The People Power and the Supreme Court in *Estrada v. Arroyo*

A. Edsel C. F. Tupaz

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I. INTRODUCTION

A. *The twin policies of supremacy and permanence of the constitution*

Two principles govern the disposition of constitutional issues in the courts of law: constitutions are characterized by their supremacy and their permanency.

For Black, "the constitution is the organic and fundamental act adopted by the people . . . as the supreme and paramount law and the basis and regulating principle of government."[1] For Mr. Justice Isagani Cruz, "[t]he

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1. HENRY CAMPBELL BLACK, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW 2 (3rd ed. 1910) [hereinafter BLACK]. Black defines 'constitution' as follows:

Constitution is the basic and paramount law to which all other laws must conform, and to which all persons, including the highest officials of the land, must defer. No act shall be valid, however noble its intentions, if it conflicts with the Constitution. The Constitution must ever remain supreme."[2] This is the principle of supremacy of the constitution as restated by the learned.

Constitutions may be written or unwritten.[3] The 1987 Constitution of the Republic of the Philippines, following the American tradition from which it is based, is a written constitution. The distinction[4] is important — whether or not a written constitution determines its degree of permanence.[5]

> The constitution of a state is the fundamental law of the state, containing the principles upon which the government is founded, and regulating the division of the sovereign powers, directing to what persons each of those powers is to be confided and the manner in which it is to be exercised.
>
> *Id.*

2. ISAGANI A. CRUZ, PHILIPPINE POLITICAL LAW 12-13 (1995) [hereinafter CRUZ, POL. LAW]. For Cruz,

> [a]ll must bow to the mandate of [the constitution]. Expediency must not be allowed to sap its strength nor greed for power debase its rectitude. Right or wrong, the Constitution must be upheld as long as it has not been changed by the sovereign people lest its disregard result in the usurpation of the majesty of law by the pretenders to illegitimate power. *Id.*

3. But according to Black, "since the formation of the constitution of the United States, and the spread of liberal ideas throughout the civilized world, attendant upon the far-reaching influences of the French Revolution, an era of written constitutions has prevailed . . . ." *Id.* at 2.

4. For Black, the written or unwritten nature determines the validity and effectively of an unconstitutional act. In jurisdictions with unwritten constitutions, an unconstitutional act is not necessarily void. It would not lack the sanction of legality. In the case of written constitutions, "an unconstitutional law is void and of no effect, and in fact is no law at all. Yet as long as it stands on the statute book unrepealed, it will have the presumptive force of law, unless the proper courts have pronounced its invalidity." *Id.* at 5. The most illustrative example would be that of the British constitution. *See id.* at 4-5 (explaining the dynamics of British parliamentary practice where the sovereign is reposed in parliament as a body). *See id.* at 5-6 (discussing further the distinctions between written and unwritten constitutions).

5. The term "constitution" implies an instrument of a permanent, Houston County v. Martin, 16 AM. JUR. 2d *Characteristics of constitutions — permanency* § 4 (1979) (*citing* 232 Ala. 511, 169 So. 13 (1936); Livermore v. Waite, 102 Cal. 113, 36 P. 424 (1894); State ex rel. Halliburton v. Roach, 230 Mo. 408 (1856); Flaska v. State, 51 N.M. 13 (1947); Moose v. Board of Com'rs., 172 N.C. 419, 90 S.E. 441 (1916); Bicket v. Knight, 169 N.C. 333, 85 S.E. 418 (1915)), and abiding nature. *Id.* (*citing* McFadden v. Jordan, 32 Cal. 2d 330 (1948)). Written constitutions place in unchanging form limitations upon legislative action and thus gives a permanence and stability to popular government which otherwise

One advantage of written constitutions, according to Cruz, is "its capacity to resist capricious or whimsical change dictated not by legitimate needs but only by passing fancies, temporary passions or occasional infatuations of the people with ideas or personalities." Moreover, a written constitution "is not likely to be easily tampered with to suit political expediency, personal ambitions or ill-advised agitation for change."[6]

But the virtue of permanence, according to the same author, is accompanied by the vice of inflexibility. Its disadvantage is the inability to adjust to new conditions and circumstances.[7] What would then be the recourse?

Conceivably, there are three.

The first and most usual method is to enforce permanency through flexible interpretation. This way, the written constitution is upheld. The rigidity of the wording is relaxed through liberal construction as an axiom of constitutional interpretation.

The second is to write a constitution that is generally phrased[8] and short.[9] For constitutions, unlike statutes, are intended not merely to meet

would be lacking. *See id.* (*citing* Muller v. Oregon, 208 U.S. 412, 52 L. Ed. 551, 28 S. Ct. 324 (1908)).

6. ISAGANI A. CRUZ, CONSTITUTIONAL LAW 7 (1995) [hereinafter CRUZ, CONST. LAW]. A "[c]onstitution must be firm and immovable, like a mountain amidst the strife of storms or a rock in the ocean amidst the raging of the waves." *Id.* at 7 (*citing* Vanhorne v. Dorrance, 1 L. Ed. 391 (1808)).

7. *Id.* The difficulty itself of the amending process may be responsible for the delay in effecting the needed change and thus cause irreparable injury to the public interest.

8. The corollary principle of generality is grounded on the human notion that framers of a constitution cannot anticipate all conditions which may arise thereafter in the progress of the nation, 16 AM. JUR. 2d *Characteristics of constitutions — permanency* § 5 (1979) (*citing* Bank of United States v. Deveaux, 9 U.S. 61 (1809)), or establish all the law which from time to time may be necessary to conform to the changing conditions. *Id.* (*citing* Moose v. Board of Com'rs., 172 N.C. 419, 90 S.E. 441 (1916)). Constitutions, traditionally, do not deal in details, but enunciate the general principles and directions which are intended to apply to all new facts which may come into being and which may be brought within these general principles or directions. *Id.* (*citing* Legal Tender Case, 110 U.S. 421 (1884); Legal Tender Cases, 79 U.S. 457 (1870)). The nature of generality permits flexibility in construction to meet changing conditions. One view states that it is not practicable to specify in detail all its objects and purposes or the means to effect the same. *Id.* (*citing* Eliasberg Bros. Mercantile Co. v. Grimes, 204 Ala. 492, 11 A.L.R. 300 (1920)). U.S. authorities point out that it is unwise to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen only dimly and which can be best provided for as they occur by the legislature in availing itself of experience to accommodate legislation to such circumstances. *Id.* (*citing* Fairbank v. United States, 181 U.S. 283 (1901)).

existing conditions but also to govern future ones.[10] But rewriting constitutions is not the function of the courts of law; it is rather a political process that is cumbersome and rare.

The third deserves more attention. Like the second, this method involves political judgment, but it is one of last resort. It almost always results in the total abrogation of the constitution. It is the exercise of the right to revolt:

> In such a situation [of inflexibility], the written constitution will become an impediment rather than a spur to progress, a treadmill to the nation seeking to liberate itself from the shackles of obsolete rules no longer conformable to their needs and aspirations. Where this happens, the people may have to resort to a violation of the provisions of the permanent constitution; and if they cannot make a new constitution, they will have to make a revolution.[11]

9. The 1987 Constitution has been criticized to be among the longest in the world.

10. 16 AM. JUR. 2d *Characteristics of constitutions — permanency* § 4 (1979) (*citing* Legal Tender Case, 110 U.S. 421, 28 L. Ed. 204 (1884); Legal Tender Cases, 79 U.S. 457, 20 L. Ed. 287 (1870)). The Constitution of the United States was made for an undefined and expanding future. *Id.* (*citing* Dirken v. Great Northern Paper Co., 110 Me. 374, 86 A. 320 (1913)). The Constitution was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages. *Id.* (*citing* Martin v. Hunter's Lessee, 14 U.S. 304, 4 L. Ed. 97 (1816)).

11. CRUZ, CONST. LAW, *supra* note 6, at 7 (*citing* Ex parte Milligan, 4 Wall. 2 (1866)). The most recent experience of constitutional inflexibility is the impeachment process as the outmoded means to remove erring high officials. Joaquin G. Bernas, S.J. states that the "Philippine experience has so far shown impeachment as an ineffective means for removing an unwanted President. . . . It still remains to be seen whether indeed impeachment as an instrument of inter-organ control should be retired as an obsolete blunderbuss." JOAQUIN G. BERNAS, S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 989 (1996) [hereinafter BERNAS, CONST.]. The quote is prophetic especially considering the perceived failure of the impeachment process as an institutional remedy against then President Joseph E. Estrada. For further discussion on impeachment as the exclusive mode of removal against impeachable high officials, *see* ANTONIO R. TUPAZ & A. EDSEL C. F. TUPAZ, FUNDAMENTALS ON IMPEACHMENT (2001) (contrasting the U.S. constitutional provisions with its Philippine counterpart and analyzing the House and Senate rules on impeachment procedure).

According to Sinco, "[i]ndeed, it has been said that under a written constitution, the people can do no act except make a new constitution or make a revolution.[12]

The Supreme Court in *Estrada v. Arroyo*[13] chose to abide by the Constitution. The general framework of the decision was that the cause of vacancy of the Presidency is intra-constitutional and hence resolvable by constitutional standards. The vote was unanimous, but four justices concurred in the result. This means that although they all arrived at the same conclusion, four justices differed in their basis and reasoning. It will be later seen that some of them are irreconcilable.

B. *Structure of Inquiry*

This essay will examine, in main, the issue of the cause of vacancy of the Presidency. It will also discuss the treatment of the Court of the political question doctrine invoked as a defense by the respondent. Topics on the political question doctrine and the issue of vacancy are essentially intertwined; the logic of the main opinion penned by Mr. Justice Reynato Puno readily shows that the resolution of the question on vacancy is conditioned on the non-applicability of the political question doctrine. The issue of immunity from suit, due to constraints of space and time, however, will be discussed elsewhere. After presenting the factual background and ruling of *Estrada v. Arroyo*, the analysis will present the notion of extra-constitutionality and the Court's reluctance to admit the same. The theory of extra-constitutionality ponders on the idea that the Office of the President was vacated through extra-constitutional methods. Its basis rests further on the Theory of Sovereignty and the Law on Revolution. The reluctance of the various opinions in *Estrada* to treat the cause or causes of vacancy as extra-constitutional may be explained by the unbendable adherence to the twin policies of supremacy and permanence of the constitution. The analysis will end by expounding on the new role of the Supreme Court in the face of

12. VICENTE SINCO, PHILIPPINE POLITICAL LAW 7 (11th ed. 1962), *cited in* Vicente V. Mendoza, *Law, Politics and a Changing Court – the Fateful Years 1985-1986*, 61 Phil. L.J. 1, 2 (1986) [hereinafter Mendoza, *Fateful Years*]. The Philippine experience is not new to revolutionary conventions. The 1973 Constitution was a product of a revolution "from within." The Freedom Constitution and the 1987 Constitution had their origins in the People Power of 1986. *See* RUPERTO G. MARTIN, LAW AND JURISPRUDENCE ON THE FREEDOM CONSTITUTION OF THE PHILIPPINES 18-19 (1986) (discussing the types of conventions and their amendatory powers).

13. Estrada v. Arroyo, G.R. No. 146738 (Mar. 2, 2001), *reconsidered on* Apr. 3, 2001 (Vitug, J. & Mendoza, J., concurring) (decided en banc with main opinion penned by Justice Reynato Puno)

People Power as an exercise of direct democracy and an emerging extra-constitutional remedy that has gradually taken root both in the Philippines and in the international community.

II. THE CASE

A. *The Facts of the Case*

On the May 11, 1998 elections, Estrada was elected President by over 10 million voters. The respondent was proclaimed Vice-President. The popularity of petitioner Estrada eroded quickly when on October 4, 2000, Ilocos Sur Governor, Luis "Chavit" Singson," accused petitioner of receiving millions of pesos from *jueteng* lords. On October 5, Senator Teofisto Guingona, Jr., then Senate Minority Leader, delivered a privileged speech accusing petitioner of receiving some P220M in *jueteng* money from Governor Singson and P70M on excise tax on cigarettes intended for Ilocos Sur.

