POLITICISATION AND JUDICIAL ACCOUNTABILITY IN THE PHILIPPINES*

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> *Vouchsafed neither the sword nor the purse by the Constitution but nonetheless vested with the sovereign prerogative of passing judgment on the life, liberty or property of his fellowmen, the judge must ultimately depend on the power of reason for sustained public confidence in the justness of his decision.*
> -People v. Bugarin, G.R. Nos. 110817-22 (1997)

I. INTRODUCTION

The Philippine Supreme Court is experiencing an uncomfortable moment in its history. Many of its decisions are criticized, even ridiculed, and the Justices themselves are frequently threatened with impeachment. Chief Justice Renato Corona summed it all up when he said that "[n]ever before has the entire Judiciary, even in the days of martial law, been subjected to so much disrespect and lack of civility from sectors we sincerely consider to be our

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partners in nation-building."[1] This statement suggests serious problems for a country that has been attempting to rebuild the judiciary's reputation since the post-Marcos era.[2]

The Article analyzes this phenomenon and offers an explanation for the Court's present conundrum. My theory is that the Court's recent conduct reflects a level of politicisation that provokes criticisms. When this happens, the legitimacy of its decisions is put into question. As a consequence, calls for impeachment come quickly and frequently.

This Article will proceed in the following way: I will discuss the increasingly scathing criticisms of Supreme Court decisions, and the threats of impeachment against the Justices. In my view, these were triggered by controversial decisions by the Supreme Court favoring certain individuals or parties—from the politicisation of the judiciary. I will show how the Court's politicisation may be rooted in its expanded power of judicial review. The Court's expanded powers are meant to prevent a repetition of judicial excesses under the Marcos regime. These excesses continue because of several factors which are enumerated by Stacia Haynie: a) expanded judicial power under the 1987 Constitution; b) increased freedom of the media; c) politicized selection process of the judges and Justices; d) mandatory retirement age; and e) ability of retired Justices to practice and appear before the courts.[3] The Article will then discuss the implication of a Court's seeming politicisation—that it challenges legitimacy. In conclusion, I will show that the Court has opened itself to challenges against its legitimacy and virtually invited criticism and calls for the impeachment of the Justices.

II. SABRE RATTLING

To fulfil a campaign promise to hold public officials of the past administration accountable, President Benigno Aquino III created a Truth Commission as his first official act as President of the Philippines. The Supreme Court declared the Commission unconstitutional in *Biraogo v.*

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[1] *Corona hits attempts to undermine Judiciary*, BUSINESSWORLD, Oct. 13, 2011, *available at* http://www.bworldonline.com/content.php?section=Nation&title=Corona-hits-attempts-to-undermine-Judiciary&id=39940.

[2] *See* discussion in Part III *infra*.

[3] *See* Stacia Haynie, *Paradise Lost: Politicisation of the Philippine Supreme Court*, 22 ASIAN STUD. REV. 459 (1998).

Philippine Truth Commission of 2010.[4] Administration allies in Congress initially considered the filing of impeachment charges against Chief Justice Renato Corona,[5] and eventually did so on December 12, 2011.[6]

In *De Castro v. Judicial and Bar Council*,[7] a majority of the Court allowed President Gloria Macapagal-Arroyo to name the next Chief Justice despite an election season ban on appointments. In response, Nueva Ecija Representative Eduardo Nonato Joson said that he would start a campaign to impeach the nine Supreme Court Justices who comprised the majority.[8]

In another case, several members of Congress and some "comfort women"[9] filed an impeachment case against Associate Justice Mariano Del Castillo "as a warning to the justices against tolerating dishonesty and injustices in the system."[10] This case was filed after the Supreme Court exonerated

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[4] G.R. No. 192935 (2010). The Court denied a motion for reconsideration on July 2011.

[5] Joyce Pañares & Rey Requejo, *Aquino: House allies plan to impeach Chief Justice*, MANILA STANDARD, *available at* http://www.manilastandardtoday.com/insideNews.htm?f=2010/december/9/news1.isx&d=2010/december/9.

[6] Andreo Calonzo, *Supreme Court Chief Justice Renato Corona impeached*, GMA NEWS, Dec. 12, 2011, http://www.gmanetwork.com/news/story/241463/news/nation/supreme-court-chief-justice-renato-corona-impeached.

[7] G.R. No. 191002 (2010). Abandoning precedent, the Supreme Court ruled that President Gloria Macapagal-Arroyo was not prevented by the constitutional bar against "midnight appointments" in filling a vacancy in the Supreme Court two months before the presidential election.

[8] Gil Cabacungan, Jr., *Lawmaker starts move to impeach 9 SC justices*, PHIL. DAILY INQUIRER, Mar. 21, 2010.

[9] Kazuko Watanabe, *Trafficking in Women's Bodies, Then and Now: The Issue of Military "Comfort Women"*, 27 WOMEN'S STUD. Q. 19, 20 (1999), discussing that the phrase "military comfort women" is a euphemism for "forced military sex slavery during World War II." In reality, it means the "systematic rape of women and the regulation of rape by the Imperial Japanese Army."

[10] Lira Dalangin-Fernandez, *11 solons file impeach rap vs SC justice*, PHIL. DAILY INQUIRER, Dec. 14, 2010, *available at* http://newsinfo.inquirer.net/breakingnews/nation/view/20101214-308934/11-solons-file-impeach-rap-vs-SC-justice.

Justice Del Castillo[11] from charges of plagiarism with respect to the Court's majority opinion in *Vinuya v. Executive Secretary*.[12]

The case of Justice Del Castillo is particularly interesting because the public response to the act of plagiarism was unprecedented. Law schools issued statements against the *Vinuya* ruling and the Court's defense of its beleaguered colleague. Members of the University of the Philippines College of Law issued a statement that, among other things, called for Del Castillo's resignation.[13] The De La Salle University College of Law in turn asked the Supreme Court to reverse its ruling that absolved Justice Del Castillo. In a strongly-worded statement dated November 5, 2010, the DLSU law faculty criticized Supreme Court Justices for tolerating intellectual dishonesty committed by a fellow member of the bench.[14]

The Ateneo de Manila University claimed that the Supreme Court's definition of plagiarism— which "presupposes intent, and a deliberate, conscious effort to steal another's work and pass it off as one's own"— contradicted its understanding of "the essential nature of plagiarism." As such, despite the Supreme Court decision, "the Loyola Schools' understanding and definition of what constitutes plagiarism has not changed[and that cases] of plagiarism will continue to be handled in the same manner, and with the same regard for due process, as stipulated in the Student Handbook."[15]

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[11] In the Matter of the Charges of Plagiarism, Etc., against Associate Justice Mariano C. Del Castillo, A.M. No. 10-7-17-SC (2010).

[12] G..R. No. 162230 (2010).

[13] The statement displeased the Court which admonished Dean Marvic Leonen and reminded the rest of the professors of their duties as officers of the Court in *Re: Letter of the UP Law Faculty Entitled "Restoring Integrity: A Statement by the Faculty of the University of the Philippines College of Law on the Allegations of Plagiarism and Misrepresentation in the Supreme Court* (A.M. No. 10-10-4-SC [2011]). *See* Tetch Torres, *SC admonishes UP law dean, professors on plagiarism case*, PHIL. DAILY INQUIRER, Mar. 8, 2011, *available at* http://newsinfo.inquirer.net/breakingnews/nation/view/20110308-324208/SC-admonishes-UP-law-dean-professors-on-plagiarism-case.

