Plenary Session I

Philippine Constitutional Framework for Economic Emergency: Expanding the Welfare State, Restricting the National Security Apparatus

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ABSTRACT

Confronted by the global economic meltdown, the central challenge for Philippine constitutionalism is that its regulatory state emerged as a response not to an episodic and passing crisis like the Great Depression but to the systemic and structural needs of a developing country.

Due to deep-seated fears of a return to dictatorship, all forms of emergency powers are checked by institutional and popular safeguards. The economic challenge qua crisis can therefore justify only temporary measures calibrated to address specific problems. The state can embark on long-term institutional reforms only by construing the challenge qua developmental imperative, but can do so only by maintaining the fiction that everything is business-as-usual, thus disabling the state from undertaking more fundamental reforms.

Either way, to the extent that constitutionalism is a "Western transplant," we overburden weak and underdeveloped state institutions which, thus expanded, become vulnerable to manipulation by corrupt and corrupting elites.

Keywords: *National Security Emergency, Economic Emergency, Marcos, Ferdinand Martial Law, Economic Development, Laissez Faire State, Welfare State, U.S. Constitutional Experience, Welfare State, Philippine Constitutional Experience*

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I. INTRODUCTION

The Great Depression pushed American constitutionalists to blur the separation of powers, combine executive and legislative powers in invigorated administrative agencies, exact judicial deference to economic legislation, subordinated business and tamed the markets—and thus created the regulatory state.

That solution hasn't quite worked for the Philippines. It has indeed adopted the welfare state as far back as its independence constitution of 1935 written under American tutelage, but that was to address the challenges of entrenched social inequality and poverty typical of developing countries—not to deal with an episodic and supposedly passing emergency. On the other hand, its current constitution of 1987 has deliberately curtailed state powers to deal with emergencies of all sorts—political, economic or natural—due to a deeply rooted fear of a Marcos-style dictatorship.

This presents fundamental difficulties. *First* is the built-in contradiction between the economic and the governance clauses of the constitution. On economic and social issues, the post-Marcos constitution is aggressively protectionist against foreign interests and heavily regulatory against private capital, both of which accordingly entail an expanded state. In terms of political governance, however, all state powers to deal with emergencies are presumptively suspect and subject to several layers of checks and balances and, correspondingly, entail a shriveled state.

Second, the next problem is specific to economic regulatory powers. For the Philippines, its economic crises have not been just episodic but rather systemic and structural, and have called for the long-term and institutional aggrandizement of state power. Yet that is historically anathema to the post-Marcos constitutional order because that was precisely the Marcos rationale for the endless prolongation of his emergency powers. Indeed the current constitution fixes a maximum period for national security emergencies, extendible only with congressional concurrence and subject to judicial oversight. For economic emergencies, prior congressional action is required. For both, the underlying concept is one of crisis, not of economic development.

Third, by the time of the Asian financial crisis that began in 1997, the resulting legal institutions had proved inadequate. On one hand, they were too weak to restrain the raw power of economic elites and of political majorities. Yet they remained cumbersome enough to provide rent-seeking opportunities for the corrupt, indeed, for the same elites they were supposed to have domesticated. In other words, even if the economic crisis was systemic rather than episodic, the solution—namely, an expanded state—was itself a problem. Politically, that solution wasn't credible because it merely

created more illicit rent-seeking mments. Economically, it was so manipulable that it simply wouldn't work.

The solution, I propose, is *one*, to distinguish between the national security and the economic emergency rationales for the assertion of state power; *two*, given the historical aversion to one-man rule and military dictatorship, to maintain the safeguards as against the commander-in-chief clause on national security issues; and *three*, in the economic sphere, to confine the state once again to its "nightwatchman functions" (save for "social safety net" functions) and shift the regulation of business away from administrative oversight and toward counter-checking by business competitors with the benefit of full disclosure in an open market. In other words, for a developing country like the Philippines, the challenge is how to expand the state institutionally in the long-term to address the problems of economic development but without creating the threat of a return to dictatorship or fostering state-centered corruption.

