# People Power and the Limits of Legal Reasoning

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To a man with a hammer, every problem looks like a nail. To the lawyer, to the legal mind, every problem appears as a legal problem. Is this the attitude also of the ordinary citizen and participant in politics in the Philippines today? From the beginning of the impeachment trial of President Joseph Estrada to the publication of the judgment of the Supreme Court, the whole country has been caught up in one legal wrangle after another. It was the television broadcast of the impeachment trial which brought the issues home to people. Through it they received the opportunity to form an opinion concerning the credibility of witnesses, to estimate for themselves the veracity of their testimony, to be apprised of the various stances taken by the Senator-Judges, to witness the performances given by the prosecution and defense teams. Television was the great informing medium, making masses of people familiar with legal niceties and courtroom decorum. "Your honor!" became for a time a popular salute or greeting. Citizens became armchair lawyers, and formed their own views on whether the *Articles of Impeachment* constrained what might be presented in the court. They made up their own minds on whether the contents of the second envelope were "immaterial and irrelevant." Following the collapse of the impeachment trial, and the culmination of People Power 2 in the swearing in as President of Vice President Gloria Macapagal-Arroyo, the turn of events was formulated in legal terms as well. Not only in the Supreme Court but also in the media and in academic circles people debated whether due process was followed in the transfer of power from Estrada to Macapagal-Arroyo, and whether she was the legitimate President. And now that the Supreme Court has ruled that there is no plausible case in support of Estrada's claims that he is still President, the Court's judgment continues to fuel public debate. Was Estrada's relinquishment

of office a resignation, freely chosen, or was it coerced? Are there any limits to the sovereignty of the people, or can any public protest qualify now as another People Power, the act of a sovereign people? It apears that the efforts of the Ombudsman to bring cases against Estrada before the Sandiganbayan will provide more legal matter for public debate.

This paper is provoked by a fundamental concern about the pervasive influence of legalities and legal reasoning in our public discourse. It is as if there is no distinctive domain of politics, unless we want to label as politics the squabbling between candidates before an election, the point scoring between different camps during the sessions of Congress, and the continual shifting in the tides of allegiance and coalition. Is the legal the only mode of discourse concerning our public life? First of all I will consider some questions will which allow us to open up the range of issues other than the merely legal. The accusations of the lack of due process, and of unconstitutionality, provide the relevant examples. I will then discuss some of the limitations of legal reasoning relying on these examples. Finally, I will explore practical wisdom as qualifying it. But first a warning: the identification of limits to legal reasoning and of the need for a complementary practical wisdom in political affairs should not be read as an eschewal of the rule of law or as an attempt to disregard the appropriate technicalities of the law.

Since the concern is with a realm of discourse appropriate to politics that is free from the unnecessary and unhelpful domination by legalisms, I attempt to present my argument in a language which is accessible to all citizens. Accordingly, I avoid a technical language which presupposes familiarity with some philosophical system. Whenever I use technical terms or distinctions I will try to present and explain them in such a way that they are accessible to ordinary citizens. It will be necessary to return to this issue at appropriate points in the course of the argument.

## *The Lack of Due Process*

Was the succession of Gloria Macapagal-Arroyo to the office of President constitutional? Had there been a lack of due process? These are frequently voiced questions, but what kind of issues do they raise? Are

they legal problems? The Supreme Court has considered them, and to that extent they do appear to be legal problems. But are they *merely* legal problems? Are they *primarily* legal problems? What other dimensions are there to the questions raised, and how do they relate to the legal dimension? My interest is primarily philosophical, and so I raise the question about the relationship between various facets of practical reason, legal reasoning and practical wisdom.

## *What is meant by due process?*

What is due process? The term is recognizable legal shorthand and there is a danger that we assume too quickly that we understand what is meant. There are two words which we must analyze, "process," and "due." "Due" means owed, and to say that something is due or owed, usually implies that there is someone who is entitled to that which is owed. So the phrase "due process" identifies some process which is owed and to which therefore someone is presumably entitled. But to consider further what process is owed by whom to whom, and when, we should locate the idea of due process within the broader network of what is due.

One of the commonly held illusions about the law is that it is an instrument for determining the truth. This is an illusion fostered by detective novels and courtroom drama, in which "whodunnit?" is the pertinent question.[1] Legal Process is not primarily about determining truth. It is about justice. It is a scheme for determining what is to be done. After a crime, the question is what is to be done: what is owed to the victims, to the society in general, by the convicted criminal, by the court, by the other public officers. Clarifying the guilt or innocence of the accused is not the whole of the process — it is simply a part of it. There are processes which are designed to establish facts — the rules of evidence for instance, and the procedures for cross-examination of witnesses. But these processes are to be understood as subordinated to the

[1] The illusion is also fostered by philosophy which has its own epistemological bias. Note the influence of legal imagery on philosophy and on the understanding of reason, biasing thereby the perspective which practical reason will take on the law, e.g. Kant on reason as a court, whose function is to give judgment. *Immanuel Kant's Critique of Pure Reason*, translated by Norman Kemp Smith (London: Macmillan, 1933), pp. 9, 14, 20.

processes which lead to the determination of what is to be done, what is owed to whom.

That the law has to do with justice may seem obvious enough. If you are prepared to accept that this is so, then perhaps you are Aristotelian as I am. If you don't accept it, then perhaps it is because you subscribe to a philosophy of law that wishes to deny the significance of any extra-legal element such as morality in determining the purpose of law. Such a philosophy as that of Hans Kelsen who defines law as a specific social technique, "the social technique which consists in bringing about the desired social conduct of men through the threat of a measure of coercion which is to be applied in the case of contrary conduct."[2] He prized this definition because he could apply it equally to the despotic leadership of an African tribal chieftain and to the constitution of a Swiss Canton. My discussion of due process and of legal reasoning is against the background of an understanding of law in terms of justice, and specifically, justice understood as prior to legal justice. In other words, it is not the law that ultimately defines and declares what is just. Human law is an instrument for the doing of justice, for providing what is due.

It remains to clarify the second word, "process." A process is a set or series of operations with a purpose, a set or series of actions conducive to an end. John Rawls' distinction of different forms of procedural justice is helpful at this point, also to illustrate the sense in which justice is prior to law. Rawls distinguishes between pure, perfect and imperfect procedural justice.[3] These are types of procedure which are relied upon in order to bring about a just outcome. Pure procedural justice has no independent criterion. The example used is a series of bets, as for instance in the game of poker. Provided every player abides by the rules and does not cheat, the outcome at the end of the game is a just distribution, because it is the result of a procedure that itself is fair. Applying the process guarantees that the outcome of the process is just. Perfect and imperfect forms of procedural justice have an independent criterion for the justice of the distribution to be achieved. A procedure to

[2] Hans Kelsen, *General Theory*, p. 19, cited by John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), p. 5.

