



CARPIO

ON THE

CONSTITUTION



Decisions and Dissents
of Justice Antonio Tirol Carpio
on the Fundamental Law



Stephanie V. Gomez-Somera





CARPIO ON THE CONSTITUTION

Decisions and Dissents
of Justice Antonio Tirol Carpio
on the Fundamental Law

Stephanie V. Gomez-Somera

Volume 1





Carpio on the Constitution
Decisions and Dissents
of Justice Antonio Tirol Carpio
on the Fundamental Law

Volume 1

Copyright © 2019
Stephanie V. Gomez-Somera

Book and Cover Design by
Ronnie C. Dela Cruz

All rights reserved.

No part of this book may be reproduced
in any form or by any means, electronic,
mechanical, or otherwise, without
the written permission of the copyright owners.

Published by
The Supreme Court of the Philippines
Manila, Philippines
October 2019

Profile of the Author

Stephanie V. Gomez-Somera is a practicing lawyer specializing in commercial law. After placing 11th in the 1987 bar examinations, she began her law practice with the firm founded by Senior Associate Justice Antonio T. Carpio, and eventually joined him in the Office of the Chief Presidential Legal Counsel during the term of President Fidel V. Ramos. She was Vice President and Chief Legal Counsel of ABS-CBN Broadcasting Corporation and the Communications Group of the Lopez Group of Companies prior to embarking on her current private practice. She is a graduate of the University of the Philippines with degrees in Political Science (*magna cum laude*) and Law. She teaches Credit Transactions at the College of Law of the University of the Philippines and has lectured at the Philippine Judicial Academy, the U.P. Law Center, and the De La Salle University College of Law.

Preface

Carpio on the Constitution is meant to be more than a commemorative case book for the retirement of Senior Associate Justice Antonio T. Carpio from the Supreme Court of the Philippines. It is meant to teach constitutional law from the perspective of the most senior member of the Judiciary whose “province and duty” it is to “say what the law is.”¹

The decision to focus only on constitutional law was not lightly reached, as there are landmark decisions and dissents penned by Justice Carpio in other legal fields. Rather, it was based on the imperative of the times, and the need to preserve and understand words that matter, whether or not we agree with them, with respect to our fundamental law.

The cases presented in this book are excerpts of decisions, opinions, and dissents of Justice Carpio, and are presented without any change in the words used by him. The decision to delete portions of certain cases, as indicated by ellipses, was even more laborious, but was arrived at to ensure a focus on constitutional law. Footnotes and endnotes referencing the *rollo*, transcript of stenographic notes of the case, the pleadings of the parties, and other similar matters have also been excluded. Effort has been made to make citations and formats uniform for the text, annotations, and footnotes, thus changing the format in the original documents. Finally, the underscoring and emphasis provided in the originals have not been retained, and the boldfacing, limited to the words and cases of Justice Carpio, is supplied by the author.

¹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1807), available at <https://supreme.justia.com/cases/federal/us/5/137/>

With Gratitude

I am grateful to:

Professor John Molo, who teaches constitutional law at the University of the Philippines College of Law, and whose course outline served as incubator for this book;

Attys. Rosalinda E. Beltran-Kawada, Eleanor S. Francisco-Anunciacion, Maria Luz A. Cabegin, Nelda Ethel P. Torio, Janice May R. Erni-Manongdo, Marlon Iñigo T. Tronqued, and Sarah Liliana Z. Sarmiento for the insights provided for featured cases;

Mr. Ronnie C. Dela Cruz, for capturing, through the design, graphics and layout of the book, the concept of the project;

Attys. Rosalinda E. Beltran-Kawada, Eleanor S. Francisco-Anunciacion, Nelda Ethel P. Torio, Janice May R. Erni-Manongdo, Christina R. Fernandez, and Sarah Liliana Z. Sarmiento for their patience and attention to detail;

Atty. Eleanor S. Francisco-Anunciacion and Ms. Angelita C. Lauchengco, for their indispensable assistance in coordinating matters for this project;

Atty. Bienvenido I. Somera Jr., who was a critical sounding board at every stage of the project; and

Senior Associate Justice Antonio T. Carpio, whose words, the very essence of this book, have always mattered.

Stephanie V. Gomez-Somera

Table of Contents

Volume 1

Preamble	1
Lambino v. Commission on Elections	1
Article I. National Territory	3
Magallona v. Ermita	3
Article II. Declaration of Principles and State Policies	20
Principles	20
Section 2	20
Magallona v. Ermita	20
Poe-Llamanzares v. Commission on Elections	20
Section 4	24
Parreño v. Commission on Audit	25
Section 5	26
Bases Conversion and Development Authority v. Commission on Audit	26
Section 6	26
Estrada v. Escritor	26
State Policies	36
Section 11	36
MVRs Publications, Inc. v. Islamic Da'wah Council of The Philippines, Inc.	36
Section 12	49
Imbong v. Ochoa	49
Section 16	51
Magallona v. Ermita	51
Section 18	51
Bases Conversion and Development Authority v. Commission on Audit	51
Section 19	52
Gamboa v. Teves	52
Section 22	53
Province of North Cotabato v. The Government of the Republic of the Philippines Peace Panel on Ancestral Domain (GRP)	54
Section 28	58
Chavez v. Public Estates Authority	58
Article III. Bill of Rights	60
Section 1	60
Due Process Clause	60
Associated Communications & Wireless Services, Ltd. v. Dumlao	60
Government Service Insurance System, Cebu City Branch v. Montesclaros	61

Estrada v. Office of the Ombudsman	67
Equal Protection Clause	104
Government Service Insurance System, Cebu City Branch v. Montesclaros	104
Reasonable Classification	108
Parreño v. Commission on Audit	108
Substantial Distinction	114
Bases Conversion and Development Authority v. Commission on Audit	114
Police Power	115
Mirasol v. Department of Public Works and Highways	115
Section 2	121
People v. Breis	121
Saluday v. People of the Philippines	133
Section 3	147
Kilusang Mayo Uno v. National Economic Development Authority	148
Section 4	157
Chavez v. Gonzales	157
Re: In the Matter of the Allegations Contained in the Columns of Mr. Macasaet Published in Malaya Dated September 18, 19, 20 and 21, 2007 ..	163
Re: Letter of the UP Law Faculty Entitled “Restoring Integrity: A Statement by the Faculty of the University of the Philippines College of Law on the Allegations of Plagiarism and Misrepresentation in the Supreme Court” ...	175
Prior Restraint	179
Soriano v. Laguardia	179
Section 5	186
Estrada v. Escritor	186
Section 6	200
Leave Division, OCA-OAS v. Heusdens	200
Section 7	204
Chavez v. Public Estates Authority	204
Section 9	209
Republic of the Philippines v. Court of Appeals	209
Section 10	212
Barangay Association for National Advancement and Transparency (BANAT) Party-List v. Commission on Elections	212
Section 12	216
Section 14	217
Right To Counsel	217
Gamas v. Oco	217
Right To Speedy Trial	220
Villa v. Fernandez	220

Section 19	227
Corpuz v. People of the Philippines	227
Section 21	236
Loney v. People of the Philippines	237
Ivler v. Modesto-San Pedro	246
Article IV. Citizenship	265
Section 2	265
Poe-Llamanzares v. Commission on Elections	265
Section 5	298
Cordora v. Commission on Elections	298
Article V. Suffrage	301
Section 1	301
Sambarani v. Commission on Elections	301
Section 2	301
Macalintal v. Commission on Elections	302
Article VI. The Legislative Department	309
Section 1	309
Review Center Association of the Philippines v. Ermita	309
Unconstitutional Enlargement of Legislative Power	327
Navarro v. Ermita	327
Section 5	331
Sema v. Commission on Elections	332
Navarro v. Ermita	349
The Party List System	352
Barangay Association for National Advancement and Transparency (BANAT) v. Commission on Elections	352
Atong Paglaum, Inc. v. Commission on Elections	387
Legislative Districts	408
Aldaba v. Commission on Elections	408
Section 9	413
Tolentino v. Commission on Elections	413
Section 13	427
Liban v. Gordon	428
Section 16	437
Pimentel v. Senate Committee of the Whole	437
Section 17	449
Barbers v. Commission on Elections	449
Barangay Association for National Advancement and Transparency (BANAT) Party-List v. Commission on Elections	461

Section 18	466
Composition	466
Pimentel v. House of Representatives Electoral Tribunal	466
Commission on Appointments	473
Pimentel v. Ermita	473
Section 21	474
Neri v. Senate Committee on Accountability of Public Officers and Investigations	474
Pimentel v. Senate Committee of the Whole	481
Section 23	482
Lagman v. Medialdea	483
Section 25	486
Goh v. Bayron	486
Section 26	508
Barangay Association for National Advancement and Transparency (BANAT) Party-List v. Commission on Elections	508
Section 27	510
Belgica v. Ochoa	511
Section 28	520
Commissioner of Internal Revenue v. St. Luke’s Medical Center, Inc.	520
Section 29	534
Strategic Alliance Development Corporation v. Radstock Securities Limited	534
Technical Education and Skills Development Authority v. Commission on Audit	593
Article VII. Executive Department	601
Section 1	601
Neri v. Senate Committee on Accountability of Public Officers and Investigations	601
Section 4	620
Barangay Association for National Advancement and Transparency (BANAT) Party-List v. Commission on Elections	621
Section 9	623
Tolentino v. Commission on Elections	624
Section 15	626
Velicaria-Garafil v. Office of the President	626
Section 16	651
Power To Appoint	652
Rufino v. Endriga	652
Pimentel v. Ermita	668
Ad Interim Appointments	675
Matibag v. Benipayo	675

Section 17	693
National Electrification Administration v. Commission on Audit	693
Rufino v. Endriga	694
Kilusang Mayo Uno v. National Economic Development Authority	697
Power Sector Assets and Liabilities Management Corporation v. Commissioner of Internal Revenue	702
Section 18	719
Lagman v. Medialdea (2017)	720
Lagman v. Pimentel	752
Lagman v. Medialdea (2019)	762
Volume 2	
Article VIII. Judicial Department	771
Section 1	771
Role of the Supreme Court	771
Lambino v. Commission on Elections	771
Strategic Alliance Development Corporation v. Radstock Securities Limited	771
Judicial Review	773
Montesclaros v. Commission on Elections	773
Philippine Constitution Association (PHILCONSA) v. Philippine Government (GPH)	778
Extraordinary Power of <i>Certiorari</i>	786
Knights of Rizal v. DMCI Homes, Inc.	786
Section 5	808
Original Jurisdiction	809
Chavez v. Public Estates Authority	809
Rule-Making Power	814
Cruz-Agana v. Santiago-Lagman	814
Baguio Market Vendors Multi-Purpose Cooperative (BAMARVEMPCO) v. Cabato-Cortes	818
Judicial Privilege	822
In Re: Production of Court Records and Documents and the Attendance of Court Officials and Employees as Witnesses Under the Subpoenas of February 10, 2012 and the Various Letters of the Impeachment Prosecution Panel Dated January 19 and 25, 2012	823
Section 6	825
Civil Service Commission v. Andal	825
Section 13	835
In Re: Production of Court Records and Documents and the Attendance of Court Officials and Employees as Witnesses Under the Subpoenas of February 10, 2012 and the Various Letters of the Impeachment Prosecution Panel Dated January 19 and 25, 2012	835
Section 14	837

Spouses Consing v. Court of Appeals	837
Section 15	838
Bancil v. Reyes	838
Article IX. Constitutional Commissions	850
A. Common Provisions	850
Section 1	850
Gonzales v. Office of the President of the Philippines	850
Matibag v. Benipayo	851
Section 7	852
Development Bank of the Philippines v. Commission on Audit	852
Repol v. Commission on Elections	855
B. The Civil Service Commission	856
Section 1	856
Matibag v. Benipayo	856
Section 2	859
Matibag v. Benipayo	860
Quinto v. Commission on Elections	860
C. The Commission on Elections	864
Section 1	864
Matibag v. Benipayo	864
Section 2	871
Sambarani v. Commission on Elections	872
Montesclaros v. Commission on Elections	878
Barangay Association For National Advancement and Transparency (BANAT) Party-List v. Commission on Elections	880
Section 3	883
Matibag v. Benipayo	883
Baytan v. Commission on Elections	884
Repol v. Commission on Elections	887
Soriano, Jr. v. Commission on Elections	896
D. The Commission on Audit	912
Section 1	912
Matibag v. Benipayo	913
Section 2	913
Development Bank of the Philippines v. Commission on Audit	914
National Electrification Administration v. Commission on Audit	928
Parreño v. Commission on Audit	929
Technical Education and Skills Development Authority v. Commission on Audit	932
Section 3	933

Development Bank of the Philippines v. Commission on Audit	933
Feliciano v. Commission on Audit	934
Article X. Local Government	946
General Provisions	946
Section 4	946
Province of Negros Occidental v. Commission on Audit	946
Section 5	954
Manila International Airport Authority v. Court of Appeals	954
Smart Communications, Inc. v. Municipality of Malvar, Batangas	958
Section 8	968
Socrates v. Commission on Elections	968
Dizon v. Comelec	976
Halili v. Commission on Elections	983
Section 10	1000
League of Cities of the Philippines v. Commission on Elections	1000
Sema v. Commission on Elections	1010
Navarro v. Ermita	1011
Autonomous Regions	1016
Section 20	1016
Sema v. Commission on Elections	1017
Article XI. Accountability of Public Officers	1020
Section 1	1020
Chavez v. Public Estates Authority	1020
Montesclaros v. Commission on Elections	1020
Office of the Court Administrator v. Silongan	1022
Section 3	1024
Republic v. Sereno	1025
Section 5	1032
Gonzales v. Office of the President of the Philippines	1032
Section 12	1036
Policy of Non-Interference	1037
Kara-An v. Office of the Ombudsman	1037
Section 13	1040
Nature and Extent of Powers	1041
Office of the Ombudsman v. Court of Appeals	1041
Alicias, Jr. v. Macatangay	1047
Exceptions To the Policy of Non-Interference	1048
Vergara v. Ombudsman	1048
Section 17	1051

Republic v. Sereno	1052
Article XII. National Economy and Patrimony	1073
Section 2	1073
Definition of “Capital”	1074
Gamboa v. Teves	1074
Technical or Financial Assistance Agreements	1075
La Bugal-B’laan Tribal Association, Inc. v. Ramos	1075
Section 3	1142
Chavez v. Public Estates Authority	1143
Section 6	1193
Alyansa Para Sa Bagong Pilipinas, Inc. (ABP) v. Energy Regulatory Commission	1193
Section 7	1195
Strategic Alliance Development Corporation v. Radstock Securities Limited	1195
Section 9	1201
Gonzales v. Office of the President of the Philippines	1202
Section 10	1203
Section 11	1203
Definition of “Capital”	1204
Gamboa v. Teves	1204
Non-Exclusive Franchise	1234
Pilipino Telephone Corporation (PILTEL) v. National Telecommunications Commission	1234
Tawang Multi-Purpose Cooperative v. La Trinidad Water District	1240
Section 16	1252
Feliciano v. Commission on Audit	1252
Manila International Airport Authority v. Court of Appeals	1259
Section 17	1267
Lagman v. Medialdea	1267
Section 19	1271
Alyansa Para Sa Bagong Pilipinas, Inc. (ABP) v. Energy Regulatory Commission	1271
Section 20	1309
Gonzales v. Office of the President of the Philippines	1309
Development Bank of the Philippines v. Commission on Audit	1311
Article XIII. Social Justice and Human Rights	1314
Labor	1314
Section 3	1314
Security of Tenure	1315
Sonza v. ABS-CBN Broadcasting Corporation	1315

Right To Self-Organization	1316
Bank of the Philippine Islands v. BPI Employees Union-Davao Chapter- Federation of Unions In BPI Unibank	1316
Agrarian and Natural Resources Reform	1329
Section 4	1329
Land Bank of the Philippines v. Domingo	1329
Health	1335
Section 11	1335
Sison v. Court of Appeals	1335
Human Rights	1337
Section 17	1337
Gonzales v. Office of the President of the Philippines	1338
Section 18	1339
MVRs Publications, Inc. v. Islamic Da'wah Council of the Philippines, Inc.	1340
Article XIV. Education, Science and Technology, Arts, Culture and Sports	1342
Education	1342
Section 4	1343
Gamboa v. Teves	1344
Arts and Culture	1347
Section 15	1347
Knights of Rizal v. DMCI Homes, Inc.	1347
Article XV. The Family	1351
Section 2	1351
Estrada v. Escritor	1351
Article XVI. General Provisions	1355
Section 11	1356
Gamboa v. Teves	1357
Article XVII. Amendments or Revisions	1359
Section 1	1359
Section 2	1359
Section 3	1359
Section 4	1359
Lambino v. Commission on Elections	1360
Article XVIII. Transitory Provisions	1397
Section 26	1401
Republic of the Philippines v. Sandiganbayan	1401
List of Cases	1419



PREAMBLE

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

On October 26, 2001, Antonio Tirol Carpio was sworn in as a Justice of the Supreme Court of the Republic of the Philippines. The oath he took on that day included the imperative to preserve and defend the Constitution and to believe in and obey its provisions. His views on the importance of this oath were evident in this unequivocally worded statement in **LAMBINO v. COMMISSION ON ELECTIONS**, G.R. No. 174153, October 25, 2006, 536 Phil. 1:

“The Constitution, as the fundamental law of the land, deserves the utmost respect and obedience of all the citizens of this nation. ... As the ultimate guardian of the Constitution, this Court is sworn to perform its solemn duty to defend and protect the Constitution, which embodies the real sovereign will of the people.”

After 18 years on the Bench, the decisions and dissents of Justice Carpio are testament to the fulfillment of that oath. When asked if the passage of those years would make him revisit any of his opinions, his reply was categorical - every case was based on thorough study, every opinion based “solely on the law and the facts,” and given the same set of law and facts, every opinion “then, now or in the future” would be the same.¹

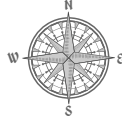
¹ Interview with Justice Antonio Tirol Carpio, Senior Associate Justice, Supreme Court, January 18, 2019.

These were the words he wielded to preserve and defend “the bible of the Court,”² juxtaposed against the very letter of the fundamental law. His words were at times measured, at times forceful, but always crystalline. They were based on his own prodigious research and thoughtful analysis, supported by that of his exemplary staff in the Supreme Court, and embodied the ideals and aspirations of a singular Filipino who believes in and fights for the rule of law.

The word that best describes him is **patriot**.



² Lambino v. COMELEC, G.R. No. 174153, October 25, 2006, 536 Phil. 1.



ARTICLE I

NATIONAL TERRITORY

The national territory comprises the Philippine archipelago, with all the islands and waters embraced therein, and all other territories over which the Philippines has sovereignty or jurisdiction, consisting of its terrestrial, fluvial and aerial domains, including its territorial sea, the seabed, the subsoil, the insular shelves, and other submarine areas. The waters around, between, and connecting the islands of the archipelago, regardless of their breadth and dimensions, form part of the internal waters of the Philippines.

On October 29, 2011, Justice Carpio delivered a speech entitled “The Rule of Law as the Great Equalizer.” To the general public, that speech signaled the beginning of his personal advocacy to protect the maritime entitlements of the Philippines in the South China Sea. Eventually he would deliver over 200 lectures and speeches, in various fora, in the Philippines and abroad, on the South China Sea dispute and the historic arbitral award¹ rendered in favor of the Philippines by the Arbitral Tribunal in *Republic of the Philippines v. People’s Republic of China*.² In 2017, those lectures and speeches were published as **The South China Sea Dispute: Philippine Sovereign Rights and Jurisdiction in the West Philippine Sea**, an electronic book available for download for free.³

But as a Justice of the Supreme Court, his advocacy for our **national territory** was exemplified in the landmark case of **MAGALLONA v. ERMITA**, G.R. No. 187167, August 16, 2011, 671 Phil. 243. For Atty. Nelda Ethel P. Torio, Court Attorney VI, Supreme Court, this case “highlighted the necessity of a baselines law compliant with the United Nations Convention on the Law of the Sea (UNCLOS), which predictably served the Philippines well in the determination of its maritime claims in the South China Sea arbitration.”⁴

¹ Antonio Carpio. *The South China Sea Dispute: Philippine Sovereign Rights And Jurisdiction In The West Philippine Sea* (2017), available at <http://www.imoa.ph/downloads/>

² PCA Case No. 2013-19.

³ Available at <http://www.imoa.ph/downloads/>

⁴ Response of Atty. Nelda Ethel P. Torio, January 29, 2019.

The **Magallona** petition, an original action that prayed for writs of *certiorari* and prohibition, assailed the constitutionality of Republic Act No. 9522,⁵ or the Baselines Law, which adjusted the country's archipelagic baselines and classified the baseline regime of nearby territories. In dismissing the petition, the Court *en banc*, speaking through Justice Carpio, ruled in perceptive language:

In fact, the demarcation of the baselines enables the Philippines to delimit its exclusive economic zone, reserving solely to the Philippines the exploitation of all living and non-living resources within such zone. Such a maritime delineation binds the international community since the delineation is in strict observance of UNCLOS III. If the maritime delineation is contrary to UNCLOS III, the international community will of course reject it and will refuse to be bound by it.

UNCLOS III favors States with a long coastline like the Philippines. UNCLOS III creates a *sui generis* maritime space - the exclusive economic zone - in waters previously part of the high seas. UNCLOS III grants new rights to coastal States to exclusively exploit the resources found within this zone up to 200 nautical miles.⁶ UNCLOS III, however, preserves the traditional freedom of navigation of other States that attached to this zone beyond the territorial sea before UNCLOS III.

... Petitioners hold the view that, based on the permissive text of UNCLOS III, Congress was not bound to pass RA 9522. We have looked at the relevant provision of UNCLOS III⁷ and we find petitioners' reading plausible. Nevertheless, the prerogative of choosing this option belongs to Congress, not to this Court. Moreover, the luxury of choosing this option comes at a very steep price. Absent an UNCLOS III compliant baselines law, an archipelagic State like the Philippines will find itself devoid of internationally acceptable baselines from where the breadth

⁵ An Act To Amend Certain Provisions Of Republic Act No. 3046, As Amended By Republic Act No. 5446, To Define The Archipelagic Baselines Of The Philippines, And For Other Purposes (2009).

⁶ This can extend up to 350 nautical miles if the coastal State proves its right to claim an extended continental shelf (see UNCLOS III, Art. 76, paragraphs 4(a), 5 and 6, in relation to Art. 77).

⁷ Art. 47 (1) provides: An archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1.

of its maritime zones and continental shelf is measured. **This is recipe for a two-fronted disaster: first, it sends an open invitation to the seafaring powers to freely enter and exploit the resources in the waters and submarine areas around our archipelago; and second, it weakens the country's case in any international dispute over Philippine maritime space. These are consequences Congress wisely avoided.**

The enactment of UNCLOS III compliant baselines law for the Philippine archipelago and adjacent areas, as embodied in RA 9522, allows an internationally-recognized delimitation of the breadth of the Philippines' maritime zones and continental shelf. RA 9522 is therefore a most vital step on the part of the Philippines in safeguarding its maritime zones, consistent with the Constitution and our national interest.

The antecedents of **Magallona** were set forth in the *en banc* decision:

In 1961, Congress passed Republic Act No. 3046 (RA 3046)⁸ demarcating the maritime baselines of the Philippines as an archipelagic State. This law followed the framing of the Convention on the Territorial Sea and the Contiguous Zone in 1958 (UNCLOS I), codifying, among others, the sovereign right of States parties over their "territorial sea," the breadth of which, however, was left undetermined. Attempts to fill this void during the second round of negotiations in Geneva in 1960 (UNCLOS II) proved futile. Thus, domestically, RA 3046 remained unchanged for nearly five decades, save for legislation passed in 1968 (Republic Act No. 5446 [RA 5446]) correcting typographical errors and reserving the drawing of baselines around Sabah in North Borneo.

In March 2009, Congress amended RA 3046 by enacting RA 9522, the statute now under scrutiny. The change was prompted by the need to make RA 3046 compliant with the terms of the United Nations Convention on the Law of the Sea (UNCLOS III),⁹ which the Philippines ratified on 27 February 1984.¹⁰ Among others, UNCLOS III prescribes the water-land ratio, length, and contour of baselines of archipelagic States like the Philippines¹¹ and sets the deadline for the filing of application

⁸ An Act To Define The Baselines Of The Territorial Sea Of The Philippines (1961).

⁹ UNCLOS III entered into force on 16 November 1994.

¹⁰ The Philippines signed the treaty on 10 December 1982.

¹¹ Art. 47 (1-3), provide:

1. An archipelagic State may draw straight archipelagic baselines joining the outermost

for the extended continental shelf.¹² Complying with these requirements, RA 9522 shortened one baseline, optimized the location of some basepoints around the Philippine archipelago and classified adjacent territories, namely, the Kalayaan Island Group (KIG) and the Scarborough Shoal, as “regimes of islands” whose islands generate their own applicable maritime zones.

Petitioners, professors of law, law students and a legislator, in their respective capacities as “citizens, taxpayers or ... legislators,” as the case may be, assail the constitutionality of RA 9522 on two principal grounds, namely: (1) RA 9522 reduces Philippine maritime territory, and logically, the reach of the Philippine state’s sovereign power, in violation of Article 1 of the 1987 Constitution, embodying the terms of the Treaty of Paris¹³ and ancillary treaties,¹⁴ and (2) RA 9522 opens the country’s waters landward of the baselines to maritime passage by all vessels and aircrafts, undermining Philippine sovereignty and national security, contravening the country’s nuclear-free policy, and damaging marine resources, in violation of relevant constitutional provisions.¹⁵

points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1.

2. The length of such baselines shall not exceed 100 nautical miles, except that up to 3 per cent of the total number of baselines enclosing any archipelago may exceed that length, up to a maximum length of 125 nautical miles.

3. The drawing of such baselines shall not depart to any appreciable extent from the general configuration of the archipelago.

¹² UNCLOS III entered into force on 16 November 1994. The deadline for the filing of application is mandated in Annex II, Art. 4: Where a coastal State intends to establish, in accordance with article 76, the outer limits of its continental shelf beyond 200 nautical miles, it shall submit particulars of such limits to the Commission along with supporting scientific and technical data as soon as possible but in any case within 10 years of the entry into force of this Convention for that State. The coastal State shall at the same time give the names of any Commission members who have provided it with scientific and technical advice.

In a subsequent meeting, the States parties agreed that for States which became bound by the treaty before 13 May 1999 (such as the Philippines) the ten-year period will be counted from that date. Thus, RA 9522, which took effect on 27 March 2009, barely met the deadline.

¹³ Entered into between the United States and Spain on 10 December 1898 following the conclusion of the Spanish-American War. Under the terms of the treaty, Spain ceded to the United States “the archipelago known as the Philippine Islands” lying within its technical description.

¹⁴ The Treaty of Washington, between Spain and the United States (7 November 1900), transferring to the US the islands of Cagayan, Sulu, and Sibutu and the US-Great Britain Convention (2 January 1930) demarcating boundary lines between the Philippines and North Borneo.

¹⁵ Const., Art. II, Secs. 7, 8, and 16.

In addition, petitioners contend that RA 9522's treatment of the KIG as "regime of islands" not only results in the loss of a large maritime area but also prejudices the livelihood of subsistence fishermen.¹⁶ To buttress their argument of territorial diminution, petitioners facially attack RA 9522 for what it excluded and included - its failure to reference either the Treaty of Paris or Sabah and its use of UNCLOS III's framework of regime of islands to determine the maritime zones of the KIG and the Scarborough Shoal.

Commenting on the petition, respondent officials raised threshold issues questioning (1) the petition's compliance with the case or controversy requirement for judicial review grounded on petitioners' alleged lack of *locus standi* and (2) the propriety of the writs of *certiorari* and prohibition to assail the constitutionality of RA 9522. On the merits, respondents defended RA 9522 as the country's compliance with the terms of UNCLOS III, preserving Philippine territory over the KIG or Scarborough Shoal. Respondents add that RA 9522 does not undermine the country's security, environment and economic interests or relinquish the Philippines' claim over Sabah.

Respondents also question the normative force, under international law, of petitioners' assertion that what Spain ceded to the United States under the Treaty of Paris were the islands and all the waters found within the boundaries of the rectangular area drawn under the Treaty of Paris.

We left unacted petitioners' prayer for an injunctive writ.

The issues and the summarized rulings of **Magallona** were identified as follows:

1. Preliminarily -
 - a. Whether petitioners possess *locus standi* to bring this suit; and
 - b. Whether the writs of *certiorari* and prohibition are the proper remedies to assail the constitutionality of RA 9522.
2. On the merits, whether RA 9522 is unconstitutional.

¹⁶ Allegedly in violation of the constitution, citing Const., Art. XII, Sec. 2(2), and Art. XIII, Sec. 7.

... On the threshold issues, we hold that (1) petitioners possess *locus standi* to bring this suit as citizens and (2) the writs of *certiorari* and prohibition are proper remedies to test the constitutionality of RA 9522. On the merits, we find no basis to declare RA 9522 unconstitutional.

On the preliminary issues, Justice Carpio explained the **Magallona** rulings in this wise:

... Petitioners themselves undermine their assertion of *locus standi* as legislators and taxpayers because the petition alleges neither infringement of legislative prerogative¹⁷ nor misuse of public funds,¹⁸ occasioned by the passage and implementation of RA 9522. Nonetheless, we recognize petitioners' *locus standi* as citizens with constitutionally sufficient interest in the resolution of the merits of the case which undoubtedly raises issues of national significance necessitating urgent resolution. Indeed, owing to the peculiar nature of RA 9522, it is understandably difficult to find other litigants possessing "a more direct and specific interest" to bring the suit, thus satisfying one of the requirements for granting citizenship standing.¹⁹

... In praying for the dismissal of the petition on preliminary grounds, respondents seek a strict observance of the offices of the writs of *certiorari* and prohibition, noting that the writs cannot issue absent any showing of grave abuse of discretion in the exercise of judicial, quasi-judicial or ministerial powers on the part of respondents and resulting prejudice on the part of petitioners. Respondents' submission holds true in ordinary civil proceedings. When this Court exercises its constitutional power of judicial review, however, we have, by tradition, viewed the writs of *certiorari* and prohibition as proper remedial vehicles to test the constitutionality of statutes,²⁰ and indeed, of acts of other

¹⁷ Kilosbayan, Inc. v. Morato, 320 Phil. 171, 186 (1995).

¹⁸ Pascual v. Secretary of Public Works, 110 Phil. 331 (1960); Sanidad v. COMELEC, 165 Phil. 303 (1976).

¹⁹ Francisco, Jr. v. House of Representatives, 460 Phil. 830, 899 (2003) citing Kilosbayan, Inc. v. Guingona, Jr., G.R. No. 113375, 5 May 1994, 232 SCRA 110, 155-156 (Feliciano, J., concurring). The two other factors are the character of funds or assets involved in the controversy and a clear disregard of constitutional or statutory prohibition.

²⁰ See Aquino III v. COMELEC, G.R. No. 189793, 7 April 2010, 617 SCRA 623 (dismissing a petition for *certiorari* and prohibition assailing the constitutionality of Republic Act No. 9716, not for the impropriety of the remedy but for lack of merit); Aldaba v. COMELEC, G.R. No. 188078, 25 January 2010, 611 SCRA 137 (issuing the writ of prohibition to declare unconstitutional Republic Act No. 9591); Macalintal v. COMELEC, 453 Phil. 586 (2003) (issuing the writs of *certiorari* and prohibition declaring unconstitutional portions of Republic Act No. 9189).

branches of government.²¹ **Issues of constitutional import are sometimes crafted out of statutes which, while having no bearing on the personal interests of the petitioners, carry such relevance in the life of this nation that the Court inevitably finds itself constrained to take cognizance of the case and pass upon the issues raised, non-compliance with the letter of procedural rules notwithstanding.** The statute sought to be reviewed here is one such law.

But it was the ruling on the merits - that RA 9522 or the Baselines Law was **constitutional** - that made **Magallona** a landmark decision. As explained by Atty. Janice May R. Erni-Manongdo, Court Attorney VI, Supreme Court, “the impact on law and jurisprudence seemed low-key. It did not change or substantially alter existing jurisprudence. However, the decision was significant in how it deliberately and painstakingly explained the UNCLOS, baselines, territorial claims, and other concepts in international law that were seldom discussed in Supreme Court decisions ... no less important was how it brought to light the issues regarding our maritime boundaries and claims, and started a national, even international, conversation on the issues in the South China Sea.”²²

**RA 9522 is a Statutory Tool
to Demarcate the Country’s Maritime Zones
and Continental Shelf Under UNCLOS III, not
to Delineate Philippine Territory**

Petitioners submit that RA 9522 “dismembers a large portion of the national territory” because it discards the pre-UNCLOS III demarcation of Philippine territory under the Treaty of Paris and related treaties, successively encoded in the definition of national territory under the 1935, 1973 and 1987 Constitutions. Petitioners theorize that this constitutional definition trumps any treaty or statutory provision denying the Philippines sovereign control over waters, beyond the territorial sea recognized at the time of the Treaty of Paris, that Spain supposedly ceded to the United States. Petitioners argue that from the Treaty of Paris’ technical description, Philippine sovereignty over territorial waters extends hundreds of nautical miles around the Philippine archipelago, embracing the rectangular area delineated in the Treaty of Paris.

²¹ See *Neri v. Senate Committee on Accountability of Public Officers and Investigations*, G.R. No. 180643, 25 March 2008, 549 SCRA 77 (granting a writ of *certiorari* against the Philippine Senate and nullifying the Senate contempt order issued against petitioner).

²² Response of Atty. Janice May R. Erni-Manongdo, January 31, 2019.

Petitioners' theory fails to persuade us.

UNCLOS III has nothing to do with the acquisition (or loss) of territory. It is a multilateral treaty regulating, among others, sea-use rights over maritime zones (i.e., the territorial waters [12 nautical miles from the baselines], contiguous zone [24 nautical miles from the baselines], exclusive economic zone [200 nautical miles from the baselines]), and continental shelves that UNCLOS III delimits. UNCLOS III was the culmination of decades-long negotiations among United Nations members to codify norms regulating the conduct of States in the world's oceans and submarine areas, recognizing coastal and archipelagic States' graduated authority over a limited span of waters and submarine lands along their coasts.

On the other hand, baselines laws such as RA 9522 are enacted by UNCLOS III States parties to mark-out specific basepoints along their coasts from which baselines are drawn, either straight or contoured, to serve as geographic starting points to measure the breadth of the maritime zones and continental shelf. Article 48 of UNCLOS III on archipelagic States like ours could not be any clearer:

Art. 48. Measurement of the breadth of the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf. - The breadth of the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf shall be measured from archipelagic baselines drawn in accordance with article 47.

Thus, baselines laws are nothing but statutory mechanisms for UNCLOS III States parties to delimit with precision the extent of their maritime zones and continental shelves. In turn, this gives notice to the rest of the international community of the scope of the maritime space and submarine areas within which States parties exercise treaty-based rights, namely, the exercise of sovereignty over territorial waters (Article 2), the jurisdiction to enforce customs, fiscal, immigration, and sanitation laws in the contiguous zone (Article 33), and the right to exploit the living and non-living resources in the exclusive economic zone (Article 56) and continental shelf (Article 77).

Even under petitioners' theory that the Philippine territory embraces the islands and all the waters within the rectangular area delimited in the Treaty of Paris, the baselines of the Philippines would still have to be drawn in accordance

with RA 9522 because this is the only way to draw the baselines in conformity with UNCLOS III. The baselines cannot be drawn from the boundaries or other portions of the rectangular area delineated in the Treaty of Paris, but from the “outermost islands and drying reefs of the archipelago.”²³ UNCLOS III and its ancillary baselines laws play no role in the acquisition, enlargement or, as petitioners claim, diminution of territory. Under traditional international law typology, States acquire (or conversely, lose) territory through occupation, accretion, cession and prescription,²⁴ not by executing multilateral treaties on the regulations of sea-use rights or enacting statutes to comply with the treaty’s terms to delimit maritime zones and continental shelves. Territorial claims to land features are outside UNCLOS III, and are instead governed by the rules on general international law.²⁵

RA 9522’s Use of the Framework of Regime of Islands to Determine the Maritime Zones of the KIG and the Scarborough Shoal, not Inconsistent with the Philippines’ Claim of Sovereignty Over these Areas

Petitioners next submit that RA 9522’s use of UNCLOS III’s regime of islands framework to draw the baselines, and to measure the breadth of the applicable maritime zones of the KIG, “weakens our territorial claim” over that area. Petitioners add that the KIG’s (and Scarborough Shoal’s) exclusion from the Philippine archipelagic baselines results in the loss of “about 15,000 square nautical miles of territorial waters,” prejudicing the livelihood of subsistence fishermen. A comparison of the configuration of the baselines drawn under RA 3046 and RA 9522 and the extent of maritime space encompassed by each law, coupled with a reading of the text of RA 9522 and its congressional deliberations, *vis-à-vis* the Philippines’ obligations under UNCLOS III, belie this view.

²³ Following Art. 47 (1) of UNCLOS III which provides: An archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1.

²⁴ Under the United Nations Charter, use of force is no longer a valid means of acquiring territory.

²⁵ The last paragraph of the preamble of UNCLOS III states that “... matters not regulated by this Convention continue to be governed by the rules and principles of general international law.”

The configuration of the baselines drawn under RA 3046 and RA 9522 shows that RA 9522 merely followed the basepoints mapped by RA 3046, save for at least nine basepoints that RA 9522 skipped to optimize the location of basepoints and adjust the length of one baseline (and thus comply with UNCLOS III's limitation on the maximum length of baselines). Under RA 3046, as under RA 9522, the KIG and the Scarborough Shoal lie outside of the baselines drawn around the Philippine archipelago. This undeniable cartographic fact takes the wind out of petitioners' argument branding RA 9522 as a statutory renunciation of the Philippines' claim over the KIG, assuming that baselines are relevant for this purpose.

Petitioners' assertion of loss of "about 15,000 square nautical miles of territorial waters" under RA 9522 is similarly unfounded both in fact and law. On the contrary, RA 9522, by optimizing the location of basepoints, increased the Philippines' total maritime space (covering its internal waters, territorial sea and exclusive economic zone) by 145,216 square nautical miles ...

Thus ... the reach of the exclusive economic zone drawn under RA 9522 even extends way beyond the waters covered by the rectangular demarcation under the Treaty of Paris. Of course, where there are overlapping exclusive economic zones of opposite or adjacent States, there will have to be a delineation of maritime boundaries in accordance with UNCLOS III.²⁶

Further, petitioners' argument that the KIG now lies outside Philippine territory because the baselines that RA 9522 draws do not enclose the KIG is negated by RA 9522 itself. Section 2 of the law commits to text the Philippines' continued claim of sovereignty and jurisdiction over the KIG and the Scarborough Shoal:

Sec. 2. The baselines in the following areas over which the Philippines likewise exercises sovereignty and jurisdiction shall be determined as "Regime of Islands" under the Republic of the Philippines consistent with Article 121 of the United Nations Convention on the Law of the Sea (UNCLOS): a) The Kalayaan Island Group as constituted under Presidential Decree No. 1596 and b) Bajo de Masinloc, also known as Scarborough Shoal.

²⁶ Under Art. 74.

Had Congress in RA 9522 enclosed the KIG and the Scarborough Shoal as part of the Philippine archipelago, adverse legal effects would have ensued. The Philippines would have committed a breach of two provisions of UNCLOS III. First, Article 47 (3) of UNCLOS III requires that “[t]he drawing of such baselines shall not depart to any appreciable extent from the general configuration of the archipelago.” Second, Article 47 (2) of UNCLOS III requires that “the length of the baselines shall not exceed 100 nautical miles,” save for three per cent (3%) of the total number of baselines which can reach up to 125 nautical miles. Although the Philippines has consistently claimed sovereignty over the KIG²⁷ and the Scarborough Shoal for several decades, these outlying areas are located at an appreciable distance from the nearest shoreline of the Philippine archipelago,²⁸ such that any straight baseline loped around them from the nearest basepoint will inevitably “depart to an appreciable extent from the general configuration of the archipelago.”

The principal sponsor of RA 9522 in the Senate, Senator Miriam Defensor-Santiago, took pains to emphasize the foregoing during the Senate deliberations:

What we call the Kalayaan Island Group or what the rest of the world call the Spratlys and the Scarborough Shoal are outside our archipelagic baseline because if we put them inside our baselines we might be accused of violating the provision of international law which states: “The drawing of such baseline shall not depart to any appreciable extent from the general configuration of the archipelago.” So sa loob ng ating baseline, dapat magkalapit ang mga islands. Dahil malayo ang Scarborough Shoal, hindi natin masasabing malapit sila sa atin although we are still allowed by international law to claim them as our own.

This is called contested islands outside our configuration. We see that our archipelago is defined by the orange line which [we] call archipelagic baseline. Ngayon, tingnan ninyo ang maliit na circle doon sa itaas, that is Scarborough Shoal, itong malaking circle sa ibaba, that is Kalayaan Group or the Spratlys. Malayo na sila sa ating archipelago kaya kung ilihis pa natin ang dating archipelagic baselines para lamang masama itong dalawang circles, hindi na sila magkalapit

²⁷ Presidential Decree No. 1596 classifies the KIG as a municipality of Palawan.

²⁸ KIG lies around 80 nautical miles west of Palawan while Scarborough Shoal is around 123 nautical west of Zambales.

at baka hindi na tatanggapin ng United Nations because of the rule that it should follow the natural configuration of the archipelago.²⁹

Similarly, the length of one baseline that RA 3046 drew exceeded UNCLOS III's limits. The need to shorten this baseline, and in addition, to optimize the location of basepoints using current maps, became imperative as discussed by respondents:

[T]he amendment of the baselines law was necessary to enable the Philippines to draw the outer limits of its maritime zones including the extended continental shelf in the manner provided by Article 47 of [UNCLOS III]. As defined by R.A. 3046, as amended by R.A. 5446, the baselines suffer from some technical deficiencies, to wit:

1. The length of the baseline across Moro Gulf (from Middle of 3 Rock Awash to Tongquil Point) is 140.06 nautical miles ... This exceeds the maximum length allowed under Article 47(2) of the [UNCLOS III], which states that "The length of such baselines shall not exceed 100 nautical miles, except that up to 3 per cent of the total number of baselines enclosing any archipelago may exceed that length, up to a maximum length of 125 nautical miles."
2. The selection of basepoints is not optimal. At least 9 basepoints can be skipped or deleted from the baselines system. This will enclose an additional 2,195 nautical miles of water.
3. Finally, the basepoints were drawn from maps existing in 1968, and not established by geodetic survey methods. Accordingly, some of the points, particularly along the west coasts of Luzon down to Palawan were later found to be located either inland or on water, not on low-water line and drying reefs as prescribed by Article 47.

Hence, far from surrendering the Philippines' claim over the KIG and the Scarborough Shoal, Congress' decision to classify the KIG and the Scarborough Shoal as "Regime[s] of Islands' under the Republic of the Philippines consistent with Article 121"³⁰ of UNCLOS III manifests the Philippine State's responsible observance of its *pacta sunt servanda* obligation under UNCLOS III. Under Article 121 of UNCLOS III, any "naturally formed area of land, surrounded by water, which is above water at high tide," such as portions of the KIG, qualifies under the category of

²⁹ Journal, Senate 14th Congress 44th Session 1416 (27 January 2009).

³⁰ RA 9522, Sec. 2.

“regime of islands,” whose islands generate their own applicable maritime zones.³¹

Statutory Claim Over Sabah under RA 5446 Retained

Petitioners’ argument for the invalidity of RA 9522 for its failure to textualize the Philippines’ claim over Sabah in North Borneo is also untenable. Section 2 of RA 5446, which RA 9522 did not repeal, keeps open the door for drawing the baselines of Sabah:

Sec. 2. The definition of the baselines of the territorial sea of the Philippine Archipelago as provided in this Act is without prejudice to the delineation of the baselines of the territorial sea around the territory of Sabah, situated in North Borneo, over which the Republic of the Philippines has acquired dominion and sovereignty.

UNCLOS III and RA 9522 not Incompatible with the Constitution’s Delineation of Internal Waters

As their final argument against the validity of RA 9522, petitioners contend that the law unconstitutionally “converts” internal waters into archipelagic waters, hence subjecting these waters to the right of innocent and sea lanes passage under UNCLOS III, including overflight. Petitioners extrapolate that these passage rights indubitably expose Philippine internal waters to nuclear and maritime pollution hazards, in violation of the Constitution.

Whether referred to as Philippine “internal waters” under Article I of the Constitution³² or as “archipelagic waters” under UNCLOS III (Article 49 [1]), the Philippines exercises sovereignty over the body of

³¹ Art. 121 provides: Regime of islands. - 1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.

2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.

3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.

³² Const., Art. XII, Sec. 2(2) uses the term “archipelagic waters” separately from “territorial sea.” Under UNCLOS III, an archipelagic State may have internal waters - such as those enclosed by closing lines across bays and mouths of rivers. See Art. 50, UNCLOS III. Moreover, Art. 8 (2) of UNCLOS III provides: Where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters.

water lying landward of the baselines, including the air space over it and the submarine areas underneath. UNCLOS III affirms this:

Art. 49. Legal status of archipelagic waters, of the air space over archipelagic waters and of their bed and subsoil. -

1. The sovereignty of an archipelagic State extends to the waters enclosed by the archipelagic baselines drawn in accordance with article 47, described as archipelagic waters, regardless of their depth or distance from the coast.

2. This sovereignty extends to the air space over the archipelagic waters, as well as to their bed and subsoil, and the resources contained therein.

...

4. The regime of archipelagic sea lanes passage established in this Part shall not in other respects affect the status of the archipelagic waters, including the sea lanes, or the exercise by the archipelagic State of its sovereignty over such waters and their air space, bed and subsoil, and the resources contained therein.

The fact of sovereignty, however, does not preclude the operation of municipal and international law norms subjecting the territorial sea or archipelagic waters to necessary, if not marginal, burdens in the interest of maintaining unimpeded, expeditious international navigation, consistent with the international law principle of freedom of navigation. Thus, domestically, the political branches of the Philippine government, in the competent discharge of their constitutional powers, may pass legislation designating routes within the archipelagic waters to regulate innocent and sea lanes passage.³³ Indeed, bills drawing nautical

³³ Mandated under Arts. 52 and 53 of UNCLOS III:

Art. 52. Right of innocent passage. - 1. Subject to article 53 and without prejudice to article 50, ships of all States enjoy the right of innocent passage through archipelagic waters, in accordance with Part II, Sec. 3.

2. The archipelagic State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its archipelagic waters the innocent passage of foreign ships if such suspension is essential for the protection of its security. Such suspension shall take effect only after having been duly published.

Art. 53. Right of archipelagic sea lanes passage. - 1. An archipelagic State may designate sea lanes and air routes thereabove, suitable for the continuous and expeditious passage of foreign ships and aircraft through or over its archipelagic waters and the adjacent territorial sea.

2. All ships and aircraft enjoy the right of archipelagic sea lanes passage in such sea lanes and air routes.

3. Archipelagic sea lanes passage means the exercise in accordance with this Convention of the rights of navigation and overflight in the normal mode solely for the purpose of continuous, expeditious and unobstructed transit between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.

4. Such sea lanes and air routes shall traverse the archipelagic waters and the adjacent

highways for sea lanes passage are now pending in Congress.

In the absence of municipal legislation, international law norms, now codified in UNCLOS III, operate to grant innocent passage rights over the territorial sea or archipelagic waters, subject to the treaty's limitations and conditions for their exercise.³⁴

territorial sea and shall include all normal passage routes used as routes for international navigation or overflight through or over archipelagic waters and, within such routes, so far as ships are concerned, all normal navigational channels, provided that duplication of routes of similar convenience between the same entry and exit points shall not be necessary.

5. Such sea lanes and air routes shall be defined by a series of continuous axis lines from the entry points of passage routes to the exit points. Ships and aircraft in archipelagic sea lanes passage shall not deviate more than 25 nautical miles to either side of such axis lines during passage, provided that such ships and aircraft shall not navigate closer to the coasts than 10 per cent of the distance between the nearest points on islands bordering the sea lane.