Investigations were initiated by the Senate and the House of Representatives. Members of the House of Representatives spearheaded the move to impeach the petitioner.

Calls for resignation became louder and took on a moral tone. On October 11, Archbishop Jaime Cardinal Sin issued a pastoral statement in behalf of the Presbyteral Council of the Archdiocese of Manila, asking petitioner to step down as he had lost the moral authority to govern. Respondent Arroyo resigned as Secretary of the Department of Social Welfare and Services on October 12, and later asked for petitioner's resignation. On October 13 the Catholic Bishops Conference of the Philippines issued a similar statement. On October 17, former Presidents Corazon C. Aquino and Fidel Ramos demanded that the petitioner take the "supreme self-sacrifice" of resignation. Petitioner Estrada refused to resign.

On November 1, four senior economic advisers of petitioner resigned. On November 2, Secretary Mar Roxas II also resigned from the Department of Trade and Industry. On November 3, Senate President Franklin Drilon, House Speaker Manuel Villar, and 47 representatives defected from the ruling coalition, Lapian ng Masang Pilipino.

On November 13, petitioner Estrada was formally impeached. House Speaker Villar transmitted to the Senate the Articles of Impeachment as signed by more than 1/3 of all the members of the House of Representatives. Villar was immediately replaced by Representative Arnulfo Fuentebella as Speaker and Drilon by Senator Aquilino Pimentel as Senate President.

On November 20, the Senate formally opened the impeachment trial. Twenty-one senators took their oath as judges with Supreme Court Chief Justice Hilario G. Davide, Jr. presiding.

December 7 marked the commencement of the impeachment trial. The trial was covered by live-TV and enjoyed the highest viewers rating.

The dramatic point of the trial was the testimony of Clarissa Ocampo, senior vice president of Equitable-PCI Bank. She testified that she was one foot away from petitioner Estrada when he affixed the signature "Jose Velarde" on documents involving a P500 million investment agreement with their bank on February 4, 2000. On January 11, 2001, Atty. Edgardo Espiritu who served as Secretary of Finance testified that Estrada jointly owned BW Resources Corporation with Mr. Dante Tan who was facing charges of insider trading.

On January 16 at 10pm, by a vote of 11-10, the senator-judges ruled against the opening of the second envelope which allegedly contained evidence showing that Estrada held P3.3 billion in a secret bank account under the name "Jose Velarde." The public and private prosecutors walked out in protest of the ruling. Senator Pimentel resigned as Senate President. The people, bursting with anger, hit the streets of the metropolis. By midnight, thousands had assembled at the EDSA Shrine.

On January 17, the public prosecutors submitted a letter to Speaker Fuentabella tendering their collective resignation, and Manifestation of Withdrawal of Appearance with the impeachment tribunal. Senator Roco moved for the indefinite postponement of the impeachment proceedings. Chief Justice Davide granted the motion.

On January 18, calls for the resignation of petitioner intensified dramatically. A ten-kilometer human chain was formed from Ninoy Aquino Monument on Ayala Avenue in Makati City to the EDSA Shrine.

On January 19, General Angelo Reyes, Chief of Staff of the Armed Forces, defected. Estrada agreed to the holding of a snap election for President where he would not be a candidate. It had no effect. Secretary of National Defense Orlando Mercado and General Reyes, together with the chiefs of all the armed services joined the crowed at the EDSA Shrine. PNP Chief, Director General Panfilo Lacson and major service commanders gave a similar announcement. Cabinet secretaries, undersecretaries, assistant secretaries, and bureau chiefs quickly resigned. Rallies exploded in various parts of the country.

On January 20 at 12:20am, the first round of negotiations for the peaceful and orderly transfer of power started at Malacañang. There was a brief skirmish at Mendiola between pro- and anti-Estrada protestors.

At noon on the same day, Chief Justice Davide administered the oath to respondent Arroyo as President of the Philippines. At 2:30pm, petitioner Estrada and his family left Malacañang. A press statement was issued.[14] On the same day, President Estrada sent letters to the Speaker of the House of Representatives and to the President of the Senate indicating his temporary inability.[15]

On January 22, respondent Arroyo began discharging the powers and duties of the Presidency. On the same day, the Supreme Court issued a resolution in Administrative Matter No. 01-1-05-SC.[16] Arroyo began to

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14. The press statement states:

20 January 2001

STATEMENT FROM PRESIDENT JOSEPH EJERCITO ESTRADA

At twelve o'clock noon today, Vice President Gloria Macapagal-Arroyo took her oath as President of the Republic of the Philippines. While along with many other legal minds of our country, I have strong and serious doubts about the legality and constitutionality of her proclamation as President, I do not wish to be a factor that will prevent the restoration of unity and order in our civil society.

It is for this reason that I now leave Malacañang Palace, the seat of the presidency of this country, for the sake of peace and in order to begin the healing process of our nation. I leave the Palace of our people with gratitude for the opportunities given to me for service to our people. I will not shirk from any future challenges that may come ahead in the same service of our country.

I call on all my supporters and followers to join me in the promotion of a constructive national spirit of reconciliation and solidarity.

May the Almighty bless our country and beloved people.

MABUHAY!

(Sgd.) JOSEPH EJERCITO ESTRADA

15. Both letters state:

Sir:

By virtue of the provisions of Section 11, Article VII of the Constitution, I am hereby transmitting this declaration that I am unable to exercise the powers and duties of my office. By operation of law and the Constitution, the Vice-President shall be the Acting President.

(Sgd.) JOSEPH EJERCITO ESTRADA

16. The resolution states:

...[T]he court Resolved unanimously to confirm the authority given by the twelve (12) members of the Court then present to the Chief Justice on January 20, 2001 to administer the oath of office to Vice President Gloria Macapagal-Arroyo as President of the Philippines, at noon of January 20, 2001.

This resolution is without prejudice to the disposition of any justiciable case that may be filed by a proper party.

appoint members of her Cabinet as well as ambassadors and special envoys. Recognition of Arroyo's administration by foreign governments swiftly followed.

On January 24, Representative Feliciano Belmonte was elected new Speaker of the House of Representatives. The House then passed Resolutions Nos. 175 and 176 "expressing the full support of the House of Representatives to the administration of Her Excellency, Gloria Macapagal-Arroyo, President of the Philippines."[17] Cases previously filed against Estrada

17. House Resolution No. 175 states in full:

RESOLUTION EXPRESSING THE FULL SUPPORT OF THE HOUSE OF REPRESENTATIVES TO THE ADMNISTRATION OF HER EXCELLENCY, GLORIA MACAPAGAL-ARROYO, PRESIDENT OF THE PHILIPPINES

WHEREAS, on January 20, 2001, Vice President Gloria Macapagal-Arroyo was sworn in as the 14th President of the Philippines;

WHEREAS, her ascension to the highest office of the land under the dictum, "the voice of the people is the voice of God" establishes the basis of her mandate on integrity and morality in government;

WHEREAS, the House of Representatives joints the church, youth, labor and business sectors in fully supporting the President's strong determination to succeed;

WHEREAS, the House of Representatives is likewise on with the people in supporting President Gloria Macapagal-Arroyo's call to start the healing and cleansing process for a divided nation in order to 'build an edifice of peace, progress and economic stability' for the country: Now, therefore, be it

Resolved by the House of Representatives, To express its full support to the administration of Her Excellency, Gloria Macapagal-Arroyo, 14th President of the Philippines.

Adopted,

(SGD.) FELICIANO BELMONTE JR.
Speaker

This Resolution was adopted by the House of Representatives on January 24, 2001.

(SGD.) ROBERTO P. NAZARENO
Secretary General

H.R. Con. Res. 175, 11th Cong., 3d Sess. (2001). H.R. Con. Res. 176, 11th Cong., 3d Sess. (2001) was passed on the same day, stating:

RESOLUTION EXPRESSING THE SUPPORT OF THE HOUSE OF REPRESENTATIVES TO THE ASSUMPTION INTO OFFICE BY THE 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 GOAL UNDER THE CONSTITUTION

WHEREAS, as a consequence of the people's loss of confidence on the ability of former President Joseph Ejercito Estrada to effectively govern, the Armed Forces of the Philippines, the Philippine National Police and majority of his cabinet had withdrawn support from him;

WHEREAS, upon authority of an *en banc* resolution of the Supreme Court, Vice President Gloria Macapagal-Arroyo was sworn in as President of the Philippines on 20 January 2001 before Chief Justice Hilario G. Davide, Jr.;

WHEREAS, immediately thereafter, members of the international community had extended their recognition to Her Excellency, Gloria Macapagal-Arroyo as President of the Republic of the Philippines;

WHEREAS, Her Excellency, President Gloria-Macapagal-Arroyo has espoused a policy of national healing and reconciliation with justice for the purpose of national unity and development;

WHEREAS, it is axiomatic that the obligations of the government cannot be achieved if it is divided, thus by reason of the constitutional duty of the House of Representatives as an institution and that of the individual members thereof of fealty to the supreme will of the people, the House of Representatives must ensure to the people a stable, continuing government and therefore must remove all obstacles to the attainment thereof;

WHEREAS, it is a concomitant duty of the House of Representatives to exert all efforts to unify the nation, to eliminate factious tension, to heal social and political wounds, and to be an instrument of national reconciliation and solidarity as it is a direct representative of the various segments of the whole nation;

WHEREAS, without surrendering its independence, it is vital for the attainment of all the foregoing, for the House of Representatives to extend its support and collaboration to the administration of Her Excellency, President Gloria Macapagal-Arroyo, and to be a constructive partner in nation-building, the national interest demanding no less: Now, therefore, be it

Resolved by the House of Representatives, To express its support to the assumption into office by Vice President Gloria Macapagal-Arroyo as President of the Republic of the Philippines, to extend its congratulations and to express its support for her administration as a partner in the attainment of the Nation's goals under the Constitution.

Adopted,

(SGD.) FELICIANO BELMONTE JR.
Speaker

This Resolution was adopted by the House of Representatives on January 24, 2001.

(SGD.) ROBERTO P. NAZARENO
Secretary General

in the Office of the Ombudsman were set in motion. Estrada was charged

with bribery, graft and corruption, plunder, forfeiture, perjury, serious misconduct, malversation, illegal use of public property, and violation of the Code of Conduct for Government Employees.

On February 5, petitioner Estrada filed a petition for prohibition with a prayer for a writ of preliminary injunction to enjoin Ombudsman Aniano Desierto from further proceeding with the cases pending against Estrada until after his term as President is over.

On February 6, petitioner through another lawyer filed a petition for quo warranto praying for judgment confirming petitioner to be the lawful and incumbent President temporarily unable to discharge the duties of his office, and declaring respondent Arroyo to be holding the Office of the President only in an acting capacity. On the same day, Arroyo nominated Senator Teofisto Guingona, Jr. as Vice President.

On February 7, the Senate adopted Resolution No. 82[18] confirming the nomination of Senator Guingona, Jr. On the same day, the Senate passed Resolution No. 83 declaring that the impeachment court is *functus officio*. Public surveys confirmed that Arroyo's presidency is accepted by majorities in all social classes.

B. Restatement of Issues

1. Whether Arroyo's ascension involved a political question.
2. Whether petitioner Estrada is a President on leave while respondent Arroyo is an Acting President.

18. The Senate Resolution states in full:

RESOLUTION

WHEREAS, the recent transition in government offers the nation an opportunity for meaningful change and challenge;

WHEREAS, to attain desired changes and overcome awesome challenges the nation needs unity of purpose and resolute cohesive resolute (sic) will;

WHEREAS, the Senate of the Philippines has been the forum for vital legislative measures in unity despite diversities in perspectives;

WHEREFORE, we recognize and express support to the new government of President Gloria Macapagal-Arroyo and resolve to discharge our duties to attain desired changes and overcome the nation's challenges.

Annex 2, Comment of Private Respondents De Vera, et al.; II Rollo, G.R. No. 146710-15, at 231.