[3] John Rawls, *A Theory of Justice*, revised edition (Oxford: Oxford University Press, 1999), p. 74. Rawls borrows these ideas from Brian Barry among others.

ensure the division of a cake into equal segments is the example for the former. Presuming each one wants to have as big a piece of the cake as possible, a fair distribution can be guaranteed, i.e. an equal share for all, if the one assigned to cut the cake must take the last piece left on the plate. Again, applying the procedure guarantees the fairness of the outcome, although there is an independent criterion for determining what is a fair share. The example given for imperfect procedural justice is the criminal trial. The independent criterion is that justice requires the guilty party to be punished. The procedure is an attempt to identify the guilty party and to allocate the punishment. The elements of the process or procedure have this as their purpose. But of course, the process is imperfect. Operating it cannot guarantee that the purpose will be achieved. The process is designed to make it more likely. But, we have plenty of evidence that the process can function to frustrate its purpose. All too often human courts have convicted the innocent and had them punished. And given the reliance on an adversarial system, the legal professionals on both sides operate the procedures so as to benefit their own clients.

If the purpose of law is justice, then any process that might be relied upon in law is subordinate to that purpose. The sense in which a process is due, is owed, is derived from the usefulness of that process in obtaining justice. If the usefulness of the process is questionable, doubtful, or only probable, then there is a question about the weight to be given to "due" in labeling the process a due process.

There is nothing absolute about due process. We know how the protections built into the criminal legal system have evolved and changed to meet changing circumstances and understandings. We tend to assume that the elements of due process in criminal law are for the purpose of protecting the interests of the accused, who is weak and vulnerable over against the majesty of the law and the power of the State. But it would be wrong and indeed dangerous to assume that it is only the interests of the accused which are protected by due process in criminal law. This assumption fuels the rhetorical effect of the accusation of lack of due process: Estrada is made to appear as the vulnerable victim who is deprived of his rights. Nor should we assume that change is only to be understood as an improvement in the process. It can also be a response to an urgent situation, a response that is deemed necessary but regrettable. In Ireland (and also in the United Kingdom), in the context of

politically motivated terrorism, special criminal courts were introduced, to try accused terrorists. These courts operated without juries. They were established because of the risk of intimidation of jury members by terrorists. Given the danger of intimidation and hostage taking, it was thought impossible to operate the established process of trial by jury. Therefore an alternative was created. This change required a political initiative, and political debate. The changing of the law to create a new process was a political event.

What then is meant by due process? The only absolute element of the notion of due process is the factual legal question which asks which is (or are) the process(es) provided by the relevant law to guide our action at this point? What is the process which the law now identifies as due in this case? But that this particular process is now due in a moral sense is not determined by reference to the law. The obligation to apply or abide by the relevant process is clarified in the complex of the relations between law and justice. That obligation is known, not by a legal reference, but in the judgment of the concerned citizen or good person who asks what justice requires.

## *Was the succession of Gloria Macapagal-Arroyo without due process?*

The collapse of the impeachment trial of President Estrada is seen by some as the critical moment in which due process was abandoned. All that followed, from the rallying of the crowds at EDSA and in other cities to the defections of cabinet members and military and police commanders was due to the abandonment of the impeachment trial. Where previously people had allowed the trial to function as the constitutionally provided means for dealing with a criminal president, now they no longer had any hope that this process could provide justice. They accepted the view expressed by the prosecutors that the impeachment trial had revealed itself to be a sham. One interpretation of the accusation of the lack of due process is that the decision to abandon the impeachment process was an abandonment of due process, and casts a pall of illegality over all that followed. How seriously should this question be taken? Definitely, it is plausible to identify that moment on the evening of Tuesday January 16 as critical. Once the trial had been abandoned, a new situation was created with new options, requiring ever new

decisions by the actors. Those decisions were constituted by the then incontrovertible fact that the trial was over, because abandoned by the prosecutors.

The question is whether the prosecutors were justified in abandoning the impeachment process? How is this question to be answered? What is meant by justified? If the assumption is that justification, to be successful, must be such as would suffice in some legal context, then the issue is loaded from the start. Before what legally constituted court could the prosecutors have made their case? If the impeachment court was the highest legal instance for trying a criminal President, then by definition, there was no higher *legal* instance to which appeal could be made in the event that the court failed to do justice. Withdrawal by one party or abandonment of the process was not a permitted move within the procedures of the impeachment court. Given then that the prosecutors could not justify their withdrawal before any court, whether the impeachment court itself or higher, then we can say that they could not legally justify their action. But does it follow from the fact that their action was legally unjustifiable (because no court to consider it) that their action was also practically, morally, or politically unjustified? And this question brings us back to the earlier one: are these questions only or primarily legal questions, and if not, what is the relationship between the legal and the other elements involved?

The impeachment process was the due process, that is, the process provided by the Constitution in Article XI for dealing with criminal charges against an incumbent President. Again it is worth recalling the complexity of the notion of "due": what was owed, by whom, to whom. To whom was the process of the impeachment court due? The impeachment process was due in the first place to the People of the Philippines. The Constitution provides the process of impeachment as an instrument to ensure the accountability of public officers to the People. Section one of the relevant Article requires of public officers, including Presidents and Senators, that they serve the people "with utmost responsibility, integrity, loyalty, and efficiency". Sections 2 & 3 provide the remedy of impeachment when a President is accused of "culpable violation of the Constitution, treason, bribery, graft and corruption, other high crimes, or betrayal of public trust."[4] Insofar as some process is due, then

[4] Constitution of the Republic of the Philippines, Article XI.

we must note that the Constitution provides this process to the People as an instrument to deliver the accountability of its highest officer. The process of impeachment is due in the first place to the People. In this regard it is different from other examples of process designed to protect the interests of the innocent, possibly wrongly accused of a crime. That the impeachment trial was not a criminal trial was remarked upon frequently.

The withdrawal of the prosecution team from the impeachment trial was certainly an abandonment of the process due to the people. Was it justified? The reason for the withdrawal is well known. The refusal of the majority of the Senator-Judges to consider evidence which the prosecution wished to introduce, was read by the prosecution team as revealing a partiality on the part of the Senator-Judges which prior to that point had only been suspected. The jubilation on the part of some of those Senator-Judges following their vote not to open the second envelope, expressed in dancing and victory punches and mobile-phone-calls, gave a clear and unmistakeable message, not only to the prosecution team but also to all viewers, that the People had little hope of getting justice from the impeachment court. They would not get what was due to them: the accountability of the President.

There is no doubt but that the abandonment of the impeachment trial was an abandonment of due process. Where the disagreement now lies is on the question whether the abandonment was justified. Let us return to the point made earlier, that there is no legal instance before which to justify that action. What legal possibilities were available to the prosecution team so as to remove or censure the Senate majority which had revealed its partiality? Ask the court to vote to remove the majority? Note that there is no provision in the Constitution for impeaching the Senate as a body. Nor could there be an impeachment of a group of Senators. No legal remedy was available. Are there those who wish to say that the members of the prosecution team were mistaken in their view of the Senate Court? Well then, let that be said. But the disagreement may not be put in terms of one position upholding the norms of legality, while the other is guilty of a violation of those legal norms. In the absence of a legal remedy, the prosecution team, and following them, the great numbers of people who rallied, the cabinet members who defected, and the leaders of police and military who withdrew

their support, sought a remedy which was practical, moral, and political.

