

Testing Constitutional Waters II: Political and Social Legitimacy of Judicial Decisions

Sedfrey M. Candelaria*

Maria Eloisa Imelda S. Singzon**

* '90 LL.M., University of British Columbia; '84 LL.B., Ateneo de Manila University School of Law. The Author is the Associate Dean for Student Affairs and a professional lecturer on Constitutional Law, Public International Law, Political Law Review, International Economic Law, Children's Rights Law, and Indigenous Peoples' Rights at the Ateneo de Manila University School of Law. He is also a former member of the GRP (Government of the Republic of the Philippines) Negotiating Panel for talks with the CPP/NPA/NDF (Communist Party of the Philippines/New People's Army/National Democratic Front) and a former Chief Legal Consultant to the GRP Negotiating Panel for talks with the Moro Islamic Liberation Front; Head of the Research, Publication, and Linkages Office and the Department of Special Areas Concern of the Philippine Judicial Academy, Supreme Court of the Philippines; Head of the Indigenous People's Desk, Ateneo Human Rights Center; and, President of the CASA/GAL Foundation of the Philippines, Inc. The Author's previous works published in the *Journal* include *Postscript to the Supreme Court MOA-AD Judgment: No Other Way but to Move Forward*, 53 ATENEO L.J. 269 (2009), *Introducing the Indigenous Peoples' Rights Act*, 47 ATENEO L.J. 571 (2002); *The Rights of Indigenous Communities in International Law*, 46 ATENEO L.J. 273 (2001); *The Legal Characterization of the Asia-Pacific Economic Conference (APEC) and the Individual Action Plans in International Law*, 44 ATENEO L.J. 405 (2000); and, *The IMF and the Philippines: Anatomy of a Third World Debt*, 36 ATENEO L.J. 18 (1992). He is also the co-author of *Consultation and the Courts: Reconfiguring the Philippine Peace Process*, 54 ATENEO L.J. 59 (2009); *An Overview of the International Legal Concept of Peace Agreements as Applied to Current Philippine Peace Processes*, 53 ATENEO L.J. 263 (2008); *The Juvenile Justice and Welfare Act of 2006: Changing Patterns and Responses for Juvenile Offending*, 52 ATENEO L.J. 293 (2007); *Legal Concept of Terrorism under International Law and Its Application to Philippine Municipal Law*, 51 ATENEO L.J. 823 (2007); *Testing Constitutional Waters: Balancing State Power, Economic Development and Respect for Human Rights*, 51 ATENEO L.J. 1 (2006); *Courts and Social Context Theory: Philippine Judicial Reform as Applied to Vulnerable Sectors*, 50 ATENEO L.J. 823 (2006); and, *The Philippines and the Convention on the Rights of a Child: Evaluating Compliance with Respect to International Standards for Procedural Rules Involving Children*, 49 ATENEO L.J. 1016 (2005).

** '12 J.D. cand., Ateneo de Manila University School of Law; Member of the Board of Editors, *Ateneo Law Journal*. She was the Associate Lead Editor of Vol. 54, Issue No. 3.

This Article follows *Testing Constitutional Waters: Balancing State Power, Economic Development and Respect for Human Rights*, 51 ATENEO L.J. 1 (2006), co-written by the author with Atty. Floralie M. Pamfilo, a former member of the Board of Editors and the Executive Committee of the *Journal*. Whereas the previous Article tested the

I. INTRODUCTION.....	2
A. <i>Judicial Activism in the Supreme Court: The Politics of Decision-Making</i>	
B. <i>Estrada v. Desierto</i>	
C. <i>“Judicialization of Politics” and Judicial Independence</i>	
II. DEVELOPING NORMS/STANDARDS IN ANALYZING SUPREME COURT DECISIONS.....	11
A. <i>Legal Legitimacy</i>	
B. <i>Sociological Legitimacy</i>	
C. <i>Moral Legitimacy</i>	
D. <i>The Philippine Standard</i>	
III. ISSUES.....	21
A. <i>The ZTE-NBN Controversy</i>	
B. <i>The Aborted MOA-AD</i>	
C. <i>The Subic Rape Case</i>	
D. <i>The Appointment of the Chief Justice</i>	
IV. ANALYSIS.....	37
V. CONCLUSION.....	45

I. INTRODUCTION

Philippine constitutional tradition holds sacrosanct the three distinct powers of the Executive, Legislative, and Judicial Departments. The wisdom behind segregating the government into three institutions is to preclude the concentration of governmental powers in one department, thereby assuring the independence of each department.¹ Thus, by virtue of this division, politics is kept within the realm of the Executive and Legislative Departments. Nevertheless, despite such separation of powers, our Supreme

constitutionality of executive and economic initiatives of the Arroyo Administration, this Article tests the legitimacy of recent Supreme Court decisions.

Cite as 55 ATENEO L.J. 1 (2010).

1. See JOAQUIN G. BERNAS, S.J., *THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY* 678 (2009 ed.). According to Fr. Bernas, “the purpose of the separation of powers and ‘checks and balances’ is to prevent concentration of powers in one department and thereby to *avoid tyranny* ... [which] was realized during the dark days of martial law.” *Id.* (emphasis supplied).

Court surprisingly becomes a political body when deciding constitutional cases and those under its “expanded judicial power.”²

It is essential to note that a “political Court” is different from an “independent Court.” As a political body, the Court does not engage in partisan activity.³ Instead, the political Court exercises the “discretionary powers of a legislature.”⁴ An independent Court, on the contrary, ably settles controversies regardless of the personalities involved.⁵ A political Court necessarily results from the “judicialization of politics”⁶ or the Court’s judicial power to deal with constitutional law, while an independent Court is a consequence of the justices’ own volition. Lastly, a political Court does not necessarily define the Judiciary as an institution while an independent Court defines the legitimacy of the Judiciary as an institution.⁷

This Article attempts to answer whether the Supreme Court of the Philippines, when it functions as a political body, is able to maintain institutional legitimacy as an independent branch of government. It is espoused that “judicialization of politics” “should only be accelerated when judicial institutions are accorded more respect or legitimacy than other government institutions.”⁸ But while the Judiciary is empowered by the 1987 Constitution to exercise judicial power in cases of grave abuse of

-
2. Pacifico A. Agabin, *The Judicial Philosophy of the Puno Court*, Address at the Fourth Chief Justice Reynato S. Puno Distinguished Lecture Series (May 7, 2010).
 3. Richard A. Posner, *The Supreme Court 2004 Foreword: A Political Court*, 119 HARV. L. REV. 31, 39 (2005).
 4. Agabin, *supra* note 2, at 5 (citing Posner, *supra* note 3, at 40.).
 5. Supreme Court, *Adopting the New Code of Judicial Conduct for the Philippine Judiciary*, A.M. No. 03-05-01-SC, canon I, § 1, Apr. 27, 2004.
 6. Agabin, *supra* note 2, at 7 (citing C. Neal Tate & Thorbjorn Vallinder, *The Global Expansion of Judicial Power: The Judicialization of Politics*, GLOBAL EXPANSION OF JUDICIAL POWER 2 (C. Neal Tate & Thorbjorn Vallinder, eds., 1995)).
 7. See Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1975 (2004). An independent Court possesses legitimacy in sociological terms insofar as the relevant public regards its decisions as “justified, appropriate, or otherwise deserving of support for reasons beyond fear of sanctions of mere hope for personal reward.” *Id.*
 8. Agabin, *supra* note 2, at 9 (citing C. Neal Tate, *Why the Expansion of Judicial Power?*, THE GLOBAL EXPANSION OF JUDICIAL POWER 31-32 (C. Neal Tate & Thorbjorn Vallinder, eds., 1995)).

discretion by the Legislative or Executive branches,⁹ regardless of the Court's comparable respect or legitimacy,¹⁰ the independence and legitimacy of the Judiciary as an institution is an essential element in maintaining democracy in the country.¹¹

By way of introduction, this Article starts with why there is no separation of law from politics and in what context can judicial activism¹² cross the fine line of judicial independence. To illustrate judicial activism, this Article discusses the historic case of *Estrada v. Desierto*.¹³

A. Judicial Activism in the Supreme Court: The Politics of Decision-Making

It is said that when the Supreme Court decides constitutional cases, it exercises the powers of a legislature,¹⁴ i.e., “because the *Constitution is about politics ... [constitutional cases] can be decided only on the basis of a political judgment*, and a political judgment cannot be called right or wrong by reference to legal norms.”¹⁵

The Supreme Court of the Philippines, like its American counterpart, functions both as an appellate court and a constitutional court.¹⁶ Unlike many countries, the Philippines does not have a separate constitutional court.¹⁷ A constitutional court is one “that deals primarily with constitutional

9. PHIL. CONST. art VII, § 1.

10. See Fallon, Jr., *supra* note 7, at 1828. According to Fallon, the Judiciary's institutional legitimacy is “relative, not absolute.” Therefore, “[a]t any particular time, some citizens will believe that the Supreme Court is a trustworthy institutional, whereas others will not.” *Id.*

11. This results from the fact that the Court's institutional legitimacy is ultimately a function of public perception. See also Fallon, Jr., *supra* note 7, at 1828 (citing *Mistretta v. United States*, 488 U.S. 361 (1989)).

12. Judicial activism is “the doctrine that the judicial branch, especially the federal courts, may interpret the Constitution by deviating from legal precedent as a means of effecting legal and social change.” Judicial activism definition — Definition — MSN Encarta, available at http://encarta.msn.com/dictionary_161677231/judicial_activism.html (last accessed May. 22, 2010).

13. *Estrada v. Desierto*, 353 SCRA 452 (2001).

14. Agabin, *supra* note 2, at 5 (citing Posner, *supra* note 3, at 40).

15. Posner, *supra* note 3, at 40 (emphasis supplied).

16. Agabin, *supra* note 2, at 5.

17. There are approximately 56 nations with a separate constitutional court. JURIST — World Law, available at <http://jurist.law.pitt.edu/world> (last accessed May 22, 2010).

law. Its main authority is to rule on whether or not laws that are challenged are in fact unconstitutional, i.e., whether or not they conflict with constitutionally established rights and freedoms.”¹⁸ In the Philippines, the Supreme Court itself is empowered to be the final interpreter of the Constitution.¹⁹ In fact, the Constitution expressly recognizes the Court as the ultimate authority in settling “cases in which the constitutionality or validity of any treaty, international or executive agreement, law, presidential decree, proclamation, order, instruction, ordinance, or regulation is in question.”²⁰

United States (U.S.) Court of Appeals Judge Richard A. Posner provides four factors behind the political nature of a constitutional court —

First, because the federal Constitution is so difficult to amend, the Court exercises more power on average, when it is deciding constitutional cases than when deciding statutory ones. Second, a constitution tends to deal with fundamental issues, and more emotion is invested in those issues than in most statutory issues, and emotion influences behavior, including the behavior of judges. *Third, fundamental issues in the constitutional context are political issues: they are issues about political governance, political values, political rights, and political power.* And fourth, constitutional provisions tend to be both old and vague ... The older and vaguer the provision at issue, the harder it is for judges to decide the case by a process reasonably described as interpretation rather than legislation.²¹

While these observations are more relevant to the U.S., suffice to say, the Philippine Supreme Court becomes a political organ when it functions as a constitutional court.

Doubts as to the political nature of the Court when it sits as a constitutional court is dispelled when taking into account the expanded

18. *Id.*

19. Then New York Governor and later Chief Justice of the U.S. Supreme Court Charles Evans Hughes once said, “We are under a Constitution, but the Constitution is what judges say it is.” MERLO J. PUSEY, CHARLES EVANS HUGHES 204 (1951). *See also* Supreme Court, Re: Clarifying and Strengthening the Organizational Structure and Administrative Set-Up of the Philippine Judicial Academy, A.M. No. 01-1-04-SC-PHILJA, Jan. 31, 2006.

20. PHIL. CONST. art. VIII, § 5, ¶ 2 (a). Furthermore, “[a]s the ultimate authority or last interpreter of the Constitution, the Supreme Court is empowered to review, revise, reverse, modify, or affirm on appeal or *certiorari*, final judgments[,] and orders of lower courts.” PHIL. CONST. art. VIII, § 5, ¶ 2.