III. Analysis of the Ruling

In sum, the main opinion as penned by Justice Puno rested on Estrada's resignation as the ground for vacancy.[19] Though resignation was not express, petitioner's conduct was indicative of an implied resignation. The concurring opinion of Justice Vitug introduced the concept of abandonment, while Justice Mendoza grounded his on permanent disability.

It should be noted at the outset that permanent disability is incompatible with abandonment or resignation, for the latter two are voluntary acts while permanent disability may be caused by circumstances independent of one's own volition.

A. Arroyo's ascendancy is intra-constitutional. It therefore poses a legal question and not a political one.

Relying on *Lawyers' League for a Better Philippines v. President Corazon C. Aquino, et al.*[20] and *Letter of Associate Justice Reynato S. Puno*,[21] respondent Arroyo contended that since Estrada is questioning the legitimacy of her government, Estrada's cases therefore present a political question.[22] Arroyo's

19. *See* PHIL. CONST. art. VII, § 8. In case of death, permanent disability, removal from office, or resignation of the President, the Vice-President shall become the President to serve the unexpired term.

20. G.R. No. 73748 (May 22, 1986). *See* People's Crusade for Supremacy of the Constitution, etc. v. Mrs. Cory Aquino, et al., G.R. No. 73972 (May 22, 1986); Councilor Clifton U. Ganay v. Corazon C. Aquino, et al., G.R. No. 73990 (May 22, 1986). In summarizing *Lawyers' League*, Vicente V. Mendoza, states:

[T]he Supreme Court dismissed several petitions questioning the legitimacy of the Aquino government on the ground that it had been established in violation of the 1973 Constitution. The Court held that the legitimacy of the government was a political question for the people to decide. "The people have accepted the government of President Corazon C. Aquino which is in effective control of the entire country so that it is not merely a de facto government but is in fact and in law a de jure government."

Mendoza, *Fateful Years*, *supra* note 12, at 2 (citing *Lawyers' League*, *supra* note 20).

21. 210 SCRA 597 (1992).

22. The political question has been defined by former Chief Justice Roberto Conception as

. . . those questions which, under the Constitution, are to be decided by the people in their sovereign capacity, or in regard to which full discretionary authority has been delegated to the legislative or executive branch of the government. It is concerned with issues dependent upon the wisdom, not legality of a particular issue.

ascendancy was made through people power; she has already taken her oath as the 14TH President of the Republic; she has exercised the powers of the presidency; and her administration has been recognized by foreign governments. According to Arroyo, these realities "constitute the political thicket which the Court cannot enter."[23]

In rejecting this contention, the Court stated that *Lawyer's League* and *Letter of Associate Justice Puno* were inapplicable because

> [In those cases] we held that the government of former President Aquino was the result of a successful revolution by the sovereign people, albeit a peaceful one. No less than the Freedom Constitution declared that the Aquino government was installed through a direct exercise of the power of the Filipino people 'in defiance of the provisions of the 1973 Constitution, as amended.' It is familiar learning that the legitimacy of a government sired by a successful revolution by people power is beyond judicial scrutiny for that government automatically orbits out of the constitutional loop. In checkered contrast, the government of respondent Arroyo is not revolutionary in character. The oath that she took at the EDSA Shrine is the oath under the 1987 Constitution. In her oath, she categorically swore to preserve and defend the 1987 Constitution. Indeed, she has stressed that she is discharging the powers of the presidency under the authority of the 1987 Constitution.[24]

Justice Puno proceeded to distinguish between EDSA I and EDSA II:

Tanada v. Cuenco, 103 Phil 1051, 1068 (1957). Authoritative guidelines are found in Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.ed 2d 663, 686 (1962), wherein Justice Brennan stated:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department or a lack of judicially discoverable and manageable standards for resolving it, or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretions; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on question. Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non justiciability on the ground of a political question's presence. The doctrine of which we treat is one of 'political questions,' not of 'political cases.'

For the oft-cited textual basis for the power of judicial review, see Marbury v. Madison, 1 Cranch (5 U.S.) 137, 2 L.Ed. 60 (1803). According to Chief Justice Marshall Marshal, "it is emphatically the province and duty of the judicial department to say what the law is . . . ." *Id.*

23. *Estrada*, G.R. No. 146738 at 18.

24. *Id.* at 21.

> In fine, the legal distinction between EDSA People Power I and EDSA People Power II is clear. EDSA I involves the exercise of the *people power of revolution which overthrew the whole* government. EDSA II is an exercise of *people power of freedom of speech and freedom of assembly to petition the government for redress of grievances which only affected the office of the President. EDSA I is extra-constitutional* and the legitimacy of the new government that resulted from it cannot be the subject of judicial review, but *EDSA II is intra-constitutional* and the resignation of the sitting President that it caused and the succession of the Vice President as President are subject to judicial review. EDSA I presented a political question; EDSA II involves legal questions.[25]

The framework of the main decision was that EDSA *Dos* was merely an instance of the people exercising their constitutionally guaranteed right to petition the government for redress of grievances.[26]

B. Petitioner Estrada is not on leave because he resigned. Respondent Arroyo is now President.

According to petitioner Estrada, he neither resigned as President nor suffered from any permanent disability. Hence, the Office of the President was not vacant when Arroyo took her oath. The claim of inability was contained in the January 20, 2001 letter of petitioner sent on the same day to Senate President Pimentel and Speaker Fuentebella. Petitioner Estrada contended that it is the "Congress [that] has the ultimate authority under the Constitution to determine whether the President is incapable of performing his functions in the manner provided for in Section 11 of Article VII."[27]

25. *Id.* at 22. (emphasis supplied).

26. Joaquin G. Bernas, S.J., *From One-Man Rule to "People Power"*, 46 ATENEO L.J. 44, 62 (2001) [hereinafter Bernas, *One-Man Rule*] (construing the main opinion of Estrada v. Arroyo, G.R. No. 146738 (Mar. 2, 2001)).

27. *Estrada*, G.R. No. 146738 at 41 (*citing* Reply Memorandum, at 3; IV Rollo, G.R. Nos. 146710-15). Section 11 of Article VII of the 1987 Constitution states:

> Whenever the President transmits to the President of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice-President as Acting President.
>
> Whenever a majority of all the Members of the Cabinet transmit to the President of the Senate and to the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice-President shall immediately assume the powers and duties of the office as Acting President.
>
> Thereafter, when the President transmits to the President of the Senate and to the Speaker of the House of Representatives his written declaration that no

In answer, the Court stated that the question whether the Court has jurisdiction to review the claim of temporary disability and revise the decision of both Houses of Congress recognizing respondent Arroyo as President is a political question and addressed solely to Congress by constitutional fiat.[28]

The Court reasoned that despite receipt of petitioner's letter claiming disability, the House and Senate Resolutions were passed. These letters expressed Congressional support to Arroyo's administration and even congratulated her *as President* and not merely as *Acting President*.[29] Hence, any Congressional disposition under the third paragraph of Section 11 of Article VII[30] on the inability of petitioner Estrada to discharge the powers and duties of his office would have been preempted by the House and Senate Resolutions even if the majority of the Cabinet did not challenge his inability. The Congress, in a manner of speaking, jumped the gun.

inability exists, he shall reassume the powers and duties of his office. Meanwhile, should a majority of all the Members of the Cabinet transmit within five days to the President of the Senate and to the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Congress shall decide the issue. For that purpose, the Congress shall convene, if it is not in session, within forty-eight hours, in accordance with its rules and without need of a call.

If the Congress, within ten days after receipt of the last written declaration, or, if not in session, within twelve days after it is required to assemble, determine by a two-thirds vote of both Houses, voting separately, that the President is unable to discharge the powers and duties of his office, the Vice-President shall act as President; otherwise, the President shall continue exercising the powers and duties of his office.

28. *Baker*, 7 L.ed 2d at 686 (holding that, among others, there should be a "textually demonstrable constitutional commitment of the issue to a coordinate political department or a lack of judicially discoverable and manageable standards for resolving it" to constitute a political question.).

29. The last paragraph of House Resolution No. 176 s. 2001 states:

Resolved by the House of Representatives, To express its support to the assumption into office by Vice President Gloria Macapagal-Arroyo as President of the Republic of the Philippines, to extend its congratulations and to express its support for her administration as a partner in the attainment of the Nation's goals under the Constitution.

H.R. Con. Res. 176, 11th Cong., 3d Sess. (2001).

30. Section 11 of Article VII is a substantial reproduction of the 25th Amendment of the United States Constitution. For a discussion of the intent of the framers on the mechanics of Section 11, *see* JOAQUIN G. BERNAS, S.J., THE INTENT OF THE 1986 CONSTITUTION WRITERS 7-8 (1995) [hereinafter BERNAS, INTENT] and *id.* at 433-34 (citing II Record of the Constitutional Commission 388-89, [hereinafter Record]).

Moreover, the Court relied on the submission of Estrada in that the "Congress [that] has the *ultimate authority* under the Constitution to determine whether the President is incapable of performing his functions in the manner provided for in Section 11 of Article VII."[31]

However, it is important to note the basis of the judgment of Congress in supporting respondent Arroyo. The second paragraph of House Resolution No. 175 states: "WHEREAS, her ascension to the highest office of the land under the dictum, '*the voice of the people is the voice of God*' establishes the basis of her mandate on integrity and morality in government;". The fifth paragraph of House Resolution no. 176 states: "[B]y reason of the constitutional duty of the House of Representatives as an institution and that of the individual members thereof of *fealty to the supreme will of the people*, the House of Representatives must ensure to the people a stable, continuing government and therefore must remove all obstacles to the attainment thereof;". Fr. Joaquin G. Bernas is more direct: "Freely translated, that means ouster by 'people power.' The Court considered the House resolution dispositive of Estrada's claim that he was merely going on leave."[32]

At this point, it is well to remember that the Court denied the application of the political question doctrine as invoked by respondent Arroyo but applied the same when petitioner Estrada tried to argue on the basis of a constitutional provision. The invocation of respondent Arroyo of the political question should be distinguished from its reliance by the Court against the temporary inability claim of petitioner Estrada. The former instance was used as a defense against any inquiry on the legitimacy of Arroyo's ascension while the latter preempted petitioner Estrada from claiming that the Cabinet and the Congress had not "decide[d] on the issue" of temporary inability.[33]

31. *Estrada*, G.R. No. 146738 at 41 (*citing* Reply Memorandum, at 3; IV Rollo, G.R. Nos. 146710-15) (emphasis added).

We sustained this submission and held that by its many acts, Congress has already determined and dismissed the claim of alleged temporary inability to govern proffered by petitioner. . . . **The power is conceded by petitioner to be with Congress and its alleged erroneous exercise cannot be corrected by this Court.** The recognition of respondent Arroyo as our *de jure* president made by Congress is unquestionably a **political judgment**. . . .

Estrada, G.R. No. 146738 at 23-24 (emphasis in original). But to the mind of the author, Estrada's statement is not really a submission that may be used against him; it is rather a mere restatement of Section 7 of Article VII.

32. Bernas, *One-Man Rule*, *supra* note 26, at 64.

33. PHIL. CONST. art. 7, § 11, ¶ 3. Though the Court's discussions on the political question doctrine are separable, the dynamics between them must be

To foreclose any further discussion on inability, the Court held that there was implied resignation. For there to be resignation, "there must be an intent to resign and the intent must be coupled by acts of relinquishment. The validity of resignation has no formal requirements. It may be oral or written, express or implied. As long as resignation is clear, it must be given legal effect."[34]

Since no letter of resignation was submitted, the Court employed the "totality test."[35] It looked into the totality of prior, contemporaneous and

understood. The successful invocation of respondent Arroyo would have preempted the disposition of Section 11, for then there would no longer be any constitution to speak of. The Court had to rule out the notion of a revolutionary government in order to apply Section 11 as the "textually demonstrable" basis for the political question to apply against Estrada. The effect was that the Court denied the political question doctrine in the first case to retain the Constitution which, in turn, would be used as basis against Estrada by invoking Section 11 as a "textually demonstrable constitutional commitment of the issue to a coordinate political department . . . ." Baker v. Carr, 7 L.Ed 2d, at 686. This reasoning was generally followed by Justice Mendoza who, in his concurring opinion, stated that "[i]ndeed, if the government of respondent Gloria Macapagal-Arroyo is a revolutionary one, all talk about the fact that it was brought about by succession due to resignation or permanent disability of petitioner Joseph Ejercito Estrada is useless." Mendoza, J., Concurring Opinion in *Estrada*, G.R. No. 146738 at 3-4. Justice Vitug himself entertained the same notion, saying:

> If, as Mr. Estrada would so have it, the takeover of the Presidency could not be constitutionally justified, then, unavoidably, one would have to hold that the Arroyo government, already and firmly in control then and now, would be nothing else but revolutionary. . . . [T]he principal points brought up in the petitions for and in behalf of Mr. Estrada, predicated on constitutional grounds, would then be left bare as there would, in the first place, be no Constitution to speak of. The invocation alone of the jurisdiction of this Court would itself be without solid foundation absent its charter.