## *Constitutionality*

The Constitution supports the view that legal arrangements are subordinate to the purposes and goals for which they are instituted. A reflection on the constitutionality of the succession of President Macapagal-Arroyo can help to clarify this point. But there is a prior question: what is the status of the Constitution? The Constitution is a construct. Like any other human product, it had its producers in their various roles, whether drafters or voters in the referendum. It has its precedents, history and background: it is not the first Constitution ever in place in the Republic of the Philippines.[5] It has its form, chosen by the commission and adopted by the people (e.g. the presidential/congress system rather than a parliamentary system). And it has its purpose. Note here the use of the Aristotelian categories of matter and form, efficient and final cause. These are not legal categories, but they reflect the spontaneous questioning of the concerned citizen. What is this Constitution? Who put it in place, and why?[6] The answers to such questions reveal arguments in terms of prior experience, of the weaknesses and strengths of previous constitutions. And it is worth noting that the relevant experience was not simply legal. It was the experience of ordinary citizens going about their business in its various facets. The context of the drafting of the Constitution in 1986/7 was the attempt to remedy defects of the previous Constitution, and to build in safeguards to ensure that certain problems would not recur.

So it cannot be denied that the constitution of a state is a human construct. It is constructed with a purpose. It has its strengths and its defects. The purposes pursued in the construction of a constitution will include the provision of remedies for the defects and weaknesses experienced in preceding arrangements. The attempt not to repeat the mistakes of the past and to do it better this time conditions the production

[5] Its precedents are Constitutions of 1973 (amended 1976) and 1935.

[6] Aristotle's distinctions reflect common-sense distinctions as reflected in these different questions. Citizens do not have to be familiar with Aristotle in order to use distinctions which he has articulated.

of any constitution. Accordingly, in the formal legal interpretation of a constitution, reference will have to be made to the purposes which the constitution was intended to serve. And even more so in political debate between concerned citizens, it will be appropriate from time to time to go behind recourse to law to ask why the law was needed in the first place.

The concurring opinion of Mr. Justice Bellosillo put this point very succinctly when discussing the interpretation of the words "permanent disability" as they occur in the Constitution. "It is axiomatic that the primary task in constitutional construction is to ascertain and assure the realization of the purpose of the framers, hence of the people, in adopting the Constitution. The language of the charter should perforce be construed in a manner that promotes its objectives more effectively."[7] He went on to ask if Estrada was "...rendered permanently disabled as President by the circumstances obtaining at the height of People Power 2 as to justify the ascension of Mme Gloria Macapagal-Arroyo as the 14th de jure President of the Republic? So he was; hence the assumption of respondent as President". In explaining his decision the Justice distinguished two perspectives on Estrada's disability, the objective and the subjective. The objective perspective warranted the conclusion that Estrada was permanently disabled because left powerless. Joseph Estrada had been deprived of popular support, and he was without the agencies normally required by the Executive for government, namely, a functioning Cabinet, Armed Forces and a Police Force. Curiously, the Justice also includes in this perspective the subsequent acknowledgements by the Houses of Congress and by the international community of Arroyo as President. This is curious, because it could not have been known on Saturday January 20 before the taking of her oath. The subjective perspective explored by the Justice allows the same conclusion, namely, that Estrada was permanently disabled. He presents a review of Estrada's "contemporaneous acts and statements during and after the critical episode" and finds in them "eloquent proofs of his implied — but nevertheless unequivocal — acknowledgment of the permanence of his disability".

[7] Text published in *Today*, March 14, 2001.

*Reasonable Doubts*

The doubts about the constitutionality of the succession of President Gloria Macapagal-Arroyo had arisen because President Joseph Estrada did not die, he was not removed from office by the impeachment court and he did not sign a formal letter of resignation. These seemed to be the possibilities which the Constitution provides in Article VII, section 8, for the transfer of the office of President to the Vice-President. Despite the fact that none of these foreseen situations had occurred, the Chief Justice administered the oath of office on Saturday 20 January 2001 to Gloria Macapagal-Arroyo in response to her request, which had been formulated as follows:

> The undersigned respectfully informs this Honorable Court that Joseph Ejercito Estrada is permanently incapable of performing the duties of his office resulting in his permanent disability to govern and serve his unexpired term. Almost all of his Cabinet members have resigned and the Philippine National Police have withdrawn their support for Joseph Ejercito Estrada. Civil society has likewise refused to recognize him as President.
>
> In view of this, I am assuming the position of the President of the Republic of the Philippines. Accordingly, I would like to take my oath as President of the Republic before the Honorable Chief Justice Hilario G. Davide Jr., today, 20 January 2001, 12:00 noon at EDSA Shrine, Quezon City, Metro Manila.
>
> May I have the honor to invite the members of the Honorable Court to attend the oath taking.[8]

Her request was based on her judgment of the permanent disability of Joseph Estrada in the office of President.

*2.3 The ambiguity of "unconstitutional"*

Was this constitutional? It must be admitted that this was extra-constitutional, in the sense that the process followed was not actually foreseen by the Constitution. However, extra-constitutional does not necessarily mean unconstitutional. Or to put it another way, unconstitu-

[8] Text published in the concurring opinion of Mr. Justice Vitug in *Today* March 11, 2001.

tional does not necessarily mean counter to the Constitution. Accordingly, "unconstitutional" has two meanings: not contained in the Constitution (extra-constitutional), and contrary to the Constitution. Are the reasons which persuaded the Supreme Court to allow the swearing in of President Macapagal-Arroyo the same as those listed in the various judgments published on March 2? It is to be noted that in their declaration of January 22 confirming the authority given by twelve members of the Court on the previous Saturday to the Chief Justice to administer the oath of office contains no mention of the reasons. The resolution highlights in two ways that its approval of the swearing-in of President Arroyo as President is not to be taken as resolving any legal issue. That a legal issue might be raised is left open by the concluding remark, and former President Joseph E. Estrada subsequently chose to take advantage of the opportunity. And the declaration also draws attention to the fact that the Court treated the request by the Vice President as an administrative matter. The Vice President was the only person who could succeed as President according to the Constitution. That the circumstances were such that it was appropriate for her to succeed as President is presupposed by her request, and in not challenging this assumption, the members of the Court recognized it as not unreasonable. But by stressing that the request and their response constituted an administrative matter the Judges noted that they were not passing judgment on those reasons.

As I see it, the judgment by the Supreme Court given at the beginning of March is not an attempt to present the actual reasoning followed by the relevant actors such as the Chief Justice on those fateful days in January. This is clear from the fact that the documents, words and actions cited in the judgment would not have been available to Chief Justice Davide and the members of the Court on that important Saturday when he administered the oath. Rather, the judgment is a legal declaration by the Court as to why it members think, as of March 2001, that the claims of Joseph E. Estrada as formulated in his petition are unfounded. The validity of the Court's judgment does not depend on its accuracy in reproducing the practical wisdom of Chief Justice Davide and his counselors in January.

