

RESEARCH ARTICLE

The Constitution of the Philippines and transformative constitutionalism

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Abstract

This article examines the 1987 Constitution of the Philippines' provisions on social and economic rights and welfare. It considers how the 1987 Constitution fits within the post-liberal paradigm of 'transformative' constitutional texts that emerged during democratic transitions in the 1980s and 1990s. It then analyses how the Supreme Court of the Philippines responded to the constitutional call for egalitarian socio-economic reform in the first fifteen years after the People Power revolution. The article highlights how the 1987 Constitution envisions far-reaching, progressive socio-economic change, and incorporates both social and economic rights as well as open-ended policy goals in this regard. The article argues that this hybrid approach to distributive justice creates a distinctive set of interpretive challenges for the judiciary. It then argues that the Philippine Supreme Court's approach to these provisions in the years following the transition to democracy was perfunctory and somewhat inchoate. The court affirmed its jurisdiction over these provisions, but did not develop meaningful standards or principles in relation to them. The article points out that transformative constitutional texts place difficult demands on the judiciary in relation to social and economic rights. They prompt the judiciary into unfamiliar domains. At the same time, institutional legitimacy – including legitimacy on questions of distributive justice – requires judges to sustain the sense of a cogent boundary between constitutional law and politics. The article argues that these challenges were heightened in the Philippines by the textual ambiguity of the 1987 Constitution as well as the relative dearth of jurisprudential resources at the time. It concludes by considering the implications of the Philippines experience for the design of transformative constitutions.

Keywords: constitutionalism; judicial review; Republic of the Philippines; social and economic rights; transformative constitutionalism

I. Introduction

With the People Power revolution in 1986, the Philippines joined the surge of democratization that unfolded across Latin America, Asia and Africa from the mid-1970s to the 1990s.¹ Many of the constitutions that emerged during these democratic transitions were notable for their ambition. While these new constitutions might have been influenced by constitutions in

¹S Gunitsky, 'Democratic Waves in Historical Perspective' (2018) 16(3) *Perspectives on Politics* 634–51.

long-standing Western democracies, they also departed from their venerable counterparts in important ways. Whether in Brazil, Colombia, South Africa or Indonesia, these new, or newly amended, constitutions sought not only to constrain state power but also to restructure political, social and economic relations in deeply unequal societies.

This article considers how the 1987 Constitution of the Philippines² fits within this roughly contemporaneous cluster of aspirational, ‘transformative’ constitutional texts. It focuses in particular on how social and economic rights are incorporated within the 1987 Constitution. It then analyses how the Philippine Supreme Court responded to the constitutional call for far-reaching socio-economic reform in the first fifteen years after the 1987 Constitution came into force.

Constitutional consolidation in the Philippines, the bedding down of the post-authoritarian constitutional order and the jurisprudence developed by the newly strengthened judiciary have received relatively little attention in comparative constitutional law scholarship. It deserves to be better understood. Among other issues, the Philippine experience helps us to reflect on judicial wherewithal in relation to social and economic rights and welfare in post-transitional democracies. Existing scholarship on judicial engagement with social and economic rights in low- and middle-income countries is somewhat lopsided. It focuses heavily on a few middle-income democracies, including South Africa, India and Colombia, where apex courts have interpreted and enforced these rights in groundbreaking and sometimes controversial ways.³ Diversifying this literature will enrich our understanding of how social and economic rights are accommodated in domestic constitutional orders. The early trajectory of these rights in the Philippines is of both historical and contemporary interest. The discussion in this article contributes to the literature on post-authoritarian constitutionalism in the Philippines specifically and that on the challenges of transformative constitutionalism more generally. It also has implications for constitutional design in transitional democracies.

In **Section II**, I discuss the concept of transformative constitutionalism. **Section III** provides politico-legal background on the Philippines. **Section IV** discusses provisions on accountability and distributive justice in the post-authoritarian 1987 Constitution. I note

²Hereinafter ‘the 1987 Constitution’ or ‘the Constitution’.

³See, for example, S Shankar, ‘The Embedded Negotiators’, in DB Maldonado (ed), *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (Cambridge University Press, Cambridge, 2013) 95–128; J Dugard, ‘Courts and Structural Poverty in South Africa’, in DB Maldonado (ed), *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (Cambridge University Press, Cambridge, 2013) 293–328; S Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Oxford University Press, 2010); N Angel-Cabo and D Lovera-Parmo, ‘Latin American Social Constitutionalism: Courts and Popular Participation’, in H Alviar García, KE Klare and LA Williams (eds), *Social and Economic Rights in Theory and Practice: A Critical Assessment* (Routledge, New York, 2015); D Landau, ‘South African Social Rights Jurisprudence and the Global Canon: A Revisionist View’, in R Dixon and T Roux (eds), *Constitutional Triumphs, Constitutional Disappointments* (Cambridge University Press, Cambridge, 2018) 406–28; D Landau, ‘The Reality of Social Rights Enforcement’ (2012) 53(1) *Harvard International Law Journal* 189; A Pillay and M Wesson, ‘Recession, Recovery and Service Delivery: Political and Judicial Responses to the Financial and Economic Crisis in South Africa’, in A Nolan (ed), *Economic and Social Rights After the Global Financial Crisis* (Cambridge University Press, Cambridge, 2014) 335–65; CM Forster and V Jivan, ‘Public Interest Litigation and Human Rights Implementation: The Indian and Australian Experience’ (2008) 3(1) *Asian Journal of Comparative Law* 1–32; S Chopra, ‘Holding the State Accountable for Hunger’ (2009) 44(33) *Economic & Political Weekly* 8–12; R Abeyaratne, ‘Socio-economic Rights in the Indian Constitution: Toward a Broader Conception of Legitimacy’ (2013) 39(1) *Brooklyn Journal of International Law* 1.

that the Constitution envisions far-reaching, egalitarian socio-economic reform, and includes both rights in relation to basic necessities as well as more open-ended goals. I describe this as a hybrid approach to distributive justice, and argue that it creates a distinctive set of interpretive challenges for the judiciary. Section V discusses the early jurisprudence of the Philippine Supreme Court on the 'social justice' provisions of the 1987 Constitution. Section VI evaluates this jurisprudence and argues that the Supreme Court's approach to these provisions in the years following the transition to democracy was perfunctory and somewhat inchoate. The Court affirmed its jurisdiction over these provisions but did not develop meaningful standards or principles in relation to them. I further argue that the textual ambiguity of the 1987 Constitution, as well as the relative dearth of jurisprudential resources at the time, heightened the challenges of recalibrating the judicial remit under a transformative constitutional order. The article concludes by considering the implications of the Philippine experience for the design of transformative constitutions.

II. Transformative constitutionalism

Democratic transitions during the 1980s were famously described as heralding the 'end of history', a global convergence towards liberal democratic norms.⁴ Many critics have argued that this view mischaracterized the political transitions unfolding across different countries during that era.⁵ As the Philippine experience discussed in Section III highlights, competing and sometimes conflictual agendas jostled for primacy during the slew of late twentieth-century transitions from authoritarianism to democracy. Moreover, many political actors in post-authoritarian contexts reached beyond liberal democratic models and sought more egalitarian politico-legal alternatives. These attempts to fashion new political contracts are reflected in the constitutions created during transitions to democracy in the 1980s and 1990s.

Some of these post-liberal constitutions are strikingly ambitious. In Klare's influential articulation of the concept of transformative constitutionalism, he describes South Africa's post-apartheid constitution as 'transformative' because it includes social and economic rights, a substantive conception of equality, affirmative duties on the state, a commitment to multiculturalism and participatory governance, robust powers of judicial review and a strong sense of history.⁶ These features of the South African constitution lend themselves to transformative constitutionalism, which Klare envisages as a 'long-term project of constitutional enactment, interpretation, and enforcement committed ... to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction'.⁷ Constitutions in many young democracies have similar features and, adopting Klare's conceptualisation, are often described as transformative.

While the essential elements of transformative constitutionalism are debated, many scholars view a commitment to distributive justice as a hallmark of transformative

⁴F Fukuyama, *The End of History and the Last Man* (The Free Press, New York, 1992).

⁵See, for example, KL Scheppelle, 'Autocratic Legalism' (2018) 85(2) *University of Chicago Law Review* 545–84.

⁶KE Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14(1) *South African Journal on Human Rights* 146, 152–56.

⁷See (n 6) 150.

constitutions.⁸ Older liberal democratic constitutions typically recognize only civil and political rights for individuals, constraining state incursions onto individual liberty. By contrast, many of the constitutions created in new democracies in the 1980s and 1990s recognize not just civil and political rights, but also social and economic rights, as fundamental individual rights, and impose not just restraints but also positive duties on the state in relation to these rights.⁹ Transformative constitutional orders also tend to include strong judicial review powers and allow liberal access to the courts.¹⁰

If taken seriously, these texts demand considerably more than incremental institutional reform or improved governance. They imply fundamental, far-reaching change in both the public and private spheres, and assign the state a central role in shaping and implementing such change.¹¹ Thus, these post-authoritarian constitutions display a complex attitude towards state power, and in particular towards executive power. They seek to make the state more accountable, representative and participatory. Bolstering judicial scrutiny and expanding the range of constitutional rights are both accountability-enhancing elements of constitutional design. Simultaneously, though, these constitutions repose great responsibility in the government for building a more egalitarian society. Traditional liberal wariness of executive power thus coexists with considerable optimism about the government's potential to reform itself and the larger polity.