II. HISTORICAL CONTEXT

A. *The American Point of Reference: The Constitutional Template for the New Deal*

Philippine was a United States colony from 1899 to 1946 when it became independent constitutionalism, and Philippine constitutionalism is heavily influenced by the American constitutional tradition from which it sprang. Its independence charter of 1935 reflected the welfare state philosophy that was eventually led to Franklin Delano Roosevelt's "New Deal," his response to the Great Depression that began in 1929. Roosevelt responded with "bold [legislative] experimentation," building a welfare state to save his people from hunger and destitution. The United States Supreme Court initially upheld his emergency legislation that imposed a moratorium on mortgage foreclosures by banks and fixed price controls to protect wheat farmers. Soon however the Court began to strike down one welfare measure after another, invalidating portions of the National Industry Recovery Act for undue delegation of legislation power, striking down federal authority to regulate the poultry business, invalidating a law to help farmers through voluntary cutbacks on farming coupled with incentive payments funded by taxes, and finally invalidating minimum wage legislation. In so doing, the Court re-affirmed older doctrine that questioned the power of the state to regulate employment contracts and legislate maximum hours of work.

Roosevelt complained that the Court had "improperly set itself up as a third House of the Congress—a super legislature."

> The chief lawmakers in our country . . . are, the judges, because they are the final seat of authority. . . . The decisions of the courts on economic and social questions depend upon their economic and social philosophy; and for the peaceful progress of our people during the twentieth century we shall owe most to those judges who hold to a twentieth century economic and social philosophy and not to a long outgrown philosophy, which was itself the product of primitive economic conditions.[1]

We have reached the point as a Nation where we must take action to save the Constitution from the Court and the Court from itself.[2]

Harlan Fiske Stone, one of the court's liberals, criticized the majority's "tortured construction of the Constitution" that substituted "judicial fiat" for the judgment of Congress. "Courts are not the only agency of government that must be assumed to have capacity to govern." Chief Justice Charles Evan Hughes, voting with the liberals, complained:

> We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum. . . . When industries organize themselves on a national scale . . . how can it be maintained that their industrial labor relations are [not "inter-state" in character and therefore] forbidden field into which Congress may not enter [to avoid] the paralyzing consequences of industrial war?

Thus was born Roosevelt's now infamous "court packing" plan. No sooner did the tide turn, and in what is now called the "Constitutional Revolution of 1937," the Court adopted a more deferential attitude to legislative reforms, abandoning laissez-faire and embracing the welfare state. It upheld minimum wage laws for women and protected the right of workers to self-organization and to collective bargaining.

B. *Philippine Adoption of the Regulatory State: The Redistributive Justice Rationale*

Way back in 1919, barely two decades into the U.S. occupation of the country, the Philippine Supreme Court referred to *laissez faire* as "a thing of

1. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 171 (citing President's Message to Congress, 43 CONG. REP. 21 (Dec. 8, 1908)) (1921).
2. PETER IRONS, A PEOPLE'S HISTORY OF THE SUPREME COURT 315 (1999).

the past"[3] which had "to some extent given way to the assumption by the Government of the right of intervention even in contractual relations affected with public interest."[4] The underlying principles of a welfare state were written into Philippines' 1935 constitution under which the country would be governed as a semi-independent Commonwealth under U.S. colonial power. It was under this charter that the country would eventually become an independent republic in 1946 and by which the country would be governed until Marcos superceded it in 1972 when he assumed dictatorial powers. As in the U.S. model, the Philippine welfare state was founded on the principle of redistributive justice.

Laissez faire, however, was later resurrected in the infamous *People v. Pomar*[5]—the Philippine equivalent of *Lochner v. U.S.*—which invalidated a law granting maternity benefits to employees, citing undue state interference with the contractual liberty of employers and employees. That ruling has since been repudiated in *ACCFA v. CUGCO*, a case involving the characterization of a government agency involved in land redistribution for peasants. Agrarian reform was "beyond the capabilities of any private enterprise [and is] purely a governmental function."[6] The Court held that the traditional distinction between constituent and ministrant functions had been "rendered . . . unrealistic, not to say obsolete" by the "growing complexities of modern society,"[7] things which private capital would not naturally undertake or that government is by its nature better equipped than private individuals. The Court then declared ceremoniously that "the ghost of the *laissez faire* concept no longer stalks the juridical stage."[8]

This actually parallels the line between nightwatchman and welfare state functions. The Court described constituent functions as

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3 . Rubi v. Provincial Bd., G.R. No. L-14078 (S. Ct., Mar. 7, 1919), *available at* http://sc.judiciary.gov.ph/ (regulating the liberty of "indigenous cultural minorities" and keeping them in reservations). Justice Malcolm also lamented that the Courts "sometimes seemed to trail [behind] in this progressive" development.

