DISTORTING THE RULE OF LAW: THE COMMITTEE ON JUSTICE AND THE 2005 IMPEACHMENT PROCEEDINGS

Roman Miguel G. de Jesus

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But most important of all... I hope to remind everybody, it is not the President [that is] on trial. It is Congress that is on trial right now.
— *Rep. Jesus Crispin C. Remulla* [1]

Although the 1987 Constitution has reaffirmed the nation's faith in the impeachment process, 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.* [2]

INTRODUCTION

Over the last two years, the "rule of law" has been an oft-repeated refrain played upon the national consciousness.

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[1] Proceedings of the Committee on Justice, House of Representatives, August 31, 2005, X:2 (henceforth cited as "Proceedings, [date], [page number]").

[2] JOAQUIN G. BERNAS, THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 989 (1996 ed., 2002). In October Isagani Cruz points to Clinton Rossiter as first having identified impeachment proceeding to the now obsolete blunderbuss. Justice Cruz writes:

> Let's have no illusions about impeachment. As a method of removing the President, it has more bark than bite. Described by Edward S. Corwin as "the most formidable weapon in the arsenal of democracy," it is dismissed by Clinton Rossiter, another acknowledged authority on the American presidency, as "a rusted blunderbuss" occasionally brandished but hardly ever fired. Isagani Cruz, *Obstacles to Impeachment*, available at <http://www.lawphil.net/current/impeachment/phiguide.html> April 15, 2006.

For instance, the Executive Secretary's September 2005 statement putting into effect the calibrated preemptive response (CPR) policy against rallies held without proper permits[3] ended with the following awkward invitation to President Gloria Macapagal-Arroyo's detractors: "The President's call for unity and reconciliation stands, based on the rule of law." This strange juxtaposition of the offensive CPR policy with the rule of law pushed one columnist to comment that "[our government today] recognizes that the true test of the rule of law is that might makes right."[4]

A few months prior to that, the rule of law was also invoked during the "Gloriagate" scandal, which revolved around President Arroyo's alleged conspiracy with a Commission on Elections ("COMELEC") Commissioner to manipulate votes in her favor.[5] At the height of the rallies and defections against the President, it was the influential Catholic Bishops Conference of the Philippines ("CBCP") that ultimately sealed the fate of the popular uprising by invoking, amongst other things, the rule of law in their call for sobriety:

> In the present crisis some calls are being made for measures that are counter-constitutional. The Constitution enshrines cherished values such as human dignity and the common good, freedom, the *rule of law* and due process. On this basis, we reject quick fixes that cater to selfish political agenda and advantage rather than to the common good. We deplore the attempts of those groups who seek to exploit our vulnerable national situation in order to create confusion and social chaos, in order to seize power by unconstitutional means. We reject calls for juntas or revolutionary councils.... Resolving the crisis has to be within the framework of the Constitution and the laws of the land so as to avoid social chaos, the further weakening of political systems, and greater harm in the future.[6] (emphasis supplied)

Eventually, what emerged as the "constitutional" or "rule of law" alternative was the process of impeachment. Retired Justice Cecilia Muñoz-Palma was one of the first to point this out:

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[3] Copy of September 21, 2005, press statement available at <http://www.news.ops.gov.ph/archives2005/sep21.htm> April 15, 2006. In particular the statement "instructed the PNP as well as the local government units to strictly enforce a "no permit, no rally" policy, disperse groups that run afoul of this standard, and arrest all persons violating the laws of the land as well as ordinances on the proper conduct of mass actions and demonstrations."

In the concrete, the policy translated into the use of water cannons for the dispersal of rallyists. See Joel Francis Guinto, *Prayer rally dispersed with water cannons: EX:VP Guingona, opposition leaders drenched*, at INQ7.net, GMA7, Oct 14, 2005, available at <http://news.inq7.net/top/index.php?index=1&story_id=53330> April 15, 2006.

[4] Manuel Quezon, III, *The rule of law*, Philippine Daily Inquirer, September 22, 2005, A11. Quezon went on to write,

> As to the only remaining question, which is whether the State has the right to defend itself, the answer must be a clear yes. But defend itself from clenched fists, speeches, protest music and banners (whatever their color may be), with a "calibrated preemptive response"? This is the behavior of a government that recognizes its legitimacy only in its press releases.

[5] For a comprehensive coverage of the issue, see the Philippine Center for Investigative Journalism's I-Report, July 2005 Special Issue. Some articles from that issue are also available at <http://www.pcij.org/i-report/special/special.html> April 15, 2006.

[6] *Restoring Trust: A Plea for Moral Values in Philippine Politics*, Catholic Bishops Conference of the Philippines, July 10, 2005, available at <http://www.cbcponline.net/html/documents.html> April 15, 2006.

> We as citizens living under the rule of law and enjoying the benefits of republicanism are bound to respect, [and] support [the process of impeachment], notwithstanding our own personal views, for that is the only way we the Filipino people can survive any political, economic and social crisis and not end up as a so-called "banana republic."[7]

When the impeachment proceedings finally got underway with the Committee on Justice of the House of Representatives receiving three complaints for the impeachment of the President, the Chairman of the Committee, Rep. Simeon A. Datumanong,[8] opened the proceedings by calling upon his colleagues to uphold the rule of law:

> THE CHAIRMAN: It may be that the ensuing proceedings can generate passionate and spirited debates that may be influenced somehow by partisan considerations, but these are necessarily expected in a democratic and dynamic institution such as ours. The most important thing is to demonstrate that our proceedings here will uphold the majesty of our Constitution and *rule of law*.[9] (emphasis supplied)

And when the House of Representatives eventually decided to throw out all three impeachment complaints, President Arroyo, exhorting the rule of law, described the moment as a "glorious day in history" for instead of relying upon the parliament of the streets she claimed that Filipino people "chose to keep a President through voting in the halls of Constitutional Democracy."[10]

The CBCP, however, was not as thrilled with the manner in which the crisis was resolved. They described the entire "Gloriagate" crisis as tarred by "acts of evasion and obstruction of the truth" and claimed that constitutional processes had failed "to make public servants accountable for wrong doings."[11] Thus, they continued to call for "the search for truth be relentlessly pursued through structures and processes mandated by the law and our Constitution."[12]

An interesting twist to the tale of the rule of law in the Philippines is that, in late 2004, President Arroyo actually issued a proclamation declaring September to be "Rule of Law Month."[13] This would give one the impression that the Philippine Government had put a premium on the protection of the rule of law. Yet, a few months after the President's proclamation, a World Bank report found that the rule of law had

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[7] Cecilia Muñoz-Palma, *Apply rule of law*, Philippine Daily Inquirer, June 26, 2005, A12.

[8] Representative of Second District of Maguindanao.

[9] Proceedings, August 10, 2005, II:1.

[10] *Statement of the President: On dismissal of impeachment complaint*, September 6, 2005, available at <http://www.news.ops.gov.ph/archives2005/sep06.htm> April 15, 2006.

[11] *Renewing Our Public Life Through Moral Values*, Catholic Bishops Conference of the Philippines, January 29, 2006, available at <http://www.rcam.org/cbcp/2006/renewing_our_public_life_through_moral_values.htm> April 15, 2006.

[12] *Ibid.*

[13] Proc. No. 731 (2004) available at <http://www.gov.ph/op_issuances/proc_no713.htm> April 15, 2006.

actually deteriorated in the Philippines over the last eight years, with the country ranking in the lower third of 213 countries in terms of the quality of its rule of law.[14]

From the foregoing, it should be obvious that the rule of law has been used in both exaltation and lament. It has been invoked to praise governmental processes and to criticize them.[15] It has become a byword for nearly all players in the political arena from the administration to the opposition, the academe, the international community and even the clergy. The breadth of its application and the variegated way in which it has been invoked in the last two years tempts one to suggest that the "rule of law" is an empty term. As one commentator puts it, "That people of vastly different political persuasions all want to take advantage of the rhetorical power of rule of law keeps it alive in public discourse, but it also leads to the worry that it has become a meaningless slogan devoid of any determinative content."[16]

The problem, however, is not so much that the rule of law is in itself "devoid of determinative content" but that because it is handled so easily, like a "cheap coin,"[17] people have forgotten to comprehend its meaning. In this paper, I contend that although the Philippine experience of the "rule of law" might suggest that the term has become absolutely meaningless, it in fact has a very clear theoretical framework. In broad strokes, this framework asserts that the "rule of law" is an equivocal term with three distinct definitions, which might be denominated as (1) the rule of law over men, (2) the law of rules, and (3) the law of right. My normative contention is that an invocation of the rule of law insensitive to this theoretical framework is foolish.[18] Furthermore, I argue that the task of protecting the "rule of law" from superfluous use is a serious one. For worse than foolishness is the real danger that attaches to an invocation of the rule of law without understanding exactly what one invokes. Drawing from the thought of Hannah Arendt, I try to show that the misuse of the term indicates a deeper malaise, which reveals not only a dearth of intellectual power but also the

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[14] Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, *Governance Matters IV: Governance Indicators for 1996-2004*, World Bank Policy Research Working Paper 3630, June 2005, available at <http://econ.worldbank.org/external/default/main?pagePK=64165259&theSitePK=469372&piPK=64165421&menuPK=64166093&entityID=000016406_20050615140310> April 15, 2006. In this study, "rule of law" was defined as "the quality of contract enforcement, the police, and the courts, as well as the likelihood of crime and violence." *Id.* at 5.

[15] Andrew Altman makes the same observation with respect to the impeachment of President Bill Clinton: "The public debate over the impeachment process often made reference to the idea of the rule of law. The president's detractors, as well as his defenders invoked the idea to support their side of the argument." ANDREW ALTMAN, ARGUING ABOUT LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY 2 (2nd ed. 2001).

[16] Randall Peerenboom, *Varieties of Rule of Law: An introduction and provisional conclusion*, in ASIAN DISCOURSES ON RULE OF LAW: THEORIES AND IMPLEMENTATION OF RULE OF LAW IN TWELVE ASIAN COUNTRIES, FRANCE AND THE U.S. 1, 1 (2004).

[17] Dieter C. Umbach, *Basic Elements of the Rule of Law in a Democratic Society*, in RULE OF LAW AND DEMOCRACY IN THE PHILIPPINES 19, 19 (Beatrice Gorawantschy, Roya Moghaddam & Eduardo Pedrosa eds., 1997). Umbach writes: "When we speak of the Rule of Law, we have something that we sometimes call in Germany a "cheap coin", that means an expression which you handle very easily and very often."

[18] The pejorative term, "fool," is apt. The Catholic theologian and philosopher, St. Anselm of Canterbury describes a fool as one guilty of only knowing words but not their meanings. He writes in the PROSLOGIUM: "For, in one sense, an object is conceived when the word signifying it is conceived; and in another, when the very entity, which the object is understood." ST. ANSELM OF CANTERBURY, PROSLOGIUM, chap. IV (S.N. Deane trans. 1962).

tenuity of one's moral fiber. Arendt will refer to this habit of speaking of the rule of law without considering its meaning as an inability to think and as the banality of evil.[19]

To avoid arguing purely in the abstract, I attempt to justify my proposed theoretical framework by examining how the rule of law was invoked by the Committee on Justice of the House of Representatives during the August 2005 impeachment proceedings against President Macapagal-Arroyo.[20] For this purpose, I divide this paper into seven parts. Part I provides a brief overview of the Committee on Justice proceedings with the intent of outlining its general flow. This is a tedious necessity for reference purposes later in the paper. If the reader is already familiar with the proceedings, then he should feel free to bypass this first section. Part II provides a theoretical overview of the first formulation of the rule of law, i.e. as "the rule of law over men." Part III then looks at how this formulation was appreciated during the Committee on Justice proceedings. This framework of laying down theory and offering an analysis thereof is followed through parts IV to VII. Thus, Part IV offers the theoretical framework for the second formulation of the rule of law, i.e. as "the law of rules"; and, Part V discusses how it is appreciated by the Committee. In the same way, Part VI offers the third and final theoretical formulation, i.e. "the rule of right"; and Part VII shows how the Committee appreciated this formulation. The paper then closes with a brief conclusion.

I. THE TALE OF THREE COMPLAINTS

The impeachment proceedings against President Arroyo came to a dramatic head on September 5, 2005. After the pro-impeachment congressmen failed to amass the magic number of 79 signatories for their Amended Complaint, the fate of the impeachment proceedings rested upon a vote in plenary. Put before the House was Committee on Justice Report No. 1012 which recommended that all the complaints against President Arroyo be dismissed.[21] At the end of what proved to be the longest session day of Congress in the history of the Republic, the "Yes's" had it, the committee report was approved and all complaints against Her Excellency were dismissed.

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[19] See HANNAH ARENDT, *Thinking and Moral Considerations*, in RESPONSIBILITY AND JUDGMENT 159 (2003). The language of good and evil may appear misplaced to regular readers of the JOURNAL. However, the assertion can be made that legal analysis is in fact frustrated if it does not, at the very least, broach questions of morality. Upon invitation by the editorial board of the HARVARD LAW REVIEW on the occasion of its hundredth anniversary, Judge Richard Posner suggested that one of the ways in which student-edited journals (like the PHILIPPINE LAW JOURNAL) could compete with the rise of faculty refereed journals would be by "using [amongst others] a student's prelegal training (for example, graduate study in economics or *philosophy*)... as a criterion of selection, promotion or assignment [of student editors]." Richard Posner, *The decline of law as an autonomous discipline: 1962-1987*, 100 HARV. L. REV. 761, 780 (1987) (emphasis supplied). It is in this spirit of moving legal scholarship beyond doctrinal analysis and towards philosophical concerns that a discussion of good and evil becomes not only permissible but apt.

[20] Rep. Amulfo P. Fuentebella of the Third District of Camarines Sur anticipated this project:

> REP. FUENTEBELLA: [W]e have to be what we call historical individuals. *Ang participation po natin dito sa prosesong ito*, it will be recorded in the annals of history at ito po ay babasahin ng law students, legal scholars, academe, and all those who may be interested in the situation that we [are] in right not because what we do will set a precedent for tomorrow.
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> Proceedings, August 30, 2005, V-1. (underscoring supplied)

[21] In particular the Report recommended the approval of House Res. No. 933, which resolved to dismiss all complaints against the President.

Although the plenary decision was decisive of the fate of the impeachment, it fails to disclose the rationale behind the House decision. This we find in the proceedings before the Committee on Justice where Majority and Minority members[22] exchanged legal arguments about what was to be done with the three impeachment complaints filed against the President. I will discuss these arguments in greater detail later in the paper. For now, it is sufficient to note that in deciding what was to be done with the three complaints, the linchpin question became whether the first complaint had barred the second and third complaints pursuant to article XI, section 3, paragraph (5) of the Constitution, which provides that "[n]o impeachment proceedings shall be initiated against the same official more than once within a period of one year." To see why this became the central concern of the proceedings it is necessary to briefly provide a recital of the antecedent facts.

A. FACTS ANTECEDENT TO THE PROCEEDINGS[23]

First, on June 27, 2005, Atty. Oliver Lozano filed an impeachment complaint ("Lozano Complaint") against President Gloria Macapagal-Arroyo for betrayal of the public's trust by conspiring to cheat in the 2004 national elections.[24] Representatives Rodante D. Marcoleta[25] and Rolex T. Suplico[26] endorsed[27] this complaint. Seven days later, Atty. Jose Lopez filed a second impeachment complaint ("Lopez Complaint"), endorsed by Rep. Antonio C. Alvarez,[28] against the President based upon similar grounds.[29] Almost one month after the filing of the Lozano Complaint, or July 25, 2005, a third impeachment complaint ("Amended Complaint") was filed[30] at 9:30 in the morning by the Roque and Butuyan Law Offices, Atty. Oliver Lozano, as well as some Members of the House.[31] Other members acted as endorsers.[32] It was in this manner

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[22] I have opted to refer to the members of the Committee on Justice by identifying them as either "Majority" or "Minority" members. This designation is admittedly insufficient. See Rep. Jacinto V. Paras of the First District of Negros Oriental, Proceedings, August 17, 2005, XXXI:3. I have, nonetheless, opted to stick to the "Majority"/"Minority" distinction as it was the manner in which Chairman Datumanong referred to membership in the Committee.

[23] See Appendix A for a brief discussion other facts "antecedent" to the proceedings.

[24] It should be noted that Between June 28, 2005, and July 21, 2005, Atty. Lozano filed seven supplemental complaints for impeachment or affidavits of impeachment. See the Amended Complaint available at <http://www.pcij.org/blog/wp-docs/ImpeachmentComplaintAmended.pdf> April 15, 2006.

[25] Representative of the ALAGAD party list.

[26] Representative of the Fifth District of Iloilo. The endorsement of Representatives Marcoleta and Suplico were critical as the complaint was filed pursuant to the second mode of initiating an impeachment, i.e. by "the filing and subsequent referral to the Committee on Justice of... a verified complaint filed by any citizen upon a resolution of endorsement by any Member [of the House of Representatives]." RULES OF PROCEDURE IN IMPEACHMENT PROCEEDINGS, 13th Congress of the House of Representatives (henceforth House Impeachment Rules), Rule II, sec. 2, par. (b).

[27] Proceedings, August 10 2005, II:1-II:2.

[28] Representative of the First District of Palawan. The Lopez Complaint was initiated pursuant to the second mode of initiation.

[29] Proceedings, August 10 2005, II:1-II:2.

[30] Proceedings, August 10 2005, II:1 to II:2.

[31] These included Rep. Francis G. Escudero of the First District of Sorsogon, Rep. Ronaldo B. Zamora of the Lone District of San Juan, Rep. Suplico, et. al..

[32] Rep. Satur C. Ocampo of the BAYAN MUNA party list, Rep. Rafael V. Mariano of the ANAK-PAWIS partylist, Rep. Crispin B. Beltran of the ANAK-PAWIS party list, Rep. Joel G. Virador of the BAYAN MUNA

that there arose three complaints duly filed with the Office of the Secretary General.[33] It should be noted that during this entire period — from June 27, 2005, to the early morning of July 25, 2005 — Congress was not in session.[34]

At 10:19 a.m., on July 25, 2005, the Second Regular Session of the House of Representatives opened. On record in the Journal of the House are the following disclosures made by Speaker Jose de Venecia, Jr.[35] in connection with the three impeachment complaints: first, that "he had directed the Secretary General early in the day to include in the Order of Business the two impeachment complaints and the attachments that had been filed earlier with the House;"[36] second, that "[i]f there are any amended complaints duly endorsed by a Member of the House, he assured, he will see to it that the same are included in the transmittal... as soon as he receives them."[37] Again, it must be reiterated that at the opening of the Second Regular Session, all three complaints had already been duly filed. It is strange therefore that Speaker de Venecia had initially included only the first two complaints in the order of business. In any case, by the afternoon of the same day, all complaints had been referred to the Committee on Justice. They were, however, not simultaneously received. The Lozano Complaint was received at 4:20 p.m. and the Amended Complaint was received at 4:30 p.m.[38]

What was therefore clear from the very start was that the Committee was faced with a novel situation. Chairman Datumanong noted this in his preliminary remarks:

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party list, Rep. Teodoro A. Casiño of the BAYAN MUNA party list, Rep. Liza L. Maza of the GARBIELA party list, Rep. Loretta Ann P. Rosales of the AKBAYAN party list, Rep. Mario "Mayong" Joyo Aguja of the AKBAYAN party list, Rep. Ana Theresia "Risa" Hontiveros-Baraquel of the AKBAYAN party list, et. al.

The Amended Complaint, unlike the first two was initiated pursuant to the first mode of initiation, i.e. "by the filing and subsequent referral to the Committee on Justice of... a verified complaint for impeachment filed by any Member of the House of Representatives or..." HOUSE IMPEACHMENT RULES, Rule II, sec. 2, par. (a).

[33] Particular reference is with respect to the first paragraph of section 3, Rule II of the HOUSE IMPEACHMENT RULES, which provides that, "A verified complaint for impeachment by a Member of the House or by any citizen upon a resolution of endorsement by any Member thereof *shall be filed with the office of the Secretary General* and immediately referred to the Speaker." (emphasis supplied)

[34] The First Regular Session of the 13th Congress closed on June 8, 2005 and the Second Regular Session opened on July 25, 2006 at 10:19 in the morning. The Amended Impeachment Complaint was filed at 9:30 a.m. of that same morning. See the Journal of the 13th Congress, available at <http://www.congress.gov.ph/download/journals.php?page=1&congress=13> April 15, 2006.

[35] Representative of the Fourth District of Pangasinan.

[36] JOURNAL OF THE HOUSE, Journal No. 1, July 25, 2005, available at <http://www.congress.gov.ph/legis/print_journal.php?congress=13&id=90> April 15, 2006. Speaker de Venecia makes particular reference to art. XI, sec. 3, par. 2 of the CONST., which provides:

> Sec. 3.... (2) A verified complaint for impeachment may be filed by any Member of the House of Representatives or by any citizen upon a resolution of endorsement by any Member thereof, *which shall be included in the Order of Business within ten session days, and referred to the proper Committee within three session days thereafter.* The Committee, after hearing, and by a majority vote of all its Members shall submit its report to the House within sixty session days from such referral, together with the corresponding resolution. The resolution shall be calendared for consideration by the House within ten session days from receipt thereof. (emphasis supplied)

[37] JOURNAL OF THE HOUSE, Journal No. 1, July 25, 2005, available at <http://www.congress.gov.ph/legis/print_journal.php?congress=13&id=90> April 15, 2006.

[38] Rep. Cagas, Proceedings, Proceedings, August 31, 2005, VI:1.

> THE CHAIRMAN: It is the first time in the history of the House of Representatives that several impeachment complaints are referred to the Committee on Justice one after the other on the same session day against one and the same impeachable official, the President of the Philippines. Our Rules of Procedure in Impeachment Proceedings do not provide a clear answer to this situation. This makes our task difficult and we will be compelled to feel our way around in search of the rightful solution. From this factual situation, it is expected that some legal and constitutional questions could arise in the proceedings in the Committee on Justice. The task may be difficult, but the Committee has to make a decision and, perhaps, set a precedent on this kind of a situation.[39]

Throughout the proceedings, Committee members from both the Majority and Minority would echo the same sentiment.[40]

It is important to recognize the novelty of the situation because, as I hope to elucidate in parts V to VII of this paper, an indulgence in what Dean Jorge Bocobo calls "the cult of legalism"[41] is inapplicable where precedent offers no clear guidelines. Novelty requires instead that participants in deliberative decision-making confront fundamental questions such as, "What principles of justice and truth should govern these proceedings?" On the whole, I contend that the Committee members failed to meet this challenge and were instead content to satisfy their "fetish" for "strict interpretation."[42]

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[39] Proceedings, August 10, 2005, II:1-II:2.

[40] The following re some examples:

> REP. VALDEZ: What makes the issue raised before the Committee... a little difficult is because we lack judicial precedence or even earlier parliamentary rulings of earlier Congresses on the issue raised. Proceedings, August 17, 2005, XII:2.
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> REP. ABAYON: [I]f we trace back the history of the Philippine legislature, never in the history of the Philippine legislature that we are confronted with a problem like this wherein in an impeachment case there are three complaints filed [sic]. We go back... Mr. Chairman, there is always one case, and this is a case of first impression, and so this is precisely why this Committee has to look into the merits of the provisions of Article XI, Section 3, subparagraph 5 which bars a proceedings that would be against the same official for more than once within a period of one year. Proceedings, August 23, 2005, II:3.
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> REP. LOPEZ: The issue, undoubtedly, is not easy to resolve because the pertinent provision of the Constitution I have just cited [Sec. 3 of paragraph 5 of Article XI] is subject to many interpretation, otherwise, this issue would xxx not have arisen. In addition to that, there is no implementing law, rules or regulations clear enough that could resolve the issue, neither is there any jurisprudence that is specifically and directly applicable to the problem. Proceedings, August 23, 2005, III:3.

See also Rep. Benigno Simeon C. Aquino III. Proceedings, August 23, 2005, V-3.

[41] Jorge Bocobo, *The Cult of Legalism*, 17 PHIL. L. J. 253, 253 (1937). Strictly, however, Dean Bocobo was referring not to legislative proceedings but to judicial decision making. His discourse on the cult of legalism begins thus:

> The votaries of formalism worship the letter of the law with undiminished unction. They have raised their fetish on the pedestal of strict interpretation. Denying the right and the duty of the judge to declare new principles, or to adapt old rules to the changing needs of modern life, many lawyers in the Philippines put their absolute faith in legislative formulation as more than sufficient to unfold any policy of the State. Therefore, they say, the courts should never usurp legislative functions by transcending the words of the statutes.

[42] J. Bocobo, *op. cit. supra* note 41 at 253.

B. THE COMMITTEE ON JUSTICE PROCEEDINGS

Later in the paper, statements made by the different Committee members will be juxtaposed with little regard as to when they were raised in the proceedings. For the purposes of this later discussion, I offer an overview of the Proceedings that ran from August 10 to August 31, arranged chronologically for easy reference.

1. August 10, 2005[43]

On the first day of the proceedings there were only two notable points: Chairman Datumanong's preliminary remarks and Rep. Edcel C. Lagman's[44] proposal that the Committee on Justice tackle his prejudicial questions. No objections were raised against Rep. Lagman's proposal.[45] Instead, Members of the Committee were more concerned with the venue of the proceedings (Rolando R. Andaya Hall), the availability of microphones, the seating arrangement of Congressmen and the extent of participation by non-members of the Committee.[46]

2. August 10, 2005 (Executive Session)[47]

During the Executive Session in the afternoon of same day the concerns raised by the Members were addressed. Chairman Datumanong ruled that Members (including ex-officio Members) and impeachment complainants and endorsers would be allowed to participate in the proceedings, but that only Members would be allowed to vote. It was also clarified that there were a total of 86 officio and ex-officio members, nine of which were both officio and ex-officio members.[48] There was a rather lengthy discussion on scheduling the proceedings. It revolved around the question of what would constitute the constitutionally required 60 session day period within which the Committee on Justice had to complete its report.[49] The Chairman decided that pursuant to the rules there are five session days per week (Monday, Tuesday, Wednesday, Thursday and Friday). The Executive Committee decided to meet on Tuesdays and Wednesdays of each week until it proved necessary to meet more often than that in order to complete its report within the constitutionally prescribed period. In fact, it did not prove necessary to meet more often as the proceedings were terminated in a little more than three weeks time.

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[43] Proceedings, August 10, 2005.

[44] Representative of the First District of Albay.

[45] See Proceedings, August 16, 2005, XI-1, where Rep. Lagman notes that no objections were raised.

[46] For instance, there is the following humorous remark of Rep. Harlin C. Abayon of the First District of Northern Samar:

> REP. ABAYON: May we know, Mr. Chairman, if there are first-class and second-class Members of this House? (*Laughter*) Because, Mr. Chairman, I think we here are considered a[s] second-class Members of this House because we are not entitled to the same privileges of those who are seated in front of us. (*Laughter*)
>
> So, my point there, Mr. Chairman, is, may we transfer to a bigger room so that we will have a sense of equality as Members of the House. Proceedings, August 10, 2005, III:3.

[47] Proceedings (Executive Session), August 10, 2005.

[48] See also Proceedings, August 16, 2005, 1-2, where the Committee Secretary clarified the membership issue.

[49] CONST. art. XI, sec. 3, par. 2.

3. August 16, 2005[50]

As per the request of the members, the Committee on Justice proceedings from the sixteenth of August onwards all took place in the more spacious Session Hall of the House of Representatives.

The August 16, 2005 proceedings began on a rather heated note when Rep. Roilo S. Golez[51] recommended that Chairman Datumanong inhibit himself from acting as Chairman. Rep. Golez pointed out that the Chairman had prejudged the question before the Committee as was evident from statements he made during a television interview aired over Channel 27 on August 11, 2005, wherein he allegedly said that the amended complaint is in violation of the one-year bar of the Constitution. Chairman Datumanong refused to inhibit himself.

The remainder of the session was devoted to a debate on whether to take up Rep. Lagman's prejudicial questions or to immediately examine the form and substance of the three complaints.

4. August 17, 2005[52]

Before continuing with the debate on Rep. Lagman's prejudicial questions, the Committee resolved, after much insistence from Rep. Escudero to write a letter to the Criminal Investigation and Detection Group ("CIDG") of the Philippine National Police ("PNP") asking for an explanation as to why the house of a certain Mr. Tabayoyong was raided early that morning. Mr. Tabayoyong, according to Rep. Escudero, was in possession of election returns, which formed part of the minority's evidence for the impeachment of the President.

5. August 23, 2005[53]

The debate on Rep. Lagman's questions was finally concluded. When put to a vote, there were 54 votes in favor of taking up the prejudicial questions, 24 against it, and only two abstentions.

6. August 24, 2005[54]

Chairman Datumanong informed the Committee that the Majority and Minority agreed in an informal meeting earlier in the day to reduce Rep. Lagman's seven prejudicial questions to two, namely: (1) Is the amended complaint a separate and new complaint instead of amendatory to the Lozano Complaint? (2) Are the Lozano, Lopez

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[50] Proceedings, August 16, 2005.
[51] Representative of the Second District of Parañaque.
[52] Proceedings, August 17, 2005.
[53] Proceedings, August 23, 2005.
[54] Proceedings, August 24, 2005.

and Amended complaints valid pursuant to section 3, paragraph 5, article XI of the Constitution?[55]

Before debating on the first prejudicial question, Rep. Loretta Ann P. Rosales inquired into the veracity of newspaper reports that certain members of the Committee on Justice belonging to the Majority had received amounts ranging from 50 to 90 million pesos from Malacañang in the guise of a road users tax. The Chairman considered the issue disposed of after Rep. Arthur D. Defensor[56] responded to the inquiry. The debate on the first prejudicial question then proceeded.

7. August 30, 2005[57]

The debate from the previous day was continued but was plagued by interruptions, which ultimately ended with the walkout of the Minority members of the Committee.

The first interruption was brought about by what the Chairman characterized as an "unruly situation obtaining in the gallery."[58] One news report described it thus:

> In the gallery, a partisan crowd brought in by party-list groups created a scene after one Rolando Guevarra from the Akbayan sa Laban ng Bayan group punched House security officer Jessie Benjamin. Guevarra claimed he was trying

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[55] The initial seven prejudicial questions offered by Rep. Lagman are as follows:

> REP. LAGMAN: One was the amended complaint, which was filed on 25 July 2005, properly or seasonably interposed or, as claimed by some quarters, is it a prohibited pleading under Article XI of the Constitution and the pertinent Rules on Impeachment of the House?
>
> Number two, considering that the amended complaint was filed on 25 July 2005, when the House had not yet adopted the Rule of Procedure on Impeachment of the Thirteenth (13th) Congress, under what rule of standard should the filing of the Amended Complaint be assessed.
>
> Number 3. Since the Amended Complaint radically and substantially supplanted the original Lozano Complaint, should it be considered as a separate, independent and new complaint?
>
> Number 4. If it is considered a separate or new complaint, is it barred by the one-year rule which provides that no impeachment proceedings shall be initiated against the same official more than once within a period of one (1) year?
>
> Number 5. How will the Amended Complaint be assessed under the standard or definition of initiating impeachment proceedings in the case of Francisco?
>
> Number 6. Did the Amended Complaint supersede the original Lozano Complaint so much so that the Lozano Complaint will be subsumed under the Amended Complaint, and considering further that Attorney Oliver Lozano signed the Verification attached to the Amended Complaint, thereby giving the conformity to the Amended Complaint.
>
> And number 7. What is the import and effect of the respondents filing of an early answer on the Amended Complaint. Proceedings, August 10, 2005, II:2-III:1.

See note 366, *infra*, in Appendix "A" for Rep. Lagman's argument in favor of taking up the last question.

