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# CHANGING CONSTITUTIONS: JUDICIAL REVIEW AND REDEMPTION IN THE PHILIPPINES

Dante Gatmaytan-Magno\*

## INTRODUCTION

A very tenacious campaign to change the Constitution overshadowed all other issues in Philippine politics in 2006. The campaign, ostensibly an initiative launched by the people themselves, pitted the highest officials of the country against elements of civil society in a clash that raised serious constitutional issues. These issues were ultimately elevated to the Supreme Court which, by a razor thin majority, ended the drive to change the Constitution.<sup>1</sup>

Constitutional changes strike sensitive nerves in students of Philippine law and history. The first time the Philippine Supreme Court was involved with constitutional change in 1973, it provided the legal basis for Ferdinand Marcos' dictatorial regime.<sup>2</sup> Filipinos were understandably concerned when the drive to amend the Constitution found its way to the Supreme Court's docket again in 2006. Fortunately, the Court resisted political pressure this time and put a stop to the latest attempt to change the Constitution.

The Philippine Supreme Court defined its role in the country's democracy through their 1973 and 2006 decisions. This article studies the politics behind those decisions and is intended as a contribution to the literature on Philippine legal history. I believe that it will also provide important lessons on the role of high courts in the development of democracy.

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1. *See Lambino v. Comm'n on Elections*, G.R. No. 174153, 505 S.C.R.A. 160 (Oct. 25, 2006) (Phil.).

2. *See Javellana v. Executive Secretary*, G.R. No. L-36142, 151-A PHIL. REP. 35 (S.C., Mar. 31, 1973).

Part I of this article provides an overview of the attempts to amend the Philippine Constitution in 1973 and in 2006. Part II discusses the Supreme Court's first foray into constitutional change in *Javellana v. Executive Secretary*<sup>3</sup> and tells the story of Ferdinand Marcos' successful effort to replace the 1935 Constitution. In particular, this section illustrates how the Supreme Court, during Marcos' time, overlooked procedural flaws in the adoption of Marcos' constitution and helped usher the Philippines into authoritarian rule. This section also examines the consequences of the Court's actions on its reputation. Part III evaluates the Court's more recent participation in constitutional change. This section discusses *Lambino v. Commission on Elections*,<sup>4</sup> where the Court redeemed itself by requiring proponents of constitutional change to abide by the requirements of the Constitution. This section also discusses the ways the executive and legislative branches of government tried to punish the Supreme Court and proceed with the revision of the Constitution. Part IV provides an analysis of the differences between the Supreme Court in 1973 and in 2006 and draws out lessons that can be derived from the Philippine experience on the politics of constitutional reform. At the end of this study, the article makes conclusions on the role of the Philippine Supreme Court in Philippine democracy.

## PART I

### OVERVIEW

The relationship between the role of high courts and democracy is a question that has received a good deal of scholarly attention. Scholars in the United States devote a considerable amount of time and effort to study the tension between judicial review and the idea of majoritarian democracy. Critics of judicial review are uncomfortable with the practice of Supreme Court Justices striking down the acts of elected representatives. In their view, the concept of judicial review is abhorrent to the very idea of democracy.<sup>5</sup>

Students of Philippine history, however, are likely to have an entirely different set of concerns. Their primary inquiry may focus on the compatibility of an independent judiciary with a dic-

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3. *See id.*

4. 505 S.C.R.A. 160.

5. *See, e.g.,* Eugene Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952); Samuel Freeman, *Constitutional Democracy and the Legitimacy of Judicial Review*, 9 LAW & PHIL. 327 (1990); Barry Friedman, *The Birth of an Academic Obsession: The History of the Counter-majoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002).

tatorship. They might ask whether judicial review can be exercised under a martial law regime. These issues resonate in the Philippines because the Supreme Court previously sanctioned an extra constitutional revision of the Constitution more than thirty years before and had allowed a dictatorship to take root and flourish. Ferdinand Marcos railroaded the adoption of a new constitution by ignoring the procedures for the amendment or revision of the Constitution. Instead, he created citizens' assemblies which, by a show of hands, allegedly approved his constitution. This was accomplished in an atmosphere of restricted civil liberties brought on by Marcos' imposition of martial law. Several suits were filed with the Supreme Court asking the Court to decide the legality of the adoption of the Constitution.

In *Javellana*<sup>6</sup> a majority of the Supreme Court declared that the 1973 Constitution was not properly ratified.<sup>7</sup> However, because the constitutional requirement of two-thirds of the Court voting to declare a law unconstitutional was not met, the Court also concluded that the new charter was already in effect.<sup>8</sup> That decision allowed Marcos to govern under a dictatorship until he was forced out of office in 1986. Since that time, the Supreme Court has had to live with the realization that it became an accomplice to the emasculation of Philippine democracy. Many wonder if the Court will allow itself to be used in a similar fashion at some point in the future—or the present.

In 2006, a new drive to adopt a parliamentary form of government was attempted, seemingly without regard for proper constitutional procedures. President Gloria Macapagal-Arroyo, reeling from charges that she cheated in the 2004 presidential elections,<sup>9</sup> initiated a campaign to adopt a parliamentary form of government.<sup>10</sup> Unfortunately for Arroyo, legal impediments stood in the way of amending the Constitution.

There are three different ways to amend the present Philippine Constitution. Two of these require the Senate's participation. Either the Senate must vote to sit with the House of Representatives as a constituent assembly to amend the Constitution, or both houses must vote to call a Constitutional conven-

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6. 151-A PHIL. REP. 35.

7. *See id.*

8. *See discussion infra* Part II.

9. *See* Dante B. Gaitmaytan, *It's All the Rage: Popular Uprisings and Philippine Democracy*, 15 PAC. RIM L. & POL'Y J. 1, 3-6 (2006).

10. Roughly one year after Marcos was deposed, Filipinos adopted a new Constitution that reestablished a presidential system of government with a bi-cameral legislature.

tion.<sup>11</sup> In 2006, however, the Senate refused to participate in the President's plans or to support either positions.

Arroyo and her allies were left with only one remedy: the amendment of the Constitution directly by the people through a "people's initiative." Under this approach, the people may directly propose amendments to the Constitution. However, this option requires an implementing statute from Congress, which has not yet been enacted.<sup>12</sup> Moreover, Arroyo's campaign seeks a substantial revision of the Constitution, not merely an amendment to the Constitution. Arroyo's campaign would convert the unitary presidential system of government to a federal parliamentary system.

The campaign to change the Constitution was elevated to the Supreme Court. In an incredible turn of events more than three decades in the making, the Court was handed an opportunity to redefine its role in the promotion of democracy and a chance to redeem itself.

## PART II

### MARCOS' SUPREME COURT

Ferdinand Marcos was elected President of the Philippines in 1965 and again in 1969. A constitutional ban on election to a third term prevented him from staying on as President, prompting Marcos to initiate a revision of the Constitution. Marcos' revisions also sought to shift the form of the Philippine Government to a parliamentary system. On March 16, 1967, the Philippine Congress passed a resolution calling a convention to propose amendments to the Philippine Constitution.<sup>13</sup>

Marcos wanted the convention to either extend his term by two more years or to change the form of government from presidential to parliamentary.<sup>14</sup> If the plan had succeeded, Marcos could have run as a member of parliament in his home province and, as leader of the majority party, could have assumed the role of Prime Minister.<sup>15</sup> This would have enabled Marcos to stay in power indefinitely, or at least as long as his party controlled Congress.

