The Constitution of the Revolutionary Assembly: A Theory of Convergence of Assessments

EDSEL C. F. TUPAZ
SCHOOL OF LAW
ATENEO DE MANILA UNIVERSITY
PHILIPPINES

The highest perfection of society
is found in the union
of order and anarchy.

Proudhon.

It is part of well-established theory that the exercise of sovereignty by the artificial person that is the state conforms to the will of the natural person,¹ which in turn conforms to the will of the “people” — not of “the electorate, as this is only a smaller group, a fraction of the people … an organ of government vested with the power to elect government officials and, on rare occasions, approve general measures such as the ratification of a constitution or its amendments,”² nor even of separate and distinct individuals, but of the organized collectivity that, as a unit,³ “constitutes the state.”⁴ The “will of this


people,” however, is “the rule of the majority, or the principle that the greater number of people moves the rest.”\textsuperscript{5} In the words of Dean Vicente Sinco: “It is the people considered collectively as a legal association that constitute the repository of sovereignty. And it is this legal association of the people acting as a unit that corresponds to the state.”\textsuperscript{6}

When the people act as a unit, they act as an organ of the state, that is, as its representative. Indeed, asserts Professor Fernandez, “the test is that action is taken in a representative capacity, that is, on behalf of society, and that the taking of such action (exercise of authority) has support or consensus within society.”\textsuperscript{7} The emergence of the representative capacity marks the shift in the office or capacity in which the individual members of the polity act. The separate and distinct individuals no longer act in their individual or private capacities. They now act collectively in behalf of the sovereign state. The representative capacity that is made possible by the consensus within the society constitutes the agency relationship between the people acting as an organ of the state and the state itself as a juridical entity.

Organization and the representative relationship, however, do not \textit{per se} constitute the people as an extra-constitutional body, for these characteristics are possessed as well by constitutional organs. They merely determine the agency relationship that, in turn, constitutes the people into a state organ. Thus, according to the 1987 Constitution the electorate is an organized body but is not superior to all state organs. It is, rather, cognate to the legislature. The constitutional processes of initiative\textsuperscript{8} are subject to the determinations

\textsuperscript{7} Perfecto V. Fernandez, “Law and Polity: Towards a Systems Concept of Legal Validity,” \textit{Philippine Law Journal}, Vol. 46 (1971), pp. 371, 379: “The extent or degree of consensus may vary greatly: in highly integrated societies, the consensus may approach virtual unanimity; in societies where the commitment to the communal goals (dominant value system) is on the wane, or is substantially absent, the authority to govern may increasingly rely on coercion, rather than popular assent. But since coercion without consensus cannot sustain a regime, in the final analysis it is the rule of consent embodied in the contract doctrine as articulated by Locke, Rousseau, and Rawls that grounds the polity.
of Congress, and sovereignty is exercised through enabling law because the system as provided by the Constitution is not self-executing. A second instance is the Supreme Court, an organized body comprised of the Chief Justice and fourteen Associate Justices. Cases heard by a division are resolved with the concurrence of a majority of the justices who actually took part in the deliberations on the issues and voted thereon. Notwithstanding these organizational characteristics, the Supreme Court is an equal and coordinate body to the Chief Executive and the Congress. It does not occupy a supreme position. That is because the people acting as a unit and in their sovereign capacity have fixed the role of the Supreme Court as it exists today through the medium of the constitution. The Congress and the Executive Branches, too, possess organizational qualities. At bottom, organization is a logical necessity to produce a unified corporate will. What, then, is the quality that elevates the people to a position of superiority? It is the exercise of popular sovereignty. It is well to remember that the exercise of popular sovereignty is always extra-constitutional or supra-legal. This is the third meaning of the word, "people." They become the supreme organ of the state whenever popular sovereignty is exercised in its pure form. In this state of affairs, the people exercise original legislative power as opposed to the derivative legislative power of the legislature. "Original legislative power rests in the people collectively while derivative legislative power is reposed in the legislature." At a mass meeting or primary assembly


9 Philippine Constitution, art. XVII, § 2, ¶ 2: "The Congress shall provide for the implementation of the exercise of this right."

10 Ibid., art. VIII, § 4(1).

11 Ibid., § 4(2-3).

12 Justice Laurel argues that when the judiciary allocates constitutional boundaries, it does not assert superiority over the other departments; it does not actually nullify or invalidate an act of the legislature, but merely asserts its solemn and sacred obligation under the Constitution to identify and decide conflicting claims of authority and to establish for the parties in an actual controversy the rights which that instrument secures and guarantees to them (Angara v. Electoral Commission, 63 Phil. 139, 1936).

13 Cf. Philippine Constitution, art. VI, § 16(2): "A majority of each House shall constitute a quorum to do business."

14 Cf. e.g. Philippine Constitution, art. VII, § 16, ¶ 1.

the people express the will of the state, not by means of delegates or representatives chosen to act on their behalf, but directly and immediately. They play out a pure democracy. The exercise of popular sovereignty is the exercise of original legislative power. Popular sovereignty, of course, comes down to the majority rule. The majority of the people determine whether sovereign action is extra-constitutional or not. The people acting collectively and in the exercise original and constituent legislative power may decide to act within or without the constitutional order. Their decision binds the rest. At the moment the will of the majority is felt, the people begin to act as a unit and in their sovereign capacity.

**Three Moments of Extra-Constitutionality**

The hurdle to overcome, therefore, is ascertaining the will of the majority of the inhabitants of the state. Once ascertained, it follows that there is organization and unity behind the expression of that will. It also follows from the same premise that the people constitute themselves as a state organ whose will corresponds to the will of the state. It must be noted at this point that the constitution of the people as a state organ is accomplished through an extra-constitutional process. This process does not, however, *ipso facto* alter the legal order. Though the revolutionary assembly, which “needs no formal invocation,” has convened as an extra-constitutional body, it is still revolution in potency. But for the revolutionary assembly to effect changes in the legal order, two basic propositions must first be resolved: first, whether it pleases the people to maintain the existing legal order; and second, whether it pleases the people to leave the

---

16 Joaquin G. Bernas, S.J., *The 1987 Philippine Constitution: A Reviewer-Primer* (Manila: Rex Bookstore, 2002), p. 587: “Constituent power is the power to formulate a Constitution or to propose amendments to or revision of the Constitution and to ratify such proposal, whereas legislative power is the power to pass, repeal or amend ordinary laws or statutes (as opposed to organic law).”

But since popular sovereignty is not exhausted by the enactment of a constitution, the people may again choose to exercise a constituent power that is extra-constitutional. The quality of extra-constitutional arises whenever the people choose to transcend the constitutional framework.

administration to those at present entrusted with it. Until either of the two questions is resolved in the negative, there is no extra-constitutional execution or performance. Distinction must, therefore, be made between the extra-constitutional convention and resolution. Depending on the resolution of the two fundamental questions, the consequent action of the revolutionary assembly may or may not be supra-constitutional. For what makes an act strictly an act of popular sovereignty is the thrust towards extra-constitutionality. The majority decides whether or not its particular exercise of sovereignty transcends the constitutional order. The people, for example, might decide not to abide by the constraints of the constitution. Constitutions, after all, are mere enactments of law and alterable, as such, by virtue of supreme and constituent legislative powers. There is a third moment in all this, relating to the choice of mode of execution (one that, in the case of People Power, falls short of armed conflict or general uprising) of the revolutionary organ. The choice of the means must be differentiated from its actual performance or execution. Whereas the former involves the exercise of supreme legislative powers, the latter is a question of power. The mode of execution may amount to an intra-constitutional exercise of sovereignty or it may be wholly extra-constitutional. “When, however, the people, in the exercise of their sovereignty,” writes Dean Joaquin Bernas, “decide that they no longer wish to be bound by the amendatory process of the Constitution, there is legally nothing to prevent them from adopting a new Constitution in a novel extra-constitutional manner.”¹⁸ In sum, then, the three moments of the extra-constitutional exercise of popular sovereignty are: (1) the formation or constitution of the revolutionary organ; (2) the resolution or non-resolution of the two fundamental questions; (3) the choice of the means or methods to execute any positive resolution. Those that make up the revolutionary organ must agree, in other words, to meet, come to agreement on its solution, and mode of execution.

It is, however, no easy matter to ascertain the will of the majority. Whereas the composition and operation of state organs created by the constitution are governed by constitutional and statutory guidelines, revolutionary organs do not appear together with such

¹⁸ Philippine Constitution: A Reviewer-Primer, p. 597.
tests and standards. Under the 1987 Constitution, for example, prior to their appointment, individuals being considered for positions in the Supreme Court, must be found to possess certain qualifications\(^\text{19}\); the Court itself may sit *en banc* or in division,\(^\text{20}\) with decisions being taken on cases brought up to it with the concurrence of a majority of those members who actually took part in the deliberations and voted therein\(^\text{21}\); on the basis of consultation are cases assigned to one or another Justice for writing and conclusions drawn\(^\text{22}\); decisions of the Court must state clearly and distinctly the facts of the case and the law on which any decision relating to it is based\(^\text{23}\); once promulgated, judicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system.\(^\text{24}\) Similarly governed by constitutional norms are the formation and operation of the legislative branch. The legislative power shall be vested in the Congress comprised of the Senate and House of Representatives.\(^\text{25}\) Like the members of the Supreme Court, members of both Houses must possess certain qualities before they may validly be elected to office.\(^\text{26}\) Each bill passed must embrace only one subject, as this is stated in the title.\(^\text{27}\) Bills that pass muster in both houses become law must be able to do so on three readings, conducted on separate days.\(^\text{28}\) Such constitutional norms, parlayed in writing (through official documents), are responsible for tying actions undertaken by state organs to the state itself.