4. Manila Trading Supply Co. v. Phil. Labor Union, G.R. No. L-47486 (S. Ct., Nov. 16, 1940), *available at* http://sc.judiciary.gov.ph/ (citing Ang Tibay v. CIR, G.R. 46496 (May 29, 1939)).

5. People of the Philippine Islands v. Pomar, G.R. No. L-22008 (S. Ct., Nov. 3, 1924), *available at* http://sc.judiciary.gov.ph/.

6. ACCFA v. CUGCO, G.R. No. L-21484, 30 S.C.R.A. 649, 672-3 (Nov. 29, 1969) (Phil.).

7. *Id.* Ministrant functions "continue to lose their well-defined boundaries and to be absorbed within activities that the government must undertake in its sovereign capacity if it is to meet the increasing social challenges of the times. [T]he tendency is undoubtedly towards a greater socialization of economic forces."

8. ACCFA v. CUGCO, *supra* note 6. *See also* Phil. Virginia Tobacco Admin. v. CIR, G.R. No. L-32052, 65 S.C.R.A. 416 (July 25, 1975) (Phil.) (arguing that governmental functions extend to the regulation of the tobacco industry), and NHA v. Reyes, G.R. No. L-49439, 123 S.C.R.A. 245 (June 29, 1983) (Phil.) ("[U]nder the welfare state concept . . . [there is] an obligation cast upon the State" to address the housing problem through "urban land reform," including the power of the state to assess just compensation at the owner's declared market value when this is the lower than the assessed value of the property).

> those which constitute the very bonds of society and are compulsory in nature, (i.e., as an attribute of sovereignty) e.g., keeping order and protecting persons and property from violence and robbery, personal status, crime, contract, justice, political rights and duties, dealings with foreign powers.[9]

and ministrant functions as

> those that are undertaken only by way of advancing the general interests of society and are merely optional, e.g., public works, public education, public health and safety, trade and industry regulation.[10]

The Court drew an explicit link to the social justice clause:

> [T]he tendency is undoubtedly towards the greater socialization of economic forces. Here of course this development was envisioned, indeed adopted as a national policy, by the Constitution itself in its declaration of principles concerning the promotion of *social justice* (emphasis supplied).[11]

The most explicit recognition of the welfare state was in *Calalang v. Williams*, written by the leading constitutionalist, Justice Jose P. Laurel, which upheld the power of the state to regulate access to roads by animal-driven vehicles, in order to relieve traffic congestion for the "general comfort, health and prosperity" of the public. "To this fundamental aim . . . the rights of the individual are subordinate." The Court, affirming that the police power has "expand[ed] as civilization advances," defined social justice as, *inter alia*, the "*equalization of social and economic forces* so that justice in its rational and objectively scientific conception may at least be

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9. Bacani v. Nacoco, G.R. No. L-9657 (S. Ct., Nov. 29, 1956), *available at* http://sc.judiciary.gov.ph/ (citing GEORGE A. MALCOLM, THE GOVERNMENT OF THE PHILIPPINE ISLANDS: ITS DEVELOPMENT AND FUNDAMENTALS 19-20 (1916)).

10. *Id.*

11. *Id. See* Phil. Virginia Tobacco Admin. v. CIR, *supra* note 8 (governmental functions extend to the regulation of the tobacco industry); NHA v. Reyes, *supra* note 8 ("[U]nder the welfare state concept . . . [there is] an obligation cast upon the State" to address the housing problem through "urban land reform," including the power of the state to assess just compensation at the owner's declared market value when this is the lower than the assessed value of the property); Alfanta v. Noe, G.R. No. L-32362, 53 S.C.R.A. 76 (Sept. 19, 1973) (Phil.) (affirming agrarian reform powers of the state); *but see* Fontanilla v. Maliaman, G.R. No. Nos. L-55963 & 61045, 194 S.C.R.A. 486 (Feb. 27, 1991) (Phil.) (applying strictly the distinction between governmental/constituent functions and proprietary/ministrant functions—though solely for the purpose of holding it liable for torts committed by its employees—and holding that the NAWASA, the waterworks authority, does not perform governmental functions).

approximated."[12]

Indeed, the equivalent of U.S. doctrine on debt moratorium statutes was adopted amid the ruins of World War II, and was upheld by the Philippine Supreme Court (*Rutter v. Esteban*, 93 Phil. 68 (1953)).