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11. See CONST. (1987), Art. XVII, (Phil.).

12. See *infra* Part III.

13. *Javellana v. Executive Secretary*, G.R. No. L-36142, 151-A PHIL. REP. 35, 103 (S.C., Mar. 31, 1973).

14. EDWARD R. KIUNISALA, *The Politicalization of the Constitutional Convention*, PHILIPPINES FREE PRESS, Jan. 22, 1972, available at [HTTP://PHILIPPINESFREEPRESS.WORDPRESS.COM/2006/05/01/THE-POLITICALIZATION-OF-THE-CONSTITUTIONAL-CONVENTION-JANUARY-22-1972/](http://philippinesfreepress.wordpress.com/2006/05/01/the-politicalization-of-the-constitutional-convention-january-22-1972/) (LAST VISITED NOV. 9, 2007).

15. John H. Adkins, *Philippines 1972: We'll Wait and See*, 13(2) ASIAN SURV. 140, 144 (1973).

Before the Commission could finish its work, Marcos placed the country under martial law. He then pushed for the adoption of a new Constitution but “not through ratification procedures laid down in either the old or the new Constitution.”<sup>16</sup> Instead Marcos 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. Under the martial law regime, there was no free press, there were no civil liberties, and Marcos’ opponents and political commentators were either in detention or exile.<sup>17</sup> These assemblies carried out the adoption of the Constitution “where armed soldiers and policemen were in prominent attendance.”<sup>18</sup>

The procedure for the ratification of the Constitution was riddled with other problems. For example, the assemblies were not limited to qualified and registered voters, and they also included minors. Additionally, no official ballots were used because voting was done by a show of hands, which violated the principle of secrecy. The Commission on Elections took no part in the exercise, so there were no regulations governing tabulation and counting of the votes.<sup>19</sup> There were even claims that these assemblies were never convened<sup>20</sup> and that the votes allegedly cast in these meetings were simply manufactured by Marcos’ people.<sup>21</sup> Marcos also had clandestine meetings with some members of the Supreme Court even before martial law was declared, and in the weeks before, the 1973 Constitution was ratified.<sup>22</sup>

Suits questioning the legality of the ratification of the 1973 Constitution were filed with the Supreme Court. The suits challenged the President’s power to create Citizens’ Assemblies and also argued that these assemblies did not have the power to approve the proposed Constitution. It was also argued that the President did not have the power to proclaim the ratification of

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16. Jean Grossholtz, *Philippines 1973: Whither Marcos?*, 14(1) *ASIAN SURV.* 101, 102 (1974).

17. *Id.*

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

19. Grossholtz, *supra* note 16, at 104.

20. Peter R. Kann, *The Philippines Without Democracy*, 52 *FOREIGN AFF.* 612, 623 (1974).

21. Insiders who bolted the Marcos administration later confessed that the votes that were supposedly cast in these assemblies were simply manufactured. See Richard P. Claude, *The Decline of Human Rights in the Republic of the Philippines*, 24 *N.Y.L. SCH. L. REV.* 201, 207 (1978).

22. See Alex Bello Brillanes, Jr., *Explaining Philippine Authoritarianism: Martial Law in 1972* (May 1986) (Unpublished PhD dissertation, University of Hawaii.) (On file with author).

the proposed Constitution.<sup>23</sup> Despite the irregularities attending the use of the citizens' assemblies, the Supreme Court in *Javellana* looked the other way. While a majority of the Supreme Court members ruled that the Constitution was not validly ratified, the Court also ruled that the new Constitution was already in force, prompting the question of how such a ruling could have happened.

Under the 1935 Constitution, a vote of two-thirds of all the members of the Court was needed to declare any law unconstitutional.<sup>24</sup> Because the Court contained eleven members at that time, seven votes were needed to declare any act unconstitutional. After six members of the Court concluded that the 1973 Constitution was not properly ratified, the Court went on to ascertain that the new charter was otherwise in force. The ten Justices of the Court (there was one vacancy at that time) voted as follows: four Justices believed the Constitution was in force and two believed that it was not. Four other Justices could not tell whether the people had acquiesced to the Constitution and refused to cast a vote on the issue. Consequently, despite the fact that six Justices had ruled that the Constitution was not properly ratified, there were not enough votes—only two of the seven necessary—saying that the Constitution was not in effect.

What could explain the Court's decision in *Javellana*? One author suggests that the Court's decision was designed to preserve its own existence:

[T]he biggest beneficiary of the Court's decision was the Court itself. For while sparing the President the embarrassment of a major legal setback, it mustered enough courage to rebuke him, albeit gently, as if to remind the President that, martial law and the demise of Congress notwithstanding, checks and balances still existed through the judicial branch of government. The uncompromising posture taken by Chief Justice Roberto Concepcion and Justice Calixto Zaldivar against the President on all five major issues raised in the cases, and the majority vote against the President on the issue of the valid ratification of the new Constitution gave the country's constitutionalists reasons to applaud and keep faith in the Court—or at least in some of its members.<sup>25</sup>

The Supreme Court succeeded at preserving its own existence at great cost to itself. Since its establishment under American colonialism, the Supreme Court had been "a respected, independent and powerful legal force in Philippine politics and

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23. *Javellana v. Executive Secretary*, G.R. No. L-36142, 151-A PHIL. REP. 35, 118 (S.C., Mar. 31, 1973).

24. CONST. (1935), Art. VIII, § 10, (Phil.).

25. Rolando V. del Carmen, *Constitutionalism and the Supreme Court in a Changing Philippine Polity*, 13 ASIAN SURV. 1050, 1058 (1973).

government.”<sup>26</sup> The Court enjoyed a reputation for competence and rectitude<sup>27</sup> and was “the most important legitimizing institution in the Philippines”<sup>28</sup>

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.<sup>29</sup> By the time Marcos was deposed in 1986, the Court was regarded by many Filipinos as subservient to the President,<sup>30</sup> and many believed that the Court had become a pliable instrument of the president’s will.<sup>31</sup> Even the Supreme Court acknowledged “many judicial problems spawned by extended authoritarian rule which effectively eroded judicial independence and self-respect” that would require time and effort to repair.<sup>32</sup> The Supreme Court survived martial law, but it emerged a shell of its former self.

### PART III

#### ARROYO’S AGENDA

Gloria-Macapagal-Arroyo was the vice-president in 2001 when massive demonstrations forced President Joseph Estrada out of office. Arroyo was second in the line of succession. Because she succeeded as president and served less than four years in that capacity, she was not disqualified for reelection when presidential elections came up in 2004.<sup>33</sup>

President Arroyo’s administration suffered a devastating blow when recorded conversations between the President and Election Commissioner Virgilio Garcillano during the 2004 presidential elections were leaked to the public. In these conversations, it seemed that the President was negotiating her margin of victory over the opposition’s candidate. The scandal triggered

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26. C. Neal Tate, *The Judicialization of Politics in the Philippines and Southeast Asia*, 15 INT’L POL. SCI. REV. 187, 188 (1994).