6. An archipelagic State which designates sea lanes under this article may also prescribe traffic separation schemes for the safe passage of ships through narrow channels in such sea lanes.

7. An archipelagic State may, when circumstances require, after giving due publicity thereto, substitute other sea lanes or traffic separation schemes for any sea lanes or traffic separation schemes previously designated or prescribed by it.

8. Such sea lanes and traffic separation schemes shall conform to generally accepted international regulations.

9. In designating or substituting sea lanes or prescribing or substituting traffic separation schemes, an archipelagic State shall refer proposals to the competent international organization with a view to their adoption. The organization may adopt only such sea lanes and traffic separation schemes as may be agreed with the archipelagic State, after which the archipelagic State may designate, prescribe or substitute them.

10. The archipelagic State shall clearly indicate the axis of the sea lanes and the traffic separation schemes designated or prescribed by it on charts to which due publicity shall be given.

11. Ships in archipelagic sea lanes passage shall respect applicable sea lanes and traffic separation schemes established in accordance with this article.

12. If an archipelagic State does not designate sea lanes or air routes, the right of archipelagic sea lanes passage may be exercised through the routes normally used for international navigation.

³⁴ The relevant provision of UNCLOS III provides:

Art. 17. Right of innocent passage. - Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.

Art. 19. Meaning of innocent passage. - 1. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.

2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:

(a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;

(b) any exercise or practice with weapons of any kind;

(c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;

(d) any act of propaganda aimed at affecting the defence or security of the coastal State;

(e) the launching, landing or taking on board of any aircraft;

(f) the launching, landing or taking on board of any military device;

Significantly, the right of innocent passage is a customary international law,³⁵ thus automatically incorporated in the corpus of Philippine law.³⁶ No modern State can validly invoke its sovereignty to absolutely forbid innocent passage that is exercised in accordance with customary international law without risking retaliatory measures from the international community.

The fact that for archipelagic States, their archipelagic waters are subject to both the right of innocent passage and sea lanes passage³⁷ does not place them in lesser footing *vis-à-vis* continental coastal States which are subject, in their territorial sea, to the right of innocent passage and the right of transit passage through international straits. The imposition of these passage

-
- (g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;
 - (h) any act of willful and serious pollution contrary to this Convention;
 - (i) any fishing activities;
 - (j) the carrying out of research or survey activities;
 - (k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;
 - (l) any other activity not having a direct bearing on passage

Art. 21. Laws and regulations of the coastal State relating to innocent passage. - 1. The coastal State may adopt laws and regulations, in conformity with the provisions of this Convention and other rules of international law, relating to innocent passage through the territorial sea, in respect of all or any of the following:

- (a) the safety of navigation and the regulation of maritime traffic;
- (b) the protection of navigational aids and facilities and other facilities or installations;
- (c) the protection of cables and pipelines;
- (d) the conservation of the living resources of the sea;
- (e) the prevention of infringement of the fisheries laws and regulations of the coastal State;
- (f) the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof;
- (g) marine scientific research and hydrographic surveys;
- (h) the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.

2. Such laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards.

3. The coastal State shall give due publicity to all such laws and regulations.

4. Foreign ships exercising the right of innocent passage through the territorial sea shall comply with all such laws and regulations and all generally accepted international regulations relating to the prevention of collisions at sea.

³⁵ The right of innocent passage through the territorial sea applies only to ships and not to aircrafts (Art. 17, UNCLOS III). The right of innocent passage of aircrafts through the sovereign territory of a State arises only under an international agreement. In contrast, the right of innocent passage through archipelagic waters applies to both ships and aircrafts (Art. 53 (12), UNCLOS III).

³⁶ Const., Art. III, Sec. 2.

³⁷ "Archipelagic sea lanes passage is essentially the same as transit passage through straits" to which the territorial sea of continental coastal State is subject. R.R. Churabill and A.V. Lowe, *The Law Of The Sea* 127 (1999).

rights through archipelagic waters under UNCLOS III was a concession by archipelagic States, in exchange for their right to claim all the waters landward of their baselines, regardless of their depth or distance from the coast, as archipelagic waters subject to their territorial sovereignty. More importantly, the recognition of archipelagic States' archipelago and the waters enclosed by their baselines as one cohesive entity prevents the treatment of their islands as separate islands under UNCLOS III.³⁸ Separate islands generate their own maritime zones, placing the waters between islands separated by more than 24 nautical miles beyond the States' territorial sovereignty, subjecting these waters to the rights of other States under UNCLOS III.³⁹...



³⁸ Falling under Art. 121 of UNCLOS III.

³⁹ Within the exclusive economic zone, other States enjoy the following rights under UNCLOS III:

Art. 58. Rights and duties of other States in the exclusive economic zone. -

1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.

2. Arts. 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part ...

Beyond the exclusive economic zone, other States enjoy the freedom of the high seas, defined under UNCLOS III as follows:

Art. 87. Freedom of the high seas. -

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:

(a) freedom of navigation;

(b) freedom of overflight;

(c) freedom to lay submarine cables and pipelines, subject to Part VI;

(d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;

(e) freedom of fishing, subject to the conditions laid down in section 2;

(f) freedom of scientific research, subject to Parts VI and XIII.

2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.



ARTICLE II

DECLARATION OF PRINCIPLES AND STATE POLICIES

PRINCIPLES

Section 1. The Philippines is a democratic and republican State. Sovereignty resides in the people and all government authority emanates from them.

Section 2. The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations.

In the *Baselines Law* case, **MAGALLONA v. ERMITA**, G.R. No. 187167, August 16, 2011, 671 Phil. 243,¹ Justice Carpio provided a sample application of the **principle of incorporation** enunciated in **Section 2 of Article II**:

In the absence of municipal legislation, international law norms, now codified in UNCLOS III, operate to grant innocent passage rights over the territorial sea or archipelagic waters, subject to the treaty's limitations and conditions for their exercise. Significantly, the right of innocent passage is a customary international law, thus **automatically incorporated in the corpus of Philippine law**. No modern State can validly invoke its sovereignty to absolutely forbid innocent passage that is exercised in accordance with customary international law without risking retaliatory measures from the international community.

Thereafter, the **principle of incorporation** was discussed at length by Justice Carpio in his **dissent** in **POE-LLAMANZARES v. COMMISSION ON ELECTIONS**, G.R. No. 221697, March 8, 2016,

¹ See discussion under Art. I.

786 SCRA 1.² These consolidated petitions³ assailed resolutions of the COMELEC (divisions and *en banc*) for having been issued without jurisdiction or with grave abuse of discretion amounting to lack or excess of jurisdiction. The COMELEC resolutions had cancelled the certificate of candidacy of then Senator Mary Grace Natividad Sonora Poe-Llamanzares for the May 2016 Presidential elections, primarily on the ground that she had misrepresented her status as a natural-born citizen of the Philippines. The Court *en banc* granted the petition, annulled and set aside the COMELEC resolutions, and declared that Poe-Llamanzares was qualified to be a candidate for President in the May 2016 elections.

Because **conventional international law, customary international law and generally accepted principles of international law** were invoked in **Poe-Llamanzares** to support the claim to natural-born Filipino citizenship, Justice Carpio reviewed and discussed these concepts in his **dissenting opinion**:

Article 38 of the Statute of the International Court of Justice sets out the following sources of international law: (1) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (2) international custom, as evidence of a general practice accepted as law; (3) general principles of law recognized by civilized nations; and (4) judicial decisions and the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law. Essentially, conventional international law is the body of international legal principles contained in treaties or conventions as opposed to customary international law or other sources of international law.⁴

Customary international law is defined as a general and consistent practice of states followed by them from a sense of legal obligation.⁵ I had occasion to explain the concept of customary international law as used in our Constitution in this wise:

Generally accepted principles of international law, as referred to in the Constitution, include customary international law. Customary international law is one of the primary sources of international law under

² See discussion under Art. IV.

³ Consolidated with G.R. Nos. 221698-700.

⁴ https://www.law.cornell.edu/wex/conventional_international_law.

⁵ *Pharmaceutical and Health Care Association of the Philippines v. Duque III*, 561 Phil. 386 (2007).

Article 38 of the Statute of the International Court of Justice. Customary international law consists of acts which, by repetition of States of similar international acts for a number of years, occur out of a sense of obligation, and taken by a significant number of States. It is based on custom, which is a clear and continuous habit of doing certain actions, which has grown under the aegis of the conviction that these actions are, according to international law, obligatory or right. Thus, customary international law requires the concurrence of two elements: (1) the established, wide-spread, and consistent practice on the part of the States; and (2) a psychological element known as *opinio juris sive necessitatis* (opinion as to law or necessity). Implicit in the latter element is a belief that the practice in question is rendered obligatory by the existence of a rule of law requiring it.⁶

In the *North Sea Continental Shelf Cases*,⁷ the International Court of Justice held that “[n]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element is implicit in the very notion of the *opinio juris sive necessitatis*.”

Moreover, to be considered as customary international law, a rule must apply to all, or majority of all, states. One possible exception to the universal applicability of customary international law is local or special custom. A local or special customary international rule binds only a group of states, regional or otherwise. “Regional customary international law refers to customary international law that arises from state practice and *opinio juris* of a discrete and limited number of states; as it departs from generally applicable customary international law, it is only binding upon and opposable against those states participating in its formation.”⁸

Generally accepted principles of international law are those legal principles which are so basic and fundamental

⁶ Dissenting opinion, Carpio, J., *Bayan Muna v. Romulo*, 656 Phil. 246, 326 (2011).

⁷ Judgment of 20 February 1969, at 77 (<http://www.icj-cij.org/docket/files/51/5561.pdf>).

⁸ John H. Currie, *Public International Law* (Second Edition, 2008).

that they are found universally in the legal systems of the world. These principles apply all over the world, not only to a specific country, region or group of states. Legal principles such as laches, estoppel, good faith, equity and *res judicata* are examples of generally accepted principles of international law.⁹ In *Pharmaceutical and Health Care Association of the Philippines v. Duque III*,¹⁰ the Court further explained the concept of generally accepted principles of law, to wit:

Some legal scholars and judges look upon certain “general principles of law” as a primary source of international law because they have the “character of *jus rationale*” and are “valid through all kinds of human societies.” (Judge Tanaka in his dissenting opinion in the 1966 *South West Africa Case*, 1966 I.C.J. 296). O’Connell holds that certain principles are part of international law because they are “basic to legal systems generally” and hence part of the *jus gentium*. These principles, he believes, are established by a process of reasoning based on the common identity of all legal systems. If there should be doubt or disagreement, one must look to state practice and determine whether the municipal law principle provides a just and acceptable solution. ...

Under ... Section 2, Article II of the 1987 Constitution, the Philippines adopts the generally accepted principles of international law as part of the law of the land. International law can become part of domestic law either by transformation or incorporation.¹¹ The transformation method requires that an international law be transformed into a domestic law through a constitutional mechanism such as domestic legislation. The incorporation method applies when, by mere constitutional declaration, international law is deemed to have the force of domestic law.¹²

The Philippine Constitution adheres to the incorporation method.

⁹ See Malcolm N. Shaw, *International Law* 69-77 (Seventh Edition, 2014).

¹⁰ 561 Phil. 386, 400 (2007), citing Louis Henkin, Richard C. Pugh, Oscar Schachter, Hans Smith, *International Law, Cases And Materials* 96 (2nd Ed.).

¹¹ *Pharmaceutical and Health Care Association of the Philippines v. Duque III*, 561 Phil. 386 (2007), citing 1 Joaquin G. Bernas, *Constitutional Structure And Powers Of Government (Notes And Cases)*, (2005).

¹² *Ibid.*

Any treaty, customary international law, or generally accepted international law principle has the status of municipal statutory law. As such, it must conform to our Constitution in order to be valid in the Philippines. If a treaty, customary international law or generally accepted international law principle does not contravene the Constitution and statutory laws, then it becomes part of the law of the land. If a treaty, customary international law or generally accepted international law principle conforms to the Constitution but conflicts with statutory law, what prevails is the later law in point of time as international law has the same standing as municipal statutory law.¹³ However, if a treaty, customary international law or generally accepted international law principle conflicts with the Constitution, it is the Constitution that prevails. **The Constitution remains supreme and prevails over any international legal instrument or principle in case of conflict.** In explaining Section 2, Article II of the 1987 Constitution, the constitutionalist Father Joaquin Bernas, S.J. narrated:

When Commissioner Guingona asked whether “generally accepted principles of international law” were adopted by this provision as part of statutory law or of constitutional law, Nollado’s answer was unclear. He seemed to suggest that at least the provisions of the United Nations Charter would form part of both constitutional and statutory law. Nobody adverted to the fact that Nollado’s interpretation was a departure from what had hitherto been the accepted meaning of the provision. Later, however, during the period of amendment, Commissioner Azcuna clarified this by saying that generally accepted principles of international law were made part only of statutory law and not of constitutional law.¹⁴

Section 3. Civilian authority is, at all times, supreme over the military. The Armed Forces of the Philippines is the protector of the people and the State. Its goal is to secure the sovereignty of the State and the integrity of the national territory.

Section 4. The prime duty of the Government is to serve and protect the people. The Government may call upon the people

¹³ Secretary of Justice v. Lantion, 379 Phil. 165 (2000).

¹⁴ Joaquin G. Bernas, The Intent Of The 1986 Constitution Writers, 75-76 (1995).

to defend the State and, in the fulfillment thereof, all citizens may be required, under conditions provided by law, to render personal, military or civil service.

PARREÑO v. COMMISSION ON AUDIT, G.R. No. 162224, June 7, 2007, 551 Phil. 368,¹⁵ was a petition for *certiorari* that, *inter alia*, questioned the constitutionality of Section 27 of Presidential Decree No. 1638.¹⁶ This section of the law had removed from the retired list of the Armed Forces of the Philippines retirees who had lost their Filipino citizenship. Justice Carpio, for the Court *en banc*, dismissed the petition and had occasion to briefly reference this **right of the State** in sustaining the constitutionality of the law:

There is a substantial difference between retirees who are citizens of the Philippines and retirees who lost their Filipino citizenship by naturalization in another country, such as petitioner in the case before us. **The constitutional right of the state to require all citizens to render personal and military service necessarily includes not only private citizens but also citizens who have retired from military service.** A retiree who had lost his Filipino citizenship already renounced his allegiance to the state. Thus, he may no longer be compelled by the state to render compulsory military service when the need arises. Petitioner's loss of Filipino citizenship constitutes a substantial distinction that distinguishes him from other retirees who retain their Filipino citizenship. If the groupings are characterized by substantial distinctions that make real differences, one class may be treated and regulated differently from another.¹⁷

Republic Act No. 7077¹⁸ (RA 7077) affirmed the constitutional right of the state to a Citizen Armed Forces. Section 11 of RA 7077 provides that citizen soldiers or reservists include ex-servicemen and retired officers of the AFP. Hence, even when a retiree is no longer in the active service, he is still a part of the Citizen Armed Forces. Thus, we do not find the requirement imposed by Section 27 of PD 1638, as amended, oppressive, discriminatory, or contrary to public policy. The state has the right to impose a

¹⁵ See discussions under Art. III, Sec. 1, and Art. IX-D, Sec. 2.

¹⁶ Establishing A New System Of Retirement And Separation For Military Personnel Of The Armed Forces Of The Philippines And For Other Purposes (1979).

¹⁷ *Tiu v. Court of Appeals*, 361 Phil. 229 (1999).

¹⁸ An Act Providing For The Development, Administration, Organization, Training, Maintenance And Utilization Of The Citizen Armed Forces Of The Philippines And For Other Purposes (1991).

reasonable condition that is necessary for national defense. To rule otherwise would be detrimental to the interest of the state.

Section 5. The maintenance of peace and order, the protection of life, liberty, and property, and the promotion of the general welfare are essential for the enjoyment by all the people of the blessings of democracy.

In **BASES CONVERSION AND DEVELOPMENT AUTHORITY v. COMMISSION ON AUDIT**, G.R. No. 178160, February 26, 2009, 599 Phil. 455, a petition for *certiorari* with prayer for the issuance of a temporary restraining order and a writ of preliminary injunction, the BCDA sought to nullify the decision of the COA that disallowed the year-end benefit granted by the BCDA to its Board members and full-time consultants. One of the grounds raised by the BCDA was that the grant of such year-end benefits was consistent with **Section 5 and Section 18 of Article II**. Justice Carpio, in the *en banc* decision, explained:

The Court is not impressed. Article II of the Constitution is entitled Declaration of Principles and State Policies. **By its very title, Article II is a statement of general ideological principles and policies. It is not a source of enforceable rights.**¹⁹ In *Tondo Medical Center Employees Association v. Court of Appeals*,²⁰ the Court held that **Sections 5 and 18, Article II of the Constitution are not self-executing provisions**. In that case, the Court held that “Some of the constitutional provisions invoked in the present case were taken from Article II of the Constitution - specifically, Sections 5 ... and 18 - the provisions of which the Court categorically ruled to be non-self-executing.”

Section 6. The separation of Church and State shall be inviolable.

On July 27, 2000, Alejandro Estrada wrote to then Judge Jose F. Caoibes, Jr., of the Regional Trial Court of Las Piñas City, and requested an investigation of rumors that Soledad Escritor, the court’s interpreter, was living with a man not her husband. During the

¹⁹ *Pamatong v. COMELEC*, G.R. No. 161872, 13 April 2004, 427 SCRA 96, 100-101; *Tañada v. Angara*, 338 Phil. 546, 580-583 (1997).

²⁰ G.R. No. 167324, 17 July 2007, 527 SCRA 746, 764-765.

preliminary conference, Escritor admitted that she had been living with Luciano Quilapio, Jr. without the benefit of marriage for twenty years and that they had a son, but, as a member of the Jehovah's Witnesses and the Watch Tower and Bible Tract Society, their conjugal arrangement was in conformity with their religious beliefs. Escritor and her partner had executed a declaration of "pledging faithfulness," but at the time of execution, Escritor's husband was still alive and living with another woman, and Quilapio was married, but separated in fact from his wife. The Estrada complaint was eventually endorsed to then Court Administrator Alfredo L. Benipayo, as A.M. No. P-02-1651, **ESTRADA v. ESCRITOR**. Then Deputy Court Administrator Christopher O. Lock recommended that the case be referred to then Executive Judge Bonifacio Sanz Maceda of Las Piñas City for investigation, report and recommendation. The Maceda report and recommendation noted that by strict Catholic standards, the live-in relationship was immoral conduct, but may not be for a member of Jehovah's Witnesses; acknowledged that religious freedom was a fundamental right which was entitled to "the highest priority and the amplest protection among human rights;" and recommended the dismissal of the complaint against Escritor. The Office of the Court Administrator, through Lock and with the approval of then Court Administrator Presbitero Velasco, concluded that Escritor may still be subject to disciplinary action as the defense of freedom of religion did not warrant dismissal of the charge of immorality, and recommended that Escritor be found guilty of immorality and penalized with suspension of six months and one day without pay with a warning that a repetition of a similar act would be dealt with more severely in accordance with the Civil Service Rules. In order to decide on this recommendation, the Court *en banc* found it necessary to determine whether or not Escritor's right to religious freedom carved out an exception from the prevailing jurisprudence on illicit relations for which government employees were held administratively liable. On August 4, 2003, the Court *en banc* remanded the case to the Office of the Court Administrator, and ordered the Solicitor General to intervene in the case to examine the sincerity and centrality of respondents claimed religious belief and practice; to present evidence on the State's compelling interest to override respondents religious belief and practice; and to show that the means the State adopts in pursuing its interest is the least restrictive to respondents' religious freedom.²¹

Justice Carpio **dissented** from the majority opinion in **Estrada**, and concluded that a remand of the case was "clearly unnecessary" as Escritor's unlawful cohabitation with Quilapio was an admitted fact

²¹ Estrada v. Escritor, A.M. No. P-02-1651, August 4, 2003.

that constituted the crime of concubinage under Philippine laws. He voted to suspend Escritor for six months and one day without pay for conduct prejudicial to the best interest of the service, but that the suspension would be lifted immediately upon Escritor's manifestation that she had ceased cohabiting with Quilapio. Moreover, he voted to warn Escritor that her continued cohabitation with Quilapio while Quilapio's marriage subsisted would merit the penalty of dismissal. In his **dissent**, Justice Carpio discussed the **separation of Church and State under Section 6 of this Article II**, and religious freedom under Section 5 of Article III:

I do not find Escritor liable for disgraceful and immoral conduct. The Jehovah's Witnesses, the church to which Escritor and Quilapio belong, formally approved in 1991 their relationship as husband and wife after a long and careful consideration by church elders. The members of the Jehovah's Witnesses have fully accepted the Escritor and Quilapio couple as part of their Christian community. In their religious and social community, Escritor and Quilapio are seen and treated just like any other husband and wife. The couple's cohabitation has not created any scandal, moral outrage or malicious gossip in their congregation or even in the community where they live and work. On the contrary, those who come to know of the couple's predicament in life express their sincerest sympathy and compassion.

When the Catholic Church annuls a marriage, and the parties remarry in church with different partners even without a court annulment of their marriage, do we condemn their second marriages as disgraceful and immoral conduct? When a Muslim man lives with more than one wife, do we declare his relationship with his other wives as disgraceful and immoral? In *Sulu Islamic Association of Masjid Lambayong v. Malik*,²² this Court ruled that a Muslim judge who takes a second wife is not guilty of disgraceful and immoral conduct because such practice is not immoral by Muslim standards. The Muslim judge is not also criminally liable for bigamy because Sharia law allows a Muslim to have more than one wife.

In *De Dios v. Alejo*,²³ the Court quoted with approval a decision of the Board of Civil Service dismissing an immorality charge against a clerk who, in the words of the Board, does not exercise a moral influence in the community and whose conduct has not

²² Adm. Matter No. MTJ-92-691, 10 September 1993, 226 SCRA 193.

²³ Adm. Matter No. P-137, 15 December 1975, 68 SCRA 354.

jeopardized the honor of any third person. The Board explained that those most concerned with the relationship - the unfaithful legal wife who no longer lived with respondent, the woman living with respondent and the four children, have not voiced an objection to the situation as it existed for ten (10) years. The Board added that technically, the clerk was guilty of immorality, but actually this can hardly be considered as notoriously disgraceful immoral conduct.

The term disgraceful and immoral conduct is not necessarily a single, ironclad universal code applicable to all situations, ethnic groups and religions. This Court has recognized Muslim standards on disgraceful and immoral conduct with respect to multiple marriages by Muslims. We cannot reject a Jehovah's Witness's standards on the same matter without violating the equal protection clause,²⁴ the free exercise of religion ...²⁵ and **the separation of Church and State provision** of the Constitution.

In disgraceful and immoral conduct, the conduct must not only be immoral, it must also be disgraceful. Immoral conduct means conduct that is willful, flagrant or shameless, and which shows a moral indifference to the opinion of the good and respectable members of the community.²⁶ Disgraceful conduct means conduct that is ignominious, shameful, and dishonorable.²⁷ Judge Bonifacio Maceda, whom the Court assigned to investigate the administrative charge, did not find the relationship between Escritor and Quilapio disgraceful and immoral in view of the acceptance of the relationship by members of the Jehovah's Witnesses. Even the complainant admits that Escritor is a decent woman. Indeed, no one has testified that Escritor's relationship with Quilapio is ignominious, shameful, or dishonorable conduct. Not a single witness who qualifies as a good and respectable member of the community has testified that Escritor's conduct is willful, flagrant and shameless.

However, while Escritor is not guilty of disgraceful and immoral conduct, her cohabitation with the legally married Quilapio, a fact Escritor readily admits, constitutes conduct prejudicial to the best interest of the service. Quilapio, whose marriage to another

²⁴ Const., Art. III, Sec. 1.

²⁵ Const., Art. III, Sec. 5.

²⁶ *Arciga v. Maniawang*, Admin. Case. No. 1608, 14 August 1981, 106 SCRA 594; *Blacks Law Dictionary* 751, 6th Edition (1990).

²⁷ *Black's Law Dictionary* 468, id.

woman still subsists, is liable for concubinage under Article 334 of the Revised Penal Code for cohabiting with Escritor. There is no showing that Quilapio's wife has consented to Quilapio's cohabitation with Escritor. In concubinage, the concubine is a necessary co-accused of the offending spouse.²⁸ The concubine is punished with *destierro*. While no one can criminally prosecute Quilapio and Escritor without the complaint of Quilapio's legal wife, still this Court cannot countenance such unlawful conduct by a court employee. In conduct prejudicial to the best interest of the service, the immorality of the conduct is not in issue. What is in issue is the adverse effect of the conduct on the efficiency, integrity and credibility of the civil service, and in the case of the judiciary, its impact on the administration of justice.

The Court cannot simply turn a blind eye to the conduct of a court employee that, by the employee's own admission, violates our criminal statutes. Such conduct is prejudicial to the best interest of the administration of justice. Court employees, from the highest magistrate to the lowliest clerk, are expected to abide scrupulously with the law. They are held to a higher standard since they are part of the judicial machinery that dispenses justice. The courts of justice cannot harbor those who openly and knowingly commit a crime. Courts of justice would lose their moral authority and credibility if they condone violators of the law. They would be remiss in their solemn duty of upholding the law if they continue to employ those who admit running afoul with our criminal statutes. Thus, there exists a compelling state interest to hold Escritor to the same standards required of every court employee. If unsanctioned, Escritor's unlawful conduct would certainly impair the integrity and credibility of the judiciary.

Unlike in *Sulu Islamic Association of Masjid Lambayong v. Malik*,²⁹ no law validates the cohabitation of Escritor with Quilapio. For the Court to provide a safe haven to Escritor despite her admission of cohabitation with Quilapio would undermine the integrity and capacity of this Court to dispense justice equally and fairly. The Jehovah's Witnesses cannot declare Escritor's cohabitation with Quilapio as lawful, although it can declare such cohabitation as compatible with its religious beliefs. **The Court cannot penalize Escritor's cohabitation as immoral in view of the freedom of religion and the separation of**

²⁸ Revised Penal Code, Art. 334.

²⁹ Adm. Matter No. MTJ-92-691, 10 September 1993, 226 SCRA 193.

Church and State. However, on the same principle of separation of Church and State, the Court can penalize Escritor's cohabitation as conduct prejudicial to the best interest of the service.

Thomas Jefferson, who championed the free exercise of religion and non-establishment clauses in the U.S. Constitution, from which we adopted our own counterpart provisions, wrote to the Baptists in 1802 when he was President:

Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith and worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should make no law respecting an establishment of religion, or prohibiting the free exercise thereof, thus building a wall of separation between Church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.³⁰

In the landmark case of *Reynolds v. United States*,³¹ the U.S. Supreme Court stated that Jefferson's explanation is almost an authoritative declaration of the scope and effect of the two constitutional clauses. **The legislature has no power to regulate mere religious belief or opinion. The legislature, however, may regulate actions or conduct, even though religiously motivated, that violate the public order.** The legislature's power to outlaw concubinage, bigamy, polygamy and other conduct harmful to public order, despite religious practices allowing such conduct, is well-settled in American jurisprudence.³²

In *Employment Division v. Smith*,³³ the U.S. Supreme Court rejected a claim by the Native American Church that smoking *peyote*, classified as a controlled substance, is protected by the free

³⁰ Quoted in *Reynolds v. United States*, 98 U.S. 145.

³¹ 98 U.S. 145.

³² David Barton, *The Image and the Reality: Thomas Jefferson and the First Amendment*, 17 Notre Dame Journal of Law, Ethics and Public Policy 399 (2003).

³³ 414 U.S. 872 (1990).

exercise of religion if done as part of a religious ceremony. The U.S. Supreme Court clarified its earlier ruling in *Wisconsin v. Yoder*³⁴ by stating that it had never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.

In *Smith*, the U.S. Supreme Court stated that the legislation prohibiting controlled substances was a neutral law that applied to all citizens and did not single out the Native American Church. Applying the hybrid test, the U.S. Supreme Court held that the free exercise of religion, standing alone without any other constitutional right being invoked, cannot defeat the States right to regulate the use of controlled substances.

In the instant case, Escritor's sole constitutional justification in claiming exemption from the prohibition on concubinage is her religious belief. Escritor does not claim that her conduct is protected by any other guarantee under the Bill of Rights. Moreover, Article 334 of the Revised Penal Code, as originally enacted and as presently in force, does not single out the Jehovah's Witnesses.

The power of the legislature to declare concubinage a crime against the State is certainly beyond dispute. In effect, the legislature pronounces a socially reprehensible act, which may or may not constitute an immoral act by certain religious standards, a crime that the State has a right to suppress to protect public order and the general welfare. The wall of separation between Church and State is no defense against the State's police power over conduct constituting concubinage, bigamy or polygamy.

While Escritor's cohabitation with Quilapio conforms to the religious beliefs of the Jehovah's Witnesses, the cohabitation violates Article 334 of the Revised Penal Code. The State cannot interfere with the religious beliefs of the Jehovah's Witnesses, in the same way that the Jehovah's Witnesses cannot interfere with the State's prohibition on concubinage. The free exercise of religion protects practices based on religious grounds provided such practices do not violate existing laws enacted in the

³⁴ 406 U.S. 205 (1972).

reasonable exercise of the State's police power.³⁵

As early as in 1933 in *People v. Bitdu*,³⁶ this Court has ruled that religious practices cannot override laws relating to public policy. In *Bitdu*, the accused, a Muslim woman charged with bigamy, raised the defense that under Muslim religious customs she validly divorced her first husband. At that time there was no statute recognizing divorces and multiple marriages under Sharia law. In rejecting this defense, this Court quoted with approval the trial court's decision stating as follows:

... In the Philippine Islands we have a law (Act No. 2710) enumerating the causes and conditions under which divorce may be secured and granted. Any divorce obtained in the Philippine Islands for causes and under conditions other than those enumerated in said law, would have no legal effect. The habits and customs of a people, the dogmas or doctrines of a religion cannot be superior to or have precedence over laws relating to public policy...

In *Bitdu*, the Solicitor-General urged this Court to uphold the validity of Muslim divorces, citing the case of American Indians whose customs and practices on marriages and divorces were, and still are, recognized by the United States Government. This Court stated:

The decisions of American courts, cited by the Solicitor-General, sustaining the validity of divorces granted to members of Indian tribes according to the customs and usages thereof, are likewise not in point. The various Indian tribes in the United States were dealt with by the Government of the United States as independent nations and treaties were made with them.

As to the suggestion of the Solicitor-General that divorces among the Moros according to their religious practices should be recognized as valid as a matter of public policy, because in the contrary case "there would be no end of criminal prosecutions, for polygamy still abounds among them, and the remarriages of people divorced under the Koran are the order of the day," that is a matter for the consideration of the Legislature and the Governor-General. ...

³⁵ Joaquin G. Bernas, *The 1987 Constitution Of The Republic Of The Philippines: A Commentary* (2003) 321, citing *Reynolds v. United States*, 98 U.S. 145 (1878).

³⁶ 58 Phil. 817 (1933).

The free exercise of religious belief is absolutely protected, but the freedom to act according to such religious belief is subject to the police power of the State.³⁷ As held in *Reynolds v. United States*³⁸ which involved the practice of polygamy:

In our opinion, the statute immediately under consideration is within the legislative power of Congress. It is constitutional and valid as prescribing a rule of action for all those residing in the Territories, and in places over which the United States have exclusive control. This being so, the only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do, must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

Article 334 of the Revised Penal Code seeks to protect marriage as the foundation of the family. **The Constitution mandates that [m]arriage, as an inviolable social institution, is the foundation of the family and shall be protected by the State. Article 334 of the Revised Penal Code is a reasonable exercise of the State's police power to protect a social institution that the Constitution declares as**

³⁷ Id. at 322, citing *Cantwell v. Connecticut*, 310 U.S. 296 (1944).

³⁸ 98 U.S. 145.

inviolable. The religious teachings of the Jehovah's Witnesses cannot amend or repeal Article 334 of the Revised Penal Code on concubinage. Escritor clearly recognized this when she promised to legalize in the future her union with Quilapio.

Under the Revised Administrative Code of 1987, one of the grounds for disciplinary action is conduct prejudicial to the best interest of the service.³⁹ The penalty for a first offense is suspension of six months and one day to one year. A second offense is punishable with dismissal from the service.

Escritor, however, deserves the same compassionate treatment accorded to a similarly situated court employee in *De Dios v. Alejo*⁴⁰ if Escritor should end her unlawful relationship with Quilapio. In *De Dios*, the Court, in deciding not to dismiss an employee because he finally terminated his cohabitation with another woman, ruled:

In the instant case, We cannot close our eyes to the important considerations that respondents have rendered government service for more than thirty-three and twenty-five years, respectively, and that there is no showing that they have ever been found guilty of any administrative misconduct during all those periods. In the case of respondent Alejo, it seems rather sadistic to make her suffer the extreme penalty of dismissal from the service after she had taken care of her co-respondent's four children, giving them the needed love and attention of a foster mother after they were completely abandoned by their errant and unfaithful natural mother. Even respondent Marfil, if to a lesser degree, is deserving of compassion. Most importantly, respondents have amply demonstrated that they recognize their mistake and have, therefore, actually mended their ways by totally breaking their relationship complained of, in order to conform with the imperatives of public interest. Objectively speaking, it cannot be denied that such separation requires a great deal of sacrifice and entails personal difficulties that cannot be easily ignored, thus making the resolution of respondents to give up what is most meaningful to them worthy of some measures of liberality in the imposition of the indispensable penalty which has to be meted to them.

Therefore, any initial penalty imposed on Escritor should be

³⁹ 1987 Revised Administrative Code, Book V, Chap. 6, Sec. 46(27).

⁴⁰ Adm. Matter No. P-137, 15 December 1975, 68 SCRA 354.

lifted the moment she ends her cohabitation with Quilapio.

Given the circumstances, it would seem unduly harsh to penalize Escritor for cohabiting for the last 23 years with a man she believes is her husband and she knows is the father of her son. No third party has claimed or suffered injury because of their cohabitation. On the contrary, suspending or even dismissing her for her continued cohabitation would only work hardship on her family. **The remedy, however, lies not with this Court but with the legislature. We can only call the legislature's attention to Escritor's failure to legalize her union with Quilapio, a failure that deserves legislative inquiry and probably remedy, even as we are bound to apply the law without fear or favor.**

STATE POLICIES

Section 7. The State shall pursue an independent foreign policy. In its relations with other states, the paramount consideration shall be national sovereignty, territorial integrity, national interest, and the right to self-determination.

Section 8. The Philippines, consistent with the national interest, adopts and pursues a policy of freedom from nuclear weapons in its territory.

Section 9. The State shall promote a just and dynamic social order that will ensure the prosperity and independence of the nation and free the people from poverty through policies that provide adequate social services, promote full employment, a rising standard of living, and an improved quality of life for all.

Section 10. The State shall promote social justice in all phases of national development.

Section 11. The State values the dignity of every human person and guarantees full respect for human rights.

MVRS PUBLICATIONS, INC. v. ISLAMIC DA'WAH COUNCIL OF THE PHILIPPINES, INC., G.R. No. 135306, January 28, 2003, 444 Phil. 230, was a petition for review that assailed a decision of the Court of Appeals, which reversed the trial court's dismissal of a complaint for damages filed by Islamic Da'wah Council of the Philippines, Inc. against MVRS Publications, Inc., for an article published in the latter's

daily tabloid, *Bulgar*. The Court of Appeals found that the article in dispute, which stated that “pigs were sacred and idolized as god by members of the Muslim religion,” was a defamation “directed to all adherents of the Islamic faith.” The Court *en banc* reversed this decision and reinstated the decision of the trial court that dismissed the complaint for lack of merit, “holding that the plaintiffs failed to establish their cause of action since the persons allegedly defamed by the article were not specifically identified.” Justice Carpio **dissented**, “not because the newspaper article in question (was) libelous, but because it constitute(d) an intentional tortious act causing mental distress to those whom ... Islamic Da’wah Council of the Philippines, Inc. represent(ed).” Justice Carpio then discussed Article 26(4) of the Civil Code⁴¹ and related it to the **guarantee of respect for human rights contained in this Article II**:

Constitutional Guarantee of ‘Full Respect for Human Rights’

The 1987 Constitution provides that “[t]he State values the dignity of every human person and guarantees full respect for human rights.” The Constitution created a Commission on Human Rights with the function, among others, to “[m]onitor the Philippine Government’s compliance with international treaty obligations on human rights.”⁴² **The framers of the Constitution made it clear that the term “human rights” as used in the Constitution referred to the civil and political rights embodied in the International Covenant on Civil and Political Rights to which the Philippines is a signatory.** This is clear from the following exchange in the deliberations of the Constitutional Commission:

MR. GARCIA: But it does not mean that we will refer to each and every specific article therein, but only to those that pertain to the civil and politically related, as we understand it in this Commission on Human Rights.

MR. GUINGONA: Madam President, I am not clear as to the distinction between social and civil rights.

⁴¹ Every person shall respect the dignity, personality, privacy and peace of mind of his neighbor and other persons. The following and similar acts, though they may not constitute a criminal offense, shall produce a cause of action for damages, prevention and other relief:

...

(4) Vexing or humiliating another on account of his religious belief, lowly station in life, place of birth, physical defect, or other personal condition.

⁴² Const., Art. XIII, Sec. 18 (7).

MR. GARCIA: There are two international covenants: the International Covenant (on) Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The second covenant contains all the different rights - the rights of labor to organize, the right to education, housing, shelter, etcetera.

MR. GUINGONA: So we are just limiting at the moment the sense of the committee to those the Gentleman has specified.

MR. GARCIA: Yes, to civil and political rights. ...⁴³

Article 20 (2) of the International Covenant on Civil and Political Rights provides that “[a]ny advocacy of ... religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.” The Human Rights Committee created under the Covenant, in its 1983 Nineteenth Session, reported to member states that:

1. ... In view of the nature of article 20, States parties are obliged to adopt the necessary legislative measures prohibiting the actions referred to therein. However, the reports have shown that in some States such actions are neither prohibited by law nor are appropriate efforts intended or made to prohibit them. Further, many reports failed to give sufficient information concerning the relevant national legislation and practice.

2. ... For article 20 to become fully effective there ought to be a law making it clear that propaganda and advocacy as described therein are contrary to public policy and providing for an appropriate sanction in case of violation. ...⁴⁴

The Covenant, being an international treaty to which the Philippines is a signatory, is part of the country’s municipal law.⁴⁵ The Covenant carries great weight in the interpretation of the scope and meaning of the term “human rights” as used in the Constitution. Unquestionably, the framers of the Constitution intentionally referred to the civil and political rights embraced in the Covenant in describing the term “human rights.” The Constitution even mandates the independent Commission on Human Rights to monitor the compliance of the Philippine Government, which includes the judiciary, with its treaty obligations under the Covenant.

⁴³ Simon, Jr. v. Commission on Human Rights, 229 SCRA 117 (1994).

⁴⁴ CCPR General Comment 11, 19th Session (1983), Office of the High Commissioner for Human Rights.

⁴⁵ La Chemise Lacoste, S. A. v. Fernandez, 129 SCRA 373 (1984); Ram Singh v. Insular Collector of Customs, 38 Phil. 862 (1918).

Paragraph 4, Article 26 of the Civil Code makes civilly liable any person who humiliates another because of his religious beliefs. This is just a soft prohibition of advocacy of religious hatred that incites discrimination, hostility or violence, the act the Covenant seeks to curb and which the Philippine Government has undertaken to declare unlawful. Other countries that signed the Covenant have criminalized the acts prohibited under the Covenant. Since our ratification of the Covenant in 1986, the Philippines has not enacted any special legislation to enforce the provisions of the Covenant, on the ground that existing laws are adequate to meet the requirements of the Covenant. There is no other law, except paragraph 4, Article 26 of the Civil Code, that can provide a sanction against intentional conduct, falling short of a criminal act, advocating religious hatred that incites hostility between Muslims and Christians in this country.

If we are to comply in good faith with our treaty obligations under the Covenant, as the Constitution expressly mandates the Philippine Government, we must give redress under Article 26 to the outrageous profanity suffered by private respondents. Our Constitution adopts the generally accepted principles of international law as part of the law of the land. *Pacta sunt servanda* - every treaty in force binds the parties who must comply with the treaty in good faith⁴⁶ - is one such principle. Thus, if we refuse to apply Article 26 to the instant case, then we admit that we have no law to enforce the Covenant. In effect, we admit non-compliance with the Covenant.

The Supreme Court of Canada, in interpreting Canada's obligation under the Covenant, explained in *R. v. Keegstra*:⁴⁷

C.E.R.D. (Convention on the Elimination of All Forms of Racial Discrimination) and I.C.C.P.R. (International Covenant on Civil and Political Rights) demonstrate that the prohibition of hate promoting expression is considered to be not only compatible with a signatory nation's guarantee of human rights, but is as well an obligatory aspect of this guarantee. Decisions under the European Convention for the Protection of Human Rights and Fundamental Freedoms are also of aid in illustrating the tenor of the international community's approach to hate propaganda and free expression. This is not to deny that finding the correct balance between prohibiting

⁴⁶ Vienna Convention on the Law of Treaties, Art. 26.

⁴⁷ 3 S.C.R. 697 (1990).

hate propaganda and ensuring freedom of expression has been a source of debate internationally (see, e.g., Nathan Lerner, *The U.N. Convention on the Elimination of All Forms of Racial Discrimination* (1980), at pp. 43-54). But despite debate Canada, along with other members of the international community, has indicated a commitment to prohibiting hate propaganda, and in my opinion this court must have regard to that commitment in investigating the nature of the government objective behind s. 319(2) of the Criminal Code. That the international community has collectively acted to condemn hate propaganda, and to oblige State Parties to C.E.R.D. and I.C.C.P.R. to prohibit such expression, thus emphasizes the importance of the objective behind s. 319(2) and the principles of equality and the inherent dignity of all persons that infuse both international human rights and the Charter.

As a signatory to the Covenant, the Philippines is, like Canada, obligated under international law and the 1987 Constitution to protect the inherent dignity and human rights of all its citizens.

Freedom of Expression and Profane Utterances

The blatant profanity contained in the newspaper article in question is not the speech that is protected by the constitutional guarantee of freedom of expression. Words that heap extreme profanity, intended merely to incite hostility, hatred or violence, have no social value and do not enjoy constitutional protection. As explained by the United States Supreme Court in the landmark case of *Chaplinsky v. New Hampshire*:⁴⁸

Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words - those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition

⁴⁸ 315 U.S. 568, 62 S. Ct. 766 (1942).

of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.

Chaplinsky expressly includes profane utterances as belonging to the narrowly limited classes of speech that are not constitutionally protected. Profane utterances, like asserting that Muslims worship the pig as their God, have no social value meriting constitutional protection. Black's Law Dictionary (6th Ed.) defines the words "profane" and "profanity" as follows:

Profane. Irreverence toward God or holy things. Writing, speaking, or acting, in manifest or implied contempt of sacred things. *Town of Torrington v. Taylor*, 59 Wyo. 109, 137 P.2d 621, 624; *Duncan v. U.S.*, C.C.A. Or., 48 F.2d 128, 133. That which has not been consecrated.

Profanity. Irreverence towards sacred things; particularly, an irreverent and blasphemous use of the name of God. Vulgar, irreverent, or coarse language. It is a federal offense to utter an obscene, indecent, or profane language on radio. 18 U.S.C.A. §1464. See also Obscenity.

The majority opinion⁴⁹ states that the doctrine in *Chaplinsky* "had largely been superseded by subsequent First Amendment doctrines." The majority opinion then cites the 1971 case of *Cohen v. California*⁵⁰ as an "illustrative" case that "American courts no longer accept the view that speech may be proscribed merely because it is lewd, profane, insulting or otherwise vulgar or offensive."

However, *Hustler Magazine v. Falwell*,⁵¹ a 1988 case which the majority opinion also cites, clearly explains the state of American law on this matter, thus:

Admittedly, these oft-repeated First Amendment principles, like other principles, are subject to limitations. We recognized in *Pacifica Foundation* that speech that is 'vulgar, offensive, and shocking' is 'not entitled to absolute constitutional

⁴⁹ Majority opinion, Bellosillo, J.

⁵⁰ 403 U.S. 15 (1971).

⁵¹ 485 U.S. 46 (1988).

protection under all circumstances.’ In *Chaplinsky v. New Hampshire*, we held that that a State could lawfully punish an individual for the use of insulting ‘fighting words’ - those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.’ These limitations are but recognition of the observation in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* 472 U.S. 749 (1985) that this Court has ‘long recognized that not all speech is of equal First Amendment importance.’ ...

Indeed, while democratic societies maintain a deep commitment to the principle that debate on public issues should be uninhibited, robust and wide open, this free debate has never been meant to include libelous, obscene or profane utterances against private individuals.⁵² Clearly, the newspaper article in question, dripping with extreme profanity, does not enjoy the protection of the constitutional guarantee of freedom of speech.

Court’s Duty and Power to Enforce Constitutional Rights

The 1987 Constitution has conferred on the Court the power to “[p]romulgate rules concerning the protection and enforcement of constitutional rights.” This is an innovation in the 1987 Constitution to insure, in the words of former Chief Justice Roberto R. Concepcion, one of the framers of the Constitution, that “the protection and enforcement of these constitutional rights is something that the courts have to consider in the exercise of their judicial power.”⁵³ This provision stresses that constitutional rights, whether found in the Bill of Rights or in other provisions of the Constitution like in the Declaration of Principles and State Policies, are “not merely declaratory but are also enforceable.”⁵⁴

One such right, the enforcement and protection of

⁵² *New York Times v. Sullivan*, 376 U.S. 254 (1964). Prior to *New York Times*, the prevailing view in the U.S. was that lewd, obscene and profane speech was not constitutionally protected, whether directed at private individuals or public officials. *New York Times* imposed, with respect to public officials, a qualified constitutional privilege. The U.S. Supreme Court stated that “the constitutional protections for speech and press require a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice,’ that is, with knowledge that it was false or made with reckless disregard of whether it was false or not.”

⁵³ I Record, Constitutional Commission 491-492.

⁵⁴ *Ibid.*

which is expressly guaranteed by the State under the Constitution, is the right to “full respect for human rights.” The trial and appellate courts have found that private respondents’ religious beliefs and practices have been twisted, ridiculed and vilified by petitioners. This is a clear violation of the human rights of private respondents under the Constitution and the International Covenant on Civil and Political Rights. It now becomes the duty of the Court, as the guardian of the fundamental rights of the people, to exercise its power to protect and enforce the constitutional rights of private respondents.

The Court, pursuant to its rule-making power, can require that in actions like the instant case, the plaintiffs must bring a class suit. This will avoid multiplicity of suits considering the numerous potential plaintiffs all over the country. A judgment in a class suit, whether favorable or unfavorable to the class, is binding under the *res judicata* principle on all members of the class whether or not they were before the court.⁵⁵ This rule will address the fear that cases will swamp the courts all over the country if profanities against religious groups are made actionable under Article 26.

The Special Circumstance of Muslim Secession in the South

Limitations on freedom of expression have always been rooted on special circumstances confronting a society in its historical development. In the 1950s, faced with rising racial tension in American society, the U.S. Supreme Court ruled in *Beauharnais v. Illinois*⁵⁶ that hate speech which denigrates a group of persons defined by their religion, race or ethnic origin defames that group and the law may validly prohibit such speech on the same ground as defamation of an individual. This was the only time that the U.S. Supreme Court upheld group libel, and since then, there has been a consistent retreat from this doctrine as blacks and other ethnic groups became more assimilated into the mainstream of American society. *Beauharnais* expressly acknowledged that race riots and massive immigration of unassimilated ethnic groups justified the legislature in “punishing ... libels directed at designated collectives and flagrantly disseminated.”

⁵⁵ Re: Request of the Heirs of the Passengers of Doña Paz, 159 SCRA 623 (1988).

⁵⁶ 343 U.S. 250 (1952).

The majority opinion states also that *Beauharnais* has been superseded by *Brandenburg v. Ohio*.⁵⁷ The majority opinion explains that *Brandenburg*, a 1969 decision, ruled that “advocacy of illegal action becomes punishable only if such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” While *Beauharnais* has been apparently weakened by subsequent decisions of the U.S. Supreme Court, it was not overturned in *Brandenburg* which did not even cite or mention *Beauharnais*. What *Brandenburg* overturned was *Whitney v. California*⁵⁸...