[56] Representative of the Third District of Iloilo. Rep. Arthur D. Defensor's name will be referred to in full throughout this paper to distinguish him from Rep. Matias V. Defensor, Jr., representative of the Third District of Quezon City.

[57] Proceedings, August 30, 2005.

[58] *Id.* at XI-4

> to bring in press releases but an examination of his bag showed it contained proimpeachment streamers.[59]

The second interruption came from the ranks of the Committee itself when Rep. Rosales raised a parliamentary inquiry regarding an impeachment complaint filed on November 6, 2000, by the same Atty. Lozano against then Vice-President Macapagal-Arroyo. Rep. Prospero A. Pichay, Jr. endorsed this complaint.[60] Her concern was that Atty. Lozano's pattern of filing impeachment complaints appeared to be a *modus operandi* of the administration, which was tantamount to obstruction of justice. The Chair did not recognize her inquiry.

The third and fatal interruption occurred when, instead of offering a concluding argument for the Minority on the first prejudicial issue, Rep. Robert S. Barbers[61] moved that the Committee summon Corazon "Dinky" Juliano-Soliman, the resigned Secretary of the Department of Social Welfare and Development ("DSWD"), to explain her statement to the press earlier in the day that the Lozano Complaint was a sham complaint because its endorsement was solicited by the President herself. The Chairman did not recognize the motion. In response, most members of the Minority stood up, threw papers into the air and immediately walked out.

After a suspension of nearly two hours and in the absence of the members of the Minority, the Committee voted on the first prejudicial question. There were 52 votes in favor of considering the Amended Complaint as a separate and new complaint and only two votes in favor of considering it as amendatory of the Lozano Complaint. Some members of the Committee thereafter explained their respective votes.

8. August 31, 2005[62]

The last day of the proceedings opened with Rep. Edmundo O. Reyes, Jr.[63] asking for six more endorsements for the Amended Complaint in order to make the required 79 endorsements, or one-third of the House of Representatives, that would effect the automatic transmittal to the Senate of the Amended Complaint as the articles for impeachment against the President. There were no takers. Instead, some members of the Majority responded to the manifestation of Rep. Edmundo Reyes.

Chairman Datumanong then made preliminary remarks and presented the second prejudicial question for resolution, i.e. whether or not the Lozano complaint barred the Lopez Complaint and the Amended Complaint pursuant to section 3,

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[59] Romie A. Evangelista, *Plenary showdown last impeach hope*, Manila Standard Today, September 1, 2005, available at <http://www.manilastandardtoday.com/?page=news01_sept01_2005> April 15, 2006.

[60] Representative of the First District of Surigao del Sur.

[61] Representative of the Second District of Surigao del Norte.

[62] Proceedings, August 31, 2005.

[63] Representative of the Lone District of Marinduque. Rep. Edmundo O. Reyes, Jr., will be referred to as "Rep. Edmundo Reyes" through this paper to distinguish him from Rep. Victoria H. Reyes of the Third District of Batangas.

paragraph 5, article XI of the Constitution.[64] Some members of the Committee then made their respective speeches on the issue.

This second question was put to a vote. Forty-eight were in favor of considering the Lozano complaint as having barred the Lopez Complaint and the Amended Complaint. There were four votes against and there was only one abstention. Some members of the Committee explained their votes.

The Committee then proceeded to determine the sufficiency in form of the Lozano Complaint. In the vote that followed shortly thereafter, 47 members voted in favor of its sufficiency in form. None voted against and there was only one abstention. Some members then explained their votes.

The Committee then proceeded to determine the sufficiency in substance of the Lozano Complaint. Upon motion shortly thereafter, 49 voted against its sufficiency in form. Only one voted in favor of its sufficiency. There were two abstentions. Some members then explained their votes.

Upon the motion of Rep. Lagman, the Committee voted to approve in principle the Committee Report which would incorporate the following: that the amended complaint is a separate and new complaint; that the Lozano Complaint barred the Lopez Complaint and the Amended Complaint; that the Lozano Complaint is sufficient in form but insufficient in substance; and that, accordingly, all three complaints are dismissed. 46 voted in favor of the motion. One did not vote. There were no abstentions. On that note, the Committee proceedings ended.

II. THE RULE OF LAW OVER MEN

> *A bird catcher was setting a snare for birds. A lark saw him and asked what he was doing. He answered that he was founding a city and then he went a short way off. The lark was persuaded by his arguments. He came up and seized him, the lark said, "You fool! If this is the sort of city you are founding, you will not find many people to live in it."*
>
> *The story shows that settlements and cities are most likely to be abandoned when their leaders are harsh.*
>
> — *Aesop*[65]

The first formulation of the rule of law is that the law and not men must govern. As Randall Peerenboom points out, "[a]t its most basic, rule of law refers to a system in which law is able to impose meaningful restraints on the state and individual

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[64] It should be noted that on August 24. 2005, the Committee phrased the second prejudicial question as follows: "Are the Lozano, Lopez and Amended Complaints valid pursuant to section 3, paragraph 5, article XI of the Constitution?" No explanation was offered for this change in phraseology.

[65] EARLY GREEK POLITICAL THOUGHT FROM HOMER TO THE SOPHISTS 148 (Michael Gagrin & Paul Woodruff eds. 2000), citing Perry 193.

members of the ruling elite."[66] This can be distinguished from what he identifies as rule *by* law, which might be described as a situation where "states... rely on law to govern but do not accept the basic requirement that law bind the state and state actors."[67] The first formulation, "rule of law and not of men," therefore concerns itself more with the "governor(s)" than the governed. In the parts IV to VII of this paper, where I tackle the second and third formulations of the rule of law, this initial and rather narrow formulation will be widened to incorporate the role of the "rule of law" vis-à-vis the governed.[68]

A. CURSORY VIEW OF THE WESTERN "RULE OF LAW OVER MEN"

The notion that the law and not men must govern has a very rich tradition in Western culture, with roots traceable to ancient Greece. Aesop's fable, which opens this section, is taken from the sixth or fifth centuries BCE and may be the first hint at the restraint imposed upon governors. After being tricked by the bird catcher that the snare he had built was part of a project to found a great city, the lark, soon to become a sumptuous dinner, cries out, "You fool! If this is the sort of city you are founding, you will not find many people to live in it!" The warning is simply that if leaders concern themselves only with their interests, they will find themselves without anyone to govern.

Where Aesop provides parable, Plato (427-347 BCE) offers theory. Plato, the acknowledged father of Western philosophy, may perhaps be one to first offer a theoretical framework which asserted that rulers must be restrained by a good greater than themselves. It was in the context of this framework that he insisted that the reluctant philosopher-kings — those who have come to recognize the Good — would be the most fitting rulers of the Greek city-state.[69]

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[66] R. Peerenboom, *op. cit. supra* note 16, at 2.

[67] *Ibid.* Peerenboom identifies rule *by* law with the German *Rechtsstaat.* In Part VI of this paper, I will use *Rechtsstaat* to explain my third formulation of the rule of law, i.e., as the rule of right.

[68] Dieter Umbach, a German State Court Judge points to this narrow and wide or "governor" and governed distinction by pointing to a distinction between Anglo-American and German notions of the rule of law. He argues:

> In the Anglo-Saxon sense, the rule of law is likely to be understood to mean that public officials are bound by law. That is very simple, but, the European principle is a little bit wider.
>
> The European concept of rule of law means that in a state in which the rule of law prevails, the rule embraces a lot more. More specifically, ...the rule of law principally generates, permits liberty to be restricted only in accordance with the statutes. It imposes as well limits on delegation of policy making for example with by-laws and statutes. D. Umbach, *op. cit. supra* note 17 at 20-21.

Furthermore, these principles of the rule of law in our understanding require, for example, a fair warning and a fair procedure in legal procedure in legal processes and meaningful limitations on retrospective-activity by the state. it has been said to embody the essence of a judicial review of administrative action as guaranteed by the constitution, and even goes as far as emphasizing the alternative meaning of law as justice rather than law as substantive of the Bill of Rights.

[69] Plato argues thus,

> [W]e've made you kings in our city and leaders of the swarm, as it were, both for yourselves and for the rest of the city. You're better and more completely educated than the others.... Therefore each of you in turn must go down to live in the common dwelling place of the others and grow accustomed to seeing in the dark. When you are used to this, you'll see vastly better than the people there.... Thus, for you and for us, the city will be governed, not

Despite these precedents, it is Aristotle (384-322 BCE) who is more often than not credited with having first formulated the "rule of law over men." In connection with his general discourse on governance, he asserts that the law is adverse to tyrannical governance: "[W]herefore it is thought to be just that among equals every one be ruled as well as rule, and therefore that all should have their turn. We thus arrive at law; for an order of succession implies law. And the rule of the law, it is argued is preferable to that of any other individual."[70]

Upon the advent of Christian philosophical thought, the notion of rulers beholden to a law higher than themselves is preserved. For instance, St. Thomas Aquinas (1225-1274) makes direct reference to Aristotle when he asserts the propriety of overthrowing a tyrannical government, i.e. one that is "unjust because it is not directed to the common good but to the private good of the ruler."[71] The more interesting example from this period, however, is the rather obscure Catholic English political theorist, John of Salisbury (1115-1180), who overtly advocated tyrannicide. This might have been due, in no small measure, to the fact that he was a friend of the Archbishop Thomas Beckett who died a martyr of the Catholic faith at the hands of King Henry II.[72] John of Salisbury defined a tyrant as "one who oppresses the people by violent domination."[73] He justifies tyrannicide thus:

> [T]he law is a gift from God, the likeness of equity, the norm of justice, the image of the divine will, the custodian of security, the unity and confirmation of a people, the standard of duties, the excluder and exterminator of vices, and the punishment of violence and all injuries. It is attacked either by violence or by

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> like the majority of cities nowadays, by people who fight over shadows and struggle against one another in order to rule — as if that were a great good — but by people who are awake rather than dreaming.... PLATO, REPUBLIC 520b-d (Grube trans.).

[70] ARISTOTLE, POLITICS, bk. III, chap. 16, 1287a in BASIC WORKS OF ARISTOTLE (Richard McKeon ed. 2001). Elsewhere it also written that "tyranny is that arbitrary power of an individual which is responsible to no one, and governs all alike, whether equals or better, with a view to its own advantage, not to that of its subjects, and therefore against their will. No freeman, if he can escape from it, will endure such a government. *Id.* at bk. IV, chap. 9, 1295a in BASIC WORKS OF ARISTOTLE (Richard Mckeon ed. 1941). See also bk. III, chap. 11, 1282b, where Aristotle says that "laws, when good, should be supreme."

[71] In the SUMMA THEOLOGICA, II:II, q. 42, a.2, c., quoted in AN AQUINAS READER 382 (Mary T. Clark ed. 1966), St. Thomas explains:

> Tyrannical government is unjust because it is not directed to the common good but to the private good of the ruler, as is clear from the philosopher in *Politics* III and *Ethics* VIII. Therefore the overthrow of such government is not strictly sedition, unless perhaps when accompanied by such disorder that the community suffers greater harm than from the tyrannical government. A tyrant is himself, moreover, far more seditious when he spreads discord and strife among the people subject to him so that he may dominate them more easily. For tyranny is the directing of affairs to the private benefit of the ruler with harm to the community.

[72] Cary Nederman, *Introduction*, in JOHN OF SALISBURY, POLICRATICUS xv-xviii (Nederman trans. 1995).

[73] JOHN OF SALISBURY, *op. cit. supra* note 72 at bk. VIII, chap. 17. On the other hand, a prince would be defined as one who,

> ...is obedient to law, and rules his people by a will that places itself at their service, and administers rewards and burdens within the republic under the guidance of law in a way favourable to the vindication of his eminent post, so that he proceeds before others to the extent that, while individuals merely look after individual affairs, princes are concerned with the burdens of the entire community. *Id.* at bk. IV, chap. 2.

> deceit and, one might say, it is either ravaged by the savagery of the lion or overthrown by the snares of the serpent. In whatever manner this happens, the grace of God is plainly being assailed and God is in a certain fashion being challenged to a battle. The prince fights for the laws and liberty of the people; the tyrant supposes that nothing is done unless the laws are cancelled and the people are brought into servitude. The prince is a sort of image of divinity and the tyrant is an image of the Adversary and the depravity of Lucifer, for indeed he is imitated who desires to establish his throne in the north and to be like the Most High, yet with His goodness removed.....
>
> As the image of the deity, the prince is to be loved, venerated and respected; the tyrant, as the image of depravity, is for the most part even to be killed. The origin of tyranny is iniquity and it sprouts forth from the poisonous and pernicious root of evil and its tree is to be cut down by an axe anywhere it grows.[74]

After the medieval period, real interest in the doctrine of the "rule of law over men" emerged during the European civil wars of the 17th and 18th centuries. This we see most strongly in Jean-Jacques Rousseau's (1712-1778) social contract theory. There he explains a consequence of the recognizing that the sovereign is "nothing less than the exercise of the general will,"[75]

> [W]e see that it can no longer be asked whose business it is to make laws, since they are acts of the general will; nor whether the prince is above the law, since he is just a member of the State; nor whether the law can be unjust, since no one is unjust to himself; nor how we can be both free and subject to the laws, since they are but registers of our wills.[76]

This obligation of the sovereign to the common will is of course already present in the earlier social contract theory of the British thinker, John Locke (1632-1704), who had argued that governments may properly be resisted "when the legislative or the prince... act contrary to their trust" for, "[b]y this breach of trust they forfeit the power the people had put into their hands for quite contrary ends."[77]

This sentiment that the government was bound to the people stretched across Europe. In France, François-Marie Arouet, i.e. Voltaire (1964-1778), argued in *Idées républicaines par un member d'un corps* (1765) that,

> [L]aws pertaining to the constitution of governments are all made to counter ambition; everywhere people have given thought to erecting dams to hold back the torrents that would engulf the world. Thus, in republics, the primary laws

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[74] JOHN OF SALISBURY, *op. cit. supra* note 72 at bk. VIII, chap. 17.

[75] Jean-Jacques Rousseau, *The Social Contract* (excerpts), in II THE GREAT POLITICAL THEORIES: FROM BURKE, ROUSSEAU AND KANT TO MODERN TIMES 18, 19 (Michael Curtis ed. 1981).

[76] *Id.* at 25.

[77] John Locke, *The Second Treatise of Civil Government* (excerpts), in I THE GREAT POLITICAL THEORIES: FROM PLATO AND ARISTOTLE TO LOCKE AND MONTESQUIEU 372, 387 (Michael Curtis ed. 1981)

> regulate the rights of each public body; thus kings, when they are crowned, swear to protect the rights of their subjects.[78]

In Germany, Immanuel Kant (1724-1804), arguing from the perspective that each man is an end unto himself, insisted that the sovereign was duty bound "to give just laws and to introduce constitutional reforms so that a republican constitution can be established."[79]

In England the argument moved beyond the question of simply binding the prince to the law and turned upon the inherent problem with monarchical governments. Thus, John Milton (1608-1674), in defense of Cromwell's republic, which was established after the execution of King Charles I, offered the following doctrine of regicide:[80]

> And so the king exists on account of the people: therefore the people are stronger than and superior to the king. Since the people are superior to and stronger than the king, there can exist no right of the king by which he, the inferior can damage the people, the superior, or keep them in slavery. Since a king has no right to do wrong, the right of the people remains supreme by nature. So by the right by which men first shared their counsels and strength for the sake of their mutual defense before the creation of kings; by the right by which, for the preservation of the common safety, peace and liberty of all men, they put one or more in charge of the rest; by the same right they might correct or depose the same people whom they had placed because of their virtue or prudence at the head of the rest, or any others that badly manage the sate, on account of cowardice, stupidity, dishonesty or treachery: since nature always has regarded and does regard not the power of one man or few men but the safety of all.[81]

After Cromwell's death, England returned to monarchical rule but eventually reverted to parliamentary government. The stigma, however, of kingly rule kept alive the arguments against monarchy well into eighteenth century England. We see this, for instance in Thomas Paine's (1737-1809) criticism of England in 1775.[82] But even when Britain

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[78] VOLTAIRE, REPUBLICAN IDEAS BY A MEMBER OF A PUBLIC BODY XIV, in VOLTAIRE: POLITICAL WRITINGS195, 198 (David Williams ed. 1994).

[79] Hans Reiss, *Introduction*, in KANT: POLITICAL WRITINGS 1, 25 (Hans Reiss ed., 1999).

[80] JOHN MILTON, A DEFENSE OF THE PEOPLE OF ENGLAND, in JOHN MILTON: POLITICAL WRITINGS51, 150 (Martin Dzelzainis ed. 1992)

[81] *Id.* at 150-151.

[82] Paine, wrote:

> The nearer any government approaches to a republic, the less business there is for a king. It is somewhat difficult to find a proper name for the government of England.... [I]n its present state is it unworthy of the name [republic], because the corrupt influence of the crown, by having all the places in its disposal, hath so effectually swallowed up the power, and eaten out the virtue of the House of Commons (the republican part of the constitution) that the government of England is nearly as monarchical as that of France of Spain..... Why is the constitution of England sickly but because the monarchy hath poisoned the republic, the crown has engrossed the commons. THOMAS PAINE, COMMON SENSE in THOMAS PAINE: POLITICAL WRITINGS 1, 15 (Bruce Kuklick ed. 1997)

A century later, and still criticizing pure monarchical rule, James Mill (1773-1836), father of the great utilitarian John Stuart Mill, wrote:

moved past the issue of monarchical rule, there was still a preoccupation with the rule of law over men. This is confirmed in 1895 when Albert Venn Dicey (1835-1922) asserted that, "every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen."[83]

Finally, across the Atlantic, John Adams (1797-1801), when crafting the constitution of the Commonwealth of Massachusetts, drew from this wealthy tradition and offered the following argument for governmental separation of powers, upon which I have based my first formulation of the rule of law:

> In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: *to the end it may be a government of laws and not of men.*[84] (emphasis supplied)

B. CURSORY VIEW OF EASTERN "RULE OF LAW OVER MEN"

Although Philippine law draws primarily from this Western tradition, the fact that we are an Asian country necessitates at least a token look at the Oriental tradition of political philosophy. A very cursory review reveals Confucian and Islamic thought are best corollaries of the Western tradition.

With respect to Confucianism, what is interesting is that it pre-dates Platonism by at least one hundred years.[85] In fact, as revealed in the following passage, Confucius (551-479 BCE) seems to have even anticipated the social contract theories of Locke and Rousseau:

> Tsze-kung asked about government. The Master said, "*The requisites of government are* that there be sufficiency of food, sufficiency of military equipment, and the confidence of the people in their ruler."
>
> Tsze-kung said, "If it cannot be helped, and one of these must be dispensed with, which of the three should be foregone first?" "The military equipment," said the Master.

> Whenever the powers of Government are placed in any hands other than those of the community, whether those of one man, or a few, or of several, those principles of human nature [i.e. that man who has not the object of his desire, has inducement to take them away from any other man who is weaker then himself] which imply that Government is at all necessary [i.e. to repress that inducement], imply that those persons will make use of them to defeat the very end for which Government exists. JAMES MILL, ESSAY ON GOVERNMENT, in JAMES MILL: POLITICAL WRITINGS 1, 9-10 (Terence Ball ed. 1992).

[83] ALBERT VENN DICEY, LAW OF THE CONSTITUTION 193 (10th ed. 1959).

[84] MASSACHUSETTS CONSTITUTION, part the first, art. XXX (1780).

[85] Confucius is believed to have lived from 551 to 479. B.C.. Plato, on the other hand, is reputed to have lived from 427 to 347 B.C. See D.C. Lau's, *Introduction*, in ANALECTS 9, 9-10 (Penguin ed. 1979); and, THE PENGUIN DICTIONARY OF PHILOSOPHY 425 (2000).

> Tsze-kung *again* asked, "If it cannot be helped, and one of the remaining two must be dispensed with, which of them should be foregone?" The Master answered, "Part with the food. From of old, death has been the lot of all men; but if the people have no faith *in their rulers*, there is no standing *for the state*."[86]

The last phrase of the third paragraph — "there is no standing for the state" — should be understood to literally mean that "the state does not stand."[87] Taken in this context, the paragraph is descriptive rather than normative. It simply says that the ruler *cannot* rule. It does not say that a ruler who does not have the trust of the people *should* not rule.

In pragmatic terms, the Confucian passage appears to provide no solution to situations where rulers rule without the trust of their people. The passage, unlike the suggestions of tyrannicide or regicide discussed above, does not therefore seem to champion the idea that such rulers should be deposed. However, if we go beyond the ANALECTS themselves and turn to subsequent works of later Confucian commentators we find a normative ethics of political action. Let me offer two examples. First, there is the commentary of the twelfth century Confucian scholar, Chû Hsî (1130-1200). With respect to the above passage from the ANALECTS, he explains:

> If the people be without food, they must die, but death is the inevitable lot of men. If they are without [trust], though they live, they have not wherewith to establish themselves. It is better for them in such case to die. Therefore it is better for the ruler to die, not losing faith to [sic] his people, so that the people will prefer death rather than lose faith to [sic] him.[88]

The second example is clearer and refers to the book of MENCIUS.[89] We find there the following passage expressly providing for the removal of leaders who do not enjoy the trust of the people:

> "Of the first importance," Mencius [372-289 BCE] said, "are the people, next comes the good of land and grains, and of the least importance is the ruler. Therefore whoever enjoys the trust of the people will be emperor. Whoever enjoys the trust of the emperor will be a feudal prince, and whoever enjoys the trust of a feudal prince will be a high official. When a feudal prince jeopardizes the state he is to be superseded."[90]

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[86] ANALECTS, bk. 12, chap. 7 (James Legge trans.).

[87] The original Chinese term translated here as "standing" is "li," which literally means "to stand," in the physical sense of to stand erect, e.g. "His back hurts, so he can't sit or stand." THE NEW CHINESE-ENGLISH DICTIONARY 555 (2001). It does not mean "standing" in the legal sense, i.e. as the standing to sue or be sued. BLACK'S LAW DICTIONARY 1405 (6th ed.). The descriptive nature of the term is more evident in this other translation of the last phrase thus: "a people that no longer trusts its rulers is lost indeed." ANALECTS, bk. 12, chap. 7 (Waley, trans. 1999)

[88] ANALECTS, bk. 12, chap. 7 at note 3 (James Legge trans.).

[89] MENCIUS (Zhao Shentao, Zhang Wenting & Zhou Dingzhi trans. 1999)

[90] *Id.* at bk. 14, chap. 14. The chapter actually closes with the following line which truly establishes the place of people above even the spirits of the land: "When the sacrificial animals have grown fat, the offerings are clean and the sacrifices are offered in due season, yet there are floods and droughts, then the god of land and grains is to be superseded."

From the Islamic tradition, on the other hand, we find a vision of man as "competitive, brutish, swayed by strong desires, and avaricious."[91] For Muslims, it is the law that saves man from this original state. The difference between the Muslim vision of law and that of social contract theorists is that, for the former, law is a gift from God:

> God in His mercy sent a Prophet with a law, to found a polity. Differently put, the social contract was with God, not with a human being. Without God's law, there could be no civilization, indeed humans would not survive at all, as Shī'ites above all were prone to claiming.[92]

In this way the Islamic tradition runs parallel to the medieval thought of St. Thomas Aquinas and John of Salisbury.

C. CURSORY VIEW OF RECENT PHILIPPINE HISTORY

In Dean Raul C. Pangalangan's recent contribution to the collection of ASIAN DISCOURSES ON THE RULE OF LAW,[93] the beginnings of the rule of law in the Philippines are traced to the 1899 Malolos Constitution, where "Filipino revolutionists rejected the personalistic exercise of state power identified with Spanish rule in the Philippines, and in its stead created modern legal institutions that secured rights and not just privilege."[94] This was followed by McKinley's Instruction, the Jones Law and, eventually, the 1935 Constitution. Dean Pangalangan comments that all these instruments were characterized by a "tripartite separation of powers,"[95] which, as pointed out above, was what pushed John Adams to declare that his Constitutionalism sought "a government of laws and not of men."

The infamous chapter in the Republic's "rule of law over men" history would be the period running from the 1970s to the mid-1980s, which refers, of course, to the Marcos dynasty. As Dean Pangalangan notes,

> The Marcos years exemplify either the demise of the 'thin' rule of law ideal in Philippine Constitutionalism or its extreme, positivist triumph. Demise, because on the classic promise of a trade-off... Marcos proceeded to dismantle the constitutional safeguards of liberty... and of democratic governance...; positivist triumph, because Marcos made sure that his authoritarianism was constitutional, a dictatorship that was expressly provided for in the Constitution and, by all appearances, established in full compliance with proper procedure.[96]

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[91] PATRICIA CRONE, GOD'S RULE: GOVERNMENT AND ISLAM 261 (2004).

[92] *Id.* at 263 (internal citations omitted).

[93] Raul C. Pangalangan, *The Philippine 'People Power Constitution, Rule of Law and the Limits of Liberal Constitutionalism*, in ASIAN DISCOURSES ON RULE OF LAW: THEORIES AND IMPLEMENTATION OF RULE OF LAW IN TWELVE ASIAN COUNTRIES, FRANCE AND THE U.S. 371 (2004).

[94] *Id.* at 372.

[95] *Id.* at 372.

[96] *Id.* at 374. What Dean Pangalangan refers to by "thin rule of law" is rule-based governance. On the other hand, he uses the "thick rule of law" to refer to substantive claims to social reform and mass-based politics. *Id.* at 381. Compare this with Peerenboom's definitions, which are discussed at some length in Part V of this paper.

The positivist triumph reference is with respect, amongst others, to *Javellana v. Executive Secretary*,[97] where the Supreme Court effectively upheld the ratification of the 1973 Constitution and legitimized President Marcos' authoritarian ascendancy.[98]

There were, however, members of the Court that found the ratification of the 1973 Constitution to be anything but in consonance with the rule of law. For instance, in anticipation of criticism about his refusal to support the ratification of the Constitution, Chief Justice Roberto Concepcion offered the following reply:

> Perhaps others would feel that my position in these cases overlooks what they might consider to be the demands of "judicial statesmanship," whatever may be the meaning of such phrase. I am aware of this possibility, if not probability; but "judicial statesmanship," though *consistent* with Rule of Law, *cannot prevail* over the latter. Among consistent ends or consistent values, there always is a hierarchy, a rule of priority.
>
> We must realize that the New Society has many achievements which would have been very difficult, if not impossible, to accomplish under the old dispensation. But, *in and for the judiciary, statesmanship* should not prevail over the Rule of Law. Indeed, *the primacy of the law or of the Rule of Law and faithful adherence thereto are basic, fundamental and essential parts of statesmanship itself*.[99] (underscoring supplied)

We see, therefore, that even in the infamous decision that helped ensure "Marcosian" rule for three decades, there were still members of the Court arguing for the rule of law over the rule of men.

Of course President Marcos disagrees that his protracted rule subverted the rule of law. He argued that the judicial imprimatur in *Javellana* and subsequent cases proved, more than anything else, that his authoritarianism was a function of rather than a foil against the rule of law:

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[97] Javellana v. Executive Secretary, 151-A Phil. 35 (1973).

[98] Considering that the 1973 constitution was arrived at through a referendum, it is noteworthy that Prof. Araceli Baviera cautions us thus,

> As observed by Professor Karl Loewenstein, constitutional referendum enjoy suspicious popularity in autocratic and authoritarian regimes of our time. The obvious reason, according to him, is less the ultrademocratic procedure than the fact that a popular vote can be manufactured by propaganda and constraint with more ease than an approval by the more rational process of a representative assembly. Araceli Baviera, *Politics and the Recent Constitutional Changes in the Philippines*, 57 PHIL. L. J. 226, 228 (1981), citing K. Lowenstein, POLITICAL POWER AND THE GOVERNMENTAL PROCESS 265 (1965).

[99] Javellana v. Executive Secretary, *supra* at 183. Similarly, Justice Calixto O. Zaldivar, taking from his dissenting opinion in the plebiscite cases, argued:

> The rule of law must prevail even over the apparent will of the majority of the people, if that will had not been expressed, or obtained, in accordance with the law. Under the rule of law public questions must be decided in accordance with the Constitution and the law. This is specially true in the case of the adoption of a constitution or in the ratification of an amendment to the Constitution. Javellana v. Executive Secretary, *supra* at 364 (Zaldivar, J. *dissenting*).

> Far from using military or summary executive measures to protect public rights or interests, the government repaired to the judiciary to vindicate itself....
>
> ...[I]t has always been my contention that constitutionalism and the *rule of law* must prevail and circumscribe our program of reform. *All government officials must be subject to law.* The people must not be governed by the capricious whims, uncontrolled discretion, or arbitrary will of officials but by regularly enacted laws applicable to both the governors and the governed alike.[100] (emphasis supplied)

Dean Pangalangan then closes his article by describing the rule of law over men brought about by the EDSA Revolutions. When characterizing the shifts in government, which deposed President Marcos and President Joseph Estrada, Dean Pangalangan notes that, although both cases could hardly be characterized by strict legalistic terms,[101] the movements did uphold substantive norms of public accountability.[102]

III. THE RULE OF LAW OVER MEN IN THE COMMITTEE PROCEEDINGS

A. IMPEACHMENT, IN GENERAL

Impeachment proceedings by nature acknowledge that the law and not men should rule. The Constitutional provisions concerning impeachment are specifically located in article XI entitled, "Accountability of Public Officers." Section 1 of the article translates the rule of law into legalese thus: "Public office is a public trust. Public officers and employees must at all time be accountable to the people, serve them with utmost responsibility, integrity, loyalty, and efficiency, act with patriotism and justice and lead modest lives."

The close connection between impeachment proceedings and the first formulation of the rule of law was not lost on members of the Committee on Justice.

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[100] FERDINAND MARCOS, HUMAN RIGHTS AND THE RULE OF LAW, 53-54. When referring to his proclamation of the martial law in particular, the President had the following to say:

> [T]he martial law administration submitted itself to the jurisdiction of the Supreme Court in all the "martial law cases" as an earnest of its subordination [sic] to the Constitution and its adherence to the rule of law, and so that a ruling might be made by the highest judicial authority of the land on whether the martial law administration or the entire government was legitimate and entitled to continue operating as such
>
> ...The overall verdict of the Supreme Court was to establish the validity of the proclamation and its continuance under our legal system. It found the circumstances which necessitated the proclamation of martial law to be matters of common knowledge. *Id.* at 52.

[101] R. Pangalangan, *op. cit. supra* note 93 at 375 & 381.

[102] *Id.* at 381. Dean Pangalangan, closes his article by describing the current state of the rule of law in the Philippines thus:

> Given the volatility of Philippine Politics, and the lack of national consensus on values and policy preference, the key function of constitutionalism is to mark, even if synthetically by law, the road that public power must take.... [T]oday constitutionalism and the rule of law tradition that is has fostered remain relevant as the non-negotiable, neutral framework for competing claims and powers. The fixity of the non-negotiable may be myth, for law's meanings are elastic and malleable, and neutrality may be an illusion, as law is partisan to the accidental bearers of constitutionalized values. But it is the possibility, the mere promise of decision-making that is untainted by power and interests that explains the continuing idealization of "decision according to law." *Id.* at 381-382.