27. *Id.* at 189.

28. C. Neal Tate & Stacia L. Haynie, *Authoritarianism and the Functions of Courts: A Time Series Analysis of the Philippine Supreme Court, 1961-1987*, 27 LAW & SOC’Y REV. 707, 708 (1993).

29. *Id.*

30. C. Neal Tate & Stacia L. Haynie, *The Philippine Supreme Court under Authoritarian and Democratic Rule: The Perception of the Justices*, 22 ASIAN PROFILE 209, 209-24 (1994).

31. Carl H. Landé & Richard Hooley, *Aquino Takes Charge*, 64 FOREIGN AFF. 1087, 1087 (1986). The Supreme Court’s credibility needed immediate repair. Upon assuming power from the Marcos government in 1986, Corazon Aquino “almost immediately reestablished a Supreme Court, staffed with several new Justices, and this court quickly ascended to a position of respect that nearly matched that of its pre-martial law predecessor.” Tate, *supra* note 26, at 190.

32. *Animas v. Minister of National Defense*, G.R. No. L-51747, 146 SCRA 406 (Dec. 29, 1986) (Phil.).

33. *See* CONST. (1987), Art. VII, § 4, (Phil.).



calls for her resignation and pushed the Arroyo administration towards collapse. At the last second, former President Fidel V. Ramos intervened and offered a compromise. He suggested that the Constitution be amended to shift to a parliamentary form of government and to provide President Arroyo with a shorter term, thus allowing her a graceful exit.<sup>34</sup> Arroyo used the suggestion to deflect attention away from the charges of vote-rigging and asked Congress to convert itself into a constituent assembly, to amend the Constitution, and consider a shift from the current presidential form of government to a parliamentary-federal system.<sup>35</sup>

Few people believed that the President was willing to shorten her term. If anything, she used the campaign to amend the Constitution to strengthen her hold on office. Speculations were rife that the real intention of the attempt to amend or revise the Constitution was “to sell the parliamentary system” so that Arroyo could “remain in power now that her present office as President of the Philippines [was] in serious question.”<sup>36</sup>

Local officials gathered signatures to amend the Constitution and filed a petition with the Commission on Elections (COMELEC) to schedule a date to allow voters to vote on the proposed constitutional changes. The COMELEC dismissed the petition a few days later, citing a 1997 decision of the Supreme Court in *Santiago v. Commission on Elections*.<sup>37</sup> *Santiago* involved an earlier attempt to amend the Constitution by lifting term limits for the president. A majority of the Court concluded there that while the Constitution recognized the right to directly amend the Constitution, the people cannot exercise the right if Congress does not provide for its implementation. Congress did enact a law, Republic Act No. 6735,<sup>38</sup> to implement the constitutional mandate, but the Supreme Court held that the law was “inadequate to cover the system of initiative on amendments to the Constitution.”<sup>39</sup> The Court permanently enjoined the Commission on Elections from “entertaining or taking cognizance of any petition for initiative on amendments to the Constitution until a sufficient law shall have been validly enacted to provide for

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34. ‘I Won’t Step Down’, MANILA TIMES, Jan. 13, 2006.

35. *Embattled Philippine leader Arroyo Calls for Overhaul of Political System*, AGENCE FRANCE-PRESSE, July 25, 2005.

36. Isagani Cruz, *Can the Initiative Revise the Constitution?*, PHILIPPINE DAILY INQUIRER, Apr. 16, 2006, available at [http://archive.inquirer.net/view.php?db=0&story\\_id=72673](http://archive.inquirer.net/view.php?db=0&story_id=72673) (last visited Nov. 29, 2007).

37. *Santiago v. Commission on Election*, G.R. No. 127325, 207 SCRA 106 (Mar. 19, 1997) (Phil.).

38. An Act Providing for a System of Initiative and Referendum and Appropriating Funds Therefor, Rep. Act No. 6735 (Aug. 4, 1988). (Phil.).

39. *Santiago*, *supra* note 36, at 157.

the implementation of the system.”<sup>40</sup> When the initiative came before the COMELEC, the poll body declared that its hands were tied and refused to consider the petition. The case was then elevated to the Supreme Court.

Apart from the absence of an implementing law for amendment of the Constitution via initiative, proponents of constitutional change had another problem—the proponents were seeking not amendments to, but a revision of the Constitution. Under the present constitution, the initiative process is available only for amendments to the Constitution. The proponents were seeking the adoption of an entirely different form of government, from the current presidential form to a parliamentary form of government, and, as noted previously, this change requires the Senate’s participation.<sup>41</sup>

One other problem faced by proponents of constitutional change was the barely concealed fact that the campaign to amend the Constitution was spearheaded by the government and not the people themselves. It was President Arroyo herself who asked Congress to revise the Constitution during her State of the Nation Address in 2005. Local governments were mobilized to gather signatures for the campaign. The Speaker of the House had been vocal about his support for a shift to a parliamentary form of government. The Solicitor General entered his appearance in support of the petition and against the COMELEC. The Government was funding the campaign to amend the Constitution.<sup>42</sup> Except for the Senate, the entire government machinery seemed to have been mobilized to ensure the amendment of the Constitution.

The people themselves are, for the most part, opposed to any attempt to make changes to the Constitution. A June 2006 survey found that if a plebiscite to approve constitutional amendments had been held then, 67% of all Filipino adults would have voted against the amendments.<sup>43</sup> This figure was an increase from the 56% three months earlier.<sup>44</sup> If anything, there was growing disenchantment with the attempts to change the Constitution, lending credence to the view that politicians, not the people, were propelling the initiative.

40. *Id.*

41. Francis Y. Capistrano, *Senate Firm on Charter Stand*, BUSINESSWORLD, May 16, 2006.

42. J.P. Lopez, *Gov’t Agencies Confirm Funding for Cha-Cha*, MALAYA, Oct. 7, 2006.

43. Mahar Mangahas, *June 2006 Social Weather Survey: “No” Vote in Cha-Cha Plebiscite Rises to 67%; only 6.8% Have Signed an Initiative-Petition*, Social Weather Stations, July 13, 2006, <http://www.sws.org.ph/> (follow “Media Release”; then follow “2006-05”) (last visited Nov. 9, 2007).

44. *Id.*

The absence of the implementing law was not insurmountable. The proponents of constitutional change may have been banking on the fact that *Santiago* was delivered by a divided Court and that all the justices who ruled that Republic Act No. 6735 did not provide a mechanism to amend the Constitution had retired. In fact only two of the Justices who decided *Santiago* were still with the Supreme Court when it considered *Lambino*—both of whom dissented. Moreover, at the time *Lambino* was considered by the Court, two-thirds of the Court's membership had been appointed by President Arroyo, and their views on Republic Act No. 6735 were not known. In short, it was a Supreme Court dominated by Arroyo's appointees that considered the propriety of resorting to initiative to amend or revise the Constitution. Still, it was evident that the campaign was government-initiated and that the government sought a revision of the Constitution.