As Klare argues in his analysis of the South African constitution, actualising the egalitarian commitments of a transformative constitutional text can be deeply challenging. In particular, it might require courts and lawyers to fashion new norms, standards and modes of reasoning.¹² What was once understood as lying beyond the judicial ambit might now, because of the demands of a transformative constitution, fall within it. My discussion below brings out the ways in which textual ambiguities and silences profoundly shape the judicial response to these challenges.

III. Background

The aspirations written into the post-authoritarian Constitution of the Philippines are rooted in its *pre*-authoritarian history. The Philippines is one of Asia's longest-standing democracies. However, for many decades it was a deeply flawed democracy, substantially controlled (and plundered) by a small class of landowning elites.¹³ Very limited franchise for wealthy, landowning men was introduced in the Philippines in 1907, soon after the

⁸O Vilhena, U Baxi and F Viljoen (eds), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (Pretoria University Law Press, Pretoria, 2013). See also DB Maldonado (ed), *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (Cambridge University Press, Cambridge, 2013); A von Bogdandy, EF Mac-Gregor, MM Antoniazzi, F Piovesan and X Soley (eds), *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune* (Oxford University Press, Oxford, 2017).

⁹P Alston and R Goodman, *International Human Rights: Texts and Materials* (Oxford University Press, Oxford, 2013) 338–39, 353–55. See also MV Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press, Princeton, NJ, 2008) 233–37; Angel-Cabo and Lovera-Parmo (n 3) 85–87.

¹⁰M Hailbronner, Michaela 'Transformative Constitutionalism: Not Only in the Global South' (2017) 65 (3) *The American Journal of Comparative Law* 527, 540.

¹¹See (n 10) 527, 531.

¹²See (n 6) 166–72.

¹³J Bertrand, *Political Change in Southeast Asia* (Cambridge University Press, Cambridge, 2013) 71–91; J Putzel, 'Survival of an Imperfect Democracy in the Philippines' (1999) 6(1) *Democratization* 198.

United States won the brutal Philippine–American war. In 1935, the US government introduced a constitution establishing the country as a Commonwealth. While the Philippines remained under the authority of the United States, it now had a bicameral legislature chosen through periodic elections, adult franchise and an independent judiciary.

By the time the Philippines became independent in 1946, these constitutional arrangements had already revealed themselves to be deeply compromised. With the collusion of the colonial authorities, a small class of wealthy landowners maintained a tight grip on political power.¹⁴ Elections were marked by rigging and violence between the private armies of rival political clans. The government and legislature largely served the interests of ruling elites, the US government and American investors, with little genuine accountability to the larger public.¹⁵

This hyper-concentration of political power and wealth continued after independence in 1946. Neglect and exploitation of the rural poor had given rise to a leftist resistance movement in the years before independence, with an armed wing waging guerilla violence against the state. This continued in the form of the Huk rebellion after independence. Over time, more moderate demands for political reform also gained momentum. Widespread frustration with the status quo coupled with economic stagnation paved the way for the ascent of Ferdinand Marcos.

In 1962, Ferdinand Marcos won the presidency by promising to deliver an alternative to the entrenched oligarchy. However, his promises quickly gave way to extreme personal corruption, crony capitalism and economic mismanagement. Confronted with presidential term limits in 1972, he declared martial law.¹⁶ He had the support of the Philippine military, the US government and US corporations invested in the Philippines. These powerful constituencies shored up his regime.

By 1980, however, Marcos's authoritarian hold on power had frayed. A multifaceted movement for democracy, encompassing student unions, human rights groups, a range of progressive social movements and elite politicians targeted by Marcos, gathered force.¹⁷ Despite harsh counter-insurgency measures, radical left resistance gained ground in rural areas. Economic decline further fuelled opposition to Marcos. A rigged presidential election in 1981, and the shocking assassination of Marcos' charismatic political challenger, Benigno Aquino, on the tarmac of Manila International Airport as soon as he returned from exile in 1983, consolidated the democratic resistance.

The widowed Corazon Aquino won the next presidential election in 1986, but Marcos claimed victory. This attempt to steal another election proved to be the last straw, setting off the People's Power revolution in February 1986. Encouraged by the Catholic Church, thousands occupied the streets of Manila demanding a return to democracy. In the days that followed, key military officials turned against Marcos and the US government

¹⁴Bertrand (n 13) 73–77.

¹⁵E Hedman and J Sidel, *Philippine Politics and Society in the Twentieth Century: Colonial Legacies, Post-Colonial Trajectories* (Taylor and Francis, Hoboken, NJ, 2013) 15–16.

¹⁶Government of the Philippines. Proclamation No. 1081 (Proclaiming a State of Martial Law in the Philippines), *Official Gazette of the Republic of the Philippines*, 21 September 1972, <<https://www.officialgazette.gov.ph/1972/09/21/proclamation-no-1081>>.

¹⁷SG Silliman and LG Noble, 'Citizen Movements and Philippine Democracy', in SG Silliman and LG Noble (eds), *Organizing for Democracy: NGOs, Civil Society, and the Philippine State* (University of Hawai'i Press, Honolulu, 1998) 285–87.

advised him to step down. Marcos took an oath of office surrounded by loyalists, but fled to Hawai'i with the US Air Force shortly afterwards, and Aquino assumed power.

Political scientists such as Hedman have noted that the People Power revolution was a contingent, temporary alliance between anti-Marcos elites seeking to reclaim power and social movements, NGOs, religious organizations and labour groups seeking fundamental change.¹⁸ Once Marcos was ousted, these differences came to the fore. Reversion to the complacent, oligopolistic, two-party political system that had preceded the dictatorship would have suited the old ruling class. But the array of civil society entities that had struggled against the dictatorship wanted root and branch reform.¹⁹ Many groups had developed concrete reform agendas for socio-economic justice and accountability during the anti-authoritarian struggle. The ongoing radical left insurgency also made rural deprivation and inequalities difficult for the political elites to disregard. Thus, when President Corazon Aquino assumed office, her government had to navigate starkly divergent interests. On one side were the recalcitrant landowning elites looking to regroup, and on the other were mobilized civil society networks that saw socio-economic transformation as essential to genuine democratization.²⁰

IV. The 1987 Constitution: A Charter for Transformation?

Accountability and Social Justice in the New Constitution

The new constitution of the Philippines emerged from these conflicting political pressures. Soon after taking office, Aquino created a Constitutional Commission, many members of which were from the political establishment, including several former legislators and Supreme Court justices.²¹ Four members, including the commission president, former Supreme Court Justice Cecilia Munoz-Palma, were close to the Aquino family. Five members belonged to pro-Marcos political parties and several to the Catholic church and business sectors. In addition to these traditionally powerful stakeholders, however, civil society actors representing less privileged interests played a strong role in drafting the constitution. Research conducted at the time indicated that almost half the constitutional commissioners had participated in mass movements and protests on issues including land reform, conflict resolution and gender equality.²² These non-traditional members advanced powerful arguments for political restructuring and socio-economic reform during the commission's deliberations.²³

¹⁸E Hedman, *In the Name of Civil Society: From Free Election Movements to People Power in the Philippines*. (University of Hawai'i Press, Honolulu, 2006) 167–70.

¹⁹J Magadia, *State-Society Dynamics: Policy Making in a Restored Democracy* (Ateneo de Manila University Press, Quezon City, 2003).

²⁰V Boudreau, *Resisting Dictatorship: Repression and Protest in Southeast Asia* (Cambridge: Cambridge University Press, 2004) 237.

²¹Putzel (n 13) 198, 211.

²²MV Paez-Hidalgo, D Sagui and G Israel, 'Socio-Demographic Profile of the Members of the 1986 Constitutional Commission' (1987) 31(1) *Philippine Journal of Public Administration* 37, 55.

²³K Eaton, 'Restoration or Transformation? Trapos versus NGOs in the Democratization of the Philippines' (2003) 62(2) *The Journal of Asian Studies* 469, 475–76; DA Desierto, 'Justiciability of Socio-economic Rights: Comparative Powers, Roles, and Practices in the Philippines and South Africa' (2009) 11(1) *Asian-Pacific Law & Policy Journal* 114, 139, n 95.

Over five months, the Constitutional Commission consulted the wider public through hearings in different parts of the country and debated the text being drafted.²⁴ The draft constitution was put to the test of public approval. After a national information campaign, a plebiscite to ratify the constitution was held in February 1987. The constitution was ratified by a strong majority, although some scholars argue that this should not be interpreted as approval for the constitutional *text*, but rather as more general support for the restoration of democracy.²⁵

The text that emerged from this historic process reflected the heterogenous and contingent character of the People Power movement. Provisions designed to prevent authoritarian capture by the President are robust; this was, after all, the one cause that united the diverse movement for democratization.²⁶ The 1987 Constitution imposes a one-term limit on the presidency.²⁷ It also includes language that places martial law beyond the constitutional pale: Article II of the Constitution states that the Philippines is a democratic republic²⁸ and that civilian authority is 'supreme' over the military.²⁹ In addition, it constrains the executive branch's use of emergency powers.³⁰

Furthermore, the 1987 Constitution strengthens the judiciary's power to check creeping authoritarianism. During the authoritarian era, the Supreme Court had frequently relied upon the 'political question' doctrine to avoid reviewing presidential decisions that centralized power or eroded rights.³¹ Under Philippine law, political questions were 'those questions which, under the Constitution, are to be decided by the people in their sovereign capacity, or in regard to which full discretionary authority has been delegated to the legislative or executive branch of the government'.³² During the Marcos era, this doctrine had operated as an alibi for quiescent judges and a jurisdictional

²⁴BM Villegas, 'The Philippines in 1986: Democratic Reconstruction in the Post-Marcos Era.' (1987) 27(2) *Asian Survey* 194, 202; See also CG Hernandez, 'The Philippines in 1987: Challenges of Redemocratization' (1988) 28(2) *Asian Survey* 229–41.

