**CHAPTER ONE**

# "ANOINTING POWER WITH PIETY"[1]: PEOPLE POWER, DEMOCRACY AND THE RULE OF LAW

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The ouster of Philippine President Estrada was peaceful though barely constitutional, but for a careful patchwork of legal arguments. Is the "People Power" overthrow of unwanted leaders a step *forward* in "democratic experimentalism", or a step *backward* for the rule of law so instrumental in constraining business and feudal elites?

The classic tension between constitutionalism and the raw power of mass struggles finds a fresh setting in the downfall of President Joseph Estrada (hereinafter, "Erap"), following civilian protests coupled with passive military support and induced economic paralysis. What is the place of law in democratic governance, in a newly restored democracy where political institutions are weak, business elites strong, and the Church even stronger? What is the role of constitutions in political transitions?

## I. Organization

The current Philippine Constitution was the fruit of the first "People Power" revolution led by Cory Aquino which ousted the Marcos regime in February 1986 (hereinafter, EDSA 1, named after the major road in Metro Manila where the protests converged) through a peaceful uprising which relied upon the moral indignation of a concerned citizenry. After EDSA 1, the Philippines constitutionalized "people power", the direct but peaceful exercise of the will of the sovereign people. The second "People Power" (hereinafter, EDSA 2) led to the ouster of President Erap by Gloria Macapagal-

[1] ROBERTO UNGER, POLITICS (1990).

Arroyo in January 2001. In May 2001, Erap's supporters, typically poor and uneducated, converged on EDSA and marched to the presidential palace, asking for their hero's return (hereinafter, EDSA 3), committing acts of violence which compelled Arroyo to declare a "state of rebellion."[3]

In this paper, *first*, I will situate EDSA 2 within the constitutional history of the Philippines, more specifically, vis-à-vis the virtually bloodless transition from the Marcos regime to Cory Aquino's democracy; *second*, I will examine the factual and constitutional framework for EDSA 2; and *third*, I will look at the implications of EDSA 2 for the future of democratic and rule-based governance in the Philippines.

## II. Brief Constitutional History

### A. Malolos Constitution

Philippine Constitutional history has bifurcated beginnings. One line begins and ends with the Malolos Constitution of 1899[4], which established a parliamentary government with an express bill of rights. The Malolos charter was adopted during that brief interval in early 1899 between the triumph of our revolution for independence against Spain, and the outbreak of the Spanish-American War, and subsequently, the continuation of the Philippine war of independence, this time against the United States, in the Philippine-American War.[5]

### B. U.S. "organic acts"

The other line begins with the "organic acts" by which the triumphant U.S. forces governed the "new territories", e.g., Cuba, Puerto Rico and the Philippines, starting with

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[3] Proclamation No. 38, Declaring a State of Rebellion in the National Capital Region (1 May 2001).
[4] THE LAWS OF THE FIRST PHILIPPINE REPUBLIC (THE LAWS OF MALOLOS, 1898-1899) (Sulpicio Guevara, ed., National Historical Institute, Manila, 1972) at 88.
[5] CESAR A. MAJUL, THE POLITICAL AND CONSTITUTIONAL IDEAS OF THE PHILIPPINE REVOLUTION (Univ. of the Philippines, Quezon City, 1967).

President William McKinley's famous Instructions to the Second Philippine Commission[6] (as commander-in-chief), the subsequent executive and legislative "charters" for the Philippine Islands, culminating with the 1916 Jones Law which allowed the colony to write its own constitution in preparation for independence. The most significant characteristic of these organic acts were express guarantees of rights to the natives, and the creation of institutions for representative government.

C. 1935 Constitution

Accordingly, the 1935 Constitution was drafted by Filipinos and, as required, approved by the U.S. Congress. It was a faithful copy of the U.S. Constitution, with a tripartite separation of powers and, again, an express bill of rights. The 1935 Constitution is the charter that was in force the longest, from 1935 until 1973 when it was "killed" after Marcos declared martial law. By that time, that Constitution had provided a textbook example of liberal democracy: periodic elections for the president and a bicameral congress; a vigorous free press; a free market, hortatory clauses on social justice for the poor and disadvantaged. Its biggest challenge came from the social ferment and the student movement of the mid-1960s, articulated by the campus Left, a straightforward critique of the legal fictions of the liberal state.