The proponents of constitutional change, realizing the weakness of their arguments, pressured the Court to recognize the "moral force" of the petition. The Speaker of the House droned on about how the more than six million signatures that accompany the petition for initiative constitute "a moral force in our society that no one can — and must — ignore."<sup>45</sup> He added that "[t]ogether, they represent the collective voice of the Filipino people who believe that urgent political change is vital to the survival of the nation."<sup>46</sup> Despite all evidence to the contrary, the Speaker claimed that there was an unstoppable clamor for the adoption of a parliamentary system in the Philippines. His press releases suggested that the sheer number of signatures attached to the petition should be enough reason for the Supreme Court to reverse *Santiago*.

Additionally, doubts regarding the validity of the signatures surfaced during oral arguments. The Justices devoted much of their time to questioning the proponents of constitutional reform on the validity of the signatures that accompanied the petition, expressing both reservations about the signatures' authenticity and the manner in which they were collected.<sup>47</sup>

The apparent illegality of the latest drive to amend the Constitution seemed too glaring to be ignored. The absence of an enabling law for the initiative, the use of the initiative for a revision of the Constitution, and the fact that public officials seemed

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45. Jess Diaz, *JDV: SC can't ignore 6.3 M signatures*, THE PHILIPPINE STAR, Sept. 9, 2006.

46. *Id.*

47. See Armand Nocum & Jerome Aning, *SC justices Question Cha-cha Signatures*, PHILIPPINE DAILY INQUIRER, Sept. 27, 2006, available at [http://archive.inquirer.net/view.php?db=1&story\\_id=23317](http://archive.inquirer.net/view.php?db=1&story_id=23317) (last visited Nov. 29, 2007).

to be the prime forces behind the drive to amend or revise the Constitution all suggested that the campaign was doomed to fail. But Ferdinand Marcos' own attempt to replace the Constitution had completely ignored the pertinent laws and yet, somehow, was sustained by the Supreme Court. President Arroyo probably hoped that the Supreme Court would reprise its 1973 role and legitimize her campaign to hold on to power despite the legal constraints that stood in her way.

It is conceivable that the Justices of the Supreme Court were aware of the impact of *Javellana* on the Court's credibility and that they saw *Lambino* as an opportunity to refurbish its reputation. The Chief Justice was aware of the impact of *Javellana* in history and recently lamented the Court's role in the institution of authoritarianism in the Philippines, writing:

. . . Perhaps this country would never have had to experience the wrenching pain of dictatorship; and a past President would not have fallen into the precipice of authoritarianism, if the Supreme Court then had the moral courage to remind him steadfastly of his mortality and the inevitable historical damnation of despots and tyrants. Let not this Court fall into that same rut.<sup>48</sup>

Instead of falling into the same mistake again, the Court could have viewed *Lambino* as an opportunity for redemption and the Supreme Court's shot at immortality.

#### PRESSURING THE COURT

While the Supreme Court was considering *Lambino v. Commission on Elections*, the Chief Justice disclosed that the Court was being pressured by interest groups in the same case, although he added that the pressure "will not impede the court in deciding the case."<sup>49</sup>

The day after the disclosure, President Arroyo told Supreme Court Chief Justice Artemio Panganiban and other Chief Justices from other countries of her administration's determination to amend the Constitution. She made her statement while hosting a dinner for the delegates of an international conference organized by the Supreme Court.<sup>50</sup> The Speaker of the House made a personal appeal on the same stage—begging the Justices not to "un-

48. David v. Macapagal-Arroyo, G.R. No. 171396, 489 SCRA 160 (Panganiban, J., concurring) (May 3, 2006) (Phil.), available at <http://www.supremecourt.gov.ph/jurisprudence/2006/may2006/G.R.%20No.%20171396.htm> (last visited Nov. 9, 2007).

49. Armand Nocum, *SC Chief Admits Pressure on People's Initiative*, PHILIPPINE DAILY INQUIRER, Oct. 19, 2006, available at [http://archive.inquirer.net/view.php?db=1&story\\_id=27481](http://archive.inquirer.net/view.php?db=1&story_id=27481) (last visited Nov. 29, 2007).

50. Christine Avendaño, Juliet Labog-Javellana & Norman Bordadora, *Arroyo Tells SC Justices Charter Change a Must*, PHILIPPINE DAILY INQUIRER, Oct. 20, 2006,

derestimate the gravity of the decision” they were about to make.<sup>51</sup> The Speaker painted pictures of the dire consequences that would follow an unfavorable decision from the Court. He raised apprehensions that the Philippines “might forever remain underdeveloped, with the ever-present danger of military rule.” Adding pressure on the Court, he added, “Whether our country is to have a new beginning or stay in the same political rut in which it has been trapped this half century, this question is in your hands.” An adverse decision in *Lambino*, in his view, would toss aside “liberty and prosperity” and risk “authoritarianism and economic stagnation.”<sup>52</sup> Still, amazingly, the Arroyo administration denied any attempt on their part to influence the Justices’ minds.<sup>53</sup>

As if the Supreme Court was not feeling enough pressure, the Social Weather Station, a polling institution, released the results of their latest survey which claimed that six out of ten Filipinos were “unsure” that the Supreme Court would decide fairly on *Lambino v. COMELEC*.<sup>54</sup> The survey triggered a media storm and prompted the President’s allies to charge that the release of the survey was designed to pressure the Court into deciding against the proponents of constitutional change.<sup>55</sup>

### THE DECISION

On October 25, 2006, the Supreme Court promulgated its decision in *Lambino v. Commission on Elections*.<sup>56</sup> The Court dismissed the petition, although it was a sharply divided opinion at 8-7: eleven different opinions were written, five in dissent. The majority decision said that “The Lambino Group miserably failed to comply with the basic requirements of the Constitution for conducting a people’s initiative.”<sup>57</sup> This “glaring failure”<sup>58</sup> to comply with the Constitution’s mandate was sufficient reason, ac-

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available at [http://archive.inquirer.net/view.php?db=1&story\\_id=27699](http://archive.inquirer.net/view.php?db=1&story_id=27699) (last visited Nov. 29, 2007).

51. Maricel V. Cruz, *De Venecia begs SC to Use Heart and Mind*, MANILA TIMES, Oct. 23, 2006.

52. *Id.*

53. David Cagahastian, *Malacañang Denies Pressuring Justices on Cha-cha Case*, MANILA BULLETIN, Oct. 24, 2006.

54. *60% of Filipinos Doubt SC Fairness, Says Poll*, PHILIPPINE DAILY INQUIRER, Oct. 24, 2006, available at [http://www.inquirer.net/specialfeatures/charter\\_change/view.php?db=1&article=20061024-28317](http://www.inquirer.net/specialfeatures/charter_change/view.php?db=1&article=20061024-28317) (last visited Nov. 29, 2007).

55. *Id.*

56. See *Lambino v. Comm’n on Elections*, G.R. No. 174153, 505 S.C.R.A. 160 (Oct. 25, 2006) (Phil.).

57. *Id.* at 227–28

58. *Id.* at 228.

ording to the majority opinion, to dismiss the case. The majority opinion made four points.