For instance, in response to the question of why the President can be impeached, Rep. Alan Peter S. Cayetano[103] answered:

> REP. CAYETANO: Because, unlike any other government official in our country... it is only the Office of the President of the Republic that is immune from suit. *Walang pupuntahan ang isang mamamayan na merong* grievance o *merong* complaint *sa ating Pangulo. Ang mapupuntahan lang po niya ay dito sa Kongreso*, the House of Representatives, to complain against the President. What happens if we close that door to that individual? *Wala nang* public accountability.[104]

Applying another tack, Rep. Zamora reflected on the phrase "betrayal of public trust"[105] in article XI, section 2, which was included amongst the grounds for impeachment in the 1987 Constitution.[106] He pointed out that the Constitutional Commissioners considered "betrayal of public trust" to be "a catch-all phrase, to cover any violation of an oath of office"[107] and to be a ground which "includes everything in the other enumerated grounds for impeachment."[108] His point was that the inclusion of this broad ground easily allowed for the consolidation of the Amended Complaint with the Lozano Complaint, even if only as a bill of particulars. Ultimately, the argument was that the Commissioners desired to see an impeachment process work against governors who had violated their social contract with the governed. In connection, it might be pointed out that "betrayal of public trust" hearkens back to John Locke's position that by a "breach of trust... [governors] forfeit the power the people had put into their hands"[109]

B. RIGHTS OF IMPEACHABLE OFFICIALS

On the other hand, the Majority members contended that the very impeachment process could itself subordinate the rule of law over men by becoming a mere tool to usurp power. In effect, nothing happens to the rule of law over men, except a changing of the guard.

Rep. Raul T. Gonzalez, Jr.[110] thus argued that an impeachment proceeding should not be considered a purely political process but should be treated as judicial or quasi-judicial in character, in order to protect the impeachable officer in the same way

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[103] Representative of the Lone District of Pateros-Taguig.

[104] Proceedings, August 16, 2005, XII:1 (ellipses in the original). See also Rep. Mario Joyo Aguja of the Akbayan Party List, Proceedings, August 17, 2005. VI:2.

[105] Const. art. XI, sec. 2. The provision reads in full:

> Sec. 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.

[106] Proceedings, August 31, 2005, VI:1-VI:2.

[107] *Id.* at VI:1.

[108] *Id.* at VI:2. See also Rep. Casiño, Proceedings, August 16, 2005, XIV:2.

[109] J. Locke, *op. cit. supra* note 77 at 387.

[110] Representative of the Lone District of Iloilo City.

that an accused is protected in a criminal proceeding.[111] He, in fact, explicitly asserted that if impeachment proceedings are judicial in character, then the Committee would have to "abide by the rule of law."[112]

Without conceding that impeachment proceedings are judicial in character, Rep. Lagman also argued in favor of rights belonging to the impeachable official. Attacking the Minority congressmen, he said:

> REP. LAGMAN: Those who filed or endorsed the amended impeachment complaint who claimed that they did so, quote, "To give the President her rightful day in court."[113] *Para na rin nilang sinabing dudungisan mo muna ang isang tao upang mabigyan din siya ng pagkakataong linisin ang kanyang sarili. Pababayaan mo munang makasagap ng impeksyon ang isang tao upang mabigyan siya ng oportunidad gamutin ang kanyang sarili, o isasakdal mo muna ang isang tao upang bigyan siya ng pagkakataon ipabalewala o ipawalang sala ang kanyang sarili.* Why do we have to do this? ...[T]o accuse the person so that he will have the opportunity to acquit himself....
>
> ...Once you sue a person, you are determined, you have ascertained, that she has committed a wrongdoing and you seek for [redress], not to give her the opportunity or to have debate in court, that is her right. She is entitled to that whether the complainant likes it or not.[114]

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[111] Proceedings, August 17 2005, VI:1. Rep. Gonzalez referred to the textbook of Justice Isagani Cruz to justify his argument:

> REP. GONZALEZ: Your honors, a lot of you prefer the point of view that the impeachment proceeding is political, in which case a lot of the questions *kung may mga* technical issues or prejudicial questions would be easily resolved. *Pero*, Your Honors, there is also a Supreme Court Justice who stated in one of his books, Philippine Political Law by Isagani Cruz, and I quote, "Impeachment proceedings are in a sense judicial and penal in character. Hence, the constitutional rights of the accused, as guaranteed in Article III, such as the right to due process and against self-incrimination, are available in these proceedings. The Rules of Court, while not strictly applicable as Congress is not a court of justice, are nonetheless, observed in the conduct of the trial. As in ordinary criminal actions proof beyond reasonable doubt is necessary for conviction. And I emphasize that Mr. Chairman. *Ibid.*

It should be noted, however, that a 2002 update of Justice Cruz's book was not so categorical about its pronouncement that impeachment proceedings are penal in nature or that the quantum of evidence is proof beyond reasonable doubt. The actual reads:

> Impeachment proceedings are in a sense judicial *but it has not yet been decided if they are penal in character.* Nevertheless, the constitutional rights of the accused as guaranteed in Article III, such as the right to due process and against self-incrimination, are available in these proceedings. The Rules of Court, while not strictly applicable because the Senate is not a court of justice, are also observable in the conduct of the trial. *Notably, the Constitution does not prescribe the quantum of evidence needed for conviction.* ISAGANI A. CRUZ, PHILIPPINE POLITICAL LAW 361 (2002) (emphasis supplied).

[112] Proceedings, August 17 2005, VI:1. See also Rep. Aurelio M. Umali of the Third District of Nueva Ecija, Proceedings, August 16, 1005, XVI:1, who also speaks of impeachment proceedings as judicial in character. His argument, however, is that it is judicial in character because Francisco v. House of Representatives, G.R. Nos. 160261-63, 160277, 160292, 160295, 160310, 160261, 160318, 160342-43, 160360, 160365, 160370, 160376, 160392, 160397, 160403, 160405, November 10, 2003 (henceforth referred to as "Francisco v. House of Representatives, November 10, 2003"), provided a judicial interpretation of impeachment proceedings.

[113] Such statements were made by the following members, amongst others, Rep. Zamora, Proceedings, August 16, 2005, IX:3, Rep. Clavel A. Martinez of the Fourth District of Cebu, Proceedings, August 16, 2005, XIII:1; Rep. Casino, Proceedings, August 16, 2005, XIV:3.

[114] Proceedings, August 30, 2005, XIV:1-XIV:2.

It seems therefore that the Majority's position was that, regardless of the characterization of the proceedings, the President was entitled to certain rights that protected her from removal from office, even in the event that the Members of the House were unanimously in favor of impeaching her. Thus, the Majority argue that the one-year bar was a rule of law that stood in the way of the capriciousness of the House.

This sense of ultimatums that bind Congress is neatly summarized in the *Francisco*[115] case, which protected Chief Justice Davide from a second impeachment proceeding against him:

> No one is above the law or the Constitution. This is a basic precept in any legal system which recognizes equality of all men before the law as essential to the law's moral authority and that of its agents to secure respect for and obedience to its commands.... The Chief Justice is not above the law and neither is any other member of this Court. *But just because he is the Chief Justice does not imply that he gets to have less in law than anybody else. The law is solicitous of every individual's rights irrespective of his station in life.*[116] (emphasis supplied)

C. IMPEACHMENT AS A POLITICAL PROCESS

1. Rep. Lagman's Double Standard

Before moving to the next section, I must point out a confusion in Rep. Lagman's argument, which brings to light the peculiar problem with this first formulation of the rule of law.

Unlike Rep. Gonzalez, Rep. Lagman insists that an impeachment is political in nature,[117] but at the same time argues for the rights due impeachable officers. When speaking of these rights, however, he makes use of the language of a judicial proceeding. Thus he says that the right to "debate in court" is something that the accused is entitled to, "whether the complainant likes it or not."[118] In this context, the impeachable officer is treated like a respondent in a civil proceeding or an accused in a criminal proceeding.

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[115] Francisco v. House of Representatives, *supra.*

[116] *Ibid.* The position of Representatives Gonzalez and Lagman might also be summarized in the following:

> The rule of law applies to the weak and to the strong, the rich and the poor, the powerful and the powerless. If you love the rule of law, you must love it in all of its application. You cannot only love it when it provides the verdict you seek; you must love it when the verdict goes against you as well. We cannot uphold the rule of law only when it is consistent with our beliefs; we must uphold it even when it protects behavior that we don't like or is unattractive, or is not admirable, or that might even be hurtful. And we cannot say we love the rule of law but dismiss arguments that appeal to the rule of law as "legalisms" or "legal hairsplitting."

Chery Mills, a lawyer of President Clinton, made this above statement during the course of the impeachment proceedings against him. "The Rule of Law Protects the President Too, Counsel Tells Senate," New York Times January 21, 1999, A18, quoted in A. ALTMAN, *op. cit. supra.* note 15 at 2.

[117] Proceedings, August 30, 2005, XIV:1.

[118] Proceedings, August 30, 2005, XIV:2.

The right to debate in court, however, cannot be invoked at the stage in an impeachment proceeding where what is in question is the sufficiency in form and substance of an impeachment complaint, for, at this stage, it is very much possible that the Committee will throw out the complaint and the "respondent" or the "accused" need not bother about demanding for his day in court. For this reason, the Minority likened the Committee on Justice proceedings to a fiscal's preliminary assessment of a complaint to determine whether or not a criminal information should be filed.[119] At this stage in the proceedings, the accused does not have any rights to invoke precisely because there is, as yet, no case filed against him.

It can therefore be said that Rep. Lagman seems to suggest that a judicial standard be employed in favor of the accused and a political standard be employed against the complainant. In other words, the accused can invoke legally protected rights but the complainant can only have his or her way if he manages to secure enough votes. This becomes clear when we see how Rep. Lagman phrased his argument against the Minority:

> REP. LAGMAN: [I]mpeachment is concededly a political process where the Majority holds [s]way.... [However,] this ascendancy of the Majority is counterbalance[d] by the expressed constitutional provision that only one third of the membership of the House is required to repudiate a report of the Committee on Justice dismissing a complaint and to elevate the impeachment case to the Senate for trial.
>
> Consequently instead of the Minority perpetually complaining at every turn of the proceedings, they should instead work hard and fast to secure the requisite number of 79 allies. But, if the Minority fails, they should hold their peace, comply with the process and submit to the results of the proceedings.[120]

In this context, it seems that Rep. Lagman is suggesting that the only "rule of law" that the Minority can rely on is the one-third voting requirement set by the Constitution.[121] They cannot, therefore, count on the provision of law that requires the Committee on Justice to look into the form and substance of the impeachment complaints referred to it.[122] Rep. Lagman suggests that these issues fall into the political realm and are thus subject to the whimsy of majority vote. This precisely was the effect of his prejudicial questions. Rep. Edmundo Reyes astutely points out this discrepancy in the following:

> REP. EDMUNDO REYES: The argument raised by the Majority is that 79 signatures would resolve the issue. The Minority has no right to complain of technicalities raised by the Majority without 79 signatures. No evidence can be

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[119] See Rep. Cayetano, Proceedings, August 16, 2005, XII:2.

[120] Proceedings, August 30, 2005, XIII:2-XIII:3. Another Majority member, Rep. Constantino G. Jaraula of the Lone District of Cagayan de Oro City rhetorically asks, "Is it our fault that the Constitution provides for one-third (1/3) endorsements so that any complaint properly referred to the Committee can go direct to the Senate?" Proceedings, August 31, 2005, III:1.

[121] CONST. art. XI, sec. 3, pars. (3) & (4).

[122] HOUSE IMPEACHMENT RULES, Rule III.A, sec. 4 with CONST. art. XI, sec. 3, pars. (8).

> presented without 79 signatures. If this premise of the Majority is the true interpretation of our Constitution and extent of the duty of Congress on impeachment proceedings, then the case was lost from the beginning.
>
> If Congress requires 79 signatures before evidence is heard, what then is the role of Congress in the determination of form and substance in impeachment proceedings? For... with 79 signatures the complaint would be directly transmitted to the Senate. All that the pro-impeachment group has been asking is the chance before the Justice Committee to uncover the evidence to allow our House to make a fare and just resolution of these most pressing issues, but they are denied this simple request on grounds that defy logic and common sense.[123]

What then comes into sharp focus is that, ultimately, what rules in proceedings before the Committee on Justice mirrors not the rule of law but that of men.

Furthermore, assuming *arguendo* that Rep. Lagman's double standard is applicable, impeachable officials still cannot be treated as ordinary respondents in a civil case or as persons accused in a criminal case. First, the Constitution — as well as the entire history of the rule of law over men (which I cursorily reviewed above) — recognizes that an impeachable officer, unlike an ordinary respondent or accused, "must at all time be accountable to the people."[124] Second, unlike an ordinary criminal proceeding, the impeached public officer is not imprisoned, fined or held civilly liable. The only penalties imposable would be "removal from office" and "disqualification to hold any other office under the Republic of the Philippines,"[125] which are mere accessory penalties in criminal law.[126] It is thus difficult to ascertain exactly what rights public officers are entitled to during Committee on Justice proceedings.

2. Impeachment Proceedings as Political

On the matter of impeachment being a political process, we are confronted with the problem of how this can still be a manifestation of the rule of law over men. For would it not seem that if impeachments are political creatures, what rules is the power play amongst men, rather than the law? Presidents might therefore be impeached not so much because they betray the public's trust but because they have met the ire of others envious of their position.

Father Joaquin G. Bernas, S.J. discussed this problem in connection with the August impeachment proceedings. In his August 22, 2005 column in the Philippine Daily Inquirer, Fr. Bernas suggested that because the Lopez and Amended complaints elaborated on the single offense of betrayal of public trust already in the Lozano Complaint, they could be consolidated with the original Lozano Complaint and simply

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[123] Proceedings, August 31, 2005, II:1.

[124] CONST. art. XI, sec. 1.

[125] CONST. art. XI, sec. 3, par (7).

[126] REVISED PENAL CODE, art. 25. Accessory penalties are those which are only "*deemed* included in the imposition of the principal penalties." I LUIS B. REYES, THE REVISED PENAL CODE 597 (15th ed. 2002).

treated as "bills" of particulars thereto.[127] He explained: "For constitutional purposes, therefore, what is being initiated is only 'one proceeding involving one complaint but with an extended bill of particulars.'"[128] Members of Majority sharply criticized Bernas' suggestion, contending that the Lopez and Amended complaints could not, by any stretch of legal imagination, be admitted as "bills" of particulars.[129]

In response to this criticism Fr. Bernas explained that if the Committee so wished, it could indeed consolidate the three impeachment complaints without any violation of the Constitution or the House Rules. However, he contended that the Majority did not want to entertain the Amended Complaint precisely because of the specificity of the allegations contained therein. As he put it, "specifics were the dreaded monster" of the Majority. [130] He then concluded his column by offering the following discussion on the place of the rule of law in the impeachment process:

> Impeachment is a political process. For that reason the responsibility for it has not been given to a court characterized by cold neutrality but to a political body. A political body can be intensely partisan. This fact explains 95 percent of what has been happening in the Committee hearings.
>
> Along every step in an impeachment process, a president and his or her men get to work. The president's power of persuasion is not inconsiderable. The essence of the president's persuasive task is to convince the object of his or her courtship that what he or she wants is what they too should choose for their own sake. Political animals always consider what is good for their own sake. I am, therefore, not surprised that the opposition is waging an uphill battle.
>
> The presence of an impeachment process in our and in the American Constitution is symbolic of the commitment to the *rule of law*. It is the consensus of most historians that the attempted impeachment of Richard Nixon was a shining moment in the nation's history. In the final analysis, the process that forced Nixon to resign from the presidency was a bi-partisan effort....

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[127] J. Bernas, *Betrayal of public trust*, Philippine Daily Inquirer, August 22, 2005, A15.

[128] *Ibid.*

[129] See Rep. Oscar L. Gozos of the Fourth District of Batangas, Proceedings, August 24, 2005, XI-3; & Rep. Matias Defensor, Proceedings, August 24, 2005, XIII:2.

[130] Fr. Bernas explained himself thus:

> I was also told of the warm eloquence displayed in attacking my use of the phrase "bill of particulars." If I had not used that phrase but had simply said that the amended complaint was nothing more than a specification of "betrayal of public trust," would eloquence also have been vented on me? Of course, because specifics were the dreaded monster!
>
> I grant that the phrase "bill of particulars" is normally used only in civil or administrative cases. A respondent in a civil or administrative case asks for a "bill of particulars" or specifics in order to be able to prepare a proper response to a complaint. An impeachment case, however, cannot easily be categorized as civil, criminal, or administrative. It is sui generis. But what is to prevent people involved in an impeachment debate from borrowing the phrase "bill of particulars" to communicate what they mean? It means details, specifics, chapter and verse, and other synonyms which can be found in Roget's Thesaurus. But then, as I said, this is precisely what the defenders of the President dread. It is not the phrase "bill of particulars" they are objecting to but the complaint's content. Joaquin G. Bernas, *Too late the hero*, Inquirer News Service, August 29, 2005, available at <http://news.inq7.net/express/html_output/20050829-48417.xml.html> April 14, 2006.

> Unfortunately, *impeachment as a symbol of the rule of law does not always manage to reflect what it symbolizes.* What is going on now in the justice committee definitely does not.[131]

The problem, therefore, is left hanging. In theory, impeachment should become a tool to uphold the rule of law over men. In practice, however, it is generally men who rule over the law.

I see two future projects that are opened up by this problem of treating impeachment as a political process. First, there is the task of distinguishing between what constitute appropriate and inappropriate partisan political activities in impeachment proceedings. For instance, the Minority, at one point, suggested that Atty. Lozano was a stooge of the President who had been fielded precisely to toll the one-year bar. Could the Majority rightfully refuse to ignore this allegation? Would that constitute appropriate partisan political activity? Second, and from a more pragmatic point of view, it is necessary to determine exactly what rules *must* bind Congress in order for the proceedings to fall within the specter of the rule of law over men. Are the voting requisites (e.g. at least one-third of the House) sufficient to ensure the rule of law? Or should complainants, regardless of a House vote, always be given, as a matter of procedural due process, an opportunity to present evidence and be heard?

The subsequent parts of this paper touch upon some of these questions but offer only an incidental treatment. A fair and exhaustive resolution of the problems will have to be postponed for a future work.

IV. RULE OF LAW AS THE LAW OF RULES

> *General Wolf and the ass:*
>
> *The very people who seem to make laws justly do not really abide by the laws they make and enforce.*
>
> *A wolf who had been made general over the other wolves established laws for all, so that whatever any of them caught while hunting he would bring back to the whole pack and give an equal share to everyone, so that the rest would not eat each other out of hunger. But an ass came forward, shaking his mane, and said, "That was a fine plan from the mind of a wolf. But how is it that you put yesterday's kill back in the den? Bring it to the whole pack and divide it into shares." Thus, exposed, the wolf repealed the law.*
>
> — *Aesop*[132]

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[131] J. Bernas, *Too late the hero, op. cit. supra* note 130.

[132] EARLY GREEK POLITICAL THOUGHT FROM HOMER TO THE SOPHISTS, *op. cit supra* note 65 at 146, citing Perry 348.

A. JUSTICE ANTONIN SCALIA'S "LAW OF RULES"

The best explanation for my second formulation of the rule of law is Justice Antonin Scalia's 1989 essay, "The Rule of Law as a Law of Rules,"[133] where he argues that appellate courts should lay down general rules of law[134] rather than practice a discretion-conferring approach to judicial decision-making.[135] He illustrates the distinction between these two approaches thus:

> In deciding, for example, whether a particular commercial agreement containing a vertical restraint constitutes a contract in restraint of trade under the Sherman Act, a court may say that under all the circumstances the particular restraint does not unduly inhibit competition and is therefore lawful; or it may say that no vertical restraints unduly inhibit competition, and since this is a vertical restraint it is lawful. The former is essentially a discretion-conferring approach; the latter establishes a general rule of law.[136]

In his example, the formulaic argument ("Under all the circumstances in this particular situation, the X is a Y.") has the effect of providing no general rules to restrain future decision-makers. Thus it is possible that given similar facts, a court can pick out one or two differences and state that, "Because all the circumstances in this particular situation are not identical with the precedent, X can no longer be Y." As Justice Scalia sarcastically puts it: "Today we decide that these nine facts sustain recovery. Whether only eight of them will do so — or whether the addition of a tenth will change the outcome — are questions for another day."[137] In straightforward terms, what Justice Scalia suggests is that Courts should enunciate *clear rules that apply generally rather than specifically or particularly.*

He admits that this approach may appear to some as unjust insofar as it tends to make broad generalizations, which may not apply in every case. As he says, "[E]very rule of law has a few corners that do not quite fit."[138] Despite this acknowledged shortcoming, Justice Scalia insists on his approach, arguing that justice is better

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[133] Antonin Scalia, *The Rule of Law as the Law of Rules*, 56 U. CHI. L. REV. 1175 (1989). Note also the work of Joseph Raz whom one author describes thus: "What Raz means is simply this: it is not the judge's role to think, afresh, what the right answer should be, but to find the right answer already determined — or at least bounded — by the rules set down in advance. Judges use these rules as the basis for their decision making." Charles Sampford, *Reconceiving the Rule of Law for a Globalizing World*, in GLOBALISATION AND THE RULE OF LAW 13 (2005).

[134] Justice Scalia, takes the term "general rules" from Aristotle's POLITICS:

> Rightly constituted laws should be the final sovereign; and personal rule, whether it be exercised by a single person or a body of persons, should be sovereign only in those matters on which law is unable, owing to the difficulty of framing general rules for all contingencies, to make an exact pronouncement. THE POLITICS OF ARISTOTLE, book III, chap. 9, sec. 19 at 127 (E. Barker trans., 1946), quoted in A. Scalia, *op. cit. supra* note 133 at 1176.

[135] A. Scalia, *The Rule of Law as the Law of Rules*, *op. cit. supra* note 133 at 1176-1178.

[136] *Id.* at 1177 (internal citation omitted).

[137] *Id.* at 1177.

[138] *Id.* at 1177. Citing Louis IX of France and King Solomon, he notes that personalistic discretion has the advantage of sensitively deciding each case on its own merits rather than adhering to general rules of precedence. *Id.* at 1175-1176.

protected when (1) rules are predictable and (2) the law is equally applied.[139] With respect to predictability, Justice Scalia argues,

> [U]ncertainty has been regarded as incompatible with the Rule of Law. Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes. It is said that one of emperor Nero's nasty practices was to post his edicts high on the columns so that they would be harder to read and easier to transgress. As laws have become more numerous, and as people have become increasingly ready to punish their adversaries in the courts, we can less and less afford protracted uncertainty regarding what the law may mean. Predictability, or as Llewellyn put it, "reckonability," is a needful characteristic of any law worthy of the name. There are times when even a bad rule is better than no rule at all.[140]

For equal protection, he offers the following analogy:

> Parents know that children will accept quite readily all sorts of arbitrary substantive dispositions — no television in the afternoon, or no television in the evening, or even no television at all. But try to let one brother or sister watch television when the others do not, and you will feel the fury of the fundamental sense of justice unleashed.[141]

What we notice is that Justice Scalia's insistence on the "law of rules" reasserts our first formulation of the "rule of law." In other words, he seems to say that the law rules over men when it is clearly defined and consistently applied. On the other hand, when discretionary rules are promulgated, judges are placed above the law and allowed to decide as they see fit, regardless of the language of the law.[142]

B. SYNTHESIZING THE FIRST TWO FORMULATIONS: A THIN VERSION OF THE RULE OF LAW

Our first two formulations of the rule of law can be consolidated in what Peerenboom refers to as a "thin" conception of the rule of law: "A thin conception stresses the formal or instrumental aspects of rule of law — those features that any legal system allegedly must possess to function effectively as a system of laws, regardless of whether the legal system is part of a democratic or non-democratic society, capitalist,

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[139] A. Scalia, *The Rule of Law as the Law of Rules*, *op. cit. supra* note 133 at 1178, 1179-1180. Justice Scalia's other considerations are (1) that appellate courts review an insignificant proportion of decided cases; (2) that it encourages judicial restraint insofar as it constrains the Court to judge similarly in future cases; (3) that when backed by a clearly enunciated general rule, Court's are emboldened to stand up the popular will; and, that the discretion-conferring approach confuses questions of fact with questions of law. *Id.* at 1178-1182.

[140] A. Scalia, *The Rule of Law as the Law of Rules*, *op. cit. supra* note 133 at 1179 (internal citations omitted). George P. Fletcher notes this same concern for predictability when he writes, "And philosophers, such as Friedrich Hayek and Joseph Raz, make the same assumption that rule of law means that the government 'is bound by rules fixed and announced beforehand.'" GEORGE P. FLETCHER, BASIC CONCEPTS OF LEGAL THOUGHT 11 (1996), citing Joseph Raz, *The Rule of Law and its Virtue*, in JOSEPH RAZ, THE AUTHORITY OF LAW 210 (1970).

[141] A. Scalia, *op. cit. supra* note 133 at 1178.

[142] Quoting Thomas Paine, Justice Scalia's position might be that, "[I]n free countries the law ought to be king; and there ought to be no other." A. Scalia, *op. cit. supra* note 133 at 1176, quoting Thomas Paine, *Common Sense*, in COMMON SENSE AND OTHER POLITICAL WRITINGS 3, 32 (F. Adkins ed., 1953).

liberal or theocratic."[143] Thus, a thin conception might simply be described as laying down minimum requirements of the rule of law.

This notion of minimum requirements becomes clearer when we look at what Peerenboom refers to as the "constitutive elements" and "normative purposes" of a thin conception. With respect to the former, he makes the following enumeration:

- [There must be] meaningful restraints on state actors....
- There must be rules of norms for determining which entities (including courts) may make law, and
- laws must be validly made by an entity in accordance with such rules and norms to be valid.
- Laws must be generally applicable: that is, laws must not be aimed at a particular person and must treat similarly situated people equally for the most part.
- Laws must be relatively clear, consistent on the whole, relatively stable and generally prospective rather than retroactive.
- Laws must be enforced — the gap between the law on books and law in practice should be relatively narrow — and fairly applied.[144]

It will be noticed that the first element — restraint on state actors — refers to our first formulation of the rule of law over men, while the subsequent elements — that the law

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[143] R. Peerenboom, *op. cit. supra* note 16 at 2. In this regard, Peerenboom makes reference to the works of Joseph Raz and Robert Summers. Specifically, at 48 note 2, he refers to Joseph Raz, *The Rule of Law and Its Virtue*, in The Authority of Law (Joseph Raz ed., 1979); Robert Summers, *The Ideal Socio-Legal Order: Its "Rule of Law" Dimension*, 1:2 RATIO JURIS 15-161 (1988); and, Robert Summers, *A Formal Theory of Rule of* Law, 6:2 RATIO JURIS 127-142 (1993).

[144] R. Peerenboom, *op. cit. supra* note 16 at 2. Peerenboom adds to this enumeration the requirement that the law be "reasonably acceptable to a majority of the populace or people affected... by the law." R. Peerenboom, *op. cit. supra* note 16 at 3. This suggests that the law must be the fruit of a democratic process, which would also suggest a blurring of the distinction between his thin and formal conception and a thick and substantive conception. Peerenboom explains that his reason for the inclusion of this final constitutive element, with due tribute to H.L.A. Hart:

> For Hart, citizens need not like the laws or find them normatively justified. As long as people obey the laws (and officials accept the rule of recognition), the legal system could exist and function. However, as a practical matter, relying on compulsory enforcement for every law or most laws is costly and impractical. Such as legal system might qualify as a rule of law, but it would not last long. *Id.* at 48 note 3, citing HERBERT LIONEL ADOLPHUS HART, THE CONCEPT OF LAW (1961).

It can thus be said that public acceptability is not so much a theoretical pre-requisite of a thin conception of the rule of law but more of a pragmatic necessity. The theoretical requirement of the thin conception is that the law must be enforced. We see, however, that this does not necessarily translate into a democratization of society. Thus, the distinction between formal and substantive conceptions of the rule of law remains.

must be clear, consistent, stable, prospective and enforced equally —refer to Scalia's law of rules.[145]

Turning to the "normative purposes" of thin conceptions, we once again see a consolidation of the first two formulations. Peerenboom writes that the minimums that a rule of law must strive for are the following:

- ensuring stability, and preventing anarchy and Hobbesian war of all against all;
- securing government in accordance with law by limiting arbitrariness on the part of the government;
- enhancing predictability, which allows people to plan their affairs and hence promote both individual freedom and economic development;
- providing a fair mechanism for the resolution of disputes; [and,]
- bolstering the legitimacy of government.[146]

Again, we see how the first, second and fifth normative purposes are in line with the first formulation of the rule of law over men and the third and fourth are in line with Justice Scalia's concerns for the predictability and equal application of the law.

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[145] Interestingly, other legal thinkers offer nearly identical enumerations as Peerenboom. Most notable would be Professor Dicey, who in 1885 published his seminal work, LAW OF THE CONSTITUTION wherein he identified three distinct facets of the rule of law, the first two of which neatly tie in with Peerenboom's "thin" conception of the rule of law:

> [1] [E]very official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification just as any other citizen. A. DICEY, *op. cit. supra* note 83 at 193 (this first facet was already mentioned in Part II of this paper). [2] [N]o one is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established before the ordinary courts of the land. In this sense the Rule of Law is contrasted with every system of government based on the exercise by persons in authority of wide arbitrary or discretionary powers of constraint. *Id.* at 188. [3] To complete Dicey's enumeration, I include here the third and last facet of the rule of law: that the law is "the result of judicial decisions determining the rights of private persons in particular cases brought before the courts." *Id.* at 195.

Aside from Dicey's enumeration, Andrew Altman also has his "Five Principles of the Rule of Law":

> [1] Government must operate under the law. [2] Government must regulate society through a system of general and authoritative rules. [3] The general and authoritative rules should give individuals fair warning: the rules should be (a) made public, (b) reasonably clear in meaning and specific in what they prohibit, (c) in force for a reasonable period of time, (d) applied prospectively, (e) applied impartially, (f) possible to comply with, and (g) enacted in accordance with preexisting legal rules. [4] All persons must be given due process, that is, a fair chance to defend themselves against formal charges that they have violated the rules. [5] The sovereign people ought to establish constitutional government and abide by its laws. A ALTMAN, *op. cit. supra* note 15 at 7.

[146] R. Peerenboom, *op. cit. supra* note 16 at 3. Peerenboom also notes the following: "Perhaps the most formal and substantively minimal basis for the rule of law is that suggested by Raz (1979), who takes as his departure point the "basic intuition" that law must be capable of guiding behavior." *Id.* at 48 note 4.

What Peerenboom's consolidation of the first two formulations highlights is the fact that governmental restraint and clear rules of general applicability are mutually reinforcing concepts. For this reason, they are spoken of in the same breath. This is evident in the manner in which both the Majority and Minority members of the Committee on Justice invoked the rule of law.

V. THE LAW OF RULES IN THE COMMITTEE PROCEEDINGS

The second formulation of the rule of law as the law of rules was invoked in the Committee proceedings in connection with three issues: (1) whether or not the Committee should take up Rep. Lagman's prejudicial questions; (2) whether or not the Lozano Complaint barred the Lopez and the Amended complaints; and, (3) whether or not the Lopez Complaint should be dismissed. I now deal with each issue consecutively, offering examples of how the law of rules was invoked in connection with each.

A. THE SINGLE-HORSE RACE: TAKING-UP LAGMAN'S PREJUDICIAL QUESTIONS

On the very first day of the Committee proceedings, and immediately after the Chairman made his introductory remarks, Rep. Lagman was recognized. Rep. Lagman was of the opinion that the Committee had to first resolve a jurisdictional question before proceeding to the task of determining the form and sufficiency of the complaints.[147] Rep. Lagman, invoking the rule of law and the dictates of rationality, explained himself thus:

> REP. LAGMAN: *It stands to reason* that before the Committee can resolve sufficiency in form and substance, it must have the competence to determine which of the three complaints should be taken cognizance of. That is an anterior question....
>
> I submit, Mr. Speaker, that *we should abide by the rule of law. Putting the horse before the cart is not consistent with the rule of law. It is an irrational sequence....* A prejudicial question entails a resolution, which is antecedent to the principal issues. Since there are antecedent questions in the nature of prejudicial questions, let us first resolve these prejudicial questions before we go to form and substance. We cannot subject any complaint to form and substance without determining which of the three complaints should be taken cognizance of by the Committee.[148] (emphasis supplied)

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[147] Note that the first issue put before the Committee was whether or not to take up the prejudicial questions and *not* the prejudicial questions themselves. This subtlety was lost on many members of the Committee. The consequence was that it took three days for the Committee to finally decide to take up Rep. Lagman's prejudicial questions.