D. 1973 Constitution

Marcos, then on his second and last term as President, initiated the re-drafting of the 1935 Constitution. Beset by Left-inspired student protests and by a countryside Maoist rebellion, he suspended the writ of habeas corpus in 1971[7] and altogether declared martial law in 1972.[8] By January 1973, a tired but pliant nation approved the new Constitution[9], changing our presidential into a parliamentary government and which provided a transition period that allowed Marcos to concentrate powers in himself.

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[6] VICENTE V. MENDOZA, FROM MCKINLEY'S INSTRUCTIONS TO THE NEW CONSTITUTION: DOCUMENTS ON THE PHILIPPINE CONSTITUTIONAL SYSTEM (Central Lawbook, Quezon City, 1978), at 65.
[7] Lansang v. Garcia, G.R. L-33964, 42 SCRA 448 (11 December 1971).
[8] Proclamation No. 1081, Proclaiming a State of Martial Law in the Philippines (21 September 1972).
[9] Proclamation 1102, Announcing the Ratification by the Filipino People of the 1973 Constitution (17 January 1973).

The bogus ratification of the 1973 Constitution was challenged before the Supreme Court. In Javellana v. Executive Secretary[10], the Court found that that the Constitution had not been ratified according to the rules but that the people had acquiesced to it. What the rules required was the approval by the people in a plebiscite wherein voters cast their ballots. What Marcos arranged was for a mere show of hands in so-called "peoples' assemblies", where people were supposedly asked: "Do you approve of the new Constitution? Do you still want a plebiscite to be called to ratify the new Constitution?". The people allegedly having acquiesced to the new government, the Supreme Court declared it a political question and stated: "There is no further judicial obstacle to the new Constitution being considered in full force and effect." The sovereign people is the fount of all authority, and once the people have spoken, the Courts are not in a position to second-guess that judgment.

> Regardless of the modality of [ratification] – even if it deviates from … the old Constitution, once the new Constitution is ratified … by the people, the Court is precluded from inquiring into the validity of those acts. (Makasiar, separate opinion)

> If they had risen up in arms and by force deposed the then existing government … there could not be the least doubt that their act would be political and not subject to judicial review. We do not see any difference if no force had been resorted to and the people, in defiance of the existing Constitution but peacefully… ordained a new Constitution. (Makalintal and Castro, separate opinion) (emphases supplied)

In 1976, Marcos had this 1973 Constitution amended making him a one-man legislature, and in 1981, he fully "constitutionalized" his government by further amending the Constitution and declaring a "new" republic altogether[11].

[10] G.R. No. 36142, 50 SCRA 30 (31 March 1973).
[11] Proclamation No. 2045, Proclaiming the Termination of the State of Martial Law (17 January 1981).

On 21 August 1983, Ninoy Aquino was executed upon landing at the Manila International Airport and his death triggered off nationwide indignation. In October 1985, yielding to international pressure caused by his human rights record, Marcos called for special elections on 7 February 1986 to get a fresh mandate. Declaring that he intended to resign the presidency before his term was over[12], he asked the parliament to pass a law calling for "snap elections."[13] Ninoy's widow, Cory, ran against him and, despite overwhelming support, was cheated of victory. What ensued is what we now call the EDSA Revolution.

E. Cory's Freedom Constitution

Marcos fled to exile in Honolulu, Cory took her oath, and no sooner promulgated her "Freedom Constitution"[14] by "direct mandate of the sovereign Filipino people." The Supreme Court, in the Freedom Constitution cases[15], held that she drew her legitimacy from outside the constitution, and that all challenges raised political and non-justiceable questions.

The Freedom Constitution was the interim charter by which the Philippines was governed between February 1986 (EDSA 1) and February 1987 (when the present Constitution was adopted). The Court recognized however 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 was "revolutionary in the sense that it came into existence in defiance of existing legal processes."[16] Thus the

