REPUBLICANISM AND ITS POLITICAL SEASONS: THE *JAVELLANA*, *FREEDOM CONSTITUTION*, AND *PIRMA* CASES

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> 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. 401 (1904) (Holmes, J., dissenting).

INTRODUCTION

All Philippine constitutions have declared that the Philippines is a democratic and republican state.[1] The "people's initiative" clauses

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[1] "The Philippines is a democratic and republican State. Sovereignty resides in the people and all government authority emanates from them." (CONST., art. II , sec. 1).

"The Philippines is a republican state. Sovereignty resides in the people and all government authority emanates from them...." (CONST. (1973), art. II , sec. 1 and CONST. (1935), art. II , sec. 1).

"Art. 1. The political association of all the Filipinos constitutes a Nation, whose state shall be known as the Philippine Republic.

....

Art. 3. Sovereignty resides exclusively in the people.

of the current Constitution have "institutionalized people power,"[2] referring to the exercise of direct democracy that deposed the Marcos dictatorship and restored democracy. The Supreme Court has "rhapsodized people power"[3] in direct initiative cases, declaring that "this Court as a matter of policy and doctrine will exert every effort to nurture, protect and promote [its] legitimate exercise."[4]

Yet recently, the Supreme Court, faced with a direct initiative to amend the Constitution and extend the term of the President, suddenly balked. How can we reconcile the Court's rejection of a people's initiative with the principle of republicanism?

Two Bites at Un-Forbidden Fruit

In 1997, there were two attempts to change the Philippines' post-Marcos Constitution, its proponents citing grave defects in that charter, its opponents stating that the real agenda was to allow the President to remain in power *via* the lifting of constitutionally-created term limits as Marcos had done twenty-five years earlier. The Constitution, adopted in 1987, provides that amendments may be proposed by:

(a) *Congress*, upon a vote of three-fourths of all its Members;[5] or

(b) A *constitutional convention* to be called by Congress, either —

Art. 4. The Government of the Republic is popular, representative...and responsible...." (Malolos Constitution, approved by the Malolos Congress on 20 January 1899 and promulgated on 22 January 1899).

[2] Subic Bay Metropolitan Authority v. Commission on Elections, G.R. No. 125416, September 26, 1996 (hereinafter *Subic Initiative*).

[3] Defensor-Santiago v. Commission on Elections, G.R. No. 127325, March 19, 1997 (hereinafter *PIRMA I*) (Puno, J., concurring and dissenting).

[4] Subic Initiative case, *supra*.

[5] CONST., art. XVII , sec. 1 par. (1).

- directly, by a vote of two-thirds of its Members, or
- subject to the approval by the electorate, by a majority vote of its Members;[6] or

(c) A *people's initiative,* upon petition by at least 12% of the total number of registered voters, and with at least 3% of these voters in each legislative district, and subject finally to implementing legislation by Congress,[7] the sufficiency of the petition should be certified by the COMELEC.[8]

The first attempt was made through a direct people's initiative, led by an organization named People's Initiative for Reforms, Modernization and Action (or PIRMA, literally meaning, in Filipino, *signature*) which initiated a signature campaign. The second attempt was through congressional action, via House[9] and Senate[10] Resolutions

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[6] CONST., art. XVII , sec. 1, par. (2) and sec. 3.

[7] CONST., art. XVII, sec. 2.

[8] CONST., art. XVII, sec. 4.

[9] H. Con. Res. No. 40, 10th Congress, Second Session (1997), *Setting the Parameters for Discussion Between the Senate and House of Representatives in Proposing Amendments to the Constitution as a Constituent Assembly*, as endorsed by Committee Report No. 846, dated 24 March 1997, by the Committee on Constitutional Amendments, recommending its approval. The Resolution proposed that the following provisions be reviewed:

a. Exclusion of aliens and preference for Filipinos in the exploitation of the national patrimony;

b. Expanded jurisdiction of courts, so as to "strengthen" the separation of powers;

c. Bicameral or unilateral legislature, and election of senators by region;

d. Presidential or parliamentary system;

e. Multi- or two-party system;

f. Lifting of term limits of the President and all elective officials;

g. Synchronization or de-synchronization of elections;

h. Limiting suffrage by excluding illiterates; and

i. Adding a section on Duties and Responsibilities of every Filipino.

[10] S. Con. Res. No. 18, 10th Congress, Third Session (1997), *Providing That the Senate and the House of Representatives Hold a Joint Session to Propose Amendments to the Constitution of the Philippines*, introduced by Senator Juan Ponce Enrile on 2 September 1997. The Resolution proposed that the following matters be reviewed:

proposing that Congress convene itself as a constituent assembly[11] to propose specified amendments for approval in a plebiscite.

Both attempts were rejected, the first, by law through the Supreme Court, and the second, by politics through mounting public protests that eventually forced the President to disavow categorically any intention to remain in power.

Approach

This essay is an attempt to settle intellectual accounts, and to consolidate *normatively* a triumph that has already been won *politically*.

I propose that while the opponents of charter change have now triumphed politically, there remains to be hurdled a normative dilemma. What PIRMA sought was merely for the COMELEC to hold a plebiscite wherein the people may accept, or reject, its proffered amendments. Yet hundreds of thousands marched against PIRMA and its cohorts, anxious about a return to military rule accomplished *via* constitutional changes.

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a. Presidential or parliamentary form of government;
b. Bicameral or unicameral legislature;
c. Number and manner of electing Congress;
d. Redefinition of economic sectors reserved for Filipinos;
e. Review of multi-party system;
f. Reexamination of the "national" Police Service;
g. Review scope of the power of the Commission on Appointments to review Presidential appointments;
h. Review Church and State doctrine;
i. Review role of military;
j. Review provisions on Judiciary;
k. Review terms of office of local government officials, congressmen, senators, the Vice-President and the President.