[148] Proceedings, August 16, 2005, XI-1-3. This reference to the logic of addressing jurisdictional questions before questions of form and substance was substantially reproduced in Committee Report No. 1012 of the Committee on Justice. The salient section of Committee on Justice, H. Rpt. No. 1012, 13th Cong., 2nd Sess. (September 5, 2005) is the following:

> The existence of three complaints referred to the Committee raised a number of a priori questions as to which of the complaints should be taken cognizance of by the Committee. Logic and Prudence dictate that the Committee cannot immediately proceed to

The problem with the argument is that, despite invoking the "rule of law," it fails to cite any specific provision of law to justify the taking-up of prejudicial questions. Instead, it relies upon the alleged inherent logic of asking these questions first. The Minority pounces upon this shortcoming.

Rep. Escudero points out at that neither the Rules of Court nor the House Impeachment Rules recognize the prejudicial questions tendered by Rep. Lagman.[149] Rep. Escudero also pointed to section 4 of the House Impeachment Rules which requires that the Committee address questions of form and substance:[150] "*Maliwanag po ang ating* Rules. *Pagtanggap ng* Committee on Justice *ng* complaint, *alamin agad ng* Committee on Justice *kung may* form *at* substance *nga ba ito o wala.*"[151] "*Simple po lamang ang aming kahilingan — sundin ang* rule *na nagsasabi alamin natin kung may* form *at* substance."[152]

. the determination of sufficiency of form and substance of the complaint without first determining which among the three complaints is the proper complaint which should undergo the test of sufficiency.

A more dramatic though less convincing argument in favor of the prejudicial questions is provided by Rep. Exequiel B. Javier of the Lone District of Antique, who, paraphrasing Robert Bolt, reminded his colleagues that, "The world may construe according to its wits; but this committee must construe according to law." Proceedings, August 16, 2005, XIII:2. I say that his argument is less convincing because it does not squarely address the issue at hand, i.e. why the prejudicial questions should be taken up at all. Unlike Rep. Lagman, who justifies his position on the ground of the primacy of the question of jurisdiction, Rep. Javier turns to the Constitution's one year bar on impeachment complaints and to the August 5, 2005, Manifestation of Atty. Lozano which sought a separate and independent proceeding on his complaint despite his having been a signatory of the amended complaint. Proceedings, August 16, 2005, XI-1-2.

[149] Rep. Escudero's exact argument follows:

> REP. ESCUDERO: Mr. Chairman, I submit that there is no legal basis for discussing prejudicial questions ahead of form and substance for the following reasons:
>
> *Una, sa* Rules of Court *na may suppletory effect sa ating Rules, wala pong kinikilalang* prejudicial question *kaugnay ng mga katanungang ni-raise ni* Congressman Lagman *dahil hindi po ito angkop tulad ng prejudicial question na binabanggit sa* Rules of Court *na mayroong naunang kaso nasisampa*[,] *halimbawa na lamang, at iyong naunang kasong naisampa ay maaaring magdetermina kung may kinalaman nga ito sa* guilt *o* innocence *ng akusado.*
>
> Secondly, Mr. Chairman, Your Honors, *wala rin po sa ating* Rules *ang pag-discuss ng* prejudical question. Proceedings, August 16, 2005, X:2.

See also Rep. Ocampo, Proceedings, August 16, 2005, V-2.

[150] The said section provides,

> Sec. 4. *Determination of Sufficiency in Form and Substance.* — Upon due referral, the Committee on Justice shall determine whether the complaint is sufficient in form and substance. If the committee finds that the complaint is insufficient in form, it shall return the same to the Secretary General within three (3) session days with a written explanation of the insufficiency. The Secretary General shall return the same to the complainant or complainants together with the committee's written explanation within three (3) session days from receipt of the committee resolution finding the complaint insufficient in form.
>
> Should the committee find the complaint sufficient in form, it shall then determine if the complaint is sufficient in substance. The requirement of substance is met if there is a recital of facts constituting the offense charged and determinative of the jurisdiction of the committee. If the committee finds that the complaint is not sufficient in substance, it shall dismiss the complaint and shall submit its report as provided hereunder.

[151] Proceedings, August 16, 2005, X:2.

[152] *Id.* at X:3.

Rep. Zamora takes the argument a step further by pointing out that Rep. Lagman's questions are not only absent from the House Rules but are actually expressly prohibited thereby. He explains his position by weaving a conspiracy theory between Rep. Lagman's prejudicial questions and the legal maneuvers of Malacañang:

> REP. ZAMORA: Mr. Chairman, let me point out that the prejudicial questions of Congressman Lagman are replicated in the President's own Motion to Strike. On... August 9, the President filed a Motion to Strike through her lawyers, which, if granted by the Committee on Justice, will result in the dismissal of our Amended Complaint. First, Mr. Chairman, let me point out that [neither] the Impeachment Rules... [nor] the Rules of Criminal Procedure, which are supposed to be suppletory to our Impeachment Rules, ...[allow] the filing of a Motion to Strike which is really a Motion to Dismiss, because it seeks the dismissal of the Amended Complaint without the President having to file an answer to the amended complaint. In impeachment proceedings, let me point out that the Motion to Dismiss is a prohibited pleading. Section 5, Rule III under paragraph (a)... says, "No Motion to Dismiss shall be allowed within the period to answer the complaint." Moreover under Rule 112, Section 3 of the Rules of Criminal Procedure, which are applied suppletorily in impeachment proceedings in Rule VII, Section 18 of the Impeachment Rules, "The respondent shall not be allowed to file a Motion to Dismiss in lieu of a counter-affidavit." By filing a Motion to Dismiss, masquerading as a Motion to Strike, the respondent, President Arroyo, seeks to circumvent the prohibition against the filing of the Motion to Dismiss.[153]

Simply put, Rep. Zamora's rationale is that because Rep. Lagman's prejudicial questions are identical to the averments in the President's Motion to Strike, the effect of addressing these questions is to indirectly permit that which is directly prohibited.

From the foregoing, it is clear that only the Minority offers concrete provisions from the House Impeachment Rules and the Rules of Court to support their position. The members of the Majority clumsily pin their legal arguments on logic and rhetoric.[154] Although Rep. Lagman refers to the rational necessity of deciding *a priori* questions concerning jurisdiction, he fails to point to any specific legal basis for doing so. Instead, vague reference is made to the implied necessity of dealing with the prejudicial question as implied by the one-year bar in article XI, section 3, paragraph (5) of the Constitution. The reference is vague because the provision says nothing about prejudicial questions or questions of jurisdiction.

Despite this, the Majority still won on a 54 to 24 vote (with two abstentions).[155] The Minority took the decision in stride and continued to debate on Rep. Lagman's prejudicial questions. Perhaps the reason for this rather calm response (in contrast to their walkout later) was that the Amended Complaint had not yet been dismissed.[156]

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[153] Proceedings, August 16, 2005, IX:1. See also Rep. Rosales, Proceedings, August 16, 2005, XV:2; Rep. Suplico, Proceedings, August 23, 2005, VIII:3-VIII:4; & Rep. Martinez, Proceedings, August 23, 2005, VIII:4.

[154] See Rep. Javier's "rhetorical" argument at note 148.

[155] Proceedings, August 23, 2005, VII:2.

[156] Rep. R. Zamora reveals this to be the real concern of the Minority in the following:

Another possible reason for the Minority's calm response may also have been due to its recognition that, whether categorized as *a priori* or not, there was no escape from the issue concerning the one-year constitutional bar. In fact, a number of members of the Minority admitted that Lagman's questions should eventually be addressed as questions regarding the substance of the impeachment complaints. For instance, we have the following admission of Rep. Zamora:

> REP. ZAMORA: Congressman Lagman's proposal seeks to tackle matters of substance ahead of form. His own proposal expressly admits this and it opens with the words, "In determining which complaint or complaints shall be subject to the jurisdiction of the Committee on Justice, I propose that the following questions be debated or resolved."....
>
> Mr. Chairman, the issue of jurisdiction pertains to sufficiency of substance and not [form]. Under Rule III, Section 4 of the Impeachment Rules, let me quote, "The requirement of substance is met if there is a recital of facts constituting the offense charged and determinative of the jurisdiction of the Committee." In short, Mr. Chairman, the so-called prejudicial questions are not prejudicial as much as they are premature.[157]

Ultimately, therefore, the Minority's contention concerning the prejudicial questions was not so much a matter of the propriety of the questions but of the propriety of asking these questions before others.

Nonetheless, this does not change the fact that, insofar as the rule of law is a law of rules, the members of the Majority misapplied the term. Ultimately, the effect of the 54 to 24 vote of the Committee was to relax the law of rules and apply a liberal interpretation of the House Impeachment Rules. What is disturbing is that the Majority failed to apply the same liberality when it finally came to the Amended Complaint. It should be noted that this iniquitous application of interpretative rules is in itself contrary to the minimum requirements of the rule of law. By liberally construing the Constitution on the issue of prejudicial questions yet strictly construing it with respect to the Amended Complaint, the Majority members of the Committee blatantly disregarded Justice Scalia's concern for the equal protection and predictability of laws. Unfortunately, the Minority is equally guilty of this hypocrisy when it does the reverse

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> REP. ZAMORA: [The Amended Complaint] is the complaint that our people, whom we all represent, are waiting to be answered and not any other impeachment complaint. It is the one complaint with the needed specificity in grounds and in charges to prove grievous wrongdoing that must be contradicted and traversed as it specifies high crimes in three grounds and ten specifications. Not to answer or to base an answer on technical rather than on substantial reasons is to do a dis-service to the respondent President and to the people of the Philippines. Proceedings, August 16, 2005, IX:2.

This in fact is what eventually happened. The Committee never reached the point of looking into the substance of the Amended Complaint. But because the Committee had yet to decide to bar the Amended Complaint, the Minority proceeded to argue on the prejudicial questions, which they had tried to dismiss over four session days.

[157] Proceedings, August 16, 2005, VIII:3-IX:1. Rep. Zamora's argument is repeated nearly verbatim by Rep. Rosales, Proceedings, August 16, 2005, XV:1. Strangely, Rep. Escudero seems to suggest that Rep. Lagman's questions could also be treated as a question of form. See Proceedings, August 16, 2005, X:2.

and calls for a strict application of the rules with respect to the first question but a relaxed application when it comes to issue of the one-year bar rule.

In closing this section, it is easy to see why Minority members described the proceedings as rigged from the very start. Rep. Rosales, for instance, described the "demise of the impeachment complaints as a 'chronicle of a death foretold.'"[158] Similarly, in response to Rep. Luis R. Villafuerte's[159] analogy of the impeachment proceedings to a horse race, Rep. Escudero had the following to say:

> REP. FRANCIS G. ESCUDERO: Mr. Chairman, jurisdiction can never be determined by an analogy using a horse race. (Laughter) But having said that, Mr. Chairman, with due respect to my *kababayan*. Even if you follow the analogy of a horse race, *kaya nga po tinawag na karera, sabay-sabay tumatakbo at titingnan kung sino and mauuna. Wala pong karera na iisa lamang ang tumatakbo. At kung iyan po and nais gawin ng mga miyembro ng administrasyon, na gawing karera ito na iisa lang ang tumatakbo, simula pa lang alam na natin na siya ang mananalo dahil siya lang naman ang tumatakbo at wala pong iba.*[160]

Rep. Teodoro L. Locsin, Jr.,[161] who did not identify himself with the Minority, referred to the same rigged proceeding but used his Roman circus analogy:

> REP. TEODORO L. LOCSIN: [T]o confine our choice to just the original after killing the amended complaint would be, to borrow the analogy of a Roman circus, like poisoning the tiger in the cage and sending out the mouse to be slaughtered in the arena which is surely pathetic. Still, I don't think that that would unleash people power on a scale sufficient to overturn the government. Not at all. But it will surely shower this committee with the [odium] it would deserve.[162]

Thus, whether thought in terms of horses, lions or mice, it seems clear that the Majority would have its way regardless of what the law did or did not provide.

B. THE POISONING OF THE TIGER: DECIDING THAT THE LOZANO COMPLAINT BARS ALL OTHER COMPLAINTS

The following are the two prejudicial questions the Committee eventually faced: (1) Is the Amended Complaint filed a separate and new complaint instead of

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[158] The Member referred to is Rep. Rosales as reported by Luz Rimban, *A death foretold*, available at the Philippine Center for Investigative Journalism website <http://www.pcij.org/blog/?p=367> October 29, 2005.

[159] Representative of the Second District of Camarines Sur.

[160] Proceedings, August 16, 2005, X:3. This was occasioned by the following argument offered by Rep. Luis R. Villafuerte of the Second District of Camarines Sur who tried to translate

> REP. VILLAFUERTE: The situation before us, Mr. Chairman, is this: There are three complaints so which complaint shall be considered do as not to violate the constitutional prerequisite.... *[K]ung... bibigyan ko ng* analogy, *na ang isang institusyon puede lang magpakarera ng isang kabayo. Huwag lalampas sa isang kabayo ang patakbuhin* in competition with the others. *[T]atlong kabayo and gusting tumakbo. Magde-determine na kaagad ba tayo kung sino doon sa tatlong kabayong iyon ang pinakamalakas, pinakamabilis[?] [I]-determine muna natin kung sino and qualified na kabayo* and that analogy applies to these three complaints. *Id.* at IX:3-X:1

[161] Representative of the First District of Makati.

[162] Proceedings, August 30, 2005, IV:1-IV:2.

amendatory of the Lozano Complaint? (2) Are the Lozano, Lopez and Amended complaints valid pursuant to section 3, paragraph 5, article XI of the Constitution?[163] Ultimately, these questions can be consolidated into one: Did the Lozano Complaint bar the other complaints? This question was the real centerpiece of the Committee proceedings.

Simply, the issue revolved around the proper interpretation of the Constitutional bar on impeachment and the Supreme Court's decision in *Francisco v. House of Representatives*. Article XI, section 3, paragraph (5) of the Constitution provides that "[n]o impeachment proceedings shall be initiated against a public official more than once within a period of one year." This provision is also referred to as the "one-year bar" or the "anti-harassment provision."[164] One author summarizes the intention that animates this provision thus:

> The purpose of Art. XI, Sec. 3(5) is to prevent the impeachment power from being used as a mere tool for harassment. Another concern was that if there was no "Anti-harassment Provision," the Congress would be inundated with numerous impeachment complaints, which would take up so much of the Congress' time and resources that it would be unable to deal with more important legislative work.[165]

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[163] Proceedings, August 24, 2005, I-2.

[164] ADEL A. TAMANO, HANDBOOK ON IMPEACHMENT UNDER THE 1987 CONSTITUTION 19 (2004).

[165] *Id.* at 20-21 (internal citations omitted). See also REYNALDO B. ARALAR, SEPARATION OF POWERS AND IMPEACHMENT 48 (2004). This two-fold purpose of protecting the impeachable officer from harassment and preventing the inundation of Congress with impeachment complaints was not lost upon members of the Committee on Justice. See Rep. Antonino P. Roman of the First District of Bataan, Proceedings, August 16, 2005, XIV:3-XIV:4; Rep. Juan Edgardo M. Angara of the Lone District of Aurora, Proceedings August, 17, 2005, IX:3-X:1.

In defense of the President, a humorous situation is invoked by one of the Majority Members, Rep. Romualdo T. Vicencio of the Second District of Northern Samar,

> REP. VICENCIO: If we should admit more than one impeachment complaint against the President, these possibilities might happen.
>
> In general, time will come that the president will just be using all his time in facing and answering impeachment proceedings in this House and in the Senate. What then will happen to our country? To make an illustration further, when the first complaint is filed against the president, it will not disturb the president because he anticipates that a complaint, no matter how frivolous it may be, may be filed at any time against her, so it is but ordinary. But when the second complaint is filed, it saddens the president or the respondent because some people he considered to be friends have turned against him because probably of publicity. They want to be known on the air and in writing....
>
> Then the third complaint, the president might feel [like he is] being harassed and terrorized, and when this time comes the president will have sleepless nights, his temper will change, [he] will seldom smile. And if another impeachment complaint is filed against him, it will be suicidal. The president, of course, will not commit suicide because it is against the law of God, laws of God and of man. He might think of declaring martial law.
>
> Supposing another complaint will be filed, what will the president think or do, only the devil and God may know. Proceedings, August 17, 2005, V-1.

1. *Francisco v. House of Representatives* [166]

What is problematic is that the Constitution does not explain when an impeachment proceeding is deemed initiated. This question is precisely what concerned the Court in the *Francisco* case. There the Court had to determine if the one-year bar could be invoked in view of the following facts: a first impeachment complaint was filed on June 2, 2003 by President Joseph E. Estrada against Chief Justice Davide and seven other Associate Justices of the Supreme Court; the complaint was referred to the Committee on Justice on August 5, 2003; the Committee ruled on October 13, 2003 that the complaint was sufficient in form; however, on October 22, 2003, the Committee voted to dismiss it for being insufficient in substance; the Committee Report was never sent to the House in plenary; on October 23, 2003, or a day after the Committee decision to dismiss the first complaint, a second impeachment complaint was filed against the Chief Justice by Rep. Gilberto C. Teodoro, Jr.[167] and Rep. Felix William Fuentebella.[168] The petitioners in the consolidated case before the Supreme Court sought to bar the second proceeding by invoking the one-year bar rule.

The House of Representatives relied upon sections 16 and 17[169] of the Rules of Procedure in Impeachment Proceedings promulgated by the Twelfth Congress.[170] The Supreme Court summarized the House's defense thus:

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[166] Francisco v. House of Representatives, November 10, 2003.

[167] Representative of the First District of Tarlac.

[168] Representative of the Third District of Camarines Sur.

[169] The said provisions read as follows:

> Sec. 16. *Impeachment Proceedings Deemed Initiated.* — In cases where a Member of the House of Representatives files a verified complaint that is endorsed against an impeachable officer, impeachment proceedings against that official are deemed initiated on the day the Committee on Justice finds that the verified complaint or resolution against such official, as the case may be, is sufficient in substance or on the date the House votes to overturn or affirm the finding of said Committee that the verified complaint and/or resolution, as the case may be, is not sufficient in substance.
>
> In cases where a verified complaint or a resolution of impeachment is filed or a resolution of impeachment is filed or endorsed, as the case may be, by at least one-third (1/3) of the Members of the House, impeachment proceedings are deemed initiated at the time of filing of such verified complaint or resolution of impeachment with the Secretary General.
>
> Sec. 17. *Bar Against Institutions of Impeachment Proceedings.* — Within a period of one (1) year from the date impeachment proceedings are deemed initiated as provided in Section 16 hereof, no impeachment proceedings as such, can be initiated against the same official.

These should be distinguished from the House Impeachment Rules of the Eleventh and Thirteenth Congresses. The pertinent provision of the Eleventh Congress' Rules are as follows:

> Sec. 2. *Mode of Initiating Impeachment.* — Impeachment shall be initiated only by a verified complaint for impeachment filed by any Member of the House of Representatives or by any citizen upon a resolution of endorsement by any Member thereof or by a verified complaint or resolution of impeachment filed by at least one-third (1/3) of all the Members of the House.
>
> Sec. 14. *Scope of Bar.* – No impeachment proceedings shall be initiated against the same official more than once within the period of one (1) year.

On the other hand, the pertinent provisions of the Thirteenth Congress' Rules are as follows

> Sec. 2. *Modes of Initiating Impeachment.* — Impeachment shall be initiated by the filing and subsequent referral to the Committee on Justice of

> Respondent House of Representatives, through Speaker De Venecia, argues that Sections 16 and 17 of Rule V of the House Impeachment Rules do not violate Section 3(5) of Article XI of our present Constitution, contending that the term "initiate" does not mean "to file"; that Section 3(1) [of article XI of the Constitution] is clear in that it is the House of Representatives, as a collective body, which has the exclusive power to initiate all cases of impeachment; that initiate could not possibly mean "to file" because filing can, as Section 3(2), Article XI of the Constitution provides, only be accomplished in 3 ways, to wit: (1) by a verified complaint for impeachment by any member of the House of Representatives; or (2) by any citizen upon a resolution of endorsement by any member; or (3) by at least 1/3 of all the members of the House. Respondent House of Representatives concludes that the one-year bar prohibiting the initiation of impeachment proceedings against the same officials could not have been violated as the impeachment complaint against Chief Justice Davide and seven Associate Justices had not been initiated as the House of Representatives, acting as the *collective body*, has yet to act on it.[171]

This argument appears to be substantiated when it is noted that article XI, section 3, paragraph 1 of the Constitution specifically provides that "[t]he House of Representatives shall have the exclusive power to initiate all cases of impeachment."

The Supreme Court, however, disagreed with the House's interpretation of the Constitution and held that initiation in paragraph (5) referred to *impeachment proceedings* and not to *impeachment cases* as provided in paragraph 1. The Court explains the distinction by referring at length to *amicus curiae* Fr. Bernas. The pertinent section of the decision is quoted here at length:

> Father Bernas explains that in these two provisions [i.e. paragraph 1 and paragraph 5 of section 3, article XI of the Constitution], the common verb is "to initiate." The object in the first sentence is "impeachment case." The object in the second sentence is "impeachment proceeding." Following the principle of *reddendo singula singulis*, the term "cases" must be distinguished from the term "proceedings." An impeachment case is the legal controversy that must be decided by the Senate. Abovequoted first provision provides that the House, by a vote of one-third of all its members, can bring a case to the Senate. It is in that sense that the House has "exclusive power" to initiate all cases of impeachment. No other body can do it. However, before a decision is made to initiate a case in the Senate, a "proceeding" must be followed to arrive at a conclusion. A proceeding must be "initiated." To initiate, which comes from the Latin word *initium*, means to begin. On the other hand, proceeding is a progressive noun. It has a beginning, a middle, and an end. It takes place not in the Senate but in the House and consists of

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(a) a verified complaint for impeachment filed by any Member of the House of Representatives or;
(b) a verified complaint filed by any citizen upon a resolution of endorsement by any Member thereof; or
(c) a verified complaint of resolution of impeachment filed by at least one-third (1/3) of all the Members of the House.

Sec. 14. *Scope of Bar.* – No impeachment proceedings shall be initiated against the same official more than once within the period of one (1) year.

[170] This power to promulgate rules on impeachment is granted by art. XI, sec. 3, par. 8 of the CONST.

[171] Francisco v. House of Representatives, November 10, 2003.

> several steps: (1) there is the filing of a verified complaint either by a Member of the House of Representatives or by a private citizen endorsed by a Member of the House of the Representatives; (2) there is the processing of this complaint by the proper Committee which may either reject the complaint or uphold it; (3) whether the resolution of the Committee rejects or upholds the complaint, the resolution must be forwarded to the House for further processing; and (4) there is the processing of the same complaint by the House of Representatives which either affirms a favorable resolution of the Committee or overrides a contrary resolution by a vote of one-third of all the members. If at least one-third of all the Members upholds the complaint, the Articles of Impeachment are prepared and transmitted to the Senate. It is at this point that the House "initiates an impeachment *case*." It is at this point that an impeachable public official is successfully impeached. That is, he or she is successfully charged with an impeachment "case" before the Senate as impeachment court.
>
> Father Bernas further explains: The "impeachment proceeding" is not initiated when the complaint is transmitted to the Senate for trial because that is the end of the House proceeding and the beginning of another proceeding, namely the trial. Neither is the "impeachment proceeding" initiated when the House deliberates on the resolution passed on to it by the Committee, because something prior to that has already been done. The action of the House is already a further step in the proceeding, not its initiation or beginning. Rather, *the proceeding is initiated or begins, when a verified complaint is filed and referred to the Committee on Justice for action.* This is the initiating step which triggers the series of steps that follow.
>
> The framers of the Constitution also understood initiation in its ordinary meaning. Thus when a proposal reached the floor proposing that "A vote of at least one-third of all the Members of the House shall be necessary... to *initiate impeachment proceedings*," this was met by a proposal to delete the line on the ground that the vote of the House does not initiate impeachment proceeding[s] but rather the filing of a complaint does. Thus the line was deleted and is not found in the present Constitution.
>
> Father Bernas concludes that when Section 3(5) says, "No impeachment proceeding shall be initiated against the same official more than once within a period of one year," it means that no second verified complaint may be accepted and referred to the Committee on Justice for action....
>
> Having concluded that the initiation takes place by the act of filing and referral or endorsement of the impeachment complaint to the House Committee on Justice or, by the filing by at least one-third of the members of the House of Representatives with the Secretary General of the House, the meaning of Section 3(5) of Article XI becomes clear. Once an impeachment complaint has been initiated, another impeachment complaint may not be filed against the same official within a one year period.[172]

In this way, the Court clearly stated that initiation of an impeachment proceeding takes place by virtue of two successive acts: (1) the act of filing the impeachment complaint and (2) its subsequent referral to the Committee on Justice.[173]

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[172] *Ibid.* (internal citation omitted; emphasis in original).

[173] *Ibid.*

The only exception is when the complaint is filed by one-third of the Members of the House. In such a case, the Constitution provides that said complaint "shall constitute the Articles of Impeachment, and trial by the Senate shall forthwith proceed."[174] Thus, referral to the Committee becomes unnecessary. With this understanding of the Constitution, the Court struck down sections 16 and 17 of the House Impeachment Rules of the Twelfth Congress as unconstitutional.[175] Consequently the Court also held that despite the fact that the Committee had not disposed of the first complaint filed against Chief Justice Davide, the proceedings had already been initiated by the simple filing of the complaint and its referral to the Committee on Justice.

With that protracted discussion, we can now proceed to examine how the *Francisco* ruling was properly or improperly applied during the August 2005 Committee proceedings.

2. Filing v. Referral

Despite the categorical language of the Court that filing *and* referral initiates a complaint, some members of the Majority still insisted that filing alone was sufficient to initiate an impeachment proceeding and that the filing of the Lozano Complaint on July 25, 2005 effectively barred any other impeachment proceeding for a one-year period. For instance, there is Rep. Benjamin D. Abalos, Jr.:[176]

> REP. ABALOS: I have with me the copy of the SCRA, Supreme Courts Reports Annotated, Francisco Jr. versus Nagmamalasakit na mga Mananganggol ng mga Pilipino. I will just quote this because everyone is quoting Fr. Bernas.
>
> Fr. Bernas concludes that when Section 3, Number 5 says, "No impeachment proceedings shall be initiated against the same official more than once within a period of one year" means that no second verified complaint may be accepted and referred to the Committee on Justice for action. *Sa Tagalog, ang sinasabi ni* Fr. Bernas, *na ang ibig sabihin daw ng* Section 3, Paragraph 5 *ng Konstitusyon na kung meron nang pangalawang beripikadong reklamo, eto ay hindi p'wedeng tanggapin at hindi p'wedeng i-refer sa* Committee on Justice *para ito ay aksyunan.*[177]

Aside from misquoting the title of the case, the above reveals that Rep. Abalos read a single sentence of the decision in isolation from other paragraphs, which, if considered, better explain the Court's position. For instance, he might have noted the Court's clear statement that, "[An impeachment] proceeding is initiated or begins, when

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[174] CONST. art. XI, sec. 3, par. 4.

[175] In particular, the Court was referring to the first sentence of sec. 16 which provides as follows:

> In cases where a Member of the House of Representatives files a verified complaint that is endorsed against an impeachable officer, impeachment proceedings against that official are deemed initiated [1] on the day the Committee on Justice finds that the verified complaint or resolution against such official, as the case may be, is sufficient in substance or [2] on the date the House votes to overturn or affirm the finding of said Committee that the verified complaint and/or resolution, as the case may be, is not sufficient in substance.

[176] Representative of the Lone District of Mandaluyong.

[177] Proceedings, August 23, 2005, V:2. See also Rep. Villafuerte, Proceedings, August 24, 2005, VIII:3; Rep. Domogan, Proceedings, August 24, 2005, VII:2; & Rep. Gozos, Proceedings, August 17, 2005, X:1.

a verified complaint is filed *and* referred to the Committee on Justice for action."[178] (emphasis supplied) Furthermore, Rep. Abalos interprets Fr. Bernas' position to mean that as long as there is a verified complaint all subsequent complaints are barred. Clearly, he misappreciates the case. It is not enough that a first complaint be filed with the Secretary General. It must have also been referred to the Committee on Justice to bar subsequent complaints.

Another example is Rep. Rodolfo W. Antonino,[179] who concedes that initiation requires referral but then convolutes the argument:

> REP. ANTONINO: It is very clear from the records, Mr. Chairman, that the initiation of each of the three complaints may be done on the same day, were done at different times and so there has to be priority given to each one of them. I think that would have been based on when the complaints themselves were filed. Certainly, when one complaint is filed ahead of another, then that complaint deserves to be initiated ahead of the other.[180]

Rep. Antonino's rule of interpretation might be phrased as follows: "Referral determines initiation; but, when more than one complaint is referred to the Committee on a single day, then filing determines initiation." Unfortunately, he offers no rule of law to justify his position.

These foregoing misinterpretations can be compared with the Minority's position, which remains consistent with *Francisco*. As Rep. Zamora explains,

> REP. ZAMORA: The filing of a complaint alone is not equivalent to initiation. An impeachment proceeding is initiated when the verified complaint is endorsed to the House Committee on Justice. In other words, it is the filing of the complaint, coupled with the referral to the Committee on Justice that triggers the initiation. And this is, of course, to be found in the case of Ernesto Francisco versus House of Representatives..., where the Supreme Court categorically held... [that] [t]o initiate refers to the filing of the complaint coupled with Congress taking initial action on the complaint, which means essentially the referral to the Committee on Justice.[181]

Rep. Antonino P. Roman[182] explains why this is the case by pointing out that if filing became the reckoning point then a private person or an individual Congressman could single-handedly toll the beginning of the one-year bar.[183]

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[178] Francisco v. House of Representatives, November 10, 2003.

[179] Representative of the Fourth District of Nueva Ecija.

[180] Proceedings, August 17, 2005, IV:2

[181] Proceedings, August 16, 2005, IX:2. See also Rep. Angara, Proceedings, August 17, 2005, IX:3.

[182] Representative of the First District of Bataan.

[183] He argues:

> REP. ROMAN: I tell you, it's so fundamental, an individual, even a congressman, cannot trigger [an] impeachment proceeding. It must be us, in plenary session in this Hall, and that happened on July 25, when the two (2) Complaints were submitted [to the Committee on Justice], triggering at the very earliest possible opportunity the start of impeachment proceedings. Proceedings, August 31, 2005, VII:2.