[14] Sophia Dedace, *More schools reject Supreme Court denial of plagiarism*, GMA NEWS, Nov. 9, 2010, *available at* http://www.gmanews.tv/willtowin/story/205543/more-schools-reject-supreme-court-denial-of-plagiarism.

[15] ATENEO DE MANILA UNIVERSITY *The Memorandum on the Treatment of Plagiarism Cases in the Loyola Schools in Light of the Recent Supreme Court Decision*, Nov. 4, 2010, *available at* http://www.admu.edu.ph/index.php?p=120&type=2&aid=9149.

The University of the Philippines' University Council issued its own statement where it said, "[w]e strongly disagree with the Supreme Court's decision to exonerate Justice Mariano del Castillo from charges of plagiarism based on the lack of malice or negligence on his part" and that the "[t]he lack of malice or intent does not excuse the act of plagiarism."[16]

The Catholic Educational Association of the Philippines ("CEAP"), the largest association of Catholic schools and universities, called on "the rest of the Philippine academia and the entire citizenry to unite and speak with one voice and act collectively in defense of honesty and integrity."[17] The Coordinating Council of Private Educational Associations ("COCOPEA") in its own statement said that cavalier attitude toward plagiarism will only invite intellectual dishonesty in the academe.[18]

Members of Congress also revealed plans to impeach members of the Court when the Supreme Court cleared the way for the impeachment of the Ombudsman in *Gutierrez v. House of Representatives Committee on Justice*.[19] The plan was conceived after it was discovered that the Court initially stopped the impeachment proceedings through a *Status Quo Ante* Order issued on September 14, 2010, when members of the Court had not even read the Ombudsman's petition.[20]

The League of Cities, on the other hand, said it would file an impeachment case against the seven Justices who voted in favor of the creation of new cities[21] in *League of Cities of the Philippines v. Commission on Elections*.[22] The

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[16] UNIVERSITY OF THE PHILIPPINES-DILIMAN STUDENT COUNCIL, *No to Plagiarism! Asserting Academic Freedom: A Statement of the University Council of the University of the Philippines. Diliman*, Nov. 26, 2010, *available at* http://www.upd.edu.ph/~updinfo/octnovdec08/articles/no_to_plagiarism.html.

[17] Dedace, *supra* note 14.

[18] *Id.*

[19] G.R. No. 193459 (2011).

[20] Rodolfo Fariñas, *'SC justices have violated public trust'–Fariñas*, NEWSBREAK, February 25, 2011, *available at* http://www.newsbreak.ph/2011/02/25/sc-justices-have-violated-public-trust/. The *Status Quo Ante* Order itself generated threats of impeachment against the Justices. See *House leader threatens to impeach Justices over Merci*, PHIL. STAR, Dec. 11, 2010, *available at* http://www.philstar.com/Article.aspx?articleId=638215&publicationSubCategoryId=.

[21] Juancho Mahusay, Eva Visperas, & Paolo Romero, *SC justices who flip-flopped on cityhood ruling to be impeached,* PHIL. STAR, March 16, 2011, *available at* http://www.philstar.com/Article.aspx?articleId=666624&publicationSubCategoryId=.

ruling exempted 16 new cities from the income requirements under the Local Government Code.

The latest call for impeachment happened when the Supreme Court recalled its "final" decision ordering the reinstatement of 1,400 Philippine Airlines ("PAL") flight attendants purportedly because a wrong division of the Court issued the ruling. The Court *en banc* decided to handle the case after Philippine Airline's lawyer wrote the tribunal and questioned its Second Division ruling, ordering the reinstatement of the members of the Flight Attendants and Stewards Association of the Philippines ("FASAP").[23] Calls for the Justices' impeachment followed immediately.[24]

There have been two earlier attempts at impeaching Supreme Court Justices. Former President Joseph E. Estrada filed an impeachment case against Chief Justice Hilario Davide and other Justices for their alleged role in unseating him as President. Another case was filed against Chief Justice Davide on the alleged misuse of the Judiciary Development Fund, but was subsequently declared unconstitutional by the Supreme Court.[25] By any measure, therefore, there are an unusual number of calls for the impeachment of Supreme Court Justices.

III. HISTORY

The Supreme Court's fall from the pedestal of independence and self-respect began when, in an attempt to duck a constitutional ban for a third term as President, Ferdinand Marcos initiated a revision of the Constitution. Marcos wanted the convention to either extend his term by two more years or to change the form of government from presidential to parliamentary. Marcos could then run as a member of parliament in his home province and, as leader of the majority party, become Prime Minister. This would have enabled Marcos to stay in power indefinitely, or at least as long as

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[22] League of Cities v. Commission on Elections, G.R. No. 176951 (2011).

[23] Philip Tabueza, *Supreme Court recalls final ruling on PAL cabin layoffs*, PHIL. DAILY INQUIRER, Oct. 11, 2011, *available at* http://newsinfo.inquirer.net/73877/supreme-court-recalls-final-ruling-on-pal-cabin-layoffs.

[24] *See* Conrado de Quiros, *Impeach them*, PHIL. DAILY INQUIRER, Oct. 11, 2011, *available at* http://opinion.inquirer.net/15125/impeach-them.

[25] G.R. No. 160261 (2003).

his party controlled Congress.[26]

Before the Constitutional Commission could finish its work, Marcos placed the country under martial law. He then pushed for the adoption of a new Constitution but ignored the procedures in the Constitution[27] Instead, he created People's Assemblies in every barrio, which were composed of all citizens over 15 years of age. These assemblies were convened and asked to vote on the Constitution, which was presented without opposition, with no free press, no civil liberties and when Marcos' opponents and political commentators were either in detention or in exile.[28] These assemblies carried out the adoption of the Constitution "where armed soldiers and policemen were in prominent attendance."[29]

The procedure for the ratification of the Constitution was attended by irregularities. For example, the assemblies included minors. Additionally, no official ballots were used because voting was done by a show of hands. The Commission on Elections took no part in the exercise, so there were no regulations governing tabulation and counting of the votes.[30] There were claims that these assemblies were never convened[31] and that the votes allegedly cast in these meetings were simply manufactured by Marcos' people.[32] Marcos also had secret meetings with some members of the Supreme Court even before martial law was declared and in the weeks before the 1973 Constitution was ratified. The Supreme Court ignored these procedural defects and refused to invalidate the Marcos Constitution. In effect, it allowed Marcos to rule for another thirteen years.

Long before the end of Marcos' rule, the public respect formerly accorded the Supreme Court, as well as the Court's reputation for independence, had dissipated. By the time Marcos was deposed in 1986, the

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[26] *See* Dante Gatmaytan, *Changing Constitutions: Judicial Review and Redemption in the Philippines*, 25 UCLA PAC. BASIN L. J. 1 (2007). This section relies heavily on said article.

[27] Jean Grossholtz, *Philippines 1973: Whither Marcos?*, 14 ASIAN SURV. 101, 102 (1974).

[28] *Id.*

[29] David Wurfel, *Martial Law in the Philippines: The Methods of Regime Survival*, 50 PAC. AFF. 5 (1977).

[30] Grossholtz, *supra* note 27 at 104.