[11] *See* Gonzalez v. Commission on Elections, G.R. Nos. 28196-28224, November 9, 1967, 21 SCRA 774 at 787 (1967) (When the members of Congress propose amendments to the Constitution, they act "not as members of Congress, but as component members of a constituent assembly...deriv[ing] their authority from the Constitution....").

What they found viscerally compelling translates, intellectually, to a very strange proposition: *to save democracy in the Philippines, we must prevent the sovereign people from speaking.* Although the proposition can be restated more sympathetically — *to save democracy, we must prevent the sovereign will from being twisted, or mangled, by politicians* — one must remember that House and Senate Resolutions were filed by the duly-elected representatives of the people, in accordance with constitutional processes adopted by the people themselves in a plebiscite.

How we choose today may return to haunt us. Recall that those who abhorred the *Javellana*[12] decision (holding that the Marcos constitution of 1973 was effective without the required plebiscite because the real test was the people's acquiescence, which was not justiceable) may very well have relished the *Freedom Constitution*[13] cases (stating that the "legitimacy of the Aquino government [was] not a justiceable matter [but] belong[ed] to the realm of politics"[14] but likewise recognizing that her government had been established "in violation of [the] Constitution"[15]). Significantly, two Members of the *Javellana* Court (Chief Justice Concepcion and Justice Teehankee) who rejected Marcos's "citizen's assemblies" and stood up for a strict legalistic requirement of a plebiscite, themselves accepted the legitimacy of the Freedom Constitution — the former, when he agreed to sit in the Constitutional Commission formed by Cory Aquino under the Freedom Constitution, the latter, when he administered Cory Aquino's oath as president under the Freedom Constitution.

These cases ironically were anchored on the supremacy of the sovereign will, and — in the verdict of history but not of law —

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[12] Javellana v. Executive Secretary, G.R. No. 36142, March 31, 1973, 50 SCRA 30 (1973) (hereinafter *Javellana*).

[13] Lawyer's League for a Better Philippines v. President Aquino, G.R. No. 73748, May 22, 1986; In re Saturnino Bermudez, G.R. No. 76180, October 24, 1986, 145 SCRA 160 (1986); De Leon v. Esguerra, G.R. No. 78059, August 31, 1987, 153 SCRA 602 (1987); Letter of Associate Justice Reynato S. Puno, A.M. No. 90-11-2697-CA (June 29, 1992), 210 SCRA 589, 599 (1992) (hereinafter, *Letter of Justice Puno*).

[14] Lawyer's League for a Better Philippines v. President Aquino, *supra*.

[15] Letter of Justice Puno, *supra at* 599.

differed only in the purported genuineness of the ratification: Marcos's was bogus, Aquino's was so to speak the "real McCoy." But the juridical refrain remains the same: the sovereign trumps law.

This essay therefore aims to ensure, in the words of Justice Panganiban, that the "fact that the [PIRMA] petition proposes a misuse of initiative does not justify a ban against its proper use,"[16] and that the *PIRMA* cases, for all their perceived gains, do not damage the Constitution's republican foundations. It is not about the *wisdom* or *desirability* or *substance* of the amendments themselves, which will necessarily entail political or economic arguments.[17] It is rather about the *process*[18] of amending the Constitution, which is governed by the principle that a constitution binds only with the consent of the governed.

Historical Context of the PIRMA decisions

Fidel V. Ramos was elected president of the Philippines in 1992 for a six-year term, and is barred by the Constitution from running for re-election. In December 1996, two years before his term was to end, a group named PIRMA campaigned for the lifting of Ramos's term limits in order that he may "continue with his reforms" and asked the Commission on Elections (hereinafter, *COMELEC*) to receive signatures under the people's initiative clause of the Constitution. On 19 March 1997, the Court stopped the people's initiative, stating first, that the existing implementing statute was "inadequate" since it provided for amending mere laws but not constitutions, and second, that the COMELEC had no jurisdiction to hear PIRMA's petition because it did not contain the requisite signatures for a people's initiative (hereinafter referred to as *PIRMA I).*

Meanwhile, Senator Orlando Mercado warned on the floor of the Senate about a return to military rule *via* several possible

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[16] PIRMA I, *supra* (Panganiban, J., concurring and dissenting), *see* note 4.
[17] *See* Lansang v. Garcia, G.R. No. 33964, December 11, 1976, 42 SCRA 448 (distinction between *wisdom* and *validity* of the contested act).
[18] *See* L. H. Tribe, *The Puzzling Persistence Of Process-Based Constitutional Theories*, 80 Yale L. J. 1063 (1980).

scenarios, among them: through "extra-legal means [as a] smokescreen," to be accomplished through a supposedly spontaneous people's initiative to improve the constitution, or congressional action to either convene a constituent assembly or call for a constitutional convention. (The third was through a deliberate sabotage of the voter registration leading to a failure of the elections in 1998.)[19] On the other hand, a Cabinet member indignantly stated: "Let the people decide,"[20] and a group put up posters saying, "Let All Voices Be Heard."[21]

On 23 June 1997, PIRMA returned to the COMELEC with the requisite signatures — 5,793,924 signatures, or 15.9% of the total number of registered voters, exceeding the minimum 12% — and asked the COMELEC, once it had verified the signatures, to hold a plebiscite on the proposed amendments. Spurned, PIRMA went to the Supreme Court anew.

At the start of September 1997, it appeared that the lifting of term limits was already assured of the votes in Congress of eight senators (out of 24) and 87 congressmen (out of 216) — not to mention the political support of the President and one-third of all local officials — all of them barred from another term.[22]

On 21 September 1997, more than half a million Filipinos marched to the historic Luneta Park — and thousands of others too in other major cities — to protest what they saw as a serious threat to democracy. They opposed any move to change the Constitution, whether *via* people's initiative or a constituent assembly, before Ramos's term ended in 1998. On the eve of the march, the President,

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[19] Senator Orlando S. Mercado, Chair, Senate Committee on National Defense and Security, Privilege Speech entitled "Check, Mr. President" (March 1997).