²⁵Putzel argues that the plebiscite was framed by the government as a referendum on Aquino and on democratization. Thus to vote against the constitution was to vote against democratization. See (n 13) 212.

²⁶SS Coronel, 'Dateline Philippines: The Lost Revolution' (1991) 84 *Foreign Policy* 166, 187. Coronel describes the People Power Revolution as a 'a hurried and partially negotiated transfer of power to a coalition of forces that had nothing in common but hatred of Marcos'.

²⁷Under Article VII, Section 4(1) of the 1987 Constitution, the President can serve a single six-year term.

²⁸Article II, Section 1, 1987 Constitution of the Republic of the Philippines.

²⁹Article II, Section 2, 1987 Constitution of the Republic of the Philippines.

³⁰Article VIII, Section 18, 1987 Constitution of the Republic of the Philippines; JG Bernas, *The 1987 Constitution of the Republic of the Philippines: A Commentary* (Rex Publishing, Manila, 2009) 895–921.

³¹In *Javellana v. Executive Secretary* G.R. No. L-36142, Supreme Court, 31 March 1973, a majority of the Supreme Court declared that whether or not the 1973 Constitution of the Philippines, which had been very questionably imposed by Marcos, was in effect was a political question. This notorious decision is criticized for legitimizing the undermining of constitutional constraints on executive power by Marcos. When the Supreme Court upheld the imposition of martial law in *Aquino, Jr. v Enrile* G.R. No. L-35546, Supreme Court, 17 September 1974 (en banc), half the justices treated the case as raising a political question that lay beyond their jurisdiction and the other half proceeded on the basis that the Court's powers of review were extremely narrow. See also the use of the political question doctrine in response to a challenge against Marcos's decision to call a referendum in order to extend his presidency in *De la Llana v COMELEC* 80 SCRA 525 (9 December 1977). See also DB Gatmaytan, *Constitutional Law in the Philippines: Government Structure* (LexisNexis, Singapore, 2015) 10–11; Desierto (n 23) 118–19; Philippine Judiciary Foundation (ed), *The History of the Philippine Judiciary* (Manila: Philippine Judiciary, 1998) 578–79.

³²*Tañada v. Cuenco* 103 Phil. 1051, 1067 (1965).

barrier for more courageous ones.³³ The Constitutional Commission deliberately attempted to whittle it down.³⁴ The 1987 Constitution expands upon the Supreme Court's longstanding judicial review powers, empowering the court to determine whether 'any branch of instrumentality of the government' has committed a 'grave abuse of discretion amounting to lack or excess of jurisdiction'.³⁵ In addition to widening judicial review powers, the 1987 Constitution grants the Supreme Court the power to promulgate rules on, *inter alia*, 'the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts',³⁶ which has no equivalent in past constitutions.³⁷

Aside from core anti-authoritarian provisions, the divergent agendas of the old political elites and progressive social movements coexist uneasily in the 1987 Constitution. The 1987 Constitution largely preserved the pre-authoritarian political system with a strong presidency and bicameral legislature.³⁸ It resurrected many provisions from past Philippine constitutions, and is viewed by some scholars as undermining the revolutionary potential of the People Power movement.³⁹ At the same time, the influence of reformist forces can be seen in an array of provisions on social and economic welfare, rights and equity.

Article II of the Constitution, the Declaration of Principles and State Policies, declares that 'the promotion of the general welfare' is necessary to enjoy the 'blessings of democracy'.⁴⁰ It directs the state to 'guarantee full respect for human rights' and promote 'social justice'.⁴¹ The state is also enjoined to foster a 'just and dynamic social order' and reduce poverty through policies that 'provide adequate social services'.⁴² In addition, Article II requires the state to 'protect and promote' the right to health and the right to 'a balanced and healthful ecology'.⁴³

Article XIII, titled Social Justice and Human Rights, assigns further 'social justice' duties to the state. It requires the legislature to prioritize legislation that reduces 'social, economic and political inequalities'. The state is also obligated to guarantee a range of labour rights,⁴⁴ ensure access to land for agricultural workers, protect the rights of subsistence fisherman to access marine and fishing resources⁴⁵ and provide employment

³³The Philippine Supreme Court highlighted the framers' motivation for expanding judicial power in *Marcos v Manglapus*, G.R. No. 88211, 15 September 1989. It again acknowledged 'the unedifying experience of the past where the Court had the propensity to steer clear of questions it perceived to be "political" in nature' when discussing its jurisdiction in *Tolentino v Secretary of Finance* 235 SCRA 630 (1994).

³⁴Bernas (n 30) 991; Record of the Constitutional Commission 434–436, quoted in Gatmaytan (n 31) 34, 39.

³⁵Article VIII, Section 1, 1987 Constitution of the Republic of the Philippines.

³⁶Article VII, Section 5(5), 1987 Constitution of the Republic of the Philippines.

³⁷See the judiciary's rule-making powers in Article X, Section 5, 1973 Constitution of the Republic of the Philippines; Article VII, Section 13, 1935 Constitution of the Republic of the Philippines.

³⁸This was moderated to an extent by provisions imposing term limits on legislators and requiring a small proportion of seats in the legislature to be chosen through a party-list system. Some scholars have argued that this somewhat decentralized, and that it broadened political influence and decision-making over time. See, for example, Eaton (n 23) 475–80.

³⁹See (n 26) 166.

⁴⁰Article II, Section 5, 1987 Constitution of the Republic of the Philippines.

⁴¹Article II, Section 10–11, 1987 Constitution of the Republic of the Philippines.

⁴²Article II, Section 9, 1987 Constitution of the Republic of the Philippines.

⁴³Article II, Sections 15 and 16, 1987 Constitution of the Republic of the Philippines.

⁴⁴Article XIII, Section 3, 1987 Constitution of the Republic of the Philippines.

⁴⁵Article XIII, Section 7, 1987 Constitution of the Republic of the Philippines.

opportunities for the poor.⁴⁶ In addition, Article XIII requires the state to provide the poor with ‘decent housing and basic services’, and prohibits evictions or house demolitions targeting the poor except ‘in accordance with law’ and in ‘a just and humane manner’.⁴⁷ Article XIII imposes policy-making obligations related to health as well. It asks the state to ‘endeavor to make’ essential goods, health and other social services available at affordable prices, particularly prioritizing the needs of the poor, the disabled, women and children.

Article XIV of the Constitution recognizes education as a right, requiring the state to ‘protect and promote the right of all citizens to quality education’.⁴⁸ This overarching obligation is disaggregated into more specific duties. The state is required to establish and maintain a system of free public elementary and high school education.⁴⁹ It is also tasked with providing inclusive education for adults, persons with disabilities and out-of-school children. Article XIV recognizes the right of all Filipinos to select their profession or studies, noting that admission and academic requirements must be ‘fair, reasonable and equitable’.⁵⁰ Article XV obligates the state to ‘defend’ the right of children to ‘proper care and nutrition’⁵¹ and the ‘right of the family to a family living wage and income’.⁵²

A hybrid approach

Through these various provisions, the progressive, egalitarian ambitions of the social movements involved in the People Power revolution are threaded through the 1987 Constitution. In numerous ways, the Constitution enjoins the state to address deprivation and ensure access to basic necessities. In so doing, the 1987 Constitution of the Philippines shares the post-liberal vision of many contemporaneous constitutions. Indeed, it could be viewed as a repudiation not just of authoritarianism, but also of the liberal democratic framework bequeathed by the United States. It unequivocally recognizes poverty, social exclusion and quality of life as salient constitutional concerns. It charges the state with implementing far-reaching socio-economic reform. In a deeply unequal society, the changes it urges would have both vertical and horizontal effects, destabilising entrenched hierarchies not just between state and citizen but also in the spheres of education, work, community and family. Moreover, the range of provisions discussed above were evidently not an afterthought. They were the focus of considerable debate when drafting the Constitution.⁵³ Article XIII, on Social Justice and Human Rights, was described by the President of the Constitutional Commission, Cecilia Muñoz-Palma, as ‘the heart of the new Charter’.⁵⁴

Notwithstanding the ostensible importance of these provisions, however, they are framed in ways that can obscure institutional authority to interpret and enforce them.

⁴⁶ Article XIII, Section 9, 1987 Constitution of the Republic of the Philippines.

⁴⁷ Article XIII, Section 10, 1987 Constitution of the Republic of the Philippines.

⁴⁸ Article XIV, Section 1, 1987 Constitution of the Republic of the Philippines.

⁴⁹ Article XIV, Section 2, 1987 Constitution of the Republic of the Philippines.

Article XIV, Section 2, 1987 Constitution of the Republic of the Philippines.

⁵⁰ Article XIV, Section 5, 1987 Constitution of the Republic of the Philippines.

⁵¹ Article XV, Section 3, 1987 Constitution of the Republic of the Philippines.

⁵² Article XV, Section 3, 1987 Constitution of the Republic of the Philippines.

⁵³ Bernas see (n 30) 1006–1127.