21. Posner, *supra* note 3, at 39-40.

definition of “judicial power” in the Constitution. Section 1 of Article VIII of the Constitution has expressly “made the court a political organ by giving the judiciary the power to declare an act of the Congress or an act of the Executive ‘a case of grave abuse of discretion,’ even if such is perfectly within the province of the political branches.”²² Thus, while the Supreme Court is mandated to ensure that the exercise of state power by the three departments of government does not infringe upon the domain of the other, it is empowered to intrude into the domains of the Executive and Legislative Branches of government. “This expansion of judicial power into the domain of politics, [as earlier enunciated], is called ‘judicialization of politics.’”²³

B. Estrada v. Desierto

A clear example of “judicialization of politics” is *Estrada v. Desierto*, involving the legitimacy of Gloria Macapagal-Arroyo’s Presidency.²⁴ The validity of Arroyo’s ascension to power was brought about by succession due to the alleged resignation or permanent disability of Joseph Estrada, in accordance with the Constitution.²⁵ Quite interestingly, Chief Justice Reynato S. Puno, known to have dissented in a number of cases decided in favor of Arroyo’s government, was the *ponente* of this decision.²⁶

In settling whether the principal issue was justiciable, the Court rejected Arroyo’s invocation of the political question doctrine.²⁷ It held that “the resignation of the sitting President that [EDSA II] caused and the succession of the Vice President as President are subject to judicial review.”²⁸ That is, the “principal issues for resolution require the proper interpretation of certain provisions of the 1987 Constitution, notably Section 1 of Article II, and Section 8 of Article VII, and the allocation of governmental powers under Section 11 of Article VII.”²⁹

22. Agabin, *supra* note 2, at 6.

23. *Id.* at 7.

24. *Estrada*, 353 SCRA at 477.

25. *Id.* at 496, 516.

26. *Id.* at 477. See e.g. *Neri v. Senate Committee on Accountability of Public Officers and Investigations*, 549 SCRA 77, 139-256 (2008) (C.J. Puno, dissenting opinion) & *Nicolas v. Romulo*, 578 SCRA 438, 469-86 (2009) (C.J. Puno, dissenting opinion).

27. *Estrada*, 353 SCRA at 490.

28. *Id.* at 493.

29. *Id.* at 495.

Perhaps taking a page from the U.S. case of *Bush v. Gore*,³⁰ which was decided a year earlier, the Court saw a parallelism and took the opportunity to inquire into the legitimacy of Arroyo's presidency and rule on the resignation of Estrada. Corollary, the U.S. Supreme Court in *Bush* ultimately resolved the presidential election in favor of George W. Bush when it ruled that the Florida Supreme Court's method for recounting ballots was a violation of the Equal Protection Clause.³¹ The Philippine Supreme Court, by exercising jurisdiction over the controversy, intruded into the Executive branch when it ruled upon the acts of the Chief Executive, then President Estrada.³² Quite ironically, when Estrada "raised the improper application of Section 11, Article VII of the Constitution, the Court rebuffed him, invoking the separation of powers and political question doctrines, saying that the Congress' application of the said section was not a legal but rather a political question."³³

In addressing the main issue on whether Estrada resigned, the Court used the *totality test* to determine the existence or non-existence of a public official resignation. Thus the Court sought to establish Estrada's intent to resign by considering his "acts and omissions, before, during[,] and after

30. *Bush v. Gore*, 531 U.S. 98 (2000).

31. *Id.* at 105.

32. Sabrina M. Querubin, et. al., *Legitimizing the Illegitimate, Disregarding the Rule of Law in Estrada v. Desierto and Estrada v. Macapagal-Arroyo* (2003), available at http://www.law.upenn.edu/journals/jil/jilp/articles/2-1_Querubin_Sabrina.pdf (last accessed May 22, 2010) [hereinafter *Legitimizing the Illegitimate*]. See *Estrada*, 353 SCRA at 495.

33. *Legitimizing the Illegitimate*, *supra* note 32.

Notably, the Court refused to rule on the acts of Congress when the House of Representatives passed House Resolution No. 176 which is entitled, "Resolution Expressing the Support of the House of Representatives to the Assumption into Office by Vice President Gloria Macapagal-Arroyo as President of the Republic of the Philippines, Extending its Congratulations and Expressing its Support for her Administration as a Partner in the Attainment of the Nation's Goals Under the Constitution." Evidently, the Court's misplaced invocation of the political question doctrine shows the lopsided treatment of the Court against Estrada and in favor of Arroyo. *Id.*

See Resolution Expressing the Support of the House of Representatives to the Assumption into Office by Vice President Gloria Macapagal-Arroyo as President of the Republic of the Philippines, Extending its Congratulations and Expressing its Support for her Administration as a Partner in the Attainment of the Nation's Goals Under the Constitution, House Res. No. 176, 11th Cong., 3d Sess. (Jan. 24, 2001); *Estrada*, 353 SCRA at 508-16.

January 20, 2001 or by the totality of prior, contemporaneous[,] and posterior facts and circumstantial evidence bearing a material relevance to the issue.”³⁴ In doing so, the Court went beyond the actuations and omissions of Estrada to establish intent, which by its very nature, should have only been culled from him. That is, the Court essentially established Estrada’s resignation by focusing on political events which demonstrated withdrawal of support for Estrada’s government.³⁵ This was the indirect implication when the Court loosely relied upon the contents of then Senate-President Angara’s diary to establish Estrada’s intent to resign.³⁶ The Court’s seemingly over-stretched reasoning was further shown when it attributed to Estrada an agreement between Angara and Ramos regarding the peaceful and orderly transfer of power.³⁷ Resignation being personal to Estrada, it behooved the Court to apply the doctrine *res inter alios acta alteri nocere non debet*.³⁸

In conclusion, although a more exhaustive set of substantive legal principles could have been applied, the Court held that the resignation of Estrada could not be doubted against a background of public pressure calling for change in leadership.

C. “Judicialization of Politics” and Judicial Independence

As culled from the facts following the ascension of Vice-President Arroyo to the Presidency, President Arroyo became the acknowledged President of the Philippines.³⁹ In fact, “[s]urveys conducted also purportedly showed

34. *Estrada*, 353 SCRA at 496.

35. *See Estrada*, 353 SCRA at 497-99.

36. In determining the state of mind of Estrada, the Court relied on the contents of the published diary of then Executive Secretary Angara [Angara Diary] in the Philippine Daily Inquirer. Describing the Angara Diary as an authoritative window on the *state of mind* of Estrada, the Court held that Angara’s account of events on Jan. 19, 2001 was “proof that Estrada had reconciled himself to the reality that he had to reign.”

See Estrada, 353 SCRA at 497-98.

37. *Legitimizing the Illegitimate*, *supra* note 32.

38. *Id.* The legal maxim “*res inter alios acta alteri nocere non debet*” means that “things done between strangers ought not to affect a third person, who is a stranger to the transaction.” *See* Legal maxims and phrases in Latin, available at http://www.inrebus.com/legalmaxims_r.php (last accessed May 22, 2010).

39. The Court enumerated the following facts to support its conclusion that both houses of Congress have recognized Arroyo’s ascension to the Presidency:

(1) Petitioner, on January 20, 2001, sent the above letter claiming inability to the Senate President and Speaker of the House;

Arroyo's wide acceptance as President."⁴⁰ It therefore does not come as a surprise that despite critiques of *Estrada*, where one declared that the decision shows "the dispensability and insignificance of the Constitution and the concept of due process when political expediency and political stability are at stake," the decision has been respected by Filipino society and recognized as legitimate.⁴¹

Two observations can be drawn from this conclusion. First, when the Court functions as a constitutional court, it can be justified by ruling along the lines of political expediency and stability. Second, the political events calling for expediency and governmental stability — public clamor calling

(2) Unaware of the letter, respondent Arroyo took her oath of office as President on January 20, 2001 at about 12:30 p.m.;

(3) *Despite receipt of the letter*, the House of Representatives passed on January 24, 2001 *House Resolution No. 175*;

(4) Also, *despite receipt of petitioner's letter* claiming inability, *some twelve (12) members of the Senate* signed [a Resolution recognizing and expressing support to the new government of President Gloria Macapagal-Arroyo; Resolution No. 82 which confirmed President Gloria Macapagal-Arroyo's nomination of Senator Teofisto T. Guingona, Jr. as Vice President of the Republic of the Philippines; and Resolution No. 83 which recognized that the impeachment court is *functus officio*];

...

(5) *Both houses of Congress* started sending *bills* to be signed into law by respondent *Arroyo as President*.

Estrada, 353 SCRA at 509-15.

[President Arroyo's] assumption to office into power and subsequent exercise of the powers and performance of the duties attaching to the said position have been acquiesced in by the Legislative Branch of government.

...

Her administration has, likewise, been recognized by numerous members of the international community of nations, including Japan, Australia, Canada, Spain, the United States, the ASEAN countries, as well as 90 major political parties in Europe, North America, Asia[,] and Africa.

Estrada, 353 SCRA at 565-66 (J. Kapunan, separate opinion).

40. *Legitimizing the Illegitimate*, *supra* note 32.

41. *Id.*

for the stepping down of then incumbent President Estrada,⁴² the need for moral authority amidst public unrest, and the urgency to appease foreign relations⁴³ — inevitably influenced the Court's decision in *Estrada*.⁴⁴ This emphasizes the fine line between “judicialization of politics” and political independence, i.e., while the Court may have validly acted as a political organ by exercising judicial power over an issue belonging to the political domain, the *totality test* was a manifestation of a Court engaged in results-oriented decision-making, which may undermine its mandate of independent judicial decision-making.

Notably, despite the Court's vulnerable legal reasoning,⁴⁵ the public's rejection of Estrada's moral authority to lead and their recognition and acceptance of Arroyo as the new President *legitimized* the decision. Thus, while the decision was wielded with political influence and its legality challenged, the social acknowledgement of its outcome was sufficient to recognize the decision as valid.

Under the doctrine of separation of powers, the Court, in its appellate and political capacity, is expected to render decisions, independent of any external influence and regardless of the personalities involved. Nevertheless, because there is a fine line between the duty of the Court to rule upon constitutional issues that are necessarily political in nature and independent

42. At the height of the Senate Blue Ribbon Committee investigation where detailed revelations of Estrada's alleged misgovernance and Estrada's powerful political allies began deserting him, “the people's call for his resignation intensified. The call reached a new crescendo when the eleven (11) members of the impeachment tribunal refused to open the second envelope ... [sending] people to paroxysms of outrage.”

Estrada, 353 SCRA at 497.

43. This is apparent in Justice Ynares-Santiago's observation stating that when “Arroyo rightfully assumed the presidency as the constitutionally anointed successor ... [t]here was at that time an urgent need for the immediate exercise of presidential functions, powers, and prerogatives.” *Estrada*, 353 SCRA at 573 (J. Ynares-Santiago, separate opinion). Expectedly, Arroyo's administration was “[soon] recognized by numerous members of the international community of nations, including Japan, Australia, Canada, Spain, the United States, the ASEAN countries, as well as 90 major political parties in Europe, North America, Asia, and Africa.” *Estrada*, 353 SCRA at 566 (J. Kapunan, separate opinion).

44. The Court declared the resignation of Estrada against the background of public pressure and moral framework.

Estrada, 353 SCRA at 495-508.

45. *Legitimizing the Illegitimate*, *supra* note 32.

judicial decision-making, the institutional legitimacy of the Judiciary is always subject to scrutiny. Dean Pacifico A. Agabin provides a brief explanation for this:

Under the Constitution, the President is always under the greatest temptation to seduce the Supreme Court. The present set-up between the Executive and the Judiciary is like marriage: it is an arrangement which combines the best of temptation with the best of opportunity ... if the judiciary intrudes into politics, politics will also encroach on the judiciary.⁴⁶

This portion of the Article attempted to establish the innate political nature of the Court when it resolves constitutional issues and the difference between judicialization of politics and judicial independence. What is left is a determination of whether the Court's institutional legitimacy is otherwise affected by the interrelationship of the Executive and the Judiciary. Part II of this Article advances standards that will provide a better understanding of the Judiciary as an institution under the present Constitution. That is, when it functions as a political organ, the Court necessarily intrudes into the domain of politics and yet the Judiciary remains a legitimate and independent institution of government. Parts III and IV provide an application and analysis of the proposed standards on the recent cases rendered under the so-called "Puno Court,"⁴⁷ while Part V proposes a perspective in evaluating Supreme Court decisions.

II. DEVELOPING NORMS/STANDARDS IN ANALYZING SUPREME COURT DECISIONS

To better understand the concept of legitimacy of the Judiciary, this part of the Article begins with a standard proposed by renowned American law professor Richard H. Fallon, Jr. He argues "that the legal legitimacy of a constitutional law decision depends more on its sociological acceptance than on the questionable legality of its formal ratification."⁴⁸ To prove this, Fallon proposes that "legitimacy invites appeal to three distinct kinds of criteria that in turn support three concepts of legitimacy: legal, sociological, and moral."⁴⁹ Fallon's arguments flow from the premise that judgments of legal, sociological, and moral legitimacy reflect concerns pertaining to the

46. Agabin, *supra* note 2, at 7-8.

47. *Id.* at 5. According to Professor Agabin, "there is a Puno Court *beyond any shadow of doubt.*" *Id.* (emphasis supplied).

48. *Id.* at 8.

