stay within legal limits and guarantee the orderly rotation of leadership in response to shifting democratic majorities': Scheppele (n 32) 558.
- 59 Raz (n 48) 229.
- 60 Gabriel Pabico Lalu, '#NeverAgain: 50 Years after Martial Law, Lagman says PH Must Not Allow Rights Abuses', *Inquirer* (online, 21 September 2022) <<https://newsinfo.inquirer.net/1668146/neveragain-50-years-after-martial-law-lagman-says-ph-must-not-allow-rights-abuses>>.
- 61 Dante Gatmaytan, 'Constitutional Deconsecration: Enforcing an Imposed Constitution in Duterte's Philippines' (2017) 62 *Ateneo Law Journal* 311, 333 ('Constitutional Deconsecration'); Richard Javad Heydarian, *The Rise of Duterte: A Populist Revolt against Elite Democracy* (Palgrave Pivot, 2018) 4.
- 62 See Raul C Pangalangan, 'Transplanted Constitutionalism: The Philippine Debate on the Secular State and the Rule of Law' (2008) 82(3) *Philippine Law Journal* 1, 1; *Kuroda v Jalandoni*, Supreme Court of the Philippines, GR No L-2662, 26 March 1949 reported in 83 Philippine Reports 171 (1949). Note that the Philippines did not adopt its own system and principles of government. Rather, constitutional limits were crafted by United States colonial policy: Gatmaytan, 'Constitutional Deconsecration' (n 61) 334, citing Howard T Fry, 'The Breakdown of the American Democratic Experiment in the Philippines: An Historical Analysis of a Crisis in Modernisation' (1977) 23(3) *Australian Journal of Politics and History* 383, 388-9. See *Philippine Organic Act of 1902*, 48 USC (1902); *Jones Act of 1916*, Pub L No 64-240, 39 Stat 545 (1916). Indeed, the Philippine Constitution was to be formulated and drafted in line with the American vision: *Philippine Independence Act 1934*, Pub L No 73-127, § 2(a), 48 Stat 456. The 1935 Constitutional Convention worked within the framework of the terms of Philippine independence 'bound by the wishes of the American people and the US government': Gatmaytan, 'Lost in Transmission' (n 58) 31-2; Emmanuel Pelaez, 'Law Reform and the Rule of Law' (1962) 1 *Philippines International Law Journal* 441, 444. The Philippines in crafting its constitutional order, therefore, 'drew its authority from the American Republic, not the Filipino people acting as agents in the exercise of their sovereign prerogatives': Gatmaytan, 'Lost in Transmission' (n 58) 31.
- 63 Gatmaytan, 'Constitutional Deconsecration' (n 61) 340, 351, citing Nikolai G Wenzel, 'Lessons from Constitutional Culture and the History of Constitutional Transfer: A Hope for Constitutionally Limited Government?' (2014) 20(2) *International Advances in Economic Research* 213, 221.
- 64 Yash Ghai, 'Chimera of Constitutionalism: State, Economy and Society in Africa' (Speech, Chinese University of Hong Kong Faculty of Law, 10 March 2010).
- 65 Heydarian (n 61) 3. David S Randolph, *Understanding Philippine Society, Culture, and Politics*, ed Laura L Samson (Anvil Publishing, 2017) 169 notes: Our Constitution's Declaration of Principles and State Policies may be read as a litany of our nation's core values. Yet the conduct of our national life is antithetical to almost everything the Constitution celebrates. We don't take our constitutional values seriously. It is obvious that enshrining them in the nation's basic charter does not guarantee their realization. The problem is not their lack of clarity. The problem is their irrelevance to our national life. The fault is not in the values themselves, or in our genes or stars. It is simply that the conditions that make it possible for us to live up to our Constitution's value aspirations are not there. We actually live by another set of values that are more congenial to the kind of society we have, more feudal than democratic, more traditional than modern, reflecting the social instincts of a highly unequal and underdeveloped nation.
- 66 Ruby Roselle L Tugade, 'Beyond Legal Transformation: Assessing the Impact of Transitional Justice Mechanisms in the Philippines' (2020) 93(1) *Philippine Law Journal* 77, 83.
- 67 Ghai (n 64) 3.
- 68 United Nations Security Council, *Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc S/2004/616 (24 August 2004) [8].
- 69 See Philip Alston, 'The Populist Challenge to Human Rights' (2017) 9(1) *Journal of Human Rights Practice* 1, 4.
- 70 See Gatmaytan, 'Duterte, Judicial Deference, and Democratic Decay' (n 39) 554. Cf Avery Poole, *Democracy, Rights and Rhetoric in Southeast Asia* (Palgrave Macmillan, 2019) 14.
- 71 Alston (n 69) 4.
- 72 Pablo de Greiff, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation, and Guarantees of Non-Recurrence*, 30th sess, Agenda Item 3, UN Doc A/HRC/30/42 (7 September 2015) [77].
- 73 See Learned Hand, 'The Spirit of Liberty' (Speech, New York, 1944).