From a commonsense point of view, in contrast to a legal perspective, it must be admitted that the manner in which President Estrada resigned, as the Supreme Court said he did, was not actually foreseen

by the Constitution. Therefore it was not unreasonable for people to say that it was unconstitutional. They seem to have a point in saying it was unconstitutional in the sense that it was a process not provided for in the Constitution, but that would not necessarily make it unconstitutional in the sense of contrary to the Constitution. However, the judgment of the Supreme Court puts an end to any such reflection and doubt.[9] This is done in two steps. The first is to emphasize the constitutionally recognized freedom of the people to assemble and seek from government redress for their grievances. Accordingly, the process of People Power 2 was consistent with the Constitution. The second is to note that since the Constitution does not define what it means by "resign", resignation can occur in a great variety of ways. Whether or not a resignation has taken place can be established as a matter of fact, in showing that there was intention to resign, and that this intention was translated into relevant action – the judgment speaks of acts of relinquishment. And the Court is satisfied that these conditions for establishing the fact are fulfilled in the case of the resignation of Joseph E. Estrada.

As noted, the published judgments of the Supreme Court are not an attempt to reconstruct the practical wisdom of the main actors in People Power. Those actors, whether politicians, public servants, citizens or indeed the Justices themselves, had acted as they saw fit in late January 2001. They could not wait for the sanction of the Supreme Court or any other legal authority before acting. What had they been thinking? Historians will eventually help us in documenting all that had been going on. Central to their account must be the argument that the institutions put in place under the Constitution for dealing with a criminal President had been frustrated in their function. It was fidelity to the Constitution which had motivated people to accept the appropriateness of the impeachment process. The whole country wanted to have answers to the simple questions, was Joseph Estrada a fit person to hold the office of President? Had he betrayed the trust of the people? Had he acted against the Constitution? Had he been involved in criminal or corrupt activities? The legal instruments of impeachment were expected

[9] This is the judgment presented by Justice Puno in the *ponencia*, published in *Today*, March 7-10, 2001.

to deliver answers to these questions. But instead it appeared as if those legal instruments were allowed to have a life of their own, and to function regardless of their subordination to the practical purpose set for them, namely, the accountability of public officers to the people. The purpose of the law was being frustrated by an exaggerated scrupulosity about the rules of impeachment, a scrupulosity judged by many to be a façade for partiality.

## *The Purpose of the Constitution*

Mr. Justice Bellosillo's concurring judgment underlined the importance of the law's purpose. How do the technicalities of the interpretation realize the purposes of the Constitution? I would suggest that the concern of those involved in People Power 2 was that the values, ideals and aspirations articulated in the Constitution should be vindicated. As the Preamble of the 1987 Constitution so eloquently puts it:

We, the sovereign Filipino people, imploring the aid of Almighty God, in order to build a just and humane society and establish a Government that shall embody our ideals and aspirations, promote the common good, conserve and develop our patrimony, and secure to ourselves and our posterity the blessings of independence and democracy under the rule of law and a regime of truth, justice, freedom, love, equality, and peace, do ordain and promulgate this Constitution.

It was entirely consistent with the spirit and intention of the Constitution that the Supreme Court made its January 22 declaration confirming its permission for the swearing in of President Macapagal-Arroyo. Whatever about the arguments presented in the later March 2 judgment, its reasoning in January may well have included a consideration of the purposes intended in the Constitution, the difficulties associated with the foreseen arrangements for the transfer of office, and the *de facto* situation of the powerlessness of President Estrada. The effect of its action is not to change any element of the Constitution, but to put in place an administration that is more likely to uphold and implement the intentions expressed in it. The reliance on an extra-constitutional process for removing the President when the other options had been frustrated was not unconstitutional in the sense of contrary to the Constitution, but was an exercise by relevant Constitutionally

established authorities to ensure that the purpose of the Constitution, the common good, would be achieved.

### *Remedying Constitutional Defects*

I have suggested above that People Power 2 can be viewed as an instance along a spectrum of possible ways of remedying constitutional defects. The spectrum ranges from constitutionally provided amendments through referenda to revolution which replaces the Constitution. There is no serious case to be made that People Power 2 was a *coup d'état*, or even an instance of mob-rule, as Estrada, his supporters, and some correspondents in the media asserted. The role of the military was indeed important, even critical. But it was not an armed involvement. Neither did it involve a replacement of civil authority with military authority. The crowds who rallied and demonstrated, at EDSA and elsewhere were not a mob; their objective was clear, they recognized constitutionally established authorities, and they accepted the constitutionally provided succession to a removed President. Following People Power 2 there was no attempt to change the Constitution, nor had there been any attempt by any faction to exploit the power vacuum so as to install their preferred candidate as President. This was no mob, but a highly motivated and well coordinated movement which attempted to achieve that which the impeachment court had shown itself incapable of achieving, the removal of President Estrada because of his criminal activity in the office of President.

Perhaps someone will object, I cannot know that Estrada behaved criminally or irresponsibly, because he has not been convicted by any court. This objection, were it to be made, would be based on the assumption that a court (impeachment or criminal) is the appropriate process for establishing the truth. I have already argued that we should consider a court as a construct for the doing of justice: it must ask what is owed, and as part of that process it has to determine who must answer for alleged crimes. Only arising from the judgment of a court can punishment be imposed. But for me, or for any citizen, to form a judgment, it is sufficient that we consider the evidence available to us. Of course we can be mistaken. But will anyone deny that the citizens of the country are entitled to form a judgment on the guilt or innocence of the President, accused of grievous crimes? Especially since they have

had access to the broadcast impeachment hearings and to the information about the President's lifestyle and political cronies? They have not denied him the opportunity of answering the charges against him in an impeachment court, and they will not deny him the protections of the law in bringing criminal charges against him before the relevant court. But neither would they allow themselves to be deprived of that which was due to them: the accountability of their President. Their practical and political judgment on his unsuitability to remain in office did not result in depriving him of any of his rights or interests, as conviction by a criminal court imposing punishment might have done. His removal from the office of President deprived him, not of anything to which he was entitled, but only of the privilege of serving his country in this public office.

## *Legal reasoning and practical wisdom*

I have been considering two challenges to the succession of President Macapagal-Arroyo. They have been considered by the Supreme Court, and to that extent they are legal challenges. But they were also practical, moral and political challenges, which the actors in this drama had to consider, before ever they had the benefit of the judgment of the Supreme Court. In my discussion of them I have attempted to deflate the force of the challenges arising from their formulation in legal terms by relocating them in a practical and political context. In discussing due process I have argued that the relevant process was due to the people, and it was the failure to provide this due process which occasioned the crisis. And in discussing constitutionality, I have noted that the Constitution is a construct with a purpose, and it is in terms of that purpose rather than the literal text that the challenge of unconstitutionality ought to be considered. I will now proceed to attempt an account of the practical rationality involved in this contrast between the narrowly legal and the broadly political.