⁵⁴ Record of the Constitutional Commission, vol. V, 945, 1010, quoted in *ARIS (Phil) Inc. v. National Labor Relations Commission*, G.R. No. 90501, Supreme Court, 5 August 1991 (Third Division).

Unlike the constitutions of, for example, South Africa⁵⁵ or Indonesia,⁵⁶ the 1987 Constitution does not clearly recognize social and economic rights as fundamental, individual, judicially enforceable entitlements. Indeed, the Bill of Rights in Article III of the Constitution includes only civil and political rights. This exclusion mirrors mid-twentieth century constitutions, such as the constitutions of India⁵⁷ and Sri Lanka,⁵⁸ which recognize only civil and political rights as fundamental rights, and address social and economic welfare through non-justiciable 'directive principles of state policy'. Directive principles principally address the political branches of the state. Whether expressly, as in the Indian constitution,⁵⁹ or impliedly, these directives are meant to be construed and implemented by the legislature and the executive rather than by the judiciary.⁶⁰ By corollary, directive principles do not, on the face of it, recognize or create enforceable constitutional rights for individuals. The state is responsible for advancing the goals in the directive principles. These principles might even be a means through which it seeks to fulfil its responsibilities to protect economic and social rights under international law. But under domestic constitutional law, it is not a duty-holder in an individuated sense in relation to these principles as it would be in relation to a civil or political right. Broadly speaking, directive principles related to social welfare are more likely to be a feature of mid-century post-colonial common-law constitutions, while expressly recognized social and economic rights are more prevalent in late-twentieth century post-authoritarian constitutions.⁶¹

The exclusion of social justice provisions from the Bill of Rights suggests that the 1987 Constitution does not recognize basic social and economic necessities as individual rights. Yet the 1987 Constitution does not neatly relegate social and economic necessities to the category of open-ended, non-justiciable policy goals. While some are framed as non-binding policy priorities, others – including access to healthcare, education and a balanced and healthful ecology – are framed as rights. Thus, the 1987 Constitution falls between two constitutional models. It partially follows an older, post-colonial model that demarcated provisions on socio-economic equity and development as directive principles of state policy, but it also echoes newer post-authoritarian texts that recognize social and economic rights as justiciable individual rights.

This hybrid approach seems to combine attributes of both models. It incorporates some economic and social necessities as individual rights. Violations of these rights could potentially be challenged in court, and the judiciary would have a legitimate role in elucidating and enforcing these rights. It also allows the constitutional inclusion of complex social justice goals that cannot viably be distilled into individual rights, but can constructively guide governments, legislatures, other public bodies and civil society.

⁵⁵*Constitution of the Republic of South Africa*, 1996, Chapter II, Arts 7–39.

⁵⁶*Undang-Undang Dasar Negara Republik Indonesia Tahun, 1945 (Constitution of the Republic of Indonesia, 1945)*, Chapter XA, Arts 28–28I, Art 29, Art 31, Art 34.

⁵⁷*The Constitution of India*, 1950, Part III (Fundamental Rights) Arts 14–34 and Part IV (Directive Principles of State Policy) Arts 36–51.

⁵⁸*The Constitution of the Democratic Republic of Sri Lanka*, Chapter III (Fundamental Rights) Arts 10–17 and Part VI (Directive Principles of State Policy) Arts 27–29.

⁵⁹Article 37 of the Constitution of India specifies that directive principles 'shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country'. See also Article 29 of the Constitution of Sri Lanka.

⁶⁰LK Weis, 'Constitutional Directive Principles' (2017) 37(4) *Oxford Journal of Legal Studies* 916, 920.

⁶¹See (n 10). See also C Jung, R Hirschl and E Rosevear, 'Economic and Social Rights in National Constitutions' (2014) 62 *American Journal of Comparative Law* 1043, 1050–51.

Indeed, Constitutional Commission records suggest that this combination of both social and economic rights and policy goals is what some of the drafters had envisioned.⁶² Finally, a hybrid approach might permit the simultaneous recognition of an individual right to a social or economic necessity, as well as a non-justiciable policy goal related to that same good or service.

These varied possibilities create interpretive challenges. This includes parsing which, if any, social justice provisions create justiciable rights. Further, even if a provision is construed as giving rise to a judicially enforceable right, should that right be treated on par with the civil and political rights included in the Bill of Rights or as subsidiary by virtue of being excluded from the Bill of Rights? If, in light of the structure of the Constitution, a social and economic right is regarded as less important than a right within the Bill of Rights, what might this hierarchy imply for judicial engagement with that right? It could imply that the judiciary should prioritise protection of a civil or political right where such a right is potentially in conflict with a social or economic right. It might imply that any social or economic right should be interpreted as placing only very modest obligations on the state. Alternatively or additionally, it might imply a deferential standard of review. It might also imply that any judicially imposed remedies should leave considerable discretion to the relevant public authorities.

Contrarily, it could be argued that the transformative social justice agenda of the 1987 Constitution as a whole supports bold and assertive judicial intervention in relation to social and economic rights. This might mean greater readiness to interpret a social justice provision as giving rise to an enforceable social or economic right, construing the state's duties in relation to that right more expansively, adopting an ordinary rather than deferential standard of review or imposing exacting rather than open-ended remedies in response to a rights violation. By way of comparison, apex courts in some jurisdictions have used strands of an ambiguous text to support projects of socio-economic justice. In India, for example, the Supreme Court has famously drawn upon constitutional directive principles to read into the fundamental right to life various economic and social rights.⁶³ Hailbronner argues that the German Constitutional Court developed a transformative constitutional jurisprudence by interpreted the social welfare obligation in the post-war German Constitution to develop positive rights and duties with socio-economic dimensions.⁶⁴

Underlying these interpretive possibilities is a deeper dilemma. Given the hybrid nature of the constitutional text, which institution/s are the most legitimate authors and arbiters of constitutional norms related to social justice? Absent express textual instruction on the justiciability of specific social justice provisions, the 1987 Constitution leaves considerable room for institutional manoeuvring and negotiation. Below, I look at how the Supreme Court of the Philippines approached these provisions – freighted as they are with ambition, ambiguity and rich interpretive potential – in the years after the People Power revolution.

V. Interpreting the 'heart of the charter'

In this section, I look at the Philippine Supreme Court's responses to early cases that raised questions of social and economic rights or welfare under the 1987 Constitution. I

⁶²Desierto (n 23) 139, nn 93–94.

⁶³Forster and Jivan (n 3); Chopra (n 3); Abeyratne (n 3).

⁶⁴See (n 10).

focus on the first fifteen years after the Constitution came into force, and examine how the court responded to the new constitution's transformative aspirations, as well as its textual ambiguities. This stretch of time includes the initial post-transitional period when institutional relationships and norms were relatively open and fluid.⁶⁵ Judicial decisions during these early years of the new constitutional order would have considerable potential to break ground and shape not just future jurisprudence but also the role and standing of the judiciary.⁶⁶ But this length of time also extends beyond the initial critical juncture. Examining decisions made when the constitutional order had bedded down allows us to discern any emerging norms or equilibrium on social justice. I analyse five cases that engage five different social justice provisions. These judgments are discussed in chronological order in order to trace how the court's approach to constitutional provisions on social justice evolved.

An early post-transition decision in 1989 concerned one of the most fraught political issues in the Philippines: land reform. Redistributing ownership of agricultural land was a crucial goal for many groups involved in the democracy movement. Soon after coming to power, the Aquino government passed the Comprehensive Agrarian Reform Law,⁶⁷ as well as executive orders to operationalise acquisition of private agricultural land. This endeavour affected the wealthiest, most politically powerful sections of Filipino society. Not surprisingly, several petitions challenging these enactments were initiated, and eventually clubbed together in *Association of Small Landowners in the Philippines v Secretary of Agrarian Reform*.⁶⁸

The petitioners argued that the land acquisition framework violated constitutional norms on the separation of powers, due process, the acquisition of private property and equal treatment before the law. They disputed, *inter alia*, whether the government had established the need to exercise its powers of eminent domain. They further argued that only public lands should be redistributed, but if private lands were to be appropriated then the appropriation of *agricultural* land alone was discriminatory to landowners. The owners of sugar, coconut and rice plantations further contended that their particular agricultural niches were free of exploitative tenancy arrangements and should therefore be exempt from appropriation.

The petitioners were on particularly firm ground on the question of compensation. They challenged legal provisions permitting non-cash compensation in the form of various financial instruments, such as government bonds. Precedent was on their side. A number of Philippine and US judgments established that 'just compensation' for appropriated property implied 'real, substantial and ample' compensation in cash, paid in full on acquisition.⁶⁹

The Supreme Court was not persuaded by any of these arguments. Submissions claiming discrimination got very short shrift. The court stated that the difference between

⁶⁵I Deinla, 'Public Support and Judicial Empowerment of the Philippine Supreme Court' (2014) 36 (1) *Contemporary Southeast Asia* 128, 129.

⁶⁶T Roux, *The Politico-legal Dynamics of Judicial Review: A Comparative Analysis* (Cambridge University Press, Cambridge, 2018) 31.

⁶⁷Comprehensive Agrarian Reform Law, Republic Act No. 6657. *Official Gazette of the Republic of the Philippines*, <<https://www.officialgazette.gov.ph/1988/06/10/republic-act-no-6657>>.

⁶⁸*Association of Small Landowners in the Philippines v Secretary of Agrarian Reform*, G.R. No. 78742, Supreme Court, 14 July 1989 (en banc), <<http://sc.judiciary.gov.ph>>. Hereinafter, '*Association of Small Landowners*'.