In any event, *Brandenburg* involved the constitutionality of a criminal statute which sought to punish the mere advocacy of violence as a means to accomplish industrial or political reform. This is distinctly different from the instant case, which involves profane utterances that have long been recognized as devoid of social value and outside the purview of constitutionally protected speech.⁵⁹

In 1990, the Canadian Supreme Court, in *R. v. Keegstra*,⁶⁰ upheld a law criminalizing hate speech toward any section of the public distinguished by color, race, religion or ethnic origin. The Canadian Supreme Court rejected the clear and present danger test of the U.S. Supreme Court, stating that it did not address the psychological trauma hate propaganda causes and the subtle and incremental way hate propaganda works. The Canadian Supreme Court found the U.S. Supreme Court’s *Beauharnais* decision more reflective of Canadian values rather than later U.S. decisions that weakened *Beauharnais*. The Canadian Supreme Court handed down *Keegstra* at a time when Canada was becoming a multi-racial society following the influx of immigrants of different color, ethnic origin and religion. The following passages in *Keegstra* are instructive:

A myriad of sources - both judicial and academic - offer reviews of First Amendment jurisprudence as it pertains to hate propaganda. Central to most discussions is the 1952 case of *Beauharnais v. Illinois*, where the Supreme Court of the United States upheld as constitutional a criminal statute forbidding certain types of group defamation. Though never

⁵⁷ 395 U.S. 444 (1969).

⁵⁸ 274 U.S. 357.

⁵⁹ *Chaplinsky v. New Hampshire*, 3 S.C.R. 697 (1990), *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

⁶⁰ 3 S.C.R. 697 (1990).

overruled, *Beauharnais* appears to have been weakened by later pronouncements of the Supreme Court (see, e.g., *Garrison v. Louisiana*, 379 U.S. 64 (1964); *Ashton v. Kentucky*, 384 U.S. 195 (1966); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); and *Cohen v. California*, 403 U.S. 15 (1971)). The trend reflected in many of these pronouncements is to protect offensive, public invective as long as the speaker has not knowingly lied and there exists no clear and present danger of violence or insurrection.

...

The question that concerns us in this appeal is not, of course, what the law is or should be in the United States. But it is important to be explicit as to the reasons why or why not American jurisprudence may be useful in the s. 1 analysis of s. 319(2) of the Criminal Code. In the United States, a collection of fundamental rights has been constitutionally protected for over 200 years. The resulting practical and theoretical experience is immense, and should not be overlooked by Canadian courts. On the other hand, we must examine American constitutional law with a critical eye, and in this respect La Forest, J. has noted in *R. v. Rahey*, (1987) 1 S.C.R. 588 at 639:

While it is natural and even desirable for Canadian courts to refer to American constitutional jurisprudence in seeking to elucidate the meaning of Charter guarantees that have counterparts in the United States Constitution, they should be wary of drawing too ready a parallel between constitutions born to different countries in different ages and in very different circumstances...

Canada and the United States are not alike in every way, nor have the documents entrenching human rights in our two countries arisen in the same context. It is only common sense to recognize that, just as similarities will justify borrowing from the American experience, differences may require that Canada's constitutional vision depart from that endorsed in the United States.

...

First, it is not entirely clear that *Beauharnais* must conflict with existing First Amendment doctrine. Credible arguments have been made that later Supreme Court cases do not necessarily erode its legitimacy (see, e.g., Kenneth Lasson, "Racial Defamation as Free Speech: Abusing the First Amendment" (1985), 17 Column. Human Rights L. Rev. 11). Indeed, there exists a growing body of academic writing in the United States which evinces a stronger focus upon the way in which hate

propaganda can undermine the very values which free speech is said to protect. This body of writing is receptive to the idea that, were the issue addressed from this new perspective, First Amendment doctrine might be able to accommodate statutes prohibiting hate propaganda (see, e.g., Richard Delgado, "Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling" (1982), 17 Harv. C.R.-C.L. Law Rev. 133; Irving Horowitz, "Skokie, the ACLU and the Endurance of Democratic Theory" (1979), 43 Law & Contemp. Prob. 328; Lasson, op. cit., at pp. 20-30; Mari Matsuda, "Public Response to Racist Speech: Considering the Victim's Story" (1989), 87 Mich. L. Rev. 2320, at p. 2348; "*Doe v. University of Michigan*: First Amendment - Racist and Sexist Expression on Campus - Court Strikes Down University Limits on Hate Speech" (1990), 103 Harv. L. Rev. 1397).

In deciding *Keegstra*, the Canadian Supreme Court also relied on Canada's treaty obligations under the United Nations International Covenant on Civil and Political Rights which requires signatory states to prohibit any "advocacy of ... religious hatred that constitutes incitement to discrimination, hostility or violence." During the negotiations of the Covenant, the United States objected to this provision on free speech grounds. When it finally ratified the Covenant, the United States made a reservation rejecting this provision insofar as it conflicts with U.S. constitutional protections.⁶¹ The Covenant opened for ratification on December 19, 1966 and entered into force on March 23, 1976. The Philippines ratified the Covenant in 1986 without any reservation, just like Canada. The 1987 Constitution of the Philippines even created a Commission on Human Rights to "[m]onitor the Philippine Government's compliance with international treaty obligations on human rights." Obviously, Canada and the Philippines are alike in their obligations under the Covenant, but the United States is differently situated.⁶²

In our country, there has been a long festering and bloody Muslim secessionist movement in the South, fueled not only by poverty but also by the palpable feeling among Muslims that the Christian majority is not treating Muslims fairly. Private respondents in the instant case, despite the outrageous profanity

⁶¹ William B. Fisch, *Hate Speech in the Constitutional Law of the United States*, American Journal of Comparative Law (Fall 2002).

⁶² "American constitutional law generally protects hate speech of various kinds, including religious and racial. In this area, the law of the United States is precisely contrary to international human rights norms. Art. 20(2) of the International Covenant

hurled at them by petitioners, chose not to join their secessionist brethren in the armed struggle but instead decided to petition our courts for legal redress of their grievance. They could have easily retaliated by flinging their own blasphemous invectives against the Christian religion. They did not, realizing perhaps that answering profanity with more profanity would mean answering hatred with more hatred, further dividing rather than unifying the Filipino nation.

Just last November of 2002, a Christian newspaper in Nigeria where the Miss World contest was being held opined that the Prophet Mohammed would have approved of the beauty contest. The newspaper stated: "What would Mohammed think? In all honesty, he would have probably chosen a wife from one of them." These words provoked bloody rioting in Nigeria among Muslims who felt insulted by the article. Hundreds died in the religious riots. Yet the offensive article in the Nigerian newspaper pales in comparison to the utterly profane newspaper article in the instant case.

Indeed, private respondent Islamic Da'wah Council of the Philippines, a federation of more than 70 Muslim religious organizations in the Philippines, deserves commendation for bringing this case before our courts for a peaceful and legal resolution of the issue. Private respondents have placed their trust and faith in our courts, knowing and insisting that they are entitled to a just remedy under paragraph 4, Article 26 of the Civil Code. It is time to breathe life to this long dormant provision of the Civil Code, to give even just a token redress to religious minorities who suffer mental and emotional distress from mindless profanity committed by irresponsible persons belonging to the religious majority. In the process we will contribute in avoiding a further cleavage in the fabric of our nation, and demonstrate to our Muslim brothers that their grievances can be redressed under the rule of law.

The instant case does not even call for a re-examination of the clear and present danger test which we have adopted in this jurisdiction in determining the constitutionality of legislation that impinges on civil liberties.⁶³ Even under the clear and

on Civil and Political Rights states, 'Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.'" David M. Smolin, *Exporting the First Amendment?: Evangelism, Proselytism, and the International Religious Freedom Act*, 31 Cumberland Law Review 2000-2001.

⁶³ ABS-CBN Broadcasting Corp. v. COMELEC, 323 SCRA 811 (2000).

present danger test, profane utterances are not constitutionally protected at least with respect to profanities directed against private individuals. The special circumstance involving the Muslim secessionist movement in the South should make us more sensitive to the grievances of our Muslim brothers who continue to have faith in the rule of law in this country.

Since the peace of mind of private respondents has been violated by the publication of the profane article in question, Article 26 of the Civil Code mandates that the tortious conduct “shall produce a cause of action for damages, prevention and other relief.” Article 2219 of the same Code provides that “[m]oral damages may be recovered in ... actions referred to in Articles 21, 26 ...” Private respondents are entitled to moral damages because, as duly established by the testimonies of prominent Muslims, private respondents suffered emotional distress which was evidently the proximate result of the petitioners’ wrongful publication of the article in question.

Conclusion

Almost thirty years ago, I had occasion to write about Article 26 in this wise:

At the time Article 26 was lifted by the Code Commission from American jurisprudence, many of the rights embodied therein were not yet widely accepted by American courts, and in fact even now at least one, the right to privacy, is still struggling to gain recognition in some states. While we have been quick to leapfrog American state decisions in recognizing such rights, we have, however, been painfully slow in galvanizing the same in actual cases. To date Article 26 stands almost as a mere decorative provision in our statutes, but it may be harnessed fruitfully anytime.⁶⁴

Now is the time to apply this provision of law since the instant case falls clearly within paragraph 4 of Article 26. Applying Article 26 will not undermine freedom of speech since the profane publication in question belongs to the class of speech that clearly does not enjoy constitutional protection. **Applying Article 26 demonstrates good faith compliance with our treaty obligations under the International Covenant on Civil**

⁶⁴ Antonio T. Carpio, *Intentional Torts in Philippine Law*, Vol. 47 No. 5 Philippine Law Journal, (December 1972).

and Political Rights. Applying Article 26 implements the constitutional policy that the “State values the dignity of every human person and guarantees full respect for human rights.” Applying Article 26 constitutes compliance by the Court of its constitutional duty to protect and enforce constitutional rights. Applying Article 26 will help bind the wounds that mindless profanities inflict on religious minorities in violation of their human rights.

Section 12. The State recognizes the sanctity of family life and shall protect and strengthen the family as a basic autonomous social institution. It shall equally protect the life of the mother and the life of the unborn from conception. The natural and primary right and duty of parents in the rearing of the youth for civic efficiency and the development of moral character shall receive the support of the Government.

On December 21, 2012, Republic Act No. 10354, the Responsible Parenthood and Reproductive Health Act of 2012 or RH Law, was passed. Several petitions for *certiorari* and prohibition were filed questioning the constitutionality of the law, and were consolidated⁶⁵ as **IMBONG v. OCHOA**, G.R. No. 204819, April 8, 2014. Ultimately, the Court *en banc* did not find the RH Law unconstitutional insofar as the law provided access to “medically-safe, non-abortifacient, effective, legal, affordable, and quality reproductive healthcare services, methods, devices, and supplies,” provided, the religious freedom of all sectors of society would not be “trampled upon.” Consequently, the Court declared the RH Law “not unconstitutional” except with respect to certain provisions that violated the principles of “no-abortion” and “non-coercion,” which were declared unconstitutional. Justice Carpio briefly explained his **concurrence** with the majority opinion,⁶⁶ citing **Section 12, Article II**:

⁶⁵ Alliance for the Family Foundation Philippines, Inc., (ALFI) v. Ochoa, G.R. No. 204934, Task Force for Family and Life Visayas, Inc. v. Ochoa, G.R. No. 204957, Serve Life Cagayan de Oro City, Inc. v. Office of the President, G.R. No. 204988, Bugarin, Jr. v. Office of the President, G.R. No. 205003, Olaguer v. Ona, G.R. No. 205043, Philippine Alliance of Xeminarians, Inc. (PAX) v. Ochoa, G.R. No. 205138, Echavez v. Ochoa, G.R. No. 205478, Tatad v. Office of the President, G.R. No. 205491, Pro-Life Philippines Foundation, Inc. v. Office of the President, G.R. No. 205720, Millennium Saint Foundation, Inc. v. Office of the President, G.R. No. 206355, Juat v. Ochoa, G.R. No. 207111, Couples for Christ Foundation, Inc. v. Ochoa, G.R. No. 207172, Tillah v. Ochoa, G.R. No. 207563.

⁶⁶ Majority opinion, Mendoza, J.C., J.

However, my opinion is that at this stage, **the Court is simply not competent to declare when human life begins, whether upon fertilization of the ovum or upon attachment of the fertilized ovum to the uterus wall.** The issue of when life begins is a scientific and medical issue that cannot be decided by this Court without the proper hearing and evidence. This issue has not even been settled within the scientific and medical community.

R.A. No. 10354, however, protects the ovum upon its fertilization without saying that life begins upon fertilization. This should be sufficient for purposes of resolving this case - for whether life begins upon fertilization or upon implantation of the fertilized ovum on the uterus wall, R.A. No. 10354 protects both asserted starting points of human life. **Absent a definitive consensus from the scientific and medical community, this Court cannot venture to pronounce which starting point of human life is correct. We can only reiterate what Section 12, Article II of the Constitution provides...**

Section 12, Article II of the Constitution is repeated in Section 2 of R.A. No. 10354. The law does not provide a definition of conception. However, the law is replete with provisions that embody the policy of the State to protect the travel of the fertilized ovum to the uterus wall. In fact, the law guarantees that the State will provide access only to “medically-safe, non-abortifacient, effective, legal, affordable, and quality reproductive health care services, methods, devices, supplies which do not prevent the implantation of a fertilized ovum as determined by the Food and Drug Administration.” R.A. No. 10354 protects the fertilized ovum by prohibiting services, methods, devices or supplies that prevent its implantation on the uterus wall.

Section 13. The State recognizes the vital role of the youth in nation-building and shall promote and protect their physical, moral, spiritual, intellectual, and social well-being. It shall inculcate in the youth patriotism and nationalism, and encourage their involvement in public and civic affairs.

Section 14. The State recognizes the role of women in nation-building, and shall ensure the fundamental equality before the law of women and men.

Section 15. The State shall protect and promote the right to health

of the people and instill health consciousness among them.⁶⁷

Section 16. The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.

The general nature of the “**non-executory constitutional provisions in Article II,**” specifically the policies enunciated under **Sections 7 and 8** and, by way of exception, **Section 16**, were briefly described by Justice Carpio in **MAGALLONA v. ERMITA**, G.R. No. 187167, August 16, 2011, 671 Phil. 243:⁶⁸

Our present state of jurisprudence considers the provisions in Article II as **mere legislative guides**, which, absent enabling legislation, “do not embody judicially enforceable constitutional rights ...”⁶⁹ Article II provisions serve as guides in formulating and interpreting implementing legislation, as well as in interpreting executory provisions of the Constitution. Although *Oposa v. Factoran*⁷⁰ treated **the right to a healthful and balanced ecology under Section 16 of Article II as an exception**, the present petition lacks factual basis to substantiate the claimed constitutional violation. The other provisions petitioners cite, relating to the protection of marine wealth⁷¹ and subsistence fishermen,⁷² are not violated by RA 9522.

Section 17. The State shall give priority to education, science and technology, arts, culture, and sports to foster patriotism and nationalism, accelerate social progress, and promote total human liberation and development.

Section 18. The State affirms labor as a primary social economic force. It shall protect the rights of workers and promote their welfare.

In BASES CONVERSION AND DEVELOPMENT AUTHORITY v. COMMISSION ON AUDIT, G.R. No. 178160, February 26, 2009, 599

⁶⁷ See *Sison v. Court of Appeals*, G.R. No. 124086, June 26, 2006, 525 Phil. 574, discussed under Art. XIII.

⁶⁸ See discussion under Art. I.

⁶⁹ *Kilosbayan, Inc. v. Morato*, 316 Phil. 652, 698 (1995); *Tañada v. Angara*, 338 Phil. 546, 580-581 (1997).

⁷⁰ G.R. No. 101083, 30 July 1993, 224 SCRA 792.

⁷¹ Const., Art. XII, Sec. 2(2).

⁷² Const., Art. XIII, Sec. 7.

Phil. 455,⁷³ one of the grounds raised by the BCDA for the nullification of the COA decision that disallowed year-end benefits granted by the BCDA to its Board members and full-time consultants was that such a grant was consistent with Section 5 and **Section 18 of Article II**. Justice Carpio, for the Court *en banc* Decision, stated:

The Court is not impressed. Article II of the Constitution is entitled Declaration of Principles and State Policies. By its very title, **Article II is a statement of general ideological principles and policies. It is not a source of enforceable rights.**⁷⁴

Section 19. The State shall develop a self-reliant and independent national economy effectively controlled by Filipinos.

This State Policy was repeatedly cited by Justice Carpio, for the Court *en banc*, in the landmark case **GAMBOA v. TEVES**, G.R. No. 176579, June 28, 2011, 668 Phil. 1,⁷⁵ an original petition for prohibition, injunction, declaratory relief and declaration of nullity of the sale of shares of stock of Philippine Telecommunications Investment Corporation by the government to Metro Pacific Assets Holdings, Inc., an affiliate of First Pacific Company Limited:

In the present case, petitioner seeks primarily the interpretation of the term “capital” in Section 11, Article XII of the Constitution. He prays that this Court declare that the term “capital” refers to common shares only, and that such shares constitute “the sole basis in determining foreign equity in a public utility.” Petitioner further asks this Court to declare any ruling inconsistent with such interpretation unconstitutional.

...

The instant petition therefore presents the Court with another opportunity to finally settle this purely legal issue which is of transcendental importance to the national economy and a fundamental requirement to a faithful adherence to our Constitution. **The Court must forthwith seize such opportunity, not only for the benefit of the litigants, but more significantly for the benefit of the entire Filipino people, to ensure, in the words of the Constitution, “a self-**

⁷³ See discussion under Art. III, Sec. 1.

⁷⁴ *Pamatong v. COMELEC*, G.R. No. 161872, 13 April 2004, 427 SCRA 96, 100-101; *Tañada v. Angara*, 338 Phil. 546, 580-583 (1997).

⁷⁵ See discussion under Art. XII, Sec. 11.

reliant and independent national economy effectively controlled by Filipinos.”

...

The evident purpose of the citizenship requirement is to prevent aliens from assuming control of public utilities, which may be inimical to the national interest.⁷⁶ **This specific provision explicitly reserves to Filipino citizens control of public utilities, pursuant to an overriding economic goal of the 1987 Constitution: to “conserve and develop our patrimony”⁷⁷ and ensure “a self-reliant and independent national economy effectively controlled by Filipinos.”**

...

To construe broadly the term “capital” as the total outstanding capital stock, including both common and non-voting preferred shares, grossly contravenes the intent and letter of the Constitution that the “State shall develop a self-reliant and independent national economy effectively controlled by Filipinos.”

...

“The Court should never open to foreign control what the Constitution has expressly reserved to Filipinos for that would be a betrayal of the Constitution and of the national interest. The Court must perform its solemn duty to defend and uphold the intent and letter of the Constitution to ensure, in the words of the Constitution, “a self-reliant and independent national economy effectively controlled by Filipinos.”

Section 20. The State recognizes the indispensable role of the private sector, encourages private enterprise, and provides incentives to needed investments.

Section 21. The State shall promote comprehensive rural development and agrarian reform.

Section 22. The State recognizes and promotes the rights of indigenous cultural communities within the framework of

⁷⁶ 2 Hector De Leon, *Philippine Constitutional Law (Principles and Cases)* 848 (1999).

⁷⁷ Const., Preamble; 2 Hector De Leon, *Philippine Constitutional Law (Principles and Cases)* 788 (1999).

national unity and development.

PROVINCE OF NORTH COTABATO v. THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES PEACE PANEL ON ANCESTRAL DOMAIN (GRP), G.R. No. 183591, October 14, 2008, was the first of the consolidated petitions⁷⁸ that assailed the Memorandum of Agreement on the Ancestral Domain (MOA-AD) Aspect of the GRP-MILF Tripoli Agreement on Peace of 2001. The Court *en banc* granted the petitions and declared the MOA-AD contrary to law and the Constitution. Justice Carpio's **concurring opinion** included a discussion of this **Section 22, Article II**, in relation to Section 5, Article XII on the protection of the rights of **indigenous cultural minorities** to their ancestral lands:

Under the MOA-AD, the Executive branch also commits to incorporate all the Lumads in Mindanao, who are non-Muslims, into the Bangsamoro people who are Muslims. There are 18 distinct Lumad groups in Mindanao with their own ancestral domains and their own indigenous customs, traditions and beliefs. The Lumads have lived in Mindanao long before the arrival of Islam and Christianity. For centuries, the Lumads have resisted Islam, a foreign religion like Christianity. To this day, the Lumads proudly continue to practice their own indigenous customs, traditions and beliefs.

Suddenly, without the knowledge and consent of the Lumads, the Executive branch has erased their identity as separate and distinct indigenous peoples. The MOA-AD, in paragraph 1 on Concepts and Principles, provides:

It is the birthright of all Moros and all Indigenous peoples of Mindanao to identify themselves and be accepted as Bangsamoros. The Bangsamoro people refers to those who are natives or original inhabitants of Mindanao and its adjacent islands including Palawan and the Sulu archipelago at the time of conquest or colonization and their descendants whether mixed or of full native blood. Spouses and their descendants are classified as Bangsamoro. The freedom of choice of the indigenous people shall be respected.

The declaration that it is the “birthright of ... all Indigenous

⁷⁸ City Government of Zamboanga v. GRP, G.R. No. 183752, City of Iligan v. GRP, G.R. No. 183893, Provincial Government of Zamboanga Del Norte v. GRP, G.R. No. 183951; Maceda v. GRP, G.R. No. 183962.

peoples of Mindanao to identify themselves and be accepted as Bangsamoros” is cultural genocide. It erases by a mere declaration the identities, culture, customs, traditions and beliefs of 18 separate and distinct indigenous groups in Mindanao. The “freedom of choice” given to the Lumads is an empty formality because officially from birth they are already identified as Bangsamoros. The Lumads may freely practice their indigenous customs, traditions and beliefs, but they are still identified and known as Bangsamoros under the authority of the BJE.⁷⁹

The MOA-AD divests the Lumads of their ancestral domains and hands over possession, ownership and jurisdiction of their ancestral domains to the BJE. In paragraphs 2, 3 and 6 on Concepts and Principles, the MOA-AD gives ownership over the Bangsamoros’ ancestral domain to the Bangsamoro people, defines the ancestral domain of the Bangsamoros, and vests jurisdiction and authority over such ancestral domain in the BJE, thus:

2. It is essential to lay the foundation of the Bangsamoro homeland in order to address the Bangsamoro people’s humanitarian and economic needs as well as their political aspirations. Such territorial jurisdictions and geographic areas being the natural wealth and patrimony represent the social, cultural and political identity and pride of all the Bangsamoro people. Ownership of the homeland is vested exclusively in them by virtue of their prior rights of occupation that had inhered in them as sizeable bodies of people, delimited by their ancestors since time immemorial, and being the first politically organized dominant occupants.

3. ... Ancestral domain and ancestral land refer to those held under claim of ownership, occupied or possessed, by themselves or through the ancestors of the Bangsamoro people, communally or individually...

...

6. Both Parties agree that the Bangsamoro Juridical Entity (BJE) shall have the authority and jurisdiction over the Ancestral Domain and Ancestral lands, including both alienable and non-alienable lands encompassed within their homeland and ancestral territory, as well as the delineation of ancestral domains/lands of the Bangsamoro people located therein.

After defining the Bangsamoro people to include all the Lumads, the MOA-AD then defines the ancestral domain of the Bangsamoro

⁷⁹ Bangsamoro Juridical Entity.

people as the ancestral domain of all the Bangsamoros, which now includes the ancestral domains of all the Lumads. The MOA-AD declares that exclusive ownership over the Bangsamoro ancestral domain belongs to the Bangsamoro people. The MOA-AD vests jurisdiction and authority over the Bangsamoros' ancestral domain in the BJE. Thus, the Lumads lost not only their separate identities but also their ancestral domains to the Bangsamoros and the BJE.

The incorporation of the Lumads as Bangsamoros, and the transfer of their ancestral domains to the BJE, without the Lumads' knowledge and consent, violate the Constitutional guarantee (in Section 22, Article II) ... The incorporation also violates the Constitutional guarantee (in Section 5, Article XII on the protection of the rights of indigenous cultural minorities to their ancestral lands) ...

These Constitutional guarantees, as implemented in the Indigenous Peoples' Rights Act of 1997, grant the Lumads "the right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies." Since the Executive branch kept the MOA-AD confidential until its publication in the Philippine Daily Inquirer on 4 August 2008, the day before its scheduled signing in Kuala Lumpur, Malaysia, there could have been no participation by the 18 Lumad groups of Mindanao in their incorporation into the Bangsamoro. This alone shows that the Executive branch did not consult, much less secure the consent, of the Lumads on their rights, lives and destinies under the MOA-AD. In fact, representatives of the 18 Lumad groups met in Cagayan de Oro City and announced on 27 August 2008, through their convenor Timuay Nanding Mudai, that "we cannot accept that we are part of the Bangsamoro."

The incorporation of the Lumads, and their ancestral domains, into the Bangsamoro violates the Constitutional and legislative guarantees recognizing and protecting the Lumads' distinct cultural identities as well as their ancestral domains. The violation of these guarantees makes the MOA-AD patently unconstitutional.

The incorporation of the Lumads, and their ancestral domains, into the Bangsamoro without the Lumads' knowledge and consent also violates Article 8 of the United Nations Declaration on the Rights of Indigenous Peoples. Article 8 of the Declaration states:

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

2. States shall provide effective mechanisms for prevention of, and redress for:

- (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
- (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
- (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
- (d) Any form of forced assimilation or integration;
- (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

The provisions of Article 8 were designed to prevent cultural genocide of indigenous peoples. This will happen if the Lumads are identified from birth as Bangsamoros and their ancestral domains are absorbed into the ancestral domain of the Bangsamoros.

There is another provision in the MOA-AD that could prove oppressive to the Lumads, and even invite conflicts with Christians. The MOA-AD, in paragraph 4 on Territory, empowers the BJE to establish political subdivisions within the Bangsamoro ancestral domain, as follows:

All territorial and geographic areas in Mindanao and its adjacent islands including Palawan and the Sulu archipelago that have been declared recognized, and/or delineated as ancestral domain and ancestral land of the Bangsamoro people as their geographical areas, inclusive of settlements and reservations, may be formed or constituted into political subdivisions of the Bangsamoro territorial jurisdictions subject to the principles of equality of peoples and mutual respect and to the protection of civil, political, economic, and cultural rights in their respective jurisdictions.

Thus, the BJE can create political subdivisions - barangays and municipalities - within the Bangsamoro ancestral domain. Under the MOA-AD, the Bangsamoro ancestral domain includes the ancestral domains of the Lumads. The BJE can create barangays and municipalities in areas that are presently the ancestral domains of the Lumads. The BJE can station its police and internal security force in these areas. Many of these areas - the present ancestral domains of the Lumads - are located within provinces, cities and municipalities where Christians are the majority.

There are obvious possible adverse ramifications of this power of the BJE to create political subdivisions within provinces, cities and

municipalities outside of the BJE territory. The creation by the BJE of such political subdivisions will alter the boundaries of the affected provinces, cities and municipalities, an alteration that, under the Constitution, requires an act of Congress and a plebiscite in the affected political units.⁸⁰ The Executive branch must conduct widespread consultations not only with the Lumads, but also with the Christians who, under the MOA-AD, will be affected by the creation of such BJE political subdivisions within their provinces, cities and municipalities.

Section 23. The State shall encourage non-governmental, community-based, or sectoral organizations that promote the welfare of the nation.

Section 24. The State recognizes the vital role of communication and information in nation-building.

Section 25. The State shall ensure the autonomy of local governments.

Section 26. The State shall guarantee equal access to opportunities for public service and prohibit political dynasties as may be defined by law.

Section 27. The State shall maintain honesty and integrity in the public service and take positive and effective measures against graft and corruption.

Section 28. Subject to reasonable conditions prescribed by law, the State adopts and implements a policy of full public disclosure of all its transactions involving public interest.

The case of **CHAVEZ v. PUBLIC ESTATES AUTHORITY**, G.R. No. 133250, July 9, 2002,⁸¹ an original petition for *mandamus* with prayer for a writ of preliminary injunction and a temporary restraining order, sought to compel the PEA to disclose all facts on PEA's then on-going renegotiations with Amari Coastal Bay and Development Corporation (AMARI) to reclaim portions of Manila Bay, and to enjoin PEA from signing a new agreement with AMARI involving such reclamation. One of the issues identified by the Court *en banc* was whether the **constitutional right to information**, enunciated in **this Section 28, Article II** and in Section 7,

⁸⁰ Const., Art. X, Sec. 10.

⁸¹ See discussion under Arts. III, Sec. 7, VIII, Sec. 5(1), XI, Sec.1, and XII, Secs. 2 and 3.

Article III, included official information on on-going negotiations before a final agreement. Speaking thru Justice Carpio, the Court explained:

Section 7, Article III of the Constitution explains the people's right to information on matters of public concern...

The State policy of full transparency in all transactions involving public interest reinforces the people's right to information on matters of public concern. This State policy is expressed in Section 28, Article II of the Constitution...

These twin provisions of the Constitution seek to promote transparency in policy-making and in the operations of the government, as well as provide the people sufficient information to exercise effectively other constitutional rights. These twin provisions are essential to the exercise of freedom of expression. If the government does not disclose its official acts, transactions and decisions to citizens, whatever citizens say, even if expressed without any restraint, will be speculative and amount to nothing. These twin provisions are also essential to hold public officials "at all times ... accountable to the people,"⁸² for unless citizens have the proper information, they cannot hold public officials accountable for anything. **Armed with the right information, citizens can participate in public discussions leading to the formulation of government policies and their effective implementation. An informed citizenry is essential to the existence and proper functioning of any democracy.** As explained by the Court in *Valmonte v. Belmonte, Jr.*⁸³ –

An essential element of these freedoms is to keep open a continuing dialogue or process of communication between the government and the people. It is in the interest of the State that the channels for free political discussion be maintained to the end that the government may perceive and be responsive to the people's will. Yet, this open dialogue can be effective only to the extent that the citizenry is informed and thus able to formulate its will intelligently. Only when the participants in the discussion are aware of the issues and have access to information relating thereto can such bear fruit.



⁸² Const., Art. XI, Sec. 1.

⁸³ 170 SCRA 256 (1989).



ARTICLE III

BILL OF RIGHTS

Section 1. 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.

Due Process Clause

The nature of the **due process clause** was briefly discussed by Justice Carpio, speaking for the First Division, in **ASSOCIATED COMMUNICATIONS & WIRELESS SERVICES, LTD. v. DUMLAO**, G. R. No. 136762, November 21, 2002, 440 Phil. 787:

Section 1 of the Bill of Rights lays down what is known as the “**due process clause**” of the Constitution...

In order to fall within the protection of this provision, **two conditions must concur, namely, that there is a deprivation and that such deprivation is done without proper observance of due process.** When one speaks of due process of law, a distinction must be made between matters of procedure and matters of substance. In essence, procedural due process “refers to the method or manner by which the law is enforced,” while substantive due process “requires that the law itself, not merely the procedures by which the law would be enforced, is fair, reasonable, and just.”¹

... Notice and hearing are fundamental requirements of procedural due process when an administrative body exercises its quasi-judicial functions... (and) the Court has maintained a clear position with regard to the due process requirements in administrative cases, that is -

(a)s long as a party was given the opportunity to defend his interests in due course, he cannot be said to have been denied

¹ *Corona v. United Harbor Pilots Association of the Philippines*, 283 SCRA 31 (1997).

due process of law, for this opportunity to be heard is the very essence of due process. Moreover, this constitutional mandate is deemed satisfied if a person is granted an opportunity to seek reconsideration of the action or ruling complained of.²

The **due process clause** was further explained by Justice Carpio in **GOVERNMENT SERVICE INSURANCE SYSTEM, CEBU CITY BRANCH v. MONTESCLAROS**, G.R. No. 146494, July 14, 2004, 478 Phil. 573, a petition for review on *certiorari* of the decision of the Court of Appeals affirming the decision of the Regional Trial Court, which held that Milagros Montesclaros was entitled to survivorship pension. In denying the petition for want of merit, Justice Carpio, on behalf of the Court *en banc*, declared the proviso in Section 18 of Presidential Decree No. 1146, which stated that “the dependent spouse shall not be entitled to said pension if his marriage with the pensioner is contracted within three years before the pensioner qualified for the pension,” void for being violative of the constitutional guarantee of **due process**:

The Facts

Sangguniang Bayan member Nicolas Montesclaros (Nicolas) married Milagros Orbiso (Milagros) on 10 July 1983. Nicolas was a 72- year old widower when he married Milagros who was then 43 years old.

On 4 January 1985, Nicolas filed with the Government Service Insurance System (GSIS) an application for retirement benefits effective 18 February 1985 under Presidential Decree No. 1146 or the Revised Government Service Insurance Act of 1977 (PD 1146). In his retirement application, Nicolas designated his wife Milagros as his sole beneficiary. Nicolas’ last day of actual service was on 17 February 1985. On 31 January 1986, GSIS approved Nicolas’ application for retirement “effective 17 February 1984,” granting a lump sum payment of annuity for the first five years and a monthly annuity thereafter. Nicolas died on 22 April 1992. Milagros filed with GSIS a claim for survivorship pension under PD 1146. On 8 June 1992, GSIS denied the claim because under Section 18 of PD 1146, the surviving spouse has no right to survivorship pension if the surviving spouse contracted the marriage with the pensioner within three years before the pensioner qualified for the pension. According to GSIS, Nicolas wed Milagros on 10 July 1983, less than one year from his date of retirement on 17 February 1984.

² Factoran, Jr. v. Court of Appeals, 320 SCRA 530 (1999).

On 2 October 1992, Milagros filed with the trial court a special civil action for declaratory relief questioning the validity of Section 18 of PD 1146 disqualifying her from receiving survivorship pension.

On 9 November 1994, the trial court rendered judgment declaring Milagros eligible for survivorship pension. The trial court ordered GSIS to pay Milagros the benefits due including interest. Citing Articles 115 and 117 of the Family Code, the trial court held that retirement benefits, which the pensioner has earned for services rendered and for which the pensioner has contributed through monthly salary deductions, are onerous acquisitions. Since retirement benefits are property the pensioner acquired through labor, such benefits are conjugal property. The trial court held that the prohibition in Section 18 of PD 1146 is deemed repealed for being inconsistent with the Family Code, a later law. The Family Code has retroactive effect if it does not prejudice or impair vested rights.

GSIS appealed to the Court of Appeals, which affirmed the decision of the trial court. Hence, this petition for review.

In the meantime, in a letter dated 10 January 2003, Milagros informed the Court that she has accepted GSIS' decision disqualifying her from receiving survivorship pension and that she is no longer interested in pursuing the case. Commenting on Milagros' letter, GSIS asserts that the Court must decide the case on the merits.

The Court will resolve the issue despite the manifestation of Milagros. The issue involves not only the claim of Milagros but also that of other surviving spouses who are similarly situated and whose claims GSIS would also deny based on the proviso. Social justice and public interest demand that we resolve the constitutionality of the proviso.

The Ruling of the Court of Appeals

The Court of Appeals agreed with the trial court that the retirement benefits are onerous and conjugal because the pension came from the deceased pensioner's salary deductions. The Court of Appeals held that the pension is not gratuitous since it is a deferred compensation for services rendered.

The Issues

GSIS raises the following issues:

1. Whether Section 16 of PD 1146 entitles Milagros to survivorship pension;
2. Whether retirement benefits form part of conjugal property;
3. Whether Articles 254 and 256 of the Family Code repealed Section 18 of PD 1146.

The Court's Ruling

The pertinent provisions of PD 1146 on survivorship benefits read:

Sec. 16. Survivorship Benefits. When a member or pensioner dies, the beneficiary shall be entitled to survivorship benefits provided for in sections seventeen and eighteen hereunder. The survivorship pension shall consist of:

1. basic survivorship pension which is fifty percent of the basic monthly pension; and
2. dependent's pension not exceeding fifty percent of the basic monthly pension payable in accordance with the rules and regulations prescribed by the System...

...

Sec. 18. Death of a Pensioner. Upon the death of a pensioner, the primary beneficiaries shall receive the applicable pension mentioned under paragraph (b) of section seventeen of his Act: Provided, That, the dependent spouse shall not be entitled to said pension if his marriage with the pensioner is contracted within three years before the pensioner qualified for the pension. When the pensioner dies within the period covered by the lump sum, the survivorship pension shall be paid only after the expiration of the said period. This shall also apply to the pensioners living as of the effectivity of this Act, but the survivorship benefit shall be based on the monthly pension being received at the time of death.

Under PD 1146, the primary beneficiaries are (1) the dependent spouse until such spouse remarries, and (2) the dependent children. The secondary beneficiaries are the dependent parents and legitimate descendants except dependent children. The law defines dependent as "the legitimate, legitimated, legally adopted, acknowledged natural or illegitimate child who is unmarried, not gainfully employed, and not over twenty-one

years of age or is over twenty-one years of age but physically or mentally incapacitated and incapable of self-support.” The term also includes the legitimate spouse dependent for support on the member, and the legitimate parent wholly dependent on the member for support.

The main question for resolution is the validity of the proviso in Section 18 of PD 1146, which proviso prohibits the dependent spouse from receiving survivorship pension if such dependent spouse married the pensioner within three years before the pensioner qualified for the pension (the proviso).

We hold that the proviso, which was the sole basis for the rejection by GSIS of Milagros’ claim, is unconstitutional because it violates the due process clause. The proviso is also discriminatory and denies equal protection of the law.

Retirement Benefits as Property Interest

Under Section 5 of PD 1146, it is mandatory for the government employee to pay monthly contributions. PD 1146 mandates the government to include in its annual appropriation the necessary amounts for its share of the contributions. It is compulsory on the government employer to take off and withhold from the employees’ monthly salaries their contributions and to remit the same to GSIS. The government employer must also remit its corresponding share to GSIS.³ Considering the mandatory salary deductions from the government employee, the government pensions do not constitute mere gratuity but form part of compensation.

In a pension plan where employee participation is mandatory, the prevailing view is that employees have contractual or vested rights in the pension where the pension is part of the terms of employment. The reason for providing retirement benefits is to compensate service to the government. Retirement benefits to government employees are part of emolument to encourage and retain qualified employees in the government service. Retirement benefits to government employees reward them for giving the best years of their lives in the service of their country.⁴

³ PD 1146, Sec. 6.

⁴ GSIS v. Civil Service Commission, 315 Phil. 159 (1995).

Thus, where the employee retires and meets the eligibility requirements, he acquires a vested right to benefits that is protected by the due process clause.⁵ Retirees enjoy a protected property interest whenever they acquire a right to immediate payment under pre-existing law.⁶ Thus, a pensioner acquires a vested right to benefits that have become due as provided under the terms of the public employees' pension statute.⁷ No law can deprive such person of his pension rights without due process of law, that is, without notice and opportunity to be heard.⁸

In addition to retirement and disability benefits, PD 1146 also provides for benefits to survivors of deceased government employees and pensioners. Under PD 1146, the dependent spouse is one of the beneficiaries of survivorship benefits. A widow's right to receive pension following the demise of her husband is also part of the husband's contractual compensation.⁹

Denial of Due Process

The proviso is contrary to Section 1, Article III of the Constitution... **The proviso is unduly oppressive in outrightly denying a dependent spouse's claim for survivorship pension if the dependent spouse contracted marriage to the pensioner within the three-year prohibited period. There is outright confiscation of benefits due the surviving spouse without giving the surviving spouse an opportunity to be heard.** The proviso undermines the purpose of PD 1146, which is to assure comprehensive and integrated social security and insurance benefits to government employees and their dependents in the event of sickness, disability, death, and retirement of the government employees.

The whereas clauses of PD 1146 state:

WHEREAS, the Government Service Insurance System in promoting the efficiency and welfare of the employees of the Government of the Philippines, administers the laws that grant to its members social security and insurance benefits;
WHEREAS, it is necessary to preserve at all times the

⁵ 60A Am. Jur. 2d Pensions and Retirement Funds § 1506 (1988).

⁶ Zucker v. U.S., 758 F.2d 637 (CA Fed. Cir., 1985).

⁷ Pennie v. Reis, 132 U.S. 464, 33 L.Ed. 426 (1889).

⁸ Stevens v. Minneapolis Fire Department Relief Ass'n, 124 Minn 381, 141 NW 35 (1914).

⁹ 60A Am. Jur. 2d Pensions and Retirement Funds § 1620 (1988).

actuarial solvency of the funds administered by the System; to guarantee to the government employee all the benefits due him; and to expand and increase the benefits made available to him and his dependents to the extent permitted by available resources;

WHEREAS, provisions of existing laws have impeded the efficient and effective discharge by the System of its functions and have unduly hampered the System from being more responsive to the dramatic changes of the times and from meeting the increasing needs and expectations of the Filipino public servant;

WHEREAS, provisions of existing laws that have prejudiced, rather than benefited, the government employee; restricted, rather than broadened, his benefits, prolonged, rather than facilitated the payment of benefits, must now yield to his paramount welfare;

WHEREAS, the social security and insurance benefits of government employees must be continuously re-examined and improved to assure comprehensive and integrated social security and insurance programs that will provide benefits responsive to their needs and those of their dependents in the event of sickness, disability, death, retirement, and other contingencies; and to serve as a fitting reward for dedicated public service;

WHEREAS, in the light of existing economic conditions affecting the welfare of government employees, there is a need to expand and improve the social security and insurance programs administered by the Government Service Insurance System, specifically, among others, by increasing pension benefits, expanding disability benefits, introducing survivorship benefits, introducing sickness and income benefits, and eventually extending the compulsory coverage of these programs to all government employees regardless of employment status.

PD 1146 has the following purposes:

- A. to preserve at all times the actuarial solvency of the funds administered by the System;
- B. to guarantee to the government employee all the benefits due him; and
- C. to expand, increase, and improve the social security and insurance benefits made available to him and his dependents such as:

increasing pension benefits
expanding disability benefits
introducing survivorship benefits
introducing sickness income benefits
extending compulsory membership to all government employees irrespective of status.

The law extends survivorship benefits to the surviving and qualified beneficiaries of the deceased member or pensioner to cushion the beneficiaries against the adverse economic effects resulting from the death of the wage earner or pensioner.

It was in **ESTRADA v. OFFICE OF THE OMBUDSMAN**, G.R. Nos. 212140-41, January 21, 2015, 751 Phil. 821, that Justice Carpio, for the Court *en banc*, exhaustively discussed the **due process clause in relation to preliminary investigations**. His *ponencia* began with a quote from the *en banc* case *Paderanga v. Drilon*:¹⁰

It is a fundamental principle that the accused in a preliminary investigation has no right to cross-examine the witnesses which the complainant may present. Section 3, Rule 112 of the Rules of Court expressly provides that the respondent shall only have the right to submit a counter-affidavit, to examine all other evidence submitted by the complainant and, where the fiscal sets a hearing to propound clarificatory questions to the parties or their witnesses, to be afforded an opportunity to be present but without the right to examine or cross-examine.

Estrada was a petition for *certiorari* with prayer for the issuance of a temporary restraining order or writ of preliminary injunction enjoining the Office of the Ombudsman from conducting further proceedings in the plunder cases against then Senator Jinggoy Ejercito Estrada, and for the Court's declaration that he was denied due process of law and that the order of the Ombudsman and the proceedings thereon were void:

The Facts

On 25 November 2013, the Ombudsman served upon Sen. Estrada a copy of the complaint in OMB-C-C-13-0313, filed by the NBI and Atty. Baligod, which prayed, among others, that criminal proceedings for Plunder as defined in RA No. 7080 be

¹⁰ 273 Phil. 290, 299 (1991).

conducted against Sen. Estrada. Sen. Estrada filed his counter-affidavit in OMB-C-C-13-0313 on 9 January 2014.

On 3 December 2013, the Ombudsman served upon Sen. Estrada a copy of the complaint in OMB-C-C-13-0397, filed by the FIO¹¹ of the Ombudsman, which prayed, among others, that criminal proceedings for Plunder, as defined in RA No. 7080, and for violation of Section 3(e) of RA No. 3019, be conducted against Sen. Estrada. Sen. Estrada filed his counter-affidavit in OMB-C-C-13-0397 on 16 January 2014.

Eighteen of Sen. Estrada's co-respondents in the two complaints filed their counter-affidavits between 9 December 2013 and 14 March 2014.

On 20 March 2014, Sen. Estrada filed his Request to be Furnished with Copies of Counter-Affidavits of the Other Respondents, Affidavits of New Witnesses and Other Filings (Request) in OMB-C-C-13-0313. In his Request, Sen. Estrada asked for copies of the following documents:

- (a) Affidavit of [co-respondent] Ruby Tuason (Tuason);
- (b) Affidavit of [co-respondent] Dennis L. Cunanan (Cunanan);
- (c) Counter-Affidavit of [co-respondent] Gondelina G. Amata (Amata);
- (d) Counter-Affidavit of [co-respondent] Mario L. Relampagos (Relampagos);
- (e) Consolidated Reply of complainant NBI, if one had been filed; and
- (f) Affidavits/Counter-Affidavits/Pleadings/Filings filed by all the other respondents and/or additional witnesses for the Complainants.

Sen. Estrada's request was made "[p]ursuant to the right of a respondent 'to examine the evidence submitted by the complainant which he may not have been furnished' (Section 3[b], Rule 112 of the Rules of Court) and to 'have access to the evidence on record' (Section 4[c], Rule II of the Rules of Procedure of the Office of the Ombudsman)."

On 27 March 2014, the Ombudsman issued the assailed Order in OMB-C-C-13-0313. The pertinent portions of the assailed Order read:

¹¹ Field Investigation Office.

This Office finds however finds [sic] that the foregoing provisions [pertaining to Section 3[b], Rule 112 of the Rules of Court and Section 4[c], Rule II of the Rules of Procedure of the Office of the Ombudsman] do not entitle respondent [Sen. Estrada] to be furnished all the filings of the respondents.

Rule 112 (3) (a) & (c) of the Rules of Court provides [sic]:

(a) The complaint shall state the address of the respondent and shall be accompanied by the affidavits of the complainant and his witnesses, as well as other supporting documents to establish probable cause...

...

(c) Within ten (10) days from receipt of the subpoena with the complaint and supporting affidavits and documents, the respondent shall submit his counter-affidavit and that of his witnesses and other supporting documents relied upon for his defense. The counter-affidavits shall be subscribed and sworn to and certified as provided in paragraph (a) of this section, with copies thereof furnished by him to the complainant.

Further to quote the rule in furnishing copies of affidavits to parties under the Rules of Procedure of the Office of the Ombudsman [Section 4 of Rule II of Administrative Order No. 07 issued on April 10, 1990]:

a) If the complaint is not under oath or is based only on official reports, the investigating officer shall require the complainant or supporting witnesses to execute affidavits to substantiate the complaints.

b) After such affidavits have been secured, the investigating officer shall issue an order, attaching thereto a copy of the affidavits and other supporting documents, directing the respondents to submit, within ten (10) days from receipt thereof, his counter-affidavits and controverting evidence with proof of service thereof on the complainant. The complainant may file reply affidavits within ten (10) days after service of the counter-affidavits.

It can be gleaned from these aforecited provisions that this Office is required to furnish [Sen. Estrada] a copy of the Complaint and its supporting affidavits and documents; and this Office complied with this requirement when it furnished [Sen. Estrada] with the foregoing documents attached to the Orders to File Counter-Affidavit dated 19 November 2013 and 25 November 2013.

It is to be noted that there is no provision under this Office's Rules of Procedure which entitles respondent to be furnished all the filings by the other parties, e.g. the respondents. Ruby

Tuason, Dennis Cunanan, Godelina G. Amata and Mario L. Relampagos themselves are all respondents in these cases. Under the Rules of Court as well as the Rules of Procedure of the Office of the Ombudsman, the respondents are only required to furnish their counter-affidavits and controverting evidence to the complainant, and not to the other respondents. To reiterate, the rights of respondent [Sen.] Estrada in the conduct of the preliminary investigation depend on the rights granted to him by law and these cannot be based on whatever rights he believes [that] he is entitled to or those that may be derived from the phrase “due process of law.”