Estrada, G.R. No. 146738 at 5 (Vitug, J., concurring) (emphasis subtracted).

34. *Estrada*, G.R. No. 146738 at 26 (*citing* Gonzales v. Hernandez, 2 SCRA 228 (1961)). *See* HECTOR S. DE LEON & HECTOR M. DE LEON, JR., THE LAW ON PUBLIC OFFICERS AND ELECTION LAW 354 (2000) (defining resignation) [hereinafter HECTOR, PUB. OFF.] (*citing* Gamboa v. Court of Appeals, 108 SCRA 1 (1981); Ortiz v. Commission on Elections, 162 SCRA 812 (1988)).

35. The totality test was fully discussed in the Court's resolution after the motion for reconsideration was filed:

> [W]hether a given resignation is voluntarily tendered, the element of voluntariness is vitiated only when the resignation is submitted under duress brought on by government action. The **three-part test** for such duress has been stated as involving the following elements: (1) whether one side involuntarily accepted the other's terms; (2) whether circumstances permitted

posterior facts and circumstantial evidence that would indicate an intent to resign. Under the test, the Court cited the entries of the diary[36] of Executive Secretary Edgardo Angara as proof of the state of mind of the petitioner.[37] In

> no other alternative; and (3) whether such circumstances were the result of coercive acts of the opposite side. The view has also been expressed that a resignation may be found involuntary if on the **totality of the circumstances** it appears that the employer's conduct in requesting resignation effectively deprived the employer [sic] of free choice in the matter. **Factors to be considered**, under this test, are: (1) whether the employee was given some alternative to resignation; (2) whether the employee understood the nature of the choice he or she was given; (3) whether the employee was given a reasonable time in which to choose; and (4) whether he or she was permitted to select the effective date of resignation. In applying this totality of the circumstances test, the assessment whether real alternatives were offered must be gauged by an objective standard rather than by the employee's purely subjective evaluation; **that the employee may perceive his or her only option to be resignation – for example, because of concerns about his or her reputation – is irrelevant. Similarly, the mere fact that the choice is between comparably unpleasant alternatives – for example, resignation or facing disciplinary charges – does not of itself establish that resignation was induced by duress or coercion, and was therefore involuntary.**
>
> *Estrada*, G.R. No. 146738 at 6-7 (*citing* 63A AM. JUR. 2d *Public Officers and Employees* § 176 (emphasis in original)).

36. For a substantive discussion on whether entries in diaries constitute hearsay, *see* Lenora Ledwon, *Diaries and Hearsay: Gender, Selfhood, and the Trustworthiness of Narrative Structure*, 73 Temp. L. Rev. 1185 (2000).

37. The acts and events may be summarized as follows: 1) the decision of Estrada to call for a snap election while stressing that he would not be a candidate; 2) Estrada's silence or failure to object to Angara's suggestion for a graceful and dignified exit; 3) Estrada's revelation to Secretary Angara that General Reyes guaranteed that he would have five days to a week in Malacañang; 4) Estrada's failure to protest after former President Ramos telephoned Secretary Angara to offer a peaceful transfer of power. Angara readily accepted Ramos's offer; 5) the first round of negotiation for a peaceful and orderly transfer of power was limited to duration, safety, and the agreement to open the second envelope; 6) Estrada's statement that if the envelope were opened on Monday, he would leave by then; 7) Estrada's revelation that he was very tired ("Pagod na pagod na ako. Ayoko na masyado nang masakit. Pagod na ako sa red tape, bureaucracy, intriga." (I am very tired. I don't want any more of this – it's too painful. I'm tired of the red tape, the bureaucracy, the intrigue.)) Estrada v. arroyo, p. 30; 8) the second round of negotiation, like the first round, treated the resignation of Estrada as a given fact. Again, the only issues were the time and measures to be undertaken during the transition; 9) the deletion by Secretary Angara of the provision on resignation in the draft agreement since this matter was already moot and academic; 10) Estrada's January 20, 2001 "valedictory" statement (a) acknowledging the oath-taking of Arroyo; and (b) emphasizing that he was

all these instances, the Court noted that the resignation of President Estrada was never in dispute. It was assumed well before Arroyo's proclamation as President.[38]

The Court rejected petitioner Estrada's contention that his resignation was made under duress. U.S. courts uniformly hold that a resignation of a public officer procured by duress or fraud is voidable and may be repudiated.[39] Any public employee may terminate his employment by tendering a resignation absent a showing of fraud, coercion, or duress.[40] The Court's ruling, however, becomes contentious especially when it admits of "prior events that built up the irresistible pressure for the petitioner to resign."[41] The Justices repeatedly referred to Estrada's expression of fatigue.[42] Petitioner, himself, claimed that he was forced out of Malacañang and was "threatened with mayhem."[43] More problematic is the statement of Justice Vitug describing the military, police, Cabinet members, and the people having abandoned Estrada: "Mr. Estrada had by then practically lost effective control of the government."[44] Bernas points out that "[n]one [of the justices] would say that the departure from Malacañang was voluntary. Estrada had no choice but to leave."[45] This may have led Justice Mendoza to rule on the

leaving the Palace, the seat of the presidency without stating any inability or intent to re-assume the presidency as soon as the disability disappears; (c) expressing gratitude to the people for the opportunity to have served them; (d) assuring that he will not shirk from any future challenge which, according to the Court, referred to a challenge after giving up the Office of the President; and (e) promoting national reconciliation and solidarity which could not be attained had he not given up the presidency. *Estrada*, G.R. No. 146738 at 27-36.

38. *Id.* at 30.

39. 63A AM. JUR. 2d *Public Officers and Employees* § 176 (1984) (*citing* Atcherson v. Siebenmann, 458 F Supp 526 (1978)).

40. *Id.* § 170.

41. *Estrada*, G.R. No. 146738 at 3.

42. "Pagod na pagod na ako. Ayoko na masyado nang masakit. Pagod na ako sa red tape, bureaucracy, intriga." (I am very tired. I don't want any more of this – it's too painful. I'm tired of the red tape, the bureaucracy, the intrigue.) *Id.* at 30.

43. *Estrada*, G.R. No. 146738 at 8 (Mendoza, J., concurring). *See Erap: I'm Still the President*, Philippine Star, Feb. 1, 2001, at 1 (reporting that "Estrada gave in to *mounting pressure* . . . to relinquish the presidency amid a popular uprising marked by withdrawal of support of the entire police and military organizations, as well as the resignation of Cabinet members . . . ." (emphasis added)). In the same article, Estrada argued that he was only "on leave" but was forced by events and circumstances beyond his control. *Id.*

44. *Estrada*, G.R. No. 146738 at 3 (Vitug, J., concurring).

45. Fr. Joaquin G. Bernas, S.J., *Estrada's Last Stand*, Today, Mar. 21, 2001, at 8.

basis of permanent disability instead of resignation which is always a voluntary act.[46]

Two things may be gleaned, therefore. First, the cause of vacancy may have been characterized by involuntariness, duress, or coercion. Second, there was a loss of effective control. Now these two elements fit the definition of "ouster" as means to remove public officers. Ouster is the removal of a public officer from office[47] while loss of effective control over one's office follows as a matter of course. Bernas styles it this way: "[Estrada's departure] was involuntary resignation. Ouster, in other words."[48]

However, removal by ouster is not contemplated[49] in Section 8 of Article VII of the Constitution as the same provides only four exclusive[50] grounds for vacating the Presidency: death, permanent disability, removal from office, or resignation. Removal may be made only by impeachment, since the President, among others, is an impeachable officer.[51] Although

46. *See generally id.*

47. BLACK'S LAW DICTIONARY 1128 (7th ed. 1999).

48. Bernas, *One-Man Rule*, *supra* note 26, at 64.

49. *Id.* ("Ouster by popular action is not in the constitutional vocabulary for removing a President.").

50. Authorities are in agreement that the four modes of vacancy are exclusive. *See* CRUZ, POL. LAW, *supra* note 2, at 180; Bernas, *One-Man Rule*, *supra* note 26, at 64.

51. This list is exclusive and may not be increased or reduced by legislative enactment. CRUZ, POL. LAW, *supra* note 2, at 333-34. For Cruz, this view is bolstered by the last sentence of Art XI, Section 2:

> The President, the Vice-President, the members of the Supreme Court, the members of the Constitutional Commissions, and the Ombudsman may be removed from office, on impeachment for and conviction of, culpable violation of the Constitution, treason, bribery, graft and corruption, other high crimes, or betrayal of public trust. *All other public officers and employees may be removed from office as provided by law, but not by impeachment.*

Id. at 334 (emphasis supplied). *See* CARLO L. CRUZ, THE LAW OF PUBLIC OFFICERS 181 (1997); BERNAS, CONST., *supra* note 11, at 990. The right to be removed only by impeachment is the Constitution's strongest guarantee of security of tenure. The guarantee effectively blocks the use of other legal ways of ousting an officer. *See, e.g.*, In re: Gonzales, 160 SCRA 771, 774 (1988) (dismissing the suggestion that a Supreme Court Justice may be subjected to disbarment proceedings because such officer may be removed from office only by impeachment.). *In re Gonzales* further qualified that such officers are not entitled to immunity from liability but rather that there "is a fundamental procedural requirement that must be observed before such liability may be determined and enforced. A Member of the Supreme Court must first be

ouster is a ground for termination of official relations under the general law on public officers,[52] this is not so with the President as provided in the Constitution.

Bernas explains the Court's reluctance from using ouster as basis:

> But it is also understandable why the Court should wish to distance itself from such a view . . . . The language of the decision shows that the Court did not wish to project Estrada's leaving office as extra-constitutional, lest the impression be given that the government under Arroyo was revolutionary. A revolutionary government is its own master.[53]

The Justices were caught in the dilemma of whether to follow constitutional succession or not. A question arises: could they have chosen not to abide by constitutional means and at the same time affirm the Constitution? Any response would involve a delicate and clinical discussion on the theory of sovereignty and revolution. This will be discussed in substance in the latter part of this paper.

In his concurring opinion, Justice Vitug introduces the concept of abandonment, a species of resignation. "[I]t connotes the giving up of the office although not attended by the formalities normally observed in resignation. Abandonment may be effected by a positive act or can be the result of an omission, whether deliberate or not."[54] He did not accept temporary incapacity under Section 11 of Article VII because such notion "clearly envisions those that are personal, either by physical or mental in nature, and innate to the individual."[55] He also agrees with the main opinion in that there was no revolutionary government. Citing U.S. authorities, revolutions must always completely overthrow the established government.[56] Arroyo's rise to the Presidency did not change the government structure.[57] It was not a revolution in the proper sense because revolutions involve radical change:[58] "[t]he basic structures, the principles, the directions, the intent and the spirit of the 1987 Constitution have been saved and preserved."[59]

removed . . . via the constitutional route of impeachment" before he may be held to answer criminally or administratively. *Id.* at 776-777.

52. *See generally* the modes of termination of public relations in HECTOR, PUB. OFF., *supra* note 34, at 339.

53. Bernas, *One-Man Rule*, *supra* note 26, at 64.

54. *Estrada*, G.R. No. 146738 at 9 (Vitug, J., concurring).

55. *Id.* at 9-10.