[20] *Exception to the Rule?*, TIME (22 September 1997) at 29.

[21] The group called itself People's Movement for Democratic Change. No further information is available.

[22] *War of Wills*, ASIAWEEK (5 September 1997) at 16 (by lifting term limits or by a formula for "synchronizing" elections of nationally-elected leaders, i.e., the President, Vice-President and Senators, who have six-year terms, with those of locally-elected officials, i.e., congressmen, governors and mayors, who hold three-year terms).

who until then had been rather unclear about his intentions — often hinting about "keeping his options open" — finally declared that he was not going to run "period, period, period,"[23] though to his detractors this signalled not finality thrice said but an ellipsis portending the unspeakable.[24]

On 23 September 1997, the Supreme Court rejected the PIRMA petition, despite the 5.7 million signatures (hereinafter referred to as *PIRMA II*).[25] The Court relied on the strict technicality that certiorari did not lie because the COMELEC, in rejecting PIRMA's petition for initiative, had not committed grave abuse of discretion because it was merely acting in accordance with the Court's ruling in *PIRMA I*.

SCHIZOID REPUBLICANISM OR FICKLE FORMALISM?[26]

> Republicanism, in so far as it implies the adoption of a representative...government, necessarily points to the enfranchised citizen as a particle of popular sovereignty.... *He has a voice in his government and whenever possible it is the solemn duty of the judiciary, when called upon to act in justiciable cases, to give it efficacy and not to stifle or frustrate it.* — *Moya v. del Fierro*, 69 Phil. 204 (1939) (Laurel, J.) (emphasis supplied)[27]

The 1987 Constitution

The Constitution contains several clauses which allow direct people's initiative:

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[23] *Showdown in Manila*, ASIAWEEK (3 October 1997) at 20.

[24] Senator Orlando S. Mercado, "On Charter Change," lecture in Symposium No. 2, The Nation in Perspective symposium series, University of the Philippines (3 October 1997).

[25] *People's Initiative for Reform, Modernization and Action et al. v. COMELEC*, G.R. No. 129754 (September 23, 1997).

[26] For these purposes, I refer the reader to the short definition of formalism in POSNER, FROBLEMS OF JURISPRUDENCE (1992), e.g., a philosophy which holds that legal analysis consists of the logical application of rules alone without recourse to subjective considerations as morality or public policy.

[27] This is the oft-cited Supreme Court ruling on republicanism, albeit by *dictum* and in the context of an election protest wherein it applied "liberality" in the appreciation of ballots.

(a) To propose or repeal national and local laws;[28]

(b) To recall local government officials, and propose or repeal local laws;[29] and

(c) To propose amendments to the Constitution.[30]

Although direct initiative was recognized for the first time in Philippine law in the 1973 Constitution, that was solely for recall of local government officials[31] and did not include amending the constitution, which in terms of the "primacy of interest, or hierarchy of values,...is far more important than the initiative on national and local laws."[32]

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[28] CONST., art. VI , sec. 32. "The Congress shall...provide for a system of initiative and referendum,...whereby the people can directly propose and enact laws or approve or reject any act or law or part thereof...[upon] a petition therefor signed by at least ten *per centum* of the total number of registered voters, of which every legislative district must be represented by at least three *per centum* of the registered voters thereof."

[29] CONST., art. X , sec. 3. "The Congress shall enact a local government code which shall provide for a more responsive and accountable local government structure instituted through a system of decentralization with effective mechanisms of *recall, initiative, and referendum*...." (emphasis supplied)

[30] CONST., art. XVII , sec. 2. "Amendments to this Constitution may likewise be directly proposed by the people through initiative upon a petition of at least twelve *per centum* of the total number of registered voters, of which every legislative district must be represented by at least three *per centum* of the registered votes therein...."

The Congress shall provide for the implementation of the exercise of this right."

[31] CONST. (1973), art. XI , sec. 3(2). "The Batasang Pambansa shall enact a local government code,...with an effective system of recall." That code was enacted, Batas Pambansa Blg. 337, *The Local Government Code of 1983*, which provided for recall elections of local officials upon petition by at least 25% of the registered voters (Ch. 3 , sec. 54).

[32] PIRMA I, *supra* (*see also* "obvious downgrading of...the paramount system of initiative").

Statutes and case-law

Congress has passed legislation intended to implement these clauses, and these laws have been applied and interpreted by the Supreme Court.

Republic Act No. 7160, the Local Government Code, provided for, among others, recall of local officials. In *Garcia v. COMELEC,*[33] the Court was asked to stop the COMELEC from holding recall elections for a provincial governor. The Court upheld the validity of the Local Government Code, which provided that recall may be initiated by either direct call by voters or, as in this case, by a "preparatory recall assembly"[34] consisting of local government officials, an "innovative attempt...to remove impediments to the effective exercise by the people of their sovereign power."[35]

In *Angobung v. COMELEC,*[36] the Court rejected as invalid a recall petition signed by only one voter and not by 25% of the registered voters required under the Local Government Code[37] and asking the COMELEC — in the same manner as PIRMA — to fix a date for the signing by other voters. The initiatory pleading, the Court said, should meet the 25% requirement. In contrast, in *Evardone v. COMELEC,*[38] the petition was signed only by three people and the COMELEC scheduled the signing of the petition by the voters. The signing proceeded despite a TRO by the Court — "through no fault of the COMELEC" nor of private respondents. The Court upheld the results of the signing because the sovereign had already spoken.[39]

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[33] G.R. No. 111511, October 5, 1993, 227 SCRA 100 (1993).
[34] Rep. Act 7160 , sec. 70.
[35] See also *Malonzo v. COMELEC,* G.R. No. 127066, 11 March 1997 (allowing a similarly PRA-initiated election, which eventually re-affirmed Mayor Malonzo's mandate).
[36] G.R. No. 126576, 5 March 1997.
[37] Ch. 5 , sec. 70(d).
[38] G.R. No. 94010, December 2, 1991, 204 SCRA 464 (1991).
[39] However, the recall was not carried out because it was time-barred under Batas Pambansa Blg. 337, the old Local Government Code deemed applicable in this case, because no recall elections may be held within one year immediately preceding a regular local election.