Finally, the Philippine welfare state has entailed transformations in takings doctrine to include both the traditional *confiscatory* taking based on nuisance doctrine and *regulatory* takings for economic and welfare purposes. In *U.S. v. Toribio*,[13] the court upheld the regulation of the slaughter for human consumption of carabaos, wherein the purpose was to preserve carabaos for agriculture and secure the nation's supply of rice. This was the indispensable first step beyond the classic nuisance rationale toward a new "redistributive taking."

The next was to reconceive the "public use" requirement to encompass even private beneficiaries in redistributive cases.[14] And in the leading welfare measure after Marcos was ousted, the agrarian reform law, the Court upheld the fusion of police power's redistributive purposes with traditional eminent domain "takings." *Association of Small Landowners v. Secretary of Agrarian Reform* confronted the "retention limits" for landholdings under the agrarian reform law. The Court held that the traditional distinction between the police power and takings doctrine would have "*logically preclude[d] the application of both powers at the same time on the same subject*."[15] However, the agrarian reform law, by fusing these powers, enabled the state to respond to social unrest by forcing landowners to sell their land while allowing the state to reduce the just compensation below market.

The post-Marcos Constitution of 1987 embraced this social justice purpose as the "completion of a peaceful social and economic revolution" that led to the ouster of Marcos in 1986.[16]

> Our February 1986 Revolution was not merely against the dictatorship nor was it merely for the realization of human rights; rather, this popular revolution was also a clamor for a more equitable share of the nation's resources and power . . . (Comm. T.

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12. *Id.* (emphasis supplied).

13. U.S. v. Toribio, 15 PHIL. 85 (1910), *available at* http://www.lawphil.net/judjuris/juri1910/jan1910/gr_l-5060_1910.html.

14. Sumulong v. Guerrero, G.R. No. L-48685, 154 S.C.R.A. 461 (Sept. 30, 1987) (Phil.). Land was expropriated for socialized housing, defined as "the construction of dwelling units for the middle and lower class members of our society, including the construction of the supporting infrastructure and other facilities," later broadened to cover "slum clearance, relocation and resettlement."

15. Ass'n of Small Landowners v. Sec'y of Agrarian Reform, G.R. No. 78742, 175 S.C.R.A. 343 (July 14, 1989) (Phil.).

16. Comm. J. Bernas, CON-COM RECORD, Vol. 2, Record No. 35 (July 21, 1986) (emphasis supplied).

Nieva, CON-COM RECORD, Vol. 2, Record No. 46 (August 2, 1986)).

This redistributive mission was carried out through "directive principles" contained in the *Declaration of Principles and State Policies* in Article II, that include the right to health, gender equality, protection to labor, economic protectionism; Article XII on the *National Economy and Patrimony*, that include economic redistribution, the social character of property, the regulation of natural resources, and protection for indigenous peoples, farmers and fishermen; and Article XIII on *Social Justice and Human Rights*, that cover agrarian reform, housing for the poor, and health programs.

The Philippine constitutional order therefore is not short of the substantive norms for carrying out its own New Deal, so to speak, and indeed exemplifies the regulatory state that embodies the U.S. constitutional order's response to the Great Depression. What constrains the governmental response to the economic meltdown, rather, is the enforcement regime by which these substantive norms are carried out. I will now proceed to look at the mechanisms by which the government can address economic emergencies.

III. Constitutional Constraints on Economic Emergency Powers

A. *General Framework*

The economic emergency clause of the 1987 Constitution has been invoked only twice so far, and both times in relation to a national security crisis. In 1991, President Cory Aquino invoked the clause after a military coup attempt, and sought and received congressional affirmation soon thereafter. In 2006, President Gloria Arroyo invoked the clause after civilian and military unrest but without recourse to congressional approval, and was roundly chastised by the Supreme Court.