Thus, this Office cannot grant his motion to be furnished with copies of all the filings by the other parties. Nevertheless, he should be furnished a copy of the Reply of complainant NBI as he is entitled thereto under the rules; however, as of this date, no Reply has been filed by complainant NBI.

WHEREFORE, respondent [Sen.] Estrada’s Request to be Furnished with Copies of Counter- Affidavits of the Other Respondents, Affidavits of New Witnesses and Other Filings is DENIED. He is nevertheless entitled to be furnished a copy of the Reply if complainant opts to file such pleading.

On 28 March 2014, the Ombudsman issued in OMB-C-C-13-0313 and OMB-C-C-13-0397 a Joint Resolution which found probable cause to indict Sen. Estrada and his co-respondents with one count of plunder and 11 counts of violation of Section 3(e) of RA No. 3019. Sen. Estrada filed a Motion for Reconsideration (of the Joint Resolution dated 28 March 2014) dated 7 April 2014. Sen. Estrada prayed for the issuance of a new resolution dismissing the charges against him.

Without filing a Motion for Reconsideration of the Ombudsman’s 27 March 2014 Order denying his Request, Sen. Estrada filed the present Petition for *Certiorari* under Rule 65 and sought to annul and set aside the 27 March 2014 Order.

The Arguments

Sen. Estrada raised the following grounds in his Petition:

The Office of the Ombudsman, in issuing the challenged Order dated 27 March 2014, acted without or in excess of its jurisdiction or with grave abuse of discretion amounting to lack or excess of jurisdiction and violated Sen. Estrada’s constitutional right to due process of law.

Sen. Estrada also claimed that under the circumstances, he has “no appeal or any other plain, speedy, and adequate remedy in the ordinary course of law, except through this Petition.” Sen. Estrada applied for the issuance of a temporary restraining order and/or writ of preliminary injunction to restrain public respondents from conducting further proceedings in OMB-C-C-13-0313 and OMB-C-C- 13-0397. Finally, Sen. Estrada asked for a judgment declaring that (a) he has been denied due process of law, and as a consequence thereof, (b) the Order dated 27 March 2014, as well as the proceedings in OMB-C-C-13-0313 and OMB-C-C-13-0397 subsequent to and affected by the issuance of the 27 March 2014 Order, are void.

On the same date, 7 May 2014, the Ombudsman issued in OMB-C-C-13-0313 and OMB-C-C-13-0397 a Joint Order furnishing Sen. Estrada with the counter-affidavits of Tuason, Cunanan, Amata, Relampagos, Francisco Figura, Gregoria Buenaventura, and Alexis Sevidal, and directing him to comment thereon within a non-extendible period of five days from receipt of the order.

On 12 May 2014, Sen. Estrada filed before the Ombudsman a motion to suspend proceedings in OMB-C-C-13-0313 and OMB-C-C-13-0397 because the denial of his Request to be furnished copies of counter-affidavits of his co-respondents deprived him of his right to procedural due process, and he has filed the present Petition before this Court. The Ombudsman denied Sen. Estrada’s motion to suspend in an Order dated 15 May 2014. Sen. Estrada filed a motion for reconsideration of the Order dated 15 May 2014 but his motion was denied in an Order dated 3 June 2014.

As of 2 June 2014, the date of filing of the Ombudsman’s Comment to the present Petition, Sen. Estrada had not filed a comment on the counter-affidavits furnished to him. On 4 June 2014, the Ombudsman issued a Joint Order in OMB-C-C-13-0313 and OMB-C-C-13-0397 denying, among other motions filed by the other respondents, Sen. Estrada’s motion for reconsideration dated 7 April 2014. The pertinent portion of the 4 June 2014 Joint Order stated:

While it is true that Senator Estrada’s request for copies of Tuason, Cunanan, Amata, Relampagos, Figura, Buenaventura and Sevidal’s affidavits was denied by Order dated 27 March 2014 and before the promulgation of the assailed Joint Resolution, this Office thereafter re-evaluated the request and

granted it by Order dated 7 May 2014 granting his request. Copies of the requested counter-affidavits were appended to the copy of the Order dated 7 May 2014 transmitted to Senator Estrada through counsel.

This Office, in fact, held in abeyance the disposition of the motions for reconsideration in this proceeding in light of its grant to Senator Estrada a period of five days from receipt of the 7 May 2014 Order to formally respond to the above-named co-respondents' claims.

In view of the foregoing, this Office fails to see how Senator Estrada was deprived of his right to procedural due process.

On 2 June 2014, the Ombudsman, the FIO, and the NBI (collectively, public respondents), through the Office of the Solicitor General, filed their Comment to the present Petition. The public respondents argued that:

- I. Petitioner [Sen. Estrada] was not denied due process of law.
- II. The petition for *certiorari* is procedurally infirm.
 - A. *Litis pendentia* exists in this case.
 - B. Petitioner has a plain, speedy and adequate remedy in the ordinary course of law.
- III. Petitioner is not entitled to a writ of preliminary injunction and/or temporary restraining order.

On 6 June 2014, Atty. Baligod filed his Comment to the present Petition. Atty. Baligod stated that Sen. Estrada's resort to a Petition for *Certiorari* under Rule 65 is improper. Sen. Estrada should have either filed a motion for reconsideration of the 27 March 2014 Order or incorporated the alleged irregularity in his motion for reconsideration of the 28 March 2014 Joint Resolution. There was also no violation of Sen. Estrada's right to due process because there is no rule which mandates that a respondent such as Sen. Estrada be furnished with copies of the submissions of his co-respondents.

On 16 June 2014, Sen. Estrada filed his Reply to the public respondents' Comment. Sen. Estrada insisted that he was denied due process. Although Sen. Estrada received copies of the counter-affidavits of Cunanan, Amata, Relampagos, Buenaventura, Figura, Sevidal, as well as one of Tuason's counter-affidavits, he claimed that he was not given the following documents:

- a) One other Counter-Affidavit of Ruby Tuason dated 21 February 2014;
- b) Counter-Affidavit of Sofia D. Cruz dated 31 January 2014;
- c) Counter-Affidavit of Evelyn Sugcang dated 11 February 2014;
- d) Two (2) Counter-Affidavits of Alan A. Javellana dated 06 February 2014;
- e) Counter-Affidavit of Victor Roman Cojamco Cacal dated 11 December 2013 (to the FIO Complaint);
- f) Counter-Affidavit of Victor Roman Cojamco Cacal dated 22 January 2014 (to the NBI Complaint);
- g) Two (2) counter-affidavits of Ma. Julie A. Villaralvo-Johnson both dated 14 March 2014;
- h) Counter-affidavit of Rhodora Bulatad Mendoza dated 06 March 2014;
- i) Counter-affidavit of Maria Ninez P. Guañizo dated 28 January 2014;
- j) Two (2) counter-affidavits of Marivic V. Jover both dated 09 December 2013; and
- k) Counter-affidavit of Francisco B. Figura dated 08 January 2014.

Sen. Estrada argues that the Petition is not rendered moot by the subsequent issuance of the 7 May 2014 Joint Order because there is a recurring violation of his right to due process. Sen. Estrada also insists that there is no forum shopping as the present Petition arose from an incident in the main proceeding, and that he has no other plain, speedy, and adequate remedy in the ordinary course of law. Finally, Sen. Estrada reiterates his application for the issuance of a temporary restraining order and/or writ of preliminary injunction to restrain public respondents from conducting further proceedings in OMB-C-C-13-0313 and OMB-C-C-13-0397.

Based on the facts narrated above, the Court *en banc*, through Justice Carpio, dismissed the petition in **Estrada** and ruled that the Ombudsman's denial of Estrada's request did not constitute grave abuse of discretion, **nor did it violate Estrada's constitutional right to due process:**

There is no law or rule which requires the Ombudsman to furnish a respondent with copies of the counter-affidavits of his co-respondents.

We reproduce below Sections 3 and 4, Rule 112 of the Revised Rules of Criminal Procedure, as well as Rule II of Administrative Order No. 7, Rules of Procedure of the Office of the Ombudsman, for ready reference.

From the Revised Rules of Criminal Procedure, Rule 112:
Preliminary Investigation

Sec. 3. Procedure. - The preliminary investigation shall be conducted in the following manner:

(a) The complaint shall state the address of the respondent and shall be accompanied by the affidavits of the complainant and his witnesses, as well as other supporting documents to establish probable cause. They shall be in such number of copies as there are respondents, plus two (2) copies for the official file. The affidavits shall be subscribed and sworn to before any prosecutor or government official authorized to administer oath, or, in their absence or unavailability, before a notary public, each of who must certify that he personally examined the affiants and that he is satisfied that they voluntarily executed and understood their affidavits.

(b) Within ten (10) days after the filing of the complaint, the investigating officer shall either dismiss it if he finds no ground to continue with the investigation, or issue a subpoena to the respondent attaching to it a copy of the complaint and its supporting affidavits and documents.

The respondent shall have the right to examine the evidence submitted by the complainant which he may not have been furnished and to copy them at his expense. If the evidence is voluminous, the complainant may be required to specify those which he intends to present against the respondent, and these shall be made available for examination or copying by the respondent at his expense.

Objects as evidence need not be furnished a party but shall be made available for examination, copying, or photographing at the expense of the requesting party.

(c) Within ten (10) days from receipt of the subpoena with the complaint and supporting affidavits and documents, the respondent shall submit his counter-affidavit and that of his witnesses and other supporting documents relied upon for his defense. The counter-affidavits shall be subscribed and sworn to and certified as provided in paragraph (a) of this section, with copies thereof furnished by him to the complainant. The respondent shall not be allowed to file a motion to dismiss in lieu of a counter-affidavit.

(d) If the respondent cannot be subpoenaed, or if subpoenaed, does not submit counter- affidavits within the ten (10) day period, the investigating officer shall resolve the complaint based on the evidence presented by the complainant.

(e) The investigating officer may set a hearing if there are facts and issues to be clarified from a party or a witness. The parties can be present at the hearing but without the right to examine or cross-examine. They may, however, submit to the investigating officer questions which may be asked to the party or witness concerned.

The hearing shall be held within ten (10) days from submission of the counter-affidavits and other documents or from the expiration of the period for their submission. It shall be terminated within five (5) days.

(f) Within ten (10) days after the investigation, the investigating officer shall determine whether or not there is sufficient ground to hold the respondent for trial.

Sec. 4. Resolution of investigating prosecutor and its review.

- If the investigating prosecutor finds cause to hold the respondent for trial, he shall prepare the resolution and information. He shall certify under oath in the information that he, or as shown by the record, an authorized officer, has personally examined the complainant and his witnesses; that there is reasonable ground to believe that a crime has been committed and that the accused is probably guilty thereof; that the accused was informed of the complaint and of the evidence submitted against him; and that he was given an opportunity to submit controverting evidence. Otherwise, he shall recommend the dismissal of the complaint.

Within five (5) days from his resolution, he shall forward the record of the case to the provincial or city prosecutor or chief state prosecutor, or to the Ombudsman or his deputy in cases of offenses cognizable by the Sandiganbayan in the exercise of its original jurisdiction. They shall act on the resolution within ten (10) days from their receipt thereof and shall immediately inform the parties of such action.

No complaint or information may be filed or dismissed by an investigating prosecutor without the prior written authority or approval of the provincial or city prosecutor or chief state prosecutor or the Ombudsman or his deputy.

Where the investigating prosecutor recommends the dismissal of the complaint but his recommendation is disapproved by the provincial or city prosecutor or chief state prosecutor or the Ombudsman or his deputy on the ground that a probable cause exists, the latter may, by himself, file the information

against the respondent, or direct any other assistant prosecutor or state prosecutor to do so without conducting another preliminary investigation.

If upon petition by a proper party under such rules as the Department of Justice may prescribe or *motu proprio*, the Secretary of Justice reverses or modifies the resolution of the provincial or city prosecutor or chief state prosecutor, he shall direct the prosecutor concerned either to file the corresponding information without conducting another preliminary investigation, or to dismiss or move for dismissal of the complaint or information with notice to the parties. The same rule shall apply in preliminary investigations conducted by the officers of the Office of the Ombudsman.

From the Rules of Procedure of the Office of the Ombudsman, Administrative Order No. 7, Rule II: Procedure in Criminal Cases

Sec. 1. Grounds. - A criminal complaint may be brought for an offense in violation of R.A. 3019, as amended, R.A. 1379, as amended, R.A. 6713, Title VII, Chapter II, Section 2 of the Revised Penal Code, and for such other offenses committed by public officers and employees in relation to office.

Sec. 2. Evaluation. - Upon evaluating the complaint, the investigating officer shall recommend whether it may be:

- a) dismissed outright for want of palpable merit;
- b) referred to respondent for comment;
- c) indorsed to the proper government office or agency which has jurisdiction over the case;
- d) forwarded to the appropriate office or official for fact-finding investigation;
- e) referred for administrative adjudication; or
- f) subjected to a preliminary investigation.

Sec. 3. Preliminary investigation; who may conduct. - Preliminary investigation may be conducted by any of the following:

- 1) Ombudsman Investigators;
- 2) Special Prosecuting Officers;
- 3) Deputized Prosecutors;
- 4) Investigating Officials authorized by law to conduct preliminary investigations; or
- 5) Lawyers in the government service, so designated by the Ombudsman.

Sec. 4. Procedure. - The preliminary investigation of cases falling under the jurisdiction of the Sandiganbayan and Regional Trial Courts shall be conducted in the manner

prescribed in Section 3, Rule 112 of the Rules of Court, subject to the following provisions:

a) If the complaint is not under oath or is based only on official reports, the investigating officer shall require the complainant or supporting witnesses to execute affidavits to substantiate the complaints.

b) After such affidavits have been secured, the investigating officer shall issue an order, attaching thereto a copy of the affidavits and other supporting documents, directing the respondent to submit, within ten (10) days from receipt thereof, his counter-affidavits and controverting evidence with proof of service thereof on the complainant. The complainant may file reply affidavits within ten (10) days after service of the counter-affidavits.

c) If the respondent does not file a counter-affidavit, the investigating officer may consider the comment filed by him, if any, as his answer to the complaint. In any event, the respondent shall have access to the evidence on record.

d) No motion to dismiss shall be allowed except for lack of jurisdiction. Neither may a motion for a bill of particulars be entertained. If respondent desires any matter in the complainant's affidavit to be clarified, the particularization thereof may be done at the time of clarificatory questioning in the manner provided in paragraph (f) of this section.

e) If the respondent cannot be served with the order mentioned in paragraph 6 hereof, or having been served, does not comply therewith, the complaint shall be deemed submitted for resolution on the basis of the evidence on record.

f) If, after the filing of the requisite affidavits and their supporting evidences, there are facts material to the case which the investigating officer may need to be clarified on, he may conduct a clarificatory hearing during which the parties shall be afforded the opportunity to be present but without the right to examine or cross-examine the witness being questioned. Where the appearance of the parties or witnesses is impracticable, the clarificatory questioning may be conducted in writing, whereby the questions desired to be asked by the investigating officer or a party shall be reduced into writing and served on the witness concerned who shall be required to answer the same in writing and under oath.

g) Upon the termination of the preliminary investigation, the investigating officer shall forward the records of the case together with his resolution to the designated authorities for their appropriate action thereon.

No information may be filed and no complaint may be

dismissed without the written authority or approval of the Ombudsman in cases falling within the jurisdiction of the Sandiganbayan, or of the proper Deputy Ombudsman in all other cases. ...

Sec. 6. Notice to parties. - The parties shall be served with a copy of the resolution as finally approved by the Ombudsman or by the proper Deputy Ombudsman.

Sec. 7. Motion for reconsideration. - a) Only one (1) motion for reconsideration or reinvestigation of an approved order or resolution shall be allowed, the same to be filed within fifteen (15) days from notice thereof with the Office of the Ombudsman, or the proper Deputy Ombudsman as the case may be. ...

b) The filing of a motion for reconsideration/reinvestigation shall not bar the filing of the corresponding Information in court on the basis of the finding of probable cause in the resolution subject of the motion.

Sen. Estrada claims that the denial of his Request for the counter-affidavits of his co-respondents violates his constitutional right to due process. Sen. Estrada, however, fails to specify a law or rule which states that it is a compulsory requirement of due process in a preliminary investigation that the Ombudsman furnish a respondent with the counter-affidavits of his co-respondents. Neither Section 3(b), Rule 112 of the Revised Rules of Criminal Procedure nor Section 4(c), Rule II of the Rules of Procedure of the Office of the Ombudsman supports Sen. Estrada's claim.

What the Rules of Procedure of the Office of the Ombudsman require is for the Ombudsman to furnish the respondent with a copy of the complaint and the supporting affidavits and documents at the time the order to submit the counter-affidavit is issued to the respondent. This is clear from Section 4(b), Rule II of the Rules of Procedure of the Office of the Ombudsman when it states, "[a]fter such affidavits [of the complainant and his witnesses] have been secured, the investigating officer shall issue an order, attaching thereto a copy of the affidavits and other supporting documents, directing the respondent to submit, within ten (10) days from receipt thereof, his counter-affidavits ..." At this point, there is still no counter-affidavit submitted by any respondent. Clearly, what Section 4(b) refers to are affidavits of the complainant and his witnesses, not the affidavits of the co-respondents. Obviously, the counter-affidavits of the co-respondents are not part of the supporting affidavits of the complainant. No grave abuse of discretion can thus be attributed

to the Ombudsman for the issuance of the 27 March 2014 Order which denied Sen. Estrada's Request.

Although Section 4(c), Rule II of the Rules of Procedure of the Office of the Ombudsman provides that a respondent "shall have access to the evidence on record," this provision should be construed in relation to Section 4(a) and (b) of the same Rule, as well as to the Rules of Criminal Procedure.

First, Section 4(a) states that "the investigating officer shall require the complainant or supporting witnesses to execute affidavits to substantiate the complaint." The "supporting witnesses" are the witnesses of the complainant, and do not refer to the co-respondents.

Second, Section 4(b) states that "the investigating officer shall issue an order attaching thereto a copy of the affidavits and all other supporting documents, directing the respondent" to submit his counter-affidavit. The affidavits referred to in Section 4(b) are the affidavits mentioned in Section 4(a). Clearly, the affidavits to be furnished to the respondent are the affidavits of the complainant and his supporting witnesses. The provision in the immediately succeeding Section 4(c) of the same Rule II that a respondent shall have "access to the evidence on record" does not stand alone, but should be read in relation to the provisions of Section 4(a and b) of the same Rule II requiring the investigating officer to furnish the respondent with the "affidavits and other supporting documents" submitted by "the complainant or supporting witnesses." Thus, a respondent's "access to evidence on record" in Section 4(c), Rule II of the Ombudsman's Rules of Procedure refers to the affidavits and supporting documents of "the complainant or supporting witnesses" in Section 4(a) of the same Rule II.

Third, Section 3(b), Rule 112 of the Revised Rules of Criminal Procedure provides that "[t]he respondent shall have the right to examine the evidence submitted by the complainant which he may not have been furnished and to copy them at his expense." A respondent's right to examine refers only to "the evidence submitted by the complainant."

Thus, whether under Rule 112 of the Revised Rules of Criminal Procedure or under Rule II of the Ombudsman's Rules of Procedure, there is no requirement whatsoever that the affidavits executed by the co-respondents should be furnished to a respondent.

Justice Velasco's dissent relies on the ruling in *Office of the Ombudsman v. Reyes* (*Reyes case*),¹² an administrative case, in which a different set of rules of procedure and standards apply. Sen. Estrada's Petition, in contrast, involves the preliminary investigation stage in a criminal case. Rule III on the Procedure in Administrative Cases of the Rules of Procedure of the Office of the Ombudsman applies in the *Reyes case*, while Rule II on the Procedure in Criminal Cases of the Rules of Procedure of the Office of the Ombudsman applies in Sen. Estrada's Petition. In both cases, the Rules of Court apply in a suppletory character or by analogy.

In the *Reyes case*, the complainant Acero executed an affidavit against Reyes and Peñaloza, who were both employees of the Land Transportation Office. Peñaloza submitted his counter-affidavit, as well as those of his two witnesses. Reyes adopted his counter-affidavit in another case before the Ombudsman as it involved the same parties and the same incident. None of the parties appeared during the preliminary conference. Peñaloza waived his right to a formal investigation and was willing to submit the case for resolution based on the evidence on record. Peñaloza also submitted a counter-affidavit of his third witness. The Ombudsman found Reyes guilty of grave misconduct and dismissed him from the service. On the other hand, Peñaloza was found guilty of simple misconduct and penalized with suspension from office without pay for six months. This Court agreed with the Court of Appeals' finding that Reyes' right to due process was indeed violated. This Court remanded the records of the case to the Ombudsman, for two reasons: (1) Reyes should not have been meted the penalty of dismissal from the service when the evidence was not substantial, and (2) there was disregard of Reyes' right to due process because he was not furnished a copy of the counter-affidavits of Peñaloza and of Peñaloza's three witnesses. In the *Reyes case*, failure to furnish a copy of the counter-affidavits happened in the administrative proceedings on the merits, which resulted in Reyes' dismissal from the service. In Sen. Estrada's Petition, the denial of his Request happened during the preliminary investigation where the only issue is the existence of probable cause for the purpose of determining whether an information should be filed, and does not prevent Sen. Estrada from requesting a copy of the counter-affidavits of his co-respondents during the pre-trial or even during the trial.

¹² G.R. No. 170512, 5 October 2011, 658 SCRA 626.

We should remember to consider the differences in adjudicating cases, particularly an administrative case and a criminal case:

Any lawyer worth his salt knows that *quanta* of proof and adjective rules vary depending on whether the cases to which they are meant to apply are criminal, civil or administrative in character. In criminal actions, proof beyond reasonable doubt is required for conviction; in civil actions and proceedings, preponderance of evidence, as support for a judgment; and in administrative cases, substantial evidence, as basis for adjudication. In criminal and civil actions, application of the Rules of Court is called for, with more or less strictness. In administrative proceedings, however, the technical rules of pleading and procedure, and of evidence, are not strictly adhered to; they generally apply only suppletorily; indeed, in agrarian disputes application of the Rules of Court is actually prohibited.¹³

It should be underscored that the conduct of a preliminary investigation is only for the determination of probable cause, and “probable cause merely implies probability of guilt and should be determined in a summary manner. A preliminary investigation is not a part of the trial and it is only in a trial where an accused can demand the full exercise of his rights, such as the right to confront and cross-examine his accusers to establish his innocence.”¹⁴ Thus, the rights of a respondent in a preliminary investigation are limited to those granted by procedural law.

A preliminary investigation is defined as an inquiry or proceeding for the purpose of determining whether there is sufficient ground to engender a well-founded belief that a crime cognizable by the Regional Trial Court has been committed and that the respondent is probably guilty thereof, and should be held for trial. The quantum of evidence now required in preliminary investigation is such evidence sufficient to “engender a well-founded belief” as to the fact of the commission of a crime and the respondent’s probable guilt thereof. A preliminary investigation is not the occasion for the full and exhaustive display of the parties’ evidence; it is for the presentation of such evidence only as may engender a well-grounded belief that an offense has been committed and

¹³ *Manila Electric Company v. NLRC, et al.*, G.R. No. L-60054, 2 July 1991, 198 SCRA 681, 682.

¹⁴ *Webb v. Hon. De Leon*, 317 Phil. 758 (1995).

that the accused is probably guilty thereof. We are in accord with the state prosecutor's findings in the case at bar that there exists *prima facie* evidence of petitioner's involvement in the commission of the crime, it being sufficiently supported by the evidence presented and the facts obtaining therein.

Likewise devoid of cogency is petitioner's argument that the testimonies of Galarion and Hanopol are inadmissible as to him since he was not granted the opportunity of cross-examination.

It is a fundamental principle that the accused in a preliminary investigation has no right to cross-examine the witnesses which the complainant may present. Section 3, Rule 112 of the Rules of Court expressly provides that the respondent shall only have the right to submit a counter-affidavit, to examine all other evidence submitted by the complainant and, where the fiscal sets a hearing to propound clarificatory questions to the parties or their witnesses, to be afforded an opportunity to be present but without the right to examine or cross-examine. Thus, even if petitioner was not given the opportunity to cross-examine Galarion and Hanopol at the time they were presented to testify during the separate trial of the case against Galarion and Roxas, he cannot assert any legal right to cross-examine them at the preliminary investigation precisely because such right was never available to him. The admissibility or inadmissibility of said testimonies should be ventilated before the trial court during the trial proper and not in the preliminary investigation.

Furthermore, the technical rules on evidence are not binding on the fiscal who has jurisdiction and control over the conduct of a preliminary investigation. If by its very nature a preliminary investigation could be waived by the accused, we find no compelling justification for a strict application of the evidentiary rules. In addition, considering that under Section 8, Rule 112 of the Rules of Court, the record of the preliminary investigation does not form part of the record of the case in the Regional Trial Court, then the testimonies of Galarion and Hanopol may not be admitted by the trial court if not presented in evidence by the prosecuting fiscal. And, even if the prosecution does present such testimonies, petitioner can always object thereto and the trial court can rule on the admissibility thereof; or the petitioner can, during the trial, petition said court to compel the presentation of Galarion and Hanopol for purposes of cross-examination.¹⁵

¹⁵ 273 Phil. 290, 299-300 (1991).

Furthermore, in citing the *Reyes* case, Justice Velasco's dissent overlooked a vital portion of the Court of Appeals' reasoning. This Court quoted from the Court of Appeals' decision: "... [A]dmissions made by Peñaloza in his sworn statement are binding only on him. *Res inter alios acta alteri nocere non debet*. The rights of a party cannot be prejudiced by an act, declaration or omission of another." In OMB-C-C-13-0313 and OMB-C-C-13-0397, the admissions of Sen. Estrada's co-respondents can in no way prejudice Sen. Estrada. Even granting Justice Velasco's argument that the 28 March 2014 Joint Resolution in OMB-C-C-13-0313 and OMB-C-C-13-0397 mentioned the testimonies of Sen. Estrada's co-respondents like Tuason and Cunanan, their testimonies were merely corroborative of the testimonies of complainants' witnesses Benhur Luy, Marina Sula, and Merlina Suñas and were not mentioned in isolation from the testimonies of complainants' witnesses.

Moreover, the sufficiency of the evidence put forward by the Ombudsman against Sen. Estrada to establish its finding of probable cause in the 28 March 2014 Joint Resolution in OMB-C-C-13-0313 and OMB-C-C-13-0397 was judicially confirmed by the Sandiganbayan, when it examined the evidence, found probable cause, and issued a warrant of arrest against Sen. Estrada on 23 June 2014.

We likewise take exception to Justice Brion's assertion that "the due process standards that at the very least should be considered in the conduct of a preliminary investigation are those that this Court first articulated in *Ang Tibay v. Court of Industrial Relations* [*Ang Tibay*]."¹⁶ Simply put, the *Ang Tibay* guidelines for administrative cases do not apply to preliminary investigations in criminal cases. An application of the *Ang Tibay* guidelines to preliminary investigations will have absurd and disastrous consequences.

Ang Tibay enumerated the constitutional requirements of due process, which *Ang Tibay* described as the "fundamental and essential requirements of due process in trials and investigations of an administrative character." These requirements are "fundamental and essential" because without these, there is no due process as mandated by the Constitution. These "fundamental and essential requirements" cannot be taken away by legislation because they are part of constitutional due process. These "fundamental and essential requirements" are:

¹⁶ 69 Phil. 635 (1940).

- (1) The first of these rights is the right to a hearing, which includes the right of the party interested or affected to present his own case and submit evidence in support thereof. ...
- (2) Not only must the party be given an opportunity to present his case and adduce evidence tending to establish the rights which he asserts but the tribunal must consider the evidence presented. ...
- (3) “While the duty to deliberate does not impose the obligation to decide right, it does imply a necessity which cannot be disregarded, namely, that of having something to support its decision. A decision with absolutely nothing to support it is a nullity, ...”
- (4) Not only must there be some evidence to support a finding or conclusion, but the evidence must be “substantial.” “Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” ...
- (5) The decision must be rendered on the evidence presented at the hearing, or at least contained in the record and disclosed to the parties affected. ...
- (6) The Court of Industrial Relations or any of its judges, therefore, must act on its or his own independent consideration of the law and facts of the controversy, and not simply accept the views of a subordinate in arriving at a decision. ...
- (7) The Court of Industrial Relations should, in all controversial questions, render its decision in such a manner that the parties to the proceeding can know the various issues involved, and the reasons for the decisions rendered. The performance of this duty is inseparable from the authority conferred upon it.¹⁷

The guidelines set forth in *Ang Tibay* are further clarified in *GSIS v. CA (GSIS)*¹⁸: “What *Ang Tibay* failed to explicitly state was, prescinding from the general principles governing due process, the requirement of an impartial tribunal which, needless to say, dictates that one called upon to resolve a dispute may not sit as judge and jury simultaneously, neither may he review his decision on appeal.” The *GSIS* clarification affirms the non-applicability of the *Ang Tibay* guidelines to preliminary investigations in criminal cases: The investigating officer, which is the role that the Office of the Ombudsman plays in the investigation and prosecution of government personnel,

¹⁷ Id. at 642-644.

¹⁸ 357 Phil. 511 (1998).

will never be the impartial tribunal required in *Ang Tibay*, as amplified in *GSIS*. The purpose of the Office of the Ombudsman in conducting a preliminary investigation, after conducting its own fact-finding investigation, is to determine probable cause for filing an information, and not to make a final adjudication of the rights and obligations of the parties under the law, which is the purpose of the guidelines in *Ang Tibay*. The investigating officer investigates, determines probable cause, and prosecutes the criminal case after filing the corresponding information.

The purpose in determining probable cause is to make sure that the courts are not clogged with weak cases that will only be dismissed, as well as to spare a person from the travails of a needless prosecution.¹⁹ The Ombudsman and the prosecution service under the control and supervision of the Secretary of the Department of Justice are inherently the fact-finder, investigator, hearing officer, judge and jury of the respondent in preliminary investigations. Obviously, this procedure cannot comply with *Ang Tibay*, as amplified in *GSIS*. However, there is nothing unconstitutional with this procedure because this is merely an Executive function, a part of the law enforcement process leading to trial in court where the requirements mandated in *Ang Tibay*, as amplified in *GSIS*, will apply. This has been the procedure under the 1935, 1973 and 1987 Constitutions. To now rule that *Ang Tibay*, as amplified in *GSIS*, should apply to preliminary investigations will mean that all past and present preliminary investigations are in gross violation of constitutional due process.

Moreover, a person under preliminary investigation, as Sen. Estrada is in the present case when he filed his Request, is not yet an accused person, and hence cannot demand the full exercise of the rights of an accused person:

A finding of probable cause needs only to rest on evidence showing that more likely than not a crime has been committed and was committed by the suspects. Probable cause need not be based on clear and convincing evidence of guilt, neither on evidence establishing guilt beyond reasonable doubt and definitely, not on evidence establishing absolute certainty of

¹⁹ See *Ledesma v. Court of Appeals*, 344 Phil. 207 (1997). See also *United States v. Grant and Kennedy*, 18 Phil. 122 (1910).

guilt. As well put in *Brinegar v. United States*, while probable cause demands more than “bare suspicion,” it requires “less than evidence which would justify ... conviction.” A finding of probable cause merely binds over the suspect to stand trial. It is not a pronouncement of guilt.

Considering the low quantum and quality of evidence needed to support a finding of probable cause, we also hold that the DOJ Panel did not gravely abuse its discretion in refusing to call the NBI witnesses for clarificatory questions. The decision to call witnesses for clarificatory questions is addressed to the sound discretion of the investigator and the investigator alone. If the evidence on hand already yields a probable cause, the investigator need not hold a clarificatory hearing. To repeat, probable cause merely implies probability of guilt and should be determined in a summary manner. Preliminary investigation is not a part of trial and it is only in a trial where an accused can demand the full exercise of his rights, such as the right to confront and cross-examine his accusers to establish his innocence. In the case at bar, the DOJ Panel correctly adjudged that enough evidence had been adduced to establish probable cause and clarificatory hearing was unnecessary.²⁰

Justice J.B.L. Reyes, writing for the Court, emphatically declared in *Lozada v. Hernandez*,²¹ that the “rights conferred upon accused persons to participate in preliminary investigations concerning themselves depend upon the provisions of law by which such rights are specifically secured, rather than upon the phrase ‘due process of law’.” This reiterates Justice Jose P. Laurel’s oft-quoted pronouncement in *Hashim v. Boncan*²² that “the right to a preliminary investigation is statutory, not constitutional.” **In short, the rights of a respondent in a preliminary investigation are merely statutory rights, not constitutional due process rights. An investigation to determine probable cause for the filing of an information does not initiate a criminal action so as to trigger into operation Section 14(2), Article III of the Constitution. It is the filing of a complaint or information in court that initiates a criminal action.**²³

²⁰ *Webb v. Hon. De Leon*, 317 Phil. 758, 789 (1995).

²¹ 92 Phil. 1051, 1053 (1953).

²² 71 Phil. 216 (1941).

²³ *Crespo v. Judge Mogul*, 235 Phil. 465 (1987).

The rights to due process in administrative cases as prescribed in *Ang Tibay*, as amplified in *GSIS*, are granted by the Constitution; hence, these rights cannot be taken away by mere legislation. On the other hand, as repeatedly reiterated by this Court, the right to a preliminary investigation is merely a statutory right,²⁴ not part of the “fundamental and essential requirements” of due process as prescribed in *Ang Tibay* and amplified in *GSIS*. Thus, a preliminary investigation can be taken away by legislation. The constitutional right of an accused to confront the witnesses against him does not apply in preliminary investigations; nor will the absence of a preliminary investigation be an infringement of his right to confront the witnesses against him.²⁵ A preliminary investigation may be done away with entirely without infringing the constitutional right of an accused under the due process clause to a fair trial.²⁶

The quantum of evidence needed in *Ang Tibay*, as amplified in *GSIS*, is greater than the evidence needed in a preliminary investigation to establish probable cause, or to establish the existence of a *prima facie* case that would warrant the prosecution of a case. *Ang Tibay* refers to “substantial evidence,” while the establishment of probable cause needs “only more than ‘bare suspicion,’ or ‘less than evidence which would justify ... conviction.’” In the United States, from where we borrowed the concept of probable cause,²⁷ the prevailing definition of probable cause is this:

In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.

“The substance of all the definitions” of probable cause “is a reasonable ground for belief of guilt.” *McCarthy v. De Armit*, 99 Pa. St. 63, 69, quoted with approval in the *Carroll* opinion, 267 U. S. at 161. And this “means less than evidence which

²⁴ *Mariñas v. Hon. Siochi, etc., et al.*, 191 Phil. 698, 718 (1981).

²⁵ See *Dequito v. Arellano*, 81 Phil. 128, 130 (1948), citing 32 CJS 456.

²⁶ *Bustos v. Lucero*, 81 Phil. 640, 644 (1948).

²⁷ The Fourth Amendment of the United States Constitution reads: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

See also *Ocampo v. United States*, 234 U.S. 91 (1914).

would justify condemnation” or conviction, as Marshall, C. J., said for the Court more than a century ago in *Locke v. United States*, 7 Cranch 339, 348. Since Marshall’s time, at any rate, it has come to mean more than bare suspicion: Probable cause exists where “the facts and circumstances within their [the officers’] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that” an offense has been or is being committed. *Carroll v. United States*, 267 U. S. 132, 162.

These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community’s protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers’ whim or caprice.²⁸

In the Philippines, there are four instances in the Revised Rules of Criminal Procedure where probable cause is needed to be established:

- (1) In Sections 1 and 3 of Rule 112: By the investigating officer, to determine whether there is sufficient ground to engender a well-founded belief that a crime has been committed and the respondent is probably guilty thereof, and should be held for trial. A preliminary investigation is required before the filing of a complaint or information for an offense where the penalty prescribed by law is at least four years, two months and one day without regard to the fine;
- (2) In Sections 6 and 9 of Rule 112: By the judge, to determine whether a warrant of arrest or a commitment order, if the accused has already been arrested, shall be issued and that there is a necessity of placing the respondent under immediate custody in order not to frustrate the ends of justice;

²⁸ *Brinegar v. United States*, 338 U.S. 160, 175-176 (1949).

(3) In Section 5(b) of Rule 113: By a peace officer or a private person making a warrantless arrest when an offense has just been committed, and he has probable cause to believe based on personal knowledge of facts or circumstances that the person to be arrested has committed it; and

(4) In Section 4 of Rule 126: By the judge, to determine whether a search warrant shall be issued, and only upon probable cause in connection with one specific offense to be determined personally by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched and the things to be seized which may be anywhere in the Philippines.

In all these instances, the evidence necessary to establish probable cause is based only on the likelihood, or probability, of guilt. Justice Brion, in the recent case of *Unilever Philippines, Inc. v. Tan (Unilever)*,²⁹ stated:

The determination of probable cause needs only to rest on evidence showing that more likely than not, a crime has been committed and there is enough reason to believe that it was committed by the accused. It need not be based on clear and convincing evidence of guilt, neither on evidence establishing absolute certainty of guilt. What is merely required is “probability of guilt.” Its determination, too, does not call for the application of rules or standards of proof that a judgment of conviction requires after trial on the merits. Thus, in concluding that there is probable cause, it suffices that it is believed that the act or omission complained of constitutes the very offense charged.

It is also important to stress that the determination of probable cause does not depend on the validity or merits of a party’s accusation or defense or on the admissibility or veracity of testimonies presented. As previously discussed, these matters are better ventilated during the trial proper of the case. As held in *Metropolitan Bank & Trust Company v. Gonzales*:

Probable cause has been defined as the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted. ... The term does not

²⁹ G.R. No. 179367, 29 January 2014, 715 SCRA 36, 49-50.

mean “actual or positive cause” nor does it import absolute certainty. It is merely based on opinion and reasonable belief. Thus, a finding of probable cause does not require an inquiry into whether there is sufficient evidence to procure a conviction. It is enough that it is believed that the act or omission complained of constitutes the offense charged. Precisely, there is a trial for the reception of evidence of the prosecution in support of the charge.

Justice Brion’s pronouncement in *Unilever* that “the determination of probable cause does not depend on the validity or merits of a party’s accusation or defense or on the admissibility or veracity of testimonies presented” correctly recognizes the doctrine in the United States that the determination of probable cause can rest partially, or even entirely, on hearsay evidence, as long as the person making the hearsay statement is credible. In *United States v. Ventresca*,³⁰ the United States Supreme Court held:

While a warrant may issue only upon a finding of “probable cause,” this Court has long held that “the term ‘probable cause’ ... means less than evidence which would justify condemnation,” *Locke v. United States*, 7 Cranch 339, 11 U.S. 348, and that a finding of “probable cause” may rest upon evidence which is not legally competent in a criminal trial. *Draper v. United States*, 358 U.S. 307, 358 U.S. 311. As the Court stated in *Brinegar v. United States*, 338 U.S. 160, 173, “There is a large difference between the two things to be proved (guilt and probable cause), as well as between the tribunals which determine them, and therefore a like difference in the quanta and modes of proof required to establish them.” Thus, hearsay may be the basis for issuance of the warrant “so long as there ... [is] a substantial basis for crediting the hearsay.” *Jones v. United States*, *supra*, at 362 U.S. 272. And, in *Aguilar*, we recognized that “an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant,” so long as the magistrate is “informed of some of the underlying circumstances” supporting the affiant’s conclusions and his belief that any informant involved “whose identity need not be disclosed ...” was “credible” or his information “reliable.” *Aguilar v. Texas*, *supra*, at 378 U.S. 114.

³⁰ 380 U.S. 102, 107-108 (1965).

Thus, probable cause can be established with hearsay evidence, as long as there is substantial basis for crediting the hearsay. Hearsay evidence is admissible in determining probable cause in a preliminary investigation because such investigation is merely preliminary, and does not finally adjudicate rights and obligations of parties. However, in administrative cases, where rights and obligations are finally adjudicated, what is required is “substantial evidence” which cannot rest entirely or even partially on hearsay evidence. Substantial basis is not the same as substantial evidence because substantial evidence excludes hearsay evidence while substantial basis can include hearsay evidence. To require the application of *Ang Tibay*, as amplified in *GSIS*, in preliminary investigations will change the quantum of evidence required in determining probable cause from evidence of likelihood or probability of guilt to substantial evidence of guilt.

It is, moreover, necessary to distinguish between the constitutionally guaranteed rights of an accused and the right to a preliminary investigation. To treat them the same will lead to absurd and disastrous consequences. All pending criminal cases in all courts throughout the country will have to be remanded to the preliminary investigation level because none of these will satisfy *Ang Tibay*, as amplified in *GSIS*. Preliminary investigations are conducted by prosecutors, who are the same officials who will determine probable cause and prosecute the cases in court. The prosecutor is hardly the impartial tribunal contemplated in *Ang Tibay*, as amplified in *GSIS*. A reinvestigation by an investigating officer outside of the prosecution service will be necessary if *Ang Tibay*, as amplified in *GSIS*, were to be applied. This will require a new legislation. In the meantime, all pending criminal cases in all courts will have to be remanded for reinvestigation, to proceed only when a new law is in place. To require *Ang Tibay*, as amplified in *GSIS*, to apply to preliminary investigation will necessarily change the concept of preliminary investigation as we know it now. **Applying the constitutional due process in *Ang Tibay*, as amplified in *GSIS*, to preliminary investigation will necessarily require the application of the rights of an accused in Section 14(2), Article III of the 1987 Constitution. This means that the respondent can demand an actual hearing and the right to cross-examine the witnesses against him, rights which are not afforded at present to a respondent in a preliminary investigation.**

The application of *Ang Tibay*, as amplified in *GSIS*, is not limited to those with pending preliminary investigations but even to those convicted by final judgment and already serving their sentences. The rule is well-settled that a judicial decision applies retroactively if it has a beneficial effect on a person convicted by final judgment even if he is already serving his sentence, provided that he is not a habitual criminal.³¹ This Court retains its control over a case “until the full satisfaction of the final judgment conformably with established legal processes.”³² Applying *Ang Tibay*, as amplified in *GSIS*, to preliminary investigations will result in thousands of prisoners, convicted by final judgment, being set free from prison.

**Sen. Estrada’s present Petition for
Certiorari is premature.**

Justice Velasco’s dissent prefers that Sen. Estrada not “be subjected to the rigors of a criminal prosecution in court” because there is “a pending question regarding the Ombudsman’s grave abuse of its discretion preceding the finding of a probable cause to indict him.” Restated bluntly, Justice Velasco’s dissent would like this Court to conclude that the mere filing of the present Petition for *Certiorari* questioning the Ombudsman’s denial of Sen. Estrada’s Request should have, by itself, voided all proceedings related to the present case.

Although it is true that, in its 27 March 2014 Order, the Ombudsman denied Sen. Estrada’s Request, the Ombudsman subsequently reconsidered its Order. On 7 May 2014, the same date that Sen. Estrada filed the present Petition, the Ombudsman issued a Joint Order in OMB-C-C-13-0313 and OMB-C-C-13-0397 that furnished Sen. Estrada with the counter-affidavits of Ruby Tuason, Dennis Cunanan, Gondelina Amata, Mario Relampagos, Francisco Figura, Gregoria Buenaventura, and Alexis Sevidal, and directed him to comment within a non-extendible period of five days from receipt of said Order. Sen. Estrada did not file any comment, as noted in the 4 June 2014 Joint Order of the Ombudsman.

³¹ See *People v. Delos Santos*, 386 Phil. 121 (2000). See also *People v. Garcia*, 346 Phil. 475 (1997).

³² *People v. Gallo*, 374 Phil. 59 (1999). See also *Echegaray v. Secretary of Justice*, 361 Phil. 73 (1999); *Bachrach Corporation v. Court of Appeals*, 357 Phil. 483 (1998); *Lee v. De Guzman*, G.R. No. 90926, 187 SCRA 276, 6 July 1990; *Philippine Veterans Bank v. Intermediate Appellate Court*, 258-A Phil. 424 (1989); *Sps. Lipana v. Development Bank of Rizal*, 238 Phil. 246 (1987); *Candelario v. Cañizares*, 114 Phil. 672 (1962).

On 4 June 2014, the Ombudsman issued another Joint Order and denied Sen. Estrada's Motion for Reconsideration of its 28 March 2014 Joint Resolution which found probable cause to indict Sen. Estrada and his co-respondents with one count of plunder and 11 counts of violation of Section 3(e), Republic Act No. 3019. In this 4 June 2014 Joint Order, the Ombudsman stated that "[t]his Office, in fact, held in abeyance the disposition of motions for reconsideration in this proceeding in light of its grant to Senator Estrada a period of five days from receipt of the 7 May 2014 Order to formally respond to the above-named respondents' claims."

We underscore Sen. Estrada's procedural omission. Sen. Estrada did not file any pleading, much less a motion for reconsideration, to the 27 March 2014 Order in OMB-C-C-13-0313. Sen. Estrada immediately proceeded to file this Petition for *Certiorari* before this Court. Sen. Estrada's resort to a petition for *certiorari* before this Court stands in stark contrast to his filing of his 7 April 2014 Motion for Reconsideration of the 28 March 2014 Joint Resolution finding probable cause. The present Petition for *Certiorari* is premature.

A motion for reconsideration allows the public respondent an opportunity to correct its factual and legal errors. Sen. Estrada, however, failed to present a compelling reason that the present Petition falls under the exceptions³³ to the general rule that the filing of a motion for reconsideration is required prior to the filing of a petition for *certiorari*. This Court has reiterated in numerous decisions³⁴ that a motion for reconsideration is mandatory before the filing of a petition for *certiorari*.

Justice Velasco's dissent faults the majority for their refusal to apply the *Reyes* case to the present Petition. Justice Velasco's dissent insists that "this Court cannot neglect to emphasize that, despite the variance in the quanta of evidence required, a uniform observance of the singular concept of due process is indispensable in all proceedings."

As we try to follow Justice Velasco's insistence, we direct Justice Velasco and those who join him in his dissent to this Court's

³³ See *Tan v. CA*, 341 Phil. 570, 576-578 (1997).

³⁴ *Delos Reyes v. Flores*, 628 Phil. 170 (2010); *Cervantes v. Court of Appeals*, 512 Phil. 210 (2005); *Flores v. Sangguniang Panlalawigan of Pampanga*, 492 Phil. 377 (2005). See also *Bokingo v. Court of Appeals*, 523 Phil. 186 (2006); *Yao v. Perello*, 460 Phil. 658 (2003).

ruling in *Ruivivar v. Office of the Ombudsman (Ruivivar)*,³⁵ wherein we stated that “[t]he law can no longer help one who had been given ample opportunity to be heard but who did not take full advantage of the proffered chance.”

The *Ruivivar* case, like the *Reyes* case, was also an administrative case before the Ombudsman. The Ombudsman found petitioner Rachel Beatriz Ruivivar administratively liable for discourtesy in the course of her official functions and imposed on her the penalty of reprimand. Petitioner filed a motion for reconsideration of the decision on the ground that she was not furnished copies of the affidavits of the private respondent’s witnesses. The Ombudsman subsequently ordered that petitioner be furnished with copies of the counter-affidavits of private respondent’s witnesses, and that petitioner should “file, within ten (10) days from receipt of this Order, such pleading which she may deem fit under the circumstances.” Petitioner received copies of the affidavits, and simply filed a manifestation where she maintained that her receipt of the affidavits did not alter the deprivation of her right to due process or cure the irregularity in the Ombudsman’s decision to penalize her.

In *Ruivivar*, petitioner received the affidavits of the private respondent’s witnesses after the Ombudsman rendered a decision against her. We disposed of petitioner’s deprivation of due process claim in this manner:

The CA Decision dismissed the petition for *certiorari* on the ground that the petitioner failed to exhaust all the administrative remedies available to her before the Ombudsman. This ruling is legally correct as exhaustion of administrative remedies is a requisite for the filing of a petition for *certiorari*. Other than this legal significance, however, the ruling necessarily carries the direct and immediate implication that the petitioner has been granted the opportunity to be heard and has refused to avail of this opportunity; hence, she cannot claim denial of due process. In the words of the CA ruling itself: “Petitioner was given the opportunity by public respondent to rebut the affidavits submitted by private respondent... and had a speedy and adequate administrative remedy but she failed to avail thereof for reasons only known to her.”