[31] Peter Kann, *The Philippines Without Democracy*, 52 FOREIGN AFF. 612, 623 (1974).

[32] Richard Claude, *The Decline of Human Rights in the Republic of the Philippines*, 24 N.Y.L. SCH. L. REV. 201, 207 (1978).

Court was regarded by many Filipinos as subservient to the President, and many believed that the Court had become loyal to the President. Even the Supreme Court acknowledged "many judicial problems spawned by extended authoritarian rule which effectively eroded judicial independence and self-respect" which would require time and effort to repair. The Supreme Court survived martial law, but it emerged a shell of its former self. Since then the Court has had to work to regain the public's respect. Part of the effort to restore the credibility was built into the 1987 Constitution. Among others, the 1987 Constitution bears the following features:

1. The appointment of all judges by the President is no longer subject to confirmation by the Commission of Appointments (a body composed of members from both houses of Congress);

2. The two-thirds majority vote required under the 1935 Constitution for setting aside a law or treaty as unconstitutional has now been reduced to a simple majority vote; and

3. There is a prohibition on decreasing the compensation of judges by law, and legislative appropriations for the Judiciary "shall be automatically and regularly released."[33]

The Filipino people, however, may have overshot their target. The Court was given the power to review discretionary acts of the political branches of government, thus raising concerns that it would become the most dangerous branch of government.[34]

IV. JUDICIALIZATION AND POLITICISATION

Scholars have expressed discomfort with these changes. They say that the empowerment of the Philippine Supreme Court under the 1987 Constitution makes the Philippines a prime candidate for judicialization of politics.

Judicialization of politics is defined as:

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[33] Florentino Feliciano, *The Application of Law: Some Recurring Aspects of the Process of Judicial Review and Decision Making*, 37 AM. J. JURIS. 26-27 (1992).

[34] PACIFICO AGABIN, *The Politics of Judicial Review over Executive Action: The Supreme Court and Social Change*, *in* UNCONSTITUTIONAL ESSAYS 167-198 (1996).

> (1) the expansion of the province of the courts or the judges at the expense of the politicians and/or the administrators, that is, the transfer of decision-making rights from the legislature, the cabinet, or the civil service to the courts or, at least, (2) the spread of judicial decision-making methods outside the judicial province proper. In summing up we might say that judicialization essentially involves turning something into a form of judicial process.[35]

In Neal Tate's view,

> The current (1987) Constitution assigns the judiciary, headed and managed by the Supreme Court, new and expanded powers and responsibilities that give it great potential to judicialize a wide variety of policy processes that would otherwise be the responsibility of the executive and the legislature, that is, the majoritarian institutions. It also contains an elaborate Bill of Rights capable of sustaining a vigorous politics of rights that would promote the judicialization of politics. Even more significantly, the Constitution contains other modifications of the provisions of the 1973 (and 1935) documents that represent clear reactions to Marcos's one-man rule. For example, in contrast to the earlier constitutions, the 1987 charter contains restrictions on the president's ability to suspend the privilege of the writ of habeas corpus, making the declaration of such a suspension almost a futile gesture.[36]

Students of law will no doubt respond to this concern with the words of Justice Laurel in *Angara v. Electoral Commission*:

> And when the judiciary mediates to allocate constitutional boundaries, it does not assert any superiority over the other departments; it does not in reality nullify or invalidate an act of the legislature, but only asserts the solemn and sacred obligation assigned to it by the Constitution to determine conflicting claims of authority under the Constitution and to establish for the parties in an actual controversy the rights which that instrument secures and guarantees to them.[37]

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[35] Torbjorn Vallinder, *When the Courts Go Marching In*, THE GLOBAL EXPANSION OF JUDICIAL POWER 13 (1995).

[36] C. Neal Tate, *The Judicialization of Politics in the Philippines and Southeast Asia*, 15 INT'L. POL. SCI. REV. 187, 190 (1994).

[37] G.R. No. L-45081 (1936).

The Supreme Court continues to assuage fears of the breakdown of checks and balances even under the present constitutional regime. In *Mantruste Systems, Inc. v. Court of Appeals*,[38] the Supreme Court explained that:

> While the judicial power may appear to be pervasive, the truth is that under the system of separation of powers set up in the Constitution, the power of the courts over the other branches and instrumentalities of the Government is limited only to the determination of ""whether or not there has been a grave abuse of discretion (by them) amounting to lack or excess of jurisdiction"" in the exercise of their authority and in the performance of their assigned tasks (Sec. 1, Art. VIII, 1987 Constitution). Courts may not substitute their judgment for that of the [Asset Privatization Trust], nor block, by an injunction, the discharge of its functions and the implementation of its decisions in connection with the acquisition, sale or disposition of assets transferred to it.
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> There can be no justification for judicial interference in the business of an administrative agency, except when it violates a citizen's constitutional rights, or commits a grave abuse of discretion, or acts in excess of, or without jurisdiction.

Fears of judicialization in the Philippines may be overstated, but others point to another consequence of the Court's new-found independence. According to others, the empowerment of the Supreme Court is "threatening to destabilise a long tradition of executive and legislative dominance."[39] This empowerment has fuelled efforts to co-opt the members of the Court, and limit its power and prestige. According to Haynie, "[t]his ensuing battle has resulted in a court under siege and an increasing recognition of the political nature of the court among the population at large, undermining public respect for the institution."

Aside from the expanded power of the Court under the 1987 Constitution, Haynie singles out increased freedom of the media as another reason for increased politicisation of the Court. Negative press attention has led to a dramatic decrease in public respect for the Court.[40] Haynie also points to other factors that increase politicisation, such as the politicized selection

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[38] G.R. Nos. 86540-41 (1989).

[39] Haynie, *supra* note 3 at 462.

[40] *Id.* at 467.

process under the Judicial and Bar Council, the mandatory retirement age which leads to higher turnovers in the Court, and allowing retired Justices to practice and appear before the courts.[41]

Haynie explains that citizens embrace the myth that judges make decisions purely on what the laws provide and they are not influenced by extraneous factors. She adds, "[i]f however, the political nature of courts become overtly evident to the public at large either through actions of members of the judiciary itself or those interacting with it, such as the executive, the legislature, and the media, the role of courts can be greatly diminished."[42] My view is that this diminished role gives rise to questions of legitimacy.

James Gibson and Gregory Caldeira treat these instances when the Court is unpopular as an opportunity to question the Court and for the Court to affirm its legitimacy in the face of strong dissent by the people:

> When people approve of a decision, the legitimacy of the decision maker is of little consequence since people are getting what they want. When the decision is unpopular, its efficacy hinges upon the perceived legitimacy of the decision-making process and institution. Some may ask, for instance, whether the institution has the authority, the "right," to make the decision, thereby challenging the outcome. Institutions short on legitimacy are thought not to be capable of vetoing the actions of more representative (and hence more legitimate) institutions of government.[43]

V. LEGITIMACY

It is when the Court seemingly decides with political motives that its legitimacy to render the decision becomes most challenged.

We, the People, assigned the power to "settle actual controversies involving rights which are legally demandable and enforceable" to courts.[44] I

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[41] *Id.* at 459, 462.

[42] *Id.*

[43] James Gibson & Gregory Caldeira, *Defenders of Democracy? Legitimacy, Popular Acceptance, and the South African Constitutional Court*, 65 THE JOURNAL OF POLITICS 1-30 (2003).