49. Fallon, Jr., *supra* note 7, at 1790.

necessary, sufficient, or morally justifiable conditions for the exercise of governmental authority.⁵⁰

A. Legal Legitimacy

Fallon posits that “[l]egal legitimacy and illegitimacy depend on legal norms.”⁵¹ He explains that when something is lawful, it is legitimate and conversely, something unlawful is necessarily illegitimate.⁵² Notably, a judicial decision may be considered *erroneous* without becoming illegitimate.⁵³ To illustrate, as argued by some critics, the Court in *Estrada* erroneously invoked the separation of powers and political question doctrines when it refused to rule upon Congress’s improper application of Section 11 of Article VII of the Constitution; and yet it had justified its exercise of judicial power over the controversy when it stated that “principal issues for resolution require the proper interpretation of certain provisions of the 1987 Constitution, notably Section 1 of Article II, and Section 8 of Article VII and the allocation of governmental powers under Section 11 of Article VII.”⁵⁴ Despite this contentious constitutional pronouncement, the *Estrada* ruling remains *legitimate*.

Legal legitimacy of judicial rulings may be distinguished as *substantive* and *authoritative*: substantive legal legitimacy reflects the correctness or reasonableness of this judicial ruling as a matter of law, while authoritative legal legitimacy is the ruling’s legally binding character.⁵⁵ Authoritative legal legitimacy depends on standards that allow a larger margin for judicial error.⁵⁶ From this distinction, it is evident that the legitimacy of *Estrada* emanates from its authoritative legal legitimacy.

When applied to judicial decision-making, legal legitimacy functions analogously with the concepts of discretion and jurisdiction.⁵⁷ Particularly, a claim of judicial legitimacy characteristically suggests that a court —

- (1) had lawful power to decide the case or issue before it;

50. *Id.* at 1791.

51. *Id.* at 1794.

52. *Id.*

53. *Id.*

54. *Legitimizing the Illegitimate*, *supra* note 32.

55. Fallon, Jr., *supra* note 7, at 1794.

56. *Id.*

57. *Id.* at 1819.

- (2) in doing so, rested its decisions only on considerations that it had lawful power to take into account or that it could reasonably believe that it had lawful power to weigh; and
- (3) reached an outcome that fell within the bounds of reasonable legal judgment.⁵⁸

For constitutional decisions, the foundations underlying legitimacy necessarily lie in current state of affairs.⁵⁹ In this context, “if a precedent is accepted as a legally valid source of authority for future decisions, then it enjoys legal legitimacy, regardless of its relation to the original understanding of constitutional language.”⁶⁰

Having discussed legal legitimacy conceptually, the next question to be asked is how is the legal legitimacy of assertions of judicial power measured? Fallon offers three claims. First, the legally authoritative status of judicial precedence recognizes the legitimacy of courts to uphold rights which were not historically recognized under relevant constitutional language.⁶¹ While precedent-based decision-making is accepted as a matter of practical and jurisprudential significance,⁶² its lawful status, particularly when precedents were initially erroneous, must arise from acceptance.⁶³ Thus, “the practice of judges in embracing precedent as deserving of enforcement and sometimes extension, when conjoined with the public’s acceptance of precedent-based decisions as legally authoritative, suffices to confer legal legitimacy on adherence to and reasonable extension of non-originalist precedent.”⁶⁴ Again, by way of example, the Court in *Estrada* extended the precedent in *Gonzales v. Hernandez*⁶⁵ by proffering the totality test as a mode of

58. *Id.*

59. *Id.* at 1852. Stating that “the foundations of contemporary constitutional legitimacy necessarily lie in current states of affairs.” *Id.*

60. *Id.*

61. Fallon, Jr., *supra* note 7, at 1821.

62. This is the doctrine of *stare decisis* (the law of the case) that contributes to the institutional stability of the Judiciary. See BLACK’S LAW DICTIONARY 1414 (Bryan A. Garner ed., 1999).

63. Fallon, Jr., *supra* note 7, at 1822-23.

64. *Id.* at 1824.

65. *Gonzales v. Hernandez*, 2 SCRA 228 (1961). The Court held that “[t]o constitute a complete and operative act of resignation, the [public] officer or employee must show a clear intention to relinquish or surrender his position.” *Id.* at 232.

establishing Estrada's resignation.⁶⁶ Using this standard, the totality test must be upheld as legally legitimate.

Second, "reliance on precedent to justify the extension of constitutional rights beyond their historically understood contours suggests how shallow the notion of acceptance can be."⁶⁷ While the legal legitimacy of the courts' role rests largely on public acceptance, the fact that the majority of the public may not have accepted courts' assertion of authority, i.e., most people have not risen up in protest of a particular decision, acceptance in the very weak sense is sufficient.⁶⁸

Third, "many claims of legal illegitimacy are best understood as maintaining that particular decisions — even if supported by precedent — are so morally objectionable that they should be deemed abuses of power and classified as constitutionally illegitimate for that substantially moral reason."⁶⁹ This standard exemplifies the interconnection between legal and moral legitimacy.⁷⁰

B. Sociological Legitimacy

A judicial decision's legitimacy in sociological terms is measured insofar as the "relevant public regards it as justified, appropriate, or otherwise deserving of support for reasons beyond fear of sanctions or mere hope for personal reward."⁷¹ It is essentially the active belief by citizens, whether warranted or not, that courts' claimed authority deserves respect or obedience for reasons beyond self-interest.⁷²

There are at least three types of sociological legitimacy.⁷³ The first is institutional legitimacy whereby the "legitimacy resides in public beliefs that it is a generally trustworthy decision maker whose rulings therefore deserve

66. *Estrada*, 353 SCRA at 496.

67. Fallon, Jr., *supra* note 7, at 1824.

68. There is acceptance in the very weak sense when most people have not risen in protest. See Fallon, Jr., *supra* note 7, at 1825 (citing CHARLES E. BLACK, JR., *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN DEMOCRACY* 210 (1960 ed.)).

69. *Id.* at 1827.

70. *Id.*

71. *Id.* at 1795.

72. *Id.*

73. *Id.* at 1828.

respect or obedience.”⁷⁴ The second is substantive legitimacy or “content legitimacy” referring to the “public’s belief that a particular judicial decision is substantially correct.”⁷⁵ Last is authoritative legitimacy which pertains to the legitimacy possessed by decisions “insofar as the public either believes that they ought to be obeyed or acquiesces [to] them.”⁷⁶

For purposes of advancing the understanding of judicial legitimacy, social scientists have studied the interrelationships between the three types of sociological legitimacy.⁷⁷ In a recent study, scientists found that “although [the] *Court’s institutional legitimacy varies with public responses to particular rulings*, it does so less sharply than earlier, less sophisticated studies had indicated.”⁷⁸ Conclusively, Fallon suggests that the Supreme Court seems to “possess a reservoir of trust that is not easily dissipated.”⁷⁹ With regard to the authoritative legitimacy of judicial decisions, American experience has shown that this type of legitimacy is relative, rather than absolute,⁸⁰ meaning “[t]he authoritative sociological legitimacy of judicial rulings is ultimately a matter of fact, capable of either evolutionary or revolutionary change regardless of the Court’s pronouncements.”⁸¹

Admittedly, there is no reliable gauge of the effective limits of judicial power when measured through the Court’s sociological legitimacy in the U.S.⁸² Thus, when a significant part of the American public disagrees with the Court on salient issues, they tend to support political candidates who pledge to change the Court’s ideological balance.⁸³ In fact, U.S. presidential candidates have campaigned against unpopular claims of judicial authority and have promised to appoint Justices who are more “right-thinking.”⁸⁴ It is therefore possible that as a result of the U.S. Court’s concern for its own sociological legitimacy, “it has seldom remained dramatically at odds with arouse[d] public opinion for extended periods ... [showing that] the Justices

74. Fallon, Jr., *supra* note 7, at 1828.

75. *Id.*

76. *Id.*

77. *Id.* at 1828-29.

78. *Id.* at 1829.

79. *Id.*

80. Fallon, Jr., *supra* note 7, at 1831.

81. *Id.* at 1832.

82. *Id.*

83. *Id.* at 1833.

84. *Id.*

undoubtedly are influenced by popular political movements and by the evolving attitudes of their society.”⁸⁵

C. Moral Legitimacy

Legitimacy used in the moral sense pertains to moral justifiability or respect-worthiness. This means that even if a judicial decision is legally correct, it may be illegitimate under a moral concept if morally unjustified.⁸⁶ Conversely, “a judicial decision might be erroneous under a strict matter of law, yet morally justified.”⁸⁷

Like legal legitimacy, “the moral legitimacy of judicial action is sometimes detached appraisals of permissibility, not endorsements of correctness.”⁸⁸ This implies that a decision need not be optimal or morally correct to be morally legitimate provided that it falls within a morally acceptable range.⁸⁹ Charges of moral illegitimacy therefore imply that a court has breached clear and important moral norm.⁹⁰

To further develop the moral legitimacy of judicial power, Fallon provides three controversial opinions on moral legitimacy —

- (1) “The moral importance of situation would have justified the Court in appealing less to the letter of positive law.”⁹¹ This arises from the premise that the judge’s promise of fidelity to law possesses moral relevance, as well the Court’s interest in “preserving legal continuity and a ‘government of laws, and not of men.’”⁹²
- (2) “Questions of moral legitimacy of Justices ‘disobey[ing] the law of their country’ ... hold little prominence in contemporary constitutional debates.”⁹³ This results from the American experience where two centuries worth of practice and precedent have created a situation in which Supreme Court Justices can reasonably

85. *Id.*

86. Fallon, Jr., *supra* note 7, at 1796.

87. *Id.* at 1837.

88. *Id.* at 1834.

89. *Id.*

90. *Id.*

91. *Id.* at 1835.

92. Fallon, Jr., *supra* note 7, at 1835.

93. *Id.* at 1837.

accommodate almost any perceived exigency without overstepping the bounds of legal legitimacy.⁹⁴

- (3) “Considerations of moral legitimacy recurrently shape judgments concerning the legal legitimacy of controversial assertions of judicial power.”⁹⁵ This flows from the ongoing debate of whether it is morally legitimate for the court to engage in “[j]udicialization of politics[”] wherein the court substitute[s] its judgments reached by another, often more democratically accountable, institution.⁹⁶

D. The Philippine Standard

1. Legal Legitimacy

The Constitution is the fundamental law of the land.⁹⁷ Because of this character, “its interpretation must be constrained by the values of the rule of law, which means that the court must construe it through a process of reasoning that is replicable, that remains fairly stable, and that is consistently applied.”⁹⁸ This standard implies that substantive legitimacy of judicial rulings must reflect, at the very least, the Constitution’s spirit and intent.

Because the Supreme Court is mandated by the Constitution to exercise judicial power as a means of checking “against all powers of the government without exception,”⁹⁹ the Court necessarily thrives on judicial activism.¹⁰⁰ Judicial activism is defined as the “philosophy of judicial decision making whereby judges allow their personal views about public policy, among other factors, to guide their decisions.”¹⁰¹ In terms of constitutional interpretations, the Court is empowered to treat the Constitution as a “living document” by adapting the Constitution’s broad provisions and interpreting them in light of economics, social, and cultural developments.¹⁰² Nevertheless, even with an “activist” Judiciary, the Philippine Supreme Court recognizes the role of precedent decision-making in “[assuring] stability in legal relations and

94. *Id.* at 1837-38.

95. *Id.* at 1839.

96. *Id.*

97. *Lambino v. Commission on Elections*, 505 SCRA 160, 408 (2006).

98. Agabin, *supra* note 2, at 13 (citing Robert Post, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY AND MANAGEMENT* 30 (1995)).

99. *Id.* at 9 (citing 3 *RECORD OF THE CONSTITUTIONAL COMMISSION* 645-46).

100. *Id.* at 5.

101. *BLACK’S LAW DICTIONARY*, *supra* note 63, at 850.

102. Agabin, *supra* note 2, at 10.

[avoiding] confusion ... [To do so, the Court] has to speak with one voice. It does so with finality, logically, and rightly, through the highest judicial organ, this Court."¹⁰³ For the Court to speak with one voice implies consistency, symmetry, and logic in its decisions.¹⁰⁴

In the Motion for Reconsideration of *De Castro v. Judicial Bar Council*,¹⁰⁵ the Court clarified the place of precedents in an activist Court, to wit:

*The Court, as the highest court of the land, may be guided but is not controlled by precedent. Thus, the Court, especially with a new membership, is not obliged to follow blindly a particular decision that it determines, after re-examination, to call for a rectification. The adherence to precedents is strict and rigid in a common-law setting like the United Kingdom, where judges make law as binding as an Act of Parliament. But ours is not a common-law system; hence, judicial precedents are not always strictly and rigidly followed. A judicial pronouncement in an earlier decision may be followed as a precedent in a subsequent case only when its reasoning and justification are relevant, and the court in the latter case accepts such reasoning and justification to be applicable to the case. The application of the precedent is for the sake of convenience and stability.*¹⁰⁶

Following this reasoning, the Court's recent "one-step forward, one-step backward" decisions¹⁰⁷ are legitimate, as a matter of law, even if the decisions "ha[ve] adversely affected [the Court's] ability to convince the relevant public that its rulings are based on legal principle rather than partisan preferences or even personal interests."¹⁰⁸

Rationally, an appropriate standard for determining the legal legitimacy of assertions of judicial power is the Court's consistency in applying precedents. Nevertheless, as pointed out by Fallon, precedent-based decisions must first and foremost be publicly accepted as legally authoritative before precedent-based decision-making is accepted as lawful. This was indirectly demonstrated when the Court in *Estrada* modified and contentiously applied the precedent set by *Gonzales*. Nevertheless, it did not render *Estrada* illegitimate. This implies that while there is a general public

103. *Id.* at 13 (citing *Barrera v. Barrera*, 34 SCRA 98 (1970)).