## *Competence for Participation in Debate*

Asked about her vote in the impeachment court in which she had been one of the Senate majority who voted not to open the second envelope, Senator Miriam Defensor-Santiago replied that she did not feel herself

obliged to answer questions or criticisms from certain unqualified Filipinos. She indicated that she would be willing to consider seriously questions from her academic peers, but definitely not from her inferiors. Who is qualified to be a partner in discourse? In the academic world, qualifications serve as an entrée into a community engaged in professional discourse in various disciplines. Not everyone can presume to contribute to debates within the fields of psychology or geophysics, neuro-surgery or marine biology. Only those who have achieved some competence in the relevant field will be in a position to contribute constructively to a debate. And qualifications are relied upon by the relevant community as testimony to the necessary competence. But not all discourse is academic. How is it in politics? Should participation in political discourse be confined only to the competent in the sense of academically qualified? Or to put the question in terms of a distinction I used earlier, should participation in the political debate be confined to those who have mastered a certain technical language?

### *Plato and Aristotle on Qualifications for Rule*

This is a question on which Aristotle (384-322 BCE) disagreed with his teacher Plato (427-347 BCE). Plato was convinced that only those with appropriate competence should be allowed to take part in the government of the political community (city). In fact, for him it was a matter of justice that each one and each section confine itself to performing in the relevant area of its specialized competence. Only harm is done when people attempt to take on functions for which they are neither suited by nature nor skilled by training. Accordingly he pursued the question of the appropriate knowledge required of a political ruler, and he bemoaned the fact that political leaders in his city of Athens were able to get power without any other qualification than the ability to persuade the crowds through empty promises and flattering speeches. The knowledge which he thought rulers ought to have is the knowledge of good order. This is the knowledge on the basis of which the various sections of the personality and the various sections of society could be coordinated with one another so that their functioning would lead to the well-being of the whole person or the whole community. And the knowledge of good order could be found through philosophy. Hence

the remark: there will be no justice until kings become philosophers and philosophers kings in our cities.[10]

Just as the patient is obliged to defer to the physician, so too the member of the city would have to respect the superior knowledge of the (philosopher) ruler. But here also Plato had to bemoan the fact that in his city of Athens true philosophers did not enjoy any respect. Those held in high esteem were the successful orators who had mastered the skills of demagoguery, not the critical thinkers such as Socrates who might embarrass people by questioning their claim to competence. Rather, Plato wished it to be the case that citizens would honor and respect the knowledge of the philosopher, and allow themselves to be guided by it, just as they trusted themselves to a navigator whenever they took ship to cross the Mediterranean.

Aristotle criticized the thought of his teacher Plato on this as on other related matters. He did not accept that citizens in a free city such as Athens should relate to those in positions of power and authority as pupils to a teacher. In fact, he considered it best that the public offices be rotated and that as many citizens as possible would take their turn in performing this public service. The reason why this taking of turns in office is possible according to Aristotle is that the same knowledge and expertise is required of the rulers as of those who are ruled. He did not envisage any hierarchy of competence whereby the experts were given power to rule, and the ruled were therefore those without competence or knowledge. To be able to function as a citizen and to take part in the public debates and public trials required of everyone a measure of experience and wisdom. No one was so endowed with these that they could claim power by virtue of exceptional competence or qualification. For Aristotle citizens were fundamentally equal, even if he insisted that they were diverse, with different backgrounds and opinions.[11]

Aristotle objected further to Plato's view on the unity to be achieved in a well-ruled city. This would not be the unity of a political commu-

[10] Plato, *The Republic*, Bk. V, 473 d-e, available in many editions, including *Classics of Moral and Political Philosophy*, edited by Michael M. Morgan, 2nd ed. (Indianapolis, Indiana: Hackett, 1996), p.140.

[11] Aristotle, *The Politics* Bk. III, chapters 4 & 5, available in many editions, including *Classics of Moral and Political Philosophy*, pp. 409-412.

nity, but the unity of a household, in which one person dominated. The unity to be achieved in a city should not be at the expense of the diversity and variety of its citizens. The plurality should be preserved in the order of the community. Aristotle's thinking on this becomes clearer when we reflect on what he saw as the business of politics. He contrasted the achievement of the economy (household) in providing what is necessary for life, with the project of the political community, which is the good life. How the good life, as distinct from life itself, is to be characterized is a difficulty. Aristotle in many texts speaks about the good life as "something more": something more than survival, and something more than the mutual non-aggression pacts required to ensure security, something more than the mutual agreements to guarantee rights.[12] Where he does speak directly about what additional elements belong in this something more, it still remains elusive and difficult to pin down. This is understandable when we realize that the good life is not something which the experts and the qualified people know about and which they graciously provide for others.

There are no experts on what constitutes the good life for citizens. This is something which people must search for together in rational discourse and try to realize with and for one another in a cooperative effort. That is why Aristotle emphasizes that the human capacity which qualifies people for citizenship is the capacity for reasoned speech. It is the ability to participate in the discussion about what is right and wrong, what is worthwhile pursuing and what is a waste of human energy, what is just and what is unjust, that characterizes the citizen. Of course he emphasizes that a certain amount of leisure and freedom from want is necessary if one is to have the time and energy for the political process. In the complexity of Aristotle's thought, it seems to be the case that the good life is achieved by participation in the search for it.[13] Anyone deprived of the opportunity of participation in the public life of her community insofar as it concerns the deliberation about what is to be done is deprived of an aspect essential to human flourishing. While Aristotle describes the human as by nature political, meaning that the human

[12] *The Politics*, Bk. III, chapter 9, *Classics*, pp. 414-6.

[13] Alasdair MacIntyre argues this in chapter 15 of his *After Virtue. A Study in Moral Theory* (Notre Dame, Indiana: University of Notre Dame Press, second edition, 1984).

achieves its completion and fulfillment in a community which pursues the good life, he also describes the isolated individual as either less than human, such as a beast, or more than human, such as a god. Just as a chess piece such as a pawn only has a function as part of the chess set, so also a human person, to be fulfilled, must be able to exercise a function as part of a community.[14] This is essential to being valued and knowing oneself to be valued by one's peers.

Aristotle's criticism of Plato is not simply a rejection of the policy of giving power and authority to the experts. It is much more positively an assertion of the importance of citizenship for the fulfillment of the human person. With the capacity for reasoned speech, and with a concern about the kind of life which the community is creating for itself, the citizen has qualification enough to take part in the public discourse. All are equal; none can claim to be obeyed on the basis of special knowledge. Given that the business of political debate is to achieve agreement on what is useful and harmful for the life of the city, what is beneficial and detrimental to the common good, on what is just and unjust, lawful and unlawful, the common good will not be achieved in sufficient measure if a significant number of citizens do not take part in this debate.

## *Only the Experts?*

Let us leave aside for one moment the element of disdain and contempt in the Senator's remarks, and let us concentrate instead on the question whether participation in certain discussions should be restricted to qualified experts. Those who follow Plato in holding knowledge to be the basis of entitlement to political power will answer the question positively. On the other hand, those who follow Aristotle in rejecting Plato will agree that the agenda for political debate is not confined to the concerns of the professionals but is of vital importance to every citizen: what kind of life do we, together, wish to make for ourselves? Everyone is entitled to participate in and make his or her contribution to this pursuit of the good life.