[44] CONST. (1987), art. VIII, § 1.

submit that we are bound to follow the Court's decisions if they are legitimate. Legitimacy assumes many definitions. According to Michael Petrick, it is not synonymous with "approval" or "rightness" but instead refers to the "the process by which authority is accepted."[45] The question of legitimacy is thus a question of how one can measure acceptance of the Court's authority. Moreover, he believes that the chief legitimizing technique of the Supreme Court is judicial review, while the final test of complete legitimacy must be compliance—preferably, voluntary compliance.

Legitimacy can also be understood in other ways. Gibson and Caldeira define it as "the right (moral and legal) to make decisions," synonymous with "authority." Institutions perceived to be legitimate are those with an authoritative mandate to render judgments for a political community.[46] Easton defined it as a "reservoir of good will" which he explained by an analogy: "a few rainless months do not seriously deplete a reservoir but a sustained drought, however, can exhaust the supply of water."[47]

This idea is explained by Richard Fallon[48] who identified two ways in appreciating claims of legal legitimacy when applied to exercises of judicial power. First, we can say that a judicial decision was legally legitimate, or at least not illegitimate, even though we disagree with it. This is because legal legitimacy is less than that a judicial judgment was correct. On the other hand, when we denounce a judicial act as illegitimate, we typically express a strong condemnation.[49] It implies more than that a legal judgment was merely incorrect. According to Fallon, when we denounce a judicial act as illegitimate, we suggest that a court either: (1) decided a case or issue that it had no lawful power to decide; (2) rested its decision on considerations that it had no lawful authority to take into account or could not reasonably believe that it had lawful authority to consider; or (3) displayed such egregiously bad judgment that its ruling amounted to an abuse of authority, not a mere error in its exercise.[50] Fallon makes the following illustration:

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[45] Michael Petrick, *The Supreme Court and Authority Acceptance*, 21 W. POL. Q. 5 (1968).

[46] Gibson & Caldeira, *supra* note 43 at 3.

[47] James Gibson et al., *Measuring Attitudes toward the United States Supreme Court*, 47 AM. J. POL. SCI. 354, 365 (2003), *citing* DAVID EASTON, A SYSTEMS ANALYSIS OF POLITICAL LIFE (1965).

[48] Richard Fallon, *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005)

[49] *Id.* at 1817-18.

[50] *Id.* at 1819-1820.

> For example, critics who claimed that the Supreme Court acted illegitimately in *Bush v. Gore* mostly seemed to imply that the majority acted not merely erroneously, but with a willful disregard for applicable constitutional principles. More particularly, some thought that the majority breached the requirement that judges must apply legal principles consistently, without regard to the parties or a case's partisan impact. To cite just one more example, suggestions that the Court behaved illegitimately in *Roe v. Wade* have often reflected views that the Court lacked lawful authority to recognize substantive due process rights not firmly rooted in the nation's history, or overstepped clear limits by resting its decision substantially on the majority Justices' personal views or preferences, or abused its discretion by extending precedents recognizing personal rights of bodily integrity to encompass a morally insupportable entitlement that inherently involves the destruction of innocent human life.[51]

The dual appreciation of legitimacy arises from Fallon's distinction between the substantive legal legitimacy and authoritative legitimacy of judicial rulings. Substantive legal legitimacy reflects the judgment's correctness or reasonableness as a matter of law; authoritative legitimacy is the legally binding character of a judicial decision which may depend on standards that allow a larger margin for judicial error.[52] In connection with Petrick's theory on legitimacy, authoritative legitimacy of a judicial judgment can thus be argued to depend on its substantive legitimacy.

VI. PUBLIC OPINION

The relationship of legitimacy and public opinion can be argued in one way or another but the thesis of this Article is that legitimate decisions withstand and can even direct public opinion, while public opinion influences decisions rendered illegitimately. Essentially, Supreme Court decisions are critically received. Especially when they are unpopular, there is no basis for presuming that the public readily accedes to the Court's rulings. The Supreme Court's effect on public opinion cannot be presumed. Therefore, the Court must first manifest its legitimacy as the institution authorized to render just

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[51] *Id.* at 1820.

[52] *Id.* at 1817-18.

decisions before they are followed by the people. They do so in the manner they exercise judicial review.

There are, however, two competing theories on the Supreme Court's impact on public opinion. The first, initially advanced by Robert Dahl, posits that because the Court is perceived as the ultimate arbiter of the law, its decisions are viewed as legitimate, credible, and therefore correct. This theory was later named the *positive response hypothesis* by Franklin and Kosaki and predicts that the public listens to the Court and always supports its decisions.[53] As to the scope of the hypothesis, Franklin and Kosaki,[54] along with Johnson and Martin, suggest that Court decisions can have a significant impact on public opinion in cases that concern the entire nation. However, Johnson and Martin limit this impact only to the *first* Supreme Court decision on a particular issue. Johnson and Martin's perspective is grounded in *social psychology theory*, which hypothesizes that once an individual forms an opinion, further elaboration will not change that opinion.[55] Johnson and Martin argue precisely that "once the Supreme Court helps individuals elaborate their opinions, subsequent decisions within the same issue area—even if they overrule an initial landmark decision—will have little effect on public opinion."[56] In a similar vein, some authors argue that individuals who are aware of a Court decision, but have low interest prior to the decision, tend to be more susceptible to persuasion by the Court.[57] Brickman and Peterson, however, disagree that only initial rulings of the Court will matter for the public while subsequent ones will not. Accordingly, they argue that the Court's impact

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[53] *See* note 54, *infra*. According to *legitimacy theory*, under some circumstances courts achieve a moral authority that places them above politics and allows them the freedom to make unpopular decisions. This moral authority—or legitimacy—means that people accept judicial decisions, even those they bitterly oppose, because they view courts as appropriate institutions for making such decisions. In this sense, commitment to procedure and process trumps concern over outcomes; dedication to the long-term health and efficacy of an institution overrides dissatisfaction with its immediate outputs; and, consequently, courts can effectively perform their assigned function within the political system.

[54] Charles Franklin & Liane Kosaki, *Republican Schoolmaster: The U.S. Supreme Court, Public Opinion and Abortion*, 83 AM. POL. SCI. REV. 751 (1989).

[55] Chaiken (1980), Petty & Cacioppo (1981) *in* Timothy Johnson & Andrew Martin, *The Public's Conditional Response to Supreme Court Decisions*, 92 AM. POL. SCI. REV. 299 (1998).

[56] *Id.* at 300.