104. *Id.*

105. *De Castro v. Judicial Bar Council*, G.R. No. 191002, Apr. 20, 2010.

106. *Id.* (emphasis supplied).

107. *De Castro*, G.R. No. 191002; *Nicolas*, 578 SCRA 438; *Province of North Cotabato v. Government of the Republic of the Philippines Peace Panel on Ancestral Domain (GRP)*, 568 SCRA 402 (2008); *Neri*, 549 SCRA 77.

108. Agabin, *supra* note 2, at 12-13.

acceptance of the authoritative legitimacy of precedent-based decisions, this standard is a weak measurement for establishing the legal legitimacy of a constitutional law decision.

2. Sociological Legitimacy

As correctly observed by Dean Agabin, the legitimacy of the Supreme Court's constitutional decisions is primarily measured by its sociological and moral legitimacy.¹⁰⁹ Thus,

even when justification is furnished by apposite legal principle, something more is required. Because not every conscientious claim of principled justification will be accepted as such ... the court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.¹¹⁰

Dean Agabin's observation rests on the premise that Filipino society's verdict in constitutional cases depend more on "whether public opinion ultimately support the outcome than on the quality of legal reasoning or the craftsmanship of the Court's opinion."¹¹¹ More than public support for the outcome of Court's opinion, the Philippine experience suggests that the practical implications of the judicial decision must be acceptable or *katanggap-tanggap*, at the very least, regardless of the quality of legal reasoning. This was evident in *Estrada* where, despite the majority's reasoning,¹¹² the acceptance by the public of Arroyo as the successor of Estrada¹¹³ essentially legitimized the Court's decision. The standard of acceptability or "*kung katanggap-tanggap*" as a measure of a decision's sociological legitimacy does not mean acquiescence by the public to the decision itself (authoritative legitimacy as proposed by Fallon) but the acquiescence by the public to the propriety of the decision's *implications*. This proposed practical notion of acceptability reflects the public's lack of legal sophistication.

109. *Id.* at 4.

110. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 865 (1992).

111. Agabin, *supra* note 2, at 4.

112. *Legitimizing the Illegitimate*, *supra* note 32.

113. *Id.*

3. Moral Legitimacy

In his Article on Filipino Legal Philosophy, Prof. Eugenio H. Villareal suggests that Filipinos view law as “inseparable from morality.”¹¹⁴ For Filipinos, the law is “essentially an *expression* of what is good and simultaneously, *a means to achieve* what is good.”¹¹⁵ Thus, any attempt by the Court to lock out morality or *what is good* in its decisions is repugnant to Filipino society. Anything short of the legal norms is viewed as anti-human and anti-Filipino.¹¹⁶ To illustrate, *Oposa v. Factoran, Jr.*¹¹⁷ has been accepted and celebrated as a hallmark case,¹¹⁸ notwithstanding its arguably shaky legal premises, because people agree with its moral justification.¹¹⁹ Observably, there is no reliable gauge of judicial power when measured through the Court’s moral legitimacy in the Philippines.

4. A Filipino-Based Standard

From the foregoing discussion, the Authors proffer that determining legal legitimacy of a constitutional cases decided by the Philippine Supreme Court depends more on socio-political implications of *acceptability* or “*kung katanggap-tanggap*” than the quality of legal reasoning. As explained, this is an expanded version of Fallon’s theory of authoritative concept under sociological legitimacy. This framework shall be used to analyze recent controversial constitutional cases rendered by the Puno Court.¹²⁰

114. Eugenio H. Villareal, *Filipino Legal Philosophy and its Essential Natural Law Content (A Concurrence in the Absolute with Aquinas, Finnis, and Fuller)*, 50 Ateneo L.J. 294, 298 (2005).

115. *Id.* at 299 (emphasis supplied).

116. *Id.* at 312.

117. *Oposa v. Factoran, Jr.*, 224 SCRA 792 (1993). The Court justified petitioners-minors personality to sue on behalf of their generation “as well as generations yet unborn ... based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned.” Said right considered the “rhythm and harmony of nature.” *Id.* at 802-03.

118. The doctrine of intergenerational responsibility has since been incorporated into “citizen suits” under the recently promulgated Rules of Procedure for Environmental Cases. See RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, A.M. No. 09-6-8-SC, rule II, § 5, Apr. 29, 2010.

119. Agabin, *supra* note 2, at 4.

120. *Id.* at 3. In his speech, Dean Agabin recognized that while the Puno Court covered the period from December 2006 up to May 2010, its philosophy will bear the stamp of the Chief Justice well before and long after his term. *Id.*

III. ISSUES

A. *The ZTE-NBN Controversy*

In her 2006 State of the Nation Address, President Gloria Macapagal-Arroyo spoke of a Cyber Corridor Initiative to enhance the competitive advantage of the natural super regions of the Philippines.¹²¹ Thus, a National Broadband Project (NBN Project) was initiated to boost telecommunications, technology, and education.¹²² The NBN Project was to be financed by the People's Republic of China while the equipment and services, approximately totaling ₱16,000,000,000.00, were to be supplied by the Zhing Xing Telecommunication Equipment (ZTE).¹²³

In light of the NBN Project, the Senate commenced investigations in aid of legislation, stating that they were relevant to three pending bills in the Senate.¹²⁴ Initiating the investigation, Senate Committees on Accountability of Public Officers and Investigations, Trade and Commerce, and National Defense and Security invited certain personalities and cabinet officials involved in the NBN Project, including former National Economic Development Authority (NEDA) Sec. Romulo Neri (Neri).¹²⁵ However, when the Senate Committees probed Neri further on his conversation with President Arroyo regarding the bribery attempt of Commission on Elections (COMELEC) Chair. Benjamin Abalos, Neri refused to answer, invoking "executive privilege;"¹²⁶ "in particular, he refused to answer the questions on (a) whether GMA followed up on the NBN Project; (b) whether she directed him to prioritize it; and (c) whether she directed him to approve it."¹²⁷ Since then, Neri failed to appear and testify in the Committee's hearing on 18 September 2007, 20 September 2007, 25 October 2007, and 20 November 2007.¹²⁸ In a Letter dated Nov. 15, 2007, *Executive Secretary Eduardo Ermita requested the Senate Committees to dispense with Neri's testimony on the ground of executive privilege, [considering that], the information sought to be disclosed might impair*

121. Pres. Gloria Macapagal-Arroyo, Address at the 2006 State of the Nation Address (July 24, 2006), available at http://www.congress.gov.ph/download/13th/sona06_gma.pdf (last accessed May 22, 2010).

122. *Id.*

123. *Neri*, 549 SCRA at 103.

124. *Id.* at 104.

125. *Id.* at 105.

126. *Id.*

127. *Id.* at 105-06 (emphasis supplied).

128. *Id.* at 109.

Philippine diplomatic and economic relations with China.¹²⁹ Unsatisfied with Neri's explanation on why he should not be cited in contempt, the Senate Committees issued an Order on 8 February 2008, citing Neri in contempt and ordering his arrest and detention.¹³⁰ By way of a petition for certiorari with the Supreme Court, Neri challenged the Show Cause Letter and Contempt Order issued by the Senate Committees alleging they committed grave abuse of discretion amounting to lack or excess of jurisdiction.

Amidst the tension of the Senate investigations, various sectors, from Catholic bishops to businessmen, went into frenzies, "[i]n the wake of new testimony at the Senate linking top government officials and allies to the lingering corruption scandal [NBN Project],"¹³¹ Catholic bishops were divided over whether to push for a protest rally,¹³² while the Catholic Bishops' Conference of the Philippines urged the President to abolish Executive Order (E.O.) No. 464¹³³ to allow officials, including Neri, to reveal further details on the NBN deal; they were steadfast in saying that a call for "communal action" did not include an active role in protest rallies organized by the opposition and leftist groups.¹³⁴ Despite differing opinions on the propriety of a rally, the 15 February 2008 rally brought together at least 10,000 people of clashing ideologies.¹³⁵ The rally was touted as "one of the loudest display ... of public outrage over the controversial \$329-million broadband deal."¹³⁶ To put things in perspective, an analysis showed that the demonstrators believed "that the removal of the embargo of E.O. No. 464 would unlock a flood of withheld information on the network deal [expecting] Neri's uninhibited testimony to fling wide open the floodgates of

129. *Neri*, 549 SCRA at 106-07 (emphasis supplied).

130. *Id.* at 109.

131. *Church militants push protest rally*, MANILA STANDARD TODAY, Feb. 13, 2008, at A1 [hereinafter *Church militants*].

132. *Id.*

133. Office of the President, Ensuring Observance of the Principle of Separation of Powers, Adherence to the Rule on Executive Privilege and Respect of the Rights of Public Officials Appearing in Legislative Inquiries in Aid of Legislation Under the Constitution, and for Other Purposes, Executive Order No. 464 (Sep. 28, 2005).

134. Amando Doronila, *Battle arena over NBN shifts to SC*, PHIL. DAILY INQUIRER, Mar. 3, 2008, at A1; *Church militants*, *supra* note 131.

135. DJ Yap & Julie M. Aurelio, *10,000 display outrage*, PHIL. DAILY INQUIRER, Feb. 16, 2008, at A1.

136. *Id.*

derogatory information that could fuel public unrest ... and intensify the momentum for another people power.”¹³⁷

Even educational institutions joined in the public outcry for truth when fierce rivals, Ateneo de Manila University and the De La Salle University, came together to offer Mass and support for Senate star witness Jun Lozada.¹³⁸ As for the business sector, business groups were unanimous in saying that the issue needs to be settled to prevent a possible economic impact.¹³⁹ On 6 March 2008, President Arroyo revoked E.O. No. 464, advising executive officials and employees to follow and abide by the Constitution, existing laws, and jurisprudence when they are invited to legislative inquiries in aid of legislation.¹⁴⁰

By 25 March 2008, the Supreme Court promulgated its decision upholding executive privilege despite the revocation of E.O. No. 464.¹⁴¹ The Court held that the communications elicited by three questions are protected by the “presidential communications privilege and executive privilege on matters relating to diplomacy or foreign relations.”¹⁴² The Court elucidated that the communications elicited by the three questions fall under presidential communications privilege because of the concurrence of the following elements: (1) the communications relate to a “quintessential and non-delegable power” of the President;¹⁴³ (2) under the “operational proximity” test, the communications are received by a close adviser of the President;¹⁴⁴ and (3) “there is no adequate showing of a compelling need that would justify the limitation of the privilege and of the unavailability of the information elsewhere by an appropriate investigating authority.”¹⁴⁵

137. Doronila, *supra* note 134.

138. Kristina L. Alave & Michael Lim Ubac, *Old rivals team up for truth's sake*, PHIL. DAILY INQUIRER, Feb. 17, 2008, at A1.

139. *Business sector wants NBN row settled*, BUS. WORLD, Feb. 18, 2008, at 1.

140. *Neri*, 549 SCRA at 114.

141. *Id.* at 117.

142. *Id.* at 122.

143. *Id.*

144. *Id.* Here, the Court declared that Neri could be considered a “close adviser” of the President considering that he was a member of President Arroyo’s cabinet.

145. *Id.*

Compared with the authoritative case of *U.S. v. Nixon*¹⁴⁶ the information elicited is not in a criminal proceeding, but a legislative inquiry.¹⁴⁷

Notably, the main decision did not receive a unanimous vote from the bench.¹⁴⁸ In fact, Chief Justice Puno, by declaring that “[a] government’s democratic legitimacy rests on the people’s information on government plans and progress on its initiatives, revenues, and spending,”¹⁴⁹ voted against the claim of presidential communications privilege in light of the pertinence of questions propounded and the lack of effective substitute for the information sought.¹⁵⁰ A day after the decision’s promulgation, the Court faced criticism, albeit indirect. For example, a report on the promulgation of the decision opted for the catchy title “SC votes 9-6 for Neri on executive privilege,” emphasizing that “[a] closer look at the favoring justices, however, shows that President Arroyo appointed all, except Quisumbing.”¹⁵¹

Senators Manuel B. Villar, Francis N. Pangilinan, Aquilino Q. Pimentel, Jr., Manuel A. Roxas II, and Maria Ana “Jamby” A. Madrigal-Valade took turns criticizing the decision, stressing that the truth about an anomalous public transaction should not be subverted by the principle of executive privilege.¹⁵² Another news article pointed that *Neri* was “President [Arroyo’s] first major victory in the Supreme Court whose 15 members included 12 she had appointed. The High Court had earlier ruled against her in her effort to gag Cabinet members,¹⁵³ her declaration of a state of national emergency two years ago¹⁵⁴ and tough measures against street protesters.”¹⁵⁵ Of interest is an online article written by the author of the controversial *Shadow of Doubt*,¹⁵⁶ Marites D. Vitug, which accused the Supreme Court

146. *United States v. Nixon*, 418 U.S. 683 (1974).