For a fuller appreciation of our above conclusion, we clarify

³⁵ 587 Phil. 100 (2008).

that although they are separate and distinct concepts, exhaustion of administrative remedies and due process embody linked and related principles. The “exhaustion” principle applies when the ruling court or tribunal is not given the opportunity to re-examine its findings and conclusions because of an available opportunity that a party seeking recourse against the court or the tribunal’s ruling omitted to take. Under the concept of “due process,” on the other hand, a violation occurs when a court or tribunal rules against a party without giving him or her the opportunity to be heard. Thus, the exhaustion principle is based on the perspective of the ruling court or tribunal, while due process is considered from the point of view of the litigating party against whom a ruling was made. The commonality they share is in the same “opportunity” that underlies both. In the context of the present case, the available opportunity to consider and appreciate the petitioner’s counter-statement of facts was denied the Ombudsman; hence, the petitioner is barred from seeking recourse at the CA because the ground she would invoke was not considered at all at the Ombudsman level. At the same time, the petitioner - who had the same opportunity to rebut the belatedly- furnished affidavits of the private respondent’s witnesses - was not denied and cannot now claim denial of due process because she did not take advantage of the opportunity opened to her at the Ombudsman level.

The records show that the petitioner duly filed a motion for reconsideration on due process grounds (i.e., for the private respondent’s failure to furnish her copies of the affidavits of witnesses) and on questions relating to the appreciation of the evidence on record. The Ombudsman acted on this motion by issuing its Order of January 17, 2003 belatedly furnishing her with copies of the private respondent’s witnesses, together with the “directive to file, within ten (10) days from receipt of this Order, such pleading which she may deem fit under the circumstances.”

Given this opportunity to act on the belatedly-furnished affidavits, the petitioner simply chose to file a “Manifestation” where she took the position that “The order of the Ombudsman dated 17 January 2003 supplying her with the affidavits of the complainant does not cure the 04 November 2002 order,” and on this basis prayed that the Ombudsman’s decision “be reconsidered and the complaint dismissed for lack of merit.” For her part, the private respondent filed a Comment/ Opposition to Motion for Reconsideration dated 27 January 2003 and prayed for the denial of the petitioner’s motion.

In the February 12, 2003 Order, the Ombudsman denied the petitioner's motion for reconsideration after finding no basis to alter or modify its ruling. Significantly, the Ombudsman fully discussed in this Order the due process significance of the petitioner's failure to adequately respond to the belatedly-furnished affidavits. The Ombudsman said:

Undoubtedly, the respondent herein has been furnished by this Office with copies of the affidavits, which she claims she has not received. Furthermore, the respondent has been given the opportunity to present her side relative thereto, however, she chose not to submit countervailing evidence or argument. The respondent, therefore (sic), cannot claim denial of due process for purposes of assailing the Decision issued in the present case. On this score, the Supreme Court held in the case of *People v. Acot*, 232 SCRA 406, that "a party cannot feign denial of due process where he had the opportunity to present his side". This becomes all the more important since, as correctly pointed out by the complainant, the decision issued in the present case is deemed final and unappealable pursuant to Section 27 of Republic Act 6770, and Section 7, Rule III of Administrative Order No. 07. Despite the clear provisions of the law and the rules, the respondent herein was given the opportunity not normally accorded, to present her side, but she opted not to do so which is evidently fatal to her cause.

Under these circumstances, we cannot help but recognize that the petitioner's cause is a lost one, not only for her failure to exhaust her available administrative remedy, but also on due process grounds. The law can no longer help one who had been given ample opportunity to be heard but who did not take full advantage of the proffered chance.

Ruivivar applies with even greater force to the present Petition because here the affidavits of Sen. Estrada's co-respondents were furnished to him before the Ombudsman rendered her 4 June 2014 Joint Order. In *Ruivivar*, the affidavits were furnished after the Ombudsman issued a decision.

Justice Velasco's dissent cites the cases of *Tatad v. Sandiganbayan (Tatad)*³⁶ and *Duterte v. Sandiganbayan (Duterte)*³⁷ in an attempt to prop up its stand. A careful reading of these cases,

³⁶ 242 Phil. 563 (1988).

³⁷ 352 Phil. 557 (1998).

however, would show that they do not stand on all fours with the present case. In *Tatad*, this Court ruled that “the inordinate delay in terminating the preliminary investigation and filing the information [by the Tanodbayan] in the present case is violative of the constitutionally guaranteed right of the petitioner to due process and to a speedy disposition of the cases against him.” The Tanodbayan took almost three years to terminate the preliminary investigation, despite Presidential Decree No. 911’s prescription of a ten-day period for the prosecutor to resolve a case under preliminary investigation. We ruled similarly in *Duterte*, where the petitioners were merely asked to comment and were not asked to file counter-affidavits as is the proper procedure in a preliminary investigation. Moreover, in *Duterte*, the Ombudsman took four years to terminate its preliminary investigation.

As we follow the reasoning in Justice Velasco’s dissent, it becomes more apparent that Sen. Estrada’s present Petition for *Certiorari* is premature for lack of filing of a motion for reconsideration before the Ombudsman. When the Ombudsman gave Sen. Estrada copies of the counter-affidavits and even waited for the lapse of the given period for the filing of his comment, Sen. Estrada failed to avail of the opportunity to be heard due to his own fault. Thus, Sen. Estrada’s failure cannot in any way be construed as violation of due process by the Ombudsman, much less of grave abuse of discretion. Sen. Estrada has not filed any comment, and still chooses not to.

Sen. Estrada’s present Petition for *Certiorari* constitutes forum shopping and should be summarily dismissed.

In his verification and certification of non-forum shopping in the present petition filed on 7 May 2014, Sen. Estrada stated:

3.1 I, however, disclose that I have filed a Motion for Reconsideration dated 07 April 2014 in OMB-C-C-13-0313 and OMB-C-C-13-0397, raising as sole issue the finding of probable cause in the Joint Resolution dated 28 March 2014. Such Motion for Reconsideration has yet to be resolved by the Office of the Ombudsman.

Sen. Estrada’s Motion for Reconsideration of the 28 March 2014 Joint Resolution prayed that the Ombudsman reconsider and issue a new resolution dismissing the charges against him.

However, in this Motion for Reconsideration, Sen. Estrada assailed the Ombudsman's 27 March 2014 Joint Order denying his Request, and that such denial is a violation of his right to due process.

8. It is respectfully submitted that the Ombudsman violated the foregoing rule [Rule 112, Section 4 of the Rules of Court] and principles. A reading of the Joint Resolution will reveal that various pieces of evidence which Senator Estrada was not furnished with - hence, depriving him of the opportunity to controvert the same - were heavily considered by the Ombudsman in finding probable cause to charge him with Plunder and with violations of Section 3(e) of R.A. No. 3019.

...

11. Notably, under dated 20 March 2014, Senator Estrada filed a "Request to be Furnished with Copies of Counter-Affidavits of the Other Respondents, Affidavits of New Witnesses and Other Filings," pursuant to the right of a respondent "to examine the evidence submitted by the complainant which he may not have been furnished" (Section 3[b], Rule 112 of the Rules of Court), and to "have access to the evidence on record" (Section 4[c], Rule II of the Rules of Procedure of the Office of the Ombudsman).

However, notwithstanding the gravity of the offenses leveled against Senator Estrada and the law's vigilance in protecting the rights of an accused, the Special Panel of Investigators, in an Order dated 27 March 2014, unceremoniously denied the request on the ground that "there is no provision under this Office's Rules of Procedure which entitles respondent to be furnished all the filings by the other parties..." (Order dated 27 March 2013, p. 3)

As such, Senator Estrada was not properly apprised of the evidence offered against him, which were eventually made the bases of the Ombudsman's finding of probable cause.

The Ombudsman denied Sen. Estrada's Motion for Reconsideration in its 4 June 2014 Joint Order. Clearly, Sen. Estrada expressly raised in his Motion for Reconsideration with the Ombudsman the violation of his right to due process, the same issue he is raising in this petition.

In the verification and certification of non-forum shopping attached to his petition docketed as G.R. Nos. 212761-62 filed on 23 June 2014, Sen. Estrada disclosed the pendency of the present petition, as well as those before the Sandiganbayan

for the determination of the existence of probable cause. In his petition in G.R. Nos. 212761-62, Sen. Estrada again mentioned the Ombudsman's 27 March 2014 Joint Order denying his Request.

17. Sen. Estrada was shocked not only at the Office of the Ombudsman's finding of probable cause, which he maintains is without legal or factual basis, but also that such finding of probable cause was premised on evidence not disclosed to him, including those subject of his Request to be Furnished with Copies of Counter-Affidavits of the Other Respondents, Affidavits of New Witnesses and Other Filings dated 20 March 2014.

In particular, the Office of the Ombudsman used as basis for the Joint Resolution the following documents -

- i. Alexis G. Sevidal's Counter-Affidavits dated 15 January and 24 February 2014;
- ii. Dennis L. Cunanan's Counter-Affidavits both dated 20 February 2014;
- iii. Francisco B. Figura's Counter-Affidavit dated 08 January 2014;
- iv. Ruby Tuason's Counter-Affidavits both dated 21 February 2014;
- v. Gregoria G. Buenaventura's Counter-Affidavit dated 06 March 2014; and
- vi. Philippine Daily Inquirer Online Edition news article entitled "Benhur Luy upstages Napoles in Senate Hearing" by Norman Bordadora and TJ Borgonio, published on 06 March 2014, none of which were ever furnished Sen. Estrada prior to the issuance of the challenged Joint Resolution, despite written request. ...

II

The Office of the Ombudsman, in issuing the challenged Joint Resolution dated 28 March 2014 and challenged Joint Order dated 04 June 2014, not only acted without or in excess of its jurisdiction or with grave abuse of discretion amounting to lack or excess of jurisdiction, but also violated Sen. Estrada's constitutional right to due process of law and to equal protection of the laws.

...

2.17 ... Notably, in its Joint Order dated 07 May 2014, the Office of the Ombudsman even arbitrarily limited the filing of Sen. Estrada's comment to the voluminous documents comprising the documents it furnished Sen. Estrada to a "non-extendible" period of five (5) days, making it virtually

impossible for Sen. Estrada to adequately study the charges leveled against him and intelligently respond to them. The Joint Order also failed to disclose the existence of other counter-affidavits and failed to furnish Sen. Estrada copies of such counter-affidavits.

Sen. Estrada has not been candid with this Court. His claim that the finding of probable cause was the “sole issue” he raised before the Ombudsman in his Motion for Reconsideration dated 7 April 2014 is obviously false.

Moreover, even though Sen. Estrada acknowledged his receipt of the Ombudsman’s 4 June 2014 Joint Order which denied his motion for reconsideration of the 28 March 2014 Joint Resolution, Sen. Estrada did not mention that the 4 June 2014 Joint Order stated that the Ombudsman “held in abeyance the disposition of the motions for reconsideration in this proceeding in light of its grant to [Sen. Estrada] a period of five days from receipt of the 7 May 2014 [Joint] Order to formally respond to the above-named co-respondent’s claims.”

Sen. Estrada claims that his rights were violated but he flouts the rules himself.

The rule against forum shopping is not limited to the fulfillment of the requisites of *litis pendentia*.³⁸ To determine whether a party violated the rule against forum shopping, the most important factor to ask is whether the elements of *litis pendentia* are present, or whether a final judgment in one case will amount to *res judicata* in another.³⁹ Undergirding the principle of *litis pendentia* is the theory that a party is not allowed to vex another more than once regarding the same subject matter and for the same cause of action. This theory is founded on the public policy that the same matter should not be the subject of controversy in court more than once in order that possible conflicting judgments may be avoided, for the sake of the stability in the rights and status of persons.⁴⁰

... [D]espite the fact that what the petitioners filed was a petition for *certiorari*, a recourse that - in the usual course and

³⁸ See *Sherwill Development Corporation v. Sitio Sto. Niño Residents Association, Inc.*, 500 Phil. 288, 301 (2005), citing *Sps. Tirona v. Alejo*, 419 Phil. 285 (2001), further citing *Tourist Duty Free Shops, Inc. v. Sandiganbayan*, 380 Phil. 328 (2000).

³⁹ *Madara v. Perello*, 584 Phil. 613, 629 (2008).

⁴⁰ *Sps. Tirona v. Alejo*, 419 Phil. 285, 303 (2001).

because of its nature and purpose - is not covered by the rule on forum shopping. The exception from the forum shopping rule, however, is true only where a petition for *certiorari* is properly or regularly invoked in the usual course; the exception does not apply when the relief sought, through a petition for *certiorari*, is still pending with or has as yet to be decided by the respondent court, tribunal or body exercising judicial or quasi-judicial body, e.g., a motion for reconsideration of the order assailed via a petition for *certiorari* under Rule 65, as in the present case. This conclusion is supported and strengthened by Section 1, Rule 65 of the Revised Rules of Court which provides that the availability of a remedy in the ordinary course of law precludes the filing of a petition for *certiorari*; under this rule, the petition's dismissal is the necessary consequence if recourse to Rule 65 is prematurely taken.

To be sure, the simultaneous remedies the petitioners sought could result in possible conflicting rulings, or at the very least, to complicated situations, between the RTC and the Court of Appeals. An extreme possible result is for the appellate court to confirm that the RTC decision is meritorious, yet the RTC may at the same time reconsider its ruling and recall its order of dismissal. In this eventuality, the result is the affirmation of the decision that the court *a quo* has backtracked on. Other permutations depending on the rulings of the two courts and the timing of these rulings are possible. In every case, our justice system suffers as this kind of sharp practice opens the system to the possibility of manipulation; to uncertainties when conflict of rulings arise; and at least to vexation for complications other than conflict of rulings. Thus, it matters not that ultimately the Court of Appeals may completely agree with the RTC; what the rule on forum shopping addresses are the possibility and the actuality of its harmful effects on our judicial system.⁴¹

Sen. Estrada resorted to simultaneous remedies by filing this Petition alleging violation of due process by the Ombudsman even as his Motion for Reconsideration raising the very same issue remained pending with the Ombudsman. This is plain and simple forum shopping, warranting outright dismissal of this Petition.

⁴¹ *Madara v. Perello*, 584 Phil. 613, 629 (2008).

Summary

The Ombudsman, in furnishing Sen. Estrada a copy of the complaint and its supporting affidavits and documents, fully complied with Sections 3 and 4 of Rule 112 of the Revised Rules of Criminal Procedure, and Section 4, Rule II of the Rules of Procedure of the Office of the Ombudsman, Administrative Order No. 7. Both the Revised Rules of Criminal Procedure and the Rules of Procedure of the Office of the Ombudsman require the investigating officer to furnish the respondent with copies of the affidavits of the complainant and affidavits of his supporting witnesses. Neither of these Rules require the investigating officer to furnish the respondent with copies of the affidavits of his co-respondents. The right of the respondent is only “to examine the evidence submitted by the complainant,” as expressly stated in Section 3(b), Rule 112 of the Revised Rules of Criminal Procedure. This Court has unequivocally ruled in *Paderanga* that “Section 3, Rule 112 of the Revised Rules of Criminal Procedure expressly provides that the respondent shall only have the right to submit a counter-affidavit, to examine all other evidence submitted by the complainant and, where the fiscal sets a hearing to propound clarificatory questions to the parties or their witnesses, to be afforded an opportunity to be present but without the right to examine or cross-examine.” Moreover, Section 4 (a, b and c) of Rule II of the Ombudsman’s Rule of Procedure, read together, only require the investigating officer to furnish the respondent with copies of the affidavits of the complainant and his supporting witnesses. There is no law or rule requiring the investigating officer to furnish the respondent with copies of the affidavits of his co-respondents.

In the 7 May 2014 Joint Order, the Ombudsman went beyond legal duty and even furnished Sen. Estrada with copies of the counter-affidavits of his co-respondents whom he specifically named, as well as the counter-affidavits of some of other co-respondents. In the 4 June 2014 Joint Order, the Ombudsman even held in abeyance the disposition of the motions for reconsideration because the Ombudsman granted Sen. Estrada five days from receipt of the 7 May 2014 Joint Order to formally respond to the claims made by his co-respondents. The Ombudsman faithfully complied with the existing Rules on preliminary investigation and even accommodated Sen. Estrada beyond what the Rules required. Thus, the Ombudsman could not be faulted with grave abuse of discretion. Since this is a Petition for *Certiorari* under Rule 65, the Petition fails in the absence of grave abuse of discretion on the part of the Ombudsman.

The constitutional due process requirements mandated in *Ang Tibay*, as amplified in *GSIS*, are not applicable to preliminary investigations which are creations of statutory law giving rise to mere statutory rights. A law can abolish preliminary investigations without running afoul with the constitutional requirements of due process as prescribed in *Ang Tibay*, as amplified in *GSIS*. The present procedures for preliminary investigations do not comply, and were never intended to comply, with *Ang Tibay*, as amplified in *GSIS*. Preliminary investigations do not adjudicate with finality rights and obligations of parties, while administrative investigations governed by *Ang Tibay*, as amplified in *GSIS*, so adjudicate. *Ang Tibay*, as amplified in *GSIS*, requires substantial evidence for a decision against the respondent in the administrative case. In preliminary investigations, only likelihood or probability of guilt is required. To apply *Ang Tibay*, as amplified in *GSIS*, to preliminary investigations will change the quantum of evidence required to establish probable cause. The respondent in an administrative case governed by *Ang Tibay*, as amplified in *GSIS*, has the right to an actual hearing and to cross-examine the witnesses against him. In preliminary investigations, the respondent has no such rights.

Also, in an administrative case governed by *Ang Tibay*, as amplified in *GSIS*, the hearing officer must be impartial and cannot be the fact-finder, investigator, and hearing officer at the same time. In preliminary investigations, the same public officer may be the investigator and hearing officer at the same time, or the fact-finder, investigator and hearing officer may be under the control and supervision of the same public officer, like the Ombudsman or Secretary of Justice. This explains why *Ang Tibay*, as amplified in *GSIS*, does not apply to preliminary investigations. To now declare that the guidelines in *Ang Tibay*, as amplified in *GSIS*, are fundamental and essential requirements in preliminary investigations will render all past and present preliminary investigations invalid for violation of constitutional due process. This will mean remanding for reinvestigation all criminal cases now pending in all courts throughout the country. No preliminary investigation can proceed until a new law designates a public officer, outside of the prosecution service, to determine probable cause.

Moreover, those serving sentences by final judgment would have to be released from prison because their conviction violated constitutional due process.

Sen. Estrada did not file a Motion for Reconsideration of the 27 March 2014 Order in OMB-C-C-13-0313 denying his Request, which is the subject of the present Petition. He should have filed a Motion for Reconsideration, in the same manner that he filed a Motion for Reconsideration of the 15 May 2014 Order denying his motion to suspend proceedings. The unquestioned rule in this jurisdiction is that *certiorari* will lie only if there is no appeal or any other plain, speedy and adequate remedy in the ordinary course of law against the acts of the public respondent.⁴² The plain, speedy and adequate remedy expressly provided by law is a Motion for Reconsideration of the 27 March 2014 Order of the Ombudsman. Sen. Estrada's failure to file a Motion for Reconsideration renders this Petition premature.

Sen. Estrada also raised in this Petition the same issue he raised in his Motion for Reconsideration of the 28 March 2014 Joint Resolution of the Ombudsman finding probable cause. While his Motion for Reconsideration of the 28 March 2014 Joint Resolution was pending, Sen. Estrada did not wait for the resolution of the Ombudsman and instead proceeded to file the present Petition for *Certiorari*. The Ombudsman issued a Joint Order on 4 June 2014 and specifically addressed the issue that Sen. Estrada is raising in this Petition. Thus, Sen. Estrada's present Petition for *Certiorari* is not only premature, it also constitutes forum shopping.

Equal Protection Clause

In the *en banc* decision in **GOVERNMENT SERVICE INSURANCE SYSTEM, CEBU CITY BRANCH v. MONTESCLAROS**, G.R. No. 146494, July 14, 2004, discussed above, Justice Carpio further ruled that the proviso in Section 18 of Presidential Decree No. 1146, which stated that "the dependent spouse shall not be entitled to said pension if his marriage with the pensioner is contracted within three years before the pensioner qualified for the pension," was void for being violative of the constitutional guarantee of **equal protection of the laws**:

Violation of the Equal Protection Clause

⁴² *InterOrient Maritime Enterprises, Inc. v. NLRC*, 330 Phil. 493, 502 (1996).

The surviving spouse of a government employee is entitled to receive survivor's benefits under a pension system. However, statutes sometimes require that the spouse should have married the employee for a certain period before the employee's death to prevent sham marriages contracted for monetary gain. One example is the Illinois Pension Code which restricts survivor's annuity benefits to a surviving spouse who was married to a state employee for at least one year before the employee's death. The Illinois pension system classifies spouses into those married less than one year before a member's death and those married one year or more. The classification seeks to prevent conscious adverse risk selection of deathbed marriages where a terminally ill member of the pension system marries another so that person becomes eligible for benefits. In *Sneddon v. The State Employee's Retirement System of Illinois*,⁴³ the Appellate Court of Illinois held that such classification was based on difference in situation and circumstance, bore a rational relation to the purpose of the statute, and was therefore not in violation of constitutional guarantees of due process and equal protection.

A statute based on reasonable classification does not violate the constitutional guaranty of the equal protection of the law.⁴⁴ The requirements for a valid and reasonable classification are: (1) it must rest on substantial distinctions; (2) it must be germane to the purpose of the law; (3) it must not be limited to existing conditions only; and (4) it must apply equally to all members of the same class.⁴⁵ Thus, the law may treat and regulate one class differently from another class provided there are real and substantial differences to distinguish one class from another.⁴⁶

The proviso in question does not satisfy these requirements. The proviso discriminates against the dependent spouse who contracts marriage to the pensioner within three years before the pensioner qualified for the pension. Under the proviso, even if the dependent spouse married the pensioner more than three years before the pensioner's death, the dependent spouse

⁴³ 388 N.E.2d 229 (1979).

⁴⁴ *Fariñas v. Executive Secretary*, G.R. No. 147387, 10 December 2003; *Villareña v. Commission on Audit*, G.R. Nos. 145383-84, 6 August 2003.

⁴⁵ *Philippine Rural Electric Cooperatives Association, Inc. (PHILRECA) v. The Secretary, Department of Interior and Local Government*, G.R. No. 143076, 10 June 2003, 403 SCRA 558; *Lacson v. Executive Secretary*, 361 Phil. 251 (1999); *Tiu v. CA*, 361 Phil. 229 (1999); *People v. Cayat*, 68 Phil. 12 (1939).

⁴⁶ *Fariñas v. Executive Secretary*, G.R. No. 147387, 10 December 2003; *Abbas v. COMELEC*, G.R. No. 89651, 10 November 1989, 179 SCRA 287.

would still not receive survivorship pension if the marriage took place within three years before the pensioner qualified for pension. **The object of the prohibition is vague. There is no reasonable connection between the means employed and the purpose intended. The law itself does not provide any reason or purpose for such a prohibition.** If the purpose of the proviso is to prevent “deathbed marriages,” then we do not see why the proviso reckons the three-year prohibition from the date the pensioner qualified for pension and not from the date the pensioner died. **The classification does not rest on substantial distinctions.** Worse, the classification lumps all those marriages contracted within three years before the pensioner qualified for pension as having been contracted primarily for financial convenience to avail of pension benefits.

Indeed, the classification is discriminatory and arbitrary. This is probably the reason Congress deleted the proviso in Republic Act No. 8291 (RA 8291), otherwise known as the “Government Service Insurance Act of 1997,” the law revising the old charter of GSIS (PD 1146). Under the implementing rules of RA 8291, the surviving spouse who married the member immediately before the member’s death is still qualified to receive survivorship pension unless the GSIS proves that the surviving spouse contracted the marriage solely to receive the benefit.

Thus, the present GSIS law does not presume that marriages contracted within three years before retirement or death of a member are sham marriages contracted to avail of survivorship benefits. The present GSIS law does not automatically forfeit the survivorship pension of the surviving spouse who contracted marriage to a GSIS member within three years before the member’s retirement or death. The law acknowledges that whether the surviving spouse contracted the marriage mainly to receive survivorship benefits is a matter of evidence. The law no longer prescribes a sweeping classification that unduly prejudices the legitimate surviving spouse and defeats the purpose for which Congress enacted the social legislation.

In the Cityhood Laws⁴⁷ cases, **LEAGUE OF CITIES OF THE PHILIPPINES v. COMMISSION ON ELECTIONS**, G.R. No.

⁴⁷ RA Nos. 9389 (Baybay, Leyte), 9390 (Bogo, Cebu), 9391 (Catbalogan, Samar), 9392 (Tandag, Surigao del Sur), 9393 (Lamitan, Basilan), 9394 (Borongan, Eastern Samar), 9398 (Tayabas, Quezon), 9404 (Tabuk, Kalinga), 9405 (Bayugan, Agusan del Sur), 9407 (Batac, Ilocos Norte), 9408 (Mati, Davao Oriental), 9409 (Guihulngan, Negros Oriental), 9434 (Cabadbaran, Agusan del Norte), 9435 (El Salvador, Misamis Oriental), 9436

176951, consolidated petitions⁴⁸ for prohibition were filed that assailed the Cityhood Laws and prayed for an injunction against the COMELEC and affected municipalities from conducting plebiscites pursuant to these laws.⁴⁹ In a decision dated November 18, 2008, penned by Justice Carpio, the Court *en banc*, struck down the Cityhood Laws as unconstitutional for violating Sections 6 and 10 of Article X, and **the equal protection clause**. The first and second motions for reconsideration were denied, but in another decision dated December 21, 2009, the Court *en banc*, reversed itself and declared the Cityhood Laws constitutional. Then in a resolution dated August 24, 2010, the Court *en banc*, reversed itself again and reinstated Justice Carpio's November 18, 2008 decision. But on the basis of a motion for reconsideration filed by certain municipalities, the Court *en banc* on February 15, 2011, reversed itself yet again and declared the Cityhood Laws as constitutional. In a resolution dated April 12, 2011, the Court *en banc* denied the motion for reconsideration of the petitioners. And then on June 28, 2011, the Court *en banc* denied the "second" motion for reconsideration of the petitioners. Obviously, Justice Carpio had reason to **dissent** in a case where the Court "made history with its repeated flip-flopping." His April 12, 2011 **dissenting opinion** is relevant:

The equal protection clause of the 1987 Constitution permits a valid classification under the following conditions:

- 1. The classification must rest on substantial distinctions;**
- 2. The classification must be germane to the purpose of the law;**
- 3. The classification must not be limited to existing conditions only; and**
- 4. The classification must apply equally to all members of the same class.⁵⁰**

As I have previously stressed, there is no substantial distinction between municipalities with pending cityhood bills in the 11th Congress and municipalities that did not have pending bills. The

(Carcar, Cebu), and 9491 (Naga, Cebu).

⁴⁸ Consolidated with G.R. No. 177499 and G.R. No. 178056.

⁴⁹ See discussion under Art. X, Sec. 10.

⁵⁰ *De Guzman, Jr. v. COMELEC*, 391 Phil. 70, 79 (2000); *Tiu v. Court of Tax Appeals*, 361 Phil. 229, 242 (1999).

mere pendency of a cityhood bill in the 11th Congress is not a material difference to distinguish one municipality from another for the purpose of the income requirement. The pendency of a cityhood bill in the 11th Congress does not affect or determine the level of income of a municipality. Municipalities with pending cityhood bills in the 11th Congress might even have lower annual income than municipalities that did not have pending cityhood bills. In short, the classification criterion - mere pendency of a cityhood bill in the 11th Congress - is not rationally related to the purpose of the law which is to prevent fiscally non-viable municipalities from converting into cities.

Moreover, the fact of pendency of a cityhood bill in the 11th Congress limits the exemption to a specific condition existing at the time of passage of RA 9009. That specific condition will never happen again. This violates the requirement that a valid classification must not be limited to existing conditions only.

Further, the exemption provision in the Cityhood Laws gives the 16 municipalities a unique advantage based on an arbitrary date - the filing of their cityhood bills before the end of the 11th Congress - as against all other municipalities that want to convert into cities after the effectivity of RA 9009.

In addition, limiting the exemption only to the 16 municipalities violates the requirement that the classification must apply to all similarly situated. Municipalities with the same income as the 16 respondent municipalities cannot convert into cities, while the 16 respondent municipalities can. Clearly, as worded, the exemption provision found in the Cityhood Laws, even if it were written in Section 450 of the Local Government Code, would still be unconstitutional for violation of the equal protection clause.

Reasonable Classification

PARREÑO v. COMMISSION ON AUDIT, G.R. No. 162224, June 7, 2007, 551 Phil. 368,⁵¹ was a petition for *certiorari* that, *inter alia*, questioned the constitutionality of Section 27 of Presidential Decree No. 1638.⁵² Justice Carpio, for the Court *en banc*, dismissed the petition and discussed the **equal protection clause** to affirm the constitutionality of the law:

⁵¹ See discussion under Art. II, Sec. 4.

⁵² Establishing A New System Of Retirement And Separation For Military Personnel Of The Armed Forces Of The Philippines And For Other Purposes (1979).

The Antecedent Facts

Salvador Parreño (petitioner) served in the Armed Forces of the Philippines (AFP) for 32 years. On 5 January 1982, petitioner retired from the Philippine Constabulary with the rank of 2nd Lieutenant. Petitioner availed, and received payment, of a lump sum pension equivalent to three years pay. In 1985, petitioner started receiving his monthly pension amounting to P13,680.

Petitioner migrated to Hawaii and became a naturalized American citizen. In January 2001, the AFP stopped petitioner's monthly pension in accordance with Section 27 of Presidential Decree No. 1638 (PD 1638), as amended by Presidential Decree No. 1650. Section 27 of PD 1638, as amended, provides that a retiree who loses his Filipino citizenship shall be removed from the retired list and his retirement benefits terminated upon loss of Filipino citizenship. Petitioner requested for reconsideration but the Judge Advocate General of the AFP denied the request.

Petitioner filed a claim before the COA for the continuance of his monthly pension.

The Ruling of the Commission on Audit

In its 9 January 2003 Decision, the COA denied petitioner's claim for lack of jurisdiction⁵³...

Hence, the petition before this Court.

The Issues

Petitioner raises the following issues:

1. Whether Section 27 of PD 1638, as amended, is constitutional...
3. Whether PD 1638, as amended, has retroactive or prospective effect.

The Ruling of this Court

The petition has no merit...

Application of PD 1638, as amended

⁵³ See discussion under Art. IX-D, Sec. 2.

Petitioner alleges that PD 1638, as amended, should apply prospectively. The Office of the Solicitor General (OSG) agrees with petitioner. The OSG argues that PD 1638, as amended, should apply only to those who joined the military service after its effectivity, citing Sections 33 and 35, thus:

Sec. 33. Nothing in this Decree shall be construed in any manner to reduce whatever retirement and separation pay or gratuity or other monetary benefits which any person is heretofore receiving or is entitled to receive under the provisions of existing law. ...

Sec. 35. Except those necessary to give effect to the provisions of this Decree and to preserve the rights granted to retired or separated military personnel, all laws, rules and regulations inconsistent with the provisions of this Decree are hereby repealed or modified accordingly.

The OSG further argues that retirement laws are liberally construed in favor of the retirees. Article 4 of the Civil Code provides: "Laws shall have no retroactive effect, unless the contrary is provided." Section 36 of PD 1638, as amended, provides that it shall take effect upon its approval. It was signed on 10 September 1979. PD 1638, as amended, does not provide for its retroactive application.

There is no question that PD 1638, as amended, applies prospectively.

However, we do not agree with the interpretation of petitioner and the OSG that PD 1638, as amended, should apply only to those who joined the military after its effectivity. Since PD 1638, as amended, is about the new system of retirement and separation from service of military personnel, it should apply to those who were in the service at the time of its approval. In fact, Section 2 of PD 1638, as amended, provides that "th[e] Decree shall apply to all military personnel in the service of the Armed Forces of the Philippines." PD 1638, as amended, was signed on 10 September 1979. Petitioner retired in 1982, long after the approval of PD 1638, as amended. Hence, the provisions of PD 1638, as amended, apply to petitioner.

Petitioner Has No Vested Right to His Retirement Benefits

Petitioner alleges that Section 27 of PD 1638, as amended, deprives him of his property which the Constitution and statutes

vest in him. Petitioner alleges that his pension, being a property vested by the Constitution, cannot be removed or taken from him just because he became a naturalized American citizen. Petitioner further alleges that the termination of his monthly pension is a penalty equivalent to deprivation of his life.

The allegations have no merit. PD 1638, as amended, does not impair any vested right or interest of petitioner. Where the employee retires and meets the eligibility requirements, he acquires a vested right to the benefits that is protected by the due process clause.⁵⁴ At the time of the approval of PD 1638 and at the time of its amendment, petitioner was still in active service. Hence, petitioner's retirement benefits were only future benefits and did not constitute a vested right. Before a right to retirement benefits or pension vests in an employee, he must have met the stated conditions of eligibility with respect to the nature of employment, age, and length of service.⁵⁵ It is only upon retirement that military personnel acquire a vested right to retirement benefits. Retirees enjoy a protected property interest whenever they acquire a right to immediate payment under pre-existing law.⁵⁶

Further, the retirement benefits of military personnel are purely gratuitous in nature. They are not similar to pension plans where employee participation is mandatory, hence, the employees have contractual or vested rights in the pension which forms part of the compensation.⁵⁷

Constitutionality of Section 27 of PD 1638

Section 27 of PD 1638, as amended, provides:

Sec. 27. Military personnel retired under Sections 4, 5, 10, 11 and 12 shall be carried in the retired list of the Armed Forces of the Philippines. The name of a retiree who loses his Filipino citizenship shall be removed from the retired list and his retirement benefits terminated upon such loss.

The OSG agrees with petitioner that Section 27 of PD 1638, as

⁵⁴ *Government Service Insurance System v. Montesclaros*, G.R. No. 146494, 14 July 2004, 434 SCRA 441, penned by Justice Carpio and excerpted above.

⁵⁵ *Brion v. South Phil. Union Mission of 7th Day Adventist Church*, 366 Phil. 967 (1999).

⁵⁶ *Government Service Insurance System v. Montesclaros*, G.R. No. 146494, 14 July 2004, 434 SCRA 441, penned by Justice Carpio and excerpted above.

⁵⁷ *Ibid.*

amended, is unconstitutional. The OSG argues that the obligation imposed on petitioner to retain his Filipino citizenship as a condition for him to remain in the AFP retired list and receive his retirement benefit is contrary to public policy and welfare, oppressive, discriminatory, and violative of the due process clause of the Constitution. The OSG argues that the retirement law is in the nature of a contract between the government and its employees. The OSG further argues that Section 27 of PD 1638, as amended, discriminates against AFP retirees who have changed their nationality.

We do not agree.

The constitutional right to equal protection of the laws is not absolute but is subject to reasonable classification.⁵⁸ To be reasonable, the classification (a) must be based on substantial distinctions which make real differences; (b) must be germane to the purpose of the law; (c) must not be limited to existing conditions only; and (d) must apply equally to each member of the class.⁵⁹

There is compliance with all these conditions. There is a substantial difference between retirees who are citizens of the Philippines and retirees who lost their Filipino citizenship by naturalization in another country, such as petitioner in the case before us. The constitutional right of the state to require all citizens to render personal and military service⁶⁰ necessarily includes not only private citizens but also citizens who have retired from military service. A retiree who had lost his Filipino citizenship already renounced his allegiance to the state. Thus, he may no longer be compelled by the state to render compulsory military service when the need arises. Petitioner's loss of Filipino citizenship constitutes a substantial distinction that distinguishes him from other retirees who retain their Filipino citizenship. If the groupings are characterized by substantial distinctions that make real differences, one class may be treated and regulated differently from another.⁶¹

Republic Act No. 7077⁶² (RA 7077) affirmed the constitutional right of the state to a Citizen Armed Forces. Section 11 of RA 7077 provides that citizen soldiers or reservists include ex-servicemen

⁵⁸ Tiu v. Court of Appeals, 361 Phil. 229 (1999).

⁵⁹ Beltran v. Secretary of Health, G.R. No. 133640, 25 November 2005, 476 SCRA 168.

⁶⁰ Const., Art. II, Sec. 4.

⁶¹ Tiu v. Court of Appeals, 361 Phil. 229 (1999).

⁶² An Act Providing For The Development, Administration, Organization, Training,

and retired officers of the AFP. Hence, even when a retiree is no longer in the active service, he is still a part of the Citizen Armed Forces. Thus, we do not find the requirement imposed by Section 27 of PD 1638, as amended, oppressive, discriminatory, or contrary to public policy. The state has the right to impose a reasonable condition that is necessary for national defense. To rule otherwise would be detrimental to the interest of the state.

There was no denial of due process in this case. When petitioner lost his Filipino citizenship, the AFP had no choice but to stop his monthly pension in accordance with Section 27 of PD 1638, as amended. Petitioner had the opportunity to contest the termination of his pension when he requested for reconsideration of the removal of his name from the list of retirees and the termination of his pension. The Judge Advocate General denied the request pursuant to Section 27 of PD 1638, as amended.

Petitioner argues that he can reacquire his Filipino citizenship under Republic Act No. 9225⁶³ (RA 9225), in which case he will still be considered a natural-born Filipino. However, petitioner alleges that if he reacquires his Filipino citizenship under RA 9225, he will still not be entitled to his pension because of its prior termination. This situation is speculative. In the first place, petitioner has not shown that he has any intention of reacquiring, or has done anything to reacquire, his Filipino citizenship. Secondly, in response to the request for opinion of then AFP Chief of Staff, General Efren L. Abu, the Department of Justice (DOJ) issued DOJ Opinion No. 12, series of 2005, dated 19 January 2005, thus:

[T]he AFP uniformed personnel retirees, having re-acquired Philippine citizenship pursuant to R.A. No. 9225 and its IRR, are entitled to pension and gratuity benefits reckoned from the date they have taken their oath of allegiance to the Republic of the Philippines. It goes without saying that these retirees have no right to receive such pension benefits during the time that they have ceased to be Filipinos pursuant to the aforequoted P.D. No. 1638, as amended, and any payment made to them should be returned to the AFP. ...

Hence, petitioner has other recourse if he desires to continue receiving his monthly pension. Just recently, in *AASJS Member-*

Maintenance And Utilization Of The Citizen Armed Forces Of The Philippines And For Other Purposes (1991).

⁶³ Citizenship Retention And Re-Acquisition Act Of 2003.

Hector Gumangan Calilung v. Simeon Datumanong,⁶⁴ this Court upheld the constitutionality of RA 9225. If petitioner reacquires his Filipino citizenship, he will even recover his natural-born citizenship.⁶⁵ In *Tabasa v. Court of Appeals*,⁶⁶ this Court reiterated that “[t]he repatriation of the former Filipino will allow him to recover his natural-born citizenship...”

Petitioner will be entitled to receive his monthly pension should he reacquire his Filipino citizenship since he will again be entitled to the benefits and privileges of Filipino citizenship reckoned from the time of his reacquisition of Filipino citizenship. There is no legal obstacle to the resumption of his retirement benefits from the time he complies again with the condition of the law, that is, he can receive his retirement benefits provided he is a Filipino citizen.

We acknowledge the service rendered to the country by petitioner and those similarly situated. However, petitioner failed to overcome the presumption of constitutionality of Section 27 of PD 1638, as amended. Unless the provision is amended or repealed in the future, the AFP has to apply Section 27 of PD 1638, as amended.

Substantial Distinction

In **BASES CONVERSION AND DEVELOPMENT AUTHORITY v. COMMISSION ON AUDIT**, G.R. No. 178160, February 26, 2009, 599 Phil. 455,⁶⁷ the BCDA sought to nullify the decision of the COA that disallowed the year-end benefit granted by the BCDA to its Board members and full-time consultants. One of the arguments raised by the BCDA was that the denial of the year-end benefit to Board members and full-time consultants violated the **equal protection clause**, alleging that there was no **substantial distinction** between regular officials and employees on one hand, who were clearly entitled to the benefit, and Board members and full-time consultants on the other:

The BCDA states that “there is here only a distinction, but no difference” because both “have undeniably one common goal as humans, that is ... ‘to keep body and soul together’” or, “[d]ifferently put, both have mouths to feed and stomachs to fill.”

⁶⁴ G.R. No. 160869, 11 May 2007.

⁶⁵ *Bengson III v. House of Representatives Electoral Tribunal*, G.R. No. 142840, 7 May 2001, 357 SCRA 545.

⁶⁶ G.R. No. 125793, 29 August 2006, 500 SCRA 9.

⁶⁷ See discussion under Art. II.

The Court is not impressed. Every presumption should be indulged in favor of the constitutionality of RA No. 7227 and the burden of proof is on the BCDA to show that there is a clear and unequivocal breach of the Constitution.⁶⁸ In *Abakada Guro Party List v. Purisima*,⁶⁹ the Court held that:

A law enacted by Congress enjoys the strong presumption of constitutionality. To justify its nullification, there must be a clear and unequivocal breach of the Constitution, not a doubtful and unequivocal one. To invalidate [a law] based on ... baseless supposition is an affront to the wisdom not only of the legislature that passed it but also of the executive which approved it.

The BCDA failed to show that RA No. 7227 unreasonably singled out Board members and full-time consultants in the grant of the year-end benefit. It did not show any clear and unequivocal breach of the Constitution. **The claim that there is no difference between regular officials and employees, and Board members and full-time consultants because both groups “have mouths to feed and stomachs to fill” is fatuous. Surely, persons are not automatically similarly situated - thus, automatically deserving of equal protection of the laws - just because they both “have mouths to feed and stomachs to fill.” Otherwise, the existence of a substantial distinction would become forever highly improbable.**

Police Power

In **MIRASOL v. DEPARTMENT OF PUBLIC WORKS AND HIGHWAYS**, G.R. No. 158793, June 8, 2006, 523 Phil. 713, a petition for review on *certiorari*, which sought the reversal of the decision and order of the Regional Trial Court, Justice Carpio, for the Court *en banc*, discussed the nature of **police power** as a limitation to **Section 1, Article III**. The relevant discussion centered on the constitutionality of Administrative Order No. 1 (AO 1) of the then Department of Public Works and Communications,⁷⁰ which the Court eventually declared as valid:

On 19 February 1968, Secretary Antonio V. Raquiza of the Department of Public Works and Communications issued AO 1,

⁶⁸ *British American Tobacco v. Camacho*, G.R. No. 163583, 20 August 2008; *Central Bank Employees Association, Inc. v. Bangko Sentral ng Pilipinas*, 487 Phil. 531, 562 (2004).

⁶⁹ G.R. No. 166715, 14 August 2008.

⁷⁰ Revised Rules And Regulations Governing Limited Access Highways, issued on 19 February 1968.

which, among others, prohibited motorcycles on limited access highways. The pertinent provisions of AO 1 read:

SUBJECT: Revised Rules and Regulations Governing Limited Access Highways

By virtue of the authority granted the Secretary [of] Public Works and Communications under Section 3 of R.A. 2000, otherwise known as the Limited Access Highway Act, the following rules and regulations governing limited access highways are hereby promulgated for the guidance of all concerned:

...

Sec. 3 - On limited access highways, it is unlawful for any person or group of persons to:

...

(h) Drive any bicycle, tricycle, pedicab, motorcycle or any vehicle (not motorized); ...

Petitioners assail the DPWH's failure to provide "scientific" and "objective" data on the danger of having motorcycles plying our highways. They attack this exercise of police power as baseless and unwarranted. Petitioners belabor the fact that there are studies that provide proof that motorcycles are safe modes of transport. They also claim that AO 1 introduces an unreasonable classification by singling-out motorcycles from other motorized modes of transport. Finally, petitioners argue that AO 1 violates their right to travel.

Petitioners' arguments do not convince us. ...

We now discuss the constitutionality of AO 1. Administrative issuances have the force and effect of law.⁷¹ They benefit from the same presumption of validity and constitutionality enjoyed by statutes.⁷² These two precepts place a heavy burden upon any party assailing governmental regulations. **The burden of proving unconstitutionality rests on such party.**⁷³ **The burden becomes heavier when the police power is at issue.**

The use of public highways by motor vehicles is subject to

⁷¹ *Eslao v. Commission on Audit*, G.R. No. 108310, 1 September 1994, 236 SCRA 161.

⁷² *Ibid.*

⁷³ *JMM Promotion and Management, Inc. v. Court of Appeals*, G.R. No. 120095, 5 August 1996, 260 SCRA 319.

regulation as an exercise of the police power of the state.⁷⁴ The police power is far-reaching in scope and is the “most essential, insistent and illimitable” of all government powers.⁷⁵ The tendency is to extend rather than to restrict the use of police power. The sole standard in measuring its exercise is reasonableness.⁷⁶ What is “reasonable” is not subject to exact definition or scientific formulation. No all-embracing test of reasonableness exists,⁷⁷ for its determination rests upon human judgment applied to the facts and circumstances of each particular case.⁷⁸

We find that AO 1 does not impose unreasonable restrictions. It merely outlines several precautionary measures, to which toll way users must adhere. These rules were designed to ensure public safety and the uninhibited flow of traffic within limited access facilities. They cover several subjects, from what lanes should be used by a certain vehicle, to maximum vehicle height. The prohibition of certain types of vehicles is but one of these. None of these rules violates reason. The purpose of these rules and the logic behind them are quite evident. A toll way is not an ordinary road. The special purpose for which a toll way is constructed necessitates the imposition of guidelines in the manner of its use and operation. Inevitably, such rules will restrict certain rights. But the mere fact that certain rights are restricted does not invalidate the rules.

Consider Section 3(g) of AO 1, which prohibits the conduct of rallies inside toll ways. The regulation affects the right to peaceably assemble. The exercise of police power involves restriction, restriction being implicit in the power itself. **Thus, the test of constitutionality of a police power measure is limited to an inquiry on whether the restriction imposed on constitutional rights is reasonable, and not whether it imposes a restriction on those rights.**

None of the rules outlined in AO 1 strikes us as arbitrary and capricious. The DPWH, through the Solicitor General, maintains that the toll ways were not designed to accommodate motorcycles

⁷⁴ Wall v. King, 109 F. Supp. 198 (1952); Munz v. Harnett, 6 F. Supp. 158 (1933); Schwartzman Service v. Stahl, 60 F.2d 1034 (1932).

⁷⁵ Ichong v. Hernandez, 101 Phil. 1155, 1163 (1957).

⁷⁶ Department of Education, Culture and Sports v. San Diego, G.R. No. 89572, 21 December 1989, 180 SCRA 533.

⁷⁷ City of Raleigh v. Norfolk Southern Railway Co., 165 S.E.2d 745 (1969).

⁷⁸ Board of Zoning Appeals of Decatur v. Decatur, Ind. Co. of Jehovah's Witnesses, 117 N.E.2d 115 (1954).

and that their presence in the toll ways will compromise safety and traffic considerations. The DPWH points out that the same study the petitioners rely on cites that the inability of other drivers to detect motorcycles is the predominant cause of accidents. Arguably, prohibiting the use of motorcycles in toll ways may not be the “best” measure to ensure the safety and comfort of those who ply the toll ways.

However, the means by which the government chooses to act is not judged in terms of what is “best,” rather, on simply whether the act is reasonable. The validity of a police power measure does not depend upon the absolute assurance that the purpose desired can in fact be probably fully accomplished, or upon the certainty that it will best serve the purpose intended.⁷⁹ Reason, not scientific exactitude, is the measure of the validity of the governmental regulation. Arguments based on what is “best” are arguments reserved for the Legislature’s discussion. Judicial intervention in such matters will only be warranted if the assailed regulation is patently whimsical. We do not find the situation in this case to be so.

Neither do we find AO 1 oppressive. Petitioners are not being deprived of their right to use the limited access facility. They are merely being required, just like the rest of the public, to adhere to the rules on how to use the facility. AO 1 does not infringe upon petitioners’ right to travel but merely bars motorcycles, bicycles, tricycles, pedicabs, and any non-motorized vehicles as the mode of traveling along limited access highways.⁸⁰ Several cheap, accessible and practical alternative modes of transport are open to petitioners. There is nothing oppressive in being required to take a bus or drive a car instead of one’s scooter, bicycle, calesa, or motorcycle upon using a toll way.