Republic Act No. 6735, the Initiative and Referendum Act (hereinafter *Initiative Law*) adopted in 1989, provides for three systems of initiative, namely, on the Constitution, on statutes, and on local legislation, and empowers the COMELEC to promulgate the necessary implementing rules.[40] The COMELEC issued in 1991 its implementing rules, Resolution No. 2300 governing "the conduct of initiative on the Constitution and initiative and referendum on national and local laws."[41] (These are the very rules in question in the *PIRMA* cases.)

In *Garcia v. COMELEC,*[42] the Court was asked to compel the COMELEC to conduct a "local initiative" election to revoke a municipal resolution wherein the Morong Sanggunian agreed to be part of the newly-created Subic Bay Metropolitan Authority.[43] The Court traced the power of initiative to the 1986 "people power" revolution when the "people took a direct hand" to topple the Marcos government. The Court, rejecting any "effort to trivialize the effectiveness of people's initiatives," allowed the initiative to proceed. In the *Subic Initiative* case,[44] Morong having been included in the Subic Bay authority, the COMELEC scheduled a "referendum" on the questioned municipal resolution. The Court cited the Initiative Law as the "actualization of effective direct sovereignty" and remanded the case to the COMELEC for correction of errors (a plebiscite, not a referendum, for instance), impliedly allowing the initiative to proceed and "expressly recognizing [the people's] residual and sovereign authority to ordain legislation directly through the concepts and processes of initiative and of referendum."

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[40] R.A. 6735 , sec. 20. The COMELEC's power to make implementing rules was upheld by the Court in the Subic Initiative cases, *supra.*

[41] *Rules and Regulations Governing the Conduct Of Initiative On The Constitution And Initiative And Referendum On National And Local Laws* (16 January 1991).

[42] G.R. No. 111230, September 30, 1994, 237 SCRA 279 (1994).

[43] See R.A. No. 7227 (*An Act Accelerating the Conversion of Military Reservations Into Other Productive Uses, Creating the Bases Conversion and Development Authority For This Purpose,...*, at , sec. 12).

[44] See note 3, *supra.*

Javellana and the Marcos Ratification of 1973

> Regardless of the modality of submission or ratification or adoption — even if it deviates from ... the old Constitution — once the new Constitution is ratified, adopted and/or acquiesced in by the people..., this Court is precluded from inquiring into the validity [of those acts] and of the consequent effectivity of the new Constitution. — Javellana, *supra* at 205 (Makasiar, J., separate opinion).
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> If they had risen up in arms and by force deposed the then existing government..., there could not be the least doubt that their act would be political and not subject to judicial review.... We do not see that the situation would be any different..., if no force had been resorted to and the people, in defiance of the existing Constitution but peacefully..., ordained a new Constitution.... — Javellana, *supra* at 164 (Makalintal and Castro, JJ., separate opinion)

Marcos declared martial law on 21 September 1972 and arrogated governmental power unto himself. He soon proclaimed that a revised constitution had been approved — not in a plebiscite as required under the then prevailing 1935 Constitution[45] — but through "citizen's assemblies" where people were asked: "Do you approve of the New Constitution? Do you still want a plebiscite to be called to ratify the new Constitution?". *Javellana* challenged the validity of that ratification.

The Court concluded: "[T]here are not enough votes to declare that the new Constitution is not in force. Accordingly,... there is no further judicial obstacle to the new Constitution being considered in force and effect."[46] With the twist of a double-negative, the reign of Marcos was thus legitimized.

Javellana has since been the subject of much commentary. I focus principally on the contest between the test of *legal* validity and

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[45] The 1935 Constitution provided: "Such amendments shall be valid as part of this Constitution when approved by a majority of the votes cast at an election at which the amendments are submitted to the people for their ratification." (art. XV, sec. 1).

[46] Javellana, *supra* at 141.

of *political* validity.[47] On one hand, seven justices[48] (out of 10) found that the 1973 constitution had not been validly ratified in accordance with the 1935 constitution, the citizen's assemblies not being "plebiscites" at which only qualified electors voted and under the supervision of an independent COMELEC.[49] In contrast, however, the other Members of the Court (including three of those who held the ratification legally invalid) found that the controlling test was whether the constitution had been accepted or "acquiesced to" by the people, and held that this was a political question.[50] A constitution — once adopted by the people in any manner they choose, whether by the ballot, by force of arms, or by their silence — is thereby placed beyond reach of judicial inquiry.

Cory Aquino's Freedom Constitution

> [T]he high court, which did not issue a restraining order to stop preparations for the special elections, "will have to take judicial notice of a *fait accompli — the elections are on.*" — *Philippine Bar Association v. COMELEC,* G.R. No. 72915, December 19, 1985, 140 SCRA 453(1985), at 460, citing Minister Blas Ople on the "snap elections" of 1986.
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> [T]he legitimacy of the Aquino government is not a justiciable matter. It belongs to the realm of politics where only the people...are the judge. And the people have made that judgment; they have accepted th[at] government. — *Lawyer's League for a Better Philippines v. President Aquino, supra, see note 14.*

The glorious story of the Freedom Constitution begins with the decision of President Ferdinand Marcos to stand for election earlier

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[47] *See* P. Fernandez, *Judicial Review, Political Questions and Constituent Power,* in SURVEY OF PHILIPPINE LAW AND JURISPRUDENCE 227-234 (1973) and J. BERNAS, THE CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 1179-1195 (1996).

