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The Legality of the Estrada Removal: The Condorcet Jury Perspective

by

*Raul V. Fabella**

**Professor, School of Economics
University of the Philippines

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Abstract

We apply the Condorcet Jury Theorems and some extensions to the issue of the legality of the removal of Estrada from the Presidency and the accession of President Arroyo. Adopting as primal the legal principle "Salus populi, suprema lex," we argue that on the basis of (a) relevant subplots in the survey results, (b) the envelope vote and (c) the Davide court's unanimous decision on the Presidential vacancy, the proposition "Remove Erap" and its realization are legal and binding beyond reasonable doubt.

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I. INTRODUCTION

This essay starts from the classic legal principle: *Salus populi, suprema lex* (The welfare of the people is the supreme law). The problem with this dictum is also classic: "What is the welfare of the people?" Over the centuries, the question has taken the more tractable and process-centered form of "Who determines the welfare of the people?"

II. MONARCHS AND SOVEREIGNS

In the golden age of sovereigns, the supreme law was lodged in one person, the monarch, who, helped along by a claimed affinity with or privileged access to Providence, determined the welfare of the people. Along the way, there were sprinklings of limited republican or representative democracy (as in the Rome of Cicero and Catilina) but they were more ephemeral curiosities than powerful challenges to kings and emperors.

III. MAJORITY RULE AND CONDORCET JURY

Since the 18th century the tide has gradually turned. The democratic ideal became variously summarized as "Vox populi, vox Dei," "All men are created equal," or "One man, one vote." The welfare of the people was now to be determined by some form of decision process which considers the preferences of citizens as the basic input. We still do not know what the welfare of the people is, but we have agreed to identify it with the winner of this process. Suppose society, faced with a choice between a bridge and a public market, takes a vote with the winner being chosen. The winner, say the bridge, is then presumed to better serve people's welfare, which itself is left undefined. Procedure has replaced essence.

Since process is all important, the decision process must maximize the likelihood that the "correct" option wins, i.e., the option that best serves people's welfare. Marquis de Condorcet, one of the famous

Encyclopaedists, a member of the French Academy of Sciences and president of the French Legislative Assembly, embarked on a program to put democracy's favorite voting mechanism, *majority rule*, on a solid mathematical footing. He postulated rather innocuously in his *Essai* (1783) that every citizen possesses a *judgmental competence* p over a binary choice problem (A, B). A could be "Remove Erap" and B then is "Do Not Remove Erap." Only one is correct and we do not know which. Competence p is the likelihood that a citizen will pick the "right" option, so (1-p) is the likelihood that he/she will choose wrong. "Right" here means serving better the welfare of the people, which we took *ab initio* as the supreme law. If the citizenry uses majority rule voting with one-man-one-vote, to decide on (A, B), the likelihood M that the winner of the vote is right can be deduced from p and (1-p) using Bernoulli's binomial theorem. Let there be N citizens voting independently and only on the merits of (A, B). The *Condorcet Jury Theorems* (see Fabella, January 2001; Young, 1995; Owen, Grofman and Feld, 1989) say that: "If $p > 0.5$, (i) $M \rightarrow 1$ as N becomes large and (ii) $M > p$. If $p < 0.5$, (iii) $M \rightarrow 0$ as N becomes large and (iv) $p > M$."

For purposes of reference, we will call them CJT (i), CJT (ii), CJT (iii) and CJT (iv), respectively. If $p > 0.5$, i.e., the likelihood that a citizen chooses "right" is better than even, then the likelihood that majority voting will choose the right option as N becomes very large is a certainty, i.e., majority rule is infallible. Thus, "Vox Populi, Vox Dei." CJT (i) is known as asymptotic Condorcet Jury Theorem. This is viewed by many as the positive foundation of democracy (see e.g., McLean and Hewitt, 1994 and Urken, 1991). Furthermore, majority rule will beat every single member in the likelihood of a correct choice. CJT(ii) is known as the nonasymptotic Condorcet Jury Theorem. Otherwise stated it goes: "democracy beats dictatorship."