From the beginning there were those who wished to make the impeachment process the preserve of the lawyers. Technicalities tended to

[14] *The Politics* Bk. I, chapter 2, *Classics*, pp. 385-7.

take over the business of the court. But the guiding questions to be answered by the court remained questions of common sense: was President Estrada fit to hold office? Had he betrayed his trust? Had he been involved in criminal activities and had he been a party to graft and corruption? On these questions, every concerned citizen was in a position to form a judgment, and every citizen was entitled, on the basis of the evidence available to him or her, to draw their own conclusions. The Senator's attitude and remarks are inconsistent with such a view of the citizen. And if we factor in once again the tone of disdain and even contempt with which the views had been expressed, we can see revealed here a disvaluing of the role of the citizen in the political life of the country and a disregard for the basic reality that all together are participants in a joint search for a dignified and worthy life which can only be achieved to the extent that it is achieved together for all together. This is an implicit denial of the solidarity which binds citizens in their pursuit of and share in the common good.

The process of People Power 2 represents an assertion by a significant body of citizens (there was no other comparable body) that they took their citizenship seriously, and that they would not allow themselves to be deprived of their voice because of the technical judgments of expert lawyers, whether on the defense team or in the Senate-Court. This was a declaration of entitlement to participate in the public discourse about what is lawful and unlawful, what is just and unjust. They did not require permission from anyone to do it: in fact, they felt themselves obliged to do it following the failure of the technical experts and the Senator-Judges to deliver straightforward answers through the impeachment process to the common sense questions which concerned them: was President Estrada fit to hold office? Had he betrayed his trust? Had he been involved in criminal activities and had he been a party to graft and corruption? They knew it would have to be left to a criminal court to convict him of crime and determine punishment, but their exercise of their responsibility as citizens could lead to political and practical judgment on Estrada's suitability for continuing in office.

## *Wisdom Not Law*

A distinction between practical wisdom and legal reasoning, I suggest, is useful in clarifying the appropriate relationship between the citizen

and the legal professional. I wish to contrast the rationality of those who criticize the lack of due process and lack of constitutionality in what has happened, with the rationality of those who do not consider such criticisms relevant in this case. Part of the background to the polarization and to the discussion between the two positions is the question on the purpose of the law. Is it to be understood as an instrument for doing justice, defined in extra-legal terms, or not? Is the Constitution to be understood as subordinate to the values it espouses, or not? Are there remedies other than legal ones, or not?

## *Law's Purpose*

The natural law tradition of philosophy of law has no difficulty in accepting the subordination of the system of positive law to its ends and purposes. Those purposes are usually summarized in philosophical reflection as the common good. They are translated into the values and aspirations of the people as formulated in such texts as the Preamble to the Constitution and Article II as a "Declaration of Principles and State Policies". The institutions and officers of the State, the body of civil law and the judicial apparatus are understood as having their function in relation to these purposes. A positivist philosophy of law always has difficulty with this kind of reflection. It finds it difficult to consider any extra-legal factor in its consideration of law. It prefers to deal with formulated statute and precedent, relying on well-developed and institutionalized skills of interpretation and argument.

The law represents the accumulated experience of a people in dealing with problems of one kind or another. In fact, in the modern world, the law usually reflects the accumulated experience of many communities. In the course of the impeachment trial in Manila, since this was a first ever for the local system of law and therefore without precedent, reference was made primarily to the experience of the USA. But it remains the case that the law encapsulates the experience of communities in dealing with conflict. A problem can disrupt our lives, and leave us confused, and so we turn to the professionals and inquire what the law requires. The problem may be a new experience for us, but we assume that it is familiar to those who know how similar problems have been handled in the community before. We acknowledge the competence of those who know and work in the law. In ordinary conflicts the

competence of the legal professional overrides the practical wisdom of the citizen. Against the facticity, the sheer givenness of the law, the reasoning of the layman can make no headway. What the law ought to be, what the client would like the law to be, are all irrelevant, from the perspective of the lawyer. The lawyer is acknowledged as knowing the law; the client is acknowledged to be in need of legal assistance.

The law is useful in providing guidance for the future, because it accumulates the experience of similar situations in the past. However, not all problems are of a familiar kind; new, unforeseen problems do occur. The law does not manage to anticipate every situation. Hence we see development in the law at all levels, as the attempt is made to accommodate new circumstances and new possibilities. At the lower levels of law the making of new law is provided for and procedures are usually clear. This is a large part of the business of the legislature. At the highest level, however, in Constitutional law, change is not so easily regulated, because there is not the same wealth of experience and the same customary or established ways of doing things. And while those whose business is the law tend to think primarily in terms of applying already established law, their habitual way of thinking may not be helpful in new circumstances for which there is no legal provision and no precedent.

### *Transparency to the purpose of the law*

There are privileged occasions in a people's history when the law and legal system become transparent to their purpose. These are moments in which people are able to see through the apparatus of the law to the values and purposes at stake. Examples in recent history are the production of the 1987 Constitution by the Constitutional Convention, and the subsequent challenge of Charter Change. The recent revolt, People Power II, is another experience of such a special moment. On these occasions, in which the question concerns the law to be put in place to regulate national life, the usual relationship between practical wisdom and legal reasoning is reversed. Now the competence of the lawyer in being able to say what the law is, is subordinated to the judgment of those who are entitled to determine what they want the law to be. And that judgment is located in a consideration of the purpose, not only of the law, but also of the institutions and authorities which are to

act according to law. To understand and to determine those purposes, no special *professional* competence is needed. To citizens of common sense, as to the natural law philosopher, there is no difficulty in considering the broader context in which the legal system functions as contributing to the rationale and indeed justification of that system. That is why in a Republic the Constitution is adopted and subsequently amended by a plebiscite or referendum. The people give themselves the law. To know when the professional competence of the lawyer must give way to the common sense and justice of the virtuous citizen is a matter of *practical wisdom.*

## *Formalism and Objectivism*

Why is it so difficult to make headway against the mindset which gives priority to due process and unconstitutionality? It is as if the notion of practical rationality is dominated by a legal model, which leaves no room for alternatives. According to the Critical Legal Studies Movement, such debates as those outlined above conceal conflict between differing visions of the good life.[15] Although the debates about due process and constitutionality appear to be legal discussions, about the interpretation of the law, or even about what the law should be, they belong in a different realm of discourse to that of law. Even though they appear to be discussions within very definite parameters, it is the contention of this group of critics that such debates are capable of being expanded into open ended disputes about the basic terms of social life, disputes normally referred to as ideological, philosophical or visionary. However, the dominant liberal establishment in Anglo-American legal circles systematically resists any such extension of the debate beyond the ambit of the law. Is the same resistance operative in the Philippine legal community? Twin pillars in the resistance by the establishment are the commitments to formalism and objectivism in mainstream legal thought. *Formalism* is a commitment to and a belief in the possibility of a definitive method of legal justification. In formalism impersonal purposes, policies and principles are held to be indispensable compo-

[15] Mark Kelman, *A Guide to Critical Legal Studies* (Cambridge Mass.: Harvard Univ. Press, 1987); cf. also Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Cambridge Mass.: Harvard Univ. Press, 1986).

nents of legal reasoning. This formalism is evident in the way in which arguments in terms of technicalities during the impeachment trial by the lawyers for the defence were accepted by some as appropriate. Senator-Judges such as the Majority leader Senator Tatad were also willing to accept arguments based on legal technicalities. The lawyers and philosophers in the Critical Legal Studies Movement, however, question the presupposition that such formalism is always appropriate. By undertaking the critique of formalism at every opportunity, they hope to make legal and political argumentation transparent to a more fundamental level of dispute, which is essentially political in the Aristotelian sense: what kind of life do we wish to make for ourselves, what are the aims and purposes for which we are willing to co-operate?