⁶⁹See, for example, *J.M. Tuazon Co v Land Tenure Administration* 31 SCRA 413.

large agrarian landowners and owners of other types of land was so stark that appropriating land only from the former needed no further justification, particularly in light of the mandate for land reform under Article XIII of the Constitution. It dismissed as lacking evidence the arguments that particular plantation industries should be exempt from land acquisition.

It affirmed that the challenged measures met both requirements for exercising the state's power of eminent domain: acquiring land for a public purpose and giving the landowner just compensation. Article XIII of the Constitution, which required the state to work towards more equitable distribution of 'all agricultural lands' meant that acquisition of private land for the purpose of redistribution to tenant farmers was indisputably a public purpose. Questions of just compensation and due process were more complicated. The Supreme Court departed from well-established precedent, and held that the manner in which land was to be acquired and compensated for under the challenged measures was fair. Acknowledging the divergence from longstanding standards of full payment in cash, the Court reasoned that more varied arrangements were constitutional in the context of a massive, costly, nationally significant land reform programme. It described the government's land acquisition project as 'a revolutionary kind of expropriation', intended to benefit 'not only ... a particular community or of a small segment of the population but ... the entire Filipino nation, ... from the impoverished farmer to the land-glutted owner'.

The court opined that when the framers of the Constitution constitutionalised the pursuit of land reform on a scale that the state could not compensate monetarily, they tacitly permitted other modes of compensating landowners. Thus, the court upheld partial payment in non-cash financial instruments, noting that the law required that compensation packages be tailored to landowners' wherewithal, with small landowners receiving a larger proportion of cash compensation and larger landowners receiving a bigger balance through other financial instruments. Importantly, a landowner could contest the decision to appropriate their land before an administrative body, whose determination in turn could be judicially reviewed. Taking these factors into account, the court held that due process requirements were satisfied.

It is evident in this judgment that the Supreme Court viewed the government's land reform programme as an emancipatory endeavour, fundamental to the new constitutional order. It observed that it was 'as acutely anxious as the rest of our people to see the goal of agrarian reform achieved at last after the frustrations and deprivations of our peasant masses during all these disappointing decades' and described its decision as clearing the way for 'true freedom of the farmer ... At last his servitude will be ended forever.'

In contrast to this landmark decision, where the constitutional directive for land reform is considered to be crucial, social justice provisions were treated as rather peripheral in some other early decisions. In *Del Rosario v Bengzon*,⁷⁰ for instance, the Philippine Medical Association, the national organization of medical practitioners, challenged the newly legislated Generics Act that required doctors to include on all prescription not just the brand name of any medicine prescribed but its generic name as well. Infractions of this requirement were criminalized in the form of fines. The petitioners argued, *inter alia*, that the fines laid down in the Act violated the injunction against

⁷⁰*Del Rosario v Bengzon*, G.R. No. 88265, Supreme Court, 21 December 1989 (en banc), <<http://sc.judiciary.gov.ph>>. Hereinafter '*Del Rosario*'.

excessive fines and cruel, degrading or inhuman punishment under the constitutional Bill of Rights.⁷¹

In response, the government argued that the Generics Act furthered the state's constitutional duty to 'protect and promote the right to health of the people' and 'make essential goods, health and other social services available to all the people at an affordable cost'.⁷² Because physicians would have to prescribe drugs based on therapeutic ingredients rather than brands, patients would be able to buy cheaper alternatives to the particular brand of medicine prescribed. The Supreme Court was persuaded by the government's submissions and declared without much ado that the requirements and fines imposed by the Generics Act were compatible with the fundamental right to freedom from excessive fines and cruel, degrading or inhuman punishment.

Because of the state's constitutional duties to protect the right to health and foster access to affordable healthcare, the government's position in *Del Rosario* was very strong. By contrast, the petitioners' position was somewhat dubious. The Generics Act disrupted the financial incentives that physicians often receive from pharmaceutical companies for favouring particular products. Robust evidence that the fundamental rights highlighted were genuinely under threat would have been required to allay the suspicion that the case was simply an attempt to stave off financial loss, couched in constitutional terms.

In both *Association of Small Landowners* and *Del Rosario*, the state's constitutional social justice duties were treated by the Supreme Court as strengthening the presumption of constitutionality when welfare laws and regulations were challenged. But on occasion these duties have also weighed *against* public bodies or private institutions performing public functions. In *Ariel Non v Judge Danes*,⁷³ Mabini College, a private institution, refused to allow twelve students who had participated in campus protests to re-enrol in their courses of study after their first semester. The students challenged their *de facto* expulsion. In so doing, they also challenged a recent Supreme Court decision in another case where students had been expelled from their colleges for participating in mass assemblies, *Sophia Alcuaz v Philippine School of Business Administration*.⁷⁴ In *Alcuaz*, a majority of the court held that a college student is considered enrolled only for one semester and can be refused readmission after the semester is over, as the contract between the student and the school is deemed terminated and the school cannot be compelled to enter into a new contract. The majority in *Alcuaz* emphasized that the school's freedom of contract and academic freedom prevailed over the right to freedom of assembly.

Despite *Alcuaz*, the students in *Ariel Non* prevailed against Mabini College at trial. The trial judge held that the college had denied students their constitutional right to education by refusing to re-enrol them for exercising their rights to free speech and peaceable assembly. The trial judge reasoned that restrictions on civil and political rights on campus could not operate in ways that deprived students of the right to education. On appeal before the Supreme Court, the right to education was not foregrounded to the same degree. But the court argued that the state's constitutional responsibility to ensure access to education and regulate educational institutions marked the student-school contract as

⁷¹Article III, Section 19(1), 1987 Constitution of the Republic of the Philippines.

⁷²Article II, Section 15, and Article XIII, Section 11, 1987 Constitution of the Republic of the Philippines.

⁷³*Ariel Non v Judge Danes*, G.R. No. 89317, Supreme Court, 20 May 1990 (en banc), available at <<http://sc.judiciary.gov.ph>>. Hereinafter 'Ariel Non'.

⁷⁴*Sophia Alcuaz v Philippine School of Business Administration*, G.R. No. 76353, Supreme Court, 2 May 1988, (Second Division), available at <<http://sc.judiciary.gov.ph>>.

a special one, 'imbued with public purpose'. This meant that freedom of contract had to be moderated in the educational context and could not be used to discriminate against students who exercised their rights to speech and assembly. Thus, the Supreme Court deployed the Constitution's emphasis on access to education to overturn a decision made just two years previously.

Similarly, a few years later in 1993, the Supreme Court overruled a past decision that had upheld the right of schools to expel students who were Jehovah's Witnesses for refusing to sing the national anthem and salute the flag, in accordance with their religious beliefs.⁷⁵ In *Ebralinag v The Division Superintendent of Schools of Cebu*, the Supreme Court found that expulsion was not tenable under the new constitutional order, violating not just the right to free expression of religion but also the students' right 'as Philippine citizens, under the 1987 Constitution, to receive free education'.⁷⁶

It is worth noting that the number of cases alleging violations of economic and social rights was fairly limited in the late 1980s and 1990s. One inhibiting factor was confusion over whether social justice provisions in the 1987 Constitution were 'self-executing' – that is, whether they could be relied upon directly by individuals in the same way as fundamental rights in the Bill of Rights. Expert opinion, as well as the Supreme Court's deep tradition of deference, suggested that they could not.⁷⁷ In 1993, the decision in *Minors Oposa v Factoran*⁷⁸ reached a different conclusion.

In *Oposa*, a number of children sued the Department of Environment and Natural Resources not just their own behalf but on behalf of 'future generations of children', to protect their constitutional right to a healthful ecology. They argued that the timber industry was doing such extreme environmental damage in the Philippines that all existing timber licences should be cancelled and no new ones issued. They argued further that government policy and practice on timber licensing was severely violating Philippine children's right to a healthful ecology, including the right of future generations, who were being deprived of an invaluable natural resource. At trial, the civil court dismissed the petition, saying, *inter alia*, that it raised a political question in which the court should not intervene.

Before the Supreme Court, the government argued that the petitioners' 'vague and nebulous' allegations could not constitute a cause of action or establish any standing. It reiterated that environmental policy matters involved 'political questions' that lay beyond the remit of the judiciary. A majority of the Supreme Court disagreed. The majority held that the petitioners' right to a balanced and healthful ecology was 'as clear' as the duty of the Department of Environment and Natural Resources to protect this right. Further, this particular right involved a responsibility to future generations, and 'the minors' assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come'. The court asserted its jurisdiction over conflicts between government policy and constitutional rights. It emphasized, as it had done in previous decisions, that after the 1987 Constitution came into force, the 'political question' doctrine was no longer the

⁷⁵*Gerona v Secretary of Education*, G.R. No. L-13954 Supreme Court, 12 August 1959 (en banc).

⁷⁶*Ebralinag v The Division Superintendent of Schools of Cebu*, G.R. No. 95770 Supreme Court, 1 March 1993 (en banc), which overruled *Gerona v Secretary of Education*. Hereinafter, 'Ebralinag'.

⁷⁷Bernas (n 30) 1006; M Defensor Santiago, *Constitutional Law Annotated* (Rex Publishing, Manila, 2015) 20.

⁷⁸*Minors Oposa v Hon. Fulgencio S. Factoran*, G.R. No. 101083, Supreme Court July 30, 1993 (en banc), <<http://sc.judiciary.gov.ph>>. Hereinafter, 'Oposa'.