But the converse results are no less remarkable. If citizen competence falls below 0.5, the majority rule winner will be "wrong" in all certainty as N becomes large [CJT (iii)]. Moreover, a dictator from the ranks will beat democracy [CJT (iv)]. Democracy and incompetence make a poisonous brew. These are no doubt remarkable results but how do they shed light on the legality of the removal of Estrada from office? The key is to view the citizenry as constituting a jury or as a set of juries.

IV. THE SUBPLOTS IN THE SURVEY RESULTS

Erap Estrada won the presidency with the highest majority ever. That he had a mandate when he started was not in doubt. So did GMA. The accumulation of scandals brought to a head by Jueteng 2000 (J2K), confronted the citizenry with a dichotomous choice problem: (A) "Remove Erap" or (B) "Do not Remove Erap". Survey results showed B to lead A in the general population with the following substory: B won among cde voters but A won among ab voters. Late survey showed that in critical Metro Manila, A won among ab by 75% to 6% for B. A won among ab by a larger margin than B won in cde.

The fact that cde voters are by far more numerous than ab was a *decisive* factor for some commentators: Erap's removal contravenes "Vox Populi Vox Dei." This is correct only if voter competence, or at least its average, is better than even. If less than even, the proposition is false, by CJT (iii): A would serve *salus populi* and not B..

Other commentators foisted the "quality versus quantity" of voters argument, i.e., that ab voters constitute the educated and the informed, and, thus, the more competent judges on this affair. The pro-Erap camp and many well-meaning observers branded this position elitist. While it may indeed be elitist, it is neither irrelevant nor outright wrong. The argument could be couched in the Condorcetian categories.

Let us view ab and cde voters as *separate juries*. (a) If the judgmental competence is equal in both juries but less than even (less than 50percent), then the greater number of cde voters imply that B (which wins among cde) is the more likely incorrect choice. On the other hand, A, which won among the fewer ab voters, is the less likely to be incorrect due to ab numbers being small. These follow from CJT (iii). Thus, A is the less likely to be incorrect than B! (b) If the judgmental competence of both juries is greater than even, with ab voters having the same competence as cde voters, the greater winning margin of A in ab voters *could well mean* that A is still the more likely correct choice than B since larger winning margins can overcome the greater numbers effect (Fabella, 2001). (c) If ab voters' competence is strictly better than even and cde's is less than even, then clearly, A is the more likely correct choice by CJT (ii) and CJT (iii). (d) The most attractive regime gives ab voters slightly better than even average competence and cde voters are fair-coin-toss deciders, i.e., their information set is very poor so that their best guess can go either way. Then A, the winner in ab, is the more likely correct choice.

The fair-coin-toss characterization is motivated by some argument to the effect: "The poor believe they will be equally poor under either A or B. But they think Erap loves them. So they go for B." This view

suggests that cde voters would vote on the intrinsic merits of A or B by tossing a fair coin. But they vote for B anyway due to an extraneous consideration. Thus, on intrinsic merit, cde voters may well be fair coin tossers. If so, A is more likely to be correct than B. A by the *suprema lex* is legal.

V. THE INFORMATION DIVIDE

Some will object to why under some regimes (c) and (d) , ab voters are postulated to have better competence than cde voters. The motivation is simply that *valuable information is costly* and the *capacity to process relevant information* is even more so. Since the divide between ab and cde voters is an *information* and *education divide*, this argument may not be far fetched. Most voting schemes respect this *information divide*. Shareholders have as many votes as their shares because higher stake means, if coarsely, more incentive to invest in valuable information for correct decisions. Physicians enjoy enormous weight in deciding on how to manage a patient who largely gives up the decision prerogative. A medical school or length of practice proxy for information superiority is used. Indeed, Nitzan and Paroush (1982) show that the maximum likelihood of a "correct" majority rule winner is attached to weighted voting (the weights being voter competence on the issue), not to one-man-one vote.

The problem attached to this divide is its *imperfect observability*. The ab versus cde voter classification is a highly imperfect proxy for the information divide, unlike shareholding (which itself is already an imperfect proxy for information investment). The state does not know who belongs to which side of the divide and, thus, accepts as a pragmatic second best, one-man-one-vote! "All men are created equal" is not a tribute to divine omniscience but to human ignorance. But we will never move ahead in anything, let alone decision theory, if we insist on perfect information or certainty. Which is why the ab-cde classification is of interest.