Petitioners’ reliance on the studies they gathered is misplaced. Police power does not rely upon the existence of definitive studies to support its use. Indeed, no requirement exists that the exercise of police power must first be conclusively justified

⁷⁹ *Hunter v. Owens*, 80 Fla. 812, 86 So. 839 (1920).

⁸⁰ See *American Motorcyclist Ass’n. v. Park Comm’n. of City of Brockton*, 575 N.E.2d 754 (1991). In this case, the plaintiffs sought declaratory and injunctive relief from a park commission regulation which prohibited motorcycles and mopeds in the city park. The court held that the regulation did not infringe upon plaintiffs’ right to travel. The court held that the right to travel does not require the state to avoid any regulation of methods of transportation. According to the court, the regulation does not prevent any person from traveling once inside the park but merely bars motorcycles as the mode of transportation.

by research. The yardstick has always been simply whether the government's act is reasonable and not oppressive.⁸¹ The use of "reason" in this sense is simply meant to guard against arbitrary and capricious government action. Scientific certainty and conclusiveness, though desirable, may not be demanded in every situation. Otherwise, no government will be able to act in situations demanding the exercise of its residual powers because it will be tied up conducting studies.

A police power measure may be assailed upon proof that it unduly violates constitutional limitations like due process and equal protection of the law.⁸² Petitioners' attempt to seek redress from the motorcycle ban under the aegis of equal protection must fail. Petitioners' contention that AO 1 unreasonably singles out motorcycles is specious. To begin with, classification by itself is not prohibited.⁸³

A classification can only be assailed if it is deemed invidious, that is, it is not based on real or substantial differences. As explained by Chief Justice Fernando in *Bautista v. Juinio*:⁸⁴

... To assure that the general welfare be promoted, which is the end of law, a regulatory measure may cut into the rights to liberty and property. Those adversely affected may under such circumstances invoked the equal protection clause only if they can show that the governmental act assailed, far from being inspired by the attainment of the common weal was prompted by the spirit of hostility, or at the very least, discrimination that finds no support in reason. It suffices then that the laws operate equally and uniformly on all persons under similar circumstances or that all persons must be treated in the same manner, the conditions not being different, both in the privileges conferred and the liabilities imposed. Favoritism and undue preference cannot be allowed. For the principle is that equal protection and security shall be given to every person under circumstances, which if not identical is analogous. If law be looked upon in terms of burden or charges, those that fall within a class should be treated in the same fashion, whatever restrictions cast on some in the group equally binding the rest.

⁸¹ *United States v. Toribio*, 15 Phil. 85 (1910).

⁸² *Ichong v. Hernandez*, 101 Phil. 1155 (1957).

⁸³ *Dumlao v. COMELEC*, No. L-52245, 22 January 1980, 95 SCRA 392.

⁸⁴ 212 Phil. 307, 317-318 (1984).

We find that it is neither warranted nor reasonable for petitioners to say that the only justifiable classification among modes of transport is the motorized against the non-motorized. Not all motorized vehicles are created equal. A 16-wheeler truck is substantially different from other light vehicles. The first may be denied access to some roads where the latter are free to drive. Old vehicles may be reasonably differentiated from newer models.⁸⁵ We find that real and substantial differences exist between a motorcycle and other forms of transport sufficient to justify its classification among those prohibited from plying the toll ways. Amongst all types of motorized transport, it is obvious, even to a child, that a motorcycle is quite different from a car, a bus or a truck. The most obvious and troubling difference would be that a two-wheeled vehicle is less stable and more easily overturned than a four-wheeled vehicle.

A classification based on practical convenience and common knowledge is not unconstitutional simply because it may lack purely theoretical or scientific uniformity. Moreover, we take note that the Philippines is home to a host of unique motorized modes of transport ranging from modified hand-carts (*kuliglig*) to bicycle “sidecars” outfitted with a motor. To follow petitioners’ argument to its logical conclusion would open up toll ways to all these contraptions. Both safety and traffic considerations militate against any ruling that would bring about such a nightmare. Petitioners complain that the prohibition on the use of motorcycles in toll ways unduly deprive them of their right to travel.

We are not persuaded.

A toll way is not an ordinary road. As a facility designed to promote the fastest access to certain destinations, its use, operation, and maintenance require close regulation. Public interest and safety require the imposition of certain restrictions on toll ways that do not apply to ordinary roads. As a special kind of road, it is but reasonable that not all forms of transport could use it.

The right to travel does not mean the right to choose any vehicle in traversing a toll way. The right to travel refers to the right to move from one place to another. Petitioners can traverse the toll way any time they choose using private or public four-wheeled

⁸⁵ *Taxicab Operators of Metro Manila, Inc. v. Board of Transportation*, 202 Phil. 925 (1982).

vehicles. Petitioners are not denied the right to move from Point A to Point B along the toll way. Petitioners are free to access the toll way, much as the rest of the public can. The mode by which petitioners wish to travel pertains to the manner of using the toll way, a subject that can be validly limited by regulation.

Petitioners themselves admit that alternative routes are available to them. Their complaint is that these routes are not the safest and most convenient. Even if their claim is true, it hardly qualifies as an undue curtailment of their freedom of movement and travel. The right to travel does not entitle a person to the best form of transport or to the most convenient route to his destination. The obstructions found in normal streets, which petitioners complain of (i.e., potholes, manholes, construction barriers, etc.), are not suffered by them alone.

Finally, petitioners assert that their possession of a driver's license from the Land Transportation Office (LTO) and the fact that their vehicles are registered with that office entitle them to use all kinds of roads in the country. Again, petitioners are mistaken. There exists no absolute right to drive. On the contrary, this privilege, is heavily regulated. Only a qualified group is allowed to drive motor vehicles: those who pass the tests administered by the LTO. A driver's license issued by the LTO merely allows one to drive a particular mode of transport. It is not a license to drive or operate any form of transportation on any type of road. Vehicle registration in the LTO on the other hand merely signifies the roadworthiness of a vehicle. This does not preclude the government from prescribing which roads are accessible to certain vehicles.

Section 2. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures of whatever nature and for any purpose shall be inviolable, and no search warrant or warrant of arrest shall issue except upon probable cause to be determined personally by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched and the persons or things to be seized.

PEOPLE v. BREIS, G.R. No. 205823, August 17, 2015, 766 Phil. 785, was an appeal from the decision of the Court of Appeals that affirmed

the decision of the Regional Trial Court:

The Facts

Appellants Regie Breis y Alvarado (Breis) and Gary Yumol y Tuazon (Yumol) were charged with violation of Section 11 of Republic Act No. 9165 (RA 9165) as follows:

That in the afternoon of February 10, 2010, at Gov. Pack Road, this City, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, in conspiracy with each other, did then and there willfully, unlawfully, and feloniously have in their possession, custody and control marijuana with a recorded net weight of 8,181 grams of dried marijuana leaves/fruited tops wrapped in plastic and further wrapped with brown packaging tape and placed inside a brown box, without the authority of law and knowing fully well that said dried marijuana leaves/fruited tops are dangerous drugs, in violation of the afore-cited provisions of law.

CONTRARY TO LAW to Sec. 11 of RA 9165.

Upon arraignment, appellants pleaded not guilty. Trial ensued, where the prosecution presented witnesses Intelligence Officers 1 Elizer Mangili (IO1 Mangili) and Ryan Peralta (IO1 Peralta) of the Philippine Drug Enforcement Agency - Cordillera Administrative Region (PDEA-CAR); while the defense presented the testimonies of appellants.

Version of the Prosecution

The prosecution's version of the facts, as summarized by the trial court, is as follows:

Around 3:00 o'clock PM of February 10, 2009 (sic), an informant went to the PDEA-CAR field office at Melvin Jones, Harrison Road, Baguio City and offered the information that the accused were bound to transport a box of marijuana from Baguio City to Dau, Mabalacat, Pampanga. Mangili gathered that the accused have been frequently traveling from Pampanga to Baguio to get marijuana bricks from their supplier at La Trinidad, Benguet. Mangili referred the informant to Senior PDEJA Officer Tacio for further interview and then the matter was referred to the PDEA Officer-in-Charge Edgar Apalla, who after careful evaluation, ordered Agent Tacio to form a team for the entrapment of the accused.

Agent Tacio created a team composed of Mangili and Peralta as arresting officer and seizing officer, respectively, and briefed them on the operations to be conducted. Tacio disclosed to the team that the accused were to transport by a public transport bus from Baguio City to Dau, Pampanga bricks of marijuana packed in a carton and that the departure from Baguio was scheduled at around 5:00 o'clock PM of that day. The accused Breis would be in a white t-shirt with "Starbucks" logo and dark jeans while accused Yumol would be wearing a black t-shirt with a white print and blue jeans. Both the accused were described as standing about 5 feet and 5 inches, thin, and dark complexion.

When the briefing was through, the team proceeded to the Genesis Bus terminal at Governor Pack Road, Baguio City at around 4:30 o'clock PM. Due to time constraints, the PDEA team chose not to secure any warrant nor coordinate with the nearest police station.

Upon reaching the bus terminal, Mangili asked the bus conductor to identify the bus which would leave at 5:00 o'clock PM. Mangili was directed to Genesis bus with plate number TXX 890. Thus, pretending to be passengers, Mangili and Peralta boarded the bus and they observed two male individuals whose physical appearances fitted the descriptions given by the informant. Both agents likewise saw a box placed in between the legs of accused Breis.

Mangili sat behind the accused while Peralta, stood near where the accused were seated. In order to have a clearer view of the box tucked in between the feet of accused Breis if the same fit the box described by informant, Mangili took the seat opposite where the accused were seated and saw that the box was with the markings "Ginebra San Miguel" and which was described by the informant. Mangili then casually asked accused Yumol who owned the "Ginebra San Miguel" box, the accused replied that it was theirs.

Accused Yumol suddenly stood up and tried to leave but before he could do so, Peralta blocked his way while Mangili confronted accused Breis and asked what was contained in the box. Instead of answering, Breis shoved Mangili and tried to flee but Mangili was able to block his way as he was much larger than the accused Yumol (sic). Mangili ordered him to sit down.

Agent Peralta then summoned the back-up officers to help secure the bus and subdue the accused. After introducing themselves as PDEA agents, Mangili asked the accused Breis to open the box but Breis ignored the request which

made Mangili lift and open the box. He took one brick and discovered it was marijuana. The “Ginebra San Miguel” box yielded three more bricks of marijuana. Mangili then marked the items on site.

Agent Peralta then informed the accused that they were being arrested for violation of Rep.

Act No. 9165 and then he read their constitutional rights in Pilipino to them.

Thereafter, the team returned to the PDEA-CAR office of Melvin Jones, Baguio City for documentation such as the preparation of the affidavits of Agents Mangili and Peralta, Booking Sheet and Arrest Report of both accused, Request for Physical Exam and Request for Laboratory Exam. Inventory likewise was done around 7:43 o’clock PM on February 10, 2010 at the said PDEA-CAR office.

After the documentation and inventory, the accused were brought to the Baguio General Hospital and Medical Center (BGHMC) and Medico-Legal Certificates were issued showing that the accused had no external signs of physical injuries at the time of their examination. Chemistry Report No. D-08-2010 indicates that the confiscated items from the accused yielded positive to (sic) the presence of marijuana, a dangerous drugs (sic).

Version of the Defense

The defense’s version of the facts, as summarized by the trial court, is as follows:

Accused, both construction workers, left Dau, Mabalacat, Pampanga for Baguio at around 6:00 o’clock AM of February 9, 2010 to visit a certain Edwin Garcia, an acquaintance and a resident of Loakan, Baguio City. Edwin Garcia had offered the accused to be upholsterers in his upholstery business way back in December of 2008.

At around 11:00 o’clock AM, the accused arrived in Baguio City and because they did not know the exact address and contact number of Edwin Garcia, they took a chance and decided to take a cab to Loakan. However, they failed to find Garcia’s house despite asking the residents of Loakan. So, they decided to go back to the Genesis bus terminal and go back home to Pampanga.

Upon reaching the terminal, they ate and took the 4:30 o’clock PM bus for Pampanga. They were already boarded when accused Yumol stepped out to buy a bottle of water.

Thereafter, Mangili went near accused Breis and uttered something inaudible, and thinking that the seat he was occupying was Mangili's, accused Breis stood up to give up his seat but instead Mangili pushed him and accused Breis asked what seems to be the problem. Mangili then asked if he owns the box under the seat in front of his, Breis replied in the negative. Mangili then opened the box, got one of the bricks contained therein, sliced the same and saw that it was marijuana. Accused Breis, infuriated, retorted that the accusation is baseless and malicious.

Mangili then summoned his companions and they dragged accused Breis outside the bus when suddenly, accused Yumol arrived and inquired what the commotion was all about. The group then asked if he (Yumol) was a companion of accused Breis and when he answered positively, Yumol was likewise apprehended.

Both the accused were then brought to the PDEA Office and were forced to admit ownership of the box of marijuana, but they refused and thus they were hit with the bricks of marijuana. One of the agents even squeezed the scrotum of accused Yumol in the hope that he will admit ownership over the box of marijuana.

The Trial Court's Ruling

The trial court gave credence to the prosecution's version, upholding the presumption of regularity in favor of the PDEA agents and finding no evil or ill-motive on their part. On the other hand, the trial court found appellants' defense of frame-up too incredible and outlandishly preposterous. The trial court also held that the warrantless search and seizure and the warrantless arrest of appellants were valid. The dispositive portion of the decision reads:

WHEREFORE, judgment is rendered finding the accused Regie Breis y Alvarado and Gary Yumol y Tuazon GUILTY beyond any reasonable doubt and they are hereby sentenced to suffer the penalty of LIFE IMPRISONMENT and each to pay a fine of P5,000,000.00.

Both the accused are immediately ORDERED TO BE TRANSFERRED to the National Penitentiary in Muntinlupa City, Metro Manila.
SO ORDERED.

The lone assignment of error in the Brief for the Accused-Appellants is as follows:

The Trial Court gravely erred in finding the accused-

appellants guilty of the crime charged beyond reasonable doubt.

In their appeal, appellants argued that the PDEA agents did not comply with Section 21, paragraph 1, Article II of RA 9165, and that the prosecution failed to establish the chain of custody over the seized items.

The Court of Appeals' Ruling

The Court of Appeals affirmed the decision of the trial court, holding that the requirements of Section 21, Article II of RA 9165 were satisfied. Further, the Court of Appeals found no break in the custody of the seized items that might compromise their evidentiary integrity. The appellate court also upheld the legality of the warrantless search and arrest of appellants. The dispositive portion of the decision of the Court of Appeals reads:

WHEREFORE, the foregoing premises considered, the appealed Decision dated February 14, 2011 of the Regional Trial Court (RTC) of Baguio City, Branch 61, in Criminal Case No. 30409-R, is **AFFIRMED** in toto.
SO ORDERED.

...

In dismissing the appeal and affirming the convictions in **Breis**, Justice Carpio, on behalf of the Second Division, discussed the procedure on seizure and custody of drugs, as well as the establishment of the “chain of custody.” But it is his discussion of **warrantless search and seizure and arrest** that is relevant for an understanding of **Section 2 of Article III**:

Although it was not raised as an error, it is imperative that we rule on the validity of the warrantless search and seizure and the subsequent warrantless arrest of appellants.

It is well settled that no arrest, search and seizure can be made without a valid warrant issued by a competent judicial authority. No less than the Constitution guarantees this right...

Further, any evidence obtained in violation of this provision is inadmissible for any purpose in any proceeding. However, the rule against warrantless searches and seizures admits of exceptions, such as the search of moving vehicles. In *People v.*

Libnao,⁸⁶ the Court held:

Warrantless search and seizure of moving vehicles are allowed in recognition of the impracticability of securing a warrant under said circumstances as the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant may be sought. Peace officers in such cases, however, are limited to routine checks where the examination of the vehicle is limited to visual inspection. When a vehicle is stopped and subjected to an extensive search, such would be constitutionally permissible only if the officers made it upon probable cause, i.e., upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains a[n] item, article or object which by law is subject to seizure and destruction.

Although the term eludes exact definition, probable cause signifies a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man's belief that the person accused is guilty of the offense with which he is charged; or the existence of such facts and circumstances which could lead a reasonably discreet and prudent man to believe that an offense has been committed and that the items, articles or objects sought in connection with said offense or subject to seizure and destruction by law are in the place to be searched.⁸⁷ The determination of probable cause must be resolved according to the facts of each case.⁸⁸

The Court has ruled in several dangerous drug cases⁸⁹ that tipped information is sufficient probable cause to effect a warrantless search. In *People v. Mariacos*,⁹⁰ the police received at dawn information that a baggage of marijuana was loaded on a passenger jeepney about to leave for the *poblacion*. There, the informant described the bag containing the prohibited drugs. The Court held that the police had probable cause to search the packages allegedly containing illegal drugs.

In the present case, the vehicle that carried the prohibited drugs was about to leave. The PDEA agents made a judgment call to

⁸⁶ G.R. No. 136860, 20 January 2003. 395 SCRA 407.

⁸⁷ *People v. Valdez*, 363 Phil. 481,489 (1999).

⁸⁸ *People v. Ayangao*, 471 Phil. 379, 388 (2004).

⁸⁹ *People v. Ayangao*, 471 Phil. 379, 388 (2004); *People v. Libnao*, 395 SCRA 407 (2003); *People v. Valdez*, 363 Phil. 481,489 (1999); *People v. Mariacos*, 635 Phil. 315 (2010).

⁹⁰ 635 Phil. 315(2010).

act fast, as time was of the essence. The team arrived at the terminal around 15 minutes before the bus was scheduled to depart. Upon boarding the bus, IO1 Mangili and IO1 Peralta identified two men fitting the description given by the informant in possession of a box described by the informant to contain marijuana.

Moreover, the PDEA agents had reasonable suspicion based on appellants' behavior that the latter were probably committing a crime. IO1 Mangili casually asked appellant Yumol who owned the box at their (appellants') feet. After answering that it belonged to them (appellants), Yumol suddenly stood up and tried to leave. IO1 Peralta prevented him from getting off the bus. Then IO1 Mangili asked appellant Breis what was contained in the box. Instead of answering, Breis shoved IO1 Mangili and tried to flee. It must be noted that IO1 Mangili identified himself as a PDEA agent before either appellant tried to leave the bus...

Appellants' act of standing up to leave the bus under different circumstances may be natural; but it is not so in this case. In *People v. Aminnudin*,⁹¹ the warrantless arrest of Aminnudin based on an informant's tip that he was carrying marijuana was declared unconstitutional because there was no outward indication that called for his arrest. There, the Court found that "[t]o all appearances, he was like any of the other passengers innocently disembarking from the vessel."

In contrast to the instant case, appellants were attempting to get out of a bus that was about to leave the terminal, and not one that had just arrived, where the other passengers were, as can be expected, seated in preparation for departure. It is unnatural for passengers to abruptly disembark from a departing bus, leaving their belongings behind. Any reasonable observer would be put on suspicion that such persons are probably up to no good. To a trained law enforcement agent, it signaled the probability that appellants were committing an offense and that the objects left behind might be contraband or even dangerous articles.

Indeed, as observed by the PDEA agents, appellants were not simply passengers carrying a box in a bus. They engaged in suspicious behavior when they tried to flee after IO1 Mangili showed interest in their box and identified himself as a PDEA agent. Worse, in his attempt at flight, Breis pushed IO1 Mangili, already knowing

⁹¹ 246 Phil. 424 (1988).

that the latter was a PDEA agent. This brazen act on the part of Breis only cemented the belief that appellants were likely hiding a wrongdoing and avoiding capture by law enforcers.

The act of Breis in physically pushing IO1 Mangili and attempting to flee constitutes resistance defined under Article 151 of the Revised Penal Code (RPC). Before a person can be held guilty of the crime of resistance or disobedience to a person in authority, it must be shown beyond reasonable doubt that the accused knew that the person he disobeyed or resisted is a person in authority or the agent of such person who is actually engaged in the performance of his official duties.⁹²

As a PDEA agent, IO1 Mangili is a law enforcement agent and as such is an agent of a person in authority as defined in the RPC.⁹³ IO1 Mangili was in the act of investigating a lead, and possibly apprehending violators of RA 9165, in accordance with the mandate of the PDEA. He announced his identity as such agent to appellants. It may even be gleaned that knowing that IO1 Mangili was a PDEA agent was precisely the cause of the attempted flight of appellants.

The laying of hands or using physical force against agents of persons in authority when not serious in nature constitutes resistance or disobedience under Article 151, and not direct assault under Article 148 of the RPC.⁹⁴ This is because the gravity of the disobedience to an order of a person in authority or his agent is measured by the circumstances surrounding the act, the motives prompting it and the real importance of the transgression, rather than the source of the order disobeyed.⁹⁵ The pushing of IO1 Mangili is not of such serious defiance to be considered direct assault, but is resistance nonetheless.

The Court has held justified resistance to illegal or abusive acts of agents of persons in authority. In *Chan Fook*,⁹⁶ the Court quoted Groizard:

A person in authority, his agent or a public officer who exceeds his power cannot be said to be in the exercise of the functions of his office. The law that defines and establishes his powers does

⁹² *Vytiaco v. Court of Appeals*, 126 Phil. 48, 59 (1967).

⁹³ *United States v. Taylor*, 6 Phil. 162 (1906).

⁹⁴ *Ibid.*

⁹⁵ *People v. Chan Fook*, 42 Phil. 230 (1921).

⁹⁶ *Ibid.*

not protect him for anything that has not been provided for. The scope of the respective powers of public officers and their agents is fixed. If they go beyond it and they violate any recognized rights of the citizens, then the latter may resist the invasion, especially when it is clear and manifest. The resistance must be coextensive with the excess, and should not be greater than what is necessary to repel the aggression. The invasion of the prerogatives or rights of another and the excess in the functions of an office, are the sources that make for legitimate resistance, especially, in so far as it is necessary for the defense of the persons or their rights in the manner provided for in article 8 of the Penal Code.

Unlike the officer in *Chan Fook*, IO1 Mangili did not exceed his authority in the performance of his duty. Prior to Breis' resistance, IO1 Mangili laid nary a finger on Breis or Yumol. Neither did his presence in the bus constitute an excess of authority. The bus is public transportation, and is open to the public. The expectation of privacy in relation to the constitutional right against unreasonable searches in a public bus is not the same as that in a person's dwelling. In fact, at that point in time, only the bus was being searched, not Yumol, Breis, or their belongings, and the search of moving vehicles has been upheld.

Moreover, appellants are not in any position to claim protection of the right against unreasonable searches as to the warrantless search of the bus. The pronouncement of the United States Supreme Court (USSC) in *Rakas v. Illinois*⁹⁷ regarding the Fourth Amendment rights⁹⁸ is instructive:

Fourth Amendment rights are personal rights, which, like some other constitutional rights, may not be vicariously asserted. A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed. And since the exclusionary rule is an attempt to effectuate the guarantees of the Fourth Amendment, it is proper to permit only defendants whose Fourth Amendment rights have been

⁹⁷ 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978).

⁹⁸ The Fourth Amendment of the U.S. Constitution reads: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

violated to benefit from the rule's protections.

It being established that IO1 Mangili was not in violation of Yumol's or Breis' rights as he was searching the bus, there is no excess of authority, clear and manifest or otherwise, for either Yumol or Breis to lawfully resist. Hence, the act of Breis in pushing IO1 Mangili was an unlawful resistance to an agent of a person in authority, contrary to Article 151 of the RPC.

Breis' commission of a crime in view of, and against IO1 Mangili, and proclivity for resorting to acts of violence further justify the warrantless search of appellants.

A further point. Appellants each attempted to alight from a departing bus, leaving behind their belongings. They may be deemed to have abandoned the box in their flight. A thing is considered abandoned and possession thereof lost if the *spes recuperandi* (the hope of recovery) is gone and the *animus revertendi* (the intention of returning) is finally given up.⁹⁹ That appellants got up to leave a departing bus without bringing their box points to the absence of both *spes recuperandi* and *animus revertendi*. Indeed, although their flight was thwarted by the PDEA agents, both appellants intended to leave the box behind without returning for it. Abandonment has the effect of converting a thing into *res nullius*.¹⁰⁰

In the United States, abandoned articles, such as those thrown away, are considered *bona vacantia*, and may be lawfully searched and seized by law enforcement authorities.¹⁰¹ Put to question in *Abel v. United States*¹⁰² was the admissibility of incriminating articles, which had been thrown away, that the Federal Bureau of Investigation recovered without warrant. The USSC held that the articles were abandoned and that there was nothing unlawful in the government's appropriation of such abandoned property. In *Hester v. United States*,¹⁰³ defendants and his associates ran away from officers, and in the process discarded a jar and a jug. The USSC held no Fourth Amendment violation occurred when officers examined the contents of the discarded items without warrant. In *California v. Hodari*,¹⁰⁴

⁹⁹ Domalsin v. Sps. Valenciano, 515 Phil. 745, 764 (2006).

¹⁰⁰ Yu v. DeLara, 116 Phil. 1105(1962).

¹⁰¹ Abel v. United States, 362 U.S. 217 (1960).

¹⁰² Ibid.

¹⁰³ 265 U.S. 57 (1924).

¹⁰⁴ 499 U.S. 621 (1991).

police officers, without warrant, pursued defendant who threw a rock of cocaine into an alley as he was running. The USSC upheld the admissibility of the abandoned cocaine.

Applied analogously, there is no objectionable warrantless search and seizure of the box of marijuana abandoned in the bus by appellants.

Given the above discussion, it is readily apparent that the search in this case is valid.

Having been found with prohibited drugs in their possession, appellants were clearly committing a criminal offense in the presence of IO1 Mangili and IO1 Peralta. The subsequent warrantless arrest falls under Section 5(a), Rule 113 of the Rules of Court:

Sec. 5. Arrest without warrant; when lawful. - A peace officer or a private person may, without a warrant, arrest a person: (a) When, in his presence, the person to be arrested has committed, is actually committing, or is attempting to commit an offense; ...

Hence, the warrantless arrest of appellants is lawful.

Defenses of Denial and Frame-Up

Appellants' defenses of denial and frame-up were disbelieved by both the trial court and the Court of Appeals. It is a settled rule that the evaluation of the credibility of witnesses and their testimonies is a matter best undertaken by the trial court because of its unique opportunity to observe the witnesses firsthand and to note their demeanor, conduct and attitude under grilling examination.¹⁰⁵ We find no reason to deviate from this rule.

The defenses of denial and frame-up cannot prevail over the positive and categorical assertions of the PDEA agents who were strangers to appellants and against whom no ill-motive was established.¹⁰⁶ Further, such defenses failed to overcome the documentary and physical evidence presented by the prosecution.

In light of the foregoing, appellants' conviction for illegal

¹⁰⁵ *People v. Sapigao, Jr.*, 614 Phil. 589, 599 (2009).

¹⁰⁶ *People v. De Jesus*, *supra* note 23, at 688-689.

possession of dangerous drugs is in order.

SALUDAY v. PEOPLE OF THE PHILIPPINES, G.R. No. 215305, April 3, 2018, was a petition for review on *certiorari* that assailed the decision and the resolution of the Court of Appeals, which affirmed the Regional Trial Court's finding of guilt beyond reasonable doubt of illegal possession of high-powered firearm, ammunition, and explosive under Presidential Decree No. 1866,¹⁰⁷ as amended. In this *en banc* decision, Justice Carpio discussed the **constitutional guarantee against unreasonable searches** at length:

The Antecedent Facts

On 5 May 2009, Bus No. 66 of Davao Metro Shuttle was flagged down by Task Force Davao of the Philippine Army at a checkpoint near the Tefasco Wharf in Ilang, Davao City. SCAA Junbert M. Bucu (Bucu), a member of the Task Force, requested all male passengers to disembark from the vehicle while allowing the female passengers to remain inside. He then boarded the bus to check the presence and intercept the entry of any contraband, illegal firearms or explosives, and suspicious individuals.

SCAA Bucu checked all the baggage and personal effects of the passengers, but a small, gray-black pack bag on the seat at the rear of the bus caught his attention. He lifted the bag and found it too heavy for its small size. SCAA Bucu then looked at the male passengers lined outside and noticed that a man in a white shirt (later identified as petitioner) kept peeping through the window towards the direction of the bag. Afterwards, SCAA Bucu asked who the owner of the bag was, to which the bus conductor answered that petitioner and his brother were the ones seated at the back. SCAA Bucu then requested petitioner to board the bus and open the bag. Petitioner obliged and the bag revealed the following contents: (1) an improvised .30 caliber carbine bearing serial number 64702; (2) one magazine with three live ammunitions; (3) one cacao-type hand grenade; and (4) a ten-inch hunting knife. SCAA Bucu then asked petitioner to produce proof of his authority to carry firearms and explosives. Unable to show any, petitioner was immediately arrested and informed of his rights by SCAA Bucu.

Petitioner was then brought for inquest before the Office of the

¹⁰⁷ Codifying The Laws On Illegal/Unlawful Possession, Manufacture, Dealing In Acquisition Or Disposition, Of Firearms, Ammunition Or Explosives Or Instruments Used In The Manufacture Of Firearms, Ammunition Or Explosives, And Imposing Stiffer Penalties For Certain Violations Thereof And For Relevant Purposes (1983).

City Prosecutor for Davao City. In its Resolution dated 7 May 2009, the latter found probable cause to charge him with illegal possession of high-powered firearm, ammunition, and explosive under PD 1866. The Information dated 8 May 2009 thus reads:

That on or about May 5, 2009, in the City of Davao, Philippines, and within the jurisdiction of this Honorable Court, the above-mentioned accused, willfully, unlawfully and knowingly, with intent to possess, had in his possession and under his custody an improvised high powered firearm caliber .30 carbine bearing Serial No. 64702 (made in Spain) with one (1) magazine loaded with three (3) live ammunitions and one (1) “cacao” type hand grenade explosive; without first securing the necessary license to possess the same.
CONTRARY TO LAW.

When arraigned, petitioner pleaded not guilty.

During the trial, the prosecution presented two witnesses namely, NUP Daniel Tabura (Tabura), a representative of the Firearms and Explosives Division of the Philippine National Police, and SCAA Bucu. NUP Tabura identified the Certification dated 5 November 2009 attesting that petitioner was “not a licensed/registered holder of any kind and caliber per verification from records.” Meanwhile, SCAA Bucu identified petitioner and the items seized from the bag, and testified on the details of the routine inspection leading to the immediate arrest of petitioner. On cross-examination, SCAA Bucu further elaborated on the search conducted:

ATTY. MAMBURAM

Q And that check point, which was conducted along Ilang [R]oad, Davao City, was by virtue of a memorandum?

A Yes, Your Honor. ...

Q Now, you said that at around 5:00 of said date, you were able to intercept a Metro Shuttle passenger bus and you requested all passengers to alight?

A Yes.

Q All female passengers were left inside?

A Yes, Your Honor.

Q And, after all passengers were able to alight, you checked all cargoes of the passengers in the bus?

A Yes. ...

Q And, you testified that one of those things inside the bus was a black gray colored pack bag which was placed at the

back portion of the bus?

A Yes.

Q You said that the bag was heavy?

A Yes.

Q And you picked up or carried also the other belongings or cargo[els] inside the bus and that was the only thing or item inside the bus which was heavy. Is that correct?

A There were many bags and they were heavy. When I asked who is the owner of the bag because it was heavy but the bag was small, when I asked, he said the content of the bag was a cellphone. But I noticed that it was heavy. ...

Q And you said that somebody admitted ownership of the bag. Is that correct?

A Yes.

Q Who admitted ownership of the bag?

A (WITNESS POINTS TO THE ACCUSED)

Q Now, you said that while you are looking at the bag, you noticed that one male passenger you pointed as the accused kept looking at you?

A Yes.

Q And, aside from the accused, all the other male passengers were not looking at you?

A The other passengers were on the ground but he was in front of [the] window looking towards his bag. ...

Q And the accused admitted that he owned the bag, you requested him to open the bag?

A Not yet. I let him board the bus and asked him if he can open it.

Q And, when he opened it?

A I saw the handle of the firearm.

On the other hand, the defense presented petitioner as sole witness. On direct examination, petitioner denied ownership of the bag. However, he also admitted to answering SCAA Buco when asked about its contents and allowing SCAA Buco to open it after the latter sought for his permission:

ATTY. MAMBURAM

Q ... [A]fter the conductor of the bus told the member of the task force that you and your brother were seated at the back of the bus, can you please tell us what happened next?

A The member of the task force asked who is the owner of the bag and what were the contents of the bag.

Q To whom did the member of the task force address that question?

A To me because I was pointed to by the conductor.

Q And what was your reply to the question of the member of the task force?

A I told him it was only a cellphone.

Q By the way, Mr. Witness, who owned that bag?

A My elder brother.

Q And why did you make a reply to the question of the member of the task force when, in fact, you were not the owner of the bag?

A Because I was pointed to by the conductor that it was me and my brother who were seated at the back. ...

Q Now, after you told the member of the task force that probably the content of the bag was cellphone, what happened next?

A He asked if he can open it.

Q And what was your reply?

A I told him yes, just open it. ...

Q Now, you said that the owner of the bag and the one who carried that bag was your brother, what is the name of your brother?

A Roger Saluday.

Q Where is your brother Roger now?

A Roger is already dead. He died in September 2009.

On cross-examination, petitioner clarified that only he was pointed at by the conductor when the latter was asked who owned the bag. Petitioner also admitted that he never disclosed he was with his brother when he boarded the bus:

PROS. VELASCO

Q You said that you panicked because they pulled you but as a way of saving yourself considering you don't own the bag, did you not volunteer to inform them that [the] bag was owned by your brother?

A I told them I have a companion but I did not tell them that it was my brother because I was also afraid of my brother.

Q So, in short, Mr. Witness, you did not actually inform them that you had a brother at that time when you were boarding that bus, correct?

A No, sir, I did not. ...

Q So, you were answering all questions by saying it is not your bag but you confirm now that it was the conductor of that bus who pointed you as the owner of the bag, correct?

A Yes, sir, the conductor pointed at me as the one who [sic] seated at the back.

The defense subsequently rested its case and the prosecution waived the right to present rebuttal evidence. Upon order from the trial court, the parties submitted their respective memoranda.

The Decision of the Trial Court

Finding the denials of petitioner as self-serving and weak, the trial court declared him to be in actual or constructive possession of firearm and explosive without authority or license. Consequently, in the dispositive portion of the Sentence dated 15 September 2011, petitioner was adjudged guilty beyond reasonable doubt of illegal possession of firearm, ammunition, and explosive under PD 1866:

WHEREFORE, in view of all the foregoing, judgment is hereby rendered finding Marcelo Gigbalen Saluday GUILTY of illegal possession of high powered firearm, ammunition and explosive. For the offense of illegal possession of high powered firearm and ammunition, he is hereby sentenced to suffer an imprisonment of *prision mayor* in its minimum period. He is likewise ordered to pay a fine of P30,000.00. For the offense of illegal possession of explosive, he is hereby sentenced to suffer an imprisonment of *prision mayor* in its maximum period to reclusion temporal. He is likewise ordered to pay a fine of P50,000.00.

...

On 12 October 2011, petitioner timely filed his Notice of Appeal.

The Decision of the Court of Appeals

On appeal, petitioner challenged his conviction raising as grounds the alleged mis-appreciation of evidence by the trial court and the supposed illegality of the search. On the other hand, the Office of the Solicitor General (OSG) argued that the warrantless search was valid being a consented search, and that the factual findings of the trial court can no longer be disturbed.

In its Decision dated 26 June 2014, the Court of Appeals sustained the conviction of petitioner and affirmed the ruling of the trial court with modification:

WHEREFORE, the instant appeal is DISMISSED. The Sentence dated September 15, 2011 of the Regional Trial Court, 11th Judicial Region, Branch 11, Davao City, in

Criminal Case No. 65,734-09, finding Marcelo Gigbalen Saluday guilty beyond reasonable doubt of illegal possession of high powered firearm, ammunition and explosive is AFFIRMED with the MODIFICATION that:

- (1) for the offense of illegal possession of high-powered firearm and ammunition, he is imposed an indeterminate sentence of four (4) years, eight (8) months and twenty-one (21) days of *prision correccional* maximum, as the minimum term, to seven (7) years and one (1) day of *prision mayor* minimum, as the maximum term, in addition to the fine of Thirty thousand pesos (P30,000.00); and
- (2) for the offense of illegal possession of explosive, he is sentenced to suffer the penalty of *reclusion perpetua* without eligibility for parole.

Petitioner then filed a Motion for Reconsideration, to which the OSG filed its Comment.

In its Resolution dated 15 October 2014, the Court of Appeals denied petitioner's Motion for Reconsideration for being pro forma. Hence, petitioner filed this Petition for Review on *Certiorari* under Rule 45 of the Rules of Court.

The Issue

Petitioner assails the appreciation of evidence by the trial court and the Court of Appeals as to warrant his conviction for the offenses charged.

The Ruling of this Court

We affirm.

Only questions of law may be raised in a petition for review on *certiorari* under Rule 45 of the Rules of Court. As a result, the Court, on appeal, is not duty-bound to weigh and sift through the evidence presented during trial.¹⁰⁸ Further, factual findings of the trial court, when affirmed by the Court of Appeals, are accorded great respect even finality.¹⁰⁹

Here, petitioner assails his conviction for illegal possession of high-powered firearm and ammunition under PD 1866, and

¹⁰⁸ Jose v. People, 479 Phil. 969, 978 (2004).

¹⁰⁹ De la Cruz v. Court of Appeals, 333 Phil. 126, 135 (1996). See also Castillo v. Court of Appeals, 329 Phil. 150, 158-159 (1996); Navallo v. Sandiganbayan, 304 Phil. 343, 354 (1994); People v. Cabalhin, 301 Phil. 494, 504 (1994).

illegal possession of explosive under the same law. The elements of both offenses are as follows: (1) existence of the firearm, ammunition or explosive; (2) ownership or possession of the firearm, ammunition or explosive; and (3) lack of license to own or possess.¹¹⁰ As regards the second and third elements, the Court of Appeals concurred with the trial court that petitioner was in actual or constructive possession of a high-powered firearm, ammunition, and explosive without the requisite authority. The Decision dated 26 June 2014 reads in pertinent part:

In the present case, the prosecution proved the negative fact that appellant has no license or permit to own or possess the firearm ammunition and explosive by presenting NUP Daniel Tab[u]ra (Tabura), a representative of the Firearms and Explosives Division (FED) of the PNP. He identified the Certification issued by the Chief, Records Section, FED of the PNP, stating that appellant “is not a licensed/registered holder of any kind and caliber per verification from records of this office.”

Appellant, however, questions the competence of Tabura to testify on the veracity or truthfulness of the Certification. He claims that the officer who issued it should have been the one presented so he would not be denied the right to confront and cross-examine the witnesses against him.

There is no merit to petitioner’s claim. The following is pertinent:

...

The Court on several occasions ruled that either the testimony of a representative of, or a certification from, the Philippine National Police (PNP) Firearms and Explosive Office attesting that a person is not a licensee of any firearm would suffice to prove beyond reasonable doubt the second element of possession of illegal firearms. The prosecution more than complied when it presented both. ...

Also, appellant denies having physical or constructive possession of the firearms, ammunition and explosive. However, his denial flies in the face of the following testimonies which he himself made: ...

Appellant gave information, albeit misleading, on the contents of the bag. He even allowed the police officer to open it. Based on his actuations, there could be no doubt that he owned the bag containing the firearm, ammunition and explosive.

¹¹⁰ *People v. Dela Cruz*, 400 Phil. 872, 879-880 (2000), citing *People v. Bergante*, 350 Phil. 275, 291 (1998).

Shifting the blame to his dead brother is very easy for appellant to fabricate. Besides, the allegation that his brother owned the bag is uncorroborated and self-serving.

As above-quoted, the presence of the second and third elements of illegal possession of firearm, ammunition, and explosive raises questions of fact. Considering further that the Court of Appeals merely echoed the factual findings of the trial court, the Court finds no reason to disturb them.

As regards the first element, petitioner corroborates the testimony of SCAA Buco on four important points: one, that petitioner was a passenger of the bus flagged down on 5 May 2009 at a military checkpoint in Ilang, Davao City; two, that SCAA Buco boarded and searched the bus; three, that the bus conductor pointed at petitioner as the owner of a small, gray-black pack bag on the back seat of the bus; and four, that the same bag contained a .30-caliber firearm with one magazine loaded with three live ammunitions, and a hand grenade. Notably, petitioner does not challenge the chain of custody over the seized items. Rather, he merely raises a pure question of law and argues that they are inadmissible on the ground that the search conducted by Task Force Davao was illegal.

The Court disagrees.

Section 2, Article III of the Constitution ... was patterned after the Fourth Amendment to the United States (U.S.) Constitution ...

Indeed, the constitutional guarantee is not a blanket prohibition. Rather, it operates against “unreasonable” searches and seizures only.¹¹¹ Conversely, when a search is “reasonable,” Section 2, Article III of the Constitution does not apply. As to what qualifies as a reasonable search, the pronouncements of the U.S. Supreme Court, which are doctrinal in this jurisdiction,¹¹² may shed light on the matter.

In the seminal case of *Katz v. United States*,¹¹³ the U.S. Supreme Court held that the electronic surveillance of a phone conversation without a warrant violated the Fourth Amendment. According to the U.S. Supreme Court, what the Fourth Amendment protects are people, not places such that what a person knowingly exposes

¹¹¹ *People v. Aruta*, 351 Phil. 868, 878 (1998).

¹¹² *People v. Marti*, 271 Phil. 51, 57 (1991).

¹¹³ 389 U.S. 347 (1967).

to the public, even in his or her own home or office, is not a subject of Fourth Amendment protection in much the same way that what he or she seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected, thus:

Because of the misleading way the issues have been formulated, the parties have attached great significance to the characterization of the telephone booth from which the petitioner placed his calls. The petitioner has strenuously argued that the booth was a “constitutionally protected area.” The Government has maintained with equal vigor that it was not. But this effort to decide whether or not a given “area,” viewed in the abstract, is constitutionally protected” deflects attention from the problem presented by this cast. For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. See *Lewis v. United States*, 385 U.S. 206, 210; *United States v. Lee*, 274 U.S. 559, 563. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. See *Rios v. United States*, 364 U.S. 253; *Ex parte Jackson*, 96 U.S. 727, 733.

Further, Justice John Harlan laid down in his concurring opinion the two-part test that would trigger the application of the Fourth Amendment. First, a person exhibited an actual (subjective) expectation of privacy. Second, the expectation is one that society is prepared to recognize as reasonable (objective).¹¹⁴

The prohibition of unreasonable search and seizure ultimately stems from a person’s right to privacy. Hence, only when the State intrudes into a person’s expectation of privacy, which society regards as reasonable, is the Fourth Amendment triggered. Conversely, where a person does not have an expectation of privacy or one’s expectation of privacy is not reasonable to society, the alleged State intrusion is not a “search” within the protection of the Fourth Amendment.

A survey of Philippine case law would reveal the same jurisprudential reasoning. To illustrate, in *People v. Johnson*,¹¹⁵ the Court declared airport searches as outside the protection of the search and seizure clause due to the lack of an expectation of privacy that society will regard as reasonable:

¹¹⁴ Id. at 361.

¹¹⁵ 401 Phil. 734 (2000).

Persons may lose the protection of the search and seizure clause by exposure of their persons or property to the public in a manner reflecting a lack of subjective expectation of privacy, which expectation society is prepared to recognize as reasonable. Such recognition is implicit in airport security procedures. With increased concern over airplane hijacking and terrorism has come increased security at the nation's airports. Passengers attempting to board an aircraft routinely pass through metal detectors; their carry-on baggage as well as checked luggage are routinely subjected to x-ray scans. Should these procedures suggest the presence of suspicious objects, physical searches are conducted to determine what the objects are. There is little question that such searches are reasonable, given their minimal intrusiveness, the gravity of the safety interests involved, and the reduced privacy expectations associated with airline travel. Indeed, travelers are often notified through airport public address systems, signs, and notices in their airline tickets that they are subject to search and, if any prohibited materials or substances are found, such would be subject to seizure. These announcements place passengers on notice that ordinary constitutional protections against warrantless searches and seizures do not apply to routine airport procedures.

Similarly, in *Dela Cruz v. People*,¹¹⁶ the Court described seaport searches as reasonable searches on the ground that the safety of the traveling public overrides a person's right to privacy:

Routine baggage inspections conducted by port authorities, although done without search warrants, are not unreasonable searches *per se*. Constitutional provisions protecting privacy should not be so literally understood so as to deny reasonable safeguards to ensure the safety of the traveling public. ...

Thus, with port security personnel's functions having the color of state-related functions and deemed agents of government, Marti is inapplicable in the present case. Nevertheless, searches pursuant to port security measures are not unreasonable *per se*. The security measures of x-ray scanning and inspection in domestic ports are akin to routine security procedures in airports. ...

Port authorities were acting within their duties and functions when [they] used x-ray scanning machines for inspection of passengers' bags. When the results of the x-ray scan revealed

¹¹⁶ 776 Phil. 653 (2016).

the existence of firearms in the bag, the port authorities had probable cause to conduct a search of petitioner's bag. Notably, petitioner did not contest the results of the x-ray scan.

In **People v. Breis**,¹¹⁷ the Court also justified a bus search owing to the reduced expectation of privacy of the riding public...

Indeed, the reasonableness of a person's expectation of privacy must be determined on a case-to-case basis since it depends on the factual circumstances surrounding the case.¹¹⁸ Other factors such as customs, physical surroundings and practices of a particular activity may diminish this expectation.¹¹⁹

In *Fortune Express, Inc. v. Court of Appeals*,¹²⁰ a common carrier was held civilly liable for the death of a passenger due to the hostile acts of armed men who boarded and subsequently seized the bus. The Court held that "simple precautionary measures to protect the safety of passengers, such as frisking passengers and inspecting their baggages, preferably with non-intrusive gadgets such as metal detectors, before allowing them on board could have been employed without violating the passenger's constitutional rights." In *Costabella Corp. v. Court of Appeals*,¹²¹ a compulsory right of way was found improper for the failure of the owners of the dominant estate to allege that the passageway they sought to be re-opened was at a point least prejudicial to the owner of the servient estate. The Court thus explained, "[c]onsidering that the petitioner operates a hotel and beach resort in its property, it must undeniably maintain a strict standard of security within its premises. Otherwise, the convenience, privacy, and safety of its clients and patrons would be compromised." Similarly, shopping malls install metal detectors and body scanners, and require bag inspection as a requisite for entry. Needless to say, any security lapse on the part of the mall owner can compromise public safety.

Concededly, a bus, a hotel and beach resort, and a shopping mall are all private property whose owners have every right to exclude anyone from entering. At the same time, however, because these private premises are accessible to the public, the State, much like the owner, can impose non-intrusive security measures

¹¹⁷ 766 Phil. 785 (2015), penned by Justice Carpio and excerpted above.

¹¹⁸ *Sps. Hing v. Choachuy, Sr.*, 712 Phil. 337, 350 (2013).

¹¹⁹ *Ople v. Torres*, 354 Phil. 948, 981 (1998).

¹²⁰ 364 Phil. 480 (1999).

¹²¹ 271 Phil. 350 (1991).

and filter those going in. The only difference in the imposition of security measures by an owner and the State is, the former emanates from the attributes of ownership under Article 429 of the Civil Code, while the latter stems from the exercise of police power for the promotion of public safety. Necessarily, a person's expectation of privacy is diminished whenever he or she enters private premises that are accessible to the public.

In view of the foregoing, the bus inspection conducted by Task Force Davao at a military checkpoint constitutes a reasonable search. Bus No. 66 of Davao Metro Shuttle was a vehicle of public transportation where passengers have a reduced expectation of privacy. Further, SCAA Buco merely lifted petitioner's bag. This visual and minimally intrusive inspection was even less than the standard x-ray and physical inspections done at the airport and seaport terminals where passengers may further be required to open their bags and luggages. Considering the reasonableness of the bus search, Section 2, Article III of the Constitution finds no application, thereby precluding the necessity for a warrant.

As regards the warrantless inspection of petitioner's bag, the OSG argues that petitioner consented to the search, thereby making the seized items admissible in evidence. Petitioner contends otherwise and insists that his failure to object cannot be construed as an implied waiver.

Petitioner is wrong.