[48] BERNAS, *supra at* 1180.

[49] *See* Javellana, *supra* (Concepcion, C.J.; Makalintal, Zaldivar, Castro, Fernando, Teehankee, Barredo, JJ., separate opinions).

[50] *See* Javellana, *supra* (Makasiar, Esguerra, Antonio, JJ., together with Makalintal, Castro and Barredo, JJ., separate opinions).

than scheduled in 1987. Toward the end of 1985, he wrote the Speaker of the legislature a "post-dated" or "conditional" resignation:

> Over the past two years [my] mandate has been the object of propaganda and dissent....
>
> I am, therefore, left no choice but to seek a new mandate in an election [which] necessarily shortens my tenure....
>
> To pave the way for the holding of a special election for President, I hereby irrevocably vacate the position of President effective only when the election is held and after the winner is proclaimed and qualified as President....
>
> I am obliged, therefore, to inform the Batasang Pambansa that a vacancy will definitely and inevitably occur in the Office of the President upon fulfillment of the conditions I have stated.[51]

Marcos apparently relied on the presidential succession clause of the 1973 constitution:

> In case a vacancy in the Office of President occurs before the presidential election in 1987,[52] the Speaker... shall act as President until a President and a Vice-President or either of them shall have been elected and shall have qualified.[53]

The Batasang Pambansa obliged with a law calling for a special election to be held on 7 February 1986.[54] *Philippine Bar Association*[55] challenged the constitutionality of that law: "The President's offer to cut his term short is valid. The trouble is he does not go far enough: he should actually vacate the office forthwith." His letter aimed "to circumvent the constitutional proviso which would, in effect, require

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[51] Letter from President Ferdinand E. Marcos to Speaker of the Batasang Pambansa Nicanor E. Yñiguez and other Members of the Batasan (11 November 1985).

[52] *Ibid.*

[53] CONST. (1973), as amended, art. VII , sec. 9. The position of Vice-President was vacant at that time.

[54] Batas Pambansa Blg. 883, (1985).

[55] G.R. No. 72915, December 19, 1985, 140 SCRA 453 (1985).

[him] to actually vacate his office...until a new [President] shall have been elected." [56]

This notwithstanding, the Supreme Court allowed the historic "snap election" to proceed. The "*real* issue," said the Court, was no longer one of unconstitutionality due to the lack of an actual vacancy. Supervening events had "transformed" it into a "*political question* that can only be truly decided by the people in their sovereign capacity,"[57] Justice Teehankee significantly citing *Javellana,* the "people's expectations [had reached] a point of no return,"[58] and the courts had simply "to take judicial notice of a *fait accompli* — the elections are on."[59] The rest is history: the elections proceeded, Marcos was declared winner by his rubber-stamp parliament, the people rebelled and installed Corazon Aquino as President.

On 25 February 1986, Corazon Aquino issued Proclamation No. 1 creating a Provisional Government following the exit of the deposed President Marcos. On 25 March 1986, she issued Proclamation No. 3 promulgating the Freedom Constitution "by the direct mandate of the people"[60] through a government "installed through a direct exercise of the power of the Filipino people."[61] This would later be recognized by the Court in 1992.

> Mrs. Aquino's rise to the presidency was not due to constitutional processes; in fact, it was achieved *in violation of the provisions of the 1973 Constitution* as a Batasang Pambansa resolution had earlier declared Mr. Marcos as the winner in the 1986 Presidential election.[62] (emphasis supplied)

The Court cited Fr. Joaquin Bernas, who said that the Aquino government was "revolutionary in the sense that it came into existence

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[56] See note 53, *supra.*
[57] Philippine Bar Association v. Commission on Elections, *supra., see* note 55.
[58] *Id,* at 457.
[59] *Id,* at 460 (citing Labor Minister Blas Ople).
[60] *Id.*
[61] Proclamation No. 3 (25 March 1986) (promulgating a Freedom Constitution). *See* Letter of Justice Puno, *supra,* see note 13.
[62] Letter of Justice Puno, *supra, at* 599.

in defiance of existing legal processes"[63] and then University of the Philippines President Edgardo Angara, who said that the Aquino government was "instituted by the direct action of the people and in opposition to the authoritarian values and practices of the overthrown government."[64]

On 22 May 1986, in *Lawyer's League for a Better Philippines v. President Aquino*, the Supreme Court rejected the claim that the Aquino government was "illegal because it [had not been] established pursuant to the 1973 Constitution." The Court, finding that the people "have accepted the government of President Corazon C. Aquino which is in effective control of the entire country," held that "the legitimacy of the Aquino government is not a justiciable matter [but] belongs to the realm of politics where only the people...are the judge."[65]

PIRMA I: UNANIMOUS ON THE CONCLUSION, DIVIDED ON THE ANALYSIS

> [W]hile at times judges need for their work the training of economists or statesmen,...when their task is to interpret and apply the words of a statute, their function is merely academic to begin with — to read English intelligently — and a consideration of consequences comes into play, if at all, only when the meaning of the words used is open to reasonable doubt. — *Northern Securities Company, supra* (Holmes, J., *dissenting*)

In *PIRMA I*, the Supreme Court ordered the COMELEC to dismiss a "Petition to Amend the Constitution, to Lift Term Limits of Elective Officials, by People's Initiative" filed by Respondent Delfin. He had asked the COMELEC essentially to assist in gathering the signatures required for a people's initiative under Article XVII, sec. 2

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[63] *Id*, at 598, *citing* J. Bernas, *Proclamation No. 3 with Notes* (1986).