The first point was that the Petition did not comply with Section 2, Article XVII of the Constitution on direct proposal by the people. The Court consulted the deliberations of the Constitutional Commission and concluded that the draft of the proposed constitutional amendment should be ready and shown to the people before they signed any proposal. Thus, an amendment may be directly proposed by the people through initiative upon a petition “only if the people sign on a petition that contains the full text of the proposed amendments.”<sup>59</sup>

Using this rule, the Court found the Lambino petition defective because there was “not a single word, phrase, or sentence of text of the Lambino Group’s proposed changes in the signature sheet. Neither does the signature sheet state that the text of the proposed changes is attached to it.”<sup>60</sup> The signature sheet merely asked whether the people approved a shift from the Bicameral-Presidential to the Unicameral-Parliamentary system of government, but it did not show the draft of the proposed changes before the people were asked to sign. According to the Court, the failure to include the text of the proposed changes in the signature sheets rendered the initiative void.<sup>61</sup>

The second point the Court made was that the initiative violated the Constitution because the proposal constituted a revision of the Constitution and not a mere amendment. The Court explained that the framers of the Constitution intended, and wrote, a clear distinction between “amendment” and “revision” of the Constitution and a people’s initiative may propose only amendments to the Constitution—but not revisions.<sup>62</sup>

According to the Court, the proposal to overhaul Article VI on the Legislature and Article VII on the Executive would affect 105 provisions in the Constitution. This would substantially alter the basic plan of government, from presidential to parliamentary, and from a bicameral to a unicameral legislature.<sup>63</sup> The Court held that the proposal to reduce the three branches of government in the present Constitution would alter the separation of powers under the Constitution. The Court added that a shift from the Bicameral-Presidential system to a Unicameral-Parliamentary system would also be a revision of the Constitution because merging the legislative and executive branches would be a

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59. *Id.* at 229.

60. *Id.* at 234.

61. *See id.* at 234.

62. *Id.* at 249.

63. *Id.* at 253.

radical change in the structure of government. More emphatically, the Court said that "By any legal test and under any jurisdiction, a shift from a Bicameral-Presidential to a Unicameral-Parliamentary system, involving the abolition of the Office of the President and the abolition of one chamber of Congress, is beyond doubt a revision, not a mere amendment."<sup>64</sup>

The Court then made its third pronouncement that a review of *Santiago* was not necessary because an affirmation or reversal of *Santiago* would not change the outcome of the present petition. Regardless of any decision on the validity of *Santiago*, the initiative would still have been invalid because it did not comply with Section 2, Article XVII of the Constitution and various provisions of Republic Act No. 6735.<sup>65</sup>

Finally, the Court held that the Commission on Elections did not commit grave abuse of discretion when it dismissed the initiative because the Commission merely followed the Court's ruling in *Santiago*.<sup>66</sup>

The majority opinion ended with an explanation of its role under a constitutional regime:

The Constitution, as the fundamental law of the land, deserves the utmost respect and obedience of all the citizens of this nation. No one can trivialize the Constitution by cavalierly amending or revising it in blatant violation of the clearly specified modes of amendment and revision laid down in the Constitution itself.

To allow such change in the fundamental law is to set adrift the Constitution in unchartered waters, to be tossed and turned by every dominant political group of the day. If this Court allows today a cavalier change in the Constitution outside the constitutionally prescribed modes, tomorrow the new dominant political group that comes will demand its own set of changes in the same cavalier and unconstitutional fashion. A revolving-door constitution does not augur well for the rule of law in this country.<sup>67</sup>

The Court was categorical in saying that no amount of signatures "can change our Constitution contrary to the specific modes that the people, in their sovereign capacity, prescribed when they ratified the Constitution."<sup>68</sup> Allusions to the "people's voice" or the "people's sovereign will," said the Court, could not override the specific modes of changing the Constitu-

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64. *Id.* at 253.

65. *Id.* at 261.

66. *Id.* at 263.

67. *Id.* at 263-64.

68. *Id.* at 264.

tion as prescribed in the Constitution itself.<sup>69</sup> The Court then concluded by saying:

This Court cannot betray its primordial duty to defend and protect the Constitution. The Constitution, which embodies the people's sovereign will, is the bible of this Court. This Court exists to defend and protect the Constitution. To allow this constitutionally infirm initiative, propelled by deceptively gathered signatures, to alter basic principles in the Constitution is to allow a desecration of the Constitution.<sup>70</sup>

With a single vote, the Supreme Court managed to avoid a repeat of *Javellana*, although only two Justices mentioned the case in their opinions. Chief Justice Panganiban, in his separate concurring opinion, again demonstrated his sense of history and his determination not to repeat the errors of his predecessors:

Verily, the Supreme Court is now on the crossroads of history. By its decision, the Court and each of its members shall be judged by posterity. Ten years, fifty years, a hundred years—or even a thousand years—from now, what the Court did here, and how each justice opined and voted, will still be talked about, either in shame or in pride. Indeed, the hand-washing of Pontius Pilate, the abomination of *Dred Scott*, and the loathing of *Javellana* still linger and haunt to this day.

Let not this case fall into the same damnation.<sup>71</sup>

Associate Justice Sandoval-Gutierrez's closing was more to the point:

Let us not repeat the mistake committed by this Court in *Javellana v. The Executive Secretary*. . . . That was during martial law when perhaps majority of the justices were scared of the dictator. Luckily at present, we are not under a martial law regime. There is, therefore, no reason why this Court should allow itself to be used as a legitimizing authority by the so-called people's initiative for those who want to perpetuate themselves in power . . . .<sup>72</sup>

She added that “history will judge us on how we resolve this issue—shall we allow the revision of our Constitution, of which we are duty bound to guard and revere, on the basis of a doubtful people's initiative?”<sup>73</sup>

69. *Id.*

70. *Id.* at 265.

71. *Id.* at 290 (Panganiban, J., concurring).

72. *Id.* at 414 (Sandoval-Gutierrez, J., concurring).

73. *Id.* at 415 (Sandoval-Gutierrez, J., concurring). The dissenters led by Senior Associate Justice Reynato S. Puno wanted to remand the Petition to the Commission on Elections for verification of the signatures. No Justice voted to grant the prayer to reverse the Commission on Elections and subject the proposed constitutional changes to a plebiscite. See Jay B. Rempillo, *SC Dismisses People's Initiative to Amend the 1987 Constitution*, available at <http://www.supremecourt.gov.ph/> (follow “News”; then follow “Oct. 25, 2006”) (last visited Nov. 9, 2007).



Both Justices seem to have seen the initiative for what it really was—a scheme developed by politicians to salvage the Arroyo administration—and refused to play along this time. This time there were just enough votes from the members of the Supreme Court to declare the drive to amend the Constitution illegal.

#### THE FALLOUT: THE ADMINISTRATION'S RESPONSE

The administration's response to *Lambino* was a comprehensive counterattack that opened two fronts: one in the Supreme Court and the other in Congress.

In the Supreme Court, the proponents of constitutional change had a three-pronged response to *Lambino*.

Their first strategy was the filing of a motion for reconsideration. Proponents of constitutional change asked the Supreme Court to declare the Initiative and Referendum Act as the basic and appropriate implementing statute to change the Constitution and to order the Commission on Elections to entertain their petition for the initiative and the holding of a plebiscite.<sup>74</sup> They urged the Supreme Court to rule on the issue of whether the initiative and referendum act was sufficient, saying that had it done so, they believed the COMELEC would have had to recognize their petition and schedule a plebiscite.<sup>75</sup>

The Office of the Solicitor General also asked the Supreme Court to reconsider its decision.<sup>76</sup> The OSG said the Supreme Court had ruled on factual matters that should have been left to the Commission on Elections when it said that the signatories to the petition for the initiative had not been properly informed of the proposed changes. It argued that the proposed amendments needed only to be presented during the public discussions prior to the plebiscite, during which the people would decide whether they agreed to the changes or not.