In summary, if valuable information is costly and information processing is even more so, and if ab voters have more of both than cde voters, the likelihood of A ("Remove Erap") being correct, i.e., serving better the welfare of the people, is higher than B's. The removal of Erap, in the sense of Condorcet, is *legal* by the *suprema lex* dictum.

VI. THE ENVELOPE VOTE AND THE SENATE AUTHORITY

When an issue (A, B) is complex, e.g., the power restructuring bill, it is reasonable to expect voter competence to be no better than a toss-of-a-coin (i.e., 50 percent). If the polity simply elects a representative (from among its members) whose competence over (A, B) is better than 50 percent, the delegation to the representative of the decision over (A, B) improves the majority rule's competence (see Fabella, January 2001). The representative has to satisfy two important qualifications as to general welfare: a) He/she must decide on (A, B) only on its merits, *not on extraneous considerations*, and (b) he/she must have a greater capacity to process information. This is the foundation of a representative (republican) democracy. The Philippine Senate is a set of elected representatives.

For a while in December and early January 2001, the nation gave the Senate trial, in the run-up to a vote on (A, B), a wide berth of benefit of a doubt. The undeclared subplot was that the nation through the TV screen was itself scrutinizing the competence of the senator-jurors to decide on (A, B). So we had, on the one hand, the senators, supposedly evaluating the evidence on (A, B) and, on the other, the nation evaluating the Senate on its competence to sift the truth. This was a case of two juries: one (Senate) directly deciding on (A, B) and the other (the public) deciding on (X, Y), where X is "the Senate will decide on evidence alone" and Y, "the Senate will ignore the evidence." The *envelope incidence* made Y a virtual certainty in the minds of the second more important jury. The winning decision in the aborted Senate vote on (A, B) is almost certainly wrong. Thus, the Senate's *delegated* authority to decide on (A, B) evaporated. The Pimentel resignation dramatized this loss of delegated authority. It was all in keeping with *salus populi suprema lex* that people decided, as it were, to vote directly on (A, B). Thus, EDSA II was *legal* in the Condorcet sense.

VII. THE DAVIDE COURT AND THE VACANCY VOTE

When by Saturday, January 21, 2001, the Estrada Government lost all capacity to govern, having lost all instruments of governance, the Davide court conferred and, by a unanimous decision, authorized the Chief Justice to administer the oath of office to GMA, ipso facto, declared the Presidency vacant. In all likelihood, they used the "incapacity provision" of the Constitution, fully aware of the dangers of a prolonged power vacuum already by then a fact. Again, *salus populi* had to be served with dispatch. Since the vote of twelve justices was unanimous, the likelihood of this being correct, i.e., legally in the sense of

suprema lex, is 99.72% if each justice's likelihood of being correct is only (0.6). The odds that they were wrong is 1 in 400. Thus, it is virtually a certainty that that jury of twelve justices of the supreme court was right on this fateful decision. Again, by the Condorcet framework, the Davide Court decision on this issue is *unassailable.*

VIII. SUMMARY

The Condorcet framework, in combination with the legal principle "Salus populi suprema lex," serves up a compelling perspective on the legality of the removal of Estrada and of the accession to the presidency of GMA. The removal of Estrada and the accession by GMA were not only pragmatic and ethical but also legal decisions. The power of mid-term recall recognized by constitutions everywhere as sometimes imperative to protect public welfare can never be exercised in *soft states* where the normal institutions of recall are readily co-opted. That the removal and accession took a path outside this normal route does not mean it is unconstitutional. "Incapacity to govern" is, after all, constitutional and was the last window that popular weal could crawl through when the impeachment door was maliciously slammed in its face. And, like a camel through a needle's eye, it did.

Finally, the fact that A was clinched when, by some count, at least 10 highly improbable events (each with, say, a 10% probability of occurrence) converged in one point of space-time with a joint probability of 1 in ten billion suggests that A also had the vote of the *Jury Upstairs*.

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