[64] *Id*, *citing* E. Angara, address before the Bishops-Businessmen's Conference, 21 March 1986.

[65] See note 14, *supra*. Subsequently, the Court has re-affirmed the legitimacy of the Aquino government. See *In re Saturnino Bermudez, supra, see* note 13, (confirming that Aquino was the "incumbent and legitimate President"); and *De Leon v. Esguerra, supra, see* note 13 (judicially affirming the ratification of the 1987 Constitution under Proclamation No. 58, issued on 11 February 1987).

of the Constitution. He proposed to submit the following proposition in a plebiscite:

> Do you approve of lifting the term limits of all elective government officials, amending for the purpose sections 4 and 7 of Article VI, section 4 of Article VII, and section 8 of Article X of the 1987 Philippine Constitution?[66]

He asked the COMELEC to cause the publication of the petition, instruct election registrars to establish "signing stations," and fix the time and dates for "signature gathering" citing COMELEC Resolution No. 2300, the implementing rules for the Initiative Law.

In *PIRMA I*, the Supreme Court stopped the COMELEC from hearing the initiative, but the Court was unanimous only on the final argument which was dispositive of the case, namely, that the Delfin petition was not the "initiatory pleading" contemplated under the Constitution. It did not contain the required signatures of voters under the Constitution but rather shifted to the COMELEC the burden of collecting the signatures.[67] The COMELEC therefore had no jurisdiction to hear the Delfin petition.

The Court was divided, however, on the majority's holding (through Justice Davide) that the direct initiative clause of the Constitution expressly required congressional implementation and was not self-executory; that the Initiative Law was "inadequate" and had not provided for charter amendments; and that the COMELEC therefore lacked jurisdiction to issue implementing rules or receive the PIRMA initiative.

The Initiative Law expressly covers direct initiative to propose amendments to the Constitution, but the Court found the law "*incomplete, inadequate* and *wanting* in essential details" and "*inadequate* to cover the system of initiative on amendments to the Constitution, and to have failed to provide sufficient standards for

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[66] Referring, respectively, to the terms of office of Senators, Congressmen, the President, and local officials.

[67] *See* PIRMA I, *supra* (Vitug, J., separate opinion).

subordinate legislation." (emphasis supplied) The law purports to enable the people

> to directly propose, enact, approve or reject, in whole or in part, the *Constitution*, laws, ordinances, or resolutions passed by any legislative body.[68] (emphasis supplied)

It refers to amendment of the Constitution as one of the three systems of initiative,[69] but provides separate sub-titles to govern only the other two systems. It does restate the constitutionally fixed percentages required but, in stating the other requirements, referred merely to revision of laws.[70] The Court found that the subsequent text deals with direct initiative on legislation alone, and that provisions for amending the Constitution were merely "reluctant lip service." Thus the COMELEC did not have the corresponding power to issue implementing rules, and COMELEC Resolution No. 2300 was void to that extent.

Justice Puno, joined by five (later, on reconsideration, six) other dissenters, examined the drafting history of the law and found that its intent was to implement direct initiative for charter changes. He found the majority's view "a strained interpretation...to defeat [that] intent."[71] Referring to the majority's finding of fatal lapses in the language of the law, he said:

> These lapses are to be expected for laws are not always written in impeccable English. Rightly, the Constitution does not require our legislators to be wordsmiths with the ability to write bills with poetic commas...or in lyrical prose... But it has always been our good policy not to refuse to effectuate the intent of a law on the ground that it is badly written.[72]

He cited established principles in statutory interpretation which hold that the Court must "effectuate the manifest intent of the legislature."

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[68] Rep. Act 6735 , sec. 2 (Statement and Policy) (1989).
[69] Rep. Act 6735 , sec. 3 (Definition of Terms) (1989).
[70] Rep. Act 6735 , sec. 5(c.1.) (Requirements) (1989).
[71] PIRMA I, *supra* (Puno, J., concurring and dissenting).
[72] PIRMA I, *supra* (Puno, J., concurring and dissenting); *see also* PIRMA II, *supra* (Vitug, J., separate opinion) (a "calligraphic weakness").

Another dissent recalled the Court's declaration in *Subic Initiative,*[73] that "provisions for initiative...are [to be] liberally construed to effectuate their purposes, to facilitate and not hamper the exercise by the voters of the rights granted thereby."

> Like elections, [initiative and referendum] are powerful and valuable modes of expressing popular sovereignty.[74] And this Court as a matter of policy and doctrine will exert every effort to nurture, protect and promote their legitimate exercise.[75]

The majority, responding, distinguished *PIRMA I* from *Subic Initiative* which pertained merely to local legislation, not to amending the Constitution.

Senator Raul Roco, party-intervenor, said that the Court had thereby "created a third species of invalid laws, a mongrel type of constitutional but inadequate and, therefore, invalid law."[76] The majority, responding, made a fine distinction: the "inadequacy" of the Initiative Law is linked to "undue delegation of legislative power," not to the issue of "statutory interpretation."

> [T]he terms *incomplete, inadequate* and *wanting in essential details*...have reference to the "completeness and sufficient standard tests" and to none other. The *intent* of the law, which is the concern of *statutory construction*, is not a sufficient guidepost.[77]

If the statute was inadequate, the COMELEC had nothing to implement. And whatever the statute lacked was not for the court to supply through exegesis.

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[73] *See* note 3, *supra.*
[74] PIRMA I, *supra* (Panganiban, concurring and dissenting).
[75] PIRMA I, *supra* (Puno, concurring and dissenting).
[76] PIRMA I, Resolution of 10 June 1997 on the Motion for Reconsideration (hereinafter, *PIRMA I on Reconsideration*) (Davide, J., separate opinion), *citing* the Comment filed by Intervenor Raul S. Roco, dated 9 May 1997.
[77] PIRMA II, *supra* (Davide, J., separate opinion) (an "overbearing conclusion").