\(^\text{19}\) Section 7 of Article VIII reads: (1) No person shall be appointed member of the Supreme Court or any lower collegiate court unless he is a natural-born citizen of the Philippines. A member of the Supreme Court must be at least forty years of age, and must have been for fifteen years or more a judge of a lower court or engaged in the practice of law in the Philippines; (2) The Congress shall prescribe the qualifications of judges of lower courts, but no person may be appointed judge thereof unless he is a citizen of the Philippines and a member of the Philippine Bar; (3) A member of the judiciary must be a person of proven competence, integrity, probity, and independence.  
\(^\text{20}\) *Philippine Constitution*, art. VIII, § 4(1).  
\(^\text{24}\) The Civil Code of the Philippines, R.A. 386, art. 8 (1950).  
\(^\text{25}\) *Philippine Constitution*, art. VI, § 1.  
\(^\text{27}\) *Ibid.*, § 26(1).  
\(^\text{28}\) *Ibid.*, §§ 26(1-2) & 27(1).
The point I would like to develop at this juncture is that the juristic tests and standards that govern the existence and self-conduct of the revolutionary organ do not come under the purview of the products (such as the aforementioned), of the constitutional order. It is only to the will of the majority that they are subject to review. A way into the interpretation of this will is provided by the theory of the convergence of assessments independently made, to which I now turn.

The Theory of Convergence of Assessments

It was the EDSA Revolution of 2001 that propelled the political scientist, Alexander Magno, to formulate the idea of convergence.29 The theory refines the principles that govern collective sovereign action undertaken in the name of direct democracy. It is an unconventional theory that warrants a new understanding of governance. For "[i]t is not only presidential power that has changed hands here. The entire method and understanding of governance has changed. The conduct of our democracy is under radical review."30 Magno writes:

Political analysts, foreign observers and many of those who were themselves at Edsa during those hectic days do not yet know how to classify this event. Foreign journalists prefer to describe this as a "constitutional coup"—although this sounds a bit like an oxymoron. Among those in the civil society groups that participated in the effort to oust Estrada, the preference is to call this a popular uprising against a dysfunctional presidency. My own preference is a vastly less dramatic but probably more accurate description: a full convergence of assessments.47

Although originally a political theory, the idea of convergence articulates in greater detail the democratic idea of majority rule and hence would fall under the penumbra of political law.32 The value of the theory of convergence of assessments is that it deepens the

---

30 Ibid.
31 Ibid., p. 2 (emphasis in original).
understanding of majority rule. It introduces certain qualitative aspects to the notion of numerical superiority. In juristic terms, the convergence theory amounts to a procedural rule governing the extra-constitutional exercise of direct democracy. In essence, convergence theory describes the decision-making process of the people: extra-constitutional action was born out of "a decision arrived at separately by independent groups and sovereign individuals across a wide cross section of society."\(^{33}\) It is not a decision imposed by charismatic personalities, disciplined political parties or conspiratorial groups. It [is] a decision arrived at by autonomous but extensively networked individuals. Through the length of the political crisis that beset the Estrada presidency, the only problem that remained was the exact method and timing for enforcing a decision already taken by the most strategic sectors of society: the business community, the churches, trade unions, civil society groups and popular movements.\(^{34}\)

In juristic terms, the convergence theory is a rule of procedure for extra-constitutional processes that involve the deliberation of political questions. I submit that the convergence principle refines the principle of majority in four distinct ways. First, decisions to convene as a primary assembly and, thereafter, to act on the two fundamental propositions, must be made by independent groups or sectors. Second, decisions must be arrived at separately and independently. Third, these "strategic sectors" must come from a wide cross section of society that comprise the people as an element of the state. Fourth, political deliberation must be made publicly, that is, in a public forum. The will of the majority may be ascertained in light of these four elements. The majority will as the end product of the deliberative process is the resolution of the two fundamental questions that face any primary assembly or revolutionary organ.\(^{35}\) Should the revolutionary organ decide to alter the existing legal order or oust the officials behind government, the means to put into effect these resolutions may or


\(^{34}\) Insurrection 101.

\(^{35}\) Whether it pleases the people to maintain the existing legal order; and whether it pleases the people to leave the administration to those at present entrusted with it.
may not be extra-constitutional. This follows from the idea that the power exercised is popular sovereignty. Execution of the means employed is, of course, an executive function. This would involve some kind of force or coercion. But any discussion on the nature of force is beyond the normative theory now being formulated.

According to convergence theory, the majority principle is no longer simply about numbers. The theory modifies the simple notion of numerical majority by virtue of the four important qualitative aspects abovementioned. The first and the second aspects go together: the decision to convene and resolve the two fundamental propositions must be made by independent groups or sectors that decide independently. This is simply another way of saying that decisions must be made freely by individuals and groups. But this idea does not prohibit the formation of larger coalitions — it only means that judgment must be exercised freely and independently and without coercion, fraud, mistake, or undue influence.

An illustration of the attribute of independent judgment is provided by those principles that underlie campaigns of civil disobedience. Civil disobedience, according to Rawls, is "a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of government." According to Freund, it is "a nonviolent protest which

---

36 Stated otherwise, the people, as the revolutionary organ, may choose to exercise sovereign powers extra-constitutionally or may abide by the constitutional machinery. Evidence of this capacity may be found in Javellana v. Executive Secretary, 50 SCRA 30 (1973). Bernas, in construing Justice Barredo's separate opinion in Javellana says, the "facts of general knowledge which [Justice Barredo has] taken judicial notice of" was accepted "as an extra-constitutional exercise by the people, under the leadership of President Marcos, of their inalienable right to change their fundamental charter by any means they may deem appropriate" (The 1987 Constitution of the Republic of the Philippines: A Commentary, p. 1191). For Justice Makasiar, the people alone are able to determine who should vote in an "election" (pp. 1186-1187). The convention, revolutionary in nature, was "an independent and sovereign body" commissioned directly by the people to perform the task of "revision" which the people had reserved unto themselves. Ibid., pp. 1187-1188.


is open and presents an issue of moral censure in an effort to shake the complacency and sear the conscience of lawmakers and the community. As such, civil disobedience movements share very similar attributes with revolutionary assemblies where the deliberative process is concerned. What differentiates the two is that the former does not involve the whole people acting as a unit and, moreover, is devoid of extra-constitutional legislative powers. For Rawls, the decision to resort to civil disobedience is one made independently and responsibly. It involves definite risks. For in saying that there is no one "to say when circumstances are such as to justify civil disobedience," the resort to do so "invites anarchy by encouraging everyone to decide for himself, and to abandon the public rendering of political principles." 

The reply to this is that each person must indeed make his own decision ... We cannot divest ourselves of our responsibility and transfer the burden of blame to others. This is true on any theory of political duty and obligation that is compatible with the principles of a democratic constitution. The citizen is autonomous yet is held responsible for what he does. If we ordinarily think that we should comply with the law, this is because our political principles normally lead to this conclusion. Certainly in a state of near justice there is a presumption in favor of compliance in the absence of strong reasons to the contrary.

That each participant "must decide for himself whether circumstances justify civil disobedience ... does not [mean] that one is to decide as one pleases." Now, "to act autonomously and responsibly, a citizen must look to the political principles that underlie and guide the interpretation of the constitution. He must try to assess

Rawls avoids presenting the tandem of civil disobedience as a mode of protest tied and militant action and resistance, as a tactic for transforming or even overturning an unjust and corrupt system.


40 A Theory of Justice, p. 341.

41 Ibid.

42 Ibid.

43 Ibid.
how these principles should be applied in the existing circumstances."\textsuperscript{44} The individual, therefore, does not act capriciously, because "after due consideration that civil disobedience is justified, [he] conducts himself accordingly, [and therefore] acts conscientiously."\textsuperscript{45} Rawls sums up the idea of independent judgment:

In a democratic society, then, it is recognized that each citizen is responsible for his interpretation of the principles of justice and for his conduct in the light of them. There can be no legal or socially approved rendering of these principles that we are always morally bound to accept not even when it is given by a supreme court or legislature. Indeed, each constitutional agency, the legislature, the executive, and the court, puts forward its interpretation of the constitution and the political ideals that inform it.\textsuperscript{46}

The third idea of convergence theory is the idea of maximum participation in the deliberation process. This simply means that minority groups are given the opportunity to participate. In a representative government, the principle of proportional representation qualifies numerical superiority: it is a method of election that gives representation to minority interests.\textsuperscript{47} In a direct democracy, however, where "the will of the state is formulated or expressed directly and immediately through the people in a mass meeting or primary assembly rather than through the medium of delegates,"\textsuperscript{48} the principle of proportional representation should not be strictly applied. Similarly in a direct democracy — when the revolutionary organ acts — the tyranny of the majority cannot be abetted. Political change "can only happen on the basis of the broadest consensus of groups and individuals in civil society."\textsuperscript{49} The processes of deliberation must transpire "across a wide cross section of society."\textsuperscript{50} Each of the "most strategic sectors of society" such as the business

\textsuperscript{44} Ibid.
\textsuperscript{45} Ibid.
\textsuperscript{46} Ibid.
\textsuperscript{47} Cf. Philippine Constitution, art. VI, § 5(1-2), § 17, § 18.
\textsuperscript{49} "Insurrection 101."
\textsuperscript{50} Ibid., p. 2.
community, faith communities, trade unions, civil society groups, popular movements, draws its conclusions autonomously from the rest, though in a manner that Rawls describes as "an overlapping rather than strict consensus." Continues Rawls:

In general, the overlapping of professed conceptions of justice suffices for civil disobedience to be a reasonable and prudent form of political dissent. Of course, this overlapping need not be perfect; it is enough that a condition of reciprocity is satisfied. Both sides must believe that however much their conceptions of justice differ, their views support the same judgment in the situation at hand, and would do so even should their respective positions be interchanged.