[12] Letter from President Ferdinand E. Marcos to Speaker of the Batasang Pambansa Nicanor E. Yñiguez and other Members of the Parliament (11 November 1985).
[13] Batas Pambansa Bilang 883, An Act Calling a Special Election for President and Vice-President (Snap Elections of 1986) (3 December 1985). See also Philippine Bar Association v. Commission on Eelections, G.R. No. 72915, 140 SCRA 453 (19 December 1985) (setting aside legal objections to the "snap elections", characterizing the matter as a political question, and declaring "the elections are on").
[14] Proclamation No. 3, Promulgating a Freedom Constitution (25 March 1986).
[15] Lawyer's League for a Better Philippines v. President Aquino, G.R. No. 73748 (22 May 1986); In re Saturnino Bermudez, G.R. No. 76180, 145 SCRA 160 (24 October 1986); De Leon v. Esguerra, G.R. No. 78059, 153 SCRA 602 (31 August 1987); and Letter of Associate Justice Reynato S. Puno, A.M. No. 90-11-2697-CA, 210 SCRA 589 (29 June 1992).
[16] Letter of Justice Puno, supra.

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 justiceable matter [but] belongs to the realm of politics where only the people … are the judge."[17]

F. The current 1987 Constitution

In January 1987, a new Constitution – written by an appointive (by Cory Aquino) Constitutional Commission – was ratified by the nation[18], and which continues to govern, unrevised, until today.

## III. Institutionalization of "Direct Democracy" after EDSA 1

The current Constitution is the fruit of the first "People Power" revolution led by Cory Aquino and reflects the values that animated EDSA 1. It embodied a long list of "directive principles" and welfare state clauses, but it also contained a strong Bill of Rights, detailed guarantees against a Marcos-style power-grab, and restored the checks-and-balances among three separate branches of government, including an independent Human Rights Commission. Finally, it institutionalized the direct exercise of democracy through "peoples' initiatives" to recall officials and propose laws and charter amendments. It was as if the Constitution first listed all the things that the state had to do <u>for</u> the people; then reminded the state of the many things it couldn't do <u>to</u> the people; and, the state thus paralyzed, allowed the state to be eternally second-guessed and subverted <u>by</u> the people.

The 1987 Constitution "institutionalized people power"[19] and the Supreme Court has since "rhapsodized people power"[20] in several cases where the "direct initiative" clauses of the Constitution had been invoked. These clauses allow direct initiative for the following:

[17] Lawyer's League for a Better Philippines, supra.
[18] Proclamation No. 58, Proclaiming the Ratification of the 1987 Constitution of the Republic of the Philippines (February 1987).
[19] Subic Bay Metropolitan Authority v. Commission on Elections, 26 September 1996.
[20] Defensor-Santiago v. Commission on Elections, 19 March 1997 (hereinafter, PIRMA I).

(a) To propose or repeal national and local laws;[21]

(b) To recall local government officials, and propose or repeal local laws;[22] and

(c) To propose amendments to the Constitution.[23]

The Congress has passed implementing laws, which have been applied, tested and affirmed before the Supreme Court. The Local Government Code[24] provided for the recall of local officials by either the direct call of the voters, or through "preparatory recall assembly" consisting of local government officials, which was hailed by the Supreme Court as an "innovative attempt … to remove impediments to the effective exercise by the people of their sovereign power."[25]

The Congress has also enacted the Initiative and Referendum Act (hereinafter, the Initiative Law)[26], which provided for three systems of initiative, namely, to amend the Constitution; to propose, revise or reject statutes; and to propose, revise or reject local legislation. In a case involving the creation and scope of a special economic zone created out of Subic Bay, a former U.S. military base[27], the Supreme Court hailed the Initiative Law as "actualizing [] direct sovereignty" and "expressly recogniz[ed the people's] residual and sovereign authority to ordain legislation directly through the concepts and processes of initiative and of referendum."

## IV. A Bogus People's Initiative to Amend the Constitution

The first wrinkle on this neat constitutional framework appeared in 1997, when then President Fidel Ramos (Cory Aquino's successor), through willing cohorts, tried to amend

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

[22] Const., art. X, sec. 3 ("a local government code … with effective mechanisms of recall, initiative, and referendum").

[23] Const., art. XVII, sec. 2 ("directly proposed by the people through initiative upon a petition of at least twelve *per centum* of the total number of registered voters, of which every legislative district must be represented by at least three *per centum* of the registered votes therein …).

[24] Republic Act No. 7160.

[25] Garcia v. Commission on Elections, 5 October 1993.

[26] Republic Act No. 6753.