[57] Hoekstra (2003), Hoekstra & Segal (1996), and Petty & Cacioppo (1986) *in* James Stoutenborough, *Reassessing the Impact of Supreme Court Decisions on Public Opinion: Gay Civil Rights Cases*, 59 POL. RES. Q. 419, 420 (2006).

appears to be determined not by the status of the Court, but the status of public opinion. If the public is unsettled on an issue, or if the issue is not accessible to most people, the Court can put an issue on the public agenda, generate discussion, and alter public opinion. If the issue is central or salient to voters, the court case should not matter regardless of how many previous rulings the Supreme Court has made.[58] Supporting Hoekstra and Segal's finding is the theory of Johnson and Martin, forwarding the theory that the Supreme Court can and does influence public attitudes toward highly salient issues, but its effect is conditional:

Under the *conditional response hypothesis*, the public, at times, will react when an issue is initially brought to the forefront of political discourse by a landmark Court decision, but at others it will not as when the Court rules on an issue again. Changes in public opinion are likely to occur in close proximity to case origination.[59] The second hypothesis is the *structural response hypothesis*. It predicts that the Court has a micro-level effect on public opinion—that it increases the intensity only of within-group opinions and only about particular issues. The general point is that the Court does not necessarily legitimate particular policies (although it may, if aggregate public opinion favors a particular policy choice before a decision) but affects attitudes.[60]

In support of the latter theory, there is little empirical evidence to show that the Supreme Court automatically influences public opinion. According to Marshall, too few Americans understand the Court's constitutional role or regard the Court as competent of impartiality. This is exactly because the Court was scarcely visible enough to the public at large to legitimate its decisions.[61] According to Petrick, while there are many reasons to explain the acceptance of the Court's authority, first and foremost is the role that groups of people play. Groups of people who are affected by the actions of the Court necessarily decide if the Supreme Court has, in any particular instance, acted in a manner deserving acceptance of its authority, and therefore

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[58] Danette Brickman and David Peterson, *Public Opinion Reaction to Repeated Events: Citizen Response to Multiple Supreme Court Abortion Decisions*, 28 POLITICAL BEHAVIOR 107 (2006).

[59] *Supra* note 54.

[60] *Id.* at 299-300.

[61] Thomas Marshall, *The Supreme Court as Opinion Leader*, 15 AM. POL. Q. 147, 148 (1987).

of compliance.[62] They consist of, among others, Congress, the national Executive branch, state and local government officials, and, ultimately, the people.[63] Supreme Court decisions prevail because "liberal activists and officeholders block reversals of key Court decisions."[64]

Other studies show that approval of the Court may be based in fear or vulnerability, or is subject to swings just like any other national institution. Research suggests that the public is poorly informed about the Court and that confidence in the Court does change over time. Marshall gives the following example:

> For example, Caldeira (1986) concludes that during periods when the Court invalidates a relatively high number of laws passed by Congress, public confidence in the Court declines. Caldeira (1986) and Caldeira and Gibson (1992) argue that during these periods the Court's base of diffuse good will or legitimacy among citizens is challenged.[65]

Whereas strongly legitimate decisions enjoy popular support, scholars argue that as a consequence of the challenge to its legitimacy, the Supreme Court might defer to public preferences on an issue when it makes a decision. It is reasoned that the Court is concerned about its reputation, the legitimacy of its rulings, and the successful implementation of its rulings. In the study of Buchanan, he discussed research that suggests that the Court lacks the necessary public attention or recognition for it to legitimate a policy:

> As Jaros and Roper (1980) put it, "Few have the necessary awareness to give—or withhold—support". Then there are the impact and implementation studies that show compliance with the Court's rulings has been, at best, hit or miss (Dolbeare & Hammond, 1970; Rodgers & Bullock, 1972). If the Court's capacity

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[62] *Id.*, citing that the other reasons for compliance are the formal powers of the Court (i.e. allocation of powers, legal procedures and judicial hierarchical structure), the expertise and professionalization surrounding the Court and the legal structure, the Court's assumption of the role of protecting individual rights, the sombre, dignified and sacred setting surrounding the Court, its members and their activities, and the Court's charismatic leadership through its work of interpreting the Constitution and because of the membership of Court justices in the ranks of American elite.

[63] *Id.* at 8.

[64] *Id.*

[65] Stoutenborough, *supra* note 57, at 420.

> to confer legitimacy on a policy results in compliance with that policy, then these studies must raise serious doubts about the High Bench's abilities. Finally, there is concrete, direct evidence that seems to demonstrate the Court's *incapacity* to confer legitimacy. Marshall's (1989) research, for example, indicates that the Court lacks the persuasive power to validate controversial policies... Bearing even more directly on the question, Baas and Thomas (1984) used an experimental design to test the Court's legitimacy conferring capacity and concluded, "Mere endorsement by the Supreme Court alone, or as interpreter of the Constitution, is not sufficient to elevate significantly mass acceptance of an issue or policy."[66]

However, Stoutenborough explains that empirical studies have clearly established that the Court does not always defer to public opinion. More importantly, scholars have increasingly suggested that it is the Supreme Court which can influence public opinion, at least temporarily and perhaps only under certain conditions.[67]

The findings of Clawson, Kegler and Walternburg suggest that the Court is a strong and credible persuasive source that is able to change deeply held beliefs, when it enjoys stable and high levels of public support. According to their research, the ability of the Supreme Court to move public opinion hinges on its level of support and credibility.[68] The Court's public prestige promotes its policy authority.[69] Citing Mondak and Smithey, they found that the support for the Court is characterized by a relatively high level of stability over time, therefore appearing that the Court's level of public support is better able to weather the effects of disruptive political and social events.[70]

VII. IS THE SUPREME COURT ALL THAT?

Hoekstra (1995) and Hoekstra and Segal (1996) "examined the effect of the Court's pronouncements across sub-groupings of respondents and

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[66] G. Sidney Buchanan, *Judicial Supremacy Re-Examined: A Proposed Alternative*, 70 MICH. L. REV. 1279 (1972).

[67] *Id.* at 419, 420.

[68] Rosalee Clawson, Elizabeth Kegler & Eric Waltenburg, *The Legitimacy-conferring Authority of the U.S. Supreme Court: An Experimental Design*, 29 AM. POL. RES. 566, 568 (2001).

[69] *Id.*

[70] *Id.*

found that the Court's legitimacy-conferring effect is somewhat contingent on the characteristics of the individuals exposed to the Court's message."[71] According to the observation of Clawson, Kegler and Waltenburg, Hoekstra (1995) concluded that the Court is more able to persuade those who hold it in high esteem, while Hoekstra and Segal (1996) showed that the persuasive power of the Court is affected by the degree to which an individual has strongly held preexisting views as well as the salience of the decision.[72]

The notion that the Supreme Court is the ultimate expositor of the law and that all citizens need bow to its pronouncements is a lesson incessantly, if subliminally, drilled into law students. However, these are two different things. While the Court is the ultimate arbiter of all legal issues, there is no law that suggests obedience to the Supreme Court. Scholars can point to *Cooper v. Aaron*[73] for the legal basis that compels this compliance. The case, however, must be understood in the proper context: it was promulgated pursuant to the Court's decision in *Brown v. Board of Education*.[74]

In the 1958 case of *Cooper v. Aaron,* Arkansas Governor Orval Fabus and William Cooper, the Little Rock school board president, argued that the U.S. Supreme Court's decision in *Brown v. Board of Education* cannot be considered as law in their state. Cooper articulated this view before the Supreme Court, saying "that if the governor of any state says that a United States Supreme Court decision is not the law of the land, the people of that state, until it is really resolved, have a doubt in their mind, and have a right to have a doubt." Members of the Court were astounded that the Governor believed they were not bound by *Brown*.[75] The Court replied by recalling the most fundamental lessons of constitutional law:

> Article VI of the Constitution makes the Constitution the "Supreme Law of the Land." In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of *Marbury v. Madison*, 1 Cranch 137, 177, that "It is emphatically the province and duty of the judicial department to say

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[71] *Id.* at 570.

[72] *Id.*

[73] 358 U.S. 1 (1958).

[74] 347 U.S. 483 (1954).