The second approach they used was a motion for certain Justices to be excluded from participating in the motion for reconsideration. They asked Chief Justice Artemio Panganiban and Associate Justice Antonio Carpio (the writer of the majority opinion) to recuse themselves from participating in deliberations on the proposed people's initiative to amend the 1987 Constitu-

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74. Leila B. Salaverria, *Pro-Cha-cha Groups Beat Appeal Deadline*, PHILIPPINE DAILY INQUIRER, Nov. 10, 2006.

75. *Id.*

76. Leila B. Salaverria, *OSG Appeals Peoples Initiative Case to SC*, PHILIPPINE DAILY INQUIRER, Nov. 11, 2006, available at [http://archive.inquirer.net/view.php?db=1&story\\_id=31917](http://archive.inquirer.net/view.php?db=1&story_id=31917) (last visited Nov. 29, 2007).

tion.<sup>77</sup> If granted, the Court would be left with a 7-6 vote in favor of the initiative. The motion seems to be devoid of any legal footing as the complaint against the Chief Justice was that he allegedly “campaign[ed] among his colleagues to reject the people’s initiative.”<sup>78</sup> The issue against Justice Carpio was that he “spiced up his decision with condemnatory and virulent conclusions and remarks that do not speak well of a magisterial document. . . .”<sup>79</sup>

The third track was a campaign to fill the impending vacancy in the Supreme Court with an unabashedly pro-initiative Justice. Among the names that were floated was that of Solicitor General Antonio Eduardo Nachura, who appeared on behalf of the proponents of constitutional change before the Supreme Court.<sup>80</sup> Nachura was eventually appointed to the Supreme Court.<sup>81</sup>

In Congress, administration allies took two tracks. The first response was the decision to convene as a Constituent Assembly and to proceed with the amendment or revision of the Constitution.<sup>82</sup> The plan was to invite the senators soon to a joint session, but to proceed with the amendment of the Constitution even if no senator attended. They reasoned that all that was required by the Constitution for the amendment to be approved was a “three-fourths vote of all the members of Congress.”<sup>83</sup> They argued that the Charter did not specify whether the House and the Senate should vote separately or whether each chamber should muster a three-fourths vote as the Senators claimed.

The second tack was the preparation of an impeachment case against the Justices who voted against the initiative. Administration lawmakers supported an impeachment complaint prepared against the Supreme Court Justices who voted to dismiss the petition for a people’s initiative to amend the Constitution.<sup>84</sup> The complaint was premised on the view that the dismissal of the *Lambino* petition was tainted with the Justices’ bias. Proponents of the move accused Chief Justice Artemio Panganiban and Associate Justice Antonio Carpio of usurping the powers of the

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77. Jose Rodel Clapano, *SC chief, Carpio Asked to Inhibit Selves From PI Case*, THE PHILIPPINE STAR, Nov. 17, 2006.

78. *Id.*

79. *Id.*

80. Jaime Laude, *5 Governors Back Nachura for SC Chief*, THE PHILIPPINE STAR, Nov. 19, 2006.

81. Gil Cabacungan, *Arroyo Picks Nachura as New SC Justice*, PHILIPPINE DAILY INQUIRER, Feb. 1, 2007, available at [http://archive.inquirer.net/view.php?db=1&story\\_id=46833](http://archive.inquirer.net/view.php?db=1&story_id=46833) (last visited Nov. 29, 2007).

82. Jess Diaz, *Plan B: Administration Allies To Revive Con-Ass*, THE PHILIPPINE STAR, Oct. 26, 2006.

83. *Id.*

84. Perseus Echeminada, *Impeach Suit vs SC Justices Backed*, THE PHILIPPINE STAR, Nov. 18, 2006.

Commission on Elections in dismissing the people's initiative petition and in denying the signatories of their right to propose amendments to the Constitution.<sup>85</sup> The Supreme Court, with the same 8-7 vote denied the motion for reconsideration and unanimously denied the motion that sought the recusal of Chief Justice Panganiban and Justice Antonio Carpio.<sup>86</sup> Undaunted, the proponents announced their intention to file another motion for reconsideration,<sup>87</sup> upped the ante on the impeachment bid saying that the complaint was "on its final stages,"<sup>88</sup> and set a day for Congress to convene as a constituent assembly.<sup>89</sup> It should be noted that all of this took place despite popular opposition to amending the Constitution.<sup>90</sup>

Chief Justice Artemio Panganiban retired on December 6, 2006, creating a vacancy in the Court and an opportunity for President Arroyo to designate a new Chief Justice. President Arroyo named Senior Associate Justice Reynato S. Puno, who was the most senior of the Justices and who, incidentally, led the dissenters in *Lambino*, as the 22nd Chief Justice of the Supreme Court.

In the House of Representatives, administration allies were bent on amending the Constitution and unilaterally scrapped the rule that constitutional amendments, like other laws, must be approved separately by both chambers.<sup>91</sup> The House then approved a resolution calling for the convening of Congress as a constituent assembly to propose changes to the Constitution. The Senate, including those belonging to the administration, however, declared that they would boycott the unconstitutional attempt to amend the Constitution.<sup>92</sup> The House's efforts were met with protests. Church and opposition groups amassed their

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85. *Id.*

86. Jay B. Rempillo, SC DENIES WITH FINALITY MOTION FOR RECONSIDERATION ON PEOPLE'S INITIATIVE CASE, available at <http://www.supremecourt.gov.ph> (follow "News"; then follow "Nov. 21, 2006") (last visited Nov. 9, 2007).

87. Alexis Douglas B. Romero, *Pro-Charter Group to Seek Clearance on Initiative Process*, BUSINESSWORLD, Dec. 1, 2006.

88. Joel M. Sy Egco, *Impeach-Panganiban Bid Gains Steam*, MANILA STANDARD, Nov. 24, 2006.

89. Michael Lim Ubac, *House to OK Charter Change Proposals Next Week*, PHILIPPINE DAILY INQUIRER, Dec. 1, 2006, at A1, available at <http://www.inquirer.net/specialfeatures/charterchange/view.php?db=1&article=20061201-35754> (last visited Nov. 29, 2007).

90. Christine O. Avendano, TJ Burgonio & Delmar Carino, *67% of Pinoys Buck Cha-cha*, PHILIPPINE DAILY INQUIRER, Nov. 27, 2006, available at [http://archive.inquirer.net/view.php?db=1&story\\_id=34940](http://archive.inquirer.net/view.php?db=1&story_id=34940) (last visited Nov. 29, 2007).

91. *It Takes Two to Cha-Cha*, THE ECONOMIST, Dec. 16, 2006.