147. *Neri*, 529 SCRA at 124.

148. *Id.* at 139.

149. *Id.* at 165.

150. *Id.* at 221.

151. Mike Frialde, *SC votes 9-6 for Neri on executive privilege*, PHIL. STAR, Mar. 26, 2008, at 1.

152. *Id.*

153. *See Senate of the Philippines v. Ermita*, 488 SCRA 1 (2006).

154. *See David v. Macapagal-Arroyo*, 489 SCRA 160 (2006).

155. Leila B. Salaverria, *High court upholds Nen*, PHIL. DAILY INQUIRER, Mar. 26, 2008, at A1.

156. *See* MARITES DAÑGUILAN VITUG, *SHADOW OF DOUBT: PROBING THE SUPREME COURT* (2010).

Justices of having pre-determined votes and voting along partisan lines.¹⁵⁷ Notwithstanding this, the decision did not garner as much noise from the public.

In its Motion for Reconsideration,¹⁵⁸ the Court reaffirmed its earlier ruling and emphasized that the operational proximity tests *is not* conclusive in every case, as the main consideration is to limit the availability of executive privilege only to officials who stand proximate to the President, by reason of their function and position in the Executive's organizational structure.¹⁵⁹ Remarkably, only Justice Reyes lambasted Vitug's accusation in his separate opinion.¹⁶⁰ Reports on the Court's decision were less catchy, with senators slamming the ruling by describing it as a "'dark' and 'sad' day for government transparency and accountability."¹⁶¹ There were no other reports on the matter. Today, despite disappointments in the ruling of the Court, *Neri* remains the leading case on executive privilege. The decision, while it remains law, has not hampered the Senate Blue Ribbon Committee from conducting its investigations.¹⁶² On November 2009, the Blue Ribbon Committee came out with its report, concluding its investigation of the NBN-ZTE controversy.¹⁶³

B. *The Aborted MOA-AD*

While peace negotiations between the Philippine government (GRP) and the Moro Islamic Liberation Front (MILF) have been stalled on the contentious issue of ancestral domain since December 2007,¹⁶⁴ a pact was finally drafted to pave the way for a final political settlement to end the 30-

157. Marites Dañguilan Vitug, Inside story: SC justices had pre-determined votes on Neri case, *available at* http://newsbreak.com.ph/index.php?option=com_content&task=view&id=4329&Itemid=88889051 (last accessed May 22, 2010).

158. *Neri v. Senate Committee on Accountability of Public Officers and Investigations*, 564 SCRA 152 (2008).

159. *Id.* at 199.

160. *Id.* at 282 (J. Reyes, separate opinion).

161. Mike Frialde, SC reaffirms gag on Neri, *available at* <http://www.newsflash.org/2004/02/hl/hl107849.htm> (last accessed May 22, 2010).

162. Aurea Calica, Senate committee report on NBN deal out soon, *available at* http://www.philstar.com/microsite/noynoy_aquino_inauguration_2010/article.aspx?articleId=458984&publicationSubCategoryId=63 (last accessed May 22, 2010).

163. Committee Report No. 743, 14th Cong., 3d Sess. (Nov. 11, 2009).

164. Fe Zamora, *Bagsamoro state eyed*, PHIL. DAILY INQUIRER, Aug. 3, 2008, at A1.

year fight by the MILF for an independent Islamic state.¹⁶⁵ However, after a 25 July 2008 closed-door meeting between the GRP and MILF, news of collapsed peace talks following renewed disagreements over the issue of ancestral domain circulated after the MILF, in its website, said its negotiators walked out when the government panel attempted to make changes in the agreement.¹⁶⁶ Mohagher Iqbal, the head of the MILF peace panel, accused the GRP peace panel, led by Rodolfo Garcia, of “undoing” settled issues.¹⁶⁷

Immediately hurling this stumbling block on the peace process, the GRP and MILF panels led by Garcia and Iqbal, respectively, initialed the final draft of the agreement on ancestral domain.¹⁶⁸ According to Exec. Sec. Eduardo Ermita, the initialing would lead to the signing of the Memorandum of Agreement on Ancestral Domain (MOA-AD) on 5 August 2008.¹⁶⁹ However, two days before the scheduled signing of the MOA-AD with the MILF, Iligan and Zamboanga Cities joined North Cotabato in filing a petition for a temporary restraining order (TRO) to stop both parties from forging the accord.¹⁷⁰

A day before the intended signing, local officials and residents of Iligan, Zamboanga, and Kidapawan staged simultaneous rallies, denouncing the inclusion of their territories in the MILF-proposed Bangsamoro Juridical Entity (BJE) without prior consultations.¹⁷¹ On the same day, the Supreme Court ignored a new plea for executive privilege to keep diplomatic negotiations secret and stopped the government from signing the MOA-AD in Malaysia,¹⁷² notwithstanding the political embarrassment the Executive

165. John Unson, *MILF on pact: It's a done deal*, PHIL. STAR, Aug. 6, 2008, at 1.

166. Inquirer Mindanao, *Talks with MILF collapse*, PHIL. DAILY INQUIRER, July 27, 2008, at A1; Edith Regalado & Jaime Laude, *Gov't-MILF talks collapse*, PHIL. STAR, July 27, 2008, at 1.

167. Inquirer Mindanao, *Talks with MILF collapse*, PHIL. DAILY INQUIRER, July 27, 2008, at 1; Edith Regalado & Jaime Laude, *Gov't-MILF talks collapse*, PHIL. STAR, July 27, 2008, at 1.

168. Zamora, *supra* note 164.

169. *Id.*

170. *Province of North Cotabato*, 568 SCRA at 436-37. Roel Pareno, *Zambo, Iligan ask SC to stop GRP-MILF deal*, PHIL. STAR, Aug. 3, 2008 at 1.

171. Rey Panaligan, *SC issues TRO on signing of MoA on ancestral domain*, MANILA BULL., Aug. 5, 2008, at 6.

172. See Leila Salaverria, et al., *SC halts Moroland deal*, PHIL. DAILY INQUIRER, Aug. 5, 2008, at A1 [Salaverria, et al., *SC halts Moroland deal*]; Mike Frialde, *SC stops gov't-MILF land deal*, PHIL. STAR, Aug. 5, 2008, at 1 [hereinafter Frialde, *SC stops gov't-MILF land deal*].

Department had to face in explaining the issuance of a TRO to the Filipino Moro rebels and Malaysian facilitator.¹⁷³ Notably, according to leading constitutionalist Fr. Joaquin G. Bernas, S.J., the MOA-AD is just a piece of paper that does not mean anything and at best, the document is an important preliminary agreement that could lead to a peace deal with the MILF.¹⁷⁴

The issuance of a TRO on the signing of the MOA-AD was welcomed by senators, as well as other political leaders such as former President Estrada and United Opposition leader Jejomar C. Binay, as a “timely intervention by the Supreme Court.”¹⁷⁵ Even Press Sec. Jesus G. Dureza described the TRO as a “relief.”¹⁷⁶ In a statement from Iqbal, the MILF leader said that the MOA-AD was a done deal as the act of initialing the MOA-AD’s agreed text between the parties constitutes the signature of the Philippine government and the MILF.¹⁷⁷ The MILF leader added that the TRO was not binding to the MILF, emphasizing that the “[MILF] does not even recognize the [Supreme Court].”¹⁷⁸

With the task of resolving legal issues surrounding the proposed MOA-AD in the hands of the Supreme Court,¹⁷⁹ several groups trooped to the High Court to express support for or disapproval of the MOA-AD during the public hearing.¹⁸⁰ Lawyer Elly V. Pamatong and 20 members of *Bangon Pilipinas* argued that the MOA-AD had turned over the sovereignty of a part of Mindanao to “state enemy” Malaysia, while about 200 members of the Bangsamoro People Solidarity for Peace led by *Anak Mindanao* Representative Mujiv Hataman demanded “Peace, not war in Mindanao.”¹⁸¹ Meanwhile, in Tacurong city, some 10,000 residents rallied to dramatize

173. Christine O. Avendano, *Red-faced RP execs to explain SC ruling*, PHIL. DAILY INQUIRER, Aug. 5, 2008, at A1.

174. Christian Esguerra, *It’s just a piece of paper — Bernas*, PHIL. DAILY INQUIRER, Aug. 5, 2008 at A1.

175. Frialde, *SC stops gov’t-MILF land deal*, supra note 172.

176. Salaverria, et al., *SC halts Moroland deal*, supra note 172.

177. Unson, supra note 165.

178. *Id.*

179. Rey Panaligan, *SC hears today controversial MoA on Ancestral Domain*, MANILA BULL., Aug. 15, 2008, at 1; Marvin Sy, et al., *Palace: Its all up to the SC*, PHIL. STAR, Aug. 6, 2008, at 1.

180. Leila Salaverria & Edson C. Tandoc, *MOA ‘patently illegal,’* PHIL. DAILY INQUIRER, Aug. 16, 2008, at A1.

181. *Id.*

their opposition to the MOA-AD and urged the government to make public contents of the agreement.¹⁸²

Three days after the first public hearing on the MOA-AD, MILF fighters killed at least 41 people in coordinated attacks in Lanao del Norte and Maasim, Sarangani.¹⁸³ Moro guerillas sprayed gunfire around the towns, hacked civilians with machetes, and torched houses before withdrawing while using residents as human shields against government counter-offensive.¹⁸⁴ Based on individual accounts of MILF hostages, “[the] attack was aimed to voice out the rebels’ disgust over the Arroyo administration’s reneging on its commitment of securing for the Bangsamoro people their homeland as defined in the [MOA-AD].”¹⁸⁵ One hostage added that the rebels gave two reasons for the attack, i.e., to highlight the government’s perceived insincerity in its peace commitments and to rebuke government leaders and politicians opposing the MOA-AD.¹⁸⁶ Unfortunately, despite the flushing out of MILF forces, an air of uncertainty pervaded their towns, pushing families to entertain the idea of relocating with relatives outside their towns.¹⁸⁷

Back in Manila, Malacañang announced on the evening of 21 August 2008 that it would not sign a controversial deal on an expanded Bangsamoro homeland in its present form, as the Administration was reviewing the MOA-AD in light of statements made by several justices.¹⁸⁸ Notwithstanding Malacañang’s categorical statement, lawyers of various parties contesting the proposed MOA-AD remained steadfast in asking the Supreme Court to rule on the constitutionality of the MOA-AD once and for all, saying that a decision now would guide future negotiations so that

182. Paolo Romero, *Gov’t eyes new deal with MILF*, PHIL. STAR, Aug. 16, 2008, at 1.

183. Nikko Dizon, *41 dead in MILF attacks*, PHIL. DAILY INQUIRER, Aug. 19, 2008, at A1.

184. *Id.*

185. Ryan Rosauo, *Rebs mad over aborted MOA signing*, PHIL. DAILY INQUIRER, Aug. 20, 2008, at A1.

186. *Id.*

187. *Id.*

188. Michael Ubag & Leila Salaverria, *Palace: No More MOA*, PHIL. DAILY INQUIRER, Aug. 22, 2008, at A1. For example, according to Justice Carpio and Azcuna, the MOA-AD was patently illegal; Justice Brion said that the provisions are unconstitutional. See Leila Salaverria & Jerome Aning, *SC asked to rule on MOA once and for all*, PHIL. DAILY INQUIRER, Aug. 23, 2008, at A1 [hereinafter Salaverria & Aning, *SC asked to rule on MOA*].