Doubtless, the constitutional immunity against unreasonable searches and seizures is a personal right, which may be waived.¹²² However, to be valid, the consent must be voluntary such that it is unequivocal, specific, and intelligently given, uncontaminated by any duress or coercion.¹²³ Relevant to this determination of voluntariness are the following characteristics of the person giving consent and the environment in which consent is given: (a) the age of the consenting party; (b) whether he or she was in a public or secluded location; (c) whether he or she objected to the search or passively looked on;¹²⁴ (d) his or her education and intelligence; (e) the presence of coercive police procedures; (f) the belief that no incriminating evidence will be found;¹²⁵ (g) the nature of the

¹²² *Caballes v. Court of Appeals*, 424 Phil. 263, 286 (2002).

¹²³ *Id.*, citing 68 Am Jur 2d Searches and Seizures, § 135.

¹²⁴ *Id.*, citing *United States v. Barahona*, 990 F. 2d 412.

¹²⁵ *Id.*, citing *United States v. Lopez*, 911 F. 2d 1006.

police questioning; (h) the environment in which the questioning took place; and (i) the possibly vulnerable subjective state of the person consenting.¹²⁶

In *Asuncion v. Court of Appeals*,¹²⁷ the apprehending officers sought the permission of petitioner to search the car, to which the latter agreed. According to the Court, petitioner himself freely gave his consent to the search. In *People v. Montilla*,¹²⁸ the Court found the accused to have spontaneously performed affirmative acts of volition by opening the bag without being forced or intimidated to do so, which acts amounted to a clear waiver of his right. In *People v. Omaweng*,¹²⁹ the police officers asked the accused if they could see the contents of his bag, to which the accused said “you can see the contents but those are only clothings.” The policemen then asked if they could open and see it, and the accused answered “you can see it.” The Court held there was a valid consented search.

Similarly in this case, petitioner consented to the baggage inspection done by SCAA Bucu. When SCAA Bucu asked if he could open petitioner’s bag, petitioner answered “yes, just open it” based on petitioner’s own testimony. This is clear consent by petitioner to the search of the contents of his bag. In its Decision dated 26 June 2014, the Court of Appeals aptly held:

A waiver was found in *People v. Omaweng*. There, the police officers asked the accused if they could see the contents of his bag and he answered “you can see the contents but those are only clothings.” When asked if they could open and see it, he said “you can see it.” In the present case, accused-appellant told the member of the task force that “it was only a cellphone” when asked who owns the bag and what are its contents. When asked by the member of the task force if he could open it, accused appellant told him “yes, just open it.” Hence, as in *Omaweng*, there was a waiver of accused-appellants right against warrantless search.

To emphasize, a reasonable search, on the one hand, and a warrantless search, on the other, are mutually exclusive. While both State intrusions are valid even without a warrant, the underlying reasons for the absence of a

¹²⁶ Id., citing *United States v. Nafzger*, 965 F. 2d 213.

¹²⁷ 362 Phil. 118, 127 (1999).

¹²⁸ 349 Phil. 640, 661 (1998).

¹²⁹ 288 Phil. 350, 358-359 (1992).

warrant are different. A reasonable search arises from a reduced expectation of privacy, for which reason Section 2, Article III of the Constitution finds no application. Examples include searches done at airports, seaports, bus terminals, malls, and similar public places. **In contrast, a warrantless search is presumably an “unreasonable search,” but for reasons of practicality, a search warrant can be dispensed with.** Examples include search incidental to a lawful arrest, search of evidence in plain view, consented search, and extensive search of a private moving vehicle.

Based on the decision denying the petition in **Saluday**, Justice Carpio laid down the following guidelines in the **conduct of bus searches** so as not to trigger the **constitutional guarantee in Section 2, Article III**:

Prior to entry, passengers and their bags and luggages can be subjected to a routine inspection akin to airport and seaport security protocol. In this regard, metal detectors and x-ray scanning machines can be installed at bus terminals. Passengers can also be frisked. In lieu of electronic scanners, passengers can be required instead to open their bags and luggages for inspection, which inspection must be made in the passenger's presence. Should the passenger object, he or she can validly be refused entry into the terminal.

While in transit, a bus can still be searched by government agents or the security personnel of the bus owner in the following three instances. First, upon receipt of information that a passenger carries contraband or illegal articles, the bus where the passenger is aboard can be stopped *en route* to allow for an inspection of the person and his or her effects. This is no different from an airplane that is forced to land upon receipt of information about the contraband or illegal articles carried by a passenger on board. Second, whenever a bus picks passengers *en route*, the prospective passenger can be frisked and his or her bag or luggage be subjected to the same routine inspection by government agents or private security personnel as though the person boarded the bus at the terminal. This is because unlike an airplane, a bus is able to stop and pick passengers along the way, making it possible for these passengers to evade the routine search at the bus terminal. Third, a bus can be flagged down at designated military or police checkpoints where State agents can board the vehicle for a routine inspection of the passengers and their bags or luggages.

In both situations, the inspection of passengers and their effects prior to entry at the bus terminal and the search of the bus while in transit must also satisfy the following conditions to qualify as a valid reasonable search. First, as to the manner of the search, it must be the least intrusive and must uphold the dignity of the person or persons being searched, minimizing, if not altogether eradicating, any cause for public embarrassment, humiliation or ridicule. Second, neither can the search result from any discriminatory motive such as insidious profiling, stereotyping and other similar motives. In all instances, the fundamental rights of vulnerable identities, persons with disabilities, children and other similar groups should be protected. Third, as to the purpose of the search, it must be confined to ensuring public safety. Fourth, as to the evidence seized from the reasonable search, courts must be convinced that precautionary measures were in place to ensure that no evidence was planted against the accused.

The search of persons in a public place is valid because the safety of others may be put at risk. Given the present circumstances, the Court takes judicial notice that public transport buses and their terminals, just like passenger ships and seaports, are in that category.

Aside from public transport buses, any moving vehicle that similarly accepts passengers at the terminal and along its route is likewise covered by these guidelines. **Hence, whenever compliant with these guidelines, a routine inspection at the terminal or of the vehicle itself while in transit constitutes a reasonable search. Otherwise, the intrusion becomes unreasonable, thereby triggering the constitutional guarantee under Section 2, Article III of the Constitution.**

To emphasize, the guidelines do not apply to privately-owned cars. Neither are they applicable to moving vehicles dedicated for private or personal use, as in the case of taxis, which are hired by only one or a group of passengers such that the vehicle can no longer be flagged down by any other person until the passengers on board alight from the vehicle.

Section 3. (1) The privacy of communication and correspondence shall be inviolable except upon lawful order of the court, or when public safety or order requires otherwise, as

prescribed by law.

(2) Any evidence obtained in violation of this or the preceding section shall be inadmissible for any purpose in any proceeding.

Right to Privacy

Sections 1, 2 and 3 of the Bill of Rights recognize and enshrine the right to privacy, or “the right to be let alone.”¹³⁰ This right was briefly discussed by Justice Carpio for the Court *en banc* in **KILUSANG MAYO UNO v. NATIONAL ECONOMIC DEVELOPMENT AUTHORITY**, G.R. No. 167798, April 19, 2006, 521 Phil. 732. The case involved two consolidated petitions¹³¹ for *certiorari*, prohibition, and *mandamus* that sought the nullification of Executive Order No. 420 on constitutional grounds. EO 420, issued by President Gloria Macapagal-Arroyo on April 13, 2005, required all government agencies and government-owned and controlled corporations to streamline and harmonize their identification systems:

Sec. 1. Adoption of a unified multi-purpose identification (ID) system for government. - All government agencies, including government-owned and controlled corporations, are hereby directed to adopt a unified multi-purpose ID system to ensure the attainment of the following objectives:

- a. To reduce costs and thereby lessen the financial burden on both the government and the public brought about by the use of multiple ID cards and the maintenance of redundant database containing the same or related information;
- b. To ensure greater convenience for those transacting business with the government and those availing of government services;
- c. To facilitate private businesses and promote the wider use of the unified ID card as provided under this executive order;
- d. To enhance the integrity and reliability of government-issued ID cards; and
- e. To facilitate access to and delivery of quality and effective government service.

¹³⁰ *Kilusang Mayo Uno v. NEDA*, G.R. No. 167798, April 19, 2006, citing *Ople v. Torres*, G.R. No. 127685, July 23, 1998, in turn citing 1 *Cooley On Torts*, Sec. 135 (4th ed. 1932), and Warren and Brandeis, *The Right to Privacy*, 4 *Harvard Law Review* 193-220 (1890). *Ople* also cites Secs. 6, 8 and 17 of the Bill of Rights as protective of the right to privacy.

¹³¹ Consolidated with *Bayan Muna Representatives v. Ermita*, G.R. No. 167930.

Sec. 2. Coverage - All government agencies and government-owned and controlled corporations issuing ID cards to their members or constituents shall be covered by this executive order.

Sec. 3. Data requirement for the unified ID system - The data to be collected and recorded by the participating agencies shall be limited to the following:

- Name
- Home Address
- Sex
- Picture
- Signature
- Date of Birth
- Place of Birth
- Marital Status
- Names of Parents
- Height
- Weight
- Two index fingers and two thumbmarks
- Any prominent distinguishing features like moles and others
- Tax Identification Number (TIN)

Provided that a corresponding ID number issued by the participating agency and a common reference number shall form part of the stored ID data and, together with at least the first five items listed above, including the print of the right thumbmark, or any of the fingerprints as collected and stored, shall appear on the face or back of the ID card for visual verification purposes.

Sec. 4. Authorizing the Director-General, National Economic and Development Authority, to Harmonize All Government Identification Systems. - The Director- General, National Economic Development Authority, is hereby authorized to streamline and harmonize all government ID systems.

Sec. 5. Functions and responsibilities of the Director-General, National Economic and Development Authority. - In addition to his organic functions and responsibilities, the Director-General, National Economic and Development Authority, shall have the following functions and responsibilities:

- a. Adopts within sixty (60) days from the effectivity of this executive order a unified government ID system containing only such data and features, as indicated in Section 3 above, to validity establish the identity of the card holder:
- b. Enter into agreements with local governments, through

their respective leagues of governors or mayors, the Commission on Elections (COMELEC), and with other branches or instrumentalities of the government, for the purpose of ensuring government-wide adoption of and support to this effort to streamline the ID systems in government;

- c. Call on any other government agency or institution, or create sub-committees or technical working groups, to provide such assistance as may be necessary or required for the effective performance of its functions; and
- d. Promulgate such rules or regulations as may be necessary in pursuance of the objectives of this executive order.

Sec. 6. Safeguards. - The Director-General, National Economic and Development Authority, and the pertinent agencies shall adopt such safeguard as may be necessary and adequate to ensure that the right to privacy of an individual takes precedence over efficient public service delivery. Such safeguards shall, as a minimum, include the following:

- a. The data to be recorded and stored, which shall be used only for purposes of establishing the identity of a person, shall be limited to those specified in Section 3 of this executive order;
- b. In no case shall the collection or compilation of other data in violation of a person's right to privacy shall be allowed or tolerated under this order;
- c. Stringent systems of access control to data in the identification system shall be instituted;
- d. Data collected and stored for this purpose shall be kept and treated as strictly confidential and a personal or written authorization of the Owner shall be required for access and disclosure of data;
- e. The identification card to be issued shall be protected by advanced security features and cryptographic technology; and
- f. A written request by the Owner of the identification card shall be required for any correction or revision of relevant data, or under such conditions as the participating agency issuing the identification card shall prescribe.

Sec. 7. Funding. - Such funds as may be recommended by the Department of Budget and Management shall be provided to carry out the objectives of this executive order....

Petitioners in G.R. No. 167798 allege that EO 420 is unconstitutional because it constitutes usurpation of legislative functions by the executive branch of the government. Furthermore, they allege that EO 420 infringes on the citizen's right to privacy.

Petitioners in G.R. No. 167930 allege that EO 420 is void based on the following grounds:

1. EO 420 is contrary to law. It completely disregards and violates the decision of this Honorable Court in *Ople v. Torres*, G.R. No. 127685, July 23, 1998. It also violates RA 8282 otherwise known as the Social Security Act of 1997.
2. The Executive has usurped the legislative power of Congress as she has no power to issue EO 420. Furthermore, the implementation of the EO will use public funds not appropriated by Congress for that purpose.
3. EO 420 violates the constitutional provisions on the right to privacy:
 - (i) It allows access to personal confidential data without the owner's consent.
 - (ii) EO 420 is vague and without adequate safeguards or penalties for any violation of its provisions.
 - (iii) There are no compelling reasons that will legitimize the necessity of EO 420.
4. Granting without conceding that the President may issue EO 420, the Executive Order was issued without public hearing.
5. EO 420 violates the Constitutional provision on equal protection of laws and results in the discriminatory treatment of and penalizes those without ID.

Justice Carpio distilled the issues in **Kilusang Mayo Uno** to two - first, whether EO 420 is a **usurpation of legislative power** by the President,¹³² and second, whether EO 420 infringes on the **citizen's right to privacy**. In dismissing the petitions, Justice Carpio first disposed of questions raised by the respondents on the legal standing of petitioners and the ripeness of the petitions, and then proceeded to rule on the issues. It is the ruling on the second issue that is germane to an understanding of the **right to privacy**:

Even assuming that petitioners are bereft of legal standing, the

¹³² See discussion under Art. VII.

Court considers the issues raised under the circumstances of paramount public concern or of transcendental significance to the people. The petitions also present a justiciable controversy ripe for judicial determination because all government entities currently issuing identification cards are mandated to implement EO 420, which petitioners claim is patently unconstitutional. Hence, the Court takes cognizance of the petitions...

On the Alleged Infringement of the Right to Privacy

All these years, the GSIS, SSS, LTO, Philhealth and other government entities have been issuing ID cards in the performance of their governmental functions. There have been no complaints from citizens that the ID cards of these government entities violate their right to privacy. There have also been no complaints of abuse by these government entities in the collection and recording of personal identification data.

In fact, petitioners in the present cases do not claim that the ID systems of government entities prior to EO 420 violate their right to privacy. Since petitioners do not make such claim, they even have less basis to complain against the unified ID system under EO 420. The data collected and stored for the unified ID system under EO 420 will be limited to only 14 specific data, and the ID card itself will show only eight specific data. The data collection, recording and ID card system under EO 420 will even require less data collected, stored and revealed than under the disparate systems prior to EO 420.

Prior to EO 420, government entities had a free hand in determining the kind, nature and extent of data to be collected and stored for their ID systems. Under EO 420, government entities can collect and record only the 14 specific data mentioned in Section 3 of EO 420. In addition, government entities can show in their ID cards only eight of these specific data, seven less data than what the Supreme Court's ID shows.

Also, prior to EO 420, there was no executive issuance to government entities prescribing safeguards on the collection, recording, and disclosure of personal identification data to protect the right to privacy. Now, under Section 5 of EO 420, the following safeguards are instituted:

1. The data to be recorded and stored, which shall be used

- only for purposes of establishing the identity of a person, shall be limited to those specified in Section 3 of this executive order;
2. In no case shall the collection or compilation of other data in violation of a person's right to privacy be allowed or tolerated under this order;
 3. Stringent systems of access control to data in the identification system shall be instituted;
 4. Data collected and stored for this purpose shall be kept and treated as strictly confidential and a personal or written authorization of the Owner shall be required for access and disclosure of data;
 5. The identification card to be issued shall be protected by advanced security features and cryptographic technology;
 6. A written request by the Owner of the identification card shall be required for any correction or revision of relevant data, or under such conditions as the participating agency issuing the identification card shall prescribe.

On its face, EO 420 shows no constitutional infirmity because it even narrowly limits the data that can be collected, recorded and shown compared to the existing ID systems of government entities. EO 420 further provides strict safeguards to protect the confidentiality of the data collected, in contrast to the prior ID systems which are bereft of strict administrative safeguards.

The right to privacy does not bar the adoption of reasonable ID systems by government entities. Some one hundred countries have compulsory national ID systems, including democracies such as Spain, France, Germany, Belgium, Greece, Luxembourg, and Portugal. Other countries which do not have national ID systems, like the United States, Canada, Australia, New Zealand, Ireland, the Nordic Countries and Sweden, have sectoral cards for health, social or other public services. Even with EO 420, the Philippines will still fall under the countries that do not have compulsory national ID systems but allow only sectoral cards for social security, health services, and other specific purposes.

Without a reliable ID system, government entities like GSIS, SSS, Philhealth, and LTO cannot perform effectively and efficiently their mandated functions under existing laws. Without a reliable ID system, GSIS, SSS, Philhealth and similar government entities stand to suffer substantial losses arising from false names and identities. The integrity of the LTO's licensing system will suffer in the absence of a reliable ID system.

The dissenting opinion cites three American decisions on the right to privacy, namely, *Griswold v. Connecticut*,¹³³ *U.S. Justice Department v. Reporters Committee for Freedom of the Press*,¹³⁴ and *Whalen v. Roe*.¹³⁵ The last two decisions actually support the validity of EO 420, while the first is inapplicable to the present case.

In *Griswold*, the U.S. Supreme Court declared unconstitutional a state law that prohibited the use and distribution of contraceptives because enforcement of the law would allow the police entry into the bedrooms of married couples. Declared the U.S. Supreme Court: “Would we allow the police to search the sacred precincts of the marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.” Because the facts and the issue involved in *Griswold* are materially different from the present case, *Griswold* has no persuasive bearing on the present case.

In *U.S. Justice Department*, the issue was not whether the State could collect and store information on individuals from public records nationwide but whether the State could withhold such information from the press. The premise of the issue in *U.S. Justice Department* is that the State can collect and store in a central database information on citizens gathered from public records across the country. In fact, the law authorized the Department of Justice to collect and preserve fingerprints and other criminal identification records nationwide. The law also authorized the Department of Justice to exchange such information with “officials of States, cities and other institutions.” The Department of Justice treated such information as confidential. A CBS news correspondent and the Reporters Committee demanded the criminal records of four members of a family pursuant to the Freedom of Information Act. The U.S. Supreme Court ruled that the Freedom of Information Act expressly exempts release of information that would “constitute an unwarranted invasion of personal privacy,” and the information demanded falls under that category of exempt information.

With the exception of the 8 specific data shown on the ID card, the personal data collected and recorded under EO

¹³³ 381 U.S. 479 (1965).

¹³⁴ 489 U.S. 749 (1989).

¹³⁵ 429 U.S. 589 (1977).

420 are treated as “strictly confidential” under Section 6(d) of EO 420. These data are not only strictly confidential but also personal matters. Section 7, Article III of the 1987 Constitution grants the “right of the people to information on matters of public concern.” Personal matters are exempt or outside the coverage of the people’s right to information on matters of public concern. The data treated as “strictly confidential” under EO 420 being private matters and not matters of public concern, these data cannot be released to the public or the press. Thus, the ruling in *U.S. Justice Department* does not collide with EO 420 but actually supports the validity EO 420.

Whalen v. Roe is the leading American case on the constitutional protection for control over information. In *Whalen*, the U.S. Supreme Court upheld the validity of a New York law that required doctors to furnish the government reports identifying patients who received prescription drugs that have a potential for abuse. The government maintained a central computerized database containing the names and addresses of the patients, as well as the identity of the prescribing doctors. The law was assailed because the database allegedly infringed the right to privacy of individuals who want to keep their personal matters confidential. The U.S. Supreme Court rejected the privacy claim, and declared:

Disclosures of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies are often an essential part of modern medical practice even when the disclosure may reflect unfavorably on the character of the patient. Requiring such disclosures to representatives of the State having responsibility for the health of the community does not automatically amount to an impermissible invasion of privacy.

Compared to the personal medical data required for disclosure to the New York State in *Whalen*, the 14 specific data required for disclosure to the Philippine government under EO 420 are far less sensitive and far less personal. In fact, the 14 specific data required under EO 420 are routine data for ID systems, unlike the sensitive and potentially embarrassing medical records of patients taking prescription drugs. *Whalen*, therefore, carries persuasive force for upholding the constitutionality of EO 420 as non-violative of the right to privacy.

... U.S. Supreme Court decisions have reiterated *Whalen*. In *Planned Parenthood of Central Missouri v. Danforth*,¹³⁶ the U.S. Supreme Court upheld the validity of a law that required doctors performing abortions to fill up forms, maintain records for seven years, and allow the inspection of such records by public health officials. The U.S. Supreme Court ruled that “recordkeeping and reporting requirements that are reasonably directed to the preservation of maternal health and that properly respect a patient’s confidentiality and privacy are permissible.”

Again, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹³⁷ the U.S. Supreme Court upheld a law that required doctors performing an abortion to file a report to the government that included the doctor’s name, the woman’s age, the number of prior pregnancies and abortions that the woman had, the medical complications from the abortion, the weight of the fetus, and the marital status of the woman. In case of state-funded institutions, the law made such information publicly available. In *Casey*, the U.S. Supreme Court stated: “The collection of information with respect to actual patients is a vital element of medical research, and so it cannot be said that the requirements serve no purpose other than to make abortion more difficult.”

Compared to the disclosure requirements of personal data that the U.S. Supreme Court have upheld in *Whalen*, *Danforth* and *Casey* as not violative of the right to privacy, **the disclosure requirements under EO 420 are far benign and cannot therefore constitute violation of the right to privacy.** EO 420 requires disclosure of 14 personal data that are routine for ID purposes, data that cannot possibly embarrass or humiliate anyone.

Petitioners have not shown how EO 420 will violate their right to privacy. Petitioners cannot show such violation by a mere facial examination of EO 420 because EO 420 narrowly draws the data collection, recording and exhibition while prescribing comprehensive safeguards. *Ople v. Torres*¹³⁸ is not authority to hold that EO 420 violates the right to privacy because in that case the assailed executive

¹³⁶ 428 U.S. 52 (1976).

¹³⁷ 505 U.S. 833 (1992).

¹³⁸ 354 Phil. 948 (1998).

issuance, broadly drawn and devoid of safeguards, was annulled solely on the ground that the subject matter required legislation. As then Associate Justice, now Chief Justice Artemio V. Panganiban noted in his concurring opinion in *Ople v. Torres*, “The voting is decisive only on the need for appropriate legislation, and it is only on this ground that the petition is granted by this Court.”

EO 420 applies only to government entities that already maintain ID systems and issue ID cards pursuant to their regular functions under existing laws. EO 420 does not grant such government entities any power that they do not already possess under existing laws. In contrast, the assailed executive issuance in *Ople v. Torres* sought to establish a “National Computerized Identification Reference System,” a national ID system that did not exist prior to the assailed executive issuance. Obviously, a national ID card system requires legislation because it creates a new national data collection and card issuance system where none existed before.

In the present case, EO 420 does not establish a national ID system but makes the existing sectoral card systems of government entities like GSIS, SSS, Philhealth and LTO less costly, more efficient, reliable and user-friendly to the public. Hence, EO 420 is a proper subject of executive issuance under the President’s constitutional power of control over government entities in the Executive department, as well as under the President’s constitutional duty to ensure that laws are faithfully executed.¹³⁹

Section 4. No law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people peaceably to assemble and petition the government for redress of grievances.

Justice Carpio’s views on **freedom of expression**, “fundamental to the preservation of a free, open and democratic society,” and of such “transcendental importance” that it “must be defended by every patriotic citizen at the earliest opportunity,” were distilled in his **concurring opinion** in **CHAVEZ v. GONZALES**, G.R. No. 168338, February 15, 2008:

¹³⁹ See discussion under Art. VII.

Freedom of expression is the foundation of a free, open and democratic society. Freedom of expression is an indispensable condition¹⁴⁰ to the exercise of almost all other civil and political rights. No society can remain free, open and democratic without freedom of expression. Freedom of expression guarantees full, spirited, and even contentious discussion of all social, economic and political issues. To survive, a free and democratic society must zealously safeguard freedom of expression.

Freedom of expression allows citizens to expose and check abuses of public officials. Freedom of expression allows citizens to make informed choices of candidates for public office. Freedom of expression crystallizes important public policy issues, and allows citizens to participate in the discussion and resolution of such issues. Freedom of expression allows the competition of ideas, the clash of claims and counterclaims, from which the truth will likely emerge. Freedom of expression allows the airing of social grievances, mitigating sudden eruptions of violence from marginalized groups who otherwise would not be heard by government. Freedom of expression provides a civilized way of engagement among political, ideological, religious or ethnic opponents for if one cannot use his tongue to argue, he might use his fist instead.

Freedom of expression is the freedom to disseminate ideas and beliefs, whether competing, conforming or otherwise. It is the freedom to express to others what one likes or dislikes, as it is the freedom of others to express to one and all what they favor or disfavor. It is the free expression for the ideas we love, as well as the free expression for the ideas we hate.¹⁴¹ Indeed, the function of freedom of expression is to stir disputes:

[I]t may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.¹⁴²

¹⁴⁰ In *Palko v. Connecticut*, 302 U.S. 319 (1937), Justice Benjamin Cardozo wrote that “freedom of expression is the matrix, the indispensable condition, of nearly every other form of freedom.”

¹⁴¹ See Dissenting opinion, Holmes, J., *United States v. Schwimmer*, 279 U.S. 644 (1929).

¹⁴² *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

Section 4, Article III of the Constitution prohibits the enactment of any law curtailing freedom of expression...

Thus, the rule is that expression is not subject to any prior restraint or censorship because the Constitution commands that freedom of expression shall not be abridged. Over time, however, courts have carved out narrow and well defined exceptions to this rule out of necessity.

The exceptions, when expression may be subject to prior restraint, apply in this jurisdiction to only four categories of expression, namely: pornography,¹⁴³ false or misleading advertisement,¹⁴⁴ advocacy of imminent lawless action,¹⁴⁵ and danger to national security.¹⁴⁶ All other expression is not subject to prior restraint. As stated in *Turner Broadcasting System v. Federal Communication Commission*, [t]he First Amendment (Free Speech Clause), subject only to narrow and well understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals.¹⁴⁷

Expression not subject to prior restraint is protected expression or high-value expression. Any content-based prior restraint on protected expression is unconstitutional without exception. A protected expression means what it says - it is absolutely protected from censorship. Thus, there can be no prior restraint on public debates on the amendment or repeal of existing laws, on the ratification of treaties, on the imposition of new tax measures, or on proposed amendments to the Constitution.

Prior restraint on expression is content-based if the restraint is aimed at the message or idea of the expression. Courts will subject to strict scrutiny content-based restraint. If the content-based prior restraint is directed at protected expression, courts will strike down the restraint as unconstitutional because there can be no content-based prior restraint on protected expression. The analysis thus turns on whether the prior restraint is content-

¹⁴³ *Gonzales v. Kalaw-Katigbak*, No. L-69500, 22 July 1985, 137 SCRA 717.

¹⁴⁴ *Pharmaceutical and Health Care Association of the Philippines v. Health Secretary Francisco T. Duque III*, G.R. No. 173034, 9 October 2007. Another fundamental ground for regulating false or misleading advertisement is Const., Art. XVI, Sec. 11(2).

¹⁴⁵ *Eastern Broadcasting Corporation v. Dans*, No. L-59329, 19 July 1985, 137 SCRA 628.

¹⁴⁶ *Ibid.*

¹⁴⁷ 512 U.S. 622, 640 (1994).

based, and if so, whether such restraint is directed at protected expression, that is, those not falling under any of the recognized categories of unprotected expression.

If the prior restraint is not aimed at the message or idea of the expression, it is content-neutral even if it burdens expression. A content-neutral restraint is a restraint which regulates the time, place or manner of the expression in public places¹⁴⁸ without any restraint on the content of the expression. Courts will subject content-neutral restraints to intermediate scrutiny.¹⁴⁹

An example of a content-neutral restraint is a permit specifying the date, time and route of a rally passing through busy public streets. A content-neutral prior restraint on protected expression which does not touch on the content of the expression enjoys the presumption of validity and is thus enforceable subject to appeal to the courts.¹⁵⁰ Courts will uphold time, place or manner restraints if they are content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of expression.¹⁵¹

In content-neutral prior restraint on protected speech, there should be no prior restraint on the content of the expression itself. Thus, submission of movies or pre-taped television programs to a government review board is constitutional only if the review is for classification and not for censoring any part of the content of the submitted materials.¹⁵² However, failure to submit such materials to the review board may be penalized without regard to the content of the materials.¹⁵³ The review board has no power to reject the airing of the submitted materials. The review boards power is only to classify the materials, whether for general patronage, for adults only, or for some other classification. The power to classify expressions applies only to movies and pre-taped television programs but not

¹⁴⁸ Bayan, Karapatan, Kilusang Magbubukid ng Pilipinas (KMP) v. Ermita, G.R. Nos. 169838, 169848 and 156881, 25 April 2006, 488 SCRA 2260.

¹⁴⁹ Erwin Chemerinsky, *Constitutional Law*, 902, 936 (2nd Edition).

¹⁵⁰ Ruiz v. Gordon, 211 Phil. 411 (1983).

¹⁵¹ United States v. Grace, 461 U.S. 171 (1983).

¹⁵² Gonzalez v. Kalaw-Katigbak, No. L-69500, 22 July 1985, 137 SCRA 717. The Court declared, "It is the opinion of this Court, therefore, that to avoid an unconstitutional taint on its creation, the power of respondent Board is limited to the classification of films."

¹⁵³ Movie and Television Review and Classification Board v. ABS-CBN Broadcasting Corporation, G.R. No. 155282, 17 January 2005, 448 SCRA 5750.

to live television programs. Any classification of live television programs necessarily entails prior restraint on expression.

Expression that may be subject to prior restraint is unprotected expression or low-value expression. By definition, prior restraint on unprotected expression is content-based¹⁵⁴ since the restraint is imposed because of the content itself. In this jurisdiction, there are currently only four categories of unprotected expression that may be subject to prior restraint. This Court recognized false or misleading advertisement as unprotected expression only in October 2007.¹⁵⁵

Only unprotected expression may be subject to prior restraint. However, any such prior restraint on unprotected expression must hurdle a high barrier. First, such prior restraint is presumed unconstitutional. Second, the government bears a heavy burden of proving the constitutionality of the prior restraint.¹⁵⁶

Courts will subject to strict scrutiny any government action imposing prior restraint on unprotected expression.¹⁵⁷ The government action will be sustained if there is a compelling State interest, and prior restraint is necessary to protect such State interest. In such a case, the prior restraint shall be narrowly drawn - only to the extent necessary to protect or attain the compelling State interest.

Prior restraint is a more severe restriction on freedom of expression than subsequent punishment. Although subsequent punishment also deters expression, still the ideas are disseminated to the public. Prior restraint prevents even the dissemination of ideas to the public.

While there can be no prior restraint on protected expression, such expression may be subject to subsequent punishment,¹⁵⁸ either civilly or criminally. Thus, the publication of election surveys

¹⁵⁴ Erwin Chemerinsky, *Constitutional Law* 903 (2nd Edition).

¹⁵⁵ *Pharmaceutical and Health Care Association of the Philippines v. Health Secretary Francisco T. Duque III*, G.R. No. 173034, 9 October 2007.

¹⁵⁶ *Iglesia ni Cristo (INC) v. Court of Appeals, Board of Review for Motion Pictures and Television*, G.R. No. 119673, 26 July 1996, 259 SCRA 529; *New York Times v. United States*, 403 U.S. 713 (1971).

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ayer Productions Pty. Ltd. v. Capulong*, G.R. No. L-82380, 29 April 1988, 160 SCRA 861.

cannot be subject to prior restraint,¹⁵⁹ but an aggrieved person can sue for redress of injury if the survey turns out to be fabricated. Also, while Article 201 (2)(b)(3) of the Revised Penal Code punishing shows which offend any race or religion cannot be used to justify prior restraint on religious expression, this provision can be invoked to justify subsequent punishment of the perpetrator of such offensive shows.¹⁶⁰

Similarly, if the unprotected expression does not warrant prior restraint, the same expression may still be subject to subsequent punishment, civilly or criminally. Libel falls under this class of unprotected expression. However, if the expression cannot be subject to the lesser restriction of subsequent punishment, logically it cannot also be subject to the more severe restriction of prior restraint. Thus, since profane language or hate speech against a religious minority is not subject to subsequent punishment in this jurisdiction,¹⁶¹ such expression cannot be subject to prior restraint.

If the unprotected expression warrants prior restraint, necessarily the same expression is subject to subsequent punishment. There must be a law punishing criminally the unprotected expression before prior restraint on such expression can be justified. The legislature must punish the unprotected expression because it creates a substantive evil that the State must prevent. Otherwise, there will be no legal basis for imposing a prior restraint on such expression.

The prevailing test in this jurisdiction to determine the constitutionality of government action imposing prior restraint on three categories of unprotected expression - pornography,¹⁶² advocacy of imminent lawless action, and danger to national security - is the clear and present

¹⁵⁹ *Social Weather Station, et al. v. COMELEC*, 409 Phil. 571 (2001).

¹⁶⁰ *Iglesia ni Cristo (INC) v. Court of Appeals, Board of Review for Motion Pictures and Television*, G.R. No. 119673, 26 July 1996, 259 SCRA 529; *New York Times v. United States*, 403 U.S. 713 (1971).

¹⁶¹ *MVRS Publications, Inc. v. Islamic Dawah Council of the Philippines, Inc.*, 444 Phil. 230 (2003). In effect, this makes hate speech against a religious or ethnic minority a protected expression. (See dissenting opinion, Carpio, J., discussed under Art. II, Sec. 11).

¹⁶² In pornography or obscenity cases, the ancillary test is the contemporary community standards test enunciated in *Roth v. United States* (354 U.S. 476 [1957]), which asks: whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. See *Gonzalez v. Kalaw-Katigbak*, No. L-69500, 22 July 1985, 137 SCRA 717.

danger test.¹⁶³ The expression restrained must present a clear and present danger of bringing about a substantive evil that the State has a right and duty to prevent, and such danger must be grave and imminent.¹⁶⁴

Based on his views in **Chavez**, Justice Carpio voted against the majority in A.M. No. 07-09-13-SC, August 8, 2008, 583 Phil. 391, **RE: IN THE MATTER OF THE ALLEGATIONS CONTAINED IN THE COLUMNS OF MR. MACASAET PUBLISHED IN MALAYA DATED SEPTEMBER 18, 19, 20 AND 21, 2007**. As explained by Atty. Rosalinda E. Beltran-Kawada, Judicial Staff Head, Office of the Senior Associate Justice, Supreme Court, his **dissenting opinion** “sought the delicate balance between the **constitutionally-protected freedom of speech and of the press** and the rights of the courts to maintain order, impartiality, and dignity in the administration of justice. Justice Carpio stressed the need to apply the clear and present danger rule test in contempt cases because it was most protective of free speech and of the press. He recognized that courts, as a matter of self-preservation, must be able to defend themselves, but only when the evil brought about by the attack is ‘extremely serious and the degree of imminence extremely high’ that it impedes, obstructs, or degrades the administration of justice. The opinion is a timely reminder in an environment where the freedom of the press is being undermined.”¹⁶⁵

In the September 18-21, 2007 issues of *Malaya*, Amado A. Macasaet’s daily column, *Business Circuit*, ran a story, based on information obtained from confidential sources, of an alleged bribery in the Court. On separate occasions, boxes containing cash were allegedly delivered to the Court and received and opened by a staff member of an unnamed Justice. The “payoff” was made allegedly in connection with a decision rendered by the Justice. Macasaet’s story, which carried commentaries on the state of the judiciary and the reputation of judges, exhorted the

¹⁶³ In false or misleading advertisement cases, no test was enunciated in *Pharmaceutical and Health Care Association of the Philippines v. Health Secretary* (op. cit.) although the Concurring and Separate Opinion of Chief Justice Reynato S. Puno advocated the four-part analysis in *Central Hudson Gas & Electric v. Public Service Commission* (447 U.S. 557[1980]), to wit: (1) the advertisement must concern lawful activity and not be misleading; (2) the asserted governmental interest must be substantial; (3) the state regulation directly advances the governmental interest asserted; and (4) the restriction is no more extensive than is necessary to serve that interest.

¹⁶⁴ *Bayan v. Ermita*, op. cit. In the United States, the prevailing test is the *Brandenburg* standard (*Brandenburg v. Ohio*, [395 U.S. 444 1969]) which refined the clear and present danger rule articulated by Justice Oliver Wendell Holmes in *Schenck v. United States* (249 U.S. 47 [1919]) by limiting its application to expressions where there is imminent lawless action. See 2 Otis H. Stephen, Jr. and John M. Scheb II, *American Constitutional Law* 133 (4th Edition).

¹⁶⁵ Response of Atty. Rosalinda E. Beltran-Kawada, February 1, 2019.

staff member, whose services had been terminated, to divulge everything she knew about the alleged bribery, and the Court to investigate the matter. In a resolution, the Court created a committee, composed of former members of the Court, to receive evidence and submit its report and recommendations. In its report and recommendation, the committee found that there existed valid grounds to cite Macasaet for indirect contempt. The report found that Macasaet's publications were "false, baseless, unbelievable, and malicious" and that Macasaet was negligent in failing to ascertain the veracity of the story. The report concluded that Macasaet's publications generated public distrust in the administration of justice and were thus, contumacious. In **Re: Macasaet**, the Court *en banc* agreed with the report and imposed a punitive fine on Macasaet. Justice Carpio's **dissent** focused on a discussion of the **freedom of speech and of the press guarantee** in contempt-by-publication proceedings:

The Applicable Standard in Contempt-by-Publication Proceedings

...

This matter comes on the heels of a small but growing line of jurisprudence on contempt-by-publication;¹⁶⁶ however, this is only the second incident to involve this Court on reports of corruption.¹⁶⁷ These cases implicate two competing but equally vital State interests: on the one hand, the right of journalists to be protected from contempt of court under the constitutional guarantees of free speech and of the press and, on the other hand, the right of the courts to maintain order, impartiality and dignity in the administration of justice. In resolving the matter, we are called upon to perform a task more commonly done in constitutional adjudication - the balancing of constitutional values using applicable standards. As ever, the result of this delicate task hinges on the liberality or stringency of the test used against which the two interests are weighed.

In concluding that "there exist valid grounds ... to cite ... Macasaet for indirect contempt ...," the Report implicitly used

¹⁶⁶ For publications by journalists, see *In re Lozano and Quevedo*, 54 Phil. 801 (1930); *In re Abistado*, 57 Phil. 669 (1932); *In Re Brillantes*, 42 O.G. 59 (1945); *Murillo v. Superable*, 107 Phil. 322 (1960); *People v. Castelo*, No. L-11816, 23 April 1962, 4 SCRA 947. For publications of letters written, or interviews given, by citizens, see *In re Kelly*, 35 Phil. 944 (1916); *People v. Alarcon*, 69 Phil. 265 (1939); *In re Sotto*, 82 Phil. 595 (1949); *Zaldivar v. Gonzalez*, Nos. L-79690-707, 7 October 1988, 166 SCRA 316.

¹⁶⁷ The first is *In Re: Emil P. Jurado*, 313 Phil. 119 (1995).

two parameters, first applied in *In Re: Emil P. Jurado*¹⁶⁸ (*Jurado* test), against which Macasaet's publications were measured: (1) whether Macasaet's story was false and (2) whether Macasaet could have prevented the publication of the false story by exercising diligence in verifying its veracity. As stated, the Report found Macasaet's publications wanting on both counts.

However, long before we adopted the *Jurado* test, this Court already laid down the two "theoretical formulas" to serve as the judicial scales upon which the competing interests in this proceeding are weighed. We held in *Cabansag v. Fernandez*:¹⁶⁹

Two theoretical formulas had been devised in the determination of conflicting rights of similar import in an attempt to draw the proper constitutional boundary between freedom of expression and independence of the judiciary. These are the [1] "clear and present danger" rule and the [2] "dangerous tendency" rule. The first, as interpreted in a number of cases, means that the evil consequence of the comment or utterance must be "extremely serious and the degree of imminence extremely high" before the utterance can be punished. The danger to be guarded against is the "substantive evil" sought to be prevented. And this evil is primarily the "disorderly and unfair administration of justice." This test establishes a definite rule in constitutional law. It provides the criterion as to what words may be published. Under this rule, the advocacy of ideas cannot constitutionally be abridged unless there is a clear and present danger that such advocacy will harm the administration of justice.

...

Thus, speaking of the extent and scope of the application of [the first] rule, the Supreme Court of the United States said "Clear and present danger of substantive evils as a result of indiscriminate publications regarding judicial proceedings justifies an impairment of the constitutional right of freedom of speech and press only if the evils are extremely serious and the degree of imminence extremely high. ... A public utterance or publication is not to be denied the constitutional protection of freedom of speech and press merely because it concerns a judicial proceeding still pending in the courts, upon the theory that in such a case it must necessarily tend

¹⁶⁸ Ibid.

¹⁶⁹ 102 Phil. 152, 161-164 (1957).

to obstruct the orderly and fair administration of justice.[“]...
...

The “dangerous tendency” rule, on the other hand, has been adopted in cases where extreme difficulty is confronted in determining where the freedom of expression ends and the right of courts to protect their independence begins. There must be a remedy to borderline cases and the basic principle of this rule lies in that the freedom of speech and of the press, as well as the right to petition for redress of grievance, while guaranteed by the constitution, are not absolute. They are subject to restrictions and limitations, one of them being the protection of the courts against contempt (*Gilbert v. Minnesota*, 254 U. S. 325.)

This rule may be epitomized as follows: If the words uttered create a dangerous tendency which the state has a right to prevent, then such words are punishable. It is not necessary that some definite or immediate acts of force, violence, or unlawfulness be advocated. It is sufficient that such acts be advocated in general terms. Nor is it necessary that the language used be reasonably calculated to incite persons to acts of force, violence, or unlawfulness. It is sufficient if the natural tendency and probable effect of the utterance be to bring about the substantive evil which the legislative body seeks to prevent. (*Gitlow v. New York*, 268 U.S. 652.)

Thus, in this jurisdiction, we have long ago applied the clear and present danger test in contempt cases.¹⁷⁰ We must scrutinize Macasaet’s publications through the lens of the clear and present danger test guided by these queries: (1) is the evil consequence of Macasaet’s publications extremely serious? and (2) is the degree of its imminence extremely high? The facts of this case do not meet either criterion.

¹⁷⁰ See *Cabansag v. Fernandez*, 102 Phil. 152, 161-164 (1957) and *People v. Godoy*, 312 Phil. 977 (1995). This is also the prevailing test in the U.S. jurisdiction in contempt-by-publication cases (see *Pennekamp v. State of Florida*, 328 U.S. 331 [1946]; *Craig v. Harney*, 331 U.S. 367 [1947]; *Bridges v. California*, 314 U.S. 252 [1941]). For a discussion on the evolution of this test in that jurisdiction as used in contempt-by-publication cases, see *Turkington v. Municipal Court*, 85 Cal. App.2d 631, 193 P.2d 795 (1948). In this jurisdiction, the test has likewise been used to determine the constitutionality of regulations and official pronouncements amounting to censorship (e.g. *Iglesia ni Cristo (INC) v. Court of Appeals*, G.R. No. 119673, 26 July 1996, 259 SCRA 529; *Chavez v. Gonzalez*, G.R. No. 168338, 15 February 2008). As used in First Amendment cases in the U.S. jurisdiction, this test has been refined under the *Brandenburg* standard in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). See separate and concurring opinion of Justice Carpio in *Chavez v. Gonzales*, G.R. No. 168338, 15 February 2008, excerpted above.

Although the majority,¹⁷¹ in adopting the Report's findings, did not expressly so state, it appears that the substantive evil allegedly brought about by Macasaet's publications is two-fold: (1) disrespect for the Court and (2) unfair administration of justice. To determine to what extent the substantive evil is likely to occur, we must turn to the particular utterances and the circumstances of their publication.¹⁷² On the question of disrespect for the Court, the Report seemed to have cherry-picked words from Macasaet's publications describing the Court's reputation ("sagging" and "soiled"), the state of the courts ("dirty"), and the public's appraisal of judges ("thieves") and separated them from their context to arrive at its conclusion. Adopting the same approach, the majority holds that "[Macasaet] has absolutely no basis to call the Supreme Court a court of 'thieves' and a 'basket of rotten apples.'"

A simple resort to the publications in question belies these findings. Macasaet used these terms to bring home his point that (1) the alleged bribery "proves" the less than desirable state of affairs in the judiciary (that is, the courts are "dirty"); (2) which reflects on the entire judiciary (similar to a basket of apples where, if "there are a few which are rotten[;] [t]hat makes the whole basket rotten"); and (3) that the Court must investigate the reported bribery ... to save the other members of the Court from "suspicions they are thieves." Thus, taken in context of their actual use as they appeared in Macasaet's publications, the words the majority finds contumacious are no more disrespectful of courts than when a publication states that a reported pay-off "proves" that the judiciary is populated by "hoodlums in robes."¹⁷³

On Macasaet's statement that the Justice in question "shamed her court" and that she should resign or be impeached, it needs no further elaboration that this statement is not directed at the Court but at one of its members. Without passing judgment on the nature of this statement, it is obvious that the remedy for any injury this may have caused lies not in this Court's exercise of its contempt power but in the resort by the Justice concerned to remedies available under our civil and criminal statutes to vindicate her rights.

On the question of unfair administration of justice, neither

¹⁷¹ Majority opinion, Reyes, R.T., J.

¹⁷² *Bridges v. California*, 314 U.S. 252, 271 (1941).

¹⁷³ A term, made popular by a former Chief Executive, which has gained currency in public discourse on corruption in the judiciary.

has it been claimed nor suggested that this matter has or will adversely affect the disposition of the pending incident in G.R. No. 172602. If there is any party which stands to be directly prejudiced by the alleged bribery, it is the government whose case against Go was ordered dismissed in the Resolution of 3 September 2007. However, the government has not asked for Justice Santiago's inhibition from that case, indicating its continuing trust and confidence in her impartiality. With this backdrop, the Report's conclusion that Macasaet's publications "generate[d] public distrust in the administration of justice" and wrought "damage and injury" to the "institutional integrity, dignity, and honor" of this Court rings hollow, rooted on assumptions bereft of factual basis. As well observed by then Associate Justice, now Chief Justice Reynato S. Puno, in *Jurado* which also involved a journalist who authored false reports of corruption in the Court:

There is nothing in the record, however, showing the degree how respondent's false report degraded the administration of justice. The evidence from which this conclusion can be deduced is *nil*. The standing of respondent as a journalist is not shown. The extent of readership of respondent is not known. His credibility has not been proved. Indeed, nothing in the record shows that any person lost faith in our system of justice because of his said report. Even the losing party ... does not appear to have given any credence to the said false report.¹⁷⁴

These observations are consistent with the rule that the clear and present danger test is deemed met only upon showing that "the material would tend to cause the unfair disposition of pending cases"¹⁷⁵ or create an imminent and serious threat to the ability of the Court to decide the issues before it.¹⁷⁶ In sum, the facts of this case fall short of the stringent standard under the clear and present danger test that the substantive evil brought about by the publications be extremely serious and the degree of imminence extremely high.¹⁷⁷

The clear and present danger test, which this Court has been

¹⁷⁴ In Re: Emil P. Jurado, 313 Phil. 119 (1995).

¹⁷⁵ 40 A.L.R.3d 1204.

¹⁷⁶ See *Pennekamp v. State of Florida*, 328 U.S. 331 (1946); *Craig v. Harney*, 331 U.S. 367 (1947); *Bridges v. California*, 314 U.S. 252 (1941).

¹⁷⁷ *Bridges v. California*, 314 U.S. 252, 263 (1941).

applying in contempt cases,¹⁷⁸ is most protective of free speech and of free press, basic rights which are necessary for the exercise of almost every other fundamental right.¹⁷⁹ That this case is a criminal contempt proceeding gives added protection to Macasaet who invokes freedom of the press. Indeed, Macasaet is afforded the basic rights granted to the accused in a criminal case and as precondition for citing him in contempt, intent to commit contempt of court must be shown by proof beyond reasonable doubt. Good faith or absence of intent to harm the courts is a valid defense.¹⁸⁰ Macasaet did invoke good faith but the Report brushed it aside as “tongue in cheek protestation.”

The clear and present danger test is the most exacting and protective test in favor of free press. Before a journalist can be punished in a criminal contempt case, as in this case, there must be proof beyond reasonable doubt that his publication tends to obstruct the administration of justice, and such obstruction must be extremely serious, likely resulting in an unfair decision, and the degree of imminence of the obstruction actually happening extremely high.