When the separately arrived at conclusions or programs of action parlayed by the heterogeneous mix of strategic sectors, as well as of individuals and groups with no affiliation to any strategic sector, overlap or converge in this way, the shared political judgment that results may be taken to be the will of the majority. It is that shared political judgment which underwrites the emergence of the revolutionary assembly. While there might emerge a figurehead around which the constituent parts of the revolutionary assembly could rally, the traditional command structure in which the locus of leadership is fixed in a political command post foes not define the revolutionary assembly, because its real agent is the people who comprise the revolutionary organ of the state. The figurehead is merely a sub-agent within the revolutionary assembly, not its head or even voice. Should the sub-agent act in violation of the trust reposed in him or her by the people, the trust relationship may be repudiated, and the people itself may proceed to appoint someone who will represent them with less of a misalignment. It is well to remember, however, that individuals or other bodies tasked with representing the larger revolutionary assembly are selected not out of necessity but for the sake of convenience. It is the people acting as a unit that exercise popular sovereignty. The important think to keep in mind here is that

---

53 Note that popular opinion is not the same as convergence. Magno refutes the idea that surveys reflect an otherwise dynamic situation.
54 "Insurrection 101."
as long as the heterogeneity of forces coalesce around a clear political
goal, the essential requirement of convergence is fulfilled.55

At this point certain clarifications must be made. It was stated
earlier that in a juridical order participants of an ostensible
revolutionary organ must first convene, resolve the two fundamental
questions, and then choose the means to operate the resolution. Now,
convention, deliberation, resolution over the two questions, and
resolution over the means, take place over different phases: (1) in the
constitution or formation of the revolutionary organ; participants
must meet; (2) in the convergence of assessments proper, that is, when
a resolution emerges following deliberation upon the two
fundamental propositions; (3) in the choice of the means for operating
that consensus; this may or may not be extra-constitutional. In other
words, constituents of the revolutionary organ must agree to meet,
agree on the solution, and agree on the means to effect such a solution.
All three need not agree, but as long as there is the agreement to meet,
there already is an exercise of popular sovereignty. All three are extra-
cstitutional actions and are instantiations of the exercise of popular
sovereignty. These are the three moments of extra-constitutionality
as earlier discussed. To recall, the third moment is the choice of means
and methods to enforce an extra-constitutional legislative enactment.
Conceivably it is the transpiring of the third moment that extra-
cstitutional behavior of the whole process is most keenly felt.

It may be argued that the juridical order of the three phases of
convention, resolution over the two questions, and the choice of means,
emerge only following the occurrence of the second moment, that is,
after a categorical resolution. Arguably, it is only in retrospect that
convention and deliberation occur, that is, once the resolution
becomes manifest. But operation must be distinguished from theory.
That the process of the formation and resolution of the revolutionary
organ is not yet concretely perceivable is a difficulty that comes about
in extraordinary times. But this should not affect the soundness of the
theory. For to speak of extra-constitutional action, there must be an
extra-constitutional power that exists a priori. The constitution of the
power and the exercise of that power begin and end with majority
rule. And that principle is refined and made perceivable through the

55 Ibid. p. 4.
convergence theory of Magno and the theories on civil disobedience by Rawls.

What if convergence fails in any of the three moments? In his discussion of the operations of civil disobedience, Rawls may have provided an answer: "Eventually, though, there comes a point beyond which the requisite agreement in judgment breaks down and society splits into more or less distinct parts that hold diverse opinions on fundamental political questions. In this case of strictly partitioned consensus, the basis for civil disobedience no longer obtains."\textsuperscript{56} In Magno's words, "political actions would have degenerated into a directionless frenzy."\textsuperscript{57} Without convergence, "independent groups would have dissipated political energy in contradictory strategies. The flashpoints would have multiplied and the probability of violence raised intolerably — until the whole effort became self-defeating."\textsuperscript{58} If the convergence of assessments occurs in three moments of extra-constitutionality, then in the same vein assessments may fail to converge during those same moments. Should political assessments dissipate under the first moment — whether the revolutionary assembly may convene — then there will be no revolutionary organ, and the political exercise becomes merely an exercise of the right to free speech and assembly.

But suppose that convergence occurs in the first instance and a revolutionary organ is formed. What then happens if the participants fail to resolve the two fundamental propositions (second moment) or fail to choose means to effect the resulting resolution (third moment)? This happens in ordinary legislative processes. A congressional bill may fail to pass; this does not disperse the legislature already convened. The revolutionary assembly may continue the deliberative process and reassert itself until such resolutions are made. Or it may adjourn. For the assembly to adjourn, however, convergence need not again occur, for it is precisely the absence of convergence in the first moment that dissipates it. The truly important idea Rawls and Magno introduce, however, is that strict consensus is unnecessary.\textsuperscript{59} A degree of overlapping consensus suffices as a condition

\textsuperscript{56} A Theory of Justice, p. 340.
\textsuperscript{57} “Insurrection 101.”
\textsuperscript{58} Ibid.
\textsuperscript{59} A Theory of Justice, p. 340.
for the formation of the revolutionary organ, the resolution of the two fundamental questions, and the choice over the mode of execution. Convergence is a shared political judgment. The idea of maximum participation as part of the convergence theory adds quality to the raw idea of quantitative superiority. The primary function is to check the tyranny of the majority.

Problems With Convergence Theory

The weakness of convergence theory is that it exists as an ideal. This, however, is no reason why it should not eventually operate in courts of law; that maximum participation is ideal is precisely why it is there. As an ideal, its metes and bounds will always be subject to debate and revision. The idea of republicanism itself has been subject to a long debate whose meaning is constantly evolving. Nonetheless, communities have continually asserted the republican tradition.

61 The idea of republicanism itself has been subject to a long debate whose meaning is constantly evolving. According to Eule, the word, "republican," in the U. S. Constitution clearly did not have a single connotation for those who drafted the Constitution, let alone for the far greater number that ratified it. John Adams confessed that he never understood what the word meant and defended his confusion by asserting his belief that "no man ever did or ever will." Julian N. Eule, "Judicial Review of Direct Democracy," Yale Law Journal, Vol. 99 (1990), pp. 1503, 1541. Nonetheless, most of Adams' contemporaries shared a sense of the clause's negative meaning — what it was trying to prevent. Eule argues that the intent of the framers of the U.S. Constitution must not be taken as dispositive but, "like every other clause in the Constitution," as something that "deserves to grow and develop." Republicanism has, in fact, been variously judicially defined as a government administered by representatives chosen or appointed by the people or by their authority, as one which derives all its powers directly or indirectly from the great body of the people, and is administered by persons who hold their offices, for a limited period, at the pleasure of the people, as a government by the people, albeit through representatives appointed by them to the executive, legislative, judicial departments, either through direct vote or through some intervening officer or body selected and appointed by direct vote for the purpose, as a government in which the supreme power resides in the whole body of the people, and is exercised by representatives elected by them. The term has been held to be equivalent to "representative government," as substantially equivalent to the "democratic form of government. "The distinction between a democratic form of government and a republican form of government ... is more theoretical than real, for the vital idea in both is a government by the people; and whether the will of the people be expressed
Additionally, it assumes the existence of subjects difficult to measure and define. What exactly constitutes a “strategic sector,” for example, may possibly involve a discretionary function that only courts of law would be authorized to define. This they may do through the power of judicial notice, that is, the power that judges have to act upon certain facts in the absence of proof because they already know them. In finding for “strategic sectors,” the courts would have to carry out a sociological function. They would have to do the work of mapping out those sectors that move society. Certainly, any enumeration of strategic sectors cannot be fixed but must always evolve according to changes in society.

It is suggested, however, that the statutory construction principle of *ejusdem generis* should apply. Magno, Salonga, and Commissioner Nieva have made considerable efforts in listing down through a representative or through a personal announcement, it is but a difference in form of expression.” Cf. also *Constitutional Structure and Powers of Government*, Vol. 19 (1997).


63 Under the rule of *ejusdem generis*, “where general terms follow the designation of particular things or classes of persons or subjects, the general term will be construed to include those things or persons of the same class or of the same nature as those specifically enumerated.” Jose G. Laurel, *Statutory Construction: Cases & Materials* (Manila: Rex Bookstore, 1999), p. 109. *Ejusdem generis* “applies only where the specific words preceding the general expression are of the same nature.”

64 Magno is of the view that strategic sectors must come from a wide cross section of society, such as the business community, churches, trade unions, civil society groups, and popular movements. Cf. “Insurrection 101.”

65 According to former Senator Salonga, People Power II was “a result of an informed judgment” formed “by students from various colleges and universities, their professors and mentors, the educated youth, including employees from various companies and from the public sector, representatives of the middle class, urban labor and other groups.” Jovito Salonga, “Coup d’etat Different From People Power II; Reyes & Co., Not Coup Plotters, *Kilosbayan* (May 20, 2002), p. 4.