On this first point of filing and referral, it is clear that that only the Minority accurately appreciated the law, i.e. article XI, section 3 of the Constitution and *Francisco v. House of Representatives.*

3. Period of Time

Recognizing this, many members of the Majority opted to acknowledge that referral was necessary for the initiation of an impeachment proceeding but then argued that the ten-minute prior referral of the Lozano Complaint to the Committee on Justice foreclosed all subsequent complaints. An example is Rep. Douglas R.A. Cagas,[184] who argued thus:

> REP. CAGAS: [The Lozano complaint] was referred to the Committee on Justice... at exactly 4:20 in the afternoon of July 25, 2005.... While the amended complaint, the controversial amended complaint, was also referred to the Committee on Justice on July 25, 2005, it came a little bit late by 10 minutes.... [I]t was received by the Committee on Justice at 4:30 in the afternoon of the same day or a difference of barely 10 minutes. This small difference in time is of great importance. In college we learned this Latin maxim, *Omnium rerum, principae parva sunt*[.] *[A]ng mga gamay na butang ang mga dakung butang maga-sugod sa gamay.... [A]ng umpisa ng malaking bagay, nanggagaling, nagsisimula sa maliliit.* The beginnings of big things are small. All provisions of the Constitution about impeachment speak of session days except when it speaks of the one-year bar rule.... [The one-year bar rule] does not speak of session days. [A] [o]ne year period consists of months, weeks, days, hours, minutes and seconds. The reason for this fine distinction is that it is possible that several complaints will be referred to the Committee on Justice in one day at an interval of hours or even minutes.... Certainly, that will be a case... of harassment against the same public official[,] something, which is sought to be prevented... in the one-year rule provision....[185]

Invoking the rule of law, Rep. Cagas closed his argument on the following note:

> REP. CAGAS: *Ang mga lagada sa Kongreso, 'may tungod sa* limited jurisdiction *sa Kongreso, ug akong guitamud and kabarianon sa balaud. Kabarianon sa balaud* means, the Rule of Law, the majesty of the law.... *Sinabi nila, nakakabiya 'pag piliin natin ang* Lozano complaint as barring other complaints. *Hindi at hindi ako nabibiya* because I am following and respecting the Constitution of the Philippines, because I am recognizing the limited jurisdiction of Congress as an impeachment investigating body and because I am obeying the Rule of the Law. I am not ashamed of what I have done. I am not ashamed of the decision that I am making because I am following my heart and the dictates of my conscience.[186]

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[184] Representative of the First District of Davao del Sur.

[185] Proceedings, August 31, 2005, VI-1. Rep. Salacnib F. Baterina of the First District of Ilocos Sur took a stronger position and insisted that even a one second delay was sufficient. Proceedings, August 16, 2005, VII:1-VII:2. See also Rep. Aurelio Umali, Proceedings, August 16, 2005, XVI:1-XVI:2.

[186] Proceedings, August 31, 2005, VI-2. Rep. Ma. Amelita C. Villarosa of the Lone District of Occidental made practically the same argument that and also called upon adherence to the rule of law. Proceedings, August 23, 2005, V-1.

Rep. Locsin did an excellent job of refuting the above arguments. First, he pointed out the difference between "real" time and time for Congress and the effect of this difference on the early filing of complaints.

> REP LOCSIN: So far as I know, time does not run when Congress is not in session. That Congress time is not the same as ordinary time is shown by the fact that Congress can turn it on or off as it pleases. All three complaints came in when Congress was not in session, the Lozano first, followed by the Lopez, and finally, at the last minute, the Minority Complaint purporting to amend the Lozano Complaint. While a self-confessed amendment conceded the precedence in time of the complaint it seeks to improve, the Minority's amending complaint came in when time was not being reckoned by Congress. Therefore, all three complaints were on the table when time started to run again upon the resumption of Congress, each and all of them contemporaneous with the others.[187]
>
> No power exists to change that fact. No authority can be cited that can, when time did not run, affix upon one complaint a temporal precedence that would legally exclude the others from congressional consideration in the same calendar year.

He then noted that Speaker De Venecia had assured the House that all complaints would be properly referred:

> REP LOCSIN: It is inconceivable that the Speaker or the Secretary General of the House might choose which of the three contemporaneous pleadings shall be deemed the first and only one, thereby extinguishing the others, especially when all three were transmitted to the Justice Committee minutes apart to be sure, with the assurance of the Speaker that, even as he placed them in the order of business....
>
> Adding that quote, "if there are any more amended complaints duly endorsed by a Member or Members of the House I shall also see to it that the same is included in the transmittal not within ten session days but also today as soon as I receive it."
>
> In other words, any more complaints would be deemed transmitted as on the first day of Congress even if the Speaker received them in the next ten days. No wonder no one in the Minority raised a [fuss] over the sequence of the transmittals. The rule of construction is that, whatever legal authority says cannot mean nothing when it can be interpreted to mean something. Worse yet, when it is susceptible to a particular interpretation, as in this case.[188]

He then concluded:

> REP LOCSIN: [W]hile the Minority was indeed sleeping on the job, as the qualification of its own complaint as a mere amendment testifies, so that it might be said that Lozano and then even Lopez beat them to them to the draw, yet time

[187] Proceedings, August 23, 2005, IV:2.
[188] *Id.* at IV:3.

> was not running. So that, late as the Minority came to the game, the game had not yet started.[189]

From the foregoing, it is clear that the Constitution or House Impeachment Rules have no specific provision regarding multiple impeachment complaints referred to the Committee on Justice on the same day at different times. In all cases of this sort, the Committee is free to adopt possible interpretations of the Constitutional bar.[190] It is therefore appalling for the Majority to insist that its doctrine of hours, minutes, and seconds is *the* rule of law. As pointed out by Rep. Jacinto V. Paras,[191] article XI, section 3 of the Constitution speaks not in terms of hours, minutes and seconds but in terms of session days.[192] Clearly, therefore, no strict rule of laws pronounced the fatality of the Amended Complaint on the basis of a mere ten-minute delay.

4. Complaint or Proceeding

Another point where the Majority members clearly misapprehended the Constitution and the *Francisco* ruling was on the issue of whether it was a complaint or a proceeding that was barred by the one-year rule. Rep. Escudero of the Minority answered the question categorically, by referring to the language of the Constitution itself:

> REP. FRANCIS G. ESCUDERO: [T]he Honorable Villafuerte and the Honorable Baterina made mention of a one-year ban in regard to impeachment complaints. Let us set the record straight. The Constitution states, verbatim if I may quote Article XI, Section 3, paragraph 5, "No impeachment proceedings shall be initiated." *Hindi po* complaint *o isa o dalawang* complaint *ang ipinagbabawal. Ang pinagbabawal po ay* proceedings *at hindi karagdagang* complaint.[193] (underscoring supplied)

His position is reinforced by the *Francisco* ruling, where the Court, referring to Fr. Bernas yet again, clarified the difference between a complaint and a proceeding:

> Briefly then, an impeachment proceeding is not a single act. It is a complexus of acts consisting of a beginning, a middle and an end. The end is the transmittal of the articles of impeachment to the Senate. The middle consists of those deliberative moments leading to the formulation of the articles of impeachment.

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[189] *Id.* at IV:2-IV:3.

[190] Rep. Locsin's interpretation, however, is the most reasonable as it reveals that that the Majority's position gives the Speaker the power to bar particular complaints. It must be stressed, however, that because of the lack of clear precedent, Rep. Locsin's interpretation, although reasonable, is not conclusive.

[191] Representative of the First District of Negros Oriental.

[192] Proceedings, August 16, 2005, XIII:3.

[193] *Id.* at X:3. Rep. Baterina indeed said, "When a complaint is deemed initiated, no other complaint must be initiated within a period of one year." *Id.* at VIII:2. Rep. Villafuerte, on the other hand, had said, "But the situation before us, Mr. Chairman, is this: There are three complaints so which shall be considered so as not to violate the constitutional prerequisite of not more than once [sic] can be entertained by the Committee on Justice and the House of Representatives." *Id.* at X:1. See also Rep. Angara, Proceedings, August 17, 2005, IX:3; Rep. Teofisto L. Guingona, III, Proceedings, August 16, 2005, XV:4.

> *The beginning or the initiation is the filing of the complaint and its referral to the Committee on Justice.*[194]

Two things are thus clear: (1) what is barred by the Constitution is a proceeding; and, (2) the filing and referral of the complaint mark only the beginning of the proceeding.

Despite this, members of the Majority insisted otherwise. For instance, Rep. Mauricio G. Domogan offers a convoluted response to Rep. Escudero:[195]

> REP. DOMOGAN: [W]e are here to follow the law and the Constitution. There are certain parameters specifically outlined by the Constitution, as well as our own Rules that we have to follow. As already... cited a while ago, Section 3, paragraph 5 of Article XI, bars the filing of two (2) *complaints* against the same impeachable officials within a period of one year.
>
> What has been stated by our Honorable Minority Floor Leader [Rep. Escudero] about saying that impeachment [is] initiated by proceedings, that's not exactly correct because no *proceedings* can be done before this Committee unless there is an impeachment *complaint* which has been filed and endorsed or referred to the Justice Committee.
>
> So there must be an impeachment *complaint* at the same time referred to the Justice Committee before the *proceedings* can be done before this Committee.[196] (emphasis supplied)

Aside from the fact that Rep. Domogan equates proceeding and complaint in direct contravention with the Constitution,[197] this interpretation is myopic for two reasons. First, it fails to recognize the reality that multiple complaints do not necessarily translate into multiple proceedings. Even the strict language of the Rules of Court specifically recognize this when it allows courts to consolidate cases into a single proceeding and thus dispose of multiple complaints with a single decision.[198] A specific example of this is the very case of *Francisco v. House of Representatives* where the Supreme Court disposed of 18 complaints in a single proceeding. Second, he fails to recognize

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[194] Francisco v. House of Representatives, November 10, 2003 (emphasis in original).

[195] Representative of the Lone District of Baguio.

[196] Proceedings, August 16, 2005, XIII:4-XIV:1. This Rationale was substantially adopted in the Committee Report to the plenary as is evinced by the following:

> [A]s held by the Supreme Court "impeachment proceedings" is a progressive noun which connotes a beginning a middle and an end. The beginning of the "impeachment proceeding" is invariably the commencement or filing of a verified complaint. It is indubitable that no proceeding can begin without a complaint, neither can it begin unless a complaint is first filed. Therefore, the initiation of an impeachment proceeding cannot be made apart, isolated, or differentiated from the filing of the complaint which starts the proceeding. An impeachment proceeding and an impeachment complaint are intertwined and inextricably linked with each other. To reiterate, the verified complaint starts the process known as the impeachment proceedings which shall accommodate only one complaint against the same impeachable official within a period of one year. Committee on Justice, H. Rpt. No. 1012, 13th Cong., 2nd Sess. (September 5, 2005).

[197] CONST. art. XI, sec. 3, par. 5.

[198] RULES OF COURT, Rule 31, sec. 1.

that the Committee on Justice mimics the role of a fiscal in criminal proceedings. Rep. Cayetano, commenting on the strategy of the Minority, pointed out this discrepancy:

> REP. CAYETANO: *Sabi natin po lahat tayo'y parang mga* fiscal *dito.... Saan po kayo nakakita ng* fiscal *na binabawasan niya ang* complaint *ng* complainant *imbes na dagdagan? Lahat po ng* fiscal *kinukuha ang lahat ng* facts, *kinukuha lahat ng* offense, at *kakasuhan po ang* accused based on... what he thinks are the crimes committed. *Sa atin po namimili tayo.*[199]

This attitude of the Majority in fact pushed Rep. Suplico to suggest that the Committee was one of "Just *tiis*," rather than "Justice," consisting of "fix-cals" rather than "fiscals.[200]

Another Majority member who confused proceedings and complaints was Rep. Lagman. In the following, for instance, we see how he uses the terms interchangeably:

> REP. LAGMAN: [The Constitution] does not say that these impeachment *proceedings* shall include a multiplicity of *complaints*. As a matter of fact, the proceedings in the Constitutional Commission say that there should be one *complaint* which the respondents should face. The reason is that the impeachment *proceedings* are against high officials of the government and they should not be harassed into answering so many impeachment *complaints* in a year.
>
> And moreover, it is Congress who would determine... [if] there is probable cause.... The principal obligation, the principal mandate of Congress is to legislate so it should not be hampered by the many impeachment *proceedings*. That is the rationale of the one-year rule. The impeachment *proceedings* here is a collective noun, which refers to the process, and there should only be one *complaint* to be subjected to that process in a year's time.[201]

It is the last sentence of the first paragraph where Rep. Lagman clearly misinterprets the law. The one-year bar seeks to prevent more than one proceeding from being initiated against an impeachable official in the span of one year. What the impeachable official must face is therefore the proceeding *in sum* and not the multiple complaints filed with the House Secretary and referred to the Committee on Justice.

The first paragraph of section 5, Rule III of the House Impeachment Rules identifies the moment that the impeachable official is actually "harassed" by the proceedings:

> Sec. 5. Notice to Respondent and Time to Plead. — If the committee finds the complaint sufficient in form and substance, it shall immediately furnish the respondent with a copy of the resolution and/or verified complaint, as the case may be, with written notice that he shall answer the complaint within ten (10) days from receipt of notice thereof and serve a copy of the answer to the complainant

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[199] Proceedings, August 16, 2005, XII:2. See, however, Rep. Casiño, Proceedings, August 30, 2005, XI:1.
[200] Proceedings, August 24. 2005, XIV:2.
[201] Proceedings, August 16, 2005, XI-2.

> or complainants. No motion to dismiss shall be allowed within the period to answer the complaint.

This stage of the proceeding has clearly moved beyond Fr. Bernas' "beginning of the impeachment," i.e. when the complaint was filed and referred. Technically, therefore, the impeachable official is not harassed until sometime in the middle of the proceedings, after the Committee's finding that the complaint is sufficient in form and substance.

In the event of the filing and referral of multiple complaints, the Committee can, therefore, first determine if all are sufficient in form and substance. For instance, in the case of the three impeachment complaints against President Macapagal-Arroyo, it may have happened that both the Lozano and Lopez complaints may have been found insufficient in substance, leaving only the Amended Complaint standing. This could then have been furnished to the President. If more than one complaint is sufficient in form and substance, then the Committee might consolidate the complaints. In these cases, the President need only be harassed once.

We shall look at these "solutions" to the problem of multiple complaints in greater detail later but may, for the meantime, refer to the following suggestions of Rep. Vincent P. Crisologo[202] and Rep. Juan Edgardo M. Angara:[203]

> REP. CRISOLOGO: *Alam nyo*, Mr. Chairman, if the complaint is different from the proceedings, in one proceeding we can hear five or six complaints provided it was referred to the Committee at the same time, as these three complaints [were] referred. What is prohibited, Mr. Chairman, in the Constitution is when there [is] more than one proceeding.... [Our countrymen] will never understand, Mr. Chairman, if we leave out the other two complaints. And history will judge us and we will be misunderstood as having failed the expectation of the common *tao kung hindi natin tatalakayin po yung dalawang* complaints. History will judge us whether we did justice for our people or not.[204]

> REP. ANGARA: Mr. Chairman, in interpreting legal provisions, we must remember the spirit underlying the letter of the law. We can choose an interpretation that puts a premium on technicality. In this case, that technicality is a matter of a mere ten minutes or twenty minutes, and we can put a premium on technicalities which would validate frivolous complaints. *Nandito na po tayo bilang isang* impeachment committee *para mag-imbestiga ng* probable cause, *walang mawawala sa atin kung ipagsasama natin ang lahat ng* complaint *na sabay-sabay naman ipinasyl, at bahagi lamang ng iisang* impeachment proceeding.[205]

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[202] Representative of the First District of Quezon City.

[203] Representative of the Lone District of Aurora.

[204] Proceedings, August 16, 2005, XVI-3

[205] Proceedings, August 17, 2005, X:1. Rep. Roman similarly notes: "My training is, if it the letter of the law that kill it and not the spirit that five it life, you don't apply the law. That law is not applicable. There are no prejudicial questions here." Proceedings, August 16, 2005, XIV:3.

Clearly the law of rules as laid down by the Constitution and *Francisco* does not support the position of the Majority.[206] Rep. Paras, criticizing the Majority's constant exhortation of the rule of law, thus remarks:

> REP PARAS: And if it's what the Honorable Lagman says that we have to obey the rule of law, then let's stick to the rules, and the rules speak of initiation. In fact, *doon sa* rules that we have approved there is even a footnote which says that we have to observe the Francisco ruling, and I think we should obey that mandate. So there is only one initiation here and there are three (3) complaints subsumed into one.[207]

5. Solutions

It must, however, be pointed out that although the law of rules does not support the Majority, this cannot be construed to mean that it automatically favors the Minority. Again, it must be reiterated that the situation before the Committee of Justice was the first of its kind in the history of the Republic. Thus, even granting that the Committee should entertain all three complaints, no clear rule exists to govern exactly what the Committee should do with the multiple complaints.

The Minority recognized this problem and offered solutions about what to do with the three complaints. As I understand it, there were essentially two solutions: (1) examine the form and substance of all and simply leave the last complaint standing; or, (2) consider the third complaint as an amendment of the first. It is not necessary to discuss the first solution as this has been sufficiently threshed out in the above discussion of Rep. Lagman's prejudicial questions. Let me focus, therefore, on the second solution.[208] I begin by discussing the Majority's arguments.

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[206] The constant misappreciation of *Francisco* seems to be explained by Rep. Teofisto L. Guingona III of the Second District of Bukidnon. He suggests that when the Majority invokes the *Francisco* ruling their preoccupation is with its dispositive portion, which dismissed the second impeachment proceeding against the Chief Justice. Rep. Guingona's approaches the problem of the Majority's misappreciation by going to the other extreme and suggesting that the *Francisco* ruling is completely inapplicable to the situation confronting the Committee because the facts in *Francisco*:

> REP. GUINGONA: The ruling of Francisco is not quite at point, Mr. Chairman, because in that case there were two (2) distinct, separate impeachment proceedings. One was filed on June 2, 2003 and dismissed. I would like to emphasize "dismissed" on October 22, 2003. Thereafter, the next day, a subsequent complaint and impeachment proceeding was initiated. In this case. there is only one proceeding. There are three (3) complaints but there is only one proceeding. Proceedings, August 16, 2005, XV:4.

Rep. Lorenzo R. Tañada III of the Fourth District of Quezon City argues for the same but on the basis of another difference between the two situations.

> REP. TAÑADA: The Francisco case did not address a situation where two or three complaints are... referred to the Committee on Justice on the same day. it is the submission of this Representation that the Francisco complaint does not fit squarely with the situation we have today. In the Francisco case, the two cases were filed and referred on difference days. Here, the cases were referred on the same day. Proceedings, August 17, 2005, IV:1.

[207] Proceedings, August 16, 2005, XIII:3. See also Rep. Roman at August 31, 2005 at VII:2.

[208] It might be noted, that this second solution offered a wide variety of possibilities such as consolidating all the three complaints into a single article of impeachment or treating the allegations in the three complaints as a bill of particulars for the single impeachable offense of betrayal of public trust.

It should be recalled that in Rep. Lagman's initial list of seven prejudicial questions, he included the following:

To capture the position of the Majority, let me offer the outline of arguments laid down by the Committee Report of the Committee on Justice. After noting that "the test of the legal standing of a complaint as amendatory is not determined by its caption, title or the prayer therein but by the allegations in the body of the complaint,"[209] the Report argued that the Amended Complaint could not be considered amendatory of the original Lozano Complaint for the following reasons:

1. "[T]he so called 'Amended Complaint' is a major departure from the original Lozano complaint because instead of merely acting as *endorsers* of the Lozano complaint, twenty-nine (29) Members of the House of Representatives signed as *Complainants*."[210]

2. The two complaints cannot be consolidated under the common charge of betrayal of public trust because "[t]he 'betrayal of public trust' [in the Lozano Complaint] is limited to allegations that the respondent 'cheated in the presidential election' or 'robbed the sovereign will', while the 'Amended Complaint' included many other new acts in its indictment on betrayal of public trust.

   "The Amended Complaint materially and substantially altered the Lozano Complaint by alleging new and purported impeachable offenses like 'culpable violation of the Constitution', 'bribery' and 'graft and corruption', all of which were not alleged in the Lozano Complaint."[211]

3. "[T]he Amended Complaint cannot partake of a bill of particulars under existing jurisprudence."[212] The reasons for this are because, (1) "it is well

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REP. LAGMAN: Number 3. Since the Amended Complaint radically and substantially supplanted the original Lozano Complaint, should it be considered as a separate, independent and new complaint?...

Number 6. Did the Amended Complaint supersede the original Lozano Complaint so much so that the Lozano Complaint will be subsumed under the Amended Complaint, and considering further that Attorney Oliver Lozano signed the verification attached to the Amended Complaint, thereby giving the conformity to the Amended Complaint. Proceedings, August 10, 2005, III:1.

[209] Committee on Justice, H. Rpt. No. 1012, 13th Cong., 2nd Sess. (September 5, 2005).

[210] *Ibid.* (emphasis in the original) Rep. Domogan pointed this out during the proceedings:

REP. DOMOGAN: Let us not forget, and let us take note, that during the initial hearing of this Committee, when His Honor, our Honorable Chairman, was mentioning those who had endorsed the Amended Complaint, and when he mentioned the name of the Honorable Sectoral Satur Ocampo, the latter said, "Let me correct you... Mr. Chairman. We are not endorsers. We are complainants in this impeachment proceedings." Which conclusively established the point that this Amended Complaint is really a new complaint, separate and distinct from that of the Lozano Complaint. Proceedings, August 24, 2005 VII:1

[211] Arguments in favor of consolidation, on this point are made by Rep. Laurence B. Wacnang of the Lone District of Kalinga Proceedings August 16, 2005, XV:3, & Proceedings, August 31, 2005, XIV:2-XIV:4; Rep. Faysah Maniri Racman Dumarpa of the First District of Lanao del Sur, Proceedings, August 30, 2005, XIX:3.Arguments against consolidation under this point are made at the following: Rep. Jaraula Proceedings, August 17, 2005, IV:3; but see how Rep. Jaraula after voting for treating the complaint separately then agreed to a partial consolidation, Proceedings, August 30, 2005, XVIII:2; Rep. Alipio V. Badelles of the First District of Lanao del Norte, Proceedings, August 17, 2005, VIII:2; Rep. Baterina, Proceedings, August 24, 2005 IV:3; Rep. Cagas, Proceedings, August 30, 2005, XVIII:1; Rep. Corazon N. Malanyaon of the First District of Davao, Proceedings, August 30, 2005, XVIII:2; Rep. Raul V. Del Mar of the First District of Cebu, Proceedings, August 30, 2005, XIX:2; Rep. Edgar L. Valdez of the APEC partylist, Proceedings, August 30, 2005, XIX:4.

[212] Committee on Justice, H. Rpt. No. 1012, 13th Cong., 2nd Sess. (September 5, 2005).

> settled that the party entitled to a bill of particulars is not the complainant but the one who is supposed to answer the complaint or enter his plea," (2) "it is not the function of a bill of particulars to add new causes of action or to change the causes of action."[213]

Simply put, the argument of the Majority is that if the Amended Complaint so changed the original, it cannot be considered a simple amendment but must instead be treated as a separate complaint and that granting that it is a separate complaint, it could then be barred by the Lozano Complaint which had been referred to the Committee ten minutes earlier.

Against this, the Minority contended that the Amended Complaint substituted the original and must be considered filed as of the date of the original.[214] The problem with Minority's position is that, on the one hand, they ask the Majority to consider the Amended Complaint as an original complaint insofar as the question of the one-year bar rule applies, i.e. it is just one of three complaints duly filed and referred. On the other hand, they ask that the Amended Complaint also be considered as an amendment of the original Lozano Complaint as is patent from the very caption of the pleading as well as its content, which specifically refers to the "original."[215]

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[213] *Ibid.* Note that I already entertained this issue in Part III, in connection with the discussion on impeachment as a political proceeding. See Rep. Paras, Proceedings, August 16, 2005, XIII:3, for arguments in favor of the suggestion, and, for arguments against the bill of particulars suggestion, see Rep. Jaime C. Lopez, Proceedings, August 23, 2005, III:2-III:3; Rep. Mauricio G. Domogan, Proceedings, August 24, 2005 VII:1.

General arguments for the distinctiveness of the two complaints are also made by Rep. Jaime C. Lopez Proceedings, August 23, 2005,III:4; & Rep. Exequiel B. Javier, Proceedings, August 30, 2005, XIX:2.

[214] Proceedings, August 17, 2005, X:2. For, instance, we find Rep. Paras arguing as follows:

> REP. PARAS: Furthermore, the Amended Complaint under our Rules, under the Rules of Court and in the Rules of Criminal Procedure, which allowed amendment under Rule 110, Section 14, the Amended Complaint has subsumed the original complaint. So we are only talking of one complaint. The Lozano Complaint is only one, which is now the Amended Complaint. We are not talking anymore of the original complaint because they are subsumed by the Amended Complaint. That is the object... of an amendment.... Proceedings, August 16, 2005, XIII:3.

[215] It is Rep. Locsin who best describes the problem:

> REP. LOCSIN: [A]n Amended Complaint is what the Opposition filed after the original with the view to improving the same.
>
> The rule is "pleadings are held against the pleader."
>
> So that what one pleads his case to be — to wit, an amendment of an original complaint — is that to which he must be held thereafter.
>
> And as we all know, while the policy on amendments is liberal it is not licentious. Certainly adding new and different causes of action cannot be allowed. And in the case of criminal complaints, where the amendments seek to introduce new matter that are not necessarily included in the original charge, the defendant must give her permission but which she here denies.
>
> Indeed, it is truly ignorant to praise a complaint that claims to be both an amendment and an original at the same time for this is to pursue alternative causes of action arising, not from the same act and the same law, but from wholly unrelated transactions and laws. In short, it sanctions a moving target for the defendant against every principle of law and fairness. Proceedings, August 30, 2005 III:4-IV:1.

H. Rpt. No. 1012, 13th Cong., 2nd Sess. (September 5, 2005) of the Committee on Justice likewise recognized this duplicity:

> In describing the nature of the complaint with a caption of "Amended Complaint" the proponent House Members expressly admitted that the third complaint "presents alternative

Rep. Locsin, in an attempt to address this discrepancy offers a middle-ground solution that admits the Amended Complaint but limits the extent of the amendment.

> REP. LOCSIN: The proper thing for this committee and the opposition to do is to limit the choices of its Members in the House in just one of two complaints.... Forget the Lopez complaint. That is merely a swindle to interpose yet another complaint between the original complaint and the substantial but over enriching amendment that was not just endorsed but actually prepared and signed by our colleagues in [the] Minority. Allow us to choose the discriminating consolidation of the original and amended complaint under one course of action. To wit the Commission on Elections irregularities and improprieties are tantamount to the betrayal of public trust but only and strictly in respect to election fraud.... The issue of impropriety of her communication with a COMELEC Commissioner as a candidate regardless of the admissibility of the tapes and evidence and the natural suspicion that she committed or caused the true election result. Everything else in the amended complaint, illegal wealth, PIATCO, North Rail and human rights abuses are pleadings for a fishing expedition in the Senate which will unfairly delay the final resolution of the real issue. [216]

Unfortunately, the Majority did not pick up this "happy" compromise. Instead the Majority ultimately agreed with Rep. Lagman that,

> REP. LAGMAN: The Amended Complaint did not only correct or improve on the original Lozano complaint. It subverted the complaint, it obliterated the complaint by interposing new causes of action.... [T]he Amended Complaint is a subterfuge, a ruse to circumvent the constitutional provision that no impeachment proceedings shall be instituted against the same official more than once in a period of one year.[217]

C. THE STRANGLING OF THE MOUSE: FINDING THE LOPEZ COMPLAINT SUFFICIENT IN FORM BUT NOT IN SUBSTANCE

It is Rep. Locsin who best describes the quality of the decision-making on the last and final day of the Committee proceedings when the Lozano Complaint was found insufficient in form and substance. Picking up on his Roman circus analogy, he says:

> REP. LOCSIN: The exclusion of all other Complaints in favor of the Lozano... Complaint *should* find this Committee to a favorable endorsement of the same to

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arguments and grounds to — the initial and subsequent supplemental complaints submitted by lawyer Oliver O. Lozano to the House of Representatives" thereby unwittingly admitting that indeed the so-called "amendatory pleading" to the Lozano Complaint is a new and separate complaint, merely disguised as an amendment to circumvent the constitutional ban against multiplicity of impeachment complaints against the same official within a period of one (1) year.

See also Rep. Antonino, Proceedings, August 17, 2005, IV:2.

[216] Proceedings, August 30, 2005 III:4-IV:1. See also Rep. Locsin's earlier speech at Proceedings, August 23, 2005, IV:3-IV:4. Support for this position came at Rep. Malanyaon, Proceedings, August 23, 2005, VI:1. On the nature of the Lopez Complaint, see Rep. Villafuerte, Proceedings, August 30, 2005, XIX:1.

[217] Proceedings, August 30, 2005, XIV:2.

> Plenary. It would be absurd for the Committee to reject all the other Complaints on the sole ground of untimeliness only to extinguish the Lozano... Complaint for insubstantiality at the end.
>
> Yesterday I said that excluding the Amended Complaint in favor of the Lozano... Complaint, or worse yet the Lopez Complaint, would be like a Roman circus where the tiger is poisoned in the cage so as to send a mouse to face the gladiators in the arena. Now it seems that even the mouse will be strangled in its box, and the curtain brought down on the Roman circus.[218]

This is exactly what happened. In less than three hours the Committee found the Lozano complaint insufficient in form and substance.[219]

D. CRITIQUE OF THE PROCEEDINGS

1. Strict v. Liberal Constructions

Despite the fact that the law strictly construed actually operated in their favor, Minority members still invoked the Constitution's liberal interpretation.[220] Members of the Majority, on the other hand, sought a strict construction of the one-year bar rule[221] despite the fact that no strict construction could be had. This irony in the Majority's position is evident in the compromises its members made with respect to the Constitution and the House Rules, such as: (1) first, the Majority left the strict letter of the Constitution by indulging Rep. Lagman's prejudicial questions; (2) second, it was members of the Majority who attempted to construe the beginning of impeachment proceedings as tolled by the filing of the complaint despite the clear pronouncement of *Francisco* that filing had to be coupled with referral for initiation of proceedings to be complete; (3) third, it was members of the Majority who spoke in terms of the complaints rather than proceedings when determining what one-year bar actually barred; and, (4) fourth, the Majority liberally construed what constituted the requisite verification of the Lozano Complaint.[222] In all these cases, if the law were strictly construed, then decisions would have been made in favor of the Minority. It is thus very

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[218] Proceedings, August 31, 2005, XIV:1.

[219] I do not discuss the debates concerning these issues for, by this point, the Minority had walked out on the proceedings. In passing, it may be noted that the Lozano Complaint was found sufficient in form despite the fact that no caption reading "Verification" was appended to the complaint, the Committee Report explained that sufficiency in form was met because (1) the complaint was prepared in affidavit form and, (2) as a member of the Philippine Bar, Atty. Lozano's signature "suffices as a verification because he was the one who prepared the complaint in his own behalf, not for a client." Committee on Justice, H. Rpt. No. 1012, 13th Cong., 2nd Sess. (September 5, 2005) Insufficiency in substance, on the other hand, was based upon the following findings: (1) that the complaint does not meet the required recital of facts constituting the offense of betrayal of public trust or of the sovereign will; (2) that the general averment of election fraud belongs to the exclusive jurisdiction of the Presidential Electoral Tribunal; (3) that the alleged acts warranting impeachment were not committed during the President's term of office; and, (4) that reliance upon the wire-tapped tape is unavailing due to failure to meet the requisites of admissibility required by the Anti-Wiretapping Law or Rep. Act No. 4200 (1965).

[220] See Rep. Escudero, Proceedings, August 16, 2005, X:2; Rep. Casiño, Proceedings, August 16, 2005, XIV:2; & Rep. Jesli A. Lapus of the Third District of Tarlac, Proceedings, August 17, 2005, XVIII:2.

[221] See Rep. Baterina, August 16, 2005, VII:1-VII:2.

[222] See note 219.

strange to find members of the Majority invoking the Latin maxim of *dura lex sed lex* when they in fact bent the rules and law by force of their Majority vote.[223]

The Majority members seemed intent on barring the Amended Complaint by ultimately resting their entire position on the fact that the Committee received it ten minutes later than the Lozano Complaint. As has been pointed out, the rules and the law offer no clear cut guideline in this respect. The same observation could be made with respect to the problem concerning what should be done with the three complaints in the event that one did not bar the others, for strict or liberal constructions of the law would have been fruitless. As has been repeatedly asserted, the situation confronting the Committee was novel. Thus, there was no rule or law to interpret, either strictly or liberally!