“[the 18 August 2008] bloodshed in Mindanao will not be repeated.”¹⁸⁹ Back on the ground, however, separatist MILF factions refused to renegotiate the controversial MOA-AD with its leaders stating that “[i]f anything, the MILF is readying for war.”¹⁹⁰

With the government junking the MOA-AD with the MILF,¹⁹¹ the government ended 11 years of peace talks with the MILF after the latter refused to surrender commanders blamed for sacking towns in Mindanao and slaughtering scores of civilians.¹⁹² While the case remained pending, Mindanao Muslims and Christians continued assailing the accord,¹⁹³ Moro National Liberation Front (MNLF) Chair. Nur Misuari declared the MNLF will not recognize the agreement between the government and the MILF,¹⁹⁴ and the indigenous people of Mindanao (*lumad*) called for the creation of an Autonomous Region for the Lumad of Mindanao in the light of the proposed Bangsamoro Juridical Entity.¹⁹⁵ Appallingly, the resumption of fighting between the military and the MILF in Mindanao served as the

189. Salaverria & Aning, *SC asked to rule on MOA*, *supra* note 188.

190. Nikko Dizon, *MILF: No renegotiation; ready for war*, PHIL. DAILY INQUIRER Aug. 23, 2008, at A1.

191. Paolo Romero, *Gov't junks MOA with MILF*, PHIL. STAR, Aug. 30, 2008 at 1.

192. Christine Avendano, et al., *GMA scraps peace panel*, PHIL. DAILY INQUIRER Sep. 4, 2008, at A1.

193. *Muslims, Christians slam land agreement*, PHIL. DAILY INQUIRER, Aug. 4, 2008, at A1 (assailants of the accord included Mindanao governors (See Grace Cantal-Albasin, et al., *Palace fails to sway governors*, PHIL. DAILY INQUIRER, Aug. 15, 2008, at A2) and Association of Generals and Flag Officers (See Aris Ilagan, *Group of generals opposes agreement on ancestral domain*, MANILA BULL., Aug. 20, 2008, at 1)).

194. Paolo Romero, *Palace to MILF: Bow to High Court*, PHIL. STAR, Aug. 7, 2008, at 1.

195. Ma. Cecilia Rodriguez, *'Lumad' want self-rule, too*, PHIL. DAILY INQUIRER, Aug. 26, 2008, at A1.

controversy's socio-political background¹⁹⁶ when the Supreme Court declared the ancestral domain deal unconstitutional.¹⁹⁷

With a vote of 8–7 on the petition of officials of the Province of North Cotabato, Iligan City, and Zamboanga City, the Court declared the MOA-AD illegal and unconstitutional, and the process that led to its crafting “whimsical, capricious, oppressive, arbitrary, and despotic.”¹⁹⁸ Malacañang did not appeal the decision.¹⁹⁹ Today, another peace accord is still in the horizon as the GRP and MILF continue on with their negotiations in the hopes of putting an end to a long-running peace dispute in Mindanao.²⁰⁰

C. *The Subic Rape Case*

A highly publicized controversy between a Filipina and an American broke out in November 2005, eliciting strong reactions from women activists and the resurrection of the controversy over the Visiting Forces Agreement (VFA).²⁰¹ Suzette Nicolas, known as “Nicole,” accused U.S. Marine Lance Corp. Daniel Smith of raping her while inside the Subic Bay Freeport.²⁰² On December 2005, Judge Benjamin T. Pozon of the Regional Trial Court of Makati convicted Daniel Smith for the crime of rape and sentenced him

196. Other events that happened are: 136 congressmen voted for a renegotiation of the MOA with the MILF (See Delon Porcalla, *136 congressmen want MOA with MILF renegotiated*, PHIL. STAR, Aug. 15, 2008, at 1); the Malaysian Prime Minister expressed disappointment over President Arroyo's decision to junk the controversial territorial agreement with the MILF (See Paolo Romero, *Malaysian PM disappointed over failed MOA between RP gov't and MILF*, PHIL. STAR, Sep. 15, 2008, at 2).

197. Mike Frialde, *SC declares ancestral domain deal 'unconstitutional'*, PHIL. STAR, Oct. 15, 2008, at 12.

198. Norman Bordadora, *SC: Moro land deal illegal*, PHIL. DAILY INQUIRER, Oct. 15, 2008, at A1.

199. David Cagahastian, *Gov't won't appeal SC ruling on MoA-AD*, MANILA BULL., Oct. 16, 2008, at 1.

200. Delon Porcalla, *Peace talks with MILF to resume after Ramadan*, available at <http://www.philstar.com/Article.aspx?articleId=597097&publicationSubCategoryId=63> (last accessed May 22, 2010).

201. Julie M. Aurelio, *Nicole recants, clears Smith*, PHIL. DAILY INQUIRER, Mar. 18, 2009, at A1.

202. *Id.*

to *reclusion perpetua*, to be served in the facilities that shall be agreed upon by the appropriate Philippine-US authorities.²⁰³

In light of his conviction, Daniel Smith was immediately detained in the Makati City Jail. Washington, protesting the decision of Pozon, cancelled the *Balikatan* military exercises on 22 December 2005.²⁰⁴ President Arroyo “bewailed” the cancellation of the joint military exercises as she saw it as “setback” to the security alliance between the Philippines and the U.S.²⁰⁵ Four days later, Smith was transferred back to the U.S. Embassy late at night and without any court order to “repair the ‘rapidly eroding relationship’ with the U.S.”²⁰⁶ The transfer drew public outrage with militant groups marching before the U.S. embassy,²⁰⁷ burning the U.S. flag,²⁰⁸ and accusing the Philippine government as being a colonial slave to its U.S. master.²⁰⁹ Some women activists²¹⁰ staged demonstrations near the U.S. Embassy and wished Smith better health so he could serve his sentence in a Philippine jail and demanded regular reports and “evidence” from the Philippine and U.S. governments to prove that Smith was still being held in the U.S. Embassy compound.²¹¹

By the second day of the new year (January 2006), the U.S. announced the resumption of the *Balikatan* military exercises with Philippine troops.²¹² Unrelenting, the Senate recommended to President Arroyo to abrogate the VFA following the U.S.’s refusal to hand over Smith and his three

203. Ferdinand Fabella & Joyce Pangco Panares, *Embassy announces return of war games*, MANILA STANDARD TODAY, Jan. 3, 2006, at A1.

204. *Id.*

205. Genalyn D. Kabling, *GMA laments US cancellation of Balikatan 2007*, MANILA BULL., Dec. 24, 2005, at 1.

206. Fabella & Panares, *supra* note 203.

207. *Id.*

208. *Id.*

209. *Id.* According to Virgie Pinlac, one of the leaders of the militant women’s group Kaisaka, “[*bowing*] to US pressure on the issue of custody of convicted rapist Smith is proof that the Philippines remains a colonial slave to its US master.” *Id.* (emphasis supplied).

210. One of them was Partido ng Manggagawa (Worker’s Party).

211. Tina Santos, Women activists wish Smith good health in protest rally, *available at* <http://www.inquirer.net/specialfeatures/subicrapcase/view.php?db=1&article=20070425=62494> (last accessed May 22, 2010).

212. Fabella & Panares, *supra* note 203.

companions to local authorities.²¹³ Nevertheless, the move to scrap the VFA was deferred when the U.S. expressed willingness to negotiate the issue of custody with Department of Foreign Affairs Sec. Alberto G. Romulo.²¹⁴

On 19 December 2006, Secretary Romulo and U.S. Ambassador to the Philippines Kristie A. Kenney executed the Romulo-Kenney Agreement paving the way for the return of Smith to U.S. Military custody at the U.S. Embassy in Manila.²¹⁵ On 3 January 2007, the Court of Appeals dismissed Smith's petition questioning Pozon's decision to confine him at the Makati City Jail, because the petition had become moot.²¹⁶ The appellate court's decision also upheld Pozon's decision to jail Smith in Makati pending an agreement between Philippine and U.S. authorities on where he should be detained, noting the Romulo-Kenney agreement on Smith's detention at the U.S. embassy.²¹⁷ Malacañang, for its part, announced that it was bent on reviewing the VFA.²¹⁸ The U.S. embassy, however, said that a review of the VFA would be premature considering that Smith's case was still ongoing.²¹⁹

To clarify the Court of Appeals' decision, "Nicole" filed a petition for certiorari and review, amending her original petition to the Supreme Court seeking to declare Article 6, Paragraph 5 of the VFA unconstitutional.²²⁰ In its February 2009 decision,²²¹ the Court reiterated its previous ruling on the constitutionality of the VFA,²²² but declared the Romulo-Kenney Agreement as unconstitutional, relying on the VFA provision that the detention shall be carried out in facilities agreed on by both parties and carried out by Philippine authorities.²²³ Thus, according to the Court, Smith

213. Christina Mendez, *Senate votes to terminate VFA*, PHIL. STAR, Jan. 20, 2006, at 1.

214. Roy Pelovello, *VFA termination on hold as US softens on custody*, MANILA STANDARD TODAY, Feb. 10, 2006, at 1; Marvin Sy, *Oversight committee defers call for VFA abrogation*, PHIL. STAR, Feb. 10, 2006, at 5; Philip Tubeza, *Lawmakers defer scrapping of VFA*, PHIL. DAILY INQUIRER, Feb. 10, 2006, at A1.

215. Charissa M. Luci, *2 officials cite RP's treaty obligations under Visiting Forces Agreement*, MANILA BULL., Dec. 21, 2006, at 1.

216. Paolo Romero, *RP seeks review of VFA*, PHIL. STAR, Jan. 5, 2007, at 1 [hereinafter Romero, *RP seeks review of VFA*].

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Nicolas*, 578 SCRA 438.

222. *Id.* at 461-62.

223. *Id.* at 464-65.

should be held in a Philippine-run facility while awaiting the result of his appeal.²²⁴

In applying the provisions of the VFA, the Court held that there is a different treatment when it comes to detention as against custody, i.e., detention shall be carried out in facilities agreed on by authorities of both parties and shall be “by Philippine authorities.”²²⁵ Therefore, since the Romulo-Kenney Agreements provided for the detention of the accused in the United States Embassy, the Agreements were not in accord with the VFA itself. Consequently, the Court ordered a renegotiation of an agreement on detention facilities under Philippine authorities.²²⁶

The Court’s ruling was hailed as a “triumph of justice” by lawmakers and urged American authorities to respect the ruling.²²⁷ *Akbayan* Party List Rep. Risa Hontiveros-Baraquel opined that “[b]y turning over [to] Philippine authorities, the Supreme Court is sending a strong message that all those who abuse our women, whoever they may be and whatever rank they may hold, will find no cover anywhere.”²²⁸ Pertaining to the ruling regarding the constitutionality of the VFA, women activist and Gabriela Party List Rep. Liza L. Maza opined that it was “an affront to women and the country’s sovereignty.”²²⁹ In her statement, Maza said that the decision virtually gave the U.S. a free hand in dealing with criminal offenders from the U.S. military, dimming the hopes for attaining justice for women and children victims of abuse and violence and other human rights victims. As for Harry L. Roque, a professor in International Law, the decision translated to the weakening of the Court’s power to annul “all acts done by the government that violated the will of the people as expressed in our Constitution.”²³⁰ Notably, the U.S. Embassy simply noted the decision.²³¹ As for the Philippine government, Executive Secretary Eduardo R. Ermita

224. Aurelio, *supra* note 201.

225. *Nicolas*, 578 SCRA at 464.

226. *Id.* at 465.

227. Lira Dalangin-Fernandez, Solons hail SC ruling on Smith custody, *available at* <http://www.inquirer.net/specialfeatures/subicrapecase/view.php?db=1&article=20090212-188792> (last accessed May 22, 2010).

228. *Id.*

229. *Id.*

230. Norman Bordadora, *Mr. Smith goes to prison*, PHIL. DAILY INQUIRER, Feb. 12, 2009, at A1.

231. Edu Punay, *SC orders transfer of US Marine rapist to RP Jail*, PHIL. STAR, Feb. 12, 2009, at 1.

pointed out that the decision upholding the constitutionality of the VFA was welcome to both the Philippine and U.S. governments.²³² As the U.S. government cannot just be compelled to abide by the Court's decision, President Arroyo assured the public that the Philippine government will bring the custody issue across to U.S. authorities.²³³

Despite the ruling, the Philippine government failed to secure Smith from the U.S. embassy and transfer him to a local facility.²³⁴ Indicative of the government's inability to assert its sovereignty, Deputy Presidential Spokesperson Lorelei Fajardo clarified that "[a]s much as we would like to uphold the Supreme Court decision, what's important is we still have to take into consideration the existing agreement which is the VFA"²³⁵ emphasizing that while the government would continue to support "Nicole," the Subic rape case is a different matter from the VFA.²³⁶ Surreptitiously, a few days before Malacañang talked about a compromise on the issue on Smith,²³⁷ "Nicole" recanted her allegations against Smith.²³⁸ Thus, the Court's decision regarding Smith's transfer to a Philippine-run facility became moot before it was enforced as the Court of Appeals acquitted Smith.