The Philippine constitution distinguishes between the national security and the economic crisis rationales for emergency powers. The first source of national security powers is found in the commander-in-chief clause, which vests three kinds of powers in the President. The first is the power to "call out" the armed forces to contain lawless violence. The second is the power to suspend the writ of habeas corpus, and facilitate the arrest of persons involved in anti-government conspiracies. The third is the power to proclaim martial law altogether. Finally, there is the "take care" power to call on the armed forces to enforce laws that are relevant in suppressing lawless violence, invasion or rebellion. Elsewhere I have detailed the layers of

institutional checks to avert any abuse of these powers. Briefly, there are several kinds of constraints. The first are substantive, that martial law does not suspend the constitution or automatically authorize warrantless arrests. The second are institutional through the congressional checks-and-balances; the congress must convene automatically to review a martial law declaration and may revoke or extend the emergency (and this, under fixed time-periods). The third are institutional through the judiciary; the commander-in-chief powers, for a long time immune from judicial review via the political question doctrine, are expressly subjected to any case that can be filed by any citizen to challenge its validity.[17]

A second source of national security powers is the War Powers clause which requires a prior congressional declaration of a "state of war." It also authorizes the congress, in case of "war or *other* national emergency"—which includes economic emergencies—to delegate "powers necessary and proper" to the President. This power is subject to severe constraints of time ("for a limited period," "cease [automatically] upon the next adjournment" of Congress) and of scope ("authorize by law," "subject to such restrictions as it may prescribe," "to carry out a declared national policy").

In contrast, there is a separate provision altogether for economic emergencies, which has been called the "take over" power,[18] which enables the state to seize public utilities in case of economic emergencies. As discussed below, the Supreme Court has required congressional (and not just presidential) action for such powers.

B. *Checks-and-balances During Economic Emergencies*

The 1987 Constitution specifically recognizes economic emergencies in its clause on the National Economy and Patrimony [hereinafter the Article XII.17 powers]:

> In times of national emergency, when the public interest so requires, the State may, during the emergency and under reasonable terms prescribed by it, temporarily take over or direct the operation of any privately-owned public utility or business affected with public interest.[19]

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17. Raul C. Pangalangan, *Political Emergencies in the Philippines: Changing Labels and the Unchanging Need for Legitimacy*, *in* EMERGENCY POWERS IN ASIA: EXPLORING THE LIMITS OF LEGALITY (Victor V. Ramraj & Arun K. Thiruvengadam eds., 2010).

18. Artemio V. Panganiban, *With Due Respect: Limits of Presidential Power*, PHIL. DAILY INQUIRER, Aug. 23, 2009, at A11.

19. CONST. (1987), art. XII, § 17 (Phil.).

The clause, "the State may" could have meant either the President or the Congress.

Once before, the Congress invoked this clause when it gave emergency powers to President Corazon Aquino on 20 December 1989 after a nearly successful coup attempt. Republic Act 6826 is entitled:

> An Act To Declare, In View Of The Existence Of A National Emergency, A National Policy In Connection Therewith And To Authorize The President Of The Republic Of The Philippines For A Limited Period And Subject To Restrictions, To Exercise Powers Necessary And Proper To Carry Out The Declared National Policy And For Other Purposes

Until recently, however, this ambiguous drafting had led to the view that the President may act alone without need of congressional authority.[20] Thus emboldened, President Arroyo tried precisely that in 2006 when she proclaimed a "State of National Emergency" after she was almost impeached following a crisis of legitimacy. Her own spokesman officially released a tape-recorded conversation—which he claimed to have been altered—of a woman's voice, which he admitted to be Arroyo's, conspiring with an election official to rig the presidential elections. She personally apologized on national TV for improper conversations with election officials during the elections, though not for this specific taped conversation. Arroyo's 2006 proclamation invoked the commander-in-chief powers, but in its final, catch-all clause, suddenly invoked the economic emergency powers clause. It called on the armed forces:

> to enforce obedience to all the laws and to all decrees, orders, and regulations promulgated by me personally or upon my direction; and as provided in Article XII Section 17 [namely, the economic emergencies clause, *supra*] of the Constitution do hereby declare a state of national emergency.

By this legal sleight of hand, President Arroyo thus relied upon her military powers to exercise her economic power to take over public utilities, including unsympathetic broadcast networks.

In *David v. Arroyo*,[21] the Supreme Court read this to mean a presidential exercise of the Article XII.17 powers without the benefit of congressional

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20. *See, e.g.*, Joaquin Bernas, S.J., *The Takeover Provision*, PHIL. DAILY INQUIRER, May 8, 2006, at A14.