[27] Subic Bay Metropolitan Authority v.Commission on Elections, 26 September 1996.

the Constitution to lift term limits which banned him from remaining in office after his term ended in 1998. In what has been called the "acid test of democratic consolidation"[28], he was rebuffed by the Supreme Court, following protests by people who saw a dark reminder of a similar maneuver by Marcos which led to the death of Philippine democracy in 1972. Since the proposal was politically unpopular, a shadowy private group called the People's Initiative for Reforms, Modernization and Action (PIRMA or, literally translated to Filipino, "signature") instead launched a signature campaign asking for that constitutional amendment, invoking the direct initiative law. That attempt was rejected twice by the Supreme Court[29], which went to great lengths to say that the direct initiative clauses of the Constitution were not self-executory; that they thus required congressional implementation; and that Congress's response, i.e., the Initiative Law, was "inadequate"– notwithstanding that it expressly referred to constitutional amendments – and thus cannot be relied upon by PIRMA.

A dissenting opinion found this "a strained interpretation … to defeat the intent" of the law. Another dissent stated: "It took only one million people to stage a peaceful revolution at [EDSA 1 but] PIRMA …claim[s] that they have gathered six million signatures." The majority, however, pierced through the legalistic arguments and saw the sinister politics lurking behind. Then Justice Davide (now Chief Justice) said that the Court must not "allow itself to be the unwitting villain in the farce surrounding a demand disguised as that of the people [and] to be used as a legitimizing tool for those who wish to perpetuate themselves in power." Another justice said that PIRMA had "cloak[ed] its adherents in sanctimonious populist garb."

But if the PIRMA cases showed the limits of direct democracy, EDSA 2 re-affirmed its power.

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[28] Jose V. Abueva, *Philippine Democratization and the Consolidation of Democracy Since the 1986 Revolutionn: An Overview of the Main Issues, Trends and Prospects*, in DEMOCRATIZATION: PHILIPPINE PERSPECTIVES (Felipe B. Miranda, ed., Univ. of the Philippines Press, 1997), at 22.

[29] Defensor-Santiago v. Commission on Elections, G.R. No. 127325 (19 March 1997); People's Initiative for Reform, Modernization and Action v. Commission on Elections, G.R. No. 129754 (23 September 1997) (both cases hereinafter cited as the PIRMA cases).

## V. Factual Framework of EDSA 2

The next test of People Power came with the barely constitutional ouster in January 2001 of President Joseph Estrada through what we now call EDSA 2.

1. *Erap was unbeatable* politically *(i.e., through elections) and could only be unseated* legally *(i.e., by conviction for impeachable offenses).*

In May 1998, Erap , a movie actor, was elected President by direct vote of the people, winning by the largest margin in Philippine history. The poor dearly loved the man for his movies, where he often played the underdog, fighting with his fists to save the downtrodden, hence his campaign mantra "Erap for the Poor." His vices were openly known: several mistresses and families, gambling and drinking, often way into the morning with buddies with shady reputations. He won despite the understandable revulsion of the Catholic clergy. The business elite, aghast at Erap's unprofessional working style (e.g., policy reversals during midnight drinking sprees) and favoritism for cronies, couldn't wait for the next presidential polls in 2004 when Erap, limited to a single six-year term, would step down.

Then in August 2000, a gambling buddy, now fallen from grace, linked Erap to a nationwide network of gambling lords who gave him illegal payoffs laundered through the banking system. How else, it was asked, could he have paid for his mistresses' lavish lifestyles? However, under the Philippine Constitution, Erap could be replaced only by impeachment, or resignation. It was thought that Erap could not be impeached, because he held the numbers among the congressmen (around 250, one-third of whom had to vote for impeachment) and the senators (24, two-thirds of whom had to vote for removal).

2. *Despite his enduring popularity with the masses, Erap was unseated by a loose coalition of business, Church, student and "civil society" groups, including Cory Aquino's "pro-democracy" legions. The voice of the people, uttered through elections, was overwhelmed by the voice of the people, spoken through mass protests.*

By mid-November 2000, enough congressmen had deserted Erap due to public protests, and the Congress hastily approved the articles of impeachment. A high profile trial ensued before the Senate. It was to be the showcase for the rule of law, the high and mighty brought to heel before the majesty of law. Yet the Senators (who by law sat as jurors in the trial) and the public were often impatient with technical debates on the admissibility of evidence ("legal gobbledygook", a Senator said), often due to the hasty drafting of the articles of impeachment. The trial was aborted when certain bank records (to prove illicit payoffs) were suppressed. Within hours, the next EDSA uprising emerged, and in a few days, civil society groups, aided by the military, succeeded in ousting Erap.