56. *Id.* at 11 (*citing* Gitlow v. Kiely, 44 F.2d 227 (1930)).

57. *Id.*

58. *Id.* (*citing* Zacorin, *Theories of Revolution in Contemporary History*, 88 Political Science Quarterly). "The ascension of Mme. Macapagal-Arroyo to the presidency has resulted neither in the rupture nor in the abrogation of the legal order. The constitutionally-established government structures . . . have all remained intact and functioning." *Id.* at 12.

Despite its affiliation with resignation, however, abandonment as a distinct concept is not a ground under Section 8, Article VII for vacating the Presidency. Authorities have always treated resignation and abandonment as two separate and distinguishable modes of terminating official relations.[60] The Court in *Palmera v. Civil Service Commission* even held that resignation and abandonment are "incompatible and contradictory."[61] However, Justice Vitug seems to have found justification on the notion that abandonment is a species of resignation. In effect, Vitug bulwarks his opinion on resignation and thus aligns himself with the main opinion of the Court on this point.

Like Justice Vitug, Justice Mendoza agrees with the main opinion in that Arroyo's ascension was something less than revolution.[62] Had it been a genuine revolution similar to the 1986 EDSA Revolution, then the legitimacy of Arroyo's government cannot be subject to judicial review.[63] "In contrast, these cases do not involve the legitimacy of a government. They only involve the legitimacy of the [succession in the] presidency . . . ."[64] For Mendoza, this is the main issue.

59. *Id.* at 14 ("There was no revolution such as that which took place in February 1986. There was no overthrow of the existing legal order and its replacement by a new one, no nullification of the Constitution.").

60. *See generally* HECTOR, PUB. OFF., *supra* note 34, at 339.

61. 235 SCRA 87 (1994). *Contra* Defensor-Santiago v. Ramos, 253 SCRA 559 (1996), *citing* McCall v. Cull, 75 P. 2d 696, 698(1938).

62. The following passage expressly adopts natural law theory as foundation for revolution:

> From the natural law point of view, the right of revolution has been defined as "an inherent right of a people to cast out their rulers, change their policy or effect radical reforms in their system of government or institutions by force or a general uprising when the legal and constitutional methods of making such change have proved inadequate or are so obstructed as to be unavailable." It has been said that "the locus of positive law-making power lies with the people of the state" and from there is derived "the right of the people to abolish, to reform and to alter any existing form of government without regard to the existing constitution."
>
> *Estrada*, G.R. No. 146738 at 2 (Mendoza, J., concurring) (*citing* Letter of Associate Justice Reynato S. Puno, 210 SCRA 589, 597 (1992)).

63. *Id.* at 2-3 (*citing* Luther v. Borden, 7 How. 1 (1848)). "If a court decides the question at all *qua* court, it must necessarily affirm the existence and authority of such government under which it is exercising judicial power."

64. *Id.* at 3.

Among the four grounds for vacancy, Mendoza chose permanent disability. This puts him in a diametrically opposed position against Justices Puno and Vitug in that permanent disability is not determined by volition. Mendoza then lays down the scope of its definition: "the permanent disability referred to in the Constitution can be physical, mental, or *moral*, rendering the President unable to exercise the powers and functions of his office."[65] In a nutshell, "[p]etitioner became permanently disabled because he had lost the public's trust."[66]

But the definition is dangerous.

Authorities have attempted to define permanent disability as one alluding to internal causes. It covers both physical and mental disability. Incurable insanity is an example of permanent disability.[67] The problem is no longer about the scope of the definition but rather the depth and degree that suffices to consider it permanent. For the incumbent may not wish to admit that he is permanently disabled to discharge the powers and duties of his office, and may therefore refuse to give it up.[68] Other authorities find the term difficult: "[o]f the four causes [for vacating the Presidency], permanent disability is perhaps the most shrouded in obscurity."[69]

Justice Mendoza expands the conventional notion of permanent disability beyond internal causes to include inability to act due to external forces.[70] And yet, Bernas says, "there is obvious reluctance to admit that the external force which created the vacancy was "people power."[71] Bernas clearly points out the dangers of Mendoza's expanded definition. If permanent disability may be determined by external factors, what then would comprise those factors? Mendoza says that it can be physical, mental,

65. *Id.* at 9 (emphasis supplied).

66. *Id.* at 10. The following passage is explanatory:

> [H]aving lost public trust and the support of his own cabinet, the military and the national police, petitioner Joseph Ejercito Estrada became permanently disabled from continuing as President of the Philippines and that respondent Gloria Macapagal-Arroyo, being then the Vice-President, legally succeeded to the presidency pursuant to Art. VII, §8 of the Constitution.

Estrada, G.R. No. 146738 at 1 (Mendoza, J., concurring).

67. CRUZ, POL. LAW, *supra* note 2, at 180.

68. HECTOR, PUB. OFF., *supra* note 34, at 352-53.

69. BERNAS, CONST., *supra* note 11, at 748.

70. Joaquin G. Bernas. S.J., *Estrada's Last Stand,* Today, Mar. 21, 2001, at 8 (construing the Concurring Opinion of Justice Mendoza).

71. *Id.*

or *moral.*[72] What is moral disability? In Mendoza's opinion, it is the loss of public trust.

Now, Mendoza's expanded definition fits the notion of recall as a means of removal. Recall has been defined as the removal of a public official from office by popular vote.[73] It is meant to be an "effective speedy remedy for the removal of an official who is not giving satisfactory service to the public and whom the electors do not want to remain in office, regardless of whether he is discharging his full duty to the best of his ability and as his conscience dictates."[74] The power of recall is political in nature. Loss of public trust is the sole ground. It is essentially the power of removal exercised by the people themselves.[75]

But recall is not a constitutional means to remove the president under Section 8 of Article VII. To recall the President would be to employ an extra-constitutional means to remove him. Like involuntary resignation or ouster, recall is extra-constitutional.[76] Bernas's statement that "the Court did not wish to project Estrada's leaving office as extra-constitutional,[77] lest the impression be given that the government under Arroyo was revolutionary" would also explain Mendoza's reluctance to adjudicate on the basis of recall.

IV. RECONCILING EXTRA-CONSTITUTIONALITY WITH THE SUPREMACY AND PERMANENCE OF THE CONSTITUTION

The tension in translating extra-constitutional standards into constitutional norms in all three opinions of the Justices on *Estrada v. Arroyo* can be readily seen. As the variance between the two grew, the twin policies of supremacy and permanence of the constitution required an even wider flexibility in constitutional construction. To save the Constitution, the Justices repeatedly invoked the maxim of flexible interpretation to accommodate extraordinary

72. *Estrada,* G.R. No. 146738 at 9 (Mendoza, J., concurring) (emphasis supplied).

73. BLACK'S LAW DICTIONARY 1274 (7th ed. 1999).

74. HECTOR, PUB. OFF., *supra* note 34, at 479.

75. *Id.* at 480, *citing* 63A AM. JUR. 2d §§ 808-09.

76. Bernas, *One-Man Rule*, *supra* note 26, at 64. "If you wish, EDSA *Dos* was an instance of extra-constitutional 'recall' but not a revolution."

77. *See generally Banana Politics in the Philippines,* The Economist, May 5, 2001, at 13. The Economist reported how Arroyo "was swept into the presidency undemocratically...that Mrs. Arroyo's more honest supporters argue that the system had clearly failed, and the greater good was served by bending a few of the rules...and that there was a heavy price to be paid for extra-constitutional activity...it is all to easy to acquire a taste for removing presidents the non-democratic way: after the original "people power" revolution of 1986 ...." *Id.*

circumstances.[78] Due recognition, however, was given to the limitations of the words and phrases of the Constitution in the face of the exercise of sovereignty: "The country was faced with a phenomenon – the phenomenon of a people, who, in the exercise of a sovereignty perhaps too limitless to be explicitly contained and constrained by the limited words and phrases of the Constitution, directly sought to remove their president from office."[79]

Bernas says there is no cause for such caution, for "[t]he ouster of Estrada, in both intent and execution, was never meant to be a rejection of the Constitution as master."[80] But how can the use of extra-constitutional means in the end not reject the Constitution? This seems to imply that one can revolt and then adopt the same constitution. Arguably, this may have been the case, but what the Constitution says is what the Supreme Court says it is.[81] And so, EDSA II was merely "an exercise of people power of freedom of speech and freedom of assembly to petition the government for redress of grievances which only affected the office of the President."[82]

Former Justice Cecilia Muñoz-Palma, however, was not as optimistic as Bernas. Before *Estrada v. Arroyo* had been promulgated, her hard-liners were that the Arroyo presidency can only be legitimized if Estrada voluntarily resigns, is removed via impeachment, is declared incapacitated by the members of the Cabinet, or if *EDSA Dos* is considered another bloodless revolution. To choose otherwise would create a constitutional crisis.[83] The former Justice of the Supreme Court could not conceive of a situation wherein the President was ousted through extra-constitutional means and yet the integrity of the constitutional order remained.

78. *E.g., Estrada*, G.R. No. 146738 (Vitug, J., concurring). According to Vitug:

> [The] high tribunal was confronted with a dilemma – should it choose a literal and narrow view of the constitution, invoke the rule of strict law, and exercise its characteristic reticence? Or was it propitious for it to itself take a hand? The first was fraught with danger and evidently too risky to accept. The second could very well help avert imminent bloodshed. Given the realities, the Court was left hardly with choice. Paradoxically, the first option would almost certainly imperil the Constitution, the second could save it.

Id. at 5 ("The danger was simply overwhelming. The extra-ordiness [sic] of the reality called for an extra-ordinary solution. The Court has chosen to prevent rather than cure an enigma incapable of being recoiled.").

79. *Id.* at 3.

80. Bernas, *One-Man Rule*, *supra* 26, at 64.

81. This is vintage Bernas.

82. *Estrada*, G.R. No. 146738 at 22.

83. *Questions Arise on Legitimacy of Her Presidency*, Manila Standard, Jan. 21, 2001, at 1.

To reconcile these views, an exposition of the theory of sovereignty is needed. There will be emphasis on Vicente G. Sinco's articulation of the doctrine of direct state action as a species of sovereign action.

A. The Juristic Theory of Sovereignty

1. The Dual Sovereignty Model

A good beginning is the concept of sovereignty.[84] Sovereignty has been described in several ways but all these descriptions center around the idea of legal omnipotence. In short, it is the possession of unlimited power to make laws.[85] A more amplified statement is that of "a power of final legal adjustment of all legal issues" which arise within the ambit of the state.[86] The United States Supreme Court says, "Sovereignty itself is, of course, not

84. Some authors differentiate between *legal* and *political* sovereignty. "Legal sovereignty is the authority which has the power to issue final commands whereas political sovereignty is the power behind the legal sovereign, or the sum of the influences that operate upon it." CRUZ, POL.LAW, *supra* note 2 at 26. According to Cruz, the Congress is the legal sovereign, while public opinion makes up the political sovereign. *Id.* The Cruz definition, however, may be insufficient in that it does not encompass the executive and the judicial branches. More accurately, the three "great departments" in a government characterized by the separation of powers are said to *exercise* sovereignty in their distinct spheres while the repository of sovereignty is lodged in the people. According to Sinco, "The juristic theory of sovereignty makes a distinction between the possession and the exercise of sovereignty. Sovereignty itself always resides in and remains with the state as a juristic person, while its exercise is delegated as a rule to the government or its organs, which may be a king or a president, a parliament or a congress, the electorate, or some other entity." Vicente G. Sinco, Philippine Political Law: Principles and Concepts 19 (10th ed. 1954). Sinco, however, argues that the attempt to distinguish between legal and political sovereignty creates confusion regarding the meaning and scope of the conception of sovereignty. To avoid the misunderstanding, Sinco limits discussion to sovereignty as a legal concept. "For it cannot be too emphatically stated that the notion of sovereignty was originally developed in law and so it should properly and legitimately remain in that field." *Id.* at 17 (*citing* ERNEST BARKER, PRINCIPLES OF SOCIAL AND POLITICAL THEORY 68 (1952). "[A]ll sovereignty is essentially legal, and you cannot divide what is essentially legal into the legal and the other-than-legal." *Id.* at 65 (*quoting* ERNEST BARKER, PRINCIPLES OF SOCIAL AND POLITICAL THEORY 68 (1952)).