Thus, it becomes clear that in order for the "rule of law" to remain relevant it cannot simply be thought to be the "law of rules." To retain its applicability, it must be elevated to the level of the "rule of right." Thus, the Committee seeking to apply the "rule of law" would have ask "What is the right and just thing to do?" rather than simply asking, "What do the rules provide?" The last part of this paper addresses this final conception of the rule of law. Before closing, however, it is necessary to say something about the misuse of the law of rules.

2. To Wash One's Hands with the Rule of Law

The "rule of law" as a "law of rules" requires adherence to legal precedent, whether statutory or judicial. When factual circumstances are novel, however, the "law of rules" is inapplicable. If one nonetheless insists on its applicability, the deceitful effect is that the "rule of men" is concealed under a cloak of propriety. We see this, for instance, in the following argument of a Majority member after the Committee decided to treat the Amended Complaint as separate and distinct from the Lozano Complaint:

> REP. ANTONINO: Mr. Chairman, I strongly believe... that Congress was vested with this power of impeachment by our elders who formed our Constitution because they saw it fit that Congress being the maker of laws would certainly be the institution that would first follow the law. While the accusation[s] have been that many of us rely on technicalities of the law, many of us rely on interpretation of jurisprudence in coming to our decisions... regarding the Lozano Complaint as being separate from the Amended Complaint I believe, Mr. Chairman, that it is our duty to follow the law being the makers of laws. And this is why, Mr. Chairman, we were given this power by those that wrote our Constitution.
>
> Many have said that this is a political process, but I do not believe that is truly a pure political process in the fact that when we were vested with this power of impeachment, we were asked to fulfill our oath of office which was to defend the Constitution, Mr. Chairman, and this is why despite all the clamor that many have said as to know the truth or as some would say, "face the music" certainly,

[223] For instance, see Rep. Gozos, Proceedings, August 24, 2005, XII:1; Rep. Monico O. Puentevella of the Lone District of Bacolod City, Proceedings, August 31, 2005, X:1.

> Mr. Chairman, one must be given the privilege of accessing the rule of law, Mr. Chairman. And this is why I voted "yes" because I truly believe, Mr. Chairman, that aside from it being a political process, we should follow the rule of law.[224]

In even simpler terms, another member put it thus: "*Ang ginawa po natin dito sa* Committee on Justice *ay sumunod lamang sa Saligang Batas, sa ating* Constitution."[225] Some Majority members went further and suggested that it was really the Minority who should be faulted for their predicament. For instance, reference was made to the fact that Minority members opted to join rallies before filing their impeachment complaint.[226] Other Majority members pointed out that it was the Minority that moved for the application of the House Impeachment Rules of the Eleventh rather than the Twelfth Congress, despite the fact that the latter had provisions on the consolidation of impeachment complaints.[227]

In the end, the Majority's evasive position can be summarized thus: "Blame the Minority. Blame the Constitution. Blame the House Impeachment Rules. Blame the Supreme Court. Even blame the rule of law. But don't blame us. We had no choice but to decide the way that we did."[228] The truth, however, is that the Majority *could* have decided otherwise but it *did* not.

VI. THE RULE OF LAW AS THE RULE OF RIGHT

> *The wolf and the lamb:*
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> *Watching a lamb drink from a river, a wolf wanted a reasonable excuse (aitia) to dine upon him. So he stood upstream and accused the lamb of muddying the water and not letting him drink. The lamb answered that he drank only with the tips of his lips, and that in any case he could not disturb the water upstream while standing below.*
>
> *Since the excuse failed, the wolf said, "But last year you slandered my father." When the lamb answered that he had not even been borne at that time, the wolf said to him, "Even though you have a good supply of answers, shall I not eat you up?"*
>
> *The story shows that even a just defense has no strength against those whose purpose is to do injustice.*
>
> — *Aesop*[229]

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[224] Proceedings, August 30, 2005, XVIII:3. See also Rep. Cagas, Proceedings, August 31, 2005, VI-2.

[225] Rep. Villafuerte, August 31, 2005, IV:1.

[226] See Rep. Sumulong, Proceedings, August 17, 2005, III:1; Rep. Antonino, Proceedings, August 17, 2005, IV:2; & Rep. Jaraula, August 31, 2005, III:2.

[227] See Rep. Abalos, Proceedings, August 31, 2005, V-2; & Rep. Amelita C. Villarosa, Proceedings, August 23, 2005.

[228] Rep. Puentevella makes virtually the same statement. After referring to a June 20, 2005, news report that quoted Rep. Escudero as saying that the "opposition would boycott impeachment proceedings stemming from Lozano's complaint," he asks, "*Mga kapatid ba't tayo sinisisi ngayon? Ibinigay ang* amendments almost one month after. *Bakit kaya? Dahil dito pinapakita, pinapaliwanag na hindi sila naniniwala sa proseso ng* impeachment *dito sa Kongreso noon dahil mas marami daw ang miymebro ng Mayorya. Ngayon, bakit tayo sisisihin ng taong bayan?*" Proceedings, August 31, 2005, IX:2.

[229] EARLY GREEK POLITICAL THOUGHT FROM HOMER TO THE SOPHISTS, *op. cit supra* note 65 at 146, citing Perry 155 & 16 for the same story with a cat and rooster.

A. *RECHTSSTAAT*

I have coined the third formulation of the "rule of law" as the "rule of right." This is admittedly an awkward formulation but it is an attempt at trying to draw from the rich tradition of "*Rechtsstaat*,"[230] which would be the closest German equivalent to the "rule of law." Even in German, however, the term is not without confusion for "*Rechtsstaat*" does not always translate as "rule of law." Some, for instance, offer "constitutional state"[231] as the proper translation. Literally, however, in the compound noun "*Rechtsstaat*," "*Staat*" translates as "state"[232] while "*Recht*" translates as many different things: "right," "privilege," "justice," "jurisprudence," and "law."[233] Thus, we see how the term can come to mean the rule or state of law, on the one hand, and the rule or state of right, on the other. It should be further noted that this distinction between law and right is not peculiar to the German language:

> Continental European languages, for example, use one term for law that expresses the idea of laws enacted — laid down, legislated — by an authoritative body. Thus Germans use the term *Gesetz*, French *loi*, Russians *zakon*, Spanish *ley*, and speakers of Hebrew *hok*. All these languages also contain a second word for law that expresses a higher notion of Law as binding because it is sound in principle. This alternative conception of law is expressed in the Continental European language as *Recht* in German, *droit* in French, *pravo* in Russian, *derecho* in Spanish, and *mishpat* in Hebrew. The closest translation of these terms in English would be "Right," an archaic expression for Law sometimes used in the translation of philosophical works. The connotation of Right (or Law with a capital L) is typically that of good or just law, which is binding on us because it is good or just.[234]

In actual use therefore the "rule of right," rather than the "rule of law" seems to more accurately capture the spirit behind *Rechtsstaat*. This is evident when we see that its antonym, *Unrechtsstaat* has been used to refer to Hitler's Third Reich[235] and was used by West Germans in reference to East Germany before German reunification.[236] Thus,

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[230] It should be noted that Peerenboom actually sets *Rechtsstaat* against the rule of law, translating the former as rule *by* law. This, however, is merely his preliminary statement. Later in his article he writes:

> As with rule of law, *Rechtsstaat* has been interpreted in various ways. While some interpret it in more instrumental terms similar to rule by law, others would argue that *the concept entails* at minimum the principle of legality and a commitment on the part of the state to promote liberty and protect property rights and thus *some limits on the state*. In any event, the concept of *Rechtsstaat* has evolved over time in Europe to incorporate democracy and fundamental rights. Accordingly, it is often now used synonymously with (liberal democratic) rule of law.

R. Peerenboom, *op. cit. supra* note 16 at 47-48 note 1.

[231] WILDHAGEN GERMAN-ENGLISH DICTIONARY 897 (5th ed. 1960).

[232] *Id.* at 1012.

[233] *Id.* at 897.

[234] G. FLETCHER, *cit. supra.* note 140 at 11-12 (internal citations omitted).

[235] Guenter Lewy, *Resistance to Tyranny: Treason, Right or Duty?*, 13:2 THE WESTERN POLITICAL QUARTERLY 581, 581 (1960).

[236] Glenn Schram, *Ideology and Politics: The Rechtsstaat Idea in West Germany*, 33:1 THE JOURNAL OF POLITICS 133, 139 (1971). On the other hand, the Western Germany has also suffered the same criticism:

> [I]t is perhaps natural that after our German reunification there was—as you can imagine—a substantial amount of bilateral work for lawyers and judges to ensure that our two systems fitted together into one system. The expectations of our countrymen in the East were very high, and indeed we have a quotation by one of those peaceful freedom fighters from the

as George Fletcher puts it, "Playing by the rules is, in some dubious contexts, a great achievement, but once societies have minimized graft and arbitrary rule, the 'rule of law' seems to promise more than blindly playing the game. After all, the rules of the game might be horribly unjust."[237] The "rule of right" or *Rechtsstaat* thus emphasizes the key difference between formal and substantial notions of the rule of law.

Thus far, this paper has been concerned with the minimum requirements of a rule of law, i.e. that the law rather than men must rule and that the law should be clearly defined, predictable and equally applicable. The obvious shortcoming of our treatment is that if the rule of law were limited to this positivist vision of law, then it could support an *Unrechtsstaat*. To protect against this danger, the rule of law must be thought in terms of the greater values of right and justice. Dean Pangalangan illustrates how the Philippine Supreme Court had to confront this schism when faced with the question of the legitimacy of Corazon C. Aquino's presidency:

> In the *Freedom Constitution* cases the Supreme Court recognized that Cory Aquino became president "in violation of [the] Constitution" as expressly declared by the Marcos-dominated parliament of that time (i.e. the *Batasang Pambansa*) and that her government was "revolutionary in the sense that it came into existence in defiance of existing legal processes"....
>
> ...[T]he Court stated that, the people having accepted the Cory government, and Cory being in effective control of the entire country, its legitimacy was "not a justiciable matter [but] belongs to the realm of politics where only the people... are the judge." She drew her legitimacy from outside the constitution, and all challenges raised political and nonjusticiable questions.
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> Note that, once again, the Court exposed the limits of formal legality... and the primacy of substantive norms.[238]

This example falls into the broad argument that governments may *rightfully* yet *unlawfully* be deposed. Dean Vicente G. Sinco tries to clarify this anomaly by distinguishing between a *de jure* and a *de facto* government, with the former being "organized and existing in accordance with the actual laws operative in the state" and the latter being a government "that exists upon a basis of fact, partly or entirely, because it is organized not in accordance with but in defiance of the existing legal processes of the state."[239] He explains that unlawful *de facto* governments rightfully rule when they are a function of direct state action — i.e. action of the people — despite the fact that they are established in contravention of the Constitution.[240]

The following questions may, however, be asked: Is not this distinction between the rule of law and the rule of right simply a restatement of the doctrine that

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East who said, "we expected justice, but what has come is the rule of law." D. Umbach, *op. cit. supra.* note 17 at 22.

[237] G. FLETCHER, *cit. supra.* note 140 at 11.

[238] R. Pangalangan, *op. cit. supra* note 93 at 374-375 (2004) (internal citations omitted).

[239] VICENTE G. SINCO, PHILIPPINE POLITICAL LAW: PRINCIPLES AND CONCEPTS 12 (11th ed. 1962).

[240] *Ibid.*

the law and not men should rule? Are not these *pseudo de jure* governments rightfully deposed precisely because they no longer act in accord with the law? Two points can be made with respect to these questions. First, insofar as tyranny has masked itself in the guise of law, then to step beyond the law and depose the tyrant accomplishes the two-fold purpose of realizing the right beyond the law and of establishing an authentic rule of law over men. Second, in the triumph of right over law, there may not always be a tyrant to depose. Howard Zinn does an excellent job of describing the hegemonic danger of the law of rules in itself.[241] In rather forceful language, Zinn distinguishes the rule of law from the rule of men and shows how the former might still become a tool of oppression:

> Under the rule of men, the enemy was identifiable, and so peasant rebellions hunted out the lords, slaves killed the plantation owners, and radicals assassinate monarchs. In the era of the corporation and the representative assembly the enemy is the elusive and unidentifiable.... In *The Grapes of Wrath*, the dispossessed farmer aims his gun confusedly at the tractor driver who is knocking down his house, learns that behind him is the banker in Oklahoma City and behind him a banker in New York, and cries out, "Then who can I shoot?"
>
> The "rule of law" in modern society is no less authoritarian than the rule of men in premodern society; it enforces the maldistribution of wealth and power as of old, but it does this in such complicated and indirect ways as to leave the observer bewildered; he who traces back from cause to cause dies of old age inside the maze. What was direct is now indirect rule. What was personal rule is now impersonal. What was visible is now mysterious. What was obvious exploitation when the peasant gave half his produce to the lord is now the product of a complex market society enforced by a library of statutes.[242]

It may seem from the above that Zinn is an advocate of anarchy, that he wants to depose law in all its forms. Nothing, however, could be further from the truth. What Zinn actually intends is that the rule of law be reconciled with the rule of right. Thus, he writes,

> A general "obligation to obey the law" is a poor guide in a time when revolutionary changes are needed and we are racing against ominous lines on the social cartograph. We need to separate whatever there is in law that serves human ends from everything else that rides along with it, on the backs of so many people....
>
> ...I have tried... by inculcating a proper disrespect for the "rule of law," only to put us at the starting point, in a mood to run. The same modern civilization which has given us unjust laws has given us great ideals. We need to learn how to violate these laws in such a way as to realize those ideals.[243]

In Zinn's framework the law of rules is always distinguishable from the rule of right. This does not, however, mean that they stand in opposition to one another. His

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[241] Howard Zinn, *The Conspiracy of the Law*, in THE RULE OF LAW 15ff. (1971)

[242] *Id.* at 17-18.

[243] *Id.* at 35-36.

position, rather, is that the rule of right must stand as a sort of pole star against which the law of rules is constantly measured. What this requires, in his words, is "a proper disrespect for the rule of law." Otherwise, the law will be deified to the prejudice of justice and right and what man will be left with is a lawful *Unrechtsstaat.*

B. ARRIVING AT JUST DECISIONS

It should be clear that the law of rules should only govern when it is in consonance with the rule of right. The next logical question to ask is, "What is right?" or "What is just?" The by-roads that that question will take us down are much too long to even be hinted at by this paper. We get a sense of the breadth of the problem when we note the elements of political morality and their variations, which Peerenboom enumerates as incorporated into thick conceptions of the rule of law. With respect to economic arrangements, he tells us that these may take the form of free-market capitalism, central planning, Asian developmental states, etc. With respect to forms of government, they may be democratic, socialist, soft authoritarian, etc. With respect to conceptions of human rights, such may be libertarian, classical liberal, social welfare liberal, communitarian, etc.[244] Which of these is most right or most just? The problem is overwhelming and we know that Peerenboom's enumeration hardly skims the surface of possible socio-economic and political arrangements. This might even push us to remark, as George Fletcher does, that the closest we come to defining the rule of right is to refer to what it is not: "In the end, it might be as difficult to specify the characteristics of this ideal of due process or of a *Rechtsstaat* as it is to define the physical ideal of good health. The best approximation of health might be this: an organism is healthy if it is not ill."[245]

On the other hand, it does not seem proper to avoid the question of justice completely especially since this paper has put before itself the severe task of criticizing the Committee on Justice. The compromise that this paper offers, therefore, is not so much a definition but a proposed formula for decision-making that facilitates the just resolutions of problems. The offered formula is inspired by the reflections of Carlos Santiago Nino on ideal and historical constitutions.[246] It is thus necessary to briefly describe his project.

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[244] R. Peerenboom, *op. cit. supra* note 16 at 4.

[245] G. FLETCHER, *op. cit. supra.* note 140 at 13. The quotation continues thus:

> The burden falls on perceiving illness, and if there is no illness, the organism is healthy. We recognize breakdowns more easily than we can define the positive ideal. (One is reminded of Justice Stewart's famous aphorism about pornography: "I know it when I see it." Jacobellis v. Ohio 378 U.S. Reports 184, 197 (1964) (*concurring opinion*)) In the same way, lawyers, have a strong sense for the perversions that prevent a legal system from realizing the rule of law.

[246] CARLOS SANTIAGO NINO, THE CONSTITUTION OF DELIBERATIVE DEMOCRACY (1996). The author concedes that Jürgen Habermas and John Rawls offer their own formulations of what Nino refers to as "deliberative democracy" and acknowledges that any formula for the just resolution of decisions would eventually have to confront the work of these two thinkers.

1. Nino's Two-Tiered Reasoning

Nino was of the opinion that the task of legislators and judges went beyond simply applying positive law. In his opinion, legal order or what we have referred to as the law of rules is not a value unto itself.[247] In the end, what justifies a decision is not so much its correspondence with the legal order or the law of rules but with "ultimate reasons" or "moral propositions" which are "autonomous in the Kantian sense."[248] What he means by autonomy is that the reason is valid not by virtue of an external force, i.e. the enactment of an authority, but because it is internally valid as a normative or moral proposition.[249]

This does not mean that Nino is ready to abandon the law of rules, positive law or the historical constitution. On the contrary, he argues that because the search for the ideal constitution is a collective and historical project, there is value in upholding the law of rules even when it may not be in accord with the ideal law or the rule of right. He offers the metaphor of a cathedral built by several generations of craftsmen and architects. He says that an architect that finds himself picking up the work of one who preceded him and recognizing that he himself would not be able to complete the project would have to choose a style which "must incorporate not only the past but also future contributions to the construction of the cathedral."[250] Applied to any communal project, the following observation could then be made:

> No matter what the generalized criteria are for defining the desirable in a collective work, those criteria are qualified when applied to efforts that contribute to a work but do not have control over the final outcome. Someone who independently contributes to a collective work cannot adopt the simple strategy of molding reality to an ideal model....
>
> Because we can only make one contribution to a collective work whose final product we do not control, the rational choice may not be the most preferred alternative. Instead, the rational choice may be others with lesser merits.[251]

Thus, what justifies adherence to the law of rules is the pragmatic consideration of maintaining "the regularity of conducts, attitudes and expectations of successive legislatures, government officials, and generations of citizens,"[252] without which a communal realization of the ideal constitution could not be had. In simplest terms, it may be necessary to compromise in the short term for the sake of the long-term communal project.

Clearly, therefore, the legislator or judge finds himself performing a balancing act by weighing steps towards the ideal constitution against threats to the social fabric

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[247] C. NINO, *op. cit. supra* note 246 at 37 (internal citations omitted).
[248] *Id.* at 32.
[249] *Id.* at 27.
[250] *Id.* at 34.
[251] *Id.* at 35.
[252] *Id.* at 35.

held together by convention and custom. Nino offers a two-tiered structure for determining what to do when confronted by particular decisions:

> 1. At the first and most basic level, the reasons legitimating a particular social practice constituted by the historical constitution must be articulated.... At this first level of practical reasoning, it is important to take into account any realistic alternative to the preservation of the historical constitution.
>
> 2. [J]ustificatory reasons incompatible with the preservation of the historical constitution are excluded as long as the first-level reasoning demonstrates that the constitution is *more legitimate*, with regard to the ideal constitution, than any realistic alternative. Similarly, a rule that is impeccable according to moral principles may be disqualified or excluded if necessary for the preservation of the historical constitution.[253] (emphasis supplied)

In sum, the two tiers consist in (1) an articulation of the reasons behind current practices as well as possible alternatives to these practices and (2) a determination of the practices which can be abandoned in favor of the ideal constitution and the practices which must be maintained in order to preserve constitutional stability.

With regard to the first tier, Nino emphasizes that the paramount considerations should be the concern for the "democratic process of decision-making" and for "fundamental rights."[254] On the second tier, Nino clarifies that this "does not imply the principles and procedures of the ideal constitution have no relevance to legal reasoning."[255] On the contrary, he explains,

> The principles of rights and democratic procedures that are morally valid as part of the ideal constitution can be called upon to resolve the inevitable *indeterminacies* that remain in a constitution.... The *indeterminacies* allow a constitutional practice to improve and evolve toward more acceptable forms of legitimacy, since it is often possible to find solutions that are normatively preferable.[256] (emphasis supplied)

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[253] *Id.* at 39-40.

[254] *Id.* at 39. However, he also admits the possibility of entertaining non-democratic possibilities such as authoritarian governments or anarchy, which may better realize the ideal constitution. Nino offers the interesting reference to Stephen Holmes to justify this possibility:

> According to Holmes, [constitutional] limitations do now always disempower the majority but may instead allow it to resolve problems that it could not resolve in any other way by removing certain issues from the decision making sphere. Holmes described this as a form of legitimate paternalism, comparable to Ulysses' request to be tied to the ship's mast in order to keep on course while simultaneously listening to the sirens' song. Yet such constitutional limitations do not involve self-paternalism; they can better be viewed as current majorities protecting future possible majorities, perhaps against the harmful decisions of intermediate majorities. *Ibid.*, citing Stephen Holmes, *Precommitment and the Paradox of Democracy*, in CONSTITUTIONALISM AND DEMOCRACY: STUDIES IN RATIONALITY AND SOCIAL CHANGE 227 (1988).

[255] C. NINO, *op. cit. supra* note 246 at 40.

[256] *Id.* at 40-41.

This clarificatory note is especially important for our purposes because by interpreting indeterminacies as "novelties" we can tie together Nino's two-tiered procedure with our three formulations of the rule of law.

To close, we might offer Nino's explanation of the rationale behind this two-tiered structure:

> [T]his approach corresponds to a kind of "second-best" rationality, since individual cases would better be solved if we were able to justify our actions and decisions on the basis of the ideal constitution. Yet we cannot do this outside of a constitutional practice. Thus, we must justify our actions and decisions in a form compatible with the historical constitution in order to preserve that practice if it is the best possible alternative to the ideal constitution. At the same time, we should always seek to move closer to the ideal one.[257]

2. Rule of Law Formula for Just Decision-Making

Following Nino's two-tiered rationality but using the vocabulary of the rule of law, which we have developed thus far, we can propose two guidelines for arriving at what would be the closest approximation of the rule of right.

First Guideline. When the question before a decision-making body is not novel, then the body is generally bound to decide in accord with the law of rules. This nonetheless requires the enunciation of the moral principles upon which the law or the rules are based. Now, when the principles upon which the law of rules are based is directly challenged by the ideal rule of right then the decision-making body must weigh adherence to the law of rules against adherence to the ideal rule of right. If adherence to the principles supporting the law of rules outweighs the ideal rule of right, then the law of rules must govern. However, if the ideal rule of right outweighs the principles supporting the law of rules, then there must be a shift in law or procedure towards the ideal rule of right. In any case, the decision-making body must articulate the reasons for its decision.

Second Guideline. When a decision-making body is confronted with a novel question, it cannot justify its decision by resorting to the law of rules, precisely because of their absolute inapplicability. Instead, the decision-making body must decide in line with its appreciation of the rule of right.

The first guideline adopts in full Nino's two-tiered rationality. The only addition to this is the qualifying phrase, "when the question before a decision-making body is not novel or is clearly circumscribed by existing law." The reason for the qualification is that it clarifies that the first guideline addresses situations wherein there is an authentic conflict between historical and ideal constitutions. The task, as Nino explains, is to pragmatically attempt a balancing of the two. This is unlike the situation

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[257] *Id.* at 41.

contemplated by the second guideline, which might be said to represent the most authentic form of decision-making. The second situation contemplated is one where the questions are novel or, as Nino puts it, indeterminate. In these instances, the decision-making body is thrust into the realm of philosophical discourse and the task of identifying the normative values or principles that should govern a people.

The underlying spirit behind these guidelines, as well as Nino's framework, is that at a certain point, legalism must give way to substance. The rather cold doctrine enunciated above is better illustrated by the more eloquent language of Dean Jorge Bocobo in his article, *Unfettering the Judiciary*,[258] where he comments on the controversy created by President Manuel Quezon's call for natural justice over legal technicality:

> The question involved in the stand of President Quezon on the judiciary is as old as humanity itself. It is the eternal conflict between form and substance, between the letter and the spirit, between technicality and justice. There come to one's mind the most stinging attacks of the Lord Jesus against the Pharisees for insisting on the outward forms of the law while they ignored mercy and faith and righteousness. There is Saint Paul's advice that one should follow not the letter but the spirit of the Scriptures, "for the letter killeth, but the spirit giveth life." Shakespeare in his works wielded his trenchant satire upon the technicalities of law, as when he spoke sarcastically of the "nice, sharp quillets of the law." There is, therefore, in the present controversy started by the utterances of President Quezon himself something of the age-old struggle which has divided men into two classes — those who have a strict and narrow view of things and those who have a liberal and broad perspective. And this conflict will endure so long as there are these two types of mentality.[259]

3. Hannah Arendt on Thinking and the Banality of Evil

Before applying these rather commonsensical principles to an analysis of the Committee proceedings, there is one last question to ask, "Why does it happen that individuals still refuse to think on the level of the rule of right even when an adherence to the law of rules has become absolutely absurd?" The Jewish German thinker, Hannah Arendt, offers us an answer.

When describing authentic thinking, Hannah Arendt offered the metaphor of the wind.[260] She used this to explain many things. For one, like the wind, the subject matter of authentic thought always remains invisible to some extent. She explains this further with her example of the word "house":

> We can use the word "house" for a great number of objects — for the mud hut of a tribe, for the palace of a king, the country home of a city dweller, the cottage in the village, the apartment house in town — but we can hardly use it for the movable tents of some nomads. The house in and by itself, *auto kath'auto*, that which makes us use the word for all these particular and very different buildings is

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[258] Jorge Bocobo, Unfettering the Judiciary, 17 PHIL. L. J. 139 (1937).
[259] *Id.* at 139.
[260] I HANNAH ARENDT, THE LIFE OF THE MIND 174 (1971).

> never seen, either by the eyes of the body of by those of the mind; every imagined house, be it ever so abstract, having the bare minimum to make it recognizable, is already a particular house.... *The word "house" is like a frozen thought that thinking must unfreeze* whenever it wants to find out the original meaning.[261]

In other words, authentic thinking does not dwell in the realm of the taken-for-granted. Instead it addresses the oft-ignored content of concepts and thus asks basic questions such as, "What is happiness? Courage? Justice?" The problem is that when the mind authentically confronts these questions, the concepts become "slippery."[262]

It is not, however, only the subject matter of authentic thinking which is akin to the wind. The very activity of thinking is itself "wind-like." Arendt quotes Heidegger who, describing Socrates, explains what she means:

> Throughout his life and up to his very death Socrates did nothing other than place himself in this draft, this current [of thinking], and maintain himself in it. This is why he is the purest of the West. This is why he wrote nothing. For anyone who begins, out of thinking, to write must inevitably be like those people who run for shelter from a wind too strong for them... all thinkers after Socrates, their greatness notwithstanding, were such refugees. Thinking became literature.[263]

Authentic thinking, therefore, cannot be treated as a mere tool that the thinker can separate himself from in order to take stock. Instead, it is an activity that consumes the thinker himself. To truly think about the rule of right can therefore be a rather threatening experience. As Arendt puts it:

> The consequence... of thinking inevitably has a destructive, undermining effect on all established criteria, values, measurements of good and evil, in short, on those customs and rules of conduct we treat of in morals and ethics. These frozen thoughts, Socrates seems to say, come so handily that you can use them in your sleep; but if the wind of thinking, which I shall now stir in you, has shaken you from your sleep and made you fully awake and alive, then you will see that you have nothing in your grasp, but perplexities....[264]

In this context, it becomes clear why, despite the rather straightforward guidelines presented above, it nonetheless happens that legislators and judges still refuse to think on the level of the rule of right. Instead, they prefer the comfort of non-thinking, which is found in simple reliance on the law of rules, *even when they are inapplicable.*

Arendt criticizes this attitude by pointing out that, "What people [who refuse to authentically think] get used to is less the content of the rules, a close examination of which would always lead them into perplexity, than the *possession* of rules under which to subsume particulars."[265] She describes the danger behind this desire for the possession

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[261] *Id.* at 170-171 (emphasis in original).
[262] *Id.* at 170.
[263] *Id.* at 174, quoting MARTIN HEIDEGGER, WAS HEISST DENKEN? 52 (1954).
[264] *Id.* at 174-175.
[265] *Id.* at 177.

of rules rather than the activity of thought by describing the reactions of "non-thinkers" when their rules are *taken* from them for whatever reason:

> The more firmly men hold to the old code, the more eager will they be to assimilate themselves to the new one, which in practice means that the readiest to obey will be those who were the most respectable pillars of society, the least likely to indulge in thoughts, dangerous or otherwise, while those who to all appearances, were the most unreliable elements of the old order will be the least tractable.[266]

Enter Adolf Eichmann. One of the greatest influences on Arendt's thought is the peculiar figure of Adolf Eichmann who served as Head of the Department for Jewish Affairs for Nazi Germany from 1941 to 1945 and was responsible for the deportation of over three million Jews to extermination camps.[267] In 1960, he stood trial in Israel for crimes against humanity. Hannah Arendt, then a reporter for the New York Times, was sent to cover the trial. What emerged as fruit of that assignment was the 1963 publication of EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL.[268] Seven years after the publication of that work, she had the occasion to comment upon it:

> Some years ago, reporting the trial of Eichmann in Jerusalem, I spoke of "the banality of evil" and meant with this no theory or doctrine but something quite factual, the phenomenon of evil deeds, committed on a gigantic scale, which could not be traced to any particularity of wickedness, pathology or ideological conviction in the doer, whose only personal distinction was a perhaps extraordinary shallowness. However monstrous the deeds were, the doer was neither monstrous nor demonic, and the only specific characteristic one could detect in his past as well as in his behavior during the trial and the preceding police examination was something entirely negative: it was not stupidity but a curious, quite authentic inability to think.[269]

Referring to what she had elsewhere identified as the willingness of the non-thinker to abandon old codes in favor of new ones, Arendt observed, "[Eichmann] knew that what he had once considered his duty was now called a crime, and he accepted this new code of judgment as though it were nothing but another language rule."[270] The conclusion therefore is that those who prefer to possess rules or codes tend to automatically adopt new rules and codes when they find themselves disposed of the old. Thus, without any thought as to the morality of his actions, Eichmann, without hesitation took on the "job" of shipping Jews to extermination camps after leaving his prior "job" as a filing clerk.

Arendt closes her reflection on Eichmann by noting that when the situation confronting him was absolutely novel, he was at a complete loss: "[H]e was utterly

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[266] *Id.* at 177.

[267] See generally <http://www.nizkor.org/hweb/people/e/eichmann-adolf/> April 15, 2006.

[268] HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1963).

[269] H. ARENDT, *Thinking and Moral Considerations*, *op. cit. supra* note 19 at 159.

[270] *Ibid.*.

helpless... when he was confronted with a situation to which none of [his clichés and stock phrases] would apply, as in the most grotesque instance when he had to make a speech under the gallows and was forced to rely on clichés used in [a] funeral oratory which were inapplicable in his case because he was not the survivor."[271]

These comments regarding the banality of evil and thinking reveal the close connection between thought and personal morality. The individual who fails to think risks committing evil acts not so much because of malice but simply because he refused to confront the task of thinking. Thus, Arendt attributed Eichmann's participation in the final solution as borne out of his failure to become conscious of himself, what she refers to as the two-in-one, "the soundless dialogue (*eme emautō*) between me and myself."[272] In line with Arendt's reflections, we can thus conclude that the refusal to think on the level of the rule of right engenders this same banality of evil.