66 Nieva, in describing “people’s organizations,” was “referring to all sectoral organizations: trade unions, peasant organizations, urban poor, cooperatives and consumer organizations, human rights groups, basic Christian communities and the like.” Joaquin G. Bernas, S.J., *The Intent of the 1986 Constitution Writers*, pp. 998-999. Cf. also Ang Bagong Bayani-OFW Labor Party v. Comelec, G. R. No. 147589 (June 26, 2001), which enumerates the marginalized sectors in the party-list system, including labor, peasant, fisher-people, urban poor, indigenous cultural communities, elderly, handicapped, women, youth, veterans, overseas workers, and professionals).
those sectors whose participation is essential in any significant political
deliberation. The underlying principle that would constitute these
sectors as belonging to the same class or of possessing the same nature
is already found in positive enactments of the law. It is submitted that
the standard is the same one embodied in Section 16 of Article XIII of
the Constitution, which provides that "[t]he right of the people and
their organizations to effective and reasonable participation at all
levels of social, political, and economic decision-making shall not be
abridged." A strategic sector, therefore, must belong to that class of
organizations whose participation is essential in significant social,
political, and economic decision-making. Judicial notice must, in
the final analysis, involve a qualitative observation in order to protect
minority rights.

67 Commissioner Nieva argues that Section 16 “institutionalizes this participation
and consultation mechanisms at all levels of social, political and economic decision-
making” — in a word, the 1986 EDSA Revolution (The Intent of the 1986 Constitution
Writers, pp. 998-999). Cf. also Philippine Constitution, art. XIII, § 15: “People's
organizations are bona fide associations of citizens with demonstrated capacity to
promote the public interest and with identifiable leadership, membership, and
structure.”

68 Since “[t]he question as to the majority is a question of fact,” Luther v. Borden,
48 U.S. 1, 41-42 (1849), and, as a rule, evidence must be offered to prove or rebut such
a fact, faith may be reposed on the power of the courts of law to take judicial notice.
But the will of the majority, or the convergence of assessments, as a fact may not be
established under mandatory judicial notice. So when is judicial notice mandatory?

(1) According to The Revised Rules of Court, Rule 129 § 1 (1997): A court shall
take judicial notice, without the introduction of evidence, of the existence and territorial
extent of states, their political history, forms of government and symbols of nationality,
the law of nations, the admiralty and maritime courts of the world and their seals, the
political constitution and history of the Philippines, the official acts of the legislative,
executive and judicial departments of the Philippines, the laws of nature, the measure
of time, and the geographical divisions. The question as to the majority as a fact,
however, may be covered under discretionary judicial notice. Section 2 of Rule 129
provides that “[a] court may take judicial notice of matters which are of public knowledge,
or are capable of unquestionable demonstration, or ought to be known to judges
because of their judicial functions.” More specifically, a majority of such magnitude as
to involve a whole people would fall under matters of public knowledge: The matter of
which a court will take judicial notice must be a subject of common and general
knowledge. In other words, judicial knowledge of facts is measured by general knowledge
of the same facts. A fact is said to be generally recognized or known when it is accepted
by the public without qualification or contention. The test is whether sufficient notoriety
attaches to the fact involved as to make it proper to assume its existence without proof.
But even if the power of judicial notice is exercised with a view to accommodating the idea of maximum participation in the deliberation process, the fundamental shortcoming of convergence theory is that it fails to resolve the problem of political competency, or the question of competency to participate in political activity. Convergence theory’s appeal is its description of the process or manner by which the majority of the people arrive at a decision without going into such details as who, precisely speaking, constitute the majority, who those individual persons are who constitute the revolutionary organ. The theory of convergence looks at political participation on the “macro” level, not the molecular. Although reference is made to the “most strategic sectors of society,” convergence theory stops short of carving out principled standards that serve to include or exclude individual participants in the political deliberative process. “The paradox underlying the prescript of participation in public deliberation by the politically competent is one that besets all variants of republican thought: who should make the decision about who is competent to participate in collective decision-making?”

The notion of political competency for participating in political processes has its roots in the concept of republican government. Much has been written about this, but one position is that “subjects of a

(2) Ricardo J. Francisco, in Basic Evidence (Manila: Rex Bookstore, 1999), p. 27, writes: The power to take judicial notice, however, “rests on the wisdom and discretion of the courts … [It] is to be exercised by courts with caution” for “care must be taken that the requisite notoriety exists. The belief that a grand majority has surfaced, however, need not be universal, and “is not controlling for it is very seldom that any belief is accepted by everyone. It is enough that the matters are familiarly known to … those persons familiar with the particular matter in question.”


dominion become free by participating in the political processes of collective deliberation that govern them.” 71 According to this conception of freedom as self-government, those who are without political franchise, by definition, shall be dominated by those who have it. Under republican theory, exclusion and resulting domination can be justified only by virtue of a principled standard, that is, competency to participate in political activity. 72 A dilemma arises, however, in terms of the determination of principled standards: who decides who is competent to participate in collective decision making? 73

The question of defining the standard of political competency reasserts itself in every age. The particular criteria at issue may vary — wealth, gender, race, literacy, intelligence, mental fitness, age, or residence have all been debated at various times — but there is no known democratic polity ... in which competency requirements have been altogether rejected. 74

To define the standards of political competency is really to ask who or by what process the determinations of political competence


73 Ibid., p. 1126.

(or incompetence) are made. It is a question of who may ‘vote.’ This issue faced the U.S. Supreme Court in 1848 in Luther v. Borden, which challenged the franchise provisions in the Rhode Island Constitution whose property requirements excluded more than half the state population from the franchise. It was made in the context of the “Dorr Rebellion”: “The question ultimately raised ... of whether the determination of political competency is susceptible to principled resolution,” emerged in Rhode Island in the context of a revolutionary attack on the constitutional foundations of the State.”

A Brief on Luther v. Borden

Since the constitution or formation of the revolutionary organ is at bottom an issue of the political competence of its would-be constituents, the case of Luther must be examined. The gist of Luther is that the U.S. Supreme Court, in denying jurisdiction on the grounds that questions pertaining to the content of “republican form” are “political questions” for the “Political Department” to decide, left the determination of political competency to such Political Department. In effect, the Luther Court “decisively repudiated the idea of a principled competency standard upon which the republican conception of a right to political participation depends.” It has been argued that the ruling holds a “fundamentally antagonistic view that there is no such principled standard and, therefore, no defensible right to participation to be claimed by the un-franchised.” The Court “effectively eviscerated the notion of a natural right to political

76 48 U.S. (7 How.) 1 (1849).
78 Ibid., p. 1128.
79 Ibid., p. 1127.
80 In nearly 140 years since Luther, the U.S. Supreme Court “has continued to apply the doctrine of political questions to the republican guaranty clause, frustrating all subsequent attempts to litigate legislative reapportionment or voting qualification cases under Article IV, Section 4, of the U. S. Constitution” (Ibid).
81 Ibid., p. 1128.
82 Ibid.
participation by deferring to the franchise prescriptions of established government." In so holding, the Court followed a positivist or formalist approach, as opposed to a substantive conception of law and politics.

Now, up until the middle of the nineteenth century, Rhode Island was governed on the basis of its original colonial charter, set up during British rule. The charter perpetuated a political system based on property qualifications which "excluded from the franchise all but forty percent of the adult white male population." One author sums it up:

Opponents of the property qualifications repeatedly appealed, with no success, to the General Assembly of the charter government to extend the franchise to all adult white male residents. Finally, frustrated by continuing resistance from the General Assembly, a "Suffragist" movement, led by Thomas Wilson Dorr, attempted to extend suffrage to all adult white male residents by extragovernmental means. The Suffragists organized a "People's Constitutional Convention" which drafted a new "People's Constitution" explicitly extending the rights to vote and to hold political office to all adult white male residents of Rhode Island. They then submitted the proposed Constitution for ratification by the adult white male residents of Rhode Island, and on January 13, 1842, they announced its alleged ratification by a majority of that constituency. On May 3, the Suffragists inaugurated a People's Government headed by Dorr and requested the transfer of all "monuments of power" from the now putatively obsolete charter government.

But the charter government did not surrender. The two governments, one existing de jure and the other, de facto, prepared for an armed confrontation. Thomas Dorr led the rebellion but soon after aborted the attack. The charter government imposed martial

---

83 Ibid.
84 Ibid.
85 Ibid. pp. 1125, 1129.
86 Ibid. "Dorr was a reformist lawyer and politician who came from a well-established Providence commercial family."
87 A. Mowry, The Dorr War or The Constitutional Struggle in Rhode Island (1901), pp. 112-117.
law throughout the state, and summoned the state militia. Hundreds of men were detained. Dorr himself fled the state, but was eventually tried and convicted of treason in a Rhode Island state court. 88 When the revolutionary momentum waned, the Suffragists turned to the courts in a last-ditch effort. Martin Luther, a rank-and-file Suffragist, and his mother sued Luther Borden, a military official who had arrested Martin Luther at his home, in trespass for breaking and entering without a warrant. The strategy of Luther as plaintiff was to argue that the charter government authorizing the arrest had been nullified by the ratification of the People’s Constitution. Article IV of the U.S. Constitution which guaranteed a “republican form of government” was used as ground for the validity of the alleged ratification by the majority of the people of Rhode Island. 89 In essence, the plaintiffs interpreted Article IV’s guarantee of a “republican form of government” to imply that such a form must reflect the will of the majority and, therefore, that majorities can change the form of government at their will. 90 But the question of majority further involves whether a majority of “qualified” voters had indeed ratified the new constitution. 91 It was a question of what makes voters qualified, and whether the formulation of political competency standards is subject to adjudication. 92 Plaintiff attempted to attribute a universal quality to the right of all adult white males to vote, and this obviously needed an independent justification. 93 The contention was made that such competency was a natural right. 94 The defendants, on the other hand, argued that suffrage qualifications are inherently arbitrary, subjective, and not natural. Hence, political competency standards necessarily