85. VICENTE G. SINCO, PHILIPPINE POLITICAL LAW: PRINCIPLES AND CONCEPTS 17 (10th ed. 1954) [hereinafter SINCO].

86. *Id.* (*citing* ERNEST BARKER, PRINCIPLES OF SOCIAL AND POLITICAL THEORY 59 (1952)).

subject to law, for it is the author and source of law."[87] Within the state there is no other person or body of persons that possess legal authority equal or superior to that of the sovereign.[88]

The notion of popular sovereignty is expressed in Section 1 of Article II, otherwise known as the Declaration of Principles and State Policies: "The Philippines is a democratic and republican State. Sovereignty resides in the people and all government authority emanates from them." Popular sovereignty is the expression of the belief that the repository of legal omnipotence is the people as contrasted to the King or Monarch. Another constitutional reference is the Preamble which serves to indicate the authors of the Constitution, to wit, "*we, the sovereign Filipino people.*"[89]

The Philippine view on popular sovereignty is the same as the American view: the power of the people lies at the foundation of American government.[90] Government derives its authority "from the consent of the governed"[91] and maintains its legitimacy through participation of the people in a representative democracy.[92] American theory states that the ultimate sovereignty is in the people, from whom all legitimate authority springs, and the people collectively, acting through the medium of constitutions, create such governmental agencies, endow them with such powers, and subject them to such limitations as in their wisdom will best promote the common good.[93]

87. *Id.* (*quoting* Yick Wo v. Hopkins, 118 U.S. 356, 30 L.Ed., 220 (1886)).

88. *Id.* (*construing* Yick Wo v. Hopkings, 118 U.S. 356, 30 L.Ed., 220 (1886)). *See* CRUZ, POL.LAW, *supra* note 2, at 26 ("Sovereignty is the supreme and uncontrollable power inherent in a State by which that State is governed.").

89. CRUZ, POL.LAW, *supra* note 2, at 49 (emphasis in original). *See* BERNAS, CONST., *supra* note 11, at 4 ("The Preamble, moreover, bears witness to the fact that the Constitution is the manifestation of the sovereign will of the Filipino people.").

90. *See generally* Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1429-66 (1987) (discussing the principle of popular sovereignty), *cited in* Michael A. Dawson, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 YALE L.J. 281, 282 (1992) [hereinafter Dawson].

91. The Declaration of Independence ¶ 2 (U.S. 1776), *cited in* Dawson, *supra* note 90, at 282.

92. *See* Paul A. Dawson, American Government: Institutions, Policies, and Politics 31-32 (1987) (discussing legitimating function of participatory democracy), *cited in* Dawson, *supra* note 90, at 283.

93. 16 AM. JUR. 2d *American Theory* § 8 (1979). *See also* Luther v. Borden 7 How. 1 (1848) (discussing the legitimacy of a "People's Government" established in defiance of the charter government of Rhode Island, and identifying the locus of positive law-making power in the people of the state); Letter of Associate Justice Reynato S. Puno, 210 SCRA 589, 597 (1992) (*citing Political Rights as*

In a republican state, although the people delegate authority and confer legitimacy, they retain sovereignty.[94] As sovereign, the people possess the final check on government authority.[95] The purpose of a republican government is the promotion of the common welfare according to the will of the people themselves.[96] This will is usually determined by the rule of the majority, that is, the greater number of the people.[97]

Now, popular sovereignty has three facets. It is important to distinguish between the delegating, legitimating, and supervising function of popular sovereignty:[98]

> While all three relate to the power of the people, only the third — supervising — constitutes an exercise of popular sovereignty, strictly speaking. While delegating authority is essential to constituting a government, until a government is constituted the people have nothing over which to exercise their sovereignty. And while legitimating government authority through representative democracy is also important, this action entails participating in government rather than exercising control over it. Only by asserting their supervisory powers over government do the people exercise their sovereignty.

The supervisory power of the people acting as sovereigns further involve two aspects: (1) an exercise of popular sovereignty must take place from without the structure of government; and (2) an exercise of popular sovereignty must be final and unappealable.[99]

First, an exercise of popular sovereignty must be "supra-legal." It cannot take place within the governmental structure. Confining it within government subjects the popular will to government regulation and even

Political Questions. The Paradox of Luther v. Borden, 100 HARV. L. REV. 1125, 1133 (1987)).

94. *See* Akhil Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1437 (1987), *cited in* Dawson, *supra* note 90, *at* 283.

95. According to Dawson, "[g]overnment authority is controlled in the first instance by a system of "checks and balances" within the government. We should not forget, however, the existence of a final check on government authority possessed by the people." Dawson, *supra* note 90, at 283 n.16. The famous quote of Tocqueville is worth mentioning: "Whenever the political laws of the United States are to be discussed, it is with the doctrine of the sovereignty of the people that we must begin." 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 55 (Phillips Bradley ed. 1945), *quoted in* Dawson, *supra* note 90, at 282.

96. CRUZ, POL.LAW, *supra* note 2, at 50.

97. *Id.*

98. Dawson, *supra* note 90, at 283.

99. *Id.*

control. Otherwise, the locus of sovereignty would not be the people but elsewhere.[100] This is explained by Bernas:

> Sovereignty in [Section 1, Article II] therefore can be understood as the source of ultimate legal authority. Since the ultimate law in the Philippine system is the constitution, sovereignty, understood as legal sovereignty, means the power to adapt or alter a constitution. This power resides in the "people" understood as those who have a direct hand in the formulation, adoption, and amendment or alteration of the Constitution.[101]

The supra-legal aspect of popular sovereignty is demonstrated historically through revolution, constitutional convention, and in the U.S., jury nullification. In revolution and convention, the people exercised their "right . . . to later or abolish" any form of government destructive of their inalienable rights.[102] "The American Revolution occurred from outside the structure of the British Empire: to exercise their right to abolish the government, the colonists found it necessary first to declare independence from British authority and to 'dissolve the political bands which have connected them with another [people].'"[103] The supra-legal aspect presupposes that popular sovereignty is a residual power above a constitution.[104]

Second, the exercise of popular sovereignty must be final and unappealable.[105] This aspect follows from the requirement that an exercise of popular sovereignty occur from without the structure of government. For "[o]nce appeal is permitted, the following questions arise: Who may appeal? Before whom? How many times? Who may limit appeals? It is impossible to

100. *Id.*

101. BERNAS, CONST., *supra* note 11, at 50.

102. Dawson, *supra* note 90, at 283 (*citing* The Declaration of Independence ¶ 2 (U.S. 1776)).

103. *Id.* (citing The Declaration of Independence ¶ 1 (U.S. 1776)).

104. Salvador H. Laurel, *What We Should Learn From EDSA I and EDSA II*, Manila Bulletin, Feb. 26, 2001, at 11. Laurel states that:

> [a]ll Presidents should be reminded that the Filipino people have the "superior right" to "alter and abolish" their government when it becomes "destructive" of the "ends for which it was instituted." This residual power is above the Constitution and can always be exercised as a last recourse to achieve the people's happiness and well-being.

105. Dawson, *supra* note 90, at 284 (quoting James Wilson in James Wilson, Pennsylvania and the Federal Constitution, 1787-88 (John Bach McMaster & Frederick Dawson Stone eds., 1888): "In all governments, whatever is their form, however they may be constituted, there must be a power established from which there is no appeal . . . . The only question is where that power is lodged? . . . [I]t remains and flourishes with the people.").

answer these questions without subjecting the popular will to government authority."[106]

2. The Act of State

An act of state is an act done by the sovereign power of a country, or by its delegate, within the limits of the power vested in him. More specifically, an act of State is an act done by the political departments of the government and not subject to judicial review.[107] The political question doctrine as a defense in legal proceedings is the jurisprudential translation of the act of state doctrine.

According to Sinco, the juristic theory of sovereignty considers the state "as a corporate entity, a juridical person in much the same sense that a corporation is so considered. Unlike the latter, however, it is not subject to law. It is legally supreme. Sovereignty resides in the state as a person. It corresponds to the will of the natural person."[108] For Sinco, there must be alignment between the corporate act of the State and the will of the natural person. What the "natural person" comprises, however, is left hanging, for this may correspond to the will of a monarch, an autocrat, or the people acting collectively. Any attempt in defining "natural person" would now depend on the form of governance, whether it is monarchial, republican, or otherwise. In the Philippine setting, Section 1 of Article II may give some direction. According to Sinco, that sovereignty resides in the people refers to the entire citizenry considered as a unit.[109]

106. *Id.*

107. CRUZ, POL.LAW, *supra* note 2, at 29 (illustrating that the President's decision, in the exercise of his diplomatic power to extend recognition to an newly-established foreign State or government is not subject to judicial review).

108. SINCO, *supra* note 85, at 18.

109. The term 'people' does

> not merely [refer to] the electorate as this is only a smaller group, a fraction of the people, and is but an organ of government vested with the power to elect government officials and, on rare occasions, approve general measures such as the ratification of a constitution or its amendments. This select group is not the source of sovereignty. It is rather the people considered collectively as a legal association that constitute the repository of sovereignty. And it is this legal association of the people acting as a unit that correspondents to the state.

Id. at 19-20 (discussing further the three meanings of the term 'people' in the 1935 Constitution).

3. Revolution as Direct State Action

Now, the state as a legal person generally acts through its government. Sometimes, however, the people rise in revolt against the existing administration or government either through force or, in the case of People Power, a bloodless coup and succeed in altering the constituted organs of government. The oft-cited case of *Gitlow v. Keily* provides the traditional definition: "The word 'revolution' is thus defined in connection with political or governmental matters: 'A complete overthrow of the established government in any country or state by those who were previously subject to it; a forcible substitution of a new ruler or form of government.'"[110] Even before the EDSA Revolution of 1986, authorities have held that revolutions need not always be accompanied by force; revolution may be by peaceful means.[111] However, authorities have consistently defined revolutions to involve "fundamental change with far-reaching social changes;"[112] or "an overthrow of a government usually resulting in fundamental political change."[113] The principal characteristic of revolution "whether violent or not, involve[s] *radical change*. Huntington defines revolution as 'a rapid, fundamental and violent domestic change in the dominant values and myths of society, in its political institution, social structure, leadership, government activity and policies.'"[114]

The crucial question now arises: Is an act of state through revolution illegal? Stated otherwise, do acts of state through revolution always contravene the constitutional order?

Sinco, like a true lawyer, varies his answer depending on the point of view. From the point of view of the constitutional framework, the act is illegal. The Supreme Court had the occasion to state that "[d]iscussions and opinions of legal experts also proclaim that the Aquino government was 'revolutionary in the sense that it came into existence in defiance of the

110. Gitlow v. Kiely, 44 F.2d 227, 232-33 (1930).

111. 46 C.J.S. *Insurrection and Sedition* § 1 (1946). *See* Tolentino v. COMELEC, 41 SCRA 702, 715 (1971). It can be gleaned that Justice Barredo, the ponencia, was able to conceive of a revolution that is bloodless — in his words, *"a la coup d'etat." Id.*

112. 46 C.J.S. *Insurrection and Sedition* § 1 (1946) (*citing* State v. Diamond, 202 P. 988, 991 in note 47).