[75] PETER IRONS, A PEOPLE'S HISTORY OF THE SUPREME COURT: THE MEN AND WOMEN WHOSE CASES AND DECISIONS HAVE SHAPED OUR CONSTITUTION 406-7 (1999).

> what the law is." This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, 3 "to support this Constitution." Chief Justice Taney, speaking for a unanimous Court in 1859, said that this requirement reflected the framers" "anxiety to preserve it [the Constitution] in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a State. * * *" *Ableman v. Booth,* 21 How. 506, 524, 16 L.Ed. 169.[76]
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> No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it. Chief Justice Marshall spoke for a unanimous Court in saying that: "If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery * * *." *United States v. Peters,* 5 Cranch 115, 136, 3 L.Ed. 53. A Governor who asserts a *19 power to nullify a federal court order is similarly restrained. If he had such power, said Chief Justice Hughes, in 1932, also for a unanimous Court, "it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases * * *." *Sterling v. Constantin,* 287 U.S. 378, 397-398.[77]

Cooper was concerned with *state* obedience to a desegragation order. The Court's claim of supremacy was not addressed to Congess or the Executive. More recently, it has been argued that the Rehnquist Supreme Court has taken the supremacy rhetoric from *Marbury* and *Cooper* to the level of the coordinate branches of the federal government. The Rehnquist Court's view of the relationship among the three branches of the federal government is

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[76] *Supra* note 73 at 18.
[77] *Id.* at 18-19.

decidedly more hierarchical than coordinate, with the Supreme Court at the top of that hierarcy. The Court proclaimed, without qualification, that "ever since *Marbury* this court has remained the ultimate expositor of the constitutional text."[78] Still, even this new direction is directed only at the Federal Government, not the citizens. If anything, the evidence suggests that the citizens, according to original design, were meant to remain supreme over the institutions of government even when it involved constitutional interpretation.

It has been suggested that judicial review as currently practiced by the judiciary is "of recent vintage" and inconsistent with the Constitutions' original design. Larry Kramer writes that "American constitutionalism assigned ordinary citizens a central and pivotal role in implementing their Constitution." He argues that the final interpretative authority rested with the people themselves and both their elected representatives and courts were subordinate to their judgments.[79] On the other hand, Mark Tushnet argues that constitutional interpretation is a function shared by all branches of government and not the exclusive domain of courts.[80]

In the Philippines, there is no debate as to the authority that interprets the Constitution. Under our Constitution, "the interpretation and application of said laws belong exclusively to the Judicial department."[81] This authority to interpret and apply the laws extends to the Constitution. Before the courts can determine whether a law is constitutional or not, it will have to interpret and ascertain the meaning not only of said law, but also of the pertinent portion of the Constitution in order to decide whether there is a conflict between the two, because if there is, then the law will have to give way and has to be declared invalid and unconstitutional.[82]

There does not seem to be any law that obligates citizens to follow the Supreme Court. However, there are many instances when the Court reminds us of our obligation to follow the Constitution. In *Manila Prince Hotel v.*

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[78] Rachel Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002).

[79] *See* LARRY KRAMER, POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

[80] *See* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 129-153 (1999).

[81] Endencia v. David, G.R. No. 6355-56 (1953).

[82] *Id.*

Government Service Insurance System,[83] the Court speaks of the Constitution as "supreme, imperious, absolute and unalterable except by the authority from which it emanates."[84] Even then the Court is quick to emphasize the Constitution's subservience to the sovereign:

> It cannot be overstressed that in a constitutional government such as ours, the rule of law must prevail. The Constitution is the basic and paramount law to which all other laws must conform and to which all persons, including the highest official of this land, must defer. From this cardinal postulate, it follows that the three branches of government must discharge their respective functions within the limits of authority conferred by the Constitution.[85]

Supreme Court decisions do not assume omnipotence. They assume the same authority as the statute itself and, "until authoritatively abandoned, necessarily become, to the extent that they are applicable, the criteria which must control the actuations not only of those called upon to abide thereby but also of those in duty bound to enforce obedience thereto."[86] Judicial decisions applying or interpreting the laws or the Constitution form part of our legal system. The Court's interpretation of the law is part of that law as of the date of enactment because its interpretation merely establishes the contemporary legislative intent that the construed law purports to carry into effect.[87] Consequently, Supreme Court Justices should act under the assumption that their authority will be validated:

> The Court must be able to establish its authority as being something less than naked power, but something more than advisory influence. This task can be viewed as one of asserting and defending judicial jurisdiction - not only in the legal-procedural sense, but more importantly by garnering attitudinal acceptance for judicial prerogatives from potential legitimizing agencies. For only if and when the Court's authority is accepted can its role as a "legitimator" of other agencies be justified. It would be absurd to assume that one body can validate the authority of other bodies

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[83] G.R. No. 122156 (1997).

[84] *Id.*

[85] Bengzon v. Drilon, G.R. No. 103524 (1992).

[86] Caltex v. Palomar, G.R. No. 19650 (1966).

[87] National Amnesty Commission v. Commission on Audit, G.R. No. 156982 (2004).

> unless the validator itself has received acceptance for its prerogative to perform the validating task.[88]

There seems to be one exception that mandates obedience to Supreme Court decisions. In Philippine law, lower courts are required to follow the Supreme Court. It is their duty to obey:

> The delicate task of ascertaining the significance that attaches to a constitutional or statutory provision, an executive order, a procedural norm or a municipal ordinance is committed to the judiciary. It thus discharges a role no less crucial than that appertaining to the other two departments in the maintenance of the rule of law. To assure stability in legal relations and avoid confusion, it has to speak with one voice. It does so with finality, logically and rightly, through the highest judicial organ, this Court. What it says then should be definitive and authoritative, binding on those occupying the lower ranks in the judicial hierarchy. They have to defer and to submit. The ensuing paragraph of the opinion in Barrera further emphasizes the point: "Such a thought was reiterated in an opinion of Justice J.B.L. Reyes and further emphasized in these words: 'Judge Gaudencio Cloribel need not be reminded that the Supreme Court, by tradition and in our system of judicial administration, has the last word on what the law is; it is the final arbiter of any justifiable controversy. There is only one Supreme Court from whose decisions all other courts should take their bearings.'"[89]

In another case, the Court reminded all judges of this duty to submit to the decisions of the Supreme Court:

> As already observed by this Court in Shioji vs. Harvey [1922], 43 Phil., 333 337), and reiterated in subsequent cases "if each and every Court of First Instance could enjoy the privilege of overruling decisions of the Supreme Court, there would be no end to litigation, and judicial chaos would result." A becoming modesty of inferior courts demands conscious realization of the position that they occupy in the interrelation and operation of the integrated judicial system of the nation.[90]

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[88] Michael Petrick, *The Supreme Court and Authority Acceptance*, 21 W. POL. Q. 5 (1968).

[89] Tugade v. Court of Appeals, G.R. No. 47772 (1978).

[90] People v. Vera, G.R. No. 45685 (1937).