D. The Appointment of the Chief Justice

Under the Constitution, a President or Acting President shall not make appointments two months immediately before the next presidential elections and up to the end of his term, except temporary appointments to executive positions when continued vacancies therein will prejudice public service or endanger public safety.²³⁹ In the Judiciary, members of the Supreme Court and judges of lower courts can only hold office until they reach the age of seventy years or become incapacitated.²⁴⁰ Since Chief Justice Puno's 70th birthday falls on 17 May 2010, his impending retirement fell within the constitutional ban on Presidential appointments during a presidential election year.²⁴¹ Mid-January, the Judicial and Bar Council unanimously agreed to

232. *Id.*

233. *Id.*

234. Marvin Sy, *Compromise on Smith seen*, PHIL. STAR, Mar. 17, 2009, at 1.

235. *Id.*

236. *Id.*

237. *Id.*

238. Aurelio, *supra* note 201.

239. PHIL. CONST. art. VII, § 15.

240. PHIL. CONST. art. VII, § 11.

241. *De Castro*, G.R. No. 191002.

start the process of filling up the shortlist of nominees for the next chief justice. According to Malacanang, this was an implied recognition by the JBC of the authority of the President to appoint the replacement for Chief Justice Puno.²⁴² Accordingly, the JBC announced the opening of the position for applications or recommendations.²⁴³

The issue brought forth criticisms, mostly from political aspirants. For one, then presidential aspirant and future president Sen. Benigno “Noynoy” C. Aquino III warned members of the Supreme Court that he will not recognize any of them who would accept an appointment as Chief Justice from the outgoing President.²⁴⁴ Former JBC consultant and retired Justice Josue N. Bellosillo, however, reassured the public that despite the fact that the Supreme Court is composed of Arroyo appointees, the Court as a collegial body has acted very independently as they have taken positions contrary to the position of the President in so many constitutional issues.²⁴⁵ Bellosillo added that the Supreme Court decision on Ancestral Domain issue in late 2008 is one of the best examples showing the Court’s independence.²⁴⁶ As for constitutionalist Fr. Bernas, he opined that the next President after the May elections should be the one to appoint the next chief justice.²⁴⁷

To finally settle the dispute, the controversy was brought to the Supreme Court. In its decision, the Court held that the ban on Presidential appointments does not apply to the Judiciary. A day after the Court’s decision, at least four major newspapers²⁴⁸ splashed in their front page that President Arroyo had authority to appoint the next Chief Justice. While Malacañang lauded the decision as a “victory of the Constitution and the Filipino people” and expressed hope the public would respect the decision of the high tribunal, Senator Pimentel, Jr., among others, was the first to express dismay over the ruling.²⁴⁹ Notably, the ruling whipped up a storm of

242. Aytch dela Cruz & Benjamin B. Pulta, *Palace says JBC concedes to Gloria power to name CJ*, THE DAILY TRIBUNE, Jan. 19, 2010, at 1.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. Norman Bordadora, *Bernas: GMA appointing CJ may destroy SC credibility*, PHIL. DAILY INQUIRER, Jan. 23, 2010, at A1.

248. They are the Philippine Star, Manila Bulletin, Philippine Daily Inquirer, and Manila Standard Today.

249. Edmer F. Panesa, *SC: GMA can appoint CJ*, MANILA BULL., Mar. 18, 2010, at 1.

protest and expressions of indignation from politicians, legal personalities (including former Chief Justice Artemio V. Panganiban),²⁵⁰ and the private sector, such as the Makati Business Club, denouncing the ruling as unconstitutional.²⁵¹

Presidential candidates, like former President Estrada, said that “[Arroyo’s] father [Pres. Diosdado P. Macapagal] did much better” and Senator Aquino claimed that the Arroyo government is worse than Marcos.²⁵² Effigies of the Justices were burned by a group known as Sagip Korte Suprema.²⁵³ Others such as a militant group of fisherfolk joined the frenzy by proposing that President Arroyo extend Chief Justice Puno’s term until June 30 while *Pambansang Lakas ng Kilusang Mamamalakaya ng Pilipinas* (Pamalakaya) suggested that the President appoint Associate Justice Antonio T. Carpio until June 30.²⁵⁴ Of interest, Tagbilaran Bishop Leonardo Y. Medroso called on the faithful to pray that President Arroyo will responsibly choose the next Chief Justice,²⁵⁵ a seemingly indirect recognition of the Court’s decision.

On 20 April 2010, the Supreme Court denied with finality an appeal to reverse the March 17 decision.²⁵⁶ The ruling did not invite further criticism from the public. In a subsequent interview, however, Justice Renato C. Corona revealed with dismay that former Ombudsman Simeon V. Marcelo, a partner of “The Firm,”²⁵⁷ was behind *Sagip Korte Suprema*, a “very noisy” group behind an advertisement that questioned his “moral ascendancy” to lead the Court.²⁵⁸ As of this writing, President Arroyo had appointed Justice Renato Corona as the next Chief Justice.²⁵⁹ While the announcement of his

250. Artemio V. Pangilinan, *Midnight chief justice*, PHIL. DAILY INQUIRER, Mar. 28, 2010, at A13.

251. Edu Punay, *SC: Just file your appeal*, PHIL. STAR, Mar. 19, 2010, at 1.

252. *Id.*

253. *Corona cries, blames the Firm for attacks on Supreme Court*, MANILA STANDARD TODAY, Apr. 21, 2010, at A1.

254. *SC: President can appoint CJ without JBC list in extreme case*, PHIL. STAR, Mar. 21, 2010, at 1.

255. Panesa, *supra* note 249.

256. *De Castro*, G.R. No. 191002.

257. Villaraza Cruz Marcelo & Angangco (CVC) was the law firm of Justice Carpio.

258. *Corona cries, blames the Firm for attacks on Supreme Court*, *supra* note 253.

259. TJ Burgonio, *Arroyo: Corona is next Chief Justice*, available at <http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20100513-269655/Arroyo-Corona-is-next-Chief-Justice> (last accessed May 22, 2010).

appointment was relatively peaceful, President-elect Noynoy Aquino was vocal about his disapproval of the appointment.²⁶⁰ Nevertheless, the President Aquino and the public have reached a general consensus on the legality and acceptability of Chief Justice Corona's appointment.²⁶¹

IV. ANALYSIS

Having laid the groundwork for the analysis (i.e., the political and social scenario surrounding the constitutional controversies), this Discussion will apply the proposed Filipino standard in evaluating the legitimacy of these constitutional decisions.

Supreme Court decisions become part of the law of the land, by operation of law.²⁶² A ruling, regardless of the quality of its reasoning or the ingeniousness of its craftsmanship will always be legally sound unless the Court overturns itself in a subsequent decision. Thus, it has often been opined that hard cases make bad law.²⁶³ Suffice it to say, this discussion will not delve into the quality of the Court's reasoning.

On the one hand, in deciding the cases of *Province of North Cotobato v. Government of the Republic Peace Panel on Ancestral Domain*, *Neri v. Senate Committee on Accountability of Public Officers and Investigations*, and *Nicolas v. Romulo*, the Court exercised its duty to check unconstitutional exercises of political power.²⁶⁴ *De Castro v. Judicial Bar Council*, on the other hand, was an exercise on the Court's authority to interpret the Constitution.²⁶⁵

In *Province of North Cotobato*, the Court struck down the negotiated agreement between the Executive and the Moro Islamic Liberation Front (MILF) as unconstitutional in *Province of North Cotobato* despite a categorical

260. Delon Porcalla, Noynoy may not take oath before Corona, *available at* <http://www.philstar.com/Article.aspx?articleid=575061> (last accessed May 22, 2010).

261. Genalyn Kabiling, Palace recognizes Corona, *available at* <http://www.mb.com.ph/node/270636/palace-recognize> (last accessed May 22, 2010).

262. An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE], Republic Act No. 386, art. 8 (1950).

263. *Northern Securities Company v. United States*, 24 S.Ct. 436, 469 (1903). "Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment." *Id.* (J. Holmes, dissenting).

264. See Agabin, *supra* note 2, at 10-11.

265. *De Castro*, G.R. No. 191002.

declaration by the Philippine government that it would no longer sign the territorial deal.²⁶⁶ The majority of the Court, highlighting values of transparency and access to information to insure broad participation in the political process,²⁶⁷ reiterated its ruling in *Chavez v. Public Estates Authority*.²⁶⁸ During the pendency of the case, Chief Justice Puno told reporters after speaking at a forum at the University of the Philippines' College of Law that the "Supreme Court Justices are aware how their decision on a deal expanding the Bangsamoro territory would impact the volatile situation."²⁶⁹ Reassuring the public, Chief Justice Puno said that the Justices would keep in mind the implications of their decision on the intense situation on the ground.²⁷⁰ Chief Justice Puno's pronouncement suggests that it is legally legitimate for the Court to let considerations of sociological legitimacy, i.e., the public's willingness to accept the implications of judicial mandates (whether the decision is *katanggap-tanggap*), to influence its judgment rather than solely base its decision on substantive legal principles.

Conversely, the Court in *Neri* blocked the Senate investigation of the NBN-ZTE bribery scandal on the basis of executive privilege, reaffirming its earlier pronouncement in *Senate of the Philippines v. Ermita*.²⁷¹ A reading of the majority opinion vis-à-vis the dissenting opinions of Chief Justice Puno²⁷² and Justice Carpio,²⁷³ as well as the separate opinion of Justice Tinga,²⁷⁴ shows that in deciding whether the information sought by the Senate was protected by executive privilege, the majority of the Court put paramount importance in Sino-Philippine diplomatic relations. As enunciated by the dissenters, the paucity of explanation offered by Secretary Ermita failed to justify how the information sought by the Senate would be

266. Genalyn Kabling, *Gov't scraps pact on ancestral domain with MILF*, MANILA BULL., Aug. 30, 2008, at 1.

267. Agabin, *supra* note 2, at 10-11.

268. See *Province of North Cotabato*, 568 SCRA at 468 citing *Chavez v. Public Estates Authority*, 384 SCRA 152, 187 (2002).

269. TJ Burgonio, *Puno says SC knows impact of MOA ruling*, PHIL. DAILY INQUIRER, Aug. 29, 2008, at A1.

270. *Id.*

271. *Senate*, 488 SCRA 1.

272. *Neri*, 549 SCRA at 139-256 (C.J. Puno, dissenting opinion).

273. *Id.* at 264-300 (J. Carpio, dissenting and concurring opinion).

274. *Id.* at 347-57 (J. Tinga, separate concurring opinion).

at the expense of our national interest.²⁷⁵ To Chief Justice Puno, the majority's ruling on this important issue was, at best, guesswork.²⁷⁶

It should be emphasized that the Court in *Neri* recognized the claim of executive privilege notwithstanding the revocation of E.O. No. 464 to wit:

In *Chavez v. PCGG*,²⁷⁷ this Court held that there is a "governmental privilege against public disclosure with respect to state secrets regarding military, diplomatic[,] and other security matters." In *Chavez v. PEA*, there is also a recognition of the confidentiality of Presidential conversations, correspondences, and discussion in closed-door Cabinet meetings. In *Senate v. Ermita* the concept of *presidential communications privilege* is fully discussed. As may be gleaned from the above discussion, the claim of executive privilege is highly recognized in cases where the subject of inquiry relates to a power textually committed by the Constitution to the President, such as the area of military and foreign relations. Under our Constitution, the President is the repository of the commander-in-chief, appointing, pardoning, and diplomatic powers. Consistent with the doctrine of separation of powers, the information relating to these powers may enjoy greater confidentiality than other.²⁷⁸

...

In the case at bar, Executive Secretary Ermita premised his claim of executive privilege on the ground that the communications elicited by the three (3) questions ... are *presidential communications privilege* and executive privilege on matters relating to *diplomacy or foreign relations*.

Using the above elements, we are convinced that, indeed, the communications elicited by the three (3) questions are covered by the *presidential communications privilege*.²⁷⁹

The Court's reliance on precedents to justify the existence of presidential communications privilege *reflects* judicial acknowledgement of the lawful status of precedent-based decision-making since the lawful status of precedent-based decision-making is already established in the Civil Code of the Philippines.²⁸⁰

Expectedly, critics of *Neri* focused on the Court's composition and the manner of voting rather than the legal soundness of the decision. While it is

275. *Id.* at 206.

276. *Id.*

277. *Chavez v. Presidential Commission on Good Government*, 299 SCRA 744 (1998).

278. *Neri*, 549 SCRA at 121.

279. *Id.* at 122 (emphasis supplied).

280. CIVIL CODE, art. 8.

true that 12 out of the 15 sitting Justices were Arroyo appointees, the fact that only 8 of them voted in favor of the Government shows the Court's judicial independence regardless of the personalities involved. Moreover, the revocation of E.O. No. 464 may have bolstered the *katanggap-tanggap* implications of *Neri* thereby increasing public acceptance of the decision, regardless of its legal basis.

In *Nicolas*, despite U.S. protest on the judicial ripeness of the issue,²⁸¹ the Court took judicial notice and reaffirmed²⁸² its earlier decision in *Bayan (Bagong Alyansang Makabayan) v. Zamora*²⁸³ against the doctrines of *stare decisis* and *res judicata* vis-à-vis *Bayan* where the Court resolved the issue in favor of the constitutionality of the VFA.²⁸⁴ For Chief Justice Puno and Justice Carpio, however, the precedent-based decision by the majority perpetuating *Bayan* was erroneous in view of the 2008 U.S. Supreme Court decision of *Medellin v. Texas*,²⁸⁵ declaring that the binding effect of a treaty as an international obligation does not automatically mean that the treaty is enforceable as domestic federal law in the U.S.²⁸⁶ In effect, the VFA failed to meet the constitutional requirements of recognition by the U.S. as a treaty.²⁸⁷

Nevertheless, considering that the *Balikatan* Exercises are generally held in the Philippines, the problem of domestic enforceability of the VFA in the U.S. remains to be an academic discussion. While the Philippine "Constitution [theoretically] bars the efficacy of a treaty that is enforceable as a domestic law only in the Philippines but unenforceable as domestic law in the other contracting State,"²⁸⁸ the majority of the Court has effectively given way to the more practical considerations of the VFA that the *Balikatan* Exercises and military aid and assistance which, as the U.S. had previously demonstrated, can be easily cancelled.