'impenetrable shield that protects executive and legislative actions from judicial inquiry or review' that it had once been. With all these factors in mind, the majority in *Oposa* held that the petitioners had standing and a cause of action, but because they were seeking the cancellation of timber licences, licensees needed to be impleaded as parties to the proceedings. The case was remitted back to the trial court, where it died a quiet death because the petitioners did not pursue it further.

Oposa is a curious decision. As Gatmaytan notes, the decision was celebrated internationally as a landmark in environmental rights jurisprudence, but had little domestic impact in that regard.⁷⁹ Indeed, the petitioners' failure to follow their Supreme Court victory with further litigation suggests the case was largely symbolic, intended to spotlight the right to a healthful ecology and the harm generated by the timber industry. But from a constitutional perspective, *Oposa* is significant. In it, the Supreme Court reinforced the diminution of the political question doctrine under the new constitutional order. Additionally, it recognized the right to a balanced and healthful ecology as self-executing. It affirmed that individuals could seek to enforce this right directly, without the scaffolding of implementing legislation. In so doing, the court countered widespread expert opinion that social justice provisions in the constitution did not create justiciable rights, and its own past prevarication on this issue. It laid a foundation not just for further litigation on the right to a balanced and healthful ecology, but on the full range of social and economic rights in the Constitution.

The expansiveness of *Oposa* contrasts with the conservatism of *People and Farmers Cooperative Marketing Association (FACOMA) v Judge Leachon*,⁸⁰ decided a few years later. Two criminal cases against squatters were dismissed at trial because the trial judge found the Marcos-era Presidential Decree that criminalized squatting⁸¹ incompatible with the 1987 Constitution's provisions on urban housing. Article XIII of the Constitution prohibits eviction of 'poor dwellers' as well as demolition of their homes, 'except in accordance with law and in a just and humane manner'.⁸² Specifically, the judge held that the evictions in the cases before him and the associated criminal convictions would not be 'just and humane' because the government had not attempted to consult the evicted people or to resettle them.

By the time the appeal against Leachon J's decision reached the Supreme Court, it had been overtaken by events. The anti-squatting Presidential Decree had been repealed in the meantime, with the requirement that any pending cases be dismissed.⁸³ Accordingly, the Supreme Court dismissed the appeal. But it also took the opportunity to disagree with the trial court. It clarified that due process under Article XIII of the Constitution implied notice, the right to be heard and official intervention without loss of life, injury or unnecessary loss or damage to property. But due process when evicting the poor or

⁷⁹D Gatmaytan, 'The Illusion of Intergenerational Equity: *Oposa v. Factoran* as Pyrrhic Victory' (2003) 15 (3) *Georgetown International Environmental Law Review* 457, 459–60.

⁸⁰*People and Farmers Cooperative Marketing Association (FACOMA) v Judge Leachon* G.R. No. 108725, Supreme Court, 25 September 1998 (Third Division), <<http://sc.judiciary.gov.ph>>. Hereinafter, 'FACOMA'.

⁸¹Penalizing Squatting and other Similar Acts, Presidential Decree No. 772, 20 August 1975. *Official Gazette of the Republic of the Philippines*, <<https://www.officialgazette.gov.ph/1975/08/20/presidential-decree-no-772-s-1975>>.

⁸²Article XIII, Section 9, 1987 Constitution of the Republic of the Philippines.

⁸³Republic Act No. 8368, An Act Repealing Presidential Decree No. 772, entitled Penalizing Squatting and Other Similar Acts, 27 October 1997, LawPhil.Net, <https://lawphil.net/statutes/repacts/ra1997/ra_8368_1997.html>.

demolishing their homes did not require the municipal authorities to consult the people affected or to develop a resettlement plan.

This case is a rare instance where the Supreme Court elucidated the content of one of the social justice provisions of the Constitution rather than simply mentioning the provision. Given that the provision in question aims expressly to protect access to housing for the poor, the Supreme Court interprets it narrowly. At trial, Leachon J construed this provision as imposing a positive duty on the state. The Supreme Court limited it instead to established procedural constraints, rather than duties to counteract the deprivations that might result from eviction and demolition.

VI. Evaluation

In this section, I evaluate the Philippine Supreme Court's early social justice jurisprudence. The cases discussed above span three presidencies and a rapidly evolving socio-political context.⁸⁴ These years saw the old political elite substantially regain its hold on electoral politics, alongside (and despite) the flourishing of an engaged, vibrant civil society.⁸⁵ Some scholars note that this was also a period of judicial consolidation, when the Supreme Court re-established its institutional salience and legitimacy.⁸⁶ By the turn of the twenty-first century, the new constitutional order was well established; we can presume, at a minimum, increasing judicial familiarity with the transformative aspirations of the 1987 Constitution.

Below I argue that, notwithstanding deepening strength and expertise, the Supreme Court's engagement with constitutional social justice provisions during this period was modest and perfunctory. I then reflect on why this might be so.

Despite the ambiguity about whether social justice provisions in the 1987 Constitution were judicially enforceable, the Philippine Supreme Court did not shy away from them. In *Association of Small Landowners*, it declared that the cases at hand 'categorically raise constitutional questions that this Court must categorically resolve'. In *Oposa*, the government's argument that the environmental fallout of timber licences is a political question was firmly rebuffed. By recognizing the right to a healthful ecology as self-executing and justiciable, the Supreme Court laid the groundwork for future public interest litigation.

In some cases, social justice provisions served as a crucial lever for departing from precedent. In *Association of Small Landowners*, the constitutional mandate for agrarian reform prompted the Supreme Court to bend the long-standing rule that the government compensate landowners fully when appropriating their land. Constitutional provisions on access to education were influential in *Ariel Non* and *Ebralinag*, when the court went against its decisions in past cases that had raised very similar questions. Both cases could have been approached more narrowly, as a contest between the right to freedom of assembly (in *Ariel Non*) or freedom of religion (in *Ebralinag*) on the one hand, and institutional freedom of contract and academic freedom on the other. But the court

⁸⁴CH Landé, 'The Return of "People Power" in the Philippines' (2001) 12(2) *Journal of Democracy* 88; S Coronel, 'Protesting Too Much: Ramos' Democratic Credentials Dented' (1994) 157(24) *Far Eastern Economic Review* nd, np; B Reid, 'The Philippine Democratic Uprising and the Contradictions of Neoliberalism: Edsa II' (2001) 22(5) *Third World Quarterly* 777; Putzel (n 13).

⁸⁵PN Abinales, 'Coalition Politics in the Philippines' (2001) 100 *Current History* 154, 155–56; Eaton (n 23).

⁸⁶SL Haynie and TL Dumas, 'The Philippine Supreme Court and Regime Response 1970–2000' (2014) 9(1) *Asian Journal of Comparative Law* 173, 179–80.

heeded the Constitution's strong emphasis on access to education (which is framed as a right) in deciding both cases in favour of the petitioners.

Thus the Supreme Court resorted easily to social justice provisions. But its treatment of these provisions remains limited and quite superficial throughout the period examined in Section V. It skated over the surface of social justice provisions rather than elucidating norms that might further the transformative aims of the 1987 Constitution. For example, while the court referred to constitutional provisions on education in *Ariel Non* and *Ebralinag* and health in *Del Rosario*, it did not clarify whether these provisions imposed binding or justiciable obligations on the government. *Oposa* was unusual in this regard, but the sweeping, quixotic nature of the *Oposa* petition limits its potential as an exemplar. The Supreme Court's similarly sweeping, insufficiently reasoned assertion of justiciability renders the *Oposa* decision a somewhat eccentric outlier from the early years.⁸⁷

Further, the Supreme Court did not articulate principles or standards related to social justice provisions except in *Judge Leachon*. And here we see the Supreme Court interpreting constitutional provisions on evictions as imposing duties only of restraint rather than proactive protection of the right to housing. It did not engage with international standards or comparative jurisprudence on the right to housing. Instead, it reiterated due process standards developed in the context of civil and political rights, without considering the specific harm and vulnerability that the constitutional provisions on eviction were designed to address.

It is also worth noting that none of these early decisions impinged upon the government in any concrete way. The state prevailed in *Association of Small Landowners*, *Del Rosario* and *Judge Leachon*. A private college rather than a public body found its discretion to expel students restricted in *Ariel Non*. Even the government's surprising loss in *Oposa* only created the possibility of future litigation challenging timber licences.

What might explain this judicial modesty, given the 1987 Constitution's emphasis on tackling deprivation and securing basic necessities? First, it is important to acknowledge that social and economic rights place complex demands on the judiciary. When these rights are constitutionalised and rendered justiciable, they contain both promise and jeopardy. Proponents of constitutionalisation argue that a constitutional order suffers from an anemic conception of human dignity if it fails to recognize as entitlements these core goods and services that are essential for survival, safety and genuine autonomy.⁸⁸ Constitutionalisation opens government welfare measures to judicial scrutiny.⁸⁹ If public authorities fail to ensure access to basic necessities, individuals can potentially hold them accountable for their failure. Further, justiciable social and economic rights can help to challenge entrenched policy neglect.⁹⁰ Marginalized groups can use social and economic

⁸⁷Feliciano J in his Separate Opinion in *Oposa*, emphasizes the practical and normative challenges opened up by the main judgment in the case.