In *Luzon Stevedoring Corp. v. Court of Appeals*, the Court ruled in the following manner:

> The spirit and initiative and independence on the part of men of the robe may at times be commendable, but certainly not when this Court, not once but at least four times, had indicated what the rule should be. We had spoken clearly and unequivocally. There was no ambiguity in what we said. Our meaning was clear and unmistakable. We did take pains to explain why it must be thus. We were within our power in doing so. It would not be too much to expect, then, that tribunals in the lower rungs of the judiciary would at the very least, take notice and yield deference. Justice Laurel had indicated in terms too clear for misinterpretation what is expected of them. Thus: "A becoming modesty of inferior court[s] demands conscious realization of the position that they occupy in the interrelation and operation of the integrated judicial system of the nation." In the constitutional sense, respondent Court is not excluded from such a category. The grave abuse of discretion is thus manifest.[91]

Outside the judicial department, however, there are two theories in terms of the nation's legal duty to comply with a Supreme Court constitutional construction. Under the *judicial supremacy model*, the legal duty is absolute. The Supreme Court assumes the role of final arbiter within the federal system; therefore, in both a literal and substantive sense, the Constitution means what the Supreme Court says it means. A Supreme Court decision is equated to a law passed "pursuant" to the Constitution and, therefore, becomes truly the supreme law of the land.[92] As a consequence of this supremacy, the rest of the federal system is responsible to the Supreme Court, and the Court is responsible only to itself and a subsequent constitutional amendment. Under this theory, however, the nation is not without remedy in challenging a Supreme Court decision. Brickman and Peterson enumerates the following measure to correct a harmful decision: a) constitutional amendment, b) the passage of time coupled with the election of a new president, which can produce a dramatic change in Court personnel and a concomitant reversal of prior Court decisions, c) change in Court personnel incident to death or normal retirement of a Justice, d) impeachment, or, more accurately, its threat, also has a definite role to play in creating Court vacancies, and e) Congress can

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[91] G.R. No. L-27746 (1970).

[92] KRAMER, *supra* note 78.

influence significantly the types of cases that reach the Court under its power to regulate the Court's appellate jurisdiction.[93]

Assuming the contrary position, the *Viable Tension Model* "accords no binding force to a Supreme Court decision" where "standing alone, a Court decision obligates no one."[94] The theory holds that until supported by another branch of the federal system, the decision has no legal effect and it remains a weighty, but nonobligatory, pronouncement by one branch of the federal government. At most, the decision may command respect and may be followed by the rest of the nation.[95]

The dominant view, however, is that non-judicial officials, in exercising their own constitutional responsibilities, "are not obliged to subjugate their constitutional judgments to what they believe are the mistaken constitutional judgments of others."[96] There are historical examples of this claim of independent interpretive authority. Abraham Lincoln argued that the Supreme Court's *Dred Scott* decision was not binding on the President, Congress, or the voters, and Franklin Roosevelt in a proposed speech exhorted Congress to disregard Supreme Court decisions invalidating New Deal legislation. Academic proponents of judicial non-exclusivity in constitutional interpretation have been led by Michael Paulsen, who maintains that executive officials should not defer to constitutional decisions of the judiciary they believe mistaken, and Mark Tushnet argues that non-exclusivity is the route to a socially desirable "populist" constitutional law.[97]

Both the political science literature and interdisciplinary work on judicial independence and accountability suggest that, although the Supreme Court does exercise "great power," it is not "totally unchecked" in doing so. That is not surprising when one considers that "the Constitution would provide very little protection against an executive and legislature intent on controlling the decisional independence of the federal courts."[98]

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[93] *Id.* at 1281.

[94] *Id.* at 1287.

[95] *Id.*

[96] Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997).

[97] *Id.* at 1359, 1360-1.

[98] Stephen Burbank, *The Selection, Tenure, and Extrajudicial Authority of Supreme Court Justices*, 154 U. PA. L. REV. 1511, 1521-2 (2006).

Political scientists, from Robert Dahl to Robert McCloskey to Gerald Rosenberg, have disputed and provided empirical evidence controverting the proposition that the Court is unaccountable to the other institutions of government when deciding cases. Their work, together with more recent work by Lee Epstein, Jack Knight, Andrew Martin, and others who share their strategic perspective, suggests that the Court does not often have the last word even on matters of constitutional interpretation, and that as a result it does not stray very far or for very long from what the majority wants. Moreover, as Barry Friedman has observed, "there is general agreement among political scientists, and increasing recognition among legal academics, that more often than not the outcomes of Supreme Court decisions are consistent with popular opinion."[99]

From the breadth of literature, it is apparent that the Supreme Court has the power to influence public opinion, be it conditional.[100] In sum, the importance of the Court's legitimacy is best explained by Gibson and Caldeira: that the Court must enjoy legitimacy because its role as a veto player in a tripartite government necessitates "going against popular opinion" and in order to effectively play its part, it must affirm its "right" to make the decision:

> To serve effectively as veto players in a democracy, courts must have some degree of legitimacy. Indeed, the very notion of vetoing the actions of another institution implies that the court is going against popular opinion, at least as opinion is represented in majoritarian institutions (see Dahl 1957, particularly his attention to the "countermajoritarian powers of courts"). Thus, legitimacy takes on importance primarily in the presence of an objection precondition. When people approve of a decision, the legitimacy of the decision maker is of little consequence since people are getting what they want. When the decision is unpopular, its efficacy hinges upon the perceived legitimacy of the decision-making process and institution. Some may ask, for instance, whether the institution has the authority, the "right," to make the decision, thereby challenging the outcome. Institutions short on legitimacy are thought not to be capable of vetoing the actions of more representative (and hence more legitimate) institutions of government.

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[99] *Id.*

[100] Marshall, *supra* note 61 at 309.

VIII. DISCUSSION

Former Chief Justice Artemio Panganiban routinely bemoans the fact that the Supreme Court no longer enjoyed the deference it used to. As he often points out, half a century ago, courts were sacrosanct and Justices were "revered like deities on Mt. Olympus, whose pronouncements were accepted with finality by the litigants and the public."[101] He credits the information revolution and the democratic space created by the ouster of Mr. Marcos for the Court's lower stature. He ignores, as most of the Judiciary does, the Court's role in propping up the Marcos regime.

My view is that *Javellana v. Executive Secretary*[102] and the Court's decision to ally itself with the Marcos dictatorship depleted the goodwill that the Court enjoyed for decades before Marcos ascended to office. We look to the Court with scepticism and guard its every move because we know now that it can choose to squander its prestige in the political arena. In short, we no longer expect it do the right thing all the time. This scepticism, along with information technology and democratic space, fuel our vigilance to prevent a repeat of 1973. The Justices were no longer deities but mere mortals who themselves wallow in petty issues. It is easy to express disagreement with the Court today, and when we do, the Court responds.

Plagiarism

We recall that charges of plagiarism, twisting of cited materials and gross neglect were filed against Justice Mariano Del Castillo by members of Malaya Lolas Organization in connection with his decision in *Vinuya v. Romulo.*[103] The Supreme Court dismissed the charges in October 12, 2010. That decision sparked objections from the academe, among others, primarily because of the Court's definition of plagiarism. In resolving a motion for reconsideration,[104] the Court redirected its decision to other reasons for Del Castillo's absolution. We should add here that the public's unprecedented response—its refusal to adopt the Court's definition—was inevitable because the Court treaded upon a sphere over which the academe in the whole world

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[101] Artemio Panganiban, *Public scrutiny of the Supreme Court*, PHIL. DAILY INQUIRER, May 11, 2008, at A15.

[102] G.R. No. 36142 (1973).

[103] *Supra* note 12.

[104] *Supra* note 11.

was very familiar with. The Court's decision to ignore well-entrenched understanding of plagiarism naturally provoked criticism.