113. BLACK'S LAW DICTIONARY 1321 (7th ed.1999).

114. Zacorin, Theories *of Revolution in Contemporary Historiography*, 88 Political Science Quarterly 23, 26, (1973), *cited in* Agnes H. Maranan, *The Dilemma of Legitimacy: A Two-Phased Resolution*, 61 Phil. L.J. 149, 152 (1986) (emphasis in original).

existing legal processes'"[115] The Court further said that "it was a revolutionary government 'instituted by the direct action of the people and in opposition to the authoritarian values and practices of the overthrown government.'"[116]

But from the point of view of "the state as a distinct entity not necessarily bound to employ a particular government or administration to carry out its will, it is the direct act of the state itself because it is successful."[117] As such, revolution as direct state action is legal, "for whatever is attributable to the state is lawful. This is the legal and political basis of the doctrine of revolution."[118] Black is more dramatic: "The constitution is only the external organization of the people, and if, by means of it, the state itself is in danger of perishing, or if vital interests of the public weal are threatened, necessity knows no law."[119]

Does that mean, therefore, that all revolutions are direct state actions? In the light of republican and democratic traditions, the answer must be in the negative, for it is conceivable that revolutionaries, regardless of how successful in bringing down the existing regime, may not receive the support of the sovereign people. In such an instance, the people will resist anew, and the outcome is now confined to the field of politics and the laws of war. But to be a true direct state action, however, the revolution must amount to a

115. Joaquin G. Bernas, S.J., Proclamation No. 3 With Notes by Joaquin Bernas, S.J. 3 (1986), *cited in* Letter of Associate Justice Reyanto S. Puno, 210 SCRA 589, 598 (1992).

116. Edgardo Angara, *Address by U.P. President Edgardo Angara, Bishiops-Businessmen's Conference*, 27 U.P. Gazette, Mar. 21, 1986, at 28, 29, *cited in* Letter of Associate Justice Reyanto S. Puno, 210 SCRA 589, 598 (1992)

117. SINCO, *supra* 85 note, at 7. Sinco's statement implies that the success of a revolution is the crucial test to see whether it arises to the level of direct state acts. The test of success per se, however, may encounter difficulties since it is conceivable that victorious revolutionaries are misaligned from the sovereign will. The true test should be the expression of the sovereign will. Acts of revolutionaries, as stated in the text, may or may not gain the support of the people acting in their sovereign capacity. In such a case, the people will continue to assert their sovereignty until those who hold the reins of government are replaced or become aligned with the sovereign will.

118. *Id.*

119. BLACK, *supra* note 1, at 11.

> All power is inherent in the people, and all free governments are founded on that authority, and instituted for their peace, safety, and happiness. For the advancement of these ends they have at all times an unalterable and indefeasible right to alter, reform, or abolish the government in such manner as they may think proper. These principles in this country are well-recognized political truths, independent of any written constitution or laws.

supervisory act of popular sovereignty according to republican theory. It is noteworthy to point out that the original draft of Section 1, Article II of the 1987 Constitution mirrors some terms found in the U.S. Declaration of Independence: "The Philippines is a republican and democratic State. Sovereignty resides in the Filipino people and all government authority emanates from them and *continues only with their consent.*" [120]

B. *Impact of People Power on the Constitutional Order*[121] *under* Estrada v. Arroyo

Estrada v. Arroyo is not friendly to the principle of direct state action. As stated at the onset, this unwillingness may be caused by the strong adherence to the policies of supremacy and permanence of the constitution. Such adherence appears adequately justified especially to preempt any perceived "rupture or abrogation of the legal order," as Justice Vitug would perhaps put it.[122] In these instances, it can be seen that the Supreme Court in the face of extraordinary events is charged with a political role.

The concurring opinion of Justice Mendoza is perhaps the most hostile towards the idea of direct state action:

> I except extravagant claims of the right of the people to change their government. While Art. II, § 1 of the Constitution says that "sovereignty resides in the people and all government authority emanates from them," it also says that "the Philippines is a democratic and republican state." This means that ours is a representative democracy – as distinguished from a direct democracy – in which the sovereign will of the people is expressed through the ballot, whether in an election, referendum, initiative, recall (in the case of local officials) or plebiscite. Any exercise of the powers of sovereignty in any other way is unconstitutional.[123]

Mendoza continues: "Indeed, the right to revolt cannot be recognized as a constitutional principle. A constitution to provide for the right of the people to revolt will carry with it the seeds of its own destruction."[124] This is in opposition to the legal opinion of Secretary of Justice Hernando Perez wherein he stated that the legal *basis*, as opposed to something *declaratory*, of People Power is found in Section 1, Article II, which states that "[s]overeignty resides in the people and all government authority emanates from them."[125]

It is one thing to say, however, that any constitutional affirmation of the right to revolt as a direct state action is inimical to constitutionalism, and yet another to say that direct state actions are always valid legal acts. Direct acts of state are always extra-constitutional or, according to Mendoza, unconstitutional. The nuances between extra-constitutional and unconstitutional acts will not be discussed here, but it is enough to note that both are contradictory.

As stated earlier, direct state acts are *always* legal "for whatever is attributable to the state is lawful."[126] This is from the point of view of the sovereign. Such acts are incontestable. The constitution, as a creature of the Sovereign, cannot be used to bind the sovereign as the ultimate legal

120. BERNAS, CONST. *supra* note 11, at 51 (emphasis added) ("The Constitutional Commission, however, did not consider it necessary to make explicit the right of the people to oust an abusive and authoritarian government through non-violent means."). The following summarizes the discussion behind the phrase "continues only with their consent."

> . . . Father Joaquin Bernas wanted to know whether this was an affirmation of the right of revolution – that is, a right to change not just the concrete set of people exercising power, that is, the "administration," or a right to overhaul the government itself as an abstract institution. Nolledo said that it referred to both, and that the February event had in fact triggered a change of both.
>
> . . . .
>
> . . . . But the draft was amended and dropped the clause "continues only with their consent."

BERNAS, INTENT, *supra* note 30, at 74-75.

121. Justice Hilario Davide, Jr. posited the question at The Tenth Centenary Lecture: "What is the impact of People Power on the Philippine Legal system? Did People Power alter our legal system?" CHIEF JUSTICE HILARIO G. DAVIDE, JR., CLOSING REMARKS AT THE TENTH CENTENARY LECTURE, SUPREME COURT SESSION HALL ON THE TOPIC: THE IMPACT OF PEOPLE POWER ON OUR LEGAL SYSTEM (May 17, 2001), *reprinted in* LAW. REV., June 30, 2001, at 76.

122. *Estrada*, G.R. No. 146738 at 4-5 (Vitug, J., concurring).

123. *Estrada*, G.R. No. 146738 at 10 (Mendoza, J., concurring). Teodoro L. Locsin, Jr. stated his allergy against Sec. 1, Art. II perhaps rather humorously:

> *Salus populi est suprema lex* is not a legal principle. It is a proverb, for God's sake, found in the one-unit, first-year law-school subject of statutory construction. It is an aid in interpreting a law so badly drafted you can't make out the sense, so you have to assume it aims at the public good rather than the public disadvantage.
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> Teodoro L. Locsin, Jr., *Lack of Faith in People Power*, Today, Jan. 22, 2001, at 8.

124. *Estrada*, G.R. No. 146738 at 10 (Mendoza, J., concurring) (emphasis supplied).

125. *Erap Ally Asks SC to Nullify Gloria Rule*, Philippine Daily Inquirer, Jan. 30, 2001, at 1 (quoting the legal opinion of Justice Secretary Hernando Perez rendered on January 24, 2001 in response to the inquiry of then Executive Secretary Renato de Villa). *See* Jose C. Sison, *Constitutionality of GMA's Presidency*, Philippine Star, Jan. 24, 2001, at 10 ("*Salus Populi est Suprema Lex*. The assumption [of Arroyo] is therefore constitutional because there is vacancy by the effective removal thru the miracle of People Power.").

126. SINCO, *supra* note 85, at 7.

authority. Bernas is of the view that the "people" in Section 1, Article II, as the source of ultimate legal authority, has the power to adopt or alter a constitution.[127] Now, the means to alter the constitution, whether constitutional or otherwise, is entirely up to the sovereign. But history shows that the recourse to such extra-constitutional behavior is always one of last resort.[128] Hence, the people as sovereign will not go through the lengths of revolution, peaceful or otherwise, unless there still exist adequate constitutional remedies. The perception of how adequate these remedies are, however, is a political judgment reserved solely to the sovereign will. It may be stated, however, that the wider the right-remedy gap[129] in the constitutional mechanism, the larger the revolutionary bubble. At any rate, whatever the cause, the courts of law cannot use legal or constitutional standards to judge the soundness of the political judgment. It may have to determine whether any act or event rose to the level of a sovereign act such as that of a revolution, but the courts must stop there. Courts do this by virtue of the political question doctrine.[130] In *Estrada v. Arroyo*, the ascension

127. BERNAS, CONST., *supra* note 11, at 50.

128. According to BLACK, *supra* note 1, at 10, The right of revolution is the inherent right of a people to cast out their rulers, change their polity, or effect radical reforms in their system of government or institution, by force or a general uprising, when the legal and constitutional methods of making such changes have proved inadequate, or are so obstructed as to be unavailable.

129. John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999) (*referring to* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803)). "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." Jeffries also stated that "Marshall also quoted Blackstone's more familiar formulation: '[I]t is a general an indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded.'" *Id.*

130. SINCO, *supra* note 85, at 7: "Indeed, it has been said that under a written constitution, the people can do no act except make a new constitution or make a revolution." *See generally* Mendoza, *Fateful Years*, *supra* note 12, at 2 (1986). As to the power of judicial review:

> Whether the change is due to a new constitution or to a revolution, the change does not admit of judicial review. The question is political. If a court decides at all *qua* court, it must necessarily affirm the existence and authority of the government under which it is exercising judicial power.
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> Luther v. Borden, 7 How. 1 (1849), *cited in* Mendoza, *Fateful Years*, *supra*. Weston, *Political Questions*, 38 Harv. L. Rev. 296, 305 (1925), *cited in* Mendoza, *Fateful Years*, *supra* ("[T]he men who were judges under the old regime and the men who are called to be judges under the new have each to decide as individuals what they are to do; and it may be that they choose at grave peril with the factional outcome still uncertain.").

of respondent Arroyo was adjudged not a political question. It was intra-constitutional — an exercise of the right to peaceably assemble and petition the government for redress of grievances as guaranteed under Section 4 of the Bill of Rights.[131] The discussion on resignation, abandonment, and permanent incapacity came as a matter of course.

Bernas adheres to the view that the Presidency had been vacated extra-constitutionally, that is, not by death or removal according to Section 8, Article VII, but rather, by a forced resignation. "[T]here is obvious reluctance to admit that the external force which created the vacancy was "people power."[132] But "[t]hat is where the extra-constitutional process ends. What followed was and should be according to the 1987 Constitution, especially considering that the Supreme Court has called his departure a 'resignation.'"[133] Following his logic, it would seem that there may have been moments when certain constitutional provisions, particularly Section 8, did not operate because the people did not want it to operate. It may even be argued that the operation of Section 8 was *suspended*[134] while the people proceeded to oust the President. For where the "powers which are passionately stirred in the people are unchained, and produce a revolutionary eruption, the regular operation of constitutional law is disturbed. In the presence of revolution, law is impotent."[135] But after Estrada was ousted, the constitutional order remained intact, and the clamor calmed. Following the

131. PHIL. CONST. art. III, § 4. No law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people peaceably to assemble and petition the government for redress of grievances. Bernas is of the view that Estrada was ousted extra-constitutionally:

> True enough, what happened was a radical redress of grievances; but the redress did not come from Mr. Estrada. It came from the military, the police and a majority of the Cabinet who together abandoned him. It is hard to see this form of redress as intra-constitutional. In fact, when one looks at the Court's recitation of the facts that led to the oath-taking of Gloria Arroyo, it can easily be seen that Estrada was driven out of office first by force of popular clamor and second by the fact of having been abandoned by his own government. He left Malacañang fearful of mayhem.
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> Bernas, *One-Man Rule*, *supra* note 26, at 63.

132. Joaqin G. Bernas, S.J., *Estrada's Last Stand*, Today, Mar. 21, 2001, at 8.

133. Bernas, *One-Man Rule*, *supra* note 26, at 65.

134. The idea that the constitution may be suspended is not new. *See generally* Agnes H. Maranan, *The Dilemma of Legitimacy: A Two-Phase Resolution*, 61 PHIL. L.J. 149 (1986) (employing CRUZ, POL. LAW, *supra* note 2, to suggest the notion that the 1973 Constitution was suspended law).