The groundswell of public indignation was triggered by the suppression of evidence during the trial (i.e., the sealed envelope of banking records alleged to be Erap's). That same evening, mass protests erupted in Manila, and the next day, the impeachment trial was aborted. The day after, the military chiefs would "withdraw their support" from the President. On the fifth day of protests, a Saturday, the Supreme Court Chief Justice, who had earned public respect when he chaired the impeachment trial, swore in Vice-President Gloria Arroyo as the new President. Internationally, it was derided as "Rich People's Power", referring to the elite and middle-class composition of the protesting groups, a reminder of a venerable statesman's warning about the perils of "political ventriloquism." Locally, it was hailed as the triumph of democracy.

*3. The constitutionality of Arroyo's presidency was challenged before the Supreme Court. Yet the desperate measure, i.e., her oath-taking, was explained by the failure of legal and institutional processes.*

The oath-taking of Arroyo was challenged before the Supreme Court. She, as vice-president, could have assumed the Presidency only in case of the Erap's death, disability, resignation, or impeachment. None of these conditions had arisen. Erap was still alive and able to perform his functions. He had not been impeached, because precisely his impeachment trial had been aborted. And he had not resigned. Indeed there was no resignation letter, and contemporaneous televised statements by both the Chief Justice and

President Arroyo indicated their own misgivings. In that context, the military's "withdrawal of support" from Erap was in effect a mutiny against the President and Commander-in-Chief, violating the fundamental precepts of "civilian supremacy" and military non-intervention in politics. Finally, the Supreme Court had lent its legitimizing power to Arroyo's presidency when the Chief Justice administered her oath, attended by several Justices, performing an administrative act (as indeed technically it was) and while so properly (and expressly) reserving the option to rule on any subsequent judicial challenge.[30]

Established interpretations of EDSA 2 portray it as the affirmation of the principle that no man is above the law, not even the President. Yet that was accomplished only by taking constitutional short-cuts, and later asking the Supreme Court to go out on a limb to lend it legitimacy. On the other hand, the "extra-constitutionality" of desperate measures was justified by the failure of legal and institutional processes, and Erap's ouster, though barely satisfying constitutional process, actually upheld the most deeply held norm that public office is a public trust.

## VI. Reconciling EDSA 2 with Constitutional Traditions

> Should [the Supreme Court] choose a literal and narrow view of the constitution, invoke the rule of strict law, and exercise its characteristic reticence? Or was it propitious for it to itself take a hand? …. *Paradoxically, the first option would almost certainly imperil the Constitution, the second could save it.* (Vitug, J., separate opinion, *Joseph Estrada v. Gloria Macapagal-Arroyo*[31]) (emphases supplied)

Thus the Court resolved the dilemma first confronted by the hero Apolinario Mabini, legal architect of the first Revolutionary Government which followed our independence from Spain, who, having seen forebodings of the Philippine-American War, said, "Drown

[30] A.M. [Administrative Matter] No. 01-1-05-SC, In re: Request of Vice-President Gloria Macapagal-Arroyo to Take her Oath of Office as President of the Republic of the Philippines before the Chief Justice (22 January 2001).
[31] G.R. Nos. 146738 (2 March 2001); Joseph E. Estrada v. Aniano Desierto, G.R. Nos. 146710-15 (2 March 2001).

the Constitution but save the principles." This was not the first time that the Court confronted the persistent dilemma between popular democracy and the rule of law.

The *first* time was when the Court validated the Marcos Constitution in *Javellana*, saying that a constitution can be ratified by the people on their own, not necessarily through the strict modes expressly laid down in the Constitution.

The *second* time, ironically, was when the Court validated Cory's presidency in the *Freedom Constitution* cases, recognizing that she had come to power in defiance of the existing Constitution and through the direct mandate of the people.

The *third* time was with the *PIRMA* cases, where the Court abandoned what Justice Vitug would later call its "characteristic reticence" and openly recognized what *viscerally* we knew to be one man's ambition cloaked in "sanctimonious populist garb", but were *intellectually* constrained to call a "peoples' initiative."