89 Ibid.
90 Section 4, Article IV, of the U. S. Constitution reads in full: “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”
92 Ibid., p. 1130.
93 Ibid., p. 1131.
94 Ibid.
95 Ibid.
arise through artificial construction by virtue of positive prescription.\textsuperscript{96} In essence, the defendants were asserting that there is no natural definition of "the people." To support this position, they argued that a natural right is one that adheres to all individuals, regardless of race, sex or age. Participatory rights, they argued, differed from "natural" rights in that they required special qualifications:

The right to vote, and the right to be voted for ... are obligations and duties to be performed for the seven-eights of society, composed of women, children and others, who are otherwise disqualified from performing these duties ... It is something worse than absurdity and nonsense to say that one man has a natural right to act for others, who from a principle of sound policy and expediency are excluded from acting for themselves.\textsuperscript{97}

The defendants then "went on to extol the mediation of the popular will by elected representatives as a necessary foil against encroachment by the 'tumultuous mob' upon the rights of the 'moral, prudent, industrial, and well disposed' minority."\textsuperscript{98} They concluded that there existed no principled source for defining franchise qualifications.\textsuperscript{99} Hence, any determination of qualifications for suffrage is necessarily partial and positive and, hence, the Court must defer jurisdiction over suffrage qualifications to the extant government.\textsuperscript{100}

The U.S. Supreme Court, through Chief Justice Taney, denied jurisdiction and invoked the political questions doctrine: questions about the meaning of "republican form" are political and non-justiciable.\textsuperscript{101} The Court agreed with the defendants that political rights are inherently subjective and thus commands judicial deference to the prescriptions of "the political department."\textsuperscript{102} Even Justice Woodbury who was alone in his dissent found it to be "obvious, on a little reflection,"\textsuperscript{103} that the validity of the charter and the "subordinate

\textsuperscript{96} Ibid. pp. 1131-32.
\textsuperscript{97} Ibid., (emphasis in original).
\textsuperscript{98} Ibid., p. 1133.
\textsuperscript{99} Ibid., pp. 1133-34.
\textsuperscript{100} Ibid., p. 1134.
\textsuperscript{101} Ibid.
\textsuperscript{102} Ibid.
\textsuperscript{103} Ibid.
question” of “whether all shall vote in forming or amending those constitutions who are capable and accustomed to transact business in social and civil life, and none others,”104 are “mere” political questions.105

This holding of Luther is problematic in the sense that both Chief Justice Taney, who penned the main opinion, and Justice Woodbury equated the power of “the people” with the power of the political departments of government, “even though the question of whether these branches in fact represented a majority of the politically competent was precisely the issue at stake.”106 Here lies the paradox of Luther. The criticism was that the ruling overturned the republican hierarchy: “How popular sovereignty paradoxically implied the sovereignty of the legislature over the popular franchise remained to be explained.”107 Now it was critiqued that the “Luther Court’s deference to those branches of government that mediate the popular will [is] an affirmation of the positivist statist position that ‘might makes right.’”108 Dennison, a historian, in summing up the ruling, asserted that “[m]ajorities could change government, but only if they had the physical power to prevail.”109 Chief Justice Taney himself linked the question of the legitimacy of a government to its success in establishing itself.110 Despite Justice Woodbury’s rhetoric that the authority of the people is “independent of the legislature,” he nonetheless conceded that “mere naked power, rather than intrinsic right.”111 controls the outcome. In the final analysis, the holder of the power to define political competency standards is the same as the one who effectively holds the reins of government. To overturn such a rule requires “a union of physical with moral strength.”112 In other words, the Luther Court found that legislative and executive determinations are guided by political power rather than by a justiciable principle. What remains obscure in this

105 Ibid., p. 51.
107 Ibid.
108 Ibid.
109 Ibid., pp. 1135-36.
110 Ibid. p. 1136. (emphasis supplied).
111 Ibid.
account is why only participatory political rights, as opposed to other rights, should be relegated to the political departments for resolution. Chief Justice Taney did not explain in *Luther* why only rights that are political in the sense that they relate to participation in public affairs should be entrusted to the elected branches of government.\textsuperscript{113}

Recall that the defendants argued that it was the biased and arbitrary character of the right to vote that differentiated it from justiciable rights. But

exclusions of various kinds occur in rights other than voting, and do not indict the universality of those rights the defendants took to be natural and, therefore, justiciable. Property and other rights, such as the right to make contracts, the right to stand trial, and the right to make a will and testament, are all subject to certain competency requirements. As long as such disqualifications are perceived to be based on a principled standard of competency, and everyone is subjected to the same standard, such rights are considered to be justiciable. Thus, contrary to the defendants’ reasoning, the simple fact that an exclusionary competency requirement adheres to the right to vote does not distinguish this right from any of these other “natural,” or “justiciable,” rights.\textsuperscript{114}

Insofar as rights other than political are concerned, it is the consistency and soundness of competency standards that takes the controversy to be a matter of law. This suggests “the evaluation of the conformity of particular characteristics with a competency standard is preeminently a judicial function.”\textsuperscript{115} We will not take up the point here whether or not this amounts to judicial legislation. Suffice it to say that for as long as there exist principled standards governing competency requirements, whether in reference to political or private rights, any controversy involving such competency standards will amount to something justiciable. In this regard, the conclusion in *Luther* “that participatory rights, unlike the other rights enumerated above, are non-justiciable is not logically supported by either the

\textsuperscript{113} “Political Rights as Political Questions: The Paradox of Luther v. Borden,” pp. 1125, 1137.

\textsuperscript{114} *Ibid.* (emphasis supplied).

existence of qualifications or the necessity that such qualifications be defined by the mediating structures of government.”116 The Court in Luther was “motivated by a formalist conception of the judicial role.”117 In essence, the formalist view is “the insistence on a rigid separation between law and morality.”118 It is a dichotomy between legal principle and value. The formalist view is revealed by the deference to positive enactment by the political departments of government. In other words, to determine political competency, recourse must be made to the mediated bodies of government and not to its naked source. This may sound absurd, for in the republican hierarchy, the people as master may not be enslaved by its servant. The formalist perspective of the judicial role is manifested in Chief Justice Taney’s declaration:

> It is the province of a court to expound the law, not to make it. And certainly it is no part of the judicial functions of any court ... to prescribe the qualifications of voters in a state ... nor has it the right to determine what political privileges the citizens of a State are entitled to, unless there is an established constitution or law to govern its decision.119

Moreover, according to Taney:

> The court had not the power to order a census of the freeholders to be taken ... Nor could the court appoint persons to examine and determine whether every person who had voted possessed the freehold qualification which the law then required. In the nature of things, the Circuit Court could not know the name and residence of every citizen: and bring him before the court to be examined. And if this were attempted, where would such an inquiry have terminated? And how long must the people of Rhode Island have waited to learn from this court under what form of government they were living during the year in controversy?120

> ... The question as to the majority is a question of fact. It depends upon the testimony of witnesses, and if the testimony offered by the plaintiff had been received, the defendants had the right to offer

---

116 Ibid.
117 Ibid.
118 Ibid.
120 Ibid.
evidence to rebut it; and there might, and probably would, have been conflicting testimony as to the number of voters in the State, and as to the legal qualifications of many of the individuals who had voted. The decision would, therefore, have depended upon the relative credibility of witnesses, and the weight of testimony.\textsuperscript{121}

According to the formalist view, for there to be a legal principle that may be employed in the determination of actual controversies, the application of such a principle must be an impersonal, mechanical process.\textsuperscript{122} The application “proceeds inexorably\textsuperscript{123} from the ‘crystal clear’ logic of the principle itself without the intervention of personal choice, or considerations of ‘conscience, natural right, or justice.’”\textsuperscript{124} The twin policies of supremacy and permanence of the constitution presuppose this view. To acquire this conception of neutrality, legal principles must be “abstract in form and divorced from the processes of collective debate. Legal principles in the formalist conception, then, have two characteristics, both of which are depicted in Luther: (1) they are unambiguous or, in Justice Woodbury’s words, ‘strict,’ ‘fixed,’ and ‘manifestly ordained,’\textsuperscript{125} and (2) they preexist the occasion of adjudication.”\textsuperscript{126} In the final analysis and in consequence of the “univocal and preexisting nature of a legal principle,”\textsuperscript{127} the formalist approach yields two conclusions: there is no principled standard of political competency and, therefore, the determinations of elected officials through positive prescriptions must prevail.\textsuperscript{128} But in order for principled standards to be “strongly evinced,” this would mean that such principles must be “clearly acknowledged by the existing political tribunals.”\textsuperscript{129} And “to be clearly acknowledged by the existing political tribunals meant having won the seat of power.”\textsuperscript{130} Justice