92. T.J. Burgonio, *22 Senators Close Ranks, Vow to Boycott Con-Ass*, PHILIPPINE DAILY INQUIRER, Dec. 9, 2006, available at [http://archive.inquirer.net/view.php?db=1&story\\_id=37229](http://archive.inquirer.net/view.php?db=1&story_id=37229) (last visited Nov. 29, 2007).

supporters for a substantial rally to be held on the same date the House would begin its deliberations.<sup>93</sup>

To preempt the demonstrations,<sup>94</sup> Speaker de Venecia announced plans to abandon the move to convene as a constituent assembly and called for the election of delegates to a constitutional convention instead. Incredibly, de Venecia gave the Senate an ultimatum—pass a resolution within 72 hours calling for a constitutional convention or the House would continue to convene a constituent assembly and approve changes to the Constitution.<sup>95</sup> The Senate quickly rejected the Speaker's demand.<sup>96</sup> Church and opposition groups refused to call off their demonstrations.<sup>97</sup>

Meanwhile, the Supreme Court, by a unanimous vote, denied the second motion for reconsideration of the decision in *Lambino*. The Court added that no further pleadings on the case would be entertained.<sup>98</sup>

Still threatened by the possibility of mass demonstrations, Speaker de Venecia was compelled to state categorically that the House of Representatives' attempt to convene as a constituent assembly was "dead."<sup>99</sup> The President, in her own retreat, issued a statement abandoning the campaign to amend the Constitution altogether.<sup>100</sup>

93. Christian V. Esguerra & Norman Bordadora, *More Groups Join CBCP in Luneta Rally Against Cha-Cha*, PHILIPPINE DAILY INQUIRER, Dec. 9, 2006, available at [http://archive.inquirer.net/view.php?db=1&story\\_id=37228](http://archive.inquirer.net/view.php?db=1&story_id=37228) (last visited Nov. 29, 2007).

94. According to one analyst, the way the President's allies in the House of Representatives were pushing the move to amend the Constitution sparked "a political storm that galvanized the strongest outrage against the administration since the crisis of July 2005, when her administration was on the verge of collapse under pressure from street protests demanding her resignation over tapes tending to show presidential interference in the canvassing of the 2004 election results." Amando Doronila, *Con-ass death shows people power alive*, PHILIPPINE DAILY INQUIRER, Dec. 11, 2006, available at [http://archive.inquirer.net/view.php?db=1&story\\_id=37534](http://archive.inquirer.net/view.php?db=1&story_id=37534) (last visited Nov. 29, 2007).

95. Maricel Cruz & William Depasupil, *House Backs Down on Con-Ass*, MANILA TIMES, Dec. 10, 2006.

96. Ilang-Ilang Quijano & Maricel V. Cruz, *Senate Ignores House Deadline to Approve Con-Con Resolution*, MANILA TIMES, Dec. 10, 2006.

97. Angel Gonong, *Outrage Over Con-Ass Won't Die Down*, MANILA TIMES, Dec. 11, 2006.

98. Janice May R. Erni, *SC DENIES SECOND MR IN PEOPLE'S INITIATIVE CASE*, available at <http://www.supremecourt.gov.ph> (follow "News"; then follow "Dec. 12, 2006") (last visited Nov. 9, 2007).

99. Alexis Douglas B. Romero, Reagan D. Tan & Josefa Labay Cagoco, *House Leaders Shelve Resolutions Calling for Constituent Assembly*, BUSINESSWORLD, Dec. 14, 2006.

100. Josefa Labay Cagoco & Alexis Douglas B. Romero, *Arroyo Withdraws Charter Change Agenda*, BUSINESSWORLD, Dec. 15, 2006.

## THE FALLOUT: POPULAR RESPONSE

Speaker Jose de Venecia's attempts to vilify the Supreme Court after its decision in *Lambino* failed. There is no evidence that the Court's reputation suffered after its decision in *Lambino*. If anything, recent surveys show that the Court's reputation improved.

In a survey conducted from January 22, 2007 to February 15, 2007, the business sector recognized the Supreme Court as the third-best performing of 37 government offices, institutions, and basic services surveyed in 2006. The Court moved up five notches from 8th place after obtaining a net performance satisfaction rating of 74.2. The Court also ranked 4th among the agencies which obtained the biggest increase in net satisfaction ratings—almost three times its net rating the previous year.<sup>101</sup>

The Social Weather Station, the Philippines' most reputable polling institution, also showed the Supreme Court in a good light. In its First Quarter 2007 Social Weather Survey, the survey found that 44% of respondents were satisfied with the Supreme Court while only 28% were dissatisfied. This reflects a moderately good net rating of +16. The report also stated that the Supreme Court's net rating "was a fairly high +37 at the start of the Arroyo administration, but dropped to neutral in March 2005, and has been modestly positive since then."<sup>102</sup>

## PART IV

## ANALYSIS

The Philippine Supreme Court has had significant opportunities to define its role in democracy. In the two cases presented here, the Court ruled on the legality of the procedures for changing the Constitution. I make three observations in this study. The first is that politicians in the Philippines are keenly aware of the concept of the rule of law and seek the approval of the Supreme Court for their actions. The second is that the resolution of issues within the Supreme Court is not always determined by the number of the President's appointees. The third is that the public's perception of and respect for the Court are directly affected by the Court's decisions.

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101. Jomar Canlas, *MBC Sees High Court Performance as 3rd Best*, MANILA TIMES, Mar. 20, 2007.

102. *First Quarter 2007 Social Weather Survey: Net Satisfaction Ratings: Vice-President de Castro +36, Senate President Villar +52, Speaker de Venecia +5, Chief Justice Puno +1*, Social Weather Stations, March 24, 2007, <http://www.sws.org.ph/> (follow "Media Release"; then follow "2007") (last visited Nov. 9, 2007).

This chapter of Philippine history shows that Philippine politicians evidently understand the concept of the rule of law. They are aware of constitutional restraints on government action yet, ironically, seek the Supreme Court's approval when they step outside legal boundaries. Politicians sought the Supreme Court's approval in both the 1973 and 2006 campaigns to change the Constitution and to cloak their actions with legality. Marcos' campaign succeeded and from a legal perspective, his martial law regime had a legal foundation. Arroyo's failure to secure judicial approval for her own campaign illustrated an important point in Philippine politics: the politicians' respect for the rule of law is apparently conditioned on the Supreme Court's acquiescence to their demands. After the Court decided *Lambino*, the House of Representatives proceeded to amend the Constitution despite the ruling, and without the Senate's participation. This attempt might have succeeded had it not been for the threat of massive protests from civil society. Evidently, to some politicians, the Supreme Court's approval for constitutional change is desired but is ultimately expendable.

This study also shows that the resolution of issues within the Supreme Court is not always determined by the number of the President's appointees. *Javellana* demonstrated how control of a faction of the Court allowed Marcos to obtain the ruling that he desired. In *Lambino*, the number of Arroyo's appointees, a majority of the Court, was not enough to sanction her campaign to amend the Constitution.

In *Javellana*, "four of the Justices seemed ready to approve all acts of the President under martial law."<sup>103</sup> Albeit small, this number is actually very significant. Under the 1935 Constitution the Supreme Court was composed of a Chief Justice and ten Associate Justices.<sup>104</sup> To declare a treaty or law unconstitutional, a concurrence of *two-thirds* of all the Members of the Court was required.<sup>105</sup> In other words, seven votes were needed to oppose Marcos—to declare his acts unconstitutional. At the time *Javellana* was decided, there was a vacancy in the Supreme Court. If Marcos had a lock on four votes, it would have been mathematically impossible to muster enough votes to overturn any act made by Marcos.