PIRMA II: "GREAT CASES," HARD RULES

> It took only one million people to stage a peaceful revolution at EDSA [but] PIRMA and its co-petitioners are claiming that they have gathered six million signatures. — *PIRMA II, supra* (Panganiban, J., separate opinion).

In *PIRMA II*, the proponents of direct initiative returned to the Supreme Court with the signatures of 5,793,924 Filipino voters, or 15.9% of the total number of registered voters nationwide, and asked the Court to compel the COMELEC to verify the signatures in order that the amendments may be presented to the people in a plebiscite.

The Court dismissed the petition under Rule 65 of the Rules of Court governing certiorari petitions, finding that the writ did not lie because the COMELEC, in denying PIRMA's petition, merely "acted in deference to and conformably with the decision of the Court" in *PIRMA I*, and that therefore the COMELEC, in doing so, could not have committed "grave abuse of discretion."[78] Several Members of the Court raised the practical question of verifying signatures considering that the extant voters list had already lapsed.[79]

CONCLUSION

> *[Javellana]* prompted the framers of the current Constitution to install safeguards [to prevent] a repetition of the abuses of power during the Marcos regime [but it is] ironic [that] the people's initiative provision, one of th[ose] safeguards...is now being invoked to [defeat another safeguard, namely, term limits].
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> The most compelling argument [is that] it will be the people...who will ultimately decide.... I find this idea seductive and beguiling in its simplicity because it glosses over the nature of our system of government in the process of cloaking its adherents in sanctimonious populist garb. — *PIRMA II, supra* (Kapunan, J., separate opinion)

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[78] PIRMA II, *supra* (Vitug, J., separate opinion).

[79] *See* PIRMA II, *supra* (Bellosillo and Kapunan, JJ. separate opinions). *Contra* PIRMA II, *supra* (Vitug, J., separate opinion).

In the *PIRMA* cases, the Court faced, if you will, an *epistemological* dilemma: it knew the sinister political agenda behind the people's initiative but it had to act, as it were, indifferent to these politics, and decide the initiative petition as it appeared on its face, namely, five million voters exercising a constitutional right of initiative.

The *PIRMA* court read its politics alright. Justice Davide, author of the *PIRMA I* decision, warned that the Court, as the "last bulwark of democracy," must —

> [not] allow itself to be the unwitting villain in the farce surrounding a demand disguised as that of the people.... Never again should it allow itself to be used as a legitimizing tool for those who wish to perpetuate themselves in power."[80]

Justice Kapunan saw the historical parallel in *Javellana* with a sense of *déjà vu*:[81]

> I am disturbed to find that the only situation which parallels [the *PIRMA* cases] is... when the question of the 1971 Constitution came before [the Court in] *Javellana v. Executive Secretary* [which] provided the stamp of legitimacy to former President Marcos' martial law regime.[82]

Yet, the Court was equally aware of the peril of inquiring into matters of wisdom and not of legality. Justice Puno, who dissented, spoke of judicial overreach as a threat to the separation of powers, the "danger of over-checking the power of Congress to make laws."

> The inadequacy of a statute is not a ground for invalidating it. Given the lawfulness of the legislative purpose,...it is not for this Court to say how well the statute succeeds in attaining that purpose. "With the wisdom of the policy adopted, with the

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[80] PIRMA II, *supra* (Davide, J., separate opinion).
[81] *See The Ghost of Marcos*, NEWSWEEK (29 September 1997) at 23 and *War of Wills*, *supra*.
[82] PIRMA II, *supra* (Kapunan, J., separate opinion).

> adequacy or practicality of the law enacted to forward it, the courts are both incompetent and unauthorized to deal."[83]

Justice Davide warned against judicial legislation even if, as in PIRMA, it was purely "interstitially."

> [To] read into the statute non-existent provisions in order to make it complete...and thus validate the delegation [of power to the COMELEC to issue implementing rules] would constitute unabashed judicial legislation.[84]

For both camps, the natural recourse was therefore *strict legalism*. Justice Davide insisted that the case be resolved on the basis of "nothing else but the rule of law."[85] Justice Puno complained that the analysis had been "obscured...by non-legal arguments."[86] But how far indeed can the case be decided on purely legal terms?

In *PIRMA I* and *II*, the legal points on which the Court was *unanimous* are squarely incontestible. In *PIRMA I*, the initiative petition failed to meet the basic constitutional requirement that a direct initiative be supported by the requisite signatures of voters, absent which the COMELEC lacked jurisdiction. In *PIRMA II*, there was no grave abuse of discretion committed by the COMELEC when it refused to act on the initiative petition.

But the purely legal explanation ends there. What lies beyond can only be explained in terms of norms and values extraneous to law and its purportedly inevitable logic.

First. Why did *PIRMA I* declare the Initiative Law "incomplete, inadequate and wanting?" This was not necessary at all for the Court's ruling, since the only legal argument needed to reject the PIRMA initiative was that its "initiatory pleading" was jurisdictionally defective. As the dissenters point out, that alone was

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[83] PIRMA I on Reconsideration, *supra* (Puno, J., separate opinion) (citing, in part, Nebbia v. New York, 291 U.S. 502 (1934)).
[84] PIRMA I on Reconsideration, *supra* (Davide, J., separate opinion).
[85] PIRMA II, *supra* (Davide, J., separate opinion).
[86] PIRMA I on Reconsideration, *supra* (Puno, J., separate opinion).

the *ratio decidendi*; the alleged inadequacy of the Initiative Law was mere *dictum* superfluous to its reasoning yet subversive of republicanism, and out of sync with the Court's "rhapsodizing people power." Indeed, the *PIRMA I* majority already declined to rule on one issue — whether the initiative was a mere amendment or a revision — for precisely this reason, namely: it was "unnecessary, if not academic,"[87] "an exercise in futility [amounting to] a declaratory judgment."[88] But, the *dictum*, while *inessential* for *PIRMA I*, was *decisive* in *PIRMA II*. As Justice Bellosillo stated in *PIRMA II:*

> The fact that the petition was supported by more than five million signatures...is of no consequence. For such signatures, no matter how many, can neither give birth to a valid enabling law nor cure the deficiency of R.A. No. 6735.[89]

One must credit either the prophetic mind or the strategic bent of the majority, but the *dictum* in question was a pre-emptive *coup de grâce*.