The *fourth* time was with the EDSA 2 case, where the Court truly cast off its "reticence" about what the sociologist Randolph David refers to as "the dark side of people power", while intellectually maintaining the test of strict legality (in the main opinion) and a virtual "political question" (in many of the concurring opinions).

In *Joseph Estrada v. Gloria Macapagal-Arroyo*[32], the Supreme Court declared Arroyo as the legitimate President, taking the path of strict doctrinal interpretation of the text of the Constitution. *One*, the Court could have taken the path of least resistance and declared the matter a political question and outside the scope of judicial review, exactly the way the Court disposed of judicial challenges to the legitimacy of Cory Aquino's government and, before that, to Marcos's martial law government. Or, *two*, the Court could have also institutionalized People Power unabashedly as a mode of changing Presidents, and rather elastically interpreted the Constitution to mean that Erap was "incapacited", not

[32] Supra.

by sickness but by induced political paralysis through "withdrawal of support" by various centers of power in government, including the military, and by civil society. Instead, *three*, the Court took the most careful legal path, declared the matter justiceable and found that Arroyo's oath-taking was squarely covered by the Constitution.

The Court rejected the first path, i.e., the political question doctrine, arguing that Arroyo assumed office under the present Constitution – under which she alone, and none of the other contenders, had the right of presidential succession – in contrast to Cory Aquino who candidly declared the revolutionary and extra-constitutional character of her assumption into power. The legitimacy of Arroyo's government thus required the resignation of Erap. Neither did the Court take on the second path, which would have thrown the gates wide open to extra-constitutional transitions. Instead, the Court insisted on the disciplined analysis of hard doctrine, as if EDSA 2 was not unusual at all and fit so snugly into the existing constitutional framework, and found that the "totality of prior, contemporaneous and posterior facts and … evidence" show an intent to resign coupled with actual acts of relinquishing the office.

What is significant is that while all the participating justices upheld the validity of the Arroyo government, almost all of them spoke persistently about the possible excesses flowing from People Power – about opening the "floodgates" of the raw power of the people – while acutely aware of the imperatives of democratic governance. A justice asked: "Where does one draw the line between the rule of law and the rule of the mob, or between People Power and Anarchy?", calling for "great sobriety and extreme circumspection." Each Supreme Court justice, in his turn, echoed this concern. One justice cautioned the "hooting throng" that "rights in a democracy" should not be hostage to the "impatient vehemence of the majority." Another spoke of the "innate perils of people power." Another asked how many "irate citizens" it takes to constitute People Power, and whether such direct action by the people can oust elected officials in violation of the Constitution. Finally, another justice expressed "disquietude [that] the use of 'people power' ["an amorphous … concept"] to create a vacancy in the presidency" can very well "encourag[e]

People Power Three, People Power Four, and People Power *ad infinitum*." In that light, the Supreme Court was unanimous only "in the result", i.e., in the conclusion that Arroyo's oath-taking was valid, but not in the reasoning, which for the majority resembled that of the political question doctrine.

## VII. The State of Philippine Constitutional Discourse

There is a weakening of the ideal of constitutionalism itself. Our original 1935 constitution was a virtual copy of the U.S. constitution, which has been described as "*A Machine That Would Go of Itself*"[33], a self-contained system of checks and balances that would enable government, first, to control the governed, and next, to control itself. That ideal is imperiled in the Philippines.

Erap's impeachment trial was to be the showcase for the "hardening" of the "soft state" – the "single most salient characteristic" of Philippine governance – as the final act of "democratic consolidation"[34]. "He who the sword of heaven will bear, Should be as holy as severe." Yet in the end Erap was removed only by cutting constitutional corners, ratifying in the courts the triumph won in the streets, "anointing power with piety." All over the country, the rule of law ideal was caricatured as "legal gobbledygook", constitutional precepts, as a passing inconvenience. What is so sacred about the Constitution anyway, people seemed to ask, why don't we just hound him out of the Presidential Palace? But constitutionalism says that we must insulate certain claims, certain values, from political bargaining, from the passions of the moment, from the hegemony of popular biases. It places certain things above "ordinary" politics, that is to say, the day-to-day parliamentary give-and-take among elected representatives, deputies we can vote out in three-year cycles

But, in doing so, critics say, constitutionalism takes politics away from the people, it distrusts the raw power of the masses, and would rather channel this energy toward government offices – directly elected representatives and appointed judges – farther and