The Court in *De Castro* authorized President Arroyo to appoint the next Chief Justice; and, as clarified by the Court, the decision is not a reversal of

281. Romero, *RP seeks review of VFA*, *supra* note 216.

282. *Nicolas*, 578 SCRA at 457.

283. *Bayan (Bagong Alyansang Makabayan) v. Zamora*, 342 SCRA 449 (2000).

284. *Nicolas*, 578 SCRA at 455.

285. *Medellin v. Texas*, 552 U.S. 491 (2008).

286. *Nicolas*, 578 SCRA at 480-86 (C.J. Puno, dissenting opinion).

287. *Id.* at 480-86 (C.J. Puno, dissenting opinion), 492-94 (J. Carpio, dissenting opinion).

288. *Id.* at 487 (J. Carpio, dissenting opinion).

the earlier decision of *In Re: Hon. Mateo A. Valenzuela and Hon. Placido B. Vallarta*,²⁸⁹ since only five among the nine Justices who concurred in the majority opinion voted to exempt the entire the Judiciary from the ban.²⁹⁰ Admittedly, had the decision overturned the 12-year old precedent in *In Re: Valenzuela*, the decision remains legally legitimate since the Court is merely guided and not controlled by precedents.²⁹¹ The limits on precedent-based decision making was expounded upon by Justice Arturo D. Brion in his separate concurring opinion:

I find it interesting that Peralta largely justifies his position ... based on Valenzuela as the prevailing rule that should be followed under the principle of *stare decisis*. Peralta apparently misappreciates the reach and real holding of Valenzuela, as explained and clarified above. A ruling involving the appointment of lower court judges under Section 9, Article VIII cannot simply be bodily lifted and applied *in toto* to the appointment of Members of the Supreme Court under Section 4(1) of the same Article.

Because of his misappreciation, Peralta is likewise mistaken in his appeal to the principle of *stare decisis*. The stability of judgments is indeed a glue that Judiciary and the litigating public cannot do without if we are to have a working and stable justice system. Because of this role, the principle is one that binds all courts, including this Court, and the litigating public. The principle, however, is not open-ended and contains its own self limitations; it applies only to actions in all future similar cases and to none other. Where ample room for distinction exists, as in this case, then *stare decisis* does not apply.

Another aspect of *stare decisis* that must be appreciated is that Supreme Court rulings are not written in stone so that they will remain unerasable and applicable for all times. The Supreme Court's review of rulings and their binding effects is a continuing one so that a ruling in one era may be declared by the Court at some future time to be no longer true and should thus be abandoned and changed ... I mention this, if only as a reminder to one and all, that *the terms of the Valenzuela ruling, if truly applicable even to appointments to this Court, is not written in stone and remains open for review by this Court.*²⁹²

Thus, while precedent-based decisions are lawful, the accepted capacity of precedent to authorize judicial decisions is largely a matter of practicality,

289. *In Re: Hon. Mateo A. Valenzuela and Hon. Placido B. Vallarta*, 298 SCRA 408 (1998).

290. Dona Z. Pazzibugan, *Can the President appoint the Chief Justice?*, PHIL. DAILY INQUIRER, March 18, 2010, at A1.

291. *See De Castro*, G.R. No. 191002.

292. *Id.* (J. Brion, separate opinion) (emphasis supplied).

i.e., a stable justice system and jurisprudential significance.²⁹³ Of interest is Justice Conchita Carpio-Morales' dissenting opinion where she stressed that "[t]he proper interpretation [of the Constitution] depends more on how it was understood by the people adopting it than in the framers' understanding thereof."²⁹⁴ This implies that the acceptability of a Court's decision and its socio-political implications rests upon an interpretation of the law that is in harmony with the public's view and understanding.

Notably, the decision generated debates on the independence of the Court (institutional legitimacy) not because of the counter majoritarian position the majority had taken but because of the unacceptability (as a matter of *delicadeza*) of the implications of the decision wherein the Court is composed mostly of Arroyo appointees (including the Chief Justice himself). In answering this partisan proposition, Justice Abad emphasized in his concurring opinion that:

The proposition that a Chief Justice will always be beholden to the President who appoints him is a myth. Former President Estrada appointed Chief Justice Hilario G. Davide, Jr. who presided over his impeachment and administered the oath to the incumbent President at the heels of EDSA II while President Estrada still sat in Malacañang. Chief Justices Artemio V. Panganiban and Reynato S. Puno voted against positions taken by the administration of the incumbent President who appointed them both to their position. These Chief Justices like those before them were first choices of the JBC before they were those of the Presidents concerned.²⁹⁵

The responses of certain Justices²⁹⁶ to the argument on partisanship suggest that the authoritative legitimacy through an independent Court rests on the social acceptability (*katanggap-tanggap*) of the socio-political impact of the decision rather than the decision's impact on the interpretation of the law.

It should also be noted that the JBC — a group composed of representatives of the different departments of government and society²⁹⁷ — itself opposed the petition on the ground of justiciability. As Justice Eduardo B. Nachura argues, the petitions involve "uncertain contingent future events

293. See *De Castro*, G.R. No. 191002.

294. *Id.* (J. Carpio-Morales, dissenting opinion).

295. *Id.* (J. Abad, concurring opinion).

296. *Id.* (J. Abad, concurring opinion; J. Brion, dissenting opinion).

297. See PHIL. CONST. art. VIII, § 8.

that may not occur as anticipated, or indeed may not occur at all”²⁹⁸ rendering the decision “nothing short of an advisory opinion.”²⁹⁹

Reaffirming the proposed Filipino standard, the above discussions suggest that the sociological legitimacy of judicial decisions resides in the public’s acceptability or *katanggap-tanggap* character of the decision’s practical implications. Since the public is not composed of legal experts, the repercussion of the decision in their everyday lives becomes their gauge in determining whether the decision, regardless of the substance of its legal reasoning, is acceptable.

It bears stressing that under the Constitution, a judicial decision’s sociological legitimacy depends on its adherence to legal norms. This implies that the Court must render decisions based on legal principles; otherwise, the decision rendered is patently illegal for being violative of the Constitution. Therefore, as long as a decision is based on some legal norm, the Court’s exercise of judicial power is legally legitimate. Of the four cases, *De Castro* was the only case which almost overturned a precedent. While the Court has declared that it is not bound by precedents, it faced numerous criticisms when the main decision discussed a reversal of *In Re: Valenzuela*. This shows that the Filipino public has generally accepted precedent-based decision-making whereby an attempt to overturn legitimately recognized precedent casts a doubt of illegitimacy upon the new ruling.

To reiterate, some judicial decisions rendered under the Puno Court suggest that it is legally legitimate for the Court to let considerations of sociological legitimacy influence its judgment, rather than decide cases exclusively on substantive legal principles. At this point, the question begged to be answered is whether the sociologically-influenced Puno Court violated its constitutional mandate to remain an independent collegial body. The Authors answer in the negative.

First, the Supreme Court is a collegial body composed of Justices who espouse their own legal ideologies. Inside the Court, the Justices vote on issues independently of each other, the Court, the Executive department, and the Legislature.³⁰⁰ While the matter of judicial deliberations is privileged

298. *De Castro*, G.R. No. 191002 (J. Nachura, separate opinion).

299. Agabin, *supra* note 2, at 14.

300. See e.g. Alejandro N. Cienca, Jr., *The Philippine Supreme Court and the Mining Act Ruling Reversal*, (International Graduate Student Conference Series No. 29, East-West Center Working Papers, 2006) available at <http://www.eastwestcenter.org/fileadmin/stored/pdfs/IGSCwp029.pdf> (last accessed May 22,

information,³⁰¹ the review of the selected constitutional cases show that while Justices may concur on common grounds, their oral arguments and separate opinions establish their independent appreciation of the law and their individual position on the issue(s). To illustrate, even if the Court (with the exception of Chief Justice Puno) is composed of Arroyo appointees, it bears stressing that the Executive department took the brunt in two of the four decisions and the voting was rarely lopsided. In asserting the individuality of Supreme Court Justices, Justice Brion reassured the public in his separate opinion in *de Castro*:

[P]artisanship is hardly a reason that would apply to the Supreme Court except when the Members of the Court individual act in violation of their oaths or directly transgress our graft and corruption laws.

...

Of course, partisanship is an objection that can apply to individual Members of the Court and even to the applicants for the position of Chief Justice. But this is a different question that should not result in placing the system of appointments to the Court within the coverage of the election ban; *objections personal to individual Members and to individual applicants are matters addressed to the JBC and to the final appointing authority* — the President. It is for reasons of these possible individual objections that the JBC and even the Office of the President are open to comments and objections.³⁰²

Second, amidst all the protest and criticisms hurled at the Judiciary, the Court still enjoys institutional legitimacy, in the weak sense. This is derived from the observation that the protests do not question the Court's authority to render decisions but rather call upon the Court to recognize or heed their partisan interests. This was observed by Justice Reyes in his separate opinion in the Motion for Reconsideration of *Neri v. Senate Committee on Accountability of Public Officers and Investigations*:³⁰³

A sad commentary of the times is when a Justice takes a stand which flatters the political opposition, it is hailed as courageous; when the stand benefits the administration, it is hounded as cowardly. But judicial independence is neither here nor there. For me, it is judicial action that is right and

2010) (This paper was presented at the 5th East-West Center International Student Graduate Conference on Feb. 16-18, 2006 in Honolulu, Hawaii, U.S.).

301. *Id.*

302. *De Castro*, G.R. No. 191002 (J. Brion, separate opinion) (emphasis supplied).

303. *Neri*, 564 SCRA 152.

reasonable, taken without fear or favor, unmindful of incidental consequences.³⁰⁴

Third, the sociological influence surrounding the Court's decision-making as enunciated by Chief Justice Puno, pertains to the Court's awareness of the impact of their decision on the ground. This is in consonance with the conclusion that for Filipinos, the sociological legitimacy of a judicial decision depends largely on the *katanggap-tanggap* character of the ruling, and not merely on the public's willingness to accept judicial mandates as proposed under Fallon's theory.

Finally, the Court remains a results-oriented decision maker because the acceptance of a judicial decision is determined by its impact on the daily lives of the people. The Court has to ensure that the decision must effect an acceptable or *katanggap-tanggap* result. This proposition does not imply a compromise of judicial independence, but rather, an affirmation of the fine line between politics and law. In its exercise of judicial activism, the Court has shown that judicialization of politics necessitates the protection of important national interests over and above the impeccable character of legal reasoning. Thus, in deciding *Neri* and *Nicolas*, the Court had to protect Philippine foreign relations with China and U.S., respectively. In *Province of North Cotabato*, the Court's interest was to protect Philippine sovereignty while in *De Castro*, the Court was protecting the Judiciary's integrity considering the impending presidential elections. To the discerning eye therefore, the Court's considerations of socio-political factors rather than of pure substantive legal principles is not a compromise of the Judiciary's institutional independence.

V. CONCLUSION

The integrity of the Judiciary must be protected to ensure government stability. Judicial independence of the Court and of the individual Justices must be safeguarded against political speculations. It must be reiterated that the Supreme Court is a collegial body. Justices do not merely conspire when deciding cases but in fact take different positions thereby reflecting the individuality of each Justice. While the majority might decide on a common ground, the concurring, separate, and dissenting opinions of the Justices demonstrate judicial independence. To illustrate, a reading of concurring opinions evinces that while the Justices concur with the outcome of the main opinion, the Justices either qualify their concurrence or offer a different legal basis for concurring with the main opinion. Justice Reyes' reaction

304. *Id.* at 282-83.

shows an unfavorable reception towards speculative journalism that challenges the individuality and independence of the Justices.³⁰⁵

While the Court has not made any declaration on rendering decisions based on non-legal considerations, the implications of its decisions reflect the Court's recognition of the need to protect the welfare of society. For example, in *Neri* and *Nicolas*, the decisions essentially protected the foreign relations of the State. In *Province of North Cotabato* and *De Castro*, the Court ultimately sought to protect the State's sovereignty and political stability, respectively. Absent any pronouncement on the matter, proposing a clear-cut standard to determine the legitimacy of the Judiciary based on its decisions remains difficult. Perhaps this difficulty rests on the greater caution the Court needs to take when it acts as a political Court.

305. See *Neri*, 564 SCRA at 282 (J. Reyes, separate opinion).