\textsuperscript{121} Ibid. pp. 41-42.
\textsuperscript{122} “Political Rights as Political Questions: The Paradox of Luther v. Borden,” pp. 1125, 1138.
\textsuperscript{123} Ibid.
\textsuperscript{124} Ibid. pp. 1138-1139.
\textsuperscript{125} Ibid. p. 1139.
\textsuperscript{126} Ibid. (emphasis in original).
\textsuperscript{127} Ibid.
\textsuperscript{128} Ibid.
\textsuperscript{129} Ibid.
\textsuperscript{130} Ibid.
Woodbury, in dissenting, distinguishes between "private rights" the conflicts of which may be subject to judicial determination, and "participatory rights."\textsuperscript{131} It has been suggested, in contrast, that participatory rights are the very vehicle through which the positive lawmaking power of the people is exercised, and as such they ought to be left to "policy, inclination, popular resolves, and popular will" — in short, "politics."\textsuperscript{132} It is because political rights are the subject of the sovereign political power of "the people," rather than the legislative power, that questions "extend[ing] to the power of the people, independent of the legislature, to make constitutions — to the right of suffrage among different classes"\textsuperscript{133} are non-justiciable. Thus, the explicit rationale for deference is that the judiciary, rather than controlling the people (as it does individual subjects and the legislature), is constrained by "the people themselves in their primary capacity as makers and amenders of constitutions"\textsuperscript{134} from usurping the political lawmaking function of the people.\textsuperscript{135}

For Justice Woodbury, political or participatory rights are non-justiciable, "[f]or they extend to the power of the people, independent of the Legislature, to make constitutions — to the right of suffrage among different classes of them in doing this — to the authority of naked majorities."\textsuperscript{136} But with an ironic twist, the Luther Court in effect held that "political rights as to competency requirements [should}

\textsuperscript{131} The analysis of the author in \textit{Political Rights as Political Questions: The Paradox of Luther v. Borden}, p. 1125, is worth quoting: "According to Justice Woodbury, only the law of 'private rights,' as opposed to political rights, can be applied by the judiciary. He distinguished private from political rights according to the nature of the person to which they attach and their subject matter. Private rights are held by persons in their role as individual subjects rather than as makers of the law; political rights belong to 'the people' in its collective capacity as lawmaker rather than to a person qua individual." Preexistence appears to be a requisite for judicial determination: "Precisely because they are "already" defined to belong to each individual, private rights (of which property is the paradigm) can be judicially applied; their prior definition supposedly removing the possibility of any controversy through which the arbitrary lawmaking power of a judge might intervene" (\textit{Ibid}).

\textsuperscript{132} \textit{Ibid}.

\textsuperscript{133} \textit{Ibid}.

\textsuperscript{134} Luther v. Borden, 48 U.S. 53 (1849).

\textsuperscript{135} "Political Rights as Political Questions: The Paradox of Luther v. Borden," pp. 1125, 1140.

\textsuperscript{136} Luther v. Borden, 48 U.S. 51 (1849).
be] set by the legislative branch, which is precisely that which extra-
governmental action seeks to redress.\footnote{137}

An alternative approach in the attempt to resolve the problem of
defining principled standards is the “substantive,” “instrumental,” or
“unmediated” conception of legal reasoning.\footnote{138} While the formalist
standpoint treats values that underlie possible principled standards
as subjective, the substantive approach treats legal objectivity as one
rooted in values:\footnote{139}

The formalist equation of legal principles with “crystal clear”
formulations that transcend the realm of collective debate implies
that the process of collective activity — that is, the political process
— is itself unprincipled. The judicial process, in this view, is unlike
the political process precisely in that it is principled by virtue of
being divorced from value judgments. Conversely, in the substantive
view, law emerges out of political activity.\footnote{140} Thus, in this view, the
judicial and political processes are similar in that both are based on
principled determinations of “intrinsic value.”\footnote{141}

The plaintiffs in \textit{Luther} invoked a substantive conception of justice
in claiming that franchise qualifications are founded on natural rights
as principled standards.\footnote{142} These “universal rights” were alleged to
justify the enfranchisement of all adult white males in Rhode Island.
The defendants, who eventually won the case, took the formalist
approach and portrayed plaintiffs’ idea of “self-government” as
“unprincipled mob rule, and mediated government as the source of

\footnote{137} “Political Rights as Political Questions: The Paradox of Luther v. Borden,”
pp. 1125, 1141. This paradoxical outcome — enforcing, in the name of the people, the
power of elected officials over the people whom they may not represent — demonstrates
the ambiguous position occupied by political rights in the multifaceted dichotomy
between natural, individual property rights on one hand, and positive, public or collective
rights of participation in politics on the other. As the subject of the people’s prior and
sovereignty political power of lawmaking, the allocation of political rights should not
be subject to judicial review. But political rights are simultaneously the \textit{vehicle} of the
popular lawmaking process, allocated to individuals. \textit{Ibid.}

\footnote{138} \textit{Ibid.} p. 1142.

\footnote{139} \textit{Ibid.}

\footnote{140} \textit{Ibid.}

\footnote{141} \textit{Ibid.}, pp. 1142-1143.

\footnote{142} \textit{Ibid.}, p. 1143.
valid, yet inherently arbitrary, rules.” But there is a lesson in Luther
that emerges only after analyzing the circularity of the Court’s ruling:
the “advocacy of direct, participatory government over mediated
representative government simply does not address, let alone resolve,
the issue of whether there exists a principled standard for
distinguishing between those who are and those who are not entitled
to the political franchise.” Although it may be said that the
defendants were correct in calling plaintiffs’ idea of the nature of self-
government as unprincipled, this criticism does not forcibly
demonstrate that the qualifications to participate in politics is
inherently unprincipled. This conclusion may go against the
“[r]epublican vision of politics as an arena of rational collective
deliberation and the central republican tenet of an enforceable right
to participate in the political arena.” For the “original republican
conception of political participation [is] premised on an objective
standard for political competency” and cannot therefore be resigned
to politics and force. These formulations are consistent with the idea
that the command theory as espoused by Austin and his successors is
foreign to any sound normative legal framework that is founded on
the theory of sovereignty.

To Write Principled Standards

To review, there are two ways to look at these principled standards.
The formalist view outlined above is that there is no such thing as a
principled standards, that political competency is inherently unprincipled, requiring nevertheless a positive, if arbitrary, enactment defining it. The substantive view is that these principled standards have an objective existence rooted in values, that they are intrinsically valid, and do not depend on positive determination by
the political department.

143 Ibid.
144 Ibid., p. 1144.
145 Ibid.
146 Ibid.
147 Ibid., p. 1145.
148 Ibid., p. 1144.
149 Ibid., p. 1142.
150 Ibid., pp. 1142-1143.
As much as the juristic theory of sovereignty may acquire formalist or positivist characteristics,\textsuperscript{151} it is at bottom a principled framework, bulwarked upon fixed and permanent first principles. Had it not been for these first principles, one could not even speak of the formation of the “political department.” Behind the validity of positive enactments are principled standards, which are generally thought to possess a universal quality that no amount of power or force can alter. Because the relation of universal qualities to “natural law,” and of the latter to political competency, while generally conceded, remains mired in the interminable debate between natural law and positivist theory, it remains to this day unsuccessfully framed, bereft of the force and effect of positive law. Thus, enfranchisement based on “wealth, gender, race, literacy, intelligence, mental fitness, age, or residence,”\textsuperscript{152} have yet to be justified by principled standards, something that the Luther Court, with respect to “adult white male residents,” was unable to do. Yet, there is “no known democratic polity ... in which competency requirements have been altogether rejected.”\textsuperscript{153} Such principled standards must preexist. Yet, “in the nature of things, the Court could not know the name and residence of every citizen, and bring him before the court to be examined.”\textsuperscript{154} If actual controversies could be disposed of, “where would such an inquiry have terminated?”\textsuperscript{155} And “how long must the people ... have waited to learn from this court under what form of government they were living during the year in controversy?”\textsuperscript{156} Convenience and feasibility would bar the courts from invoking such principled standards. Rightly so. Even were such standards to be written here, the courts of law could not adjudicate

\textsuperscript{151} One positivist trait is that the theory of sovereignty here formulated is source-based: acts are legally valid as long as they may be traced to the legal sovereign.

\textsuperscript{152} “Political Rights as Political Questions: The Paradox of Luther v. Borden,” pp. 1125, 1126 (1987). Cf. also The Life and Times of Liberal Democracy, p. 23. The author argues that the statement “universal franchise” obtaining in contemporary Western democracies is accurate only if it is assumed that minors, felons, and aliens are “not full members of society,” an assumption that formerly justified the exclusion of women and slaves from the franchise).


\textsuperscript{154} Luther v. Borden, 48 U. S. 41 (1849).

\textsuperscript{155} Ibid.

\textsuperscript{156} Ibid.
conflicting rights in cases possibly involving millions of individuals claiming to be privileged with a political franchise. With these limitations in mind, the normative theory now being formulated, for better or for worse, must content itself at the present time with the principled standard of majority rule as refined by the theory of convergence independently made.

The solution has been stated already. Since “[t]he question as to the majority is a question of fact”\textsuperscript{157} and as a rule evidence must be offered to prove or rebut such a fact, faith may be reposed on the power of the courts of law to take judicial notice. But the will of the majority, or the convergence of assessments, as a fact may not be established under mandatory judicial notice.\textsuperscript{158} It may, however, be covered under discretionary judicial notice. Section 2 of Rule 129 of the Revised Rules of Court of the Philippines provides that “[a] court may take judicial notice of matters which are of public knowledge, or are capable of unquestionable demonstration, or ought to be known to judges because of their judicial functions.” More specifically, a majority of such magnitude as to involve a whole people would fall under matters of public knowledge:

The matter of which a court will take judicial notice must be a subject of common and general knowledge. In other words, judicial knowledge of facts is measured by general knowledge of the same facts. A fact is said to be generally recognized or known when its existence or operation is accepted by the public without qualification or contention. The test is whether sufficient notoriety attaches to the fact involved as to make it proper to assume its existence without proof.\textsuperscript{159}

The power to take judicial notice, however, “rests on the wisdom and discretion of the courts. . . . [I]t is to be exercised by courts with caution” for “care must be taken that the requisite notoriety exists.”\textsuperscript{160} The belief that a grand majority has surfaced, however, need not be universal, and “is not controlling for it is very seldom that any belief is accepted by everyone. It is enough that the matters are familiarly

\textsuperscript{157} Ibid., pp. 41-42.
\textsuperscript{158} The Revised Rules of Court, Rule 129, § 1.
\textsuperscript{159} Basic Evidence, p. 27.
\textsuperscript{160} Ibid.
known to ... those persons familiar with the particular matter in question.”