In its Resolution denying the motion for reconsideration, the Court deemphasized its earlier ruling on the definition of plagiarism, and added other reasons for exonerating Justice Del Castillo:

1. the academic norm of identifying plagiarism as the objective act does not apply to judicial decisions where the originality of the writing is the object of the law, which is justice on the strength of *stare decisis*;

2. It is practice and tradition in the legal practice to lift passages from writings because such works are common property and thus, judges have the implied right to use them; and

3. the value of judicial decisions lie in its substance.

The norms of the academe, according to the Court, do not apply to judicial decisions because the value and object of writings for purposes of the academe and legal practice differ.[105] According to the Court, in the legal profession, the object of and the interest of society in every decision of a court of law is justice, not originality, form, and style.[106] The judge, said the Court, "is not expected to produce original scholarship in every respect and decisions

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[105] In the academe, the value of writings is the originality of the writer's thesis, intended to earn for the student an academic degree, honor, or distinction. Consequently, he who takes the research of others, copies their dissertations, and proclaims these as his own earns no credit nor deserves it. There should be no question that a cheat deserves neither reward nor sympathy. It is on this basis that the Loyola Schools Code of Academic Integrity ordains that "plagiarism is identified not through intent but through the act itself… [and] [s]tudents who plead ignorance or appeal to lack of malice are not excused." But in any case, the policy adopted by schools of disregarding the element of malicious intent found in dictionaries is evidently more in the nature of establishing what evidence is sufficient to prove the commission of such dishonest conduct than in rewriting the meaning of plagiarism.

[106] The strength of a decision lies in the soundness and general acceptance of the precedents and long-held legal opinions it draws from. Under the doctrine of *stare decisis*, courts are "to stand by precedent and not to disturb settled point." Once the court has "laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same; regardless of whether the parties or property are the same."

of courts are not written to earn merit, accolade, or prize as an original piece of work or art."[107] Further,

> It is practice and tradition for judges and practitioners alike to usually lift passages from precedents and writings, at times omitting, without malicious intent, attributions to the originators. Judges have the duty to apply the laws as these are written but laws include, under the doctrine of *stare decisis*, judicial interpretations of such laws which are not always clearly delineated and are quite often entangled in apparent inconsistencies or even in contradictions. Thus, judges draw from the materials of legal experts which constitute a large body of commentaries or annotations that, in themselves, often become part of legal writings.[108]

The Supreme Court concluded thus that omission of attribution is not dishonest because the works are common property and judges have the implicit right to use legal materials regarded as belonging to the public domain. Yet it quickly defended itself:

> But this is not to say that the magistrates of our courts are mere copycats. It is rather in the substance of their decisions that their genius, originality, and honest labor can be found, of which they should be proud. In *Vinuya*, Justice Del Castillo's work, on the whole, was original and he had but done an honest work. He examined the facts, formulated the core of the issues, discussed the state of the law relevant to their resolution, drew materials from various sources, compared the divergent views, explained why the Court must reject some views, and applied those that suit the facts. Finally, he drew from his discussions of the facts and the law the right solution to the dispute in the case. The Court will not, therefore, consistent with established practice in the Philippines and elsewhere, dare permit the filing of actions to annul the decisions promulgated by its judges or expose them to charges of plagiarism for honest work done so long as they do not depart, as officers of the court, from the objective of assisting the Court in the administration of justice.[109]

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[107] *Supra* note 11.

[108] *Id.*

[109] *Id.*

Foreign Ownership of Corporations

The Supreme Court's recent decision in *Gamboa v. Teves*[110] set off a storm of criticism again. The Chief Justice, in response to criticisms, said that the Court would consider the economic implications of the decision when it hears appeals filed by businessmen and regulators. Corona admitted that the Court failed to consider the economic implications of its ruling that the 40-percent limit on foreign ownership in local companies covers the capital which, under the Constitution, also refers to shares of stock that will also allow the election of the members of board of directors.[111]

Business groups have indicated that they want to intervene in the case. PLDT filed a motion for reconsideration urging the High Court to consider the possible massive effects of the ruling on businesses in the country. The Philippine Stock Exchange filed a separate appeal and argued that the country's economy stands to lose over P630 billion in allowable foreign investments in PSE-listed shares or equivalent to a loss of nine percent of the current total fair market value of the PSE-listed shares due to the SC ruling.[112] The Supreme Court was thus prompted to set the case for an oral argument over the issue.

Here again we see the public reacting adversely to a Supreme Court decision and the Court backtracking on its legal conclusions. There is no talk of impeachment, but there is some admission at least by the Chief Justice that *Gamboa* may be defective. What we see today is that objection to Supreme Court decisions are made by writing and the Court relents.

These two cases show a range of possible responses to Supreme Court decisions, all of which chaotic. As then Chief Justice Corona himself recognized: "Never before has the entire Judiciary, even in the days of martial law, been subjected to so much disrespect and lack of civility from sectors we sincerely consider to be our partners in nation-building."[113]

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[110] G.R. No. 176579 (2011).

[111] Edu Punay, *SC to consider economic repercussions of ruling on PLDT foreign ownership*, PHIL. STAR, Aug. 5, 2011, *available at* http://www.philstar.com/Article.aspx?articleId=713423&publicationSubCategoryId=63.

[112] *Id.*

[113] Carmela Fonbuena, *Supreme Court Wins in Budget Battle with Malacanang*, RAPPLER, Nov. 29, 2011, *available at* http://www.rappler.com/nation/225-supreme-court-wins-in-budget-battle-with-malacanang.

Former Chief Justice Corona's attempt to illicit public support and sympathy failed. The *Philippine Daily Inquirer's* editorial quipped that Corona could have used his public address "to address the concerns raised about the court's baffling conduct" instead of playing politician "by throwing red meat at his audience."[114] Columnist Conrado de Quiros was less cordial. He wrote, "Corona hasn't just killed the meaning of Supreme, he has killed the essence of Court... [a]ll he leaves by way of legacy is: [a] wreath."[115] Or as another columnist wrote, "[h]e has only himself to blame."[116]

IX. CONCLUSION

The suggestion that Supreme Court opinions are not the final word on legal disputes might strike some as irresponsible. By limiting the powers of the Court in settling disputes are we not in effect inviting instability? Discomfort at the notion that the Court cannot or does not always command respect comes from our expectation that the Justices of the Court are beyond politics. Our experiences with *Javellana* and the present Supreme Court suggest that we are no longer awe-struck by our Justices. We respond to the Courts' weaknesses with meta-constitutional checks (public outrage or private correspondence) which are designed to check the Court, not to destroy it. We rattle sabres to remind the Court that it does not occupy an exalted place under our constitutional scheme—that it is one branch among equals and that it is subject to the rule of law and ultimately, the will of the sovereign. The Supreme Court is neither infallible nor final.

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[114] *Judicial Decorum*, PHIL. DAILY INQUIRER, Oct. 19, 2011, *available at* http://opinion.inquirer.net/15607/judicial-decorum.

[115] Conrado de Quiros, *Wreath*, PHIL. DAILY INQUIRER, October 17, 2011, *available at* http://opinion.inquirer.net/15533/wreath.

[116] Oscar Lagman Jr., *Corona's rhetoric full of contraries*, BUSINESSWORLD, Oct. 17, 2011.