The second pillar on which the legal establishment relies, *Objectivism*, is the belief that the authoritative legal materials embody and sustain a defensible scheme of human association, that they represent an intelligible moral order. As it stands, the Constitution and the body of civil and criminal law are assumed to be satisfactory in regulating social and political life. But once again, the critics insist that this presupposition is not beyond question. Objectivism is a target for critique because of the experience of group preference or exclusion which generated the demand for an actual defence of the given. Formalism and Objectivism serve to immunize the dominant framework of liberalism in the Anglo-American legal and political world, and to harden this context against the human powers of re-imagining and remaking their world. So mainstream liberal thought is not only beset by internal contradiction, but as a system of thought it contains a systematic repression of the presence of those contradictions.[16]

## *Practical Wisdom*

The foregoing explains what is meant by legal reasoning, with its presuppositions of formalism and objectivism. The reasoning of those who cried lack of due process and unconstitutionality in the recent political developments illustrates the point. Of course, much more could and should be said, also in appreciation of the value and usefulness of

16 *A Guide to Critical Legal Studies*, p. 2.

legal reasoning. But the present task is to show why it is that the legally minded are reluctant or unwilling to adopt forms of argument in practical and political affairs outside of those sanctioned by legal practice. The critique of the Critical Legal Studies Movement is drawn upon to as one way of meeting this task. At this point, it is necessary also to say something about practical wisdom. This also is a complex notion and one which could merit a longer treatment. Reference in this context could be made to Immanuel Kant's distinction between reason's practical use in contrast to its theoretical use. Aquinas follows Aristotle in making a distinction between reason as oriented to finding out the truth of a matter, and reason as oriented to bringing about some goal or purpose. I want to argue that such practical reason is not exhausted by its use in a legal mode, as exemplified in legal reasoning. But at the same time, legal reasoning is an important and appropriate use of practical intellect, so it should not be excluded. I identify practical wisdom as one other form of practical reason. I identify it as the form of argument relied upon by the participants and main players in People Power 2, and which I have described at length above. But how should it be analyzed?

## *Aquinas on Epieikeia*

In his discussion of justice Aquinas draws on the Aristotelian idea of *epieikeia*, which is translated into Latin as *aequitas* and therefore often into English as equity. However, as will become clear, we must be careful about using the term equity. For Aquinas, *epieikeia* is the good sense or practical wisdom of someone who gives a decision or makes a judgment which seems to go against the letter of the law, but is in fact the best realization of the lawmaker's intention or what the lawmaker would have legislated for had he/they known of the particular circumstances. In asking whether it is ever permissible for those who are subject to a law to act contrary to the letter of the law he clarifies that it may be permissible, and all the more so if there is great risk to the common good requiring instant remedy.

Now it happens often that the observance of some point of law conduces to the common weal in the majority of instances, and yet, in some cases, is very hurtful. Since then the lawgiver cannot have in view every single case, he shapes the law according to what happens most frequently, by directing his attention to the common good. Wherefore

if a case arise wherein the observance of that law would be hurtful to the general welfare, it should not be observed.[17]

In the later discussion of the virtue of justice, the role of *epieikeia* in relation to justice is clarified. First of all he inquires if *epieikeia* is a virtue, and then in a second article if it is part of justice.

I answer that, as stated above (1a2ae 96 6), when we were treating of laws, since human actions, with which laws are concerned, are composed of contingent singulars and are innumerable in their diversity, it was not possible to lay down rules of law that would apply to every single case. Legislators in framing laws attend to what commonly happens: although if the law be applied to certain cases it will frustrate the equality of justice and be injurious to the common good, which the law has in view ... In these and like cases it is bad to follow the law, and it is good to set aside the letter of the law and to follow the dictates of justice and the common good. This is the object of *epieikeia* which we call equity. Therefore it is evident that *epieikeia* is a virtue.[18]

There is a practical wisdom in this observation that the law (the Constitution) cannot encompass every possible scenario. When a situation arises which is not actually provided for (as for instance, the abandonment of the impeachment trial), and it would do harm to continue to adhere to the letter of the law as it presently exists (allow Estrada to continue in office as President until he should choose to resign formally, or he should be convicted following another impeachment process), then it is appropriate to proceed apart from the letter of the law. Note in particular that the reference to "the dictates of justice and the common good" presupposes knowledge of these realities apart from that which is provided by legislation.

The discussion in the later article about the relationship between *epieikeia* and legal justice makes clear that in Aquinas's mind *epieikeia* is an exercise of practical reason which allows legality to be overruled. We must be careful in reading Aquinas in translation not to misinterpret his notion of legal justice: this is general as distinct from particular justice, but it involves giving what is due, as provided for by law, whether divine or human law. In the cases in which the letter of the law

[17] *Summa theologiae* (ST) 1a2ae q96 a6.

[18] ST 2a2ae q120 a1.

is unsatisfactory, *epieikeia* is entitled to override the provision of the law.

*Epieikeia* corresponds properly to legal justice, and in one way is contained under it, and in another way exceeds it. For if legal justice denotes that which complies with the law, whether as regards the letter of the law, or as regards the intention of the lawgiver, which is of more account, then *epieikeia* is the more important part of legal justice. But if legal justice denote merely that which complies with the law with regard to the letter, then *epieikeia* is a part not of legal justice but of justice in its general acceptation, and is condivided with legal justice, as exceeding it.[19]

Aquinas himself does not speak of practical wisdom in this context, but in one text he does compare *epieikeia* to common sense in contrast to legality.[20]

## *John Finnis*

In commenting on these discussions, the Oxford Professor of Law and Legal Philosophy, John Finnis, notes how Aquinas uses Aristotle's term "legal justice" to mean general justice, which, however, is always understood in relation to relevant law, whether divine or human.[21] Legal justice is

> ...the justice of acting according to a *common* rule, i.e. according to all relevant laws, divine or human – in the first instance according to their letter, but more fundamentally and ultimately according to the intent (always to be assumed to be just and reasonable) of their author(s): the radical justice of *epeiekeia* which departs from the common rule in its common (usual) meaning in order to uphold the rule in its true sense all things considered.

A further comment by Finnis is that legislative intent is not only to be considered as the lawmaker's intention and plan for the common good, but also what the legislature would have enacted had it envisaged

[19] ST 2a2ae q120 a2 ad1m.

[20] ST 2a2ae q80 1 ad5m.