21. David v. Arroyo, G.R. No. 171396, 489 S.C.R.A. 160 (May 3, 2006) (Phil.).

action. The Court traced its history to the "martial law thinking" of the drafters of the Marcos-era constitution of 1973. When Marcos placed the country under martial law, he ordered the take over of the "management, control and operation" of the country's largest businesses—electric power, telephone, water supply, air travel, railways, etc.—"for the successful prosecution by the Government of its effort to contain, solve and end the present national emergency."[22]

The Court recognized the broad sweep of the word "emergency" to include "rebellion, economic crisis, pestilence or epidemic, typhoon, flood, or other similar catastrophe of nationwide proportions or effect." However, the Court held that the taking over of privately owned public utilities and businesses affected with public interest requires express delegation from Congress. The "take over" clause was seen as "an aspect of the emergency powers clause" governing "war and other national emergency." When the Constitution vests the "take over" power in "the State," it refers to Congress and not the President.

While this may be read to fuse the national security and the economic crisis rationales, the Court cites the famous wartime steel seizure case in the United States.

> The order cannot properly be sustained as an exercise of the President's military power as Commander-in-Chief of the Armed Forces. . . . *Even though "theater of war" be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander-in-Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production*. This is a job for the nation's lawmakers, not for its military authorities.[23]

The Court's reasoning maintains the strictly civilian nature of the take-over powers, and distinguishes it from the ever-expanding notion of the "theater of war."

This constitutional clause has been implemented, for instance, in the Oil Industry Deregulation Act,[24] which provides that:

> In times of national emergency, when the public interest so requires,

22. Letter of Instruction No. 2 (Sept. 22, 1972), issued by authority of Proclamation No. 1081 (Sept. 21, 1972) placing the entire country under martial law.

23. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) (emphasis added).

24. An Act Deregulating the Downstream Oil Industry, and for Other Purposes, Republic Act No. 8479 of 1998 (Phil.), *available at* http://www.chanrobles.com/republicacts/republicactno8479.html. *See also* Garcia v. Executive Sec'y, G.R. No. 132451 (Dec. 17, 1999) (Phil.), *available at* http://www.chanrobles.com/scdecisions/jurisprudence1999/dec99/132451.php.

> the Department of Energy may, during the emergency and under reasonable terms prescribed by it, temporarily take over or direct the operation of any person or entity engaged in the Industry.[25]

Under the Supreme Court's interpretation in *David v. Arroyo*, the takeover of oil companies under an economic emergency will require the prior authorization of Congress. In other words, the Court has applied on economic emergencies the same cautious approach that the constitution adopts for national security emergencies.

IV. Transplanted Constitutionalism

Finally, for much of Asia and especially in the Philippines, constitutionalism is a Western transplant that has yet to grow roots in local soil. The financial crisis that hit Asian markets in 1997 exposed the weaknesses of the regulatory state, exemplified in the Philippines by a huge insider trading scandal that hit the Philippine stock market. It exposed the weakness of the administrative regulatory regimes and their vulnerability to manipulation by business elites. The subsequent political crises in the Philippines, Thailand, Indonesia, South Korea and Taiwan—all of which have seen the prosecution of former presidents over ill-gotten wealth—also documented the pervasive corruption in many democratizing Asian states, and which have thrived in spite of—and possibly, partly because of—the rise of democratic institutions. In other words, constitutional government consists of feeble republican institutions thinly veneered over political alliances among contending elites. Constitutional governance is a defective instrument to deal with the global economic crisis, one that is hobbled by pervasive corruption and manipulability.

In other words, to adopt the regulatory state as the Asian constitutional response to the global economic crisis assumes that the state in Asia is similar to the state in the West. It ignores the circumstance, especially in Southeast Asia and certainly for the Philippines, that these states are emerging democracies, barely recovered from several decades of colonial rule and more recently a decade or so of dictatorship. The state is rarely organic to the host communities, and began as colonial impositions upon "imagined communities" thus constituted as "nations." To the extent that these states have been internalized locally, they were historically hijacked by domestic elites who would rule typically through a strongman or a military hierarchy. And to the extent that these states have regained their democracies, the inherited state mechanisms, when strong, are suspect and

25. *Id.* sec. 14, para. e.

constantly hostage to public approval.

In many Asian countries today, constitutionalism is caught in the tension between rule by impersonal institutions and rule by popular majorities. The global economic crisis heightens that tension, because it calls for strong institutions made strong not by the personality of a ruling caudillo but by the backing of broadbased public opinion.

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