⁸⁸F Michelman, 'Constitutionally Binding Social and Economic Rights as a Compelling Idea: Reciprocating Perturbations in Liberal and Democratic Constitutional Visions', in H Alviar García, KE Klare and LA Williams (eds), *Social and Economic Rights in Theory and Practice: A Critical Assessment* (Routledge, New York, 2015) 288–90.

⁸⁹C O'Conneide, 'The Constitutionalization of Social and Economic Rights', in H Alviar García, KE Klare and LA Williams (eds), *Social and Economic Rights in Theory and Practice: A Critical Assessment* (Routledge, New York, 2015) 260.

⁹⁰LE White and J Perelman, 'Stones of Hope: Experience and Theory in African Economic and Social Rights Activism', in LE White and J Perelman (eds), *Stones of Hope: How African Activists Reclaim Human Rights to Challenge Global Poverty* (Stanford University Press, Stanford, CA, 2010) 154–60. See also R Dixon,

rights litigation to draw attention to deprivation that previously has been ignored by the state. Particularly in polities where governments are chronically derelict in implementing their welfare commitments or (as happened in the Philippines) ignore vulnerable sections of the population, justiciable social and economic rights can serve to deepen accountability.

At the same time, social and economic rights litigation draws judges into questions of distributive justice that traditionally have been the domain of the government and legislature. This phenomenon – a predictable outcome of transformative constitutional texts that recognize social and economic rights – has been described as the ‘judicialization of politics’.⁹¹ Rejecting the somewhat pejorative edge to this description, scholars such as Gargarella argue that judicial involvement in securing material wellbeing contributes to fairer and more deliberative democracy.⁹² Whether one is sanguine or sceptical in this regard, there is considerable scholarship that highlights how judges engaging with social and economic rights confront multiple challenges.⁹³ Many scholars have noted regulatory complexity as a particular challenge of social and economic rights adjudication.⁹⁴ Courts adjudicating these cases grapple with the risk that their decisions might distort carefully negotiated policies and budgets in ways that cannot fully be anticipated from within the courtroom. Interpreting the content of social and economic rights or crafting remedies for their enforcement also poses difficulties. Judges must impose meaningful obligations on the state while also leaving ample room for political disagreement and negotiation.⁹⁵

These various challenges are amplified in the Philippines by the ambiguities in the 1987 Constitution. As discussed in Section IV, the framing of social justice provisions leaves unclear which, if any, give rise to justiciable rights and duties. The cases examined in Section V suggest that textual silence encouraged judicial modesty. The Supreme Court did not eschew jurisdiction over social justice provisions, but it did not elaborate upon the status or import of these provisions either.

Among the cases discussed earlier, the court was jurisprudentially boldest in the landmark *Association of Small Landowners* decision. Perhaps it is no coincidence that this decision, which wholeheartedly embraces the constitutional call for land reform, is also politically safe. The Supreme Court upheld the Aquino government’s flagship land reform initiative. This is not to suggest, however, that the Philippine Supreme Court was overly deferential in its judgment. Haynie and Dumas have argued that the Philippine

‘Creating Dialogue About Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited’ (2007) 5 *International Journal of Constitutional Law* 391, 401–03.

⁹¹O Ferraz, ‘Between Activism and Deference: Social Rights Adjudication in the Brazilian Supreme Federal Tribunal’, in H Alviar García, KE Klare and LA Williams (eds), *Social and Economic Rights in Theory and Practice: A Critical Assessment* (Routledge, New York, 2015) 121.

⁹²R Gargarella, ‘Deliberative Democracy, Dialogic Justice and the Promise of Social and Economic Rights’ in H Alviar García, KE Klare and LA Williams (eds), *Social and Economic Rights in Theory and Practice: A Critical Assessment* (Routledge, New York, 2015) 106–14; R Gargarella, ‘Theories of Democracy, the Judiciary and Social Rights’ in R Gargarella, P Domingo and T Roux (eds), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Ashgate, Farnham, 2006) 13–19.

⁹³See, for example, Angel-Cabo and Lovera-Parmo (n 3); Ferraz (n 91); J Dugard and T Roux, ‘The Record of the South African Constitutional Court in Providing an Institutional Voice for the Poor: 1995–2004’, in R Gargarella, P Domingo and T Roux (eds), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Ashgate, Farnham, 2006) 107–26.

⁹⁴For a review of this literature, see M Pieterse, ‘Coming to Terms with Judicial Enforcement of Socio-Economic Rights’ (2004) 20 *South African Journal of Human Rights* 383, 391–92.

⁹⁵See (n 89) 273–74.

Supreme Court sensitivity to political context is nuanced; it seeks to build legitimacy not just with the government of the day but also with the wider public.⁹⁶ Deinla develops this further and argues that public approval is an important source of strength and independence for the court.⁹⁷ In the early years after the restoration of democracy, the court would surely have been alert to widespread and deeply felt public support for agrarian land reform.

But while judges might be politically strategic actors,⁹⁸ judicial concern for governmental and public acceptance is mediated and structured by legal texts, precedents, traditions of interpretation and the conceptualisation of the divide between law and politics within a particular legal culture.⁹⁹ Indeed, institutional credibility for a constitutional court might *depend* on working within established modes of interpretation and reasoning. The Philippine Supreme Court faced a delicate post-authoritarian predicament. It had to distance itself from its Marcos-era timidity on constitutional matters. It had to respect the demands of the 1987 Constitution. And it also had to maintain continuity with its own jurisprudence, ways of working, and enduring expectations about the judicial role. It is not surprising, then, that the court embraces the social justice aspirations of the 1987 Constitution most fully in a decision where it affirms an official measure and there is little likelihood of any separation-of-powers concerns.

The expanded review power of the judiciary coupled with multiple references to social and economic rights in the 1987 Constitution warrants a liberalization of what constitutes legitimate judicial terrain. In response to the constitutional text, the Supreme Court does indeed reject the political question doctrine in decisions such as *Association of Small Landowners and Oposa*. At the same time, the court's reticent handling of social justice provisions suggests that this inhibiting doctrine still exerts a tacit influence.

There is a rich and provocative literature on judicial engagement with social and economic rights.¹⁰⁰ Young¹⁰¹ and Gargarella¹⁰² criticize the tendency in some of this scholarship to perceive adjudication of social and economic rights as either judicial usurpation (for intervening in what should be the exclusive domain of the executive and legislature) or judicial abdication (for failing to protect these rights with sufficient

⁹⁶See (n 86) 195–96.

⁹⁷See (n 65). Examining the relationship between public approval for the Supreme Court and judicial assertiveness since 1986, Deinla suggests that high public support has enabled the Supreme Court to act vigorously, even during politically fractious or turbulent times.

⁹⁸See, for example, G Helmke, *Courts Under Constraints: Judges, Generals, and Presidents in Argentina* (Cambridge University Press, Cambridge, 2004); G Helmke and F Rosenbluth, 'Regimes and the Rule of Law: Judicial Independence in Comparative Perspective' (2009) 12 *Annual Review of Political Science* 345; L Epstein, J Knight and O Shvetsova, 'The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government' (2001) 35 *Law & Society Review* 117.

⁹⁹See (n 6) 159–70; Roux (n 66) 52–58.

¹⁰⁰See, for example, CF Sabel and WH Simon, 'Destabilization Rights: How Public Law Litigation Succeeds' (2004) 117 *Harvard Law Review* 1016; Tushnet (n 9); KG Young, 'A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review' (2010) 8(3) *International Journal of Constitutional Law* 385, 412–13; S Liebenberg and K Young, 'Adjudicating Economic and Social Rights: Can Democratic Experimentalism Help?', in H Alviar Garcia, KE Klare and LA Williams (eds), *Social and Economic Rights in Theory and Practice: A Critical Assessment* (Routledge, New York, 2015) 240; Dixon (n 90); D Bilchitz, *Poverty and Fundamental Rights* (Oxford University Press, Oxford, 2008) 135–77; Pieterse (n 94) 407.

¹⁰¹KG Young, *Constituting Economic and Social Rights* (Oxford University Press, Oxford, 2012) 134–36.

¹⁰²See (n 92).

vigour). Young further criticizes as inadequate Tushnet's influential heuristic of strong-form and weak-form judicial review in relation to social and economic rights.¹⁰³ She argues that more contextualized analysis of social and economic rights review reveals that courts have tended to calibrate levels of scrutiny and remedial approaches more thoughtfully to the particular situation at hand.¹⁰⁴

Neither the usurpation/abdication and strong/weak binaries nor Young's more fine-grained typology map well onto the Philippine experience. The broad-brush allegation of judicial usurpation cannot be levelled at the decisions examined in Section V. As a more general matter, the usurpation/abdication binary is conceptually inadequate in light of the demands that post-liberal, transformative constitutional texts place on the state. The Supreme Court has repeatedly asserted jurisdiction over social justice provisions, so cannot be accused of abdication. But in the cases discussed above, it rarely goes beyond referring to social justice provisions. There is little in the judgments to suggest the considered calibration regarding strength of scrutiny or remedies that Young has observed in other jurisdictions. Burdened with the ambiguities of the constitutional text on social and economic rights, the Supreme Court's approach to these rights was inchoate and liminal, neither avoiding nor elucidating them.