One final but important distinction must be made. Thinking and judging are two different activities. Arendt clarifies the difference thus:

> The faculty of judging particulars (as Kant discovered it), the ability to say, "this is wrong," "this is beautiful," etc., is not the same as the faculty of thinking. Thinking deals with invisibles, with representations of things that are absent; judging always concerns particulars and things close at hand.[273]

In the first volume of LIFE OF THE MIND,[274] Arendt further explains what she means by judgment:

> [J]udgments are not arrived at by either deduction of induction; in short, they have nothing in common with logical operations — as when we say: All men are mortal, Socrates is a man, hence, Socrates is mortal. We shall be in search of the "silent sense," which — when it was dealt with at all — has always, even in Kant, been thought of as "taste" and therefore as belonging to the realm of aesthetics.[275]

In sum, we can say that, for Arendt, judgment is not reducible to the task of thinking for its subject matter is the particular and concrete rather than the abstract and invisible. However, this does not mean that they are unrelated. In fact, she says that, "[Judging] realizes thinking, makes it manifest in the world."[276] There is still, therefore, a need to think but, in order to judge, one must go beyond speculating on "righteousness" and "justice" towards categorically pronouncing that in this particular situation, given these particular parties, with this particular problem, the right thing to do is _____! And the best way to describe this prudent decision is to call it "tasteful."

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[271] *Id.* at 160 (internal citations omitted).
[272] *Id.* at 184.
[273] *Id.* at 189.
[274] HANNAH ARENDT, I LIFE OF THE MIND, *op. cit. supra* note 260.
[275] *Id.* at 215.
[276] H. ARENDT, *Thinking and Moral Considerations*, *op. cit. supra* note 19 at 189.

As a final note, and in order to bring us back to the Committee impeachment proceedings, I would like to point out that for Arendt, authentic thinking and judging gave certain men a certain power over history. Noting that in ancient Greek "historian" or *histôr* referred to a judge, Arendt writes,

> If judgment is our faculty of dealing with the past, the historian is the inquiring man who by relating it sits in judgment over it. If that is so, we may reclaim our human dignity, win it back, as it were, from the pseudo-divinity named history of the modern age, without denying history's importance, but denying its right to be the ultimate judge.[277]

Arendt seems to be crying out to our Committee members that they are not victims of precedent or hostages of their histories. Rather, they have the power to stand over and beyond their pasts, precedents, and even the law in order to chart their own visions of what constitute the *Rechtsstaat* — the Just or Righteous State.

VII. THE RULE OF RIGHT IN THE COMMITTEE PROCEEDINGS

A. TYRANNY OF THE MAJORITY: TURNING A BLIND-EYE

The manner in which the Majority consistently misapplied the law of rules has already been discussed at length in Part V. The point was to show that despite the inapplicability of the red letter of the law the Majority members still argued that the law of rules impelled their decision. Clearly, this evinced an unwillingness to think beyond legal precedent despite the unavailability thereof.

Aside from this misconstruction, the Majority through the person of the Chairman mishandled issues raised by the Minority that fell outside his strict agenda. In the order in which they were raised, these issues were the following: (1) that the Chairman as well as other Members of the House had prejudged the impeachment proceedings;[278] (2) that the CIDG raided the house of a certain Mr. Tabayoyong, who

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[277] H. ARENDT, I LIFE OF THE MIND, *op. cit. supra* note 260 at 216.

[278] Rep. Golez put the issue thus:

> REP. GOLEZ: Mr. Chairman, I'd like to preface my parliamentary inquiry with some observations and this is in regard to the show, "Viewpoint," dated August 11, aired over Channel 17, or ANC, where... Chairman Datumanong... was quoted to have said, and if I may paraphrase the statement of Chairman Datumanong... "the amended Lozano complaint violates the one-year bar rule under Article XI, Section 2(5)of the Constitution because it should be treated separately from the original Lozano Complaint, both of which must also be treated separately from the original Lopez Complaint" etcetera, etcetera. In addition, the Chairman was quoted as having said, and I quote, "The Hello Garci tapes are not admissible for being in violation of Republic Act 4200." Mr. Chairman, this gives me the impression that the Chair has prejudged the case, because this is precisely what we are going to discuss in today's hearing and in succeeding hearings. Proceedings, August 16, 2005, II:4.

Rep. Paras also had this to add:

> REP. PARAS: And besides, you have been appointed twice by the same President who is not the subject matter of this impeachment. You have been appointed Public Works Secretary, you have been appointed Secretary of Justice. Proceedings, August 16, 2005, III:5.

was allegedly in possession of the Minority's evidence;[279] (3) that Malacañang gave pro-administration Members of the House a road users tax as incentive for junking the impeachment complaint;[280] (4) that Atty. Lozano had filed an impeachment complaint against Gloria Macapagal-Arroyo when she was Vice-President of the Republic;[281] and,

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See also the Comments of Rep. Martinez, Proceedings, August 16, 2005, IV:2; & Rep. Antonio M. Serapio of the Second District of Valenzuela, Proceedings, August, 16, 2005, V-4-VI-2.

On the issue of the prejudice of certain members of the House, there is the following inquiry of Rep. Casiño:

> REP. CASIÑO: I would just like to ask the Chair, in the light of the pronouncements of Secretary Eduardo Ermita a week before we first opened this hearing and also the pronouncement of... Speaker de Venecia, to the effect that there is a document that has been signed by 170 members of this House, ...and this document is against the impeachment of the President, as well as the statement of Speaker De Venecia *na meron daw pong* 189 Members *ng Kongreso ang nagbigay ng* firm commitment *sa kanya na hindi papayagang umabot sa Senado ang* impeachment complaint *kahit na ano pa ang ebidensya. Puwede bang ilinaw sa atin ng* Chair *na walang ganyang dokumento* and, if there [is] such a document, that this does not bind the Members of the Committee on Justice to prematurely trash the complaint and, if there is such a document, may we please see that document just to dispel *'yung mga agam-agam ho ng ating mga kababayan na bale wala na itong pinag-uusapan natin dahil* 189 Congressmen *na ang boboto.* Proceedings, August 16, 2005, V-1.

See also Rep. Luis A. Asistio of the Second District of Caloocan, Proceedings, August 16, 2005, VI-2-VI-3.

[279] Rep. Escudero clarified the issue thus:

> REP. ESCUDERO: [I]t came to our attention that some of the election returns which were in our possession during the canvassing time last year were still or are still in the possession of Mr. Tabayoyong. Pieces of evidence, Mr. Chairman, or election returns which are being considered as part of the evidence that we would be presenting to support allegations of fraud, in addition to the tapes, if at all allowed before this Committee. Proceedings, August 17, 2005, I-2-I-3.

He added the following later in the proceedings:

> REP. ESCUDERO: I was on the phone, Mr. Chairman, a few minutes ago, with Attorney Raval, one of the lawyers... that helped us in the canvassing... one of the lawyers of Vice-Presidential candidate Loren Legarda-Leviste, and he just confirmed with me on the phone that, indeed the election returns for ARMM, that's... the election returns subject matter of the Garci tapes, some of them at least, where at the house of Mr. Tabayoyong and all of these ER's were confiscated by the CIDG when they conducted their raid. Proceedings, August 17, 2005, II:4.

See also Rep. Cayetano, Proceedings, August 17, 2005, I-2.

[280] Rep. Rosales put the issue thus:

> REP. ROSALES: *Noong Lunes po,* Monday, August 22, ...*lumabas na nagkaroon ng* election of members to the Committee of Justice, *ito'y patapos na, si* Representative Remedios Petilla vice Representative Fred H. Casto; *at ang pangalawa si* Representative Eric Singson vice Representative Edcel C. Lagman. *Ito po iyan noong Lunes. Eh halos wala nang tao pero andito rin ako pero nabayaan na rin ho iyon.*
>
> *Ngayon,* the next day, Tuesday *iyong unang* session *po natin, eh noong panahon ng* Tuesday *po ay lumabas sa diyaryo iyong pangalang ni* Representative Petilla at *alalang-alala ako sapagkat doon lumabas na siya po ay pinakamalaki ang natanggap na* 90 million *pesos sa* road users tax at *pumapangalawa lang sa kanya si* Representative Miranda *na* 68 million, *at pagkatapos* 50 million *naman si* Representative Aquino. *Iyon po iyong* PDI 23....
>
> Mr. Chairperson, when all these... *itong mga balitang lumalabas,* does it not cast a doubt on the objectivity and impartiality of the Members of the Committee on Justice to vote on the integrity of the questions that are... posed before us. Proceedings, August 24, 2005, II:3.

[281] Rep. Rosales put the issue thus:

> REP. ROSALES: Mr. Chair *nababahala po ako* while we are having a discussion *puwede ko bang maitanong lamang sa inyo kung ano ba ang tingin ng* Committee on Justice *tungkol dito sa bagay na ito na nakita ko itong dokumentong* that was addressed to Honorable Manuel B. Villar *noong* 10 November 2000 *na kung saan merong* endorsement *ng* impeachment complaint that was filed against President Gloria Macapagal Arroyo *noong* November 6, 2000....

(5) that Secretary Soliman allegedly overheard the President asking for the endorsement of the Lozano complaint.

The manner in which these five issues were handled evinces the Majority's dogged refusal to leave its misconstruction of the law of rules as well as its unwillingness to entertain a broader concern for the rule of right. To justify this assertion, I briefly examine each of the five issues.

1. The Chairman prejudged the proceedings!

When Rep. Golez had asked that Rep. Datumanong to inhibit himself from acting as Chairman because he had prejudged the case, the Chairman initially denied that he had made any such statement,[282] but when Rep. Golez volunteered to play a video recording of the interview in the session hall,[283] the Chairman abandoned his outright denial and instead attempted to justify his position thus:

> THE CHAIRPERSON: To put, once and for all, an end to the debate or discussion on what has been alleged to or [has] been said by the Chairman and which according to a member of the Committee, is a ground for inhibition, the Chair would like to state that, first, he is not [going to] inhibit himself from presiding over the meeting. The position of the Chair is a political position to which he has been elected by the House of Representatives in the plenary.[284]

In effect, the Chairman seemed to acknowledge that he had indeed prejudged the proceedings but that his biased position did not require that he inhibit himself because the House in plenary had elected him to the post of Chairman of the Committee on Justice.

> This was filed by Atty. Oliver O. Lozano, the same Atty. Oliver O. Lozano who filed the original complaint here in 2005. Here is, and was endorsed by Congressman Pichay on November 10, 2000.
>
> Mr. Chair, *ang tanong ko po, itong* verified complaint *ni* Atty. Lozano against Vice-President Macapagal-Arroyo in year 2000 *baka ito po ba ay parang modus operandi ng Administrasyon*.... Proceedings, August 30, 2005, XII:3.

[282] Proceedings, August 16, 2005, II:5.

[283] *Id.* at II:5. Rep. Rodolfo G. Plaza of the Lone District of Agusan del Sur similarly requested for the playing of the tape. Proceedings, August 15, 2005, III:2. this was protested against by Rep. Antonio V. Cuenco of the Second District of Cebu City who accused the Minority of deliberately delaying the proceedings. Proceedings, August 15, 2005, III:2.

[284] Proceedings, August 16, 2005, III:3. The Chair also tried to point out that his duties as Chair were very limited and thus his sentiments would not substantially affect the proceedings:

> REP. GOZOS: Mr. Chairman, I would just like to ask, on the issues and questions raised before this Committee, who decides — is it the Chair or the members?
>
> THE CHAIRPERSON: The decision of the Committee is a decision of majority of all the members.
>
> REP. GOZOS: Does the Chair vote on...
>
> THE CHAIRPERSON: The Chair does not even participate unless there is a tie....
>
> REP. GOZOS: Mr. Chairman, my last question is: What is the role of the Chairman, if you may please tell us?
>
> THE CHAIRPERSON: The Chairman is to preside over the meeting of the Committee and to ensure that, as much as possible, there should be orderly proceedings in the meeting. Proceedings, August 16, 2005, II:2.

Connected to this issue of the Chairman's prejudice is the issue raised by Rep. Casiño and Rep. Asistio regarding the amassing of the signatures of Members of the House against the impeachment of President Arroyo. This issue was completely disregarded by the Committee. The closest thing to a response came not from the Chairman but from Majority members who pointed out that the issue had already been raised in plenary[285] and that Speaker de Venecia, who could properly respond to the issue, was not even present at the Committee proceedings.[286]

Towards the end of the discussion on these issues, which occupied the Committee for about an hour and a half, Rep. Antonio V. Cuenco[287] called on the Chairman to be "more strict in the application of the rules" as the issues raised by the Minority are "irrelevant and immaterial."[288]

Nothing, however, could be further from the truth for, indeed, the bias of a presider has consequences on the basic sense of fairness. In particular, a prejudged case has the effect of denying an equal application of laws which is a value protected even by the law of rules. If indeed the Chairman and the Majority had prejudged the proceedings despite not having heard the arguments or seen the evidence of the Minority, then it can truthfully be said that the death of the Amended Complaint was foretold.

2. The Administration is stealing our evidence!

The second issue involved the requests of the Minority that the Committee (1) inform the CIDG, by way of a letter, of its concern about the alleged raid of Mr. Tabayoyong's house and (2) request the CIDG to justify its raid. Rep. Escudero put it thus,

> REP. ESCUDERO: At the very least, Mr. Chairman, I think we owe, not only [to] those who endorsed the impeachment complaint but also [to] our people, that letter asking the CIDG, and the PNP in general to explain their conduct because, to our minds, it impinges upon the proceedings that we are presently undertaking in connection with the impeachment filed against President Gloria Macapagal-Arroyo.[289]

Ultimately, the Chairman acceded to the request of Rep. Escudero.[290] This, however, came with very strong resistance from the Majority. In particular, Rep. Fred H. Castro[291] and Rep. Arthur D. Defensor argued that the issue was beyond the jurisdiction of the Committee.[292] Resorting to the rationale employed by Rep. Lagman, Rep.

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[285] Rep. Cuenco, Proceedings, August 16, 2005, VI-3.
[286] Rep. Puentevella, Proceedings, August 16, 2005, VI-3.
[287] Representative of the Second District of Cebu City.
[288] Proceedings, August 16, 2005, VI-3.
[289] Proceedings, August 17, 2005, I-3.
[290] Chairman Simeon A. Datumanong, Proceedings, August 17, 2005, III:1.
[291] Representative for the Second District of Capiz.
[292] Rep. Arthur D. Defensor's enunciated his position thus:

Defensor argued that the protection of the evidence of the Minority was not yet an issue for the Committee.

> REP. ARTHUR D. DEFENSOR: [I]f we are going to accede to the request, I assume that we are "*putting the cart before the horse.*" If we are talking of protection of witnesses, we haven't reached the point where we are going to determine whether there is a complaint that is valid; ...whether there is a complaint that has met the test of sufficiency of form and sufficiency of substance.[293]

The argument unfairly prejudices the Minority for two reasons. First, at this point in the proceedings, the Committee had not yet decided to take up Rep. Lagman's prejudicial questions.[294] Strictly speaking, therefore, there was no horse before which the cart could be put. Second, to follow the rationale of Rep. Defensor would have had the effect of rendering moot the concern raised by the Minority. In fact, Rep. Escudero harps on this consequence: "*Kung susundan nating iyong sinasabi ni* Congressman Defensor *na wala pa tayo sa punto ng may didinggin tayong ebidensiya, ang kinakatakutan ho namin baka pagdating natin sa puntong iyon ay wala na po kaming ebidensiya.*"[295]

Although ultimately allowed by the Chair, the position of Rep. Defensor reveals an insistence on strict rules even at the expense of substantial justice. What is even more peculiar, and to which much emphasis has already been given, is that the prejudicial questions, which kept the Committee from looking into the form and substance of the complaints, do not even belong to the strict letter of the law. Furthermore, even assuming *arguendo* the validity of the "cart before the horse" argument, it is clear that the Committee by virtue of the House Impeachment Rules has the power to act upon the matter. Rep. Escudero was quick to point out that the power to give protection to witnesses,[296] which he did not invoke in itself, "makes no distinction... as to what stage the impeachment proceedings is in."[297] Thus, regardless of the question occupying the Committee, if it already proved necessary, protection could have been afforded Mr. Tabayoyong. And, in comparison with the prejudicial questions, this is a matter strictly provided for by the rules.

> REP ARTHUR D. DEFENSOR: [W]hile we join them in their concern for government action on the event that they related, we beg to disagree on the request for a ruling from the Chair[.] [E]ven by any stretch of the broadest of our imagination insofar as the jurisdiction and task of this Committee is concerned, can we relate this incident to the relevance of the duties and functions and powers of the Committee. Proceedings, August 17, 2005, II:1.

It is peculiar to note that the comment was directed at a prior request of Rep. Escudero for a ruling from the Chair on the propriety of the raid. Rep. Escudero had actually clarified himself when he requested for only a letter from the Committee. Rep. Francis G. Escudero, Proceedings, August 17, 2005, I-3.

[293] Rep. Arthur D. Defensor, Proceedings, August 17, 2005, II:3.

[294] This issue was raised during the August 17, 2005, Proceedings. The questions of Rep. Lagman were accepted by the Committee on August 23, 2005.

[295] Rep. Francis G. Escudero, Proceedings, August 17, 2005.

[296] House Impeachment Rules, Rule III, sec. 7.

[297] Rep. Escudero, Proceedings, August 17, 2005, II:4. As the Chair pointed out, however, said power requires that it be shown that a witness' "personal safety is in jeopardy because of his participation in impeachment proceedings." Proceedings, August 17, 2005, III:1, quoting sec. 7 of , Rule III of the House Impeachment Rules.

3. The Administration is Buying Votes in Congress!

With respect to the third issue concerning the road users tax, Chairman Datumanong ventilated the issue but ultimately decided that it did not merit the Committee's attention.[298] He considered the issue resolved upon the following explanation of Rep. Arthur D. Defensor:

> REP. ARTHUR D. DEFENSOR: [I]f the allocation or implementation of the road users tax was intended to influence the vote of the Members so as to dismiss or kill or terminate the proceedings prematurely, I think the reverse is happening. Because, if you will notice, while in the newspapers there were some members who were allegedly allocated fantastic amounts of money..., then Members like Congressman Nograles had no allocation, who is Majority Leader. I as Senior Deputy Majority Leader have no allocation.... [T]hat was a very bad attempt at influencing, because instead of me supporting the anti-impeachment position, I will vote for the impeachment if that is the intention because I have no allocation.[299]

Basically, the argument suggests that if the grant of the road users tax was intended as a bribe, it was not a good one because Majority members who did not receive the tax from Malacañang would have become jealous of those who did. The argument is unsatisfying. First, it does not squarely confront the issue of whether or not the road users tax had in fact been given to some members of the Majority. It simply asserts that it is not an effective bribe. Second, it implicitly concedes that other Majority members would have been willing to accept the bribe if it had been offered. Third, by conceding that Majority members would have been willing to vote for the dismissal of the impeachment complaints if "the price was right," the argument reveals that what motivated the "yes" or "no" votes was financial favor or disfavor with Malacañang.

Perhaps Rep. Arthur D. Defensor and the Chairman could have taken a step further and attempted to justify this financial motivation. This could have been done by way of some pragmatic utilitarian and economic ethos that would candidly admit the sordid state of the separation of powers in the Philippines and point, in particular, to the fact that the executive can hold Members of the House hostage by withholding or delaying budgetary allocations to the different regional voting districts. The argument would most definitely have been a hard sell as it would be a blow on the independence of the House as well as a concession that the Executive rules by force rather than by law. However, if the news reports concerning the road users tax were indeed accurate, then this argument might offer a semblance of discourse on the level of right.

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[298] "THE CHAIRPERSON: [I]f it is about the road users tax, this impeachment proceedings has nothing to with road users tax." Proceedings, August 24, 2005, III:3.

[299] Proceedings, August 24, 2005, II:3-II:4.

4. The Complainant is in Cahoots with the President!

With respect to the fourth issue raised by Rep. Rosales, that it appeared that the complaint filed by Atty. Lozano was a *modus operandi* of the President to file weak impeachment complaints against herself, the Chairman responded to this with a trite, "Distinguished Lady, thank you very much for the parliamentary inquiry. That is not related to the... impeachment proceedings today."[300]

Of the five issues, this one should have been ventilated before the Committee on Justice because if indeed the same complainant in the 2000 case against then Vice-President Macapagal-Arroyo was the same complainant in the 2005 impeachment case, then it might indeed suggest that the Lozano Complaint was a sham complaint set merely to toll the constitutional one-year bar and thus jump the gun on all other impeachment proceedings. If that were the case, then to entertain Rep. Lagman's prejudicial questions would be to reinforce this blatant insubordination of the Constitution.

5. The Endorser is an ally of the President!

The fifth and last issue centered on the refusal of the Chairman to entertain the motion of Rep. Barbers to call on Secretary Soliman to explain her allegation that the President had asked that Rep. Marcoleta immediately endorse the complaint filed by Atty. Lozano. It is quite unfortunate that the Majority refused to entertain this issue. For one, Secretary Soliman's allegation is easily refuted. As Rep. Abalos pointed out a day after the walkout of the Minority, Rep. Marcoleta was not the only endorser of the Lozano Complaint. Its other endorser was a member of the Minority, Rep. Suplico.[301] Thus, even granting that Secretary's Soliman's allegations were true, it would appear to have been mooted by the Suplico endorsement.

On the other hand, if the Committee was indeed convinced that Secretary Soliman's testimony was authentic, then the same comments made with respect to the prior section would apply, i.e. the Committee would have done well to avoid deciding upon Rep. Lagman's prejudicial questions, which would have the effect of legitimizing the President's *modus operandi* of filing complaints against herself.

What all these five issues reveal is the refusal of the Majority and the Chair, more specifically, to entertain issues that fail to follow their strict conception of what falls within the jurisdiction of the Committee. The consequence is that the Majority awkwardly turns a blind eye to the issues of collusion and prejudice, revealing either their malicious intent or, as Arendt says, their inability to think on the level of the rule of right.

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[300] Proceedings, August 30, 2005, XII:3-XII:4.
[301] Proceedings, August 31, 2005, V-3.

B. MISAPPRECIATING MAJORITARIAN RULE: THE MINORITY WALKOUT AND THE DEMOCRATIC PROCESS

The Committee on Justice proceedings completely broke down on July 30, 2005, when the Minority walked out on the proceedings. As has been noted, this was apparently a reaction to Chairman Datumanong's refusal to entertain the Minority's motion to hear the testimony of Sec. Soliman concerning President Arroyo's alleged order to have the Lozano complaint endorsed immediately.[302]

During the plenary vote on the Committee report, Rep. Escudero explained that the Minority had walked out "because they could no longer stomach what was being done to them and what they were seeing."[303] He described it as an "outburst of emotion" which might be credited to the fact that the Minority was composed of "young Congressmen and first-term Members who held high ideals and goals for the House as an institution and whom the Committee had failed."[304] On the other hand, critics of the Minority commented that the walkout was not an emotional outburst but a calculated move.[305] This is not so farfetched an idea.

Walkouts have become an ingredient of the People Power formula. The first EDSA had the February 9, 1986 walkout of 30 COMELEC computer controllers in protest of the alleged tampering of election results.[306] Similarly, the second EDSA had the January 16, 2001 walkout of the House's private prosecutors after the Senate voted not to open the controversial second envelope.[307]

With respect to the Minority's walkout, Malacañang officials were quick to say that it was part of an organized effort tied in with Sec. Soliman's news conference earlier in the day.[308] This conspiracy theory makes sense when seen in the light of the escalating

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[302] A newspaper article reported Secretary Soliman's disclosure thus:

> Soliman said she happened to be beside the President when [her political adviser, Gabriel] Claudio[,] approached and informed the Chief Executive that Marcos loyalist Oliver Lozano had filed an impeachment complaint.
>
> "Na-endorse na ba? (Has it been endorsed?)" Soliman quoted President Arroyo as saying.
>
> "Pa-endorse mo na," the President allegedly ordered Claudio when he said no.
>
> Soliman said Claudio also said he would talk to Alagad Rep. Rodante Marcoleta to see if he would endorse Lozano's complaint. Ferdinand Fabella & Fel Maragay, *Dinky returns, alleges Palace-House collusion*, in Manila Standard Today, August 31, 2005, available at <http://www.manilastandardtoday.com/?page=news02_aug31_2005> April 15, 2006.

[303] Journal of the House of Representatives, Journal No. 14, Monday and Tuesday, September 5 & 6, 2005, available at <http://www.congress.gov.ph/legis/print_journal.php?congress=13&id=104> December 15, 2005.

[304] *Ibid.*

[305] "REP. JARAULA: In a very well managed, good only for the movies, on cue, they all stood up and showed some papers, some of them claimed that those papers are election returns." Proceedings, August 31, 2005, III:1. See also Rep. Marcoleta, Proceedings, August 31, 2005, XII:2.

[306] See <http://library.thinkquest.org/15816/thebeginning.article8.html> December 15, 2005.

[307] See, generally, AMANDO DORONILA, THE FALL OF JOSEPH ESTRADA (THE INSIDE STORY) (2001).

[308] See Michael Lim Ubac, *Arroyo foes stage walkout: Theatrics, a planned tantrum, Palace says*, Philippine Daily Inquirer, August 31, 2005, A1. An interesting side story to the even is shared in one editorial published two days after the event:

number of mass protests that were then being staged against President Arroyo. Furthermore, if we note that Rep. Escudero had from the very start declared that the Minority would not participate in an impeachment proceeding based upon the Lozano Complaint,[309] then it appears that the walkout could indeed have been planned from the very start.

To determine whether the walk out was planned from the very start or was a spontaneous emotional response would be to speculate into motives of individual Minority members. At best, this would yield tentative propositions. In order to arrive at a more categorical determination of the Minority's adherence to the rule of law, it is better to examine the concrete ramifications of the Minority members' walkout and their continued refusal to participate in the proceedings.

What then was the effect of the walkout? Some Committee members suggested that the proceedings should be stopped altogether pending the return of the Minority.[310] Chairman Datumanong realized, however, that this was unnecessary as the Majority comprised a quorum. Clearly, therefore, the walkout did not leave the Committee inutile. Its only clear categorical effect, therefore, is that it prevented the Minority from participating in the debate. We must then ask, "Is this refusal to participate contrary to the rule of law?" This paper contends that, in this particular circumstance, it is. To justify this assertion, it is necessary to take a brief look at the purpose of proceedings governed by the "rule of the majority" for, ultimately, the Minority walked out precisely because they were *only* a Minority.

1. Carlos Santiago Nino and Deliberative Democratic Discourse

For Carlos Santiago Nino, the closest one can come to the morally right decision would be a decision which is unanimously approved. The reason for this is that a unanimous approval would be the closest approximation of impartiality.[311]

> At one point, another neophyte, Rep. Robert Jaworski Jr., harangued the justice committee chair, Rep. Simeon Datumanong who is a former governor, five-term congressman and two-time cabinet member. Jaworski told the supremely patient and amiable Datumanong that if the majority continued behaving the way they were doing, they should be prepared for a "rebellion."
>
> The pint-sized Muslim representative from the Maguindanao tribe, the largest tribe in Mindanao, who was seated then, drew himself up to the tall basketball player and told him, "Are you threatening me with "rebellion"? That is something we live with every day where I come from, so don't threaten me like that. Back where we come from, "*hindi ginagamit ang bola, kundi bala.*" [balls aren't used, bullets are]." Jaworski retreated.
>
> The problem with some of these young opposition lawmakers is that they seem to have become so arrogant and self-righteous. Belinda Olivares-Cunanan, *Opposition lost points with walkout*, Philippine Daily Inquirer, September 1, 2005, A15.

[309] Rep. Puentevella, Proceedings, August 31, 2005, IX:2. See also Manuel L. Quezon, III, *The walkout by the minority*, Philippine Daily Inquirer, September 1, 2005 where it was suggested that the walk-out was an inevitability: "Actually, for weeks now, it was said that the minority would do a walkout, either with or without Susan Roces. Rep. Edcel Lagman claims the opposition was set to walk out anyway after the disposition of the second prejudicial question."

[310] See Augusto H. Baculio, Proceedings, August 31, 2005, XII:1.

[311] Nino writes:

Majoritarian rule, Nino explains, is a further compromise of the morally right decision but still the best alternative when decisions must be arrived at within limited time frames that prevent participants from securing the consent of all.[312] It might seem that these democratic ideals support a utilitarian ethos of "the more that benefit, the better." This, however, is not what Nino intends. For him, the value of a unanimous vote or a majority vote is not the number of votes amassed by a particular side but the procedure that must be followed in order to arrive at unanimous or majoritarian decisions.[313]

In what way, then, do the democratic processes concerned with arriving at unanimous or majoritarian decisions have "greater epistemic power for providing access to morally correct decisions than any other collective decision-making procedure"?[314] Nino offers five reasons. First, *democratic discussion best makes known the interests of others.* He explains the rationale behind this rather obvious characteristic of democracy: "[L]ack of impartiality is often due, not to selfish inclinations of the actors in the social and political processes, but to the sheer ignorance of where the interest of others lie."[315] Second, *democratic discussion allows for the detection of factual and logical mistakes.* As with his first reason, Nino explains:

> Often a proposed solution is unjust not because it conceals selfish motives or because the person proposing it fails to represent the interests of others but because he ignores certain relevant facts or commits come logical fallacy. In these cases, it is possible that other participants in the discussion can detect those pitfalls and point them out so that the speaker may correct them.[316]

Third, *democratic discussion requires justification.* In his view of the democratic process, all participants must "justify their proposals to others" and must show that their interests are legitimate.[317] Fourth, *emotional factors come into play in democratic discussion.* In particular, Nino refers to (1) sympathy, which allows participants to put themselves into the shoes of another, and (2) the desire to avoid social blame, which is best realized only when a participant offers genuine, impartial, justified, consistent, and logically sound

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> If all those who may be affected by a decision have participated in the discussion and have had an equal opportunity to express their interests and justify to each other a certain solution of the conflict, this solution is almost always impartial and morally right as long as everyone has accepted the solution freely and without coercion. C. NINO, *op. cit. supra* note 246 at 117.

Nino, tells us that this is only a close approximation of the right decision because it may be possible that a person may propose a solution contrary to his own interests.

[312] C. NINO, *op. cit. supra* note 246 at 117.

[313] The shortcoming of a purely quantitative treatment of majoritarian decisions is clearly explained by the following example: a condominium's elevator breaks down; the unit owners meet to discuss how to repair the elevator; the problem arises when those who live in the lower floors refuse to pay for the repair of the elevator; eventually, a vote is held and the majority decides that only one person should pay for the cost of repairing the elevator. C. NINO, *op. cit. supra* note 246 at 118-119. Nino explains this obviously unfair solution thus:

> [O]ne cannot simply say that it is better to have a decision supported by a majority than one supported by a minority. It cannot be merely that the majority is closer to unanimity, since the functional equivalence between unanimity and impartiality does not seem to depend on a mere quantitative question. *Id.* at 119.

[314] C. NINO, *op. cit. supra* note 246 at 119.

[315] *Id.* at 119.

[316] *Id.* at 124.