135. BLACK, *supra* note 1, at 11.

line of Bernas,[136] it must be stressed that upon Arroyo's revolutionary ascension, perhaps consciously to align herself with the will of the people, she chose to abide by the 1987 Constitution as manifested in her oath of office.[137] Now, whether the Filipino people would have aligned themselves nonetheless had she declared a revolutionary government is a speculative exercise. The thesis that People Power may bring moments of extra-constitutional behavior without completely abrogating constitutions is a new force that courts of law must now reckon with. That government institutions remained intact after EDSA II is not now a test for the success of revolutionary or direct state action. Radical change, the usual end of revolutions, may perhaps not always be an automatic feature, for the exercise of direct state actions may merely suspend elements of the constitutional order and thereafter leave the whole system intact. A successful exercise of People Power is not measured by whether governmental bodies survive, for the goals of People Power is as infinite as the sovereign will.[138] With *Estrada* in the foreground, it is not whether presidential succession resulted in the rupture or abrogation of the legal order[139] since the problem then was with the person of the President and not with government as an institution. The expulsion of the former need not change the latter.

136. Bernas is of the view that the extra-constitutionality ended with ouster, beyond which the constitution began to operate again for Arroyo to succeed. *See* Bernas, *One-Man Rule, supra* note 26.

137. Interview with Joaquin G. Bernas, S.J., Dean of the Ateneo School of Law, Ateneo Professional Schools, Rockwell Center, Makati City, Philippines (May 14, 2002).

138. In an *obiter,* Justice Vitug himself noticed the dynamism of popular will in EDSA II:

> The indications would seem that much also depended, by good margin, on how the power-holders would have wanted it to be at the time. *The circumstances that prevailed would have likely allowed them to declare a revolutionary government,* to dismantle the old, and to have a new one installed, thereby effectively abrogating the Constitution until yet another if minded. Respondent could have, so enjoying a show of overwhelming civilian and military support as she did, forever silenced any legal challenge to her leadership by choosing a previously-tested path trodden by then President Corazon C. Aquino fifteen years before – declaring a revolutionary government, doing away with the constitution and railroading all extant democratic institutions and, once ensconced in power, rule by decree. The large group of people, already then impatient after a four-day vigil at EDSA and later at Mendiola, *could have given in to the popular passions and impulses that prevailed. stormed Malacanang gates, bodily removed petitioner from office and, in his place, sworn in respondent, or any other person or group not so dictated by the Charter as the successor."*
>
> *Estrada,* G.R. No. 146738 at 3-4 (Vitug, J., concurring) (emphasis supplied).

139. *Id.* at 4-5.

The facts and opinions of the Justices in *Estrada v. Arroyo* reflect these propositions but the Justices were however bound by the rigidity of conventional juristic classification.[140] For them, flexible interpretation of Sec. 8, Article VII was key. It is at this point, however, where the utility of the political question doctrine comes into play.[141] But the invocation of such a doctrine, unlike in Aquino's ascension, need not always lead the courts to conclude total revolution. People Power as an extra-constitutional exercise of direct state action can amount to something less. It is clear that EDSA II was something less.

C. *The Three-Fold Function of Judicial Review*

Justice Vitug, in one occasion, had the privilege to state the nature of the Constitution as a social compact between the people and their governors:

> The Constitution is a compact where the people, as being the ultimate sovereign, surrender the vast portion of their authority to the State and *agree to limit the exercise of direct rule into basically four avenues — elections, initiative, referendum, and recall* — all designed to channel the expression of the popular will into an orderly and coherent exercise. Clearly, *the EDSA phenomenon has spawned a fifth dimension, and now there may truly be reason for anxiety.* . . . Unchecked, EDSA might even turn into an untamed, unpredictable and unruly stallion that can crush its rider. If a government born at the streets of EDSA were to derive its legitimacy solely from the changing throng then a Pandora's box might unwittingly open to rear just about its edges an ugly malaise more potent than that which it may seek to address.[142]

140. *See* Emil P. Jurado, *3 Scenarios on SC's Legitimacy Ruling,* Manila Standard, Mar. 2, 2001, at 15. Jurado presented the following: 1) the Court may rule on the basis of *salus populi est suprema lex.* In this manner, the Court shall declare Arroyo as duly-constituted President, relying on both chambers of Congress to have recognized her, together with the military, international community, greater majority of the people; 2) the Court may declare two presidents, one acting and the other on leave. Jurado asserts that popular opinion will not accept this. Should the Court act this way, then the only recourse for Arroyo is to declare a revolutionary government. This would open the door to the backlash of a political and economic crisis of terrible proportions, such as the abolition of Congress and the Supreme Court; or 3) the Court may invoke the political question doctrine and "wash its hands." *Id.*

141. The Court, however, did not invoke it to defend the extra-constitutionality of Arroyo's succession. It was instead invoked against Estrada's claim of temporary inability.

142. ASSOCIATE JUSTICE JOSE. C. VITUG, OPENING REMARKS AT THE TENTH CENTENARY LECTURE; SUPREME COURT SESSION HALL ON THE TOPIC: THE IMPACT OF PEOPLE POWER ON OUR LEGAL SYSTEM (May 17, 2001), *reprinted in* LAW. REV., June 30, 2001, at 76 (emphasis supplied).

Courts now must have to deal with the "fifth dimension" of direct rule otherwise known as People Power in a way that is more unconventional. Otherwise, judges will be constantly faced with the difficulty of stretching their construction of the Constitution to accommodate events which would otherwise be glaringly revolutionary to the layman. EDSA I brought about fundamental change. EDSA II was something less than total revolution or radical change. The reasoning in *Estrada* followed an inflexible black-white classification[143] process — the Justices in *Estrada* had to decide whether EDSA II either abrogated the Constitution or sustained it. But after all, there may be a shade of gray between total revolution and constitutional order. Vitug foresees that "[a]fter two non-violent civilian uprising [sic] within just a short span of years between them, it might be said that popular mass action is fast becoming an institutionalized enterprise."[144] Whether these gray areas indicate the need for constitutional amendments will not be discussed here, but the point remains — People Power is an emerging extra-constitutional remedy that is beginning to behave on its own, and to a great extent, defies traditional juristic classification. The courts must catch up. At the end of his concurring opinion, Vitug presents a question to the youth: "Should the streets now be the venue for the exercise of popular democracy? Where does one draw the line between the rule of law and the rule of the mob, or between 'People Power' and 'Anarchy'?"[145]

Obviously these lines cannot once and for all be frozen by legislative enactment — People Power is a dynamic phenomenon. The burden lies with the courts.

The function of judicial review[146] involves the exercise of two functions: *checking* and *legitimating*.[147] According to Justice Mendoza,

143. Then U.P. President and now Senator Edgardo Angara encapsulated the "either-or" legal classification in the following statement: "[A government] instituted by direct action of the people and in opposition to the authoritarian values and practices of the overthrown government can only be revolutionary." *Address by U.P. President Edgardo Angara, Bishiops-Businessmen's Conference*, 27 U.P. Gazette, Mar. 21, 1986, at 28, 29, *cited in* Agnes H. Maranan, *The Dilemma of Legitimacy: A Two-Phased Resolution*, 61 Phil. L. J. 149, 151 (1986).

144. *Estrada*, G.R. No. 146738 at 14 (Vitug, J., concurring). *See* Teodoro L. Locsin, Jr. *Lack of Faith in People Power*, Today, Jan. 22, 2001, at 8 (stating that "People Power must forever be accepted as an integral part of the Philippine constitutional order, the unwritten security that what the written Constitution fails to deliver, the people will.").

145. *Estrada*, G.R. No. 146738 at 14-15 (Vitug, J., concurring).

146. PHIL. CONST. art. VII, § 1. Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.

147. *See* Occena v. COMELEC, 104 SCRA 1 (1981); Mitra v. COMELEC, 104 SCRA 59 (1981).

148. Mendoza, *Fateful Years, supra* note 12, at 6.

149. 134 SCRA 438 (1985).

150. Mendoza, *Fateful Years, supra* note 12, at 6 (*construing* Salonga v. Pano, 134 SCRA 438 (1985)).

151. *Id.* at 6-7 (*citing* Salonga v. Pano, 134 SCRA 438 (1985)).

152. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952), *cited in* Mendoza, *Fateful Years, supra* note 12, at 7.

153. Justice Holmes famously said:

> [t]he checking function is the more familiar and indeed the more dramatic, because by means of this function, the Court curbs the exercise of powers by the other branches of the government. The legitimating function, on the other hand, sometimes passes unnoticed because it may simply result, according to the Court, from the mere dismissal of a petition challenging the validity of a statute.[148]

In *Salonga v. Cruz Paño*,[149] Court mentioned third function of judicial review – the *symbolic or educational* function – to justify the decision of a constitutional question, even as it dismissed the case for being moot and academic.[150] In *Salonga*,

> [t]he opinion of the Court by Justice Gutierrez, while holding that the case had become moot and academic, nevertheless proceeded to decide the constitutional issues raised for two reasons: (1) The fiscal had said the dismissal of the criminal case was without prejudice to its refilling inasmuch as the petitioner had not been placed in jeopardy; (2) the Supreme Court has the duty to formulate "guiding and controlling constitutional principles, precepts, doctrines or rules. It has the symbolic function of educating bench and bar on the extent of protection given by constitutional guarantees."[151]

Truly, "[t]he legitimating, checking and symbolic functions are by-products of the Court's power of judicial review . . . . The Justices, in Eugene Rostow's phrase, 'are inevitably teachers in a vital national seminar.'"[152]

V. CONCLUSION

Any future exercise of the "fifth dimension" that is known as People Power will have to pass through the three filtering functions of judicial review. Refinement of the Law on People Power is inevitable. It is at its infancy. Some, quoting Justice Holmes, have criticized *Estrada* as an "accident of an immediate overwhelming interest."[153] True enough, Justice Vitug himself

admitted that "[t]he danger was simply overwhelming. The [extraordinariness] of the reality called for an extraordinary solution. The Court has chosen to prevent rather than cure an enigma incapable of being recoiled."[154] Critics of *Estrada* may be right, but there are always rough stages in any emerging body of law.

The educational function of the Court in *Estrada* is most apparent in the classification of EDSA II as opposed to EDSA I. The checking function was manifested in the subtle use of the political question doctrine against the petitioner. The legitimating function is the product of the latter two.

When faced again with the unlimited phenomenon of direct state actions, courts of law must be now more conscious of the three functions of judicial review. The duty to reconcile extra-constitutionality with the twin principles of supremacy and permanence of the constitution is now even more pronounced. Direct state actions are slowly becoming institutionalized. Use of the political question doctrine must be more clinical and more refined. Pressing questions such as, 'What are the tests and standards in gauging whether popular action amounted to mob rule?' 'What are the house rules of the "parliament in the streets"'?

It is not anymore enough to say that these are left to the fields of politics and war. For in refusing to integrate the doctrine of direct state actions, courts will have no choice but to keep expanding the words and phrases of constitutions to accommodate an otherwise unlimited phenomenon.

> Great cases like hard cases make bad law. For great cases are called great . . . because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.
>
> Northern Securities Company v. United States, 193 U.S. 197, 400-01 (1904), *quoted in* Bernas, *One-Man Rule*, *supra* note 26, at 65.

154. *Estrada*, G.R. No. 146738 (Vitug, J., concurring).

The Jotting of *Obiter Dicta* in *Estrada v. Sandiganbayan*: Did the Supreme Court Blunder in its Decision on the Constitutionality of the Law on Plunder?

Aris L. Gulapa *

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INTRODUCTION

Nothing is more objectionable than erroneous *obiter dicta*.[1]

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1. Kuenzle & Streiff v. Villanueva, 41 Phil. 611, 624 (1921) (Moreland, J., concurring and dissenting). The context of Justice Moreland's statement can be gleaned from his adroit opinion:

> I want, first of all, to point out what the court holds in this case and the train of argument by which it arrives at its conclusion. As I have said, I find no fault with the bare finding that the attachment must be upheld. With that I agree. That was a resolution of the question, and the sole question, before the court. But the court decides much more than that; and this, together with the style and character of the argument found in the opinion, is what I object to. Near