In addition to textual ambiguity, relatively limited jurisprudential resources might also have contributed to the Supreme Court's approach to social justice provisions. At the domestic level, previous national constitutions had recognized 'social justice', defined as 'well-being and economic security', as a 'concern of the State'.¹⁰⁵ Over time, the Supreme Court translated this constitutional call for social justice into a principle of statutory interpretation. Applying this principle, if the meaning of a law was clear, then social justice considerations were irrelevant. But when interpreting an ambiguous provision, the interpretation that favoured the underprivileged litigant would be adopted.¹⁰⁶ This approach was to be wielded cautiously: the Supreme Court clarified on multiple occasions that it was not meant to become 'an instrument to hoodwink courts of justice and undermine the rights of landowners'.¹⁰⁷ In addition, past case law on welfare policy, particularly on the vexed question of land reform, could potentially help to construe social justice provisions in the 1987 Constitution. Tate and Haynie also note that judges on the Philippine Supreme Court were attentive to resource differentials of litigants both before and after the democratic transition, with some expressing the importance of 'protect[ing] the downtrodden'.¹⁰⁸ But notwithstanding existing case law and judicial sensitivity to disadvantaged litigants, the range, ambition and ambiguities of the social justice provisions in the 1987 Constitution created new interpretive challenges.

In this regard, Desierto points out that the Supreme Court has tended to neglect an important domestic resource on interpreting social justice provisions.¹⁰⁹ As mentioned in

¹⁰³See (n 101) 138–39.

¹⁰⁴See (n 101) 144–66.

¹⁰⁵Article II, Section 5, 1935 Constitution of the Philippines. The 1973 Constitution included more detailed provisions on social justice, addressing, *inter alia*, rural and urban land reform and access to education. See Articles V, XIV and XV, 1973 Constitution of the Philippines.

¹⁰⁶AT Muyot, 'Social Justice and the 1987 Constitution: Aiming for Utopia' (1996) 70 *Philippine Law Journal* 310, 330.

¹⁰⁷*Nilo v. CA*, 128 SCRA 519 (1984), discussed in (n 106) 329.

¹⁰⁸CN Tate and SL Haynie, 'The Philippine Supreme Court under Authoritarian and Democratic Rule: The Perceptions of the Justices' (1994) 22 *Asian Profile* 209.

¹⁰⁹Desierto (n 23) 139 nn 93–94.

Section IV, Constitutional Commission records show that some social justice provisions were specifically envisioned as creating justiciable rights, while others were conceptualised as non-justiciable programmatic aims. Desierto argues that that the Supreme Court could engage purposively with the drafting history of the Constitution to elucidate social justice provisions more rigorously.¹¹⁰

When the 1987 Constitution came into force, international and comparative jurisprudential resources on social and economic rights were also less abundant than they would be even a decade later. This was a period of considerable ferment in international jurisprudence on social and economic rights. At the United Nations, the Committee on Economic, Social and Cultural Rights (CESCR) was established in 1987 to guide the enforcement of the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹¹¹ The CESCR clarified in 1990 that states had concrete, meaningful obligations in relation to these rights, no less binding than their obligations in relation to civil and political rights.¹¹² In 1993, the CESCR issued a statement at the United Nations World Conference on Human Rights asserting the centrality of economic, social and cultural rights, and describing the prevalence of poverty, hunger and illiteracy as 'inhumane, distorted and incompatible with international standards'.¹¹³ The Vienna Declaration that emerged from the conference affirmed that 'all human rights are universal, indivisible, interdependent and interrelated'.¹¹⁴ Over the next decade, the CESCR issued multiple General Comments, developing norms and guidelines on different aspects of the ICESCR.¹¹⁵ Unfolding in parallel was the constitutionalisation of social and economic rights in several late twentieth-century constitutions¹¹⁶ and the evolution of judicial review on social and economic rights in a range of jurisdictions.

¹¹⁰Desierto (n 23) 156–60.

¹¹¹International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316, at 49 (entered into force 3 January 1976) (hereinafter 'ICESCR' or 'the Covenant'). The Philippines ratified the ICESCR in 1974. See Office of the High Commissioner of Human Rights, United Nations, *Status of Ratification*, <<https://indicators.ohchr.org>>.

¹¹²United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, E/1991/23, <<https://www.refworld.org/docid/4538838e10.html>>.

¹¹³J Couso, 'The Changing Role of Law and Courts in Latin America: From an Obstacle to Social Change to a Tool of Social Equity', in R Gargarella, P Domingo and T Roux (eds), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Ashgate, Farnham, 2006) 67.

¹¹⁴Vienna Declaration and Programme of Action, United Nations General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23, <<https://www.refworld.org/docid/3ae6b39ec.html>>; United Nations General Assembly, *Indivisibility and Interdependence of Economic, Social, Cultural, Civil and Political rights: Resolution*, adopted by the General Assembly, 13 December 1985, A/RES/40/114, <<https://www.refworld.org/docid/3b00effd68.html>>.

¹¹⁵See, for example, United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 4: The Right to Adequate Housing (Art. 11(1))*, 13 December 1991, E/1992/23, <<https://www.refworld.org/docid/47a7079a1.html>>; *General Comment No. 5: Persons with Disabilities*, 9 December 1994, E/1995/22, <<https://www.refworld.org/docid/4538838f0.html>>; *General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons*, 8 December 1995, E/1996/22, <<https://www.refworld.org/docid/4538838f11.html>>; *General Comment No. 7: The Right to Adequate Housing (Art. 11.1): Forced Evictions*, 20 May 1997, E/1998/22, <<https://www.refworld.org/docid/47a70799d.html>>; *General Comment No. 9: The Domestic Application of the Covenant*, 3 December 1998, E/C.12/1998/24, <<https://www.refworld.org/docid/47a7079d6.html>>; *General Comment No. 13: The Right to Education (Art. 13)*, 8 December 1999, E/C.12/1999/10, <<https://www.refworld.org/docid/4538838c22.html>>.

¹¹⁶Alston and Goodman (n 9) 278–81, 292. See also Jung et al. (n 61) 1050–51.

The transformative demands of the 1987 Constitution were articulated at the threshold of this period. The 1987 Constitution is influenced by the ICESCR; multiple references to the Covenant can be found in the Constitutional Commission's discussions about social justice provisions.¹¹⁷ But the early decisions discussed in Section V did not have the benefit of the useful international guidance, thought-provoking comparative precedents and scholarly debate on justiciable social and economic rights that accumulated through the 1990s. It is worth noting, however, that the court barely engaged with international or foreign jurisprudence even in the later decisions discussed in Section V. The *FACOMA* decision, for example, was made a year after the CESCR issued a General Comment specifically dealing with the right to adequate housing in relation to forced evictions,¹¹⁸ yet the Supreme Court did not touch upon this directly salient legal resource.

By virtue of timing, the Philippine Supreme Court embarked on interpreting the social justice provisions of the 1987 Constitution without the wealth of international and comparative resources that would emerge over the next two decades. But even as time went on, the court neglected a crucial domestic resource as well as emergent international and comparative jurisprudence. This neglect suggests that the court's initial, perfunctory engagement with social justice provisions shaped the tenor of its social justice jurisprudence for some years to come.

VII. Conclusion

When the 1987 Constitution came into force, the Philippine Supreme Court seemed well placed to grapple with the challenges of a transformative constitution. Marcos-era judges had been replaced by new appointees who were outsiders to the existing judiciary. Some had participated in the anti-authoritarian struggle and others were legal academics.¹¹⁹ The Constitution had expanded the judiciary's powers of review and protected its fiscal security. But the Court's early social justice jurisprudence was modest.

I have argued above that the 1987 Constitution adopts a hybrid approach to socio-economic needs and inequality. Some basic necessities are framed as rights but lie outside the constitutional Bill of Rights. Other social justice provisions resemble directive principles of state policy, which in some older constitutions were expressly demarcated as non-justiciable. This hybrid approach could potentially combine the benefits of constitutionalising social and economic rights (which can help to deepen government accountability, open up previously opaque policy areas and amplify the concerns of disadvantaged groups) and of constitutionalising purely political, open-ended policy goals (which can guide governments, influence legislation and inspire civil society). However, the 1987 Constitution does not say which, if any, of these provisions are judicially enforceable and which, if any, are judicially *unenforceable*.

Transformative constitutional texts place difficult demands on the judiciary in relation to social and economic rights. They prompt the judiciary to shift into unfamiliar domains. At the same time, institutional legitimacy – including legitimacy on questions of social and economic justice – requires judges to sustain the sense of a cogent boundary between

¹¹⁷Desierto (n 23) 139, n 94; Bernas (n 30).

¹¹⁸United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 7: The Right to Adequate Housing (Art. 11.1): Forced Evictions*, 20 May 1997, E/1998/22, available at <<https://www.refworld.org/docid/47a70799d.html>>.

¹¹⁹See (n 65) 143.

constitutional law and politics. These challenges are heightened in the Philippines by the combination of ambition and ambiguity in the 1987 Constitution. The Philippine Supreme Court has to negotiate a prior, additional set of interpretive dilemmas before it embarks on enforcing social and economic rights. The 1987 Constitution diluted the blunt instrument of the political question doctrine. But, absent textual clarity, the Supreme Court's engagement with social justice provisions in the Constitution remained inchoate and liminal. It asserted jurisdiction over these provisions but avoided meaningful elucidation.

The Philippines experience might be instructive for other contexts. Institutional norms and practices are relatively malleable in the early years after a democratic transition, but while courts might quickly embrace enhanced review powers in principle, judicial confidence and creativity on unfamiliar questions take longer to develop. If the judiciary is to play a role in facilitating distributive justice, then clear constitutional permission is important. Without it, the judicial contribution to developing norms and implementing measures to address material deprivation is likely to be waylaid.

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