Even without concrete and crystal clear principled standards that would underlie political competence in the exercise of People Power, experience has shown that the ascertainment of the will of the majority, whether made by a judicial tribunal or not, is nonetheless possible and has in fact been made. According to a resolution of the House of Representatives, the House “joins the church, youth, labor and business sectors in fully supporting the President's strong determination to succeed.” The resolution continues: “WHEREAS, [Arroyo's] ascension to the highest office of the land under the dictum, ‘the voice of the people is the voice of God’ establishes the basis of her mandate on integrity and morality in government ...” Justice Puno, who penned the main opinion in Estrada v. Arroyo, in describing the events that led to “People Power II,” claimed that “[a]ll these events are facts which are well-established and cannot be refuted. Thus, we adverted to prior events that built up the irresistible pressure for the [Estrada] to resign.” This view was reiterated at a later decision in response to the argument that the use of newspaper reports amounted to hearsay:

All these prior events are facts which are within judicial notice by this Court. There was no need to cite their news accounts. The reference by the Court to certain newspapers reporting them as they happened does not make them inadmissible evidence for being hearsay. The news account only buttressed these facts as facts.

For Bernas, it was evident that “[t]he sole target of People Power 2001 was the president.” And for Magno: “By the last quarter of 2000, it was clear that the problem was narrowly delimited to that of a failed presidency.” It was clear that over time, “consensus was

161 Ibid. p. 65.
165 Ibid., p. 5 (emphasis in original).
growing that the continuation of the Estrada presidency would be disastrous for the nation. Pre-termination of this presidency became an urgent task to save the nation."\textsuperscript{168} It was also noticeable that the convergence of assessments of the participating groups had adopted specific means that were both constitutional and extra-constitutional; the strategic sectors "adopted a flexible strategy. This was summed up in the acronym RIO: resign, impeach, oust."\textsuperscript{169} Justice Vitug, on another occasion, distinguished "EDSA III" from EDSA II by appealing to the majority: "EDSA III, not even four months following EDSA II, was less resolute. Its sentiment, ostensibly a clamor for the return of the fallen leader to the presidency, \textit{did not ultimately win the decisive support and sympathy of all major sectors of society}."\textsuperscript{170}

As for the February Revolution of 1986, Minister of National Defense Juan Ponce Enrile and Vice Chief of Staff General Fidel Ramos declared to align themselves with the mandate of the people as allegedly expressed in the elections and initiated a revolt against President Marcos. According to Enrile, "I cannot in conscience support President Marcos who thwarted the people's will in the last elections."\textsuperscript{171} This he stated despite an official promulgation of election results to the contrary: "For myself, the mandate of the people does not belong to the present regime."\textsuperscript{172} When Marcos rang him up, Enrile replied, "Our only mission here is to see to it that the will of the people is respected, whoever the winner is, whether it's you or Mrs. Aquino. But the people perceived that the one who claimed the mandate was Mrs. Aquino."\textsuperscript{173} In deciding to undertake the civil disobedience campaign, Vice-

\textsuperscript{168} Ibid., p. 3.
\textsuperscript{169} Ibid., p. 7. Noteworthy is that the strategy to have Estrada first resign, then to impeach him, and then to oust him if all else fails, is the very resolution that is the third moment of extra-constitutionality earlier discussed. This third moment pertains to the choice of ways and means to enforce the second moment of extra-constitutionality.
\textsuperscript{170} Associate Justice Jose. C. Vitug, "Opening Remarks on "The Impact of People Power on our Legal System," The Tenth Centenary Lecture, Supreme Court Session Hall (May 17, 2001). Justice Vitug's statements reflect, perhaps unknowingly, the "strategic sector" test of Magno's convergence theory.
\textsuperscript{172} Ibid.
\textsuperscript{173} Ibid., p. 64. Cf. also Harry Anderson \textit{et al.}, "The Showdown," \textit{Newsweek}, Mar. 3, 1986, p. 8 (quoting Enrile: "The president did not win the election. He should
President Laurel announced, "Cory and I have decided to pressure Marcos to respect the true mandate of the people. We will use people power to uphold the people's mandate." In promulgating the provisional constitution, President Aquino rested her authority on the "direct mandate of the people." The Whereas clauses of Proclamation No. 1 stated: "Sovereignty resides in the people and all government authority emanates from them. On the basis of the people's mandate clearly manifested last February 7, I and Salvador H. Laurel are taking power in the name and by the will of the Filipino people as President and Vice-President, respectively."

The formation of the majority and the expression of its will are perceivable and may thus be subject to judicial notice by the courts of law. This judges and justices may do notwithstanding the absence of clear and concrete principled standards that define the political competence to engage in the exercise of People Power. But what is essential is that there must be a convergence of assessments independently made by the strategic sectors of society.

The Fourth Modifier of the Majority Principle: The Public Forum Requirement

Revolution is certainly a form of disobedience. But it is a disobedience that is sanctioned by the state. It is never a disobedience directed towards the state. Rather, it is one made against an inferior organ of government. Revolutionary action is remedial and, under the theory of sovereignty, always lawful. As the habitual obedience of individuals respect the people.


175 See Proclamation No. 3 (March 25, 1986); Proclamation No. 1 (Feb. 25, 1986) ("Whereas Clauses").

176 Proclamation No. 1 (Feb. 25, 1986)

177 Jeremy Bentham, A Fragment on Government and An Introduction to the Principles of Morals and Legislation, Wilfrid Harrison ed., (Oxford: Oxford University Press, 1948), p. 45. Recall that Bentham and his successors regard the state of revolution as a state of nature. This occurs when the habit of obedience is lost, and a state of disobedience arises against an object that the subjects of a state formerly obeyed.
constitutes a state of submission, so is it their disobedience that constitutes a state of revolt.\textsuperscript{178} Recall that for Bentham, not every kind of disobedience amounts to revolution: "Is it then every act of disobedience that will do as much? The affirmative, certainly, is what can never be maintained: for then would there be no such thing as government to be found anywhere."\textsuperscript{179} He then suggests some standards to help distinguish between simple disobedience and the state of revolt:

Disobedience may be distinguished into conscious or unconscious: and that, with respect as well to the law as to the fact. Disobedience that is unconscious with respect to either, will readily, I suppose, be acknowledged not to be a revolt. Disobedience again that is conscious with respect to both, may be distinguished into secret and open; or, in other words, into fraudulent and forcible. Disobedience that is only fraudulent, will likewise, I suppose, be readily acknowledged not to amount to a revolt.\textsuperscript{180}

In other words, for disobedience to amount to revolt, it must first be conscious. Second, disobedience must be with respect to law and fact. Third, it must be open and forcible and not "fraudulent." What is relevant here is the proposition that not only must disobedience be conscious, it must also be open. In the absence of any of these prerequisites, disobedience may degenerate into criminal acts.\textsuperscript{181} These suggestions, however, were not further substantiated. Bentham's categories would need a more principled justification in order to acquire the attributes of law.

That revolutionary action under the three moments of convergence must take place publicly is necessarily an instance of the exercise of sovereignty. This requirement is satisfied when the exercise of popular sovereignty is made in a public forum. But what would be its principled basis? The public forum requirement proceeds from the entrenched principle that matters of general concern must be made public.\textsuperscript{182}

\textsuperscript{178} Ibid.
\textsuperscript{179} Ibid.
\textsuperscript{180} Ibid., pp. 45-46 (emphasis in original).
\textsuperscript{181} Ibid. p. 46.
\textsuperscript{182} Cf. Tañada v. Tuvera, 136 SCRA 27 (1985); Tañada v. Tuvera, 146 SCRA 446 (1986) (holding that for laws to bind the general public, they must first be published). The Philippine Constitution affirms this principle from the point of view of individual
Since the exercise of popular sovereignty is essentially an act of the state, it fall under is of public concern. According to the theory of sovereignty, the constitution and operation of the revolutionary organ are, in effect, official acts and hence, these must be brought to public attention. But there are many exceptions to the publication requirement under ordinary governmental processes. In these cases, secrecy does not necessarily make the official act void. It is, rather, the access to the evidence of such official acts that may be curtailed. The right of the public to know all about official acts merely exists as a public right to be informed on matters of public concern and not as a requisite in extra-constitutional lawmaking. Arguably, the right to information exists as an enforceable right under certain circumstances, but not as a normative requisite. Hence, the requirement that revolutionary action must take place in a public forum must rest on another justification.

_Tañada v. Tuvera_ may provide a clue: the "[t]otal omission of publication would be a denial of due process in that the people would not know what laws to obey." "It is a rule of law," Justice Escolin says, "that before a person may be bound by law, he must first be officially and specifically informed of its contents." Since the formation and

---

183 See _Tañada v. Tuvera_, 136 SCRA 27 (1985); _Legaspi v. Civil Service Commission_, 150 SCRA 530 (1987) (holding that every citizen has standing and may seek enforcement by _mandamus_);

184 See _Baldoza v. Dimaano_, 71 SCRA 14 (1976) (holding that access is subject to reasonable regulation for convenience).