[33] Michael Kammen, *A Machine That Would Go of Itself*' (1993).
[34] Abueva, supra, at 61-62.

farther away from the people. As Harvard Law Professor Richard Parker says, yes, we have a Constitution but there is no constitutionalism. And he concludes: "Here, the people rule."[35]

Finally, "People power" is constitutionally awkward precisely because it is peaceful and relies upon the moral power of an indignant citizenry. As recognized by the *Javellana* court, the political question doctrine may have been more easily applied had the change of constitutions been done by force of arms. "Treason doth never prosper, for if it prosper, none dare call it treason." Why make it any less acceptable that it was done by a mere show of hands? The People Power cases before the Supreme Court demonstrate amply the full range of constitutional principles to foster non-recourse to violence, without rewarding extra-constitutional temptations.

**Conclusion**

> Democracy is the solved *riddle* of all constitutions. Here not merely *implicitly* and in essence but *existing* in reality, the constitution is constantly brought back to its actual basis, the *actual human being*, the *actual people*, and established as the people's own work.[36]

The Philippines' post-Marcos constitutional order aimed at two competing goals: one, to restore the primacy of the rule of law – "a government of laws and not of men"[37] – while two, institutionalizing the gains of "People Power" – the direct but peaceful exercise of democracy that ousted the Marcos regime. Looking at liberal democracy as being more than just free elections but as the search for a common basis of legitimacy for competing interests and values[38], I look at the tension between rule-based governance through periodic elections and representative institutions *vis-à-vis* mass-based politics which by-passes formal processes.

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[35] RICHARD PARKER, HERE THE PEOPLE RULE: A POPULIST MANIFESTO (Harvard, 1996).
[36] Karl Marx, as cited in SUSAN MARKS, THE RIDDLE OF ALL CONSTITUTIONS: INTERNATIONAL LAW, DEMOCRACY AND THE CRITIQUE OF IDEOLOGY 149 (2000) (emphases in the original).
[37] Abueva, supra, at 21.
[38] JOHN RAWLS, POLITICAL LIBERALISM (Columbia Univ. Press, 1993).

EDSA 2 presented a stark setting for the counter-majoritarian dilemma. On one hand, the ideal of strict legalism, the separation of powers and the built-in checks-and-balances, the constitution as "A Machine That Would Go of Itself" and, on the other, the rawness of the people's power, the romanticism of popular democracy, the readiness to look at social outcomes, not constitutional norms; to choose viscerally but speak legalistically, to look at interests and pretend to see only principles. All these, in an Asian setting where liberal constitutionalism is a Western import[39], indeed a colonial imposition, and law is several layers estranged from life; where democratic institutions are veneered over feudal alliances; where the state began, not organically from its milieu, but as the creature of the colonial power, and never embodied for the people their communal self. The public sphere commands no fealty, and is seen at best as merely the arena for pursuing private gain, and at worst, as easy prey for private spoliation.

Thus we exalt democracy's institutions and its rhetoric in grand scale, while we subvert its day-to-day workings in *ad hoc* compromises. The challenge to Philippine constitutionalism is that it can work only by confessing that to be myth yet to do so is destroy itself.

In contrasting Philippine democracy's rituals from its substance, the debate between democracy and the rule of law must go beyond *formal* institutions, and inquire into our *attitudes* toward rules and institutions. What we *formally* debate (about laws, morals and principles) is rarely the *real* point of dispute (about interests and appetites). We feel no duty to believe our formal arguments, and we lack the institutions and traditions that foster such belief. We are liberals in law, tribal in life. In our grand declarations we are free citizens in a republic but, in day-to-day life, a network of fiefdoms, where the rights-bearing self is so wholly encumbered by allegiances to family and a web of kin-like obligations. On paper, elections are a sacred rite of democracy, but in our hearts we listen elsewhere for the people's voice. We have debased democracy into ritual, and we are perplexed, now that we have tried it in practice, that it actually works, while our legal rhetoric lags behind.

[39] *But see* Inoue Tatsuo, *Liberal Democracy and Asian Orientalism*, The East Asian Challenge for Human Rights (Joanne R. Bauer and Daniel A. Bell, eds., Cambridge Univ. Press, 1999)., at 27 (the "inauthenticity of 'Asian values'", in the purported clash between a stereotypical individualist West and communitarian Asia).