[317] *Id.* at 121.

arguments.[318] Fifth, *democratic processes involves bargaining.* Nino explains the value of bargaining thus: "It forces participants... to attend to as many interests as possible, offering solutions that satisfy those interests for fear of losing the favor of the majority."[319]

The fruit of discourse in the spirit of the above is wonderfully captured by Claro M. Recto's Valedictory Address delivered on February 8, 1935, on the occasion of the closing session of the Constitutional Convention:[320]

> When it looked as if irreconcilably antagonisms of party and doctrine were going to frustrate our common task, the upholders of opposite tendencies and theories gave magnificent proof of their self-control by overcoming their passions and prejudices. Leaving behind them, before entering the portals of this august hall, their animosities and ill-wills, these men did their part in the common national task by placing the supreme interest of the people above their private creeds and ideologies. In a spirit of nobility they have tried always to see the other side of every question with the result that the party barriers which separated them from the others were ignored and gave way to the unanimous desire to render the greatest service to the country.[321]

We likewise find Cecilia Muñoz Palma, the President of the 1986 Constitutional Commission, similarly thanking her colleagues on the morning of October 15, 1986, at the closing of their Commission proceedings: "If we have accomplished the mission given to us by our people it was because we rose above our personal biases and animosities and worked in peace and harmony to attain a common goal, the full liberation of the Filipino people."[322]

From the words of Recto and Muñoz Palma, it might seem that the demands of discourse are proper only for a special breed of unselfish individuals. Although this might ultimately be Nino's desire, the truth is that he works on the assumption that individuals do indeed have personal interests. His contention however is that by virtue of collective decision-making, these interests, can be tempered by the interests of others.[323]

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[318] *Id.* at 125.

[319] *Id.* at 127.

[320] II PROCEEDINGS OF THE PHILIPPINE CONSTITUTIONAL CONVENTION 798.

[321] *Id.* at 802.

[322] V Record of the Constitutional Commission: Proceedings and Debates, 1013.

[323] For instance, Nino explains the third reason — i.e. discussion requires justification — by returning to his condominium example (See note 313):

> If in our example of the discussion between the members of a condominium, it were allowed as a proper move to say, "This is what I want," "This is convenient for me," it would be impossible for the discussion to progress. Thus, the neighbors whose interests are not affected by any particular solution or who have a natural tendency to be impartial would not know how to resolve the dispute. Instead, if the self-interested neighbors are obliged to frame their arguments in the form of "Those who do not benefit from a service are not obliged to pay for it" or "A condominium is a scheme of cooperation in which everybody pays for everything whether he directly benefits from it of not," there are many foreseeable ways I which the discussion may progress and in which unselfish participants may be convinced. C. NINO, *op. cit. supra* note 246 at 123.

Majoritarian decisions should, theoretically, always be a function of deliberative democratic discourse for such decisions are not concerned with the numbers per se but with the task of arriving at those numbers.[324]

2. The Minority Walkout as an Abandonment of Democratic Discourse

Nino tells us that the above rationale rests upon the following "underlying conditions of the process":[325]

> ...[1] *that all interested parties participate in the discussion and decision*; [2] that they participate on a reasonably equal basis and without any coercion; [3] that they are able to express their interest and to justify them on the basis of genuine arguments; [4] that the group has a proper size which maximizes the probability of a correct result; [5] that there are no insular minorities, but the composition of majorities and minorities changes with the issues; and [6] that people are not extraordinarily excited by emotions.[326] (emphasis supplied)

It is in the light of these underlying conditions that we see how the Minority's non-participation in the proceedings was detrimental to the rule of law as the rule of right. For indeed, how might deliberative discourse be possible if the first condition — participation in the discussion and decision — is not met?

By dissociating themselves from the proceedings, the Minority effectively muted its voice in the Committee. This cannot be justified by the argument that it was an "emotional outburst." Nino's last underlying condition is that participants must not be extraordinarily excited by emotions. In addition, the walkout cannot be justified by pointing to the second underlying condition — ability to participate on a reasonably equal basis — and accusing Chairman Datumanong of undue bias when he refused to hear their motions, to entertain their parliamentary inquiries or to divide the House in order to resolve disputes. This precisely is the point of discourse, the task of unmasking the biases of the other parties. It would have been sheer *naiveté* on the part of Minority to expect that they would get whatever they pleased from the proceedings. Precisely, it

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[324] It should be pointed out that Nino does offer a further justification for majoritarian rule in particular. He argues that quantitatively a majority is more likely to arrive at the correct decision than an individual for Condorcet's theorem provides that "if we assume that each member of a decision-making panel has a tendency to adopt the right decision, the probability that the decision is right also increases as the number of the members of the panel increases." C. NINO, *op. cit. supra* note 246 at 127. Nino follows Kornahuser and Sager and explains that "by considering each person's decision as the draw of a marble from a bag with marbles of two colors: white for the correct decision and blue for the incorrect one, mixed in the proportion of the probability that each person reaches the correct decision. As long as the proportion of white marbles exceeds half of the total amount of the bag, the more draws there are, the more likely that more than half of the marbles drawn will be white—that is, that the decisions are correct." *Ibid.* This confidence Nino places in man's tendency to arrive at correct moral decision might be explained in part by Owen Fiss who describes Nino as being "always the believer in the essential goodness of people." Owen Fiss, *The Death of a Public Intellectual*, 104 YALE L. J. 1187 (1995), available at <http://www.stafforini. com/nino/fiss.htm> November 2004. Nino notes that in the event that the rights in conflict are so complex that they cannot be resolved within the time limit, "the morally correct outcome is that which maximizes the satisfaction of interests protected by those rights." C. NINO, *op. cit. supra* note 246 at 128.

[325] C. NINO, *op. cit. supra* note 246 at 128-129.

[326] *Id.* at 129.

was their task to continuously unmask injustices taking place during the proceedings; and, it is my contention that they were in fact succeeding until they had walked out. For instance, Representatives Locsin and Roman, who were not aligned with the "pro-impeachment" representatives ultimately decided against the blatantly biased tactic of the Majority.[327] Similarly, Representatives Barbers, E. Reyes, Robert Jaworski, Jr., and Gilbert C. Remulla formally aligned themselves with the Minority on August 23, 2005 when they saw that the Majority was relying upon "sheer numerical superiority" and "legal technicalities" to prevent the Committee from entertaining the Amended Complaint.[328] Furthermore, even some Majority members seemed to be wavering in their support of President Arroyo as was evident from their tentative stand on the last day of the proceedings.[329]

By removing themselves from the decision-making process, they could not continue to argue against the Majority's tactic. As put very simply by Rep. Villafuerte, "*[P]ag hindi pa tapos ang usapan ang umuwi hindi magwawagi, ang pikon laging talo.*"[330] The Minority should have conceded the quantitative shortfall of "the rule of majority" but should nonetheless have sought to protect the rationale behind deliberative democratic processes. By refusing to participate in the discourse, the rule of right was subverted precisely because the Minority refused to verbalize it in the proceedings.

C. ATTEMPTS AT ARGUING BEYOND THE LAW OF RULES

It would be unfair not to acknowledge the attempts of members from both the Majority and Minority to argue on the level of principles beyond the strict language of the law. To close this paper the following are offered as examples of such attempts by some Committee members.

1. We make the rules!

More than one Committee member recognized that the problem of the three impeachment complaints was hardly an issue for the law of rules. For instance, Rep.

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[327] For instance, their final pronouncements with respect to the sufficiency in form of the Lozano Complaint reveal their sentiment that the Majority had indeed unfairly handled the proceedings:

> REP. ROMAN: I vote yes because if the Committee, after having chosen the Lozano Complaint, decided to junk it because of insufficiency of form, it would have confirmed the worst suspicions of the so-called opposition and the so-called pervasive public perception.
>
> So now I think that what is before us, as a humble Member of your Committee, is this historic and golden opportunity that this is an honest impeachment proceeding. Proceedings, August 31, 2005, XXI-3.
>
> REP. LOCSIN: I also warn that [striking] out the Amended Complaint and the Lopez Complaint is [to] implicitly... endorse the Lozano-Suplico Complaint which this Committee cannot now avoid without the risk of absurdity.
>
> It may be that even the remaining Lozano-Suplico Complaint will not get the support of Congress. Well, then, let it be struck down by Congress in plenary, but it cannot be done in committee. Proceedings, August 31, 2005, XXIII:3-XXIV:1.

[328] Rep. Edmundo O. Reyes, Jr., Proceedings, August 31, 2005, II:1.

[329] See Rep. Baculio, Proceedings, August 31, 2005, XII:1; Rep. Wacnang, August 31, 2005, XIV:2; & Rep. Jaraula, August 31, 2005, XXIII:2.

[330] August 31, 2005, IV:2.

Roman pointed out that the Committee was not required by the law to choose "any one of the complaints."[331] Instead, he argued that the better solution would be to choose a standard that would "give credibility to this process":[332]

> REP. ROMAN: If you choose the first complaint, you must justify it in the sense that it should not be seen as having been chosen because it is the weakest of all, it should not be seen as being chosen because it seemed that Malacañang welcomed it as evidenced by the fact that the answer was filed even before the impeachment rules. If you choose the amended complaint, I should remind the others that an impeachment is not an instrument of political warfare. You should not probably choose an offense committed even before the term....
>
> So, *ang importante lang po sa atin*, whatever we choose, be sure we can pass it off because the entire country is watching us. We choose this not because any particular party will be protected but because this is what will give credibility and life to the Constitution.[333]

Another example of a member who argued for the Committee's power to make rules, rather than simply being bound by them is Rep. Casiño:

> REP. CASIÑO: *Tayo po ay Kongreso*, exercising our exclusive power over impeachment. That's why we are the ones who decide *kung ano ang gusto natin mangyari sa* impeachment. That is our power. *Kaya pinag-uusapan natin itong* amended complaint. And we all know that there is nothing to stop us from doing what we want. If we want to choose the amended complaint, we can do it. If we want to consolidate the three, we can do it because that is our exclusive power. *Eh, yun ho yung kapangyarihan natin.*[334]

Finally, it was the rather silent Representative from Kalinga, Rep. Laurence B. Wacnang,[335] who pointed out the rationale behind the rule-making power of the House: "[T]he Constitution... has allocated this power to the House of Representatives, where it is not only our role to find whether or not there is probable cause, but also to grapple with the bigger question of whether or not it is the better policy to impeach a sitting president."[336]

2. Truth v. Justice

From the very start, the Minority identified "the search for truth" as the moral standard against which all decisions should be measured. Rep. Cayetano in fact set "the truth" side by side with the concern for the rule of law:

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[331] Proceedings, August 16, 2005, XIV:3.

[332] *Id.* at XIV:4.

[333] *Id.* at XIV:4.

[334] Proceedings, August 30, 3005, XI:2.

[335] Representative of the Lone District of Kalinga.

[336] Proceedings, August 31, 2005, XIV:4. Note that Rep. Wacnang was one of the Majority members who was of the opinion that the Lozano and Amended complaints could be consolidated..

> REP. CAYETANO: Mr. Chairman, let us go back to the purpose of the Constitution imploring the aid of the Almighty in order to build a just and human society found in the Preamble of the Constitution. The Constitution states that, to secure ourselves and our posterity the blessings of independence and democracy under the rule of law — *pero hindi po nagtatapos doon, may kasunod po 'yun* — and a regime of truth, justice, freedom, love, equality, and peace. *Wala pong* rule of law *kung walang* regime of truth. *Yun pong mga* technicalities *ay inilalagay sa batas para madaling mahanap ang katotohanan at hindi po maging mahirap hanapan ang katotohanan.*[337]

The Minority's problem was that, more often than not, their reference to "the truth" seemed to be an abstract invocation of empty principle.[338]

The Majority, on the other hand, acknowledged the importance of the search for truth but insisted that this had to be measured against basic concerns for due process. We see this, for instance, in Rep. Javier argument against Rep. Edmundo Reyes' plea for more signatures for the Amended Complaint:

> REP. JAVIER: We, too, are in search for the truth. We, too, are in search for justice, in the same manner that today I stand in this Committee in search for truth and justice. But I cannot search for truth and justice if I assume the role of accuser and judge at the same time. For as a member of this Committee and of this House, I have to sit in judgment on whether a probable cause exists to warrant the impeachment of the highest official of the land, no less than the President of the Republic. I am, therefore, asking our colleagues for understanding, not to tar and feather our fellow colleagues who refuse to affix their signatures to the impeachment complaint.[339]

In the same vein, Rep. Edgar M. Chatto[340] argued that although "[f]inding out the truth is our aim and our collective objective, ...observing both procedural and substantive due process in arriving at the truth is a constitutionally guaranteed right."[341]

Alternatively, Rep. Gozos argued not so much for the supremacy of justice but for its inseparability from the truth and law:

> REP. GOZOS: *Alam po ninyo, natatandaan ko ang sinabi [ni]* Justice Pompei Diaz, *no'ng kanyang idinefayn* (define) *kung ano ang* justice... He said, "What is Justice? Justice is to give someone his due. And what is the truth? The truth is that, which

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[337] Proceedings, August 16, 2005, XII:1.

[338] The following is an example of a "motherhood" invocation of truth, which though eloquent, seems to be more fit for the rally call of the streets than the halls of Congress:

> REP. MARIANO: *Ang lumalakas pong panawagan ng taong bayan, lalung-lalo na po sa lahat ng Miyembro ng Komiteng ito at ng Mababang Kapulungan ng Kongreso, ay manindigan para sa katotohan at katarungan. Dahil po and katotohanan ay hindi maaaring piringan ng mata, ang katotohanan po ay hindi maaaring busalan ang bibig. Ang katotohanan po ay hindi maaaring mapaglalangan. Ang katotohanan po ang magpapalaya sa ating lahat. Sa ngalan po ng katotohanan, katarungan at kagalingan at kapakanan ng taumbayan, lalung lalo na po sa yugto't panahaong ito,* the truth is not for sale. Proceedings, August 17, 2005, X:4-XI:1.

[339] Proceedings, August 31, 2005, XV:1.

[340] Representative of the First District of Bohol.

[341] Proceedings, August 17, 2005, XVIII:4-XIX:1.

> we seek so that we can give someone his due. And what is the law? The law is the instrument by which we seek the truth so that we can give someone his due. And that is justice." *Ang akin po, ang pairalin dito ay ang batas.*[342]

Unfortunately, no member of the Committee was able to offer a coherent theory that would incorporate all these various concerns, and much less, show how these principles would be applicable to their problem of three impeachment complaints. For instance, why would the Amended Complaint best uncover the truth? In fact, if the "truth" is the central concern, why resort to an impeachment process? Investigative journalism may be the more appropriate vehicle for truth. And, with respect to due process, why would the entertainment of the Lozano Complaint be a more just resolution to the problem? In fact, why should the Committee even look into questions of form and substance? Why can't the Committee simply dismiss all the complaints from the onset? Would that not be more just? And, in the end, are justice and truth really in conflict? Which of the two values should be the primary consideration in an impeachment process?

Thus, although there were attempts at discussing on the level of principle, the discourse, for the most part remained rather shallow.

3. National Welfare

Other members referred to broad principles of national welfare.[343] One of the more insightful "national welfare" arguments was made by Rep. Manuel C. Ortega,[344] who in response to the Minority walkout, had the following to say:

> REP. MANUEL C. ORTEGA: For me, both sides are right when they argue, but then you have to make a decision which side will you go. *Hindi pwedeng baklang desisyon.* We have to do to the left or to the right. But the final nail that made up my mind today, Mr. Chairman, was the action displayed by the complainants yesterday which is, I think, very unparliamentary, ungentlemanly and irresponsible. Can you imagine if they take over the reins of government, such irresponsible people running our government, what will happen to the Philippines, what will happen to us and yet, we are for sobriety, we want order and yet, they try to ignite the emotions of people who are against the administration.[345]

We see that Rep. Ortega's decision is hinged upon the quality of the leaders that would replace the President if she were impeached from office. Ultimately, he sees that the President may in fact be guilty of betrayal of the public trust but that she would still be the lesser evil as compared to the Minority. Rep. Ortega explains his position as

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[342] Proceedings, August 24, 2005, XI-3-XII:1. See also Rep. Abalos, Proceedings, August 31, 2005, V-2, who makes reference to Justice Diaz's argument that "the law should be made an instrument in finding the truth."

[343] See Rep. Agapito A. Aquino of the Second District of Makati, Proceedings, August 23, 2005, III:1, who invoked national stability.

[344] Representative of the First District of La Union.

[345] Proceedings, August 31, 2005, VIII:1.

justified by the rule of law that would be more fully realized by the leadership of President Arroyo than her successors.[346]

4. Pragmatic Considerations

Although, the above are all clear indications of attempts to think beyond the clear boundaries of the law, they all are marked by the fatal defect of not being able to translate general visions of truth, justice and public welfare into concrete decisions. In Arendt's language, the above might be considered examples of thinking but they are hardly examples of judging, i.e. which are always concerned with "particulars and things close at hand."[347]

Thus, some Committee members tried to look at the concrete ramifications of deciding one way or another. For the Majority, Rep. Gozos argued against allowing amendments to the previously filed complaints thus:

> REP. GOZOS: [I]f the House were to countenance such amendments, it would open the floodgates to the willy-nilly practice of filing impeachment complaints with the Secretary-General... during the House recess with the hopes that others will jump [on to] the bandwagon and file amendments before the first complaint is referred to the Committee on Justice. The effect of such is that the original complaint could be amended a hundred times over before the actual referral to the Committee in order to accommodate innumerable grounds of impeachment and the pleasures and whims of co-complainants. Such absurdities could not have been contemplated by the Constitution.[348]

On the other hand, Rep. Jesus Crispin Remulla, offered the following pragmatic argument for the Minority:

> REP. JESUS CRISPIN REMULLA: On June 27, 2006, [exactly one year after the filing of the Lozano Complaint] *marahil sa* June 26 midnight or *alas diyes ng gabi* 2006, *ay baka magkaroon ng karera ng daga. Pipila ang tao sa gate ng batasan, magu-unahan kung sino ang unang magpa-file ng* complaint *laban sa Pangulo pagkat ang nakikita ko ay hindi tayo matatapos dito kahit ano man ang ating gawin.* This is the ridiculous, preposterous and probably unacceptable facet of what we are doing now. We are debating about who enter[ed] the gate first and being able to enter the gate first is the first one to get the prize. *Karera, parang mga batang nagu-unahan, parang taguan. Hindi po ito laro.*[349]

Both arguments are valid and offer real concerns that should have been addressed by either side.

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[346] Unfortunately, because this is the first time Rep. Ortega speaks before the Committee, we fail to see his sentiments on Rep. Lagman's prejudicial questions and the arguments of the Majority and Minority on the issue of the one year bar rule.

[347] H. ARENDT, *Thinking and Moral Considerations*, *op. cit. supra* note 19 at 189.

[348] Proceedings, August 24, 2005, XI-2.

[349] Proceedings, August 31, 2005, X:2.

IX. CONCLUSION

In Franz Kafka's parable, *Before the Law*,[350] a man from the country waits to enter into the gates of the Law. His waiting is in vain as the doorkeeper "in his fur coat, with his big sharp nose and long, thin, black Tartar beard" never grants him admittance. On his last breath, the man asks why, during his long wait, no one else has ever sought admittance. The doorkeeper responds, "No one else could ever be admitted here, since this gate was made only for you. I am now going to shut it."

On the occasion of the tenth anniversary of Kafka's death, Walter Benjamin[351] attempted to explain the parable as well as the novel within which it was published, THE TRIAL.[352] He pointed out that Kafka understood the law to be ruthless because it always remains a secret.[353] In the parable, the imposing doorkeeper stands as the guardian of the gates of the Law who threatens the man from the country thus:

> If you are so drawn to [the Law], just try to go in despite my veto. But take note: I am powerful. And I am only the least of the doorkeepers. From hall to hall there is one doorkeeper after another, each more powerful than the last. The third doorkeeper is already so terrible that even I cannot bear to look at him.[354]

As Benjamin writes, "The courts, to be sure, have lawbooks at their disposal, but people are not allowed to see them."[355] Hannah Arendt clarified this further.[356] She explained that the inaccessibility of the law was a function of an irrational bureaucracy,[357] which could not be simply abandoned because men had deified the law. She writes: "Kafka depicted a society which had established itself as a substitute for God, and he described men who looked upon the laws of society as though they were divine laws...."[358] The

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[350] FRANZ KAFKA, *Before the Law* (Willa Muir & Edwin Muir trans.), in FRANZ KAFKA: THE COMPLETE STORIES AND PARABLES 3 (Nahum N. Glatzer ed. 1983). *Before the Law* was published in 1914 during Kafka's lifetime and posthumously in 1925 as part of his novel, THE TRIAL.

[351] WALTER BENJAMIN, *Franz Kafka, On the Tenth Anniversary of His Death*, in ILLUMINATIONS: ESSAYS AND REFLECTIONS 111 (Hannah Arendt ed. & Harry Zohn, trans. 1968).

[352] FRANZ KAFKA, THE TRIAL (1937).

[353] *Id.* at 115. It should be noted however that the sense of "the law" in Benjamin refers not so much to positive law, but to some sort of divine order which he refers to as "prehistoric":

> Laws and norms remain unwritten in the prehistoric world. A man can transgress them without suspecting it and thus become subject to atonement.... In Kafka, the written law is contained in books, but these are secret; by basing itself on them the prehistoric world exerts its rule all the more ruthlessly. *Id.* at 114-115.

[354] F. KAFKA, *op. cit. supra* note 350 at 3.

[355] W. BENJAMIN, *op. cit. supra* note 351 at 114.

[356] HANNAH ARENDT, *Franz Kafka: A Revaluation: On the Occasion of the Twentieth Anniversary of His Death*, in ESSAYS IN UNDERSTANDING 1930-1954: FORMATION, EXILE AND TOTALITARIANISM 69(Random House ed. 1994).

[357] In particular, she writes:

> [Kafka] knew that a man caught in the bureaucratic machinery is already condemned; and that no man can expect justice from judicial procedures where interpretation of law is coupled with the administering of lawlessness, and where the chronic inaction of the interpreters is compensated by a bureaucratic machine whose senseless automatism has the privilege of ultimate decision. H. ARENDT, *Franz Kafka: A Revaluation, op. cit. supra* note 356 at 71.

[358] H. ARENDT, *Franz Kafka: A Revaluation, op. cit. supra* note 356 at 72.

ruthlessness of the law is that, on the one hand, it always remains inaccessible and, on the other hand, it has become man's God. Joyce Carol Oates sums up the problem thus: "[T]the gateway *is* the means of salvation, yet it is also inaccessible."[359] Before the law, men forever remain fallen.

To the common Filipino the impeachment proceedings had the same absurd air as Kafka's parable. The term "rule of law" was cast about so often that it took on the obscure character of a divinity, which if invoked would infuse any argument with validity. Thus, Committee members could say whatever they pleased as long as they closed their speeches with the magic words: "rule of law." A Kafka commentator warns that this "self-righteous trust in... the rule of law cannot dispel the bad dream of a society whose bureaucracy seems to be set up only to deny the efficacy of rationality."[360] And that precisely, has been the point of this paper. The use and abuse of the "rule of law" by members of the Committee on Justice revealed, more than anything else, that the proceedings were irrational.

It might be asked, "Exactly how were the proceedings irrational?" This paper tried to show that the questions before the Committee on Justice were novel and that no simple solution could be found in the rote application of constitutional provisions, procedural rules on impeachment, or jurisprudence. Thus decisions which simply invoked the rule of law as the law of rules appeared empty and baseless. But when the law of rules was applicable, its red letter would shift hue to satisfy the strained arguments of the Majority that the Constitution barred multiple *complaints* or that impeachment proceedings were initiated by the *filing* of a complaint with the Secretary General of the House or that a *ten-minute difference* in the time the Committee on Justice receives a complaint bars subsequent complaints. There is no way to rationalize these decisions. They are all blatantly absurd. And yet, they are justified as the "rule of law"!

Furthermore, given the novelty of the issue, the Committee need not have relied on the strict "law of rules" but could have attempted to explain the positions by referring to *Rechtsstaat* and abandoning the question, "What rules should we apply?" in favor of "What is the right thing to do?" As has been pointed out, however, the Committee refused to think, in the sense in which Arendt speaks of thinking. Instead, Latin maxims like *dura lex sed lex* cluttered the argument much like the clichés Eichmann was left with when making his final speech.

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[359] Joyce Carol Oates, *Kafka as Storyteller*, in FRANZ KAFKA: THE COMPLETE STORIES AND PARABLES ix, xii (Nahum N. Glatzer ed. 1983).

[360] Rolf J. Goebel, *The exploration of the modern city in The Trial*, in THE CAMBRIDGE COMPANION TO KAFKA 42, 59 (Julain Preece ed. 2002).

In the end, the student reviewing the proceedings is left with the strange sense that perhaps he has missed something in the discourse. He might think of himself as lacking a certain facility with the language of the law. Perhaps he has not read the right books or really understood the jurisprudence. And the doorkeeper's message rings in his ears: "I am now going to shut [the gates to the Law]."

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APPENDIX A:

FOUR OTHER "ANTECEDENT" FACTS

Four points must be noted in connection with the brief recapitulation of antecedent facts in Part I. The first is that even before the Amended Complaint was filed, President Macapagal-Arroyo through Atty. Pedro Ferrer filed an "Answer *Ex Abundante Ad Cautelam*" to the Lozano Complaint. Specifically, the said answer was filed on July 19, 2005.[361] The reaction of Minority members of the House was sharp. Rep. Cayetano for instance was reported to have made the comment that not only had the administration gotten an ally, in the person of Rep. Marcoleta, to endorse the Lozano complaint but that the House Impeachment Rules only require the respondent to answer the complaint after it has been determined to be sufficient in form and substance.[362]

The three final points are not really antecedent facts but they are best noted here as they are of the same character as the President's "Answer *Ex Abundante Ad Cautelam.*"

On August 5, 2005, Atty. Lozano, after already having signed the Amended Complaint, "filed an urgent manifestation seeking the urgent resolution of his original complaint separately and independently of the amended complaint."[363] This is strange

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[361] A brief recital of the contents of the pleading are offered by Sol Jose Vanzi in *GMA to House: Dismiss Impeachment Complaint To filed by Lawyer*, in Philippine Star, July 23, 2005, available at <http://www.newsflash.org/2004/02/hl/hl102453.htm> April 15, 2006.

> In her answer, the President denied betraying the public trust, which is the single impeachable offense raised by Lozano in his complaint against Mrs. Arroyo.
>
> She noted the controversial "Hello, Garci" recordings, which are the principal basis for the complainant's petition, were not legally admissible for any purpose in any proceeding....
>
> "Under the Constitution and Republic Act No. 4200 (the Anti-Wiretapping Law), however, the alleged wiretapped conversations subject of the controversy cannot be used for any purpose in any proceeding..... The same obviously cannot be used as evidence in these impeachment proceedings without running afoul of the Constitution and Republic Act No. 4200," the President's answer read....
>
> [Furthermore,] Mrs. Arroyo denied the complainant's claim, saying it was vague "as to what particular alleged tape the complainant is referring to therein."
>
> Insofar as allegations of cheating in the May 2004 presidential elections are concerned, the President said the House had no jurisdiction over this matter since it was within the authority of the Supreme Court, sitting as the Presidential Electoral Tribunal.
>
> Besides, she argued, the impeachable acts she allegedly committed "are acts prior to, or outside the term of the respondent, the duly elected President, and hence, not subject to impeachment."
>
> She dismissed all other allegations as "mere baseless conclusions and/or unfounded opinions," such as those claiming she cheated in the elections, robbed the sovereign will of the people and that her presidency was bogus.

It is interesting that many of these points raised in this "Answer Ex Abundante Ad Cautelam" actually appear in the Committee Report eventually submitted to the House in plenary.

[362] S. Vanzi, *op. cit. supra* note 361.

[363] Proceedings, August 24, 2005, XII:3. Some members harped upon this point in order to argue for the eventual exclusion of the Amended Complaint. See, for instance, Rep. Valdez, Proceedings, August 17, 2005 XII:3-XIII:1.

not only because Atty. Lozano signed the Amended Complaint but also because the said Amended Complaint reproduced in toto the Lozano Complaint together with all its supplements. In any case, Atty. Lozano later withdrew his retraction and manifested his desire to have all three complaints consolidated into one. The biased treatment by the Majority of these retractions become evident in the following statements of Rep. Lagman:

> REP. LAGMAN: No less than Atty. Lozano in a live television show admitted that the filing of the Amended Complaint was a tactical maneuver to avoid [it] being tagged as a prohibited pleading which it is. Consequently, Atty. Lozano in an urgent manifestation before this Committee said that this Committee should consider his original complaint as a separate complaint, independent of the Amended Complaint. But later Atty. Lozano filed a manifestation like... [an] after thought that the three (3) complaints should be consolidated, but this ambivalence on the part of Atty. Lozano should not be given credence anymore.[364]

In effect, Rep. Lagman considered the first "retraction" to be worthy of being taken up by the Committee, but considered the second "retraction" as impertinent. Would it not have been more reasonable to have either thrown out or kept both of Lozano's retractions rather than adopting this jaundice-faced stance of accepting one but denying the other?

The third point is that over and above the "Answer *Ex Abundante Ad Cautelam*," the President filed on August 10, 2005 a "Motion to Strike re: Supplemental Complaints." This was filed despite the fact that the prohibition of the House Impeachment Rules against motions to dismiss.[365] Again, Rep. Lagman takes a questionable position vis-à-vis this prohibited motion by including it amongst his initial seven prejudicial questions.[366] Ultimately, the Committee did not take up the issue. It

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[364] Proceedings, August 30, 2005, XIV:2.

[365] "No motion to dismiss shall be allowed within the period to answer the complaint." House Impeachment Rules, Rule III, sec. 5.

[366] Proceedings, August 16, 2005, VII:1-VII:2.

> REP. LAGMAN: There are some who said that the Motion to Strike cannot be filed at the outset of this proceedings because the respondent of her counsel has no personality yet.... Mr. Chairman, it is also contended that since the Motion to Strike would refer to the jurisdiction of this Committee... then it could be raised at any time.... It is also contended, Mr. Chairman... that the Motion to Strike is a prohibited pleading because it is virtually a motion to dismiss, which is not consistent with our rules. According to our rules no motion to dismiss shall be allowed within the period to answer the complaint.
>
> On the other hand, it is contended that the motion to dismiss is prohibited within the period within which the respondent would make his responsive pleading. And before that, the respondent can file a motion to strike corresponding or challenging the jurisdiction of the Committee with respect to taking cognizance of certain complaints....'[I]t is very possible, Mr. Chairman, that in resolving the issues you have raised and the prejudicial questions, the very questions raised in the motion to dismiss can also be resolved. Id. at VII:2.

See also Rep. Domogan, Proceedings, August 24, 2005, VII:1; Rep. Dumarpa, Proceedings, August 30, 2005, XIX:3. For the Minority, see Rep. Ocampo, Proceedings, August 16, 2005, V:2.

should be noted, however, that the "Motion to Strike" did not escape the critical remarks of the Minority.[367]

The fourth and final point is that on August 15, 2005, Rep. Marcoleta filed a manifestation and motion before the Committee to "suspend all proceedings pending decision by the Supreme Court on whether [the] Committee has jurisdiction to decide which complaint or complaints it should take cognizance of."[368] Specifically, Rep. Marcoleta offered the following argument:

> REP. MARCOLETA: I would like to believe, Mr. Chairman, that this Committee is stripped of jurisdiction to select and to resolve the issue as to which of the three complaints is supposed to be taken cognizance of [by] this Committee.... Our Rules [presuppose] the existence of only [one] complaint before the limited jurisdiction of this Committee can be had. The limited jurisdiction is only to determine the sufficiency to form and sufficiency of substance. Only upon the existence of only one valid complaint. But before us is an unprecedented case that never happened in the history of the House. How can this Committee, with that limited jurisdiction, try to resolve a fundamental and basic dispute as to which of these three [complaints] will be heard?[369]

Like the second issue, the Committee did not address this manifestation and motion.[370]

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[367] See Rep. Mariano, Proceeding, August 17, 2005, XI:2.

[368] Proceedings, August 16, 2005, VII:3.

[369] *Id.* at V-4.

[370] In fact, when Rep. Lagman pointed out Rep. Marcoleta's motion to the attention of the Committee, Minority members quickly raised a point of order as they were not even aware that such a manifestation and motion had been filed. See the exchange between Rep. Suplico and Rep. Lagman, Proceedings, August 16, 2005, VII:3.