Not surprisingly, four Justices ruled that the 1973 Constitution was validly ratified and that the charter was already in force.

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103. C. Neal Tate, *Courts and Crisis Regimes: A Theory Sketch With Asian Case Studies*, 46 POLITICAL RESEARCH Q. 311, 327 (1993). These were Associate Justices Antonio P. Barredo, Felix V. Makasiar, Felix Q. Antonio, and Salvador V. Esguerra.

104. CONST. (1935), Art. VIII, § 4, (Phil.).

105. *Id.* § 10.

The other six Justices were either of the opinion that the 1973 Constitution was not in effect or could not tell either way. Two of these six Justices voted that the 1973 Constitution was not in effect, while the other four Justices refused to vote on the issue. With an absence of the votes necessary to rule against his actions, Marcos was safely on his way to retaining power.

The four Justices who voted that the 1973 Constitution was already in effect were all appointed by President Marcos. Of the four Justices who refused to cast a vote on whether the Filipino people had accepted the 1973 Constitution, three were appointed by Marcos.<sup>106</sup> The two Justices who voted consistently against Marcos were appointed by other Presidents.<sup>107</sup> This tally suggests that loyalty to the appointing power can influence the way Justices of the Supreme Court vote, or at least that they did during Ferdinand Marcos' time.

The outcome was different in President Arroyo's time. On paper, Arroyo's chances of controlling the Supreme Court today were far greater than Marcos'. At the time *Lambino* landed at the Court's docket, two-thirds of the members of the Court were Arroyo's appointees, but as explained earlier, an 8-7 decision kept Arroyo's agenda at bay. Significantly, under the present Constitution, Arroyo needed only a majority of the Justices to take her side, not two-thirds of its membership as was required during Marcos' time.<sup>108</sup>

An 8-7 decision suggests that the decision could have gone either way. So why did a majority of the Supreme Court Justices rule against Constitutional change this time? What could account for the difference in the votes cast in *Javellana* and *Lambino*? The first reason could be the fact that *Javellana* was decided under a martial law regime. The Justices could have been constrained by the possible impact of a different ruling on the future of the Supreme Court or the safety of its members. It might also be conceivable that members of the Court were willing to give martial law a try—as a way to deal with economic

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106. Associate Justices Fred Ruiz Castro, Enrique M. Fernando and Claudio Teehankee were appointed by Marcos. Associate Justice Querube Makalintal was appointed by President Diosdado Macapagal in 1962.

107. Chief Justice Roberto Concepcion was appointed by President Ramon Mag-saysay in 1954 while Calixto Zaldivar was appointed by President Diosdado Macapagal in 1963. For details of these appointments see <http://www.supremecourt.gov.ph/> (follow "E-Library"; then follow "Memorabilia Room"; then follow "View List") (last visited Nov. 9, 2007).

108. I do not claim that the Supreme Court will never sustain government action on the basis of loyalty to the appointing power. This Article goes so far only to say that in *Lambino*, the Justices of the Supreme Court looked beyond personalities and pressure politics and stopped the very determined government's attempt to overhaul the Constitution.

woes and a growing insurgency in the 1970s.<sup>109</sup> Together, these considerations might have impelled the Justices to craft the *Javellana* decision.

A second reason could be the effect of the Court's decision in *Javellana*. As pointed out earlier, at least two of the Justices made explicit references to the case and were aware of the impact that case has had on the Court's own reputation. The majority may have been consciously working to restore its reputation and to assert its independence from the executive branch.

Third, the Court may have been wary of the potentially volatile response of the public to another *Javellana* decision. Since Marcos' expulsion from the Philippines in 1986, popular protest toppled President Joseph Estrada in 2001 and almost ended Arroyo's regime shortly thereafter. For better or worse, Filipinos have had a more hands-on approach to governance on crucial issues. It is possible that any misstep on the part of the Court could trigger another uprising—something which the *Javellana* court did not have to worry about. Mass actions have a very powerful force in Philippine politics.<sup>110</sup> After all, it may be that the mere threat of another “people power” uprising finally helped to end Arroyo's campaign to change the constitution.

Finally, the Philippine experience shows very clearly that the public's perception and respect of the Court is directly affected by the Court's decisions. In 1973, the Court's willingness to play along with the games that politicians play succeeded in ruining its reputation with the public. Inversely, its ability to stand up to political pressure in 2006 allowed the Court to regain a large measure of respect. Public perception of the Court, it seems, can keep the institution in check.

## CONCLUSION

What role do the courts play in democracy? In the Philippines, the Supreme Court had swung from one end, legitimizing Marcos' illegal efforts to entrench himself in power, to the other, stopping Arroyo's attempt at constitutional change.

*Javellana* was a monumental mistake by the Philippine Supreme Court. The decision sanctioned a revision of the Constitution that completely disregarded the law. It served the interests

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109. For literature on the state of the Philippines in the 1970s see John H. Adkins, *Philippines 1972: We'll Wait and See*, 13 *ASIAN SURV.* 140–50 (1973); David F. Roth, *The Deterioration and Reconstruction of National Political Parameters: The Philippines During the 1970s*, 13 *ASIAN SURV.* 812–25 (1973); and William H. Overholt, *The Rise and Fall of Ferdinand Marcos*, 26 *ASIAN SURV.* 1137–63 (1986).

110. See Gatmaytan, *supra* note 8.



of politicians, who ushered the country into its darkest moment in history—the Marcos' martial law regime. Since then, the Supreme Court has yet to recover the respect it once enjoyed. *Javellana* is a self-inflicted wound, which had consequences the Supreme Court has never fully recovered from. This serves as a reminder of what the Court has done before and what it is capable of doing.

Politics gave the Philippine Supreme Court another opportunity to redefine its role in democracy. It was called upon to sanction the seemingly deliberate refusal to abide by constitutional rules on amendment or revision. The Court's decision in *Lambino* is an important contribution in and of itself, not only to the discourse on the judicial role in democracies, but also as an important effort towards rehabilitating the image of the Philippine Supreme Court.

What this chapter of Philippine history shows is that politicians will invoke judicial review if they believe the courts can legitimize their agenda. The administration's allies in the House of Representatives demonstrated a single-minded obsession with instituting the changes that they wanted, even to the extent of unilaterally amending its rules and proceeding with the purpose of amending the Constitution without the Senate's participation. They strained the logic of constitutional interpretation and ultimately popular patience. When various churches and other elements of civil society threw their weight behind the drive to protect the Constitution, the administration capitulated. The House had to abandon the push for amendments through a constituent assembly and President Arroyo herself, unwilling to subject her already tenuous mandate to another popular uprising, dropped efforts to amend the Constitution. Filipinos are often criticized for their political immaturity, but this episode demonstrated their adherence to constitutionalism and the rule of law when they threatened to stage protests against the blatant attempts to change the Constitution. The Supreme Court, for its part, seems to have reinforced its role as a protector of the Constitution.