Second. Why did the *PIRMA II* court, presented with five million signatures, ignore the political *fait accompli* that the Court found formidable in *Javellana* and the *Freedom Constitution* cases? The five million signatures could have easily met the constitutional requirement. The Initiative Law was adequate according to at least seven out of 14 justices. Any purported gaps had been sufficiently filled by a supervening fact, namely, five million signatures, which at the very least could have rendered the Initiative Law "reasonably" adequate. To borrow the words of *Philippine Bar Association*, the matter having been transformed into a "political question that can only be truly decided by the people in their sovereign capacity," the courts had simply "to take judicial notice of a *fait accompli* — the [plebiscite is] on." And to echo *Lawyer's League*, "it belongs to the realm of politics where only the people...are the judge." In *PIRMA II*, the Court could have easily deferred to the political judgment of the sovereign, and done a *Javellana* (and deferred to a legal fiction) or adhered to the *Freedom Constitution* cases (and deferred to a historical

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[87] PIRMA I, *supra*.
[88] PIRMA I on Reconsideration, *supra* (Davide, J., separate opinion).
[89] PIRMA II, *supra* (Bellosillo, J., separate opinion).

fact), but instead the Court disposed of a "great case" on narrow procedural grounds.

Third. Why did the *PIRMA I* court not pursue the argument that only *amendments* are susceptible of direct initiative, and that extension of term limits amounts to a *revision*? It has been contended that the PIRMA proposition would entail the abandonment of "a political philosophy that rejects unlimited tenure,...guaranteeing equal access to [public office] and prohibiting political dynasties."[90] That was the one argument that would have met head-on PIRMA's republican "guile" and "uncloaked [its] sanctimonious populist garb."[91] Yet as noted earlier, in *PIRMA I* it was considered superfluous by the majority ("unnecessary, if not academic") and the dissenters (a mere "advisory opinion"[92]) alike. It was not until *PIRMA II* that the majority confronted the issue, Justice Davide stating that the "perpetual ban" on the re-election of the President was meant "to promote equal access to...public service [and] prevent accumulation or concentration of political and economic power in one man, one family, [one] political party."

> [T]he lifting of term limits [involves] the alteration of fundamental principles essential to a vibrant, living, participatory democracy.... Under any language, [the proposition] involves a revision of, not just an amendment to, the Constitution.[93]

These dilemmas cannot be resolved purely at the level of law, fixed and logical, but only at the level of value choices, amorphous and intuitive. To quote the legal philosopher Unger, and here he refers to philosophical, for which I substitute legal, analysis —

> [when we] run...up against its limits, [we] come...at last to the outer frontiers, politics and religion, at which [our] pride is cast

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[90] PIRMA I, *supra* (Davide, J.).

[91] PIRMA II, *supra* (Kapunan, J., separate opinion).

[92] *See* PIRMA I on Reconsideration, *supra* (Puno, J., separate opinion). *See* also *id* (Francisco, J., separate opinion) (a mere amendment, an "innocuous alteration").

[93] PIRMA II, *supra* (Davide, J., separate opinion). See also PIRMA II (Kapunan, J., separate opinion).

> down, and other kinds of striving come to the fore...politics through which the world is changed, prayer through which men ask God to complete the change of the world...and giv[e] them what, left to themselves, they would always lack.[94]

The *PIRMA* court was clearly inclined to protect, at a practical level, our democratic gains but, toward that end, had to choose between two paths in legal reasoning. One was to throw caution to the wind and candidly reject the initiative outright as mere subterfuge, and say, in the manner of Mabini who, besieged by the exigencies of revolution, declared, "Drown the Constitutions and save the principles." [95] In contrast is the well-worn path taken by the *PIRMA* court, which masterfully deployed legal doctrine to the satisfaction of the formalist but not of those who insisted to reconcile the needs of the particular case with transcendent constitutional claims.

Cardozo said that the Constitution is a guarantee "against the assaults of opportunism, the expediency of the passing hour,... the derision of those who have no patience with general principles."[96] The *PIRMA* court may have been wise in its law but it could have been wiser still in its "general principles." The *PIRMA* court was, in its reasoning, too deliberately oblivious to politics but, in its conclusions, even more historically bound up in its role as the "last bulwark of democracy." Were it that as much can be said of those outside its halls, "men of zeal, well-meaning but without understanding,"[97] who reviled dictatorship more than they loved the Constitution, and betrayed an ominous impatience with "those wise restraints that make men free."[98]

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[94] R. M. UNGER, KNOWLEDGE AND POLITICS 294 (1975).

[95] C. A. MAJUL, POLITICAL AND CONSTITUTIONAL IDEAS OF THE PHILIPPINE REVOLUTION 170 (1960).

[96] Philippine Blooming Mills Employees Organization v. Philippine Blooming Mills Co., G.R. No. 31195, June 5, 1973, 51 SCRA 200 (1973), *citing* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 92-93 (1921).

[97] *Olmstead v. United States*, 277 U.S. 479 (1927) (Brandeis, J., dissenting) ("The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.")

[98] A. SUTHERLAND, THE LAW AT HARVARD: A HISTORY OF IDEAS AND MEN (1967).