185 _Tañada v. Tuvera_, 136 SCRA 39 (1985): the duty to publish laws of general application "must be enforced if the Constitutional right of the people to be informed on matters of public concern is to be given substance and reality." Cf. Record of the Constitutional Commission, 677 (1986); PHILIPPINE CONSTITUTION, art. III, § 7 affirms the right of citizens to information regarding matters of public concern.

186 146 SCRA 446 (1986).


188 _Tañada v. Tuvera_, 136 SCRA 39 (1985)
operation of the revolutionary organ is strictly an exercise of popular sovereignty understood as legal sovereignty, in the light of Tañada it may be said that the public forum requirement is necessary to satisfy due process.\textsuperscript{189} Justice Teehankee, in his concurring opinion, declared that

\textit{[t]he Rule of Law connotes a body of norms and laws published and ascertainable and of equal application to all similarly circumstanced and not subject to arbitrary change but only under certain set procedures. The Court has consistently stressed that “it is an elementary rule of fair play and justice that a reasonable opportunity to be informed must be afforded to the people who are commanded to obey before they can be punished for its violation,”\textsuperscript{190} citing the settled principle based on due process … that “before the public is bound by its contents, especially its penal provisions, a law, regulation or circular must first be published and the people officially and specially informed of said contents and its penalties.”\textsuperscript{191}}

The publication in major conduits of information to the public of all laws of general applicability is a requirement in law.\textsuperscript{192} Otherwise, there would be no basis for the maxim that “ignorance of the law excuses no one from compliance therewith.”\textsuperscript{193} For Justice Escolin, it would certainly “be the height of injustice to punish or otherwise burden a citizen for the transgression of a law of which he had no notice whatsoever, not even a constructive one.”\textsuperscript{194} For the will of the majority to bind the rest, it must be published. According to Judge Learned Hand, the law as the command of the sovereign “must be ascertainable in some form if it is to be enforced at all.”\textsuperscript{195} In order for a law to acquire jural effect, it cannot remain “unknown and unknowable.”\textsuperscript{196}

\begin{flushright}
\textsuperscript{189} \textit{Ibid.}, p. 46.
\textsuperscript{190} Tañada v. Tuvera, 136 SCRA 46 (1985).
\textsuperscript{191} \textit{Ibid.}
\textsuperscript{192} \textit{Ibid.}, p. 39. But it was stated that the publication requirement does not apply if the enactment were to apply to persons or class of persons.
\textsuperscript{193} \textit{Ibid.}, p. 46.
\textsuperscript{194} \textit{Ibid.}, p. 38.
\textsuperscript{196} Cardozo, \textit{The Growth of the Law} (1924), p. 3., cited in Tañada v. Tuvera, 136 SCRA 44 (1985). In his concurring opinion, Chief Justice Fernando is of the view,
\end{flushright}
These considerations must be brought to bear upon Tañada insofar as at issue there is Article 2 of the Civil Code and, ultimately, Section 1 of the Bill of Rights, the right to due process. Not unlike the other provisions in the Bill of Rights, as a principled standard, that is, as a sine qua non principle of fairness that one could expect to find imbedded in any legal system, the right to due process possesses the force and effect of law regardless of positive prescription. It exists whether or not the constitution makes explicit provision for it. Itself an instance of due process, the publication or public forum requirement is an element in the normative framework governing the revolutionary organ. This is especially true of the republican tradition in which rights of individuals are taken into account in face of the state’s exercise of its powers.

There is another justification for the public forum requirement, which rests more on convenience rather than objective or principled standards. In order for the courts of law to take judicial notice of the majority as a fact, the will of the majority must be of “common and general knowledge” whose existence is generally accepted “without qualification or contention.” There must be a manifestation of the will of the majority. The public forum, therefore, is the venue in which the majority will is most felt. It is through the public forum requirement that the law on evidence may operate. There is, where

however, that the fact of publication particularly in the Official Gazette is not a sufficient standard for laws to acquire “jural effect,” for “it could be that parties [were] aware of their existence could have conducted themselves in accordance with their provisions.”

Ibid., p. 44 (Fernando, C. J., concurring)

197 Article 2 of the Civil Code provides: “Laws shall take effect after fifteen days following the completion of their publication either in the Official Gazette or in a newspaper of general circulation in the Philippines, unless it is otherwise provided.”

198 Section 1 of Article III states: “No person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied the equal protection of the laws.”

199 For Freund, “[t]he great fundamental guarantees of the Constitution are, after all, moral standards wrapped in legal commands: due process of law, equal protection of the laws ... When claims are raised in lawsuits that invoke these ethical-legal standards, the opinions of the Court are bound to contribute to our more general thinking about social justice and ethical conduct. Paul A. Freund, “Constitutional Dilemmas,” in On Law and Justice (1968), p. 35.

200 Basic Evidence, p. 27.
this is concerned, recent history. Material accounts of the two People Power Revolutions are vast. Magno observes that EDSA II followed the same pattern as EDSA I: “Following the 1986 Edsa model, it was decided the political resolution of this crisis will be quick and will be on the streets of the metropolis.” The EDSA Shrine was again chosen as venue where a “media-genic focal point could be sustained.” The strategy, writes Magno,

proved to be a correct decision. The shrine area became a pilgrimage point for a constant stream of hundreds of thousands moving in and out to maintain the magnitude of the gathering. The shrine was also the ceremonial site for all those withdrawing support from the Estrada presidency. It was the center of attention of national and international media, treated to a convincing number of people opposing Estrada’s continuation in office.

“The events which occurred from the evening of January 16 to the afternoon of January 20, 2001 at Edsa,” wrote Salonga, “[took place] in various plazas and centers of assembly in the Philippines.” Kompil had decided “it was important to maintain the presence of People Power at the Edsa Shrine,” because following the failure of government institutions, specifically the Senate, the Edsa Shrine became the new center for the parliament of the streets, that is, for democracy in the country. “Apart from those at Edsa,” wrote David, “People Power was everywhere in the public squares of the country.” By many accounts, therefore, the exercise of People Power at EDSA II was essentially public. Publicity is the decisive means through which the majority will is made known.

---

201 Since, ultimately, the life of law is not logic but human experience, any normative framework therefore should be reflective of history. Otherwise, laws lose their relevance, and they will be resigned to speculative constructs.


203 Ibid.

204 “Coup d'état Different From People Power II; Reyes & Co. Not Coup Plotters,” p. 1.


In any campaign the widest *publicity* or (if one wishes) agitation was necessary in order to induce the public either to intervene in advance, or to provide public pressure in support of the action to be taken. That action, in fact, had to be announced in all detail in advance, with a clear *ultimatum* binding upon all, and yet permitting the resumption of arbitration at any stage of the enfolding action — an arbitration, that is, conducive to face-saving all around. Therefore, an *action committee* created for this purpose would select such *forms of non-cooperation* — strike, boycott, civil disobedience — as would seem fitting as the *minimum force necessary to reach a defined goal*: no quick triumph would be permitted to spread the issue beyond this goal, nor any defeat to narrow it.\(^{207}\)

The emergence of the public forum is crucial, as without, there would be no space of deliberation. The public forum, however, cannot be tied to specific places such as the EDSA Shrine, or even to Metropolitan Manila as a whole. Quite the contrary, it even ought to be possible to scatter the public forum throughout the territory of the state.\(^{208}\) The convergence of assessments must come from different sectors in different places, and must be manifested openly.

**Towards A Summation**

The articulation of norms governing the constitution and operation of the revolutionary organ is fraught with difficulty. They are by nature extra-constitutional, and occupy the highest echelon in the hierarchy of legal norms. But the law on extra-constitutionality must be framed in order to complete the theory of People Power. I have attempted to do just that. Theories on sovereignty lay down the framework in which the revolutionary organ operates, but such a framework presupposes the existence of a validly constituted revolutionary organ whose actions are imputable to the state. For instance, it is easy to say that the end result of revolutionary processes amounts to law — this is

---


\(^{208}\) Conceivably, the public forum requirement may be satisfied even if participants do not occupy the territory of the state in which changes are sought. The public *fora* need not be located in the particular state in which the People Power is exercised, provided that there is a convergence of assessments.

BUDHI 2 & 3 ～ 2002
certainly an application of principles of sovereignty. But what exactly is the revolutionary organ? I have sought to define exactly the conditions that would give rise to the revolutionary organ as an extra-constitutional organ of the state. In other words, I have attempted to formulate the objective and principled standards that govern the formation and operation of the revolutionary organ. Since the majority principle as refined by convergence theory serves as the principled standard for the constitution and operation of the revolutionary organ, it must be asked what exactly comprises the majority and how it is formed. The idea of majority must be probed more deeply. The convergence of assessments theory is demonstrates the formation of the majority will but, ultimately, it is a question of the political competency of the individual person. For such would determine who may participate in the grand deliberative process involving a whole people. The political competence of each individual is the basis for his or her inclusion in or exclusion from the deliberative process that, in turn, may or may not give rise to a majority. The conception of political competency must be backed by coercive principled standards that are intrinsically valid. This is so that they could be said to form part of the perennial core of the legal order that is the juristic theory of sovereignty. They must pre-exist, for they determine sovereign action. Hence, principled standards must be framed in a manner that reflects their intrinsic validity. The convergence of assessments theory may serve as a principled standard, but ultimately, principled standards defining the political competency of individuals have yet to be forged today. ⇐