[21] John Finnis, *Aquinas. Moral, Political and Legal Theory* (Oxford: University Press, 1998), pp. 216f.

the novel circumstances of the particular case. Compliance with the law on Finnis's reading of Aquinas is not merely doing what the letter of the law requires but what the lawgiver intended for the common good.[22] Aquinas's language is clear: "In these and like cases it is bad to follow the law, and it is good to set aside the letter of the law and to follow the dictates of justice and the common good."[23]

## *Epieikeia replaced by equity*

A recent study with the provocative title *Why Lawyers Derail Justice. Probing the Roots of Legal Injustices*, includes a discussion of the Aristotelian doctrine of *epieikeia*, and provides me with further clarification.[24] The author, John Anderson, documents how Aristotle's *epieikeia*, which originally was respected as a source of remedy to defects in legality, has been accommodated in the course of history within the ambit of mainstream law, so that it now features as equity. This absorption is a further example of how uncomfortable legal reasoning is with an alternative form of argument which does not rely to the same extent on the formalities of the law. "I argue that there has been a displacement and confusion of *epieikeia* with legalisms, such as procedural due process, the various legal rules of equity arising out of equitable jurisdiction, impartiality, and equality, none of which, in the end, can ever temper the inherent injustice of the law in the same way that *epieikeia* can."[25] Similar to the stance of the Critical Legal Theorists on formalism in the law, Anderson identifies what he calls the legalist fallacy:

> The legalist fallacy is exemplified in both law and morals in two instances:
>
> (1) when one holds that law and the legal system are in and of themselves somehow inherently good or just, or that the legal system does not (or need not) have justice as its end,

[22] *Ibid.* p. 257, n. 19, p. 258.

[23] Finnis has also contrasted legal reasoning with unrestricted practical rationality: "Natural Law and Legal Reasoning," *Natural Law Theory: Contemporary Essays*, edited by R.P. George (Oxford: Clarendon, 1992), pp. 134-157.

[24] John C, Anderson, *Why Lawyers Derail Justice. Probing the Roots of Legal Injustices* (University Park, PA: The Pennsylvania State University Press, 1999).

[25] *Ibid.* p. 9.

> (2) when the legal text of the interpretation of universalizable legal or ethical rules is emphasized to the exclusion of the consideration of what is a just end or result in particular circumstances, or to the exclusion of properly recognizing the degree to which justice is grounded in (and constrained by) human sociability.[26]

The original Aristotelian idea of *epieikeia* has been incorporated in the practice of law in the Anglo-American tradition as equity or as judicial discretion. Anderson stresses that these do not incorporate what had been the key element of *epieikeia.* That judges in their decisions create precedents which in turn operate as universal rules is very different from judges taking a decision to go against the literal requirements of the rule for the sake of the values which the rule was intended to realize. Applying *epieikeia* does not make a new rule and it does not change any rule. It achieves the value in a particular but unusual situation which the rule had been created to achieve in the normal, usual event.

A notion of justice that reduces itself to rules that may be rationally justified becomes harsh and inequitable in the Aristotelian sense, because it fails to acknowledge the role and importance of a less articulate practical wisdom in rendering the rules more just. This notion of practical wisdom cannot be accommodated in the Anglo-American legalistic set of rules called equity.[27]

> *It is noticeable that the judgments by the Justices of the Supreme Court recognize that in dealing with the events of People Power 2 they are dealing with something quite extraordinary. This occurrence is to some extent like EDSA 1, but in many respects is different. Care is taken to formulate the differences. But there is not simply a recognition of the uniqueness of these events: there is an attempt to fit them under pre-existing legal categories. Part of the reason for doing this is to avoid creating precedents. Another part is simply the habit of legal reasoning which manages actions and situations by classifying them in some familiar category, the handling of which is prescribed by the law. So for instance, People Power 2 is interpreted by the Court as an exercise of the right of peaceable assembly so as to petition the government.*

[26] *Ibid.* p. 7.
[27] *Ibid.* p. 158.

> *"Petition"? Joseph Estrada's removal from office is due to his "permanent disability", the reason for his "resignation". These are categories provided in the Constitution. Once the events of People Power 2 can be slotted into these categories, they become manageable, no longer threatening. But however convenient this may be, there is nonetheless something false about this approach. To the extent that it is not completely true to the complexity of what was taking place from the perspective of the actors, this reading of the events is distorting. The participants in the public demonstration did not see themselves as petitioning the government; Joseph Estrada did not think he resigned, even though he had resigned himself to the fact that he had lost; he was not permanently disabled in the ordinary meaning of the terms, but he had been dis-empowered through the defection of leaders of Armed Forces and Police, resignation of some cabinet members, and the resistance of civil society.*

The legal instances cannot accommodate the practical rationality of the actors in this situation, unless they translate their reasons into legal categories. The inability of modern legal thought to accommodate *epieikeia* except as precedent-setting equity is its very inability to deal with the practical wisdom of political agents who act creatively so as to deal with crises and problems.

Anderson concludes with a warning about the danger of giving precedence to the technical language of the law. There is a recognition of what is just which can be expressed in ordinary language. But when the technical language of the lawyers seems to diverge from what the ordinary people think, then we should be careful not to accept uncritically the lawyer's presumption that the ordinary language formulation and common sense perception is incorrect. The legal technicalities should be shown to represent and express both a real improvement in understanding and a more advantageous way of proceeding.

## *Conclusion*

This has not been an appeal for more law. It is not a matter of amending either the Constitution or any other part of the body of law in order to improve it, to overcome defects or limits. The nature of practical wisdom, as illustrated by *epieikeia* is that it cannot be incorporated in the law. This is what has happened with the attempt to integrate equity

in law. It has become another case of the general and the universal, the common rule, which in the ordinary course of events can guide human action. But every once in a while there is a need for the practical wisdom of one who says "I will not cooperate in doing wrong according to law". And while the action of such a person will attract criticism from those who cannot acknowledge any standard other than that of the law, it may well be defensible in terms of *epieikeia*. There is a practical wisdom appropriate to assessing the purpose of law and which can identify, in non-legal terms, the limitations of any legal instrument relative to law's purpose. This practical wisdom is essential for a vibrant political culture and for public debate. However, it does not exist in a vacuum or in codes of law. It requires the characters of citizens who are committed to the relevant values. Accordingly, my argument is in favor of strengthening the consciousness of the citizen body of the values that are the purpose to be achieved by law and legal process. Heightened awareness of this realm of discourse is the best antidote to the overemphasis on legal reasoning. It is what will make it possible to recognize the courage and the wisdom of those virtuous people who refuse to cooperate in doing wrong, even if it is legally sanctioned. It is not a matter of abandoning legal reasoning, but of recognizing its limitations and of strengthening the capacity to practical wisdom, a capacity that is essential for political existence. To a man with a hammer, every problem looks like a nail; to the legal mind, every problem appears as a legal problem. It is not some further specialization but practical wisdom which allows the citizen to recognize that not all problems are like nails, and that even for nails hammers are not the only possible solutions. No less than a hammer, the law is an instrument with a purpose. Practical wisdom enables the citizen to see the law as the human construct to which she submits, in terms of its purpose. This practical wisdom was exemplified in the reasoning of participants in People Power 2, who upheld the values of the law and the Constitution, even as they seemed to be acting extra-constitutionally.