Macasaet and *Newsbreak*¹⁸¹ based their reports on the alleged bribery from information obtained from their respective confidential sources. In short, it was a professional call on the part of Macasaet and *Newsbreak* to run the story. This Court should be the last to attribute negative motives for this judgment call. Admittedly, Macasaet has failed to substantiate his story - spread over four issues of *Malaya*, divulging bits and pieces of vague information. This, however, does not serve to lessen the protection afforded to the publications which carried them under the constitutional guarantees of free speech and of free press. Journalists, “agents of the people”¹⁸² who play a vital role in our polity by bringing to the public fora issues of common concern such as corruption, must be accorded the same “breathing space”

¹⁷⁸ *Cabansag v. Fernandez*, 102 Phil. 152, 161-164 (1957) and *People v. Godoy*, 312 Phil. 977 (1995).

¹⁷⁹ *Philippine Blooming Mills Employees Organization v. Philippine Blooming Mills*, No. L-31195, 5 June 1973, 51 SCRA 189 (1973). See separate and concurring opinion of Justice Carpio in *Chavez v. Gonzalez*, G.R. No. 168338, 15 February 2008, excerpted above.

¹⁸⁰ *People v. Godoy*, 312 Phil. 977 (1995).

¹⁸¹ Subsequent to the Macasaet publications, *Newsbreak*, an online magazine, posted on its website a news report that the Court was investigating a bribery incident based on facts substantially similar to the Macasaet publications. Written by Marites Danguilan Vitug, editor, and Aries Rufo, reporter, the news report named Justice Consuelo Ynares-Santiago as the member of the Court involved in the alleged bribery and Cecilia Delis as her staff member.

¹⁸² *In Re: Emil P. Jurado*, 313 Phil. 119, 367 (1995), Puno, J., dissenting.

for erroneous statements necessary for free expression to thrive in a democratic society.¹⁸³

Further, failure to substantiate a story, or even the mere falsity of publications, had long ceased to suffice to hold journalists in contempt of court (unless there is a clear and present danger that such false reports will impair the administration of justice)¹⁸⁴ just as it had long ceased to suffice to hold journalists liable for libel for criticism of public officials under the actual malice standard.¹⁸⁵ Chief Justice Puno's discussion of this point in *Jurado* is most illuminating:

[R]espondent [is punished] for publishing "stories shown to be false ... stories that he made no effort whatsoever to verify and which, after being denounced as lies, he has refused, or is unable to substantiate." The undue weight given to the falsity alone of respondent's columns is unsettling. For after finding respondent's columns as false, the majority did not go any further to determine whether these falsehoods constitute a clear and present danger to the administration of justice.

...

[T]he majority cites in support of its non-too-liberal stance the cases of *New York Times Co. v. Sullivan* and *Garrison v. Louisiana*. These cases, however, are ground breaking in importance for they expanded the protection given to freedom of speech and of the press. New York Times restricted the award of damages in favor of public officials in civil suits for damages arising out of libel precisely because of their chilling effects on the exercise of freedom of speech and of the press. To be entitled to damages, the public official concerned was imposed a very difficult, if not impossible, burden of proof. He was required to prove that the defamatory statement was not only false but

¹⁸³ See *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964).

¹⁸⁴ *Pennekamp v. State of Florida*, 328 U.S. 331 (1946). The rule is stated thus: "If a person, by false charges against a court, does directly interfere with the administration of justice he may be punished for a constructive contempt, and the constitutional guarantee will not protect him. But before he can be so punished the false charges must be of such a nature that they not only have a 'reasonable tendency' to obstruct justice, but also must constitute 'a clear and present danger' to the administration of justice. Intemperate language, false charges, and unfair criticism, no matter how strongly expressed, may be in bad taste, but they do not constitute a constructive contempt unless there is an immediate, clear and present danger imperiling the administration of justice." (*Turkington v. Municipal Court*, 193 P.2d 795, 802 [1948]). Of course, it does not follow that erring journalists and their publishers should not earn the public's ire for sloppy journalistic work. ...

¹⁸⁵ As held in *New York Times v. Sullivan* (376 U.S. 254 [1964]), the actual malice standard is met upon proof of knowledge that the publication was false or with reckless disregard of whether the publication was false or not.

was made with “actual malice.” This means he has to prove that the defamatory statement was made with the “knowing falsity or with a reckless disregard for the truth.” On the other hand, *Garrison* did not only reiterate but even extended the *New York Times* rule to apply to criminal cases. ...

...

The majority opinion in the case at bench certainly did not follow the *New York Times* rule which was reiterated and even expanded in *Garrison*. The majority halted after finding that the respondent’s columns are false or slanted.¹⁸⁶

To support its conclusion finding Macasaet guilty of contempt of this Court, the majority made a selective survey of contempt of court jurisprudence and sought to apply them here. However, of the cases the majority cites, only three involved contempt by publication proceedings, two of which, *In re Kelly*¹⁸⁷ and *In re Sotto*¹⁸⁸ were decided long before we laid down the parameters of the clear and present danger test in *Cabansag*. As for the third case of *People v. Godoy*,¹⁸⁹ the Court in fact applied the clear and present danger test in that case, thus:

Snide remarks or sarcastic innuendoes do not necessarily assume that level of contumely which is actionable under Rule 71 of the Rules of Court. Neither do we believe that the publication in question was intended to influence this Court for it could not conceivably be capable of doing so. The article has not transcended the legal limits for editorial comment and criticism. Besides, it has not been shown that there exists a substantive evil which is extremely serious and that the degree of its imminence is so exceptionally high as to warrant punishment for contempt and sufficient to disregard the constitutional guaranties of free speech and press.

Thus, while ostensibly using relevant jurisprudence to arrive at its conclusion, the majority actually relied on the liberal parameters of the “falsity and negligence test” used in *Jurado*. The “falsity and negligence test” is a sharp dagger aimed at the heart of free speech and of free press. Applied for the first time in *Jurado* and nowhere else on this planet, this test does not consider the seriousness or imminence of the substantive evil

¹⁸⁶ In Re: Emil P. Jurado, 313 Phil. 119, 362-365 (1995).

¹⁸⁷ 35 Phil. 944 (1916).

¹⁸⁸ 82 Phil. 595 (1949).

¹⁸⁹ 312 Phil. 977, 997 (1995).

sought to be prevented. Any kind of unflattering publication to a judge or court, whether or not putting at risk a fair trial or decision, becomes punishable for contempt if false and the journalist could have prevented the publication by exercising diligence to verify its veracity. Good faith is not a defense.

The “falsity and negligence test” compels the journalist to guarantee the veracity of what he writes on pain of criminal contempt of court. Obviously, this has a chilling effect on free speech and free press. This will lead to self-censorship, suppressing the publication of not only what is false but also of what is true. Critics of judges or the courts will be forced into silence, unless they are willing to face imprisonment or fine for criminal contempt. The “falsity and negligence test” is a dangerous throwback to the Dark Ages in the history of free speech and of free press.

By approving the Report’s reliance on the *Jurado* test, the majority perpetuates a double-standard *vis-a-vis* publications critical of public officials. On the one hand, the majority applies the liberal “falsity and negligence test” in lieu of the exacting clear and present danger test to scrutinize publications critical of judges in contempt cases, and on the other hand, applies the stringent “actual malice test” for publications critical of all other public officials.

This Court has extended the constitutional protection of free speech to publications critical of a barangay official,¹⁹⁰ provincial governor (and concurrently a cabinet official),¹⁹¹ and other public figures,¹⁹² for lack of proof of knowledge that the publication was false or of reckless disregard of whether the publication was false or not. However, the Court today is imposing punitive sanctions on a journalist for authoring publications imputing malfeasance on a member of the Court because the journalist failed to substantiate his story, despite incontrovertible proof that he acted in good faith as shown by the parallel publication of the same story by another media outlet based on its own confidential sources (which, significantly, was never made to justify its conduct).

Supreme Court Justices, as public officials, and the Supreme

¹⁹⁰ *Vasquez v. Court of Appeals*, 373 Phil. 238 (1999).

¹⁹¹ *Flor v. People*, G.R. No. 139987, 31 March 2005, 454 SCRA 440.

¹⁹² “A civil engineer, businessman, business consultant and journalist” (*Borjal v. Court of Appeals*, 361 Phil. 1 [1999]) and a “broadcast journalist” (*Guinguing v. Court of Appeals*, G.R. No. 128959, 30 September 2005, 471 SCRA 196).

Court, as an institution, are entitled to no greater immunity from criticism than other public officials and institutions.¹⁹³ Indeed, the dual-treatment that the majority tolerates turns on its head the purpose of the contempt power: instead of “protect[ing] immediate litigants and the public from the mischievous danger of an unfree or coerced tribunal” it “protects the court as a mystical entity or the judges ... as anointed priests set apart from the community and spared the criticism to which in a democracy other public servants are exposed.”¹⁹⁴ As the Highest Court of the land, the Court should be the first to resist the temptation to privilege its members with the shield of *lese-majeste*, through the liberal “falsity and negligence test,” at the expense of diluting the essence of the free press guarantee indispensable in a democratic society. This Court diminishes itself if it diminishes the free press guarantee, for an independent judiciary needs a free press as much as a free press needs an independent judiciary.¹⁹⁵

Courts must, as a matter of self-preservation, be able to defend themselves. But it is not against all attacks that they can employ the preservative¹⁹⁶ **power of contempt. As this Court recognized more than half a century ago in *Cabansag*,** it is only when the evil brought about by the attack is “extremely serious and the degree of imminence extremely high” so as to impede, obstruct, or degrade the administration of justice that courts must act. To apply this exacting test is not to deny a right inherent in courts but to recognize their place in a free society always accountable to the public whom they serve and for whom they exist. More than a decade ago, this Court was given the chance in *Jurado*, as the Court is again now, of applying to itself this rigorous test to an unsubstantiated publication imputing corruption to a member of this Court. The eloquent words of Chief Justice Puno explaining why a step towards such a direction serves the cause of press freedom and good government remain true today as they did then:

¹⁹³ See *Bridges v. California*, 314 U.S. 252, 271, 289 (1941), Frankfurter, J., dissenting.

¹⁹⁴ *Id.* at 292.

¹⁹⁵ A ruling well elucidated the interdependence between the press and the judiciary: “The freedom of the press in itself presupposes an independent judiciary through which that freedom may, if necessary, be vindicated. And one of the potent means for assuring judges their independence is a free press.” (*Pennekamp v. State of Florida*, 328 U.S. 331, 335 [1946], Frankfurter, J., concurring).

¹⁹⁶ As distinguished from vindictive. The contempt power ought not to be utilized for the purpose of merely satisfying what is admittedly a natural inclination to strike back at a party who had shown less than full respect for the dignity of the Court (*Royeca v. Animas*, 162 Phil. 851, 858 [1976]).

[I]t is not every falsehood that should incur the Court's ire, lest it runs out of righteous indignation. Indeed, gross falsehoods, vicious lies, and prevarications of paid hacks cannot deceive the public any more than can they cause this Court to crumble. If we adopt the dangerous rule that we should curtail speech to stop every falsehood we might as well abolish freedom of speech for there is yet to come a man whose tongue tells only the truth. In any event, we should take comfort in the thought that falsehoods cannot destroy - only truth does but only to set us free.

...

[T]he columns of respondent dealt with the sensitive subject of corruption in courts. It cannot be gainsaid that corruption in government is a matter of highest concern to our citizenry. Yet it is a problem that defies solution primarily because it is a subject where people in the know maintain the countenance of a claim. Thus, the prosecution of corruption in government has not hit a high note and that what now appears as the most effective restraint against corruption in government is the fear of the light of print. If the light of print continues to be a strong deterrent against government misdeeds, it is mainly because newsmen have an unimpeded access to information. On many an occasion, these confidential sources of information are the only leads to government malfeasance. To fashion a rule derogatory of the confidentiality of newsmen's sources will result in tremendous loss in the flow of this rare and valuable information to the press and will prejudice the State's policy to eliminate corruption in government. In the absence of clear and convincing evidence that respondent knowingly foisted a falsehood to degrade our administration of justice, we should be slow in citing him for contempt. The *New York Times* rule correctly warned us that occasional erroneous statements are "inevitable in free debate ... and must be protected if the freedoms of expression are to have the 'breathing space' that they 'need, to survive.'"

...

[T]he abuses of some newsmen cannot justify an overarching rule eroding the freedom of all of them. Indeed, the framers of the Constitution knew that these abuses will be committed by some newsmen but still, they explicitly crafted section 4, Article III of the Constitution to read: "[No law shall be passed abridging the freedom of speech, of expression, or of the press ... "Madison stressed that "some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press." There is an appropriate

remedy against abusive newsmen. I submit, however, that the remedy is not to be too quick in wielding the power of contempt for that will certainly chain the hands of many newsmen. Abusive newsmen are bad but laundered news is worse.

...

[T]he Constitution did not conceive the press to act as the cheer leader of government, including the judiciary. Rather, the press is the agent of the people when it gathers news, especially news derogatory to those who hold the reins of government. The agency is necessary because the people must have all available information before they exercise their sovereign judgment. As well observed: "The newspapers, magazines, and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrument of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern." As agent of the people, the most important function of the press in a free society is to inform and it cannot inform if it is uninformed. We should be wary when the independent sources of information of the press dry up, for then the press will end up printing "praise" releases and that is no way for the people to know the truth.¹⁹⁷

Justice Carpio's views on **freedom of expression** were further distilled in his **dissenting opinion** in A.M. No. 10-10-4-SC, March 8, 2011, 660 Phil. 1, **RE: LETTER OF THE UP LAW FACULTY ENTITLED "RESTORING INTEGRITY: A STATEMENT BY THE FACULTY OF THE UNIVERSITY OF THE PHILIPPINES COLLEGE OF LAW ON THE ALLEGATIONS OF PLAGIARISM AND MISREPRESENTATION IN THE SUPREME COURT."** The *en banc* decision disposed of various submissions of 37 law professors in response to a resolution that directed them to show cause why they should not be disciplined as members of the bar for violation of specific provisions of the Code of Professional Responsibility by issuing the "Restoring Integrity" statement. The Court found that the submitted explanations (except for one), were "decidedly unsatisfactory," consequently 35 of the law professors were "warned," and one was "admonished." Justice Carpio **dissented**, and voted to consider the explanations of the 37 law professors as satisfactory and to consider the matter closed and terminated:

¹⁹⁷ In Re: Emil P. Jurado, 313 Phil. 119, 366-368 (1995).

I find the Compliance of the 37 legal scholars satisfactory and therefore see no need to admonish or warn them for supposed use of disrespectful language in their statement commenting on a public issue involving the official conduct of a member of this Court. The majority's action impermissibly expands the Court's administrative powers and, more importantly, **abridges constitutionally protected speech on public conduct guaranteed to all, including members of the bar.**

First. The matter of Justice Mariano del Castillo's reported misuse and non-attribution of sources in his *ponencia* in *Vinuya v. Executive Secretary*¹⁹⁸ is an issue of public concern. A day before the *Vinuya* petitioners' counsels filed their supplemental motion for reconsideration on 19 July 2010 raising these allegations, a national TV network carried a parallel story online. On the day the pleading was filed, another national TV network and an online news magazine, carried the same story. Soon, one of the authors allegedly plagiarized commented that the work he and a co-author wrote was misrepresented in *Vinuya*. Justice del Castillo himself widened the scope of publicity by submitting his official response to the allegations to a national daily which published his comment in full. Justice del Castillo's defenses of good faith and non-liability echoed an earlier statement made by the Chief of the Court's Public Information Office. These unfolding events generated an all-important public issue affecting no less than the integrity of this Court's decision-making - its core constitutional function - thus inexorably inviting public comment.

Along with other sectors, the law faculty of the University of the Philippines (UP), which counts among its ranks some of this country's legal experts, responded by issuing a statement, bemoaning what the professors see as the Court's indifference to the perceived dishonesty in the crafting of the *Vinuya ponencia* and its aggravating effect on the *Vinuya* petitioners' cause, refuting Justice del Castillo's defenses, underscoring the seriousness of the issue, and calling for the adoption of individual and institutional remedial measures. **This is prime political speech critical of conduct of public officials and institution, delivered in public forum. Under the scheme of our constitutional values, this species of speech enjoys the highest protection,¹⁹⁹ rooted on the deeply-held notion**

¹⁹⁸ G.R. No. 162230, 28 April 2010.

¹⁹⁹ Chavez v. Gonzales, G.R. No. 168338, 15 February 2008, 545 SCRA 441, 538. See separate and concurring opinion of Justice Carpio excerpted above.

that “the interest of society and the maintenance of good government demand a full discussion of public affairs.”²⁰⁰ Indeed, preceding western jurisprudence by nearly five decades, this Court, in the first score of the last century, identified the specific right to criticize official conduct as protected speech, branding attempts by courts to muzzle criticism as “tyranny of the basest sort.”²⁰¹

Second. In testing whether speech critical of judges and judicial processes falls outside the ambit of constitutionally protected expression, spilling into the territory of sanctionable utterances, this Court adheres to the “clear and present danger” test.²⁰² Under this analytical framework, an utterance is constitutionally protected unless “the evil consequence of the comment or utterance [is] ‘extremely serious and the degree of imminence extremely high.’”²⁰³

It appears that the evil consequences the UP law faculty statement will supposedly spawn are (1) the slurring of this Court’s dignity and (2) the impairment of its judicial independence *vis-à-vis* the resolution of the plagiarism complaint in *Vinuya*. Both are absent here. On the matter of institutional degradation, the 12-paragraph, 1,553-word statement of the UP law faculty, taken as a whole, does not exhibit that “irrational obsession to demean, ridicule, degrade and even destroy the courts and their members” typical of unprotected judicial criticism.²⁰⁴ On the contrary, the statement, taken as a whole, seeks to uphold the bedrock democratic value of keeping judicial processes free of any taint of dishonesty or misrepresentation. Thus, the UP law faculty statement is far removed from speech the Court has rightly sanctioned for proffering no useful social value, solely crafted to vilify its members and threaten its very existence.²⁰⁵

²⁰⁰ *United States v. Bustos*, 37 Phil. 731, 740 (1918). Jurisprudence privileges this right by requiring the very high quantum of proof of actual malice to establish liability for libelous comment on public conduct (*Vasquez v. Court of Appeals*, 373 Phil. 238 (1999); *Flor v. People*, G.R. No. 139987, 31 March 2005, 454 SCRA 440).

²⁰¹ *United States v. Bustos*, 37 Phil. 731, 741 (1918).

²⁰² *Cabansag v. Fernandez*, 102 Phil. 152 (1957); *People v. Godoy*, 312 Phil. 977 (1995); *In re Almacen*, No. L-27654, 18 February 1970, 31 SCRA 562.

²⁰³ *Cabansag v. Fernandez*, 102 Phil. 152, 161 (1957).

²⁰⁴ Column of Ramon Tulfo in the *Philippine Daily Inquirer* Issues of 13 and 16 October 1989, A.M. No. 90-4-1545-0, 17 April 1990 (Resolution).

²⁰⁵ *In re Sotto*, 82 Phil. 595 (1949). See also Column of Ramon Tulfo in the *Philippine Daily Inquirer* Issues of 13 and 16 October 1989, *id.*

On the alleged danger of impairment of this Court's judicial independence in resolving the plagiarism charge in *Vinuya*, this too, did not come to pass. In the Resolution of 8 February 2011 in A.M. No. 10- 17-17-SC,²⁰⁶ the Court denied reconsideration to its earlier ruling finding no merit in the *Vinuya* petitioners' claim of plagiarism. Not a single word in the 8 February 2011 Resolution hints that the UP law faculty statement pressured, much less threatened, this Court to decide the motion for reconsideration for the *Vinuya* petitioners. Thus, the 8 February 2011 Resolution gives the lie to the conclusion that the UP law faculty statement posed any danger, much less one that is "extremely serious," to the Court's independence.

Third. The conclusion that the UP law faculty statement disrespects the Court and its members is valid only if the statement is taken apart, its dismembered parts separately scrutinized to isolate and highlight perceived offensive phrases and words. This approach defies common sense and departs from this Court's established practice in scrutinizing speech critical of the judiciary. *People v. Godoy*²⁰⁷ instructs that speech critical of judges must be "read with contextual care," making sure that disparaging statements are not "taken out of context." Using this approach, and applying the clear and present danger test, the Court in *Godoy* cleared a columnist and a publisher of liability despite the presence in the assailed news article of derogatory yet isolated statements about a judge. We can do no less to the statement of the members of the UP law faculty, who, after all, were impelled by nothing but their sense of professional obligation to "speak out on a matter of public concern and one that is of vital interest to them."

On the supposed unpleasant tone of the statement, critical speech, by its nature, is caustic and biting. It is for this same reason, however, that it enjoys special constitutional protection. "The constitution does not apply only to sober, carefully reasoned discussion. There may be at least some value in permitting cranky, obstreperous, defiant conduct by lawyers on the ground that it encourages a public culture of skepticism, anti-authoritarianism, pluralism, and openness. It is important to remember that the social function of lawyers is not only to preserve order, but also to permit challenges to the status quo."²⁰⁸

²⁰⁶ In the Matter of the Charges of Plagiarism etc., Against Associate Justice Mariano C. Del Castillo.

²⁰⁷ *People v. Godoy*, 312 Phil. 977 (1995).

²⁰⁸ W. Bradley Wendel, *Free Speech For Lawyers*, 28 Hastings Const. L.Q. 305, 440 (2001).

Supreme Court Justices, as public officials, and the Supreme Court, as an institution, are entitled to no greater immunity from criticism than other public officials and institutions.²⁰⁹ The members of this Court are sustained by the people's resources and our actions are always subject to their accounting. Thus, instead of shielding ourselves with a virtual *lese-majeste* rule, wholly incompatible with the Constitution's vision of public office as a "public trust," we should heed our own near century-old counsel: a clear conscience, not muzzled critics, is the balm for wounds caused by a "hostile and unjust accusation" on official conduct.²¹⁰

Fourth. The academic bar, which the UP law faculty represents, is the judiciary's partner in a perpetual intellectual conversation to promote the rule of law and build democratic institutions. It serves the interest of sustaining this vital relationship for the Court to constructively respond to the academics' criticism. Instead of heeding the UP law faculty's call for the Court to "ensur[e] that not only the content, but also the processes of preparing and writing its own decisions, are credible and beyond question," the majority dismisses their suggestion as useless calumny and brands their constitutionally protected speech as "unbecoming of lawyers and law professors." The Constitution, logic, common sense and a humble awareness of this Court's role in the larger project of dispensing justice in a democracy revolt against such response.

Prior Restraint

In **SORIANO v. LAGUARDIA**, G.R. No. 164785, and **SORIANO v. MOVIE AND TELEVISION REVIEW AND CLASSIFICATION BOARD**, G.R. No. 165636, April 29, 2009, 605 Phil. 43, Justice Carpio prefaced his **dissenting opinion** with this statement, reminiscent of his concurring opinion in **Chavez**:

“Freedom of expression is always under threat even in a democracy. Those who wish to enjoy freedom of expression must steadfastly defend it whenever and wherever it is threatened. The lesson that history teaches us is clear - defend freedom of expression, or lose it.”

²⁰⁹ See Dissenting opinion, Carpio., J., In the Matter of the Allegations Contained in the Columns of Mr. Amado A.P. Macasaet Published in Malaya Dated September 18, 19, 20, and 21, 2007, A.M. No. 07-09-13-SC, 8 August 2008, 561 SCRA 395, 489, excerpted above.

²¹⁰ *United States v. Bustos*, 37 Phil. 731, 741 (1918).

The **Soriano** cases were petitions for *certiorari* and prohibition that sought to nullify and set aside an order and a decision of the Movie and Television Review and Classification Board in connection with certain utterances made by Eliseo F. Soriano in his television show, *Ang Dating Daan*. The MTRCB imposed the penalty of three months suspension of Soriano from *Ang Dating Daan*, which the Court *en banc* modified to a three-month suspension of the television show itself. Justice Carpio's **dissent** focused on the unconstitutional **prior restraint on freedom of expression**:

I dissent because the three-month suspension of petitioner's TV program *Ang Dating Daan* constitutes an unconstitutional prior restraint on freedom of expression. The suspension prevents petitioner from even reciting the Lord's Prayer, or even saying "hello" to viewers, in his TV program. The suspension bars the public airing of petitioner's TV program regardless of whatever subject matter petitioner, or anyone else, wishes to discuss in petitioner's TV program.

This is like suspending the publication of the *Philippine Daily Inquirer* for three months if its editorial describes a private person as "masahol pa sa putang babae." This is also similar to suspending for three months the column of a newspaper columnist for using the expletive "putang ina mo" in his column. **Such suspension is the censorship that the Constitution outlaws (in Section 4, Article III) ...**

The remedy of any aggrieved person is to file a libel or tort case after the utterance or publication of such cusswords. Our libels laws punish with fine, imprisonment or damages libelous language already uttered or published. Our tort laws also allow recovery of damages for tortious speech already uttered or published. However, both our libel and tort laws never impose a gag order on future expression because that will constitute prior restraint or censorship. Thus, our libel and tort laws do not allow the filing of a suit to enjoin or punish an expression that has yet to be uttered or written.

Indeed, there can never be a prior restraint on future expression, whether for fear of possible libelous utterance or publication, or as a punishment for past libelous utterance or publication. Otherwise, many of the radio and TV political programs will have to be banned for the frequent use of cusswords and other libelous language. Even politicians will have to be barred from addressing political rallies, or the rallies themselves will have to be banned, because politicians often use cusswords and other profanities during political rallies.

In the present case, the three-month preventive suspension of petitioner's TV program bars petitioner from talking about the weather, or from talking about the birds and the bees, or even from talking about nothingness, in his TV program. The public airing of the entire TV program, regardless of its content, is totally suppressed for three months. The Government has no power under the Constitution to so brazenly suppress freedom of expression. **This Court should never give its imprimatur to such a blatant violation of a fundamental constitutional right, which has been described as the one basic right that makes all other civil, human and political rights possible.**

Prior Restraint on Expression

The well-settled rule is there can be no prior restraint on expression. This rule emanates from the constitutional command (in Section 4, Article III) ... The history of freedom of expression has been a constant struggle against the censor's prior restraint on expression. The leading American case of *Near v. Minnesota*²¹¹ teaches us that the primordial purpose of the Free Expression Clause is to prevent prior restraint on expression.

This well-settled rule, however, is subject to exceptions narrowly carved out by courts over time because of necessity. In this jurisdiction, we recognize only four exceptions, namely: pornography,²¹² false or misleading advertisement,²¹³ advocacy of imminent lawless action,²¹⁴ and danger to national security.²¹⁵ Only in these instances may expression be subject to prior restraint. All other expression is not subject to prior restraint.

Although pornography, false or misleading advertisement, advocacy of imminent lawless action, and expression endangering national security may be subject to prior restraint, such prior restraint must hurdle a high barrier. First, such prior restraint is strongly presumed as unconstitutional. Second, the government bears a heavy burden of justifying such prior restraint.²¹⁶

²¹¹ 283 U.S. 697 (1931).

²¹² *Gonzales v. Kalaw-Katigbak*, 222 Phil. 225 (1985).

²¹³ *Pharmaceutical and Health Care Association of the Philippines v. Duque III*, G.R. No. 173034, 9 October 2007, 535 SCRA 265.

²¹⁴ *Eastern Broadcasting Corporation v. Dans*, No. 222 Phil. 151 (1985).

²¹⁵ *Ibid.*

²¹⁶ *Iglesia ni Cristo (INC) v. Court of Appeals*, G.R. No. 119673, 26 July 1996, 259 SCRA 529; *New York Times v. United States*, 403 U.S. 713 (1971).

The test to determine the constitutionality of prior restraint on pornography, advocacy of imminent lawless action, and expression endangering national security is the clear and present danger test. The expression subject to prior restraint must present a clear and present danger of bringing about a substantive evil the State has a right and duty to prevent, and such danger must be grave and imminent.²¹⁷

The power of Congress to impose prior restraint on false or misleading advertisements emanates from the constitutional provision that the “advertising industry is impressed with public interest, and shall be regulated by law for the protection of consumers and the promotion of the general welfare.”²¹⁸

Prior restraint on expression may be either content-based or content-neutral. Content-based prior restraint is aimed at suppressing the message or idea contained in the expression. Courts subject content-based restraint to strict scrutiny. Content-neutral restraint on expression is restraint that regulates the time, place or manner of expression in public places without any restraint on the content of the expression. Courts subject content-neutral restraint to intermediate scrutiny.

Subsequent Punishment of Expression

The rule is also well-settled that expression cannot be subject to subsequent punishment. This rule also emanates from the constitutional command (in Section 4, Article III) ... However, courts again have carved out narrow exceptions to this rule out of necessity.

The exceptions start with the four types of expression that may be subject to prior restraint. If a certain expression is subject to prior restraint, its utterance or publication in violation of the lawful restraint naturally subjects the person responsible to subsequent punishment. Thus, acts of pornography, false or misleading advertisement, advocacy of imminent lawless action, and endangering national security, are all punishable under the law.

Two other exceptions are defamation, which includes libel and slander, and tortious speech. Defamatory and tortious speech, *per se*, are not subject to prior restraint because by definition

²¹⁷ Bayan v. Ermita, G.R. Nos. 169838, 169848 and 169881, 25 April 2006, 488 SCRA 226.

²¹⁸ Const., Art. XVI, Sec. 11(2).

they do not constitute a clear and present danger to the State that is grave and imminent. Once defamatory or tortuous speech rises to the level of advocacy of imminent lawless action, then it may be subject to prior restraint because it is seditious but not because it is defamatory or tortious. Defamation and tortious conduct, however, may be subject to subsequent punishment, civilly or criminally.

Fighting words are not subject to subsequent punishment unless they are defamatory or tortious. Fighting words refer to profane or vulgar words that are likely to provoke a violent response from an audience. Profane or vulgar words like “Fuck the draft,” when not directed at any particular person, ethnic or religious group, are not subject to subsequent punishment.²¹⁹ As aptly stated, “one man’s vulgarity may be another man’s lyric.”²²⁰

If profane or vulgar language like “Fuck the draft” is not subject to subsequent punishment, then with more reason it cannot be subject to prior restraint. Without a law punishing the actual utterance or publication of an expression, an expression cannot be subject to prior restraint because such expression is not unlawful or illegal.

Prior restraint is more deleterious to freedom of expression than subsequent punishment. Although subsequent punishment also deters expression, still the ideas are disseminated to the public. Prior restraint prevents even the dissemination of ideas to the public. Thus, the three-month suspension of petitioner’s TV program, being a prior restraint on expression, has far graver ramifications than any possible subsequent punishment of petitioner.

Three-Month Suspension is a Prohibited Prior Restraint

The three-month suspension of petitioner’s TV program is indisputably a prior restraint on expression. During the three-month suspension, petitioner cannot utter a single word in his TV program because the program is totally suppressed. A prior restraint may be justified only if the expression falls under any of the four types of expression that may be subject to prior restraint, namely, pornography, false or misleading advertisement, advocacy of imminent lawless action, and danger

²¹⁹ Cohen v. California, 403 U.S. 15 (1971).

²²⁰ Ibid.

to national security.

Obviously, what petitioner uttered does not fall under any of the four types of expression that may be subject to prior restraint. What respondents assail is the following ranting of petitioner:

Lehitimong anak ng demonyo; sinungaling;
Gago ka talaga Michael, masahol ka pa sa putang babae o di ba. Yung putang babae ang gumagana lang doon yung ibaba, [dito] kay Michael ang gumagana ang itaas, o di ba! O, masahol pa sa putang babae yan. Sabi ng lola ko masahol pa sa putang babae yan. Sobra ang kasinungalingan ng mga demonyong ito...

No matter how offensive, profane or vulgar petitioner's words may be, they do not constitute pornography, false or misleading advertisement, advocacy of imminent lawless action, or danger to national security. Thus, petitioner's offensive, profane or vulgar language cannot be subject to prior restraint but may be subject to subsequent punishment if defamatory or tortious.

Any prior restraint is strongly presumed to be unconstitutional and the government bears a heavy burden of justifying such prior restraint.²²¹ Such prior restraint must pass the clear and present danger test. The majority opinion, which imposes a prior restraint on expression, is totally bereft of any discussion that petitioner's ranting poses a clear and present danger to the State that is grave and imminent. The respondents have not presented any credible justification to overcome the strong presumption of unconstitutionality accorded to the three-month suspension order.

The three-month suspension cannot be passed off merely as a preventive suspension that does not partake of a penalty. The actual and real effect of the three-month suspension is a prior restraint on expression in violation of a fundamental constitutional right. Even Congress cannot validly pass a law imposing a three-month preventive suspension on freedom of expression for offensive or vulgar language uttered in the past. Congress may punish such offensive or vulgar language, after their utterance, with damages, fine or imprisonment but Congress has no power to suspend or suppress the people's right

²²¹ *Iglesia ni Cristo (INC) v. Court of Appeals*, G.R. No. 119673, 26 July 1996, 259 SCRA 529; *New York Times v. United States*, 403 U.S. 713 (1971).

to speak freely because of such past utterances.

In short, Congress may pass a law punishing defamation or tortious speech but the punishment cannot be the suspension or suppression of the constitutional right to freedom of expression. Otherwise, such law would be “abridging the freedom of speech, of expression, or of the press.” If Congress cannot pass such a law, neither can respondent MTRCB promulgate a rule or a decision suspending for three months petitioner’s constitutional right to freedom of expression. And of course, neither can this Court give its stamp of imprimatur to such an unconstitutional MTRCB rule or decision.

Conclusion

In conclusion, petitioner’s ranting may constitute, at most, defamatory or tortious speech. Even then, such expression can never be subject to prior restraint like a three-month suspension of petitioner’s TV program. The remedy of private respondents is to seek subsequent punishment, that is, file complaints for defamation or tortious speech against petitioner.

Any prior restraint on expression is strongly presumed to be unconstitutional and the Government bears a heavy burden of justifying such imposition of prior restraint. Such prior restraint can be justified only on four narrow grounds - pornography, false or misleading advertisement, advocacy of imminent lawless action, and danger to national security. Here, the Government does not even claim that petitioner’s ranting falls under any of these four types of unprotected speech.

The majority opinion²²² does not also make any finding that petitioner’s ranting poses a clear and present danger to the State that is grave and imminent. In fact, the majority opinion even declares that the clear and present danger rule is irrelevant in the present case. The majority opinion dismantles in one sweep the clear and present danger rule as applied to freedom of expression, a rule painstakingly built over almost a century of jurisprudence here and abroad.²²³ The ramification of the majority’s ruling can only be catastrophic to freedom of expression, which jurists have even elevated to a preferred constitutional right.

²²² Majority opinion, Velasco, J.

²²³ See *Schenck v. United States*, 249 U.S. 47 (1919).

There is simply an utter lack of legal basis to impose a prior restraint - three-month suspension - on petitioner's TV program. Any such prior restraint is glaringly unconstitutional for violation of the fundamental right to freedom of expression.

Television and radio commentators, broadcasters and their guests will now tremble in fear at this new censorship power of the MTRCB. The majority opinion has invested the MTRCB with the broadest censorship power since William Blackstone wrote in 1765 that "the liberty of the press ... consists in laying no previous restraints upon publications." This is one of the saddest and darkest days for freedom of expression in this country.

Justice Carpio again **dissented** from the *en banc* resolution of the Court issued on March 15, 2010, denying the motion for reconsideration in the **Soriano** cases:

I end this dissenting opinion with a reminder from Justice Oliver Wendell Holmes - that the market place of ideas is still the best alternative to censorship.²²⁴ The market place of ideas makes freedom of speech robust and allows people to be more tolerant of opposing views. It has been said that freedom of speech is not only to freely express oneself within the context of the law but also to hear what others say, that all may be enlightened, regardless of how obnoxious or erroneous the opposing views may be.²²⁵

Section 5. No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed. No religious test shall be required for the exercise of civil or political rights.

As previously discussed,²²⁶ in **ESTRADA v. ESCRITOR**, A.M. No. P-02-1651, August 4, 2003, Justice Carpio **dissented** from the majority opinion and had occasion to discuss **Section 5 of this Article III on religious freedom** and the separation of Church and State under Section 6, Article II:

²²⁴ Dissenting opinion, Holmes, J., *Abrams v. United States*, 250 U.S. 616, 40 S. Ct. 17, 63 L. Ed. 1173 (1919).

²²⁵ Ruben Agpalo, *Philippine Constitutional Law* 330 (2006).

²²⁶ See discussion under Art. II, Sec. 6.

The issue then would inevitably turn on whether Escritor, or any citizen for that matter, may invoke **religious freedom** to justify conduct that patently violates our criminal statutes. Such conduct in the present case is concubinage. However, under the same claim of religious freedom, such conduct may be bigamy, sacrifice of infants or infanticide, sacrifice of virgins or murder, or use and possession of prohibited drugs as part of religious rituals. This is the issue that I address in this dissent, after showing that Escritor's conduct is neither disgraceful nor immoral.

...

... while Escritor is not guilty of disgraceful and immoral conduct, her cohabitation with the legally married Quilapio, a fact Escritor readily admits, constitutes conduct prejudicial to the best interest of the service. ...

The Court cannot penalize Escritor's cohabitation as immoral in view of the freedom of religion and the separation of Church and State. However, on the same principle of separation of Church and State, the Court can penalize Escritor's cohabitation as conduct prejudicial to the best interest of the service. ...

In the landmark case of *Reynolds v. United States*,²²⁷ the U.S. Supreme Court stated that Jefferson's explanation is almost an authoritative declaration of the scope and effect of the two constitutional clauses. **The legislature has no power to regulate mere religious belief or opinion. The legislature, however, may regulate actions or conduct, even though religiously motivated, that violate the public order.** The legislatures power to outlaw concubinage, bigamy, polygamy and other conduct harmful to public order, despite religious practices allowing such conduct, is well-settled in American jurisprudence.²²⁸...

In the instant case, Escritor's sole constitutional justification in claiming exemption from the prohibition on concubinage is her religious belief. Escritor does not claim that her conduct is protected by any other guarantee under the Bill of Rights. Moreover, Article 334 of the Revised Penal Code, as originally enacted and

²²⁷ 98 U.S. 145.

²²⁸ David Barton, *The Image and the Reality: Thomas Jefferson and the First Amendment*, 17 Notre Dame Journal of Law, Ethics and Public Policy 399 (2003).

as presently in force, does not single out the Jehovah's Witnesses. ...

While Escritor's cohabitation with Quilapio conforms to the religious beliefs of the Jehovah's Witnesses, the cohabitation violates Article 334 of the Revised Penal Code. **The State cannot interfere with the religious beliefs of the Jehovah's Witnesses, in the same way that the Jehovah's Witnesses cannot interfere with the States prohibition on concubinage. The free exercise of religion protects practices based on religious grounds provided such practices do not violate existing laws enacted in the reasonable exercise of the State's police power.**²²⁹ ...

The free exercise of religious belief is absolutely protected, but the freedom to act according to such religious belief is subject to the police power of the State.²³⁰ ...

Then, in the return of the remanded **ESTRADA v. ESCRITOR**, A.M. No. P-02-1651, June 22, 2006, although the majority voted to dismiss the administrative case against Soledad S. Escritor, Justice Carpio maintained his **dissent** and voted to suspend Escritor for six months and one day without pay for conduct prejudicial to the best interest of the service. In reiterating his **dissent**, Justice Carpio further explained his views on the **free exercise clause**:

The majority opinion²³¹ relies heavily on *Sherbert v. Verner*²³² in upholding Escritor's claim of exemption from administrative liability grounded on her religious belief as a member of the Jehovah's Witnesses. This religious sect allows Escritor's cohabitation with Luciano D. Quilapio, Jr., who has a subsisting marriage with another woman.

The compelling state interest test espoused in *Sherbert* has been abandoned more than 15 years ago by the U.S. Supreme Court in the *Employment Division v. Smith*²³³ cases. In the *Smith* cases, the U.S. Supreme Court set aside the balancing test for religious minorities laid down in *Sherbert*. Instead, the U.S. Supreme Court ruled categorically in the *Smith* cases that the guarantee of

²²⁹ 1 Joaquin G. Bernas, *The 1987 Constitution Of The Republic Of The Philippines: A Commentary* (2003) 321, citing *Reynolds v. United States*, 98 U.S. 145 (1878).

²³⁰ *Id.* at 322, citing *Cantwell v. Connecticut*, 310 U.S. 296 (1944).

²³¹ Majority opinion, Puno, J.

²³² 374 U.S. 398 (1963).

²³³ 485 U.S. 660 (1988) and 494 U.S. 872 (1990).

religious liberty as embodied in the Free Exercise Clause does not require the grant of exemptions from generally applicable laws to individuals whose religious practice conflict with those laws.

In the first *Employment Division v. Smith (Smith I)*,²³⁴ petitioner denied respondents' application for unemployment compensation benefits under an Oregon statute declaring ineligible for benefits employees discharged for work-related misconduct. The misconduct for which respondents were discharged from their jobs consisted of their ingesting *peyote*, a hallucinogenic drug, for sacramental purposes at a ceremony of their Native American Church. The Oregon Supreme Court ruled that although the denials of benefits were proper under Oregon law, *Sherbert* required the Oregon Supreme Court to hold that the denials significantly burdened respondents' religious freedom in violation of the Free Exercise Clause. The Oregon Supreme Court did not attach significance to the fact that *peyote* possession is a felony in Oregon.

The U.S. Supreme Court vacated the Oregon Supreme Court's judgment and ordered the remand of the case for a definitive ruling on whether the religious use of *peyote* is legal in Oregon. The U.S. Supreme Court deemed the legality or illegality of the questioned conduct critical in its analysis of respondents' claim for protection under the Free Exercise Clause.

In *Smith I*, the U.S. Supreme Court distinguished respondents' conduct with that involved in *Sherbert*, thus:

... In *Sherbert*, as in *Thomas and Hobbie v. Unemployment Appeals Comm'n of Fla.*, the conduct that gave rise to the termination of employment was perfectly legal; indeed, the Court assumed that it was immune from state regulation.²³⁵ The results we reached in *Sherbert*, *Thomas and Hobbie* might well have been different if the employees had been discharged for engaging in criminal conduct. ... The protection that the First Amendment provides to "legitimate claims to the free exercise of religion" does not extend to conduct that a State has validly proscribed.²³⁶

In the second *Employment Division v. Smith (Smith II)*,²³⁷

²³⁴ 485 U.S. 660 (1988).

²³⁵ In *Sherbert*, the appellant was discharged because she would not work on Saturday, the Sabbath Day of her faith.

²³⁶ *Employment Division v. Smith*, 485 U.S. 660, 670-671 (1988).

²³⁷ 494 U.S. 872 (1990).

the Oregon Supreme Court held on remand that respondents' religiously inspired use of *peyote* fell within the prohibition of the Oregon statute classifying *peyote* as a "controlled substance" and punishing its possession as a felony. Although the Oregon Supreme Court noted that the statute makes no exception for the sacramental use of *peyote*, it still concluded that the prohibition was not valid under the Free Exercise Clause.

The U.S. Supreme Court reversed the Oregon Supreme Court. The U.S. Supreme Court ruled that a claim of exemption from a generally applicable law grounded on the right of free exercise could not be evaluated under the compelling state interest test of *Sherbert*, particularly where such law does not violate other constitutional protections. The U.S. Supreme Court expressly declared:

... We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. ... The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press. ... Respondents argue that even though exemption from generally applicable criminal laws need not automatically be extended to religiously motivated conduct, at least the claim for a religious exemption must be evaluated under the balancing test set forth in *Sherbert v. Verner*. ... In recent years we have abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all. ... Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law. ...²³⁸

What the *Smith* cases teach us is that the compelling state interest test in *Sherbert* is not the correct test in determining the legitimacy of a claim of exemption from generally applicable, religion-neutral laws that have the incidental effect of burdening particular religious practice. Any such claim for exemption should be analyzed by considering whether the conduct in question is one that "the State has validly proscribed," irrespective of the sincerity or centrality of an individual's religious beliefs.

²³⁸ Id. at 881-884.

Here, Escritor is indisputably engaged in criminal conduct. Escritor's continued cohabitation with Quilapio is patently in violation of Article 334 of the Revised Penal Code on concubinage. Article 334 makes no exception for religiously sanctioned cohabitation such as that existing between Escritor and Quilapio. The majority opinion in fact concedes that the present case involves a claim of exemption "from a law of general applicability that inadvertently burdens religious exercise." The majority opinion even concedes further that the conduct in question is one "which Philippine law and jurisprudence consider both immoral and illegal." And yet, the majority opinion expediently brushes aside the illegality of Escritor's questioned conduct using the obsolete compelling state interest test in *Sherbert*.

The majority opinion mentions two "opposing strains of jurisprudence on the religion clauses" in U.S. history, namely, separation or strict neutrality and benevolent neutrality or accommodation. The majority opinion asserts that the framers of our 1935, 1973, and 1987 Constitutions intended to adopt a benevolent neutrality approach in interpreting the religion clauses, i.e., the Establishment and Free Exercise Clauses. The majority opinion then reasons that in determining claims of exemption based on freedom of religion, this Court must adopt the compelling state interest test laid down by the U.S. Supreme Court in *Sherbert*, which according to the majority, best exemplifies the benevolent neutrality approach. Hence, even as the majority opinion acknowledges that the U.S. Supreme Court in the *Smith* cases has abandoned the compelling state interest test espoused in *Sherbert*, the majority opinion dismisses this abandonment in its analysis of Escritor's free exercise exemption claim by simply labeling the *Smith* cases as exemplifying the strict neutrality approach.

The majority opinion blatantly ignores that whatever theory may be current in the United States - whether strict neutrality, benevolent neutrality or some other theory - the undeniable fact is what is clearly stated in *Smith II*:

... We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. ...²³⁹

Thus, from the 1879 case of *Reynolds v. U.S.*²⁴⁰ on the practice

²³⁹ Employment Division v. Smith, 494 U.S. 872, 878-879 (1990).

²⁴⁰ 98 U.S. 145 (1878).

of polygamy by Mormons, to the 1988 and 1990 *Smith* cases on the use of prohibited drugs by native American Indians, the U.S. Supreme Court has consistently held that religious beliefs do not excuse any person from liability for violation of a valid criminal law of general application. The majority opinion simply refuses to face and accept this reality.

The present case involves conduct that violates Article 334 of the Revised Penal Code, a provision of law that no one challenges as unconstitutional. Clearly, the theories invoked in the majority opinion have no application to the present case based on an unbroken line of U.S. Supreme Court decisions. In any event, we shall discuss for academic purposes the merits of the theories advanced in the majority opinion.

While the majority opinion only mentions separation and benevolent neutrality, a close reading of the major U.S. Supreme Court opinions specifically relating to the religion clauses presents three principal theories at play, namely, (a) the strict separation or “no aid” theory, (b) the governmental neutrality theory, and (c) the accommodation or benevolent neutrality theory.²⁴¹

The strict separation or “no aid” theory holds that the establishment clause viewed in conjunction with the free exercise clause requires a strict separation of church and state and that government can do nothing which involves governmental support of religion or which is favorable to the cultivation of religious interests.²⁴² This theory found its first expression in the case of *Everson v. Board of Education*,²⁴³ which espoused the “no aid” principle. Thus, the government cannot by its programs, policies, or laws do anything to aid or support religion or religious activities.²⁴⁴

Everson upheld the validity of a New Jersey statute authorizing bus fare reimbursement to parents of parochial, as well as public school children. Apparently, the strict interpretation or “no aid” theory prohibits state benefits to a particular sect or sects only, but does not prohibit benefits that accrue to all, including one or more sects. *Everson* did not involve religiously motivated conduct that constituted a violation of a criminal statute.

²⁴¹ Paul Kauper, *Religion And The Constitution* 59 (1964). See also Abraham, H. And Perry, B., *Freedom And The Court: Civil Rights And Liberties In The United States* 270 (7th ed., 1998).

²⁴² *Ibid.*

²⁴³ 330 U.S. 1 (1947).

²⁴⁴ Kauper, *op. cit.*, at 61.

Under the governmental neutrality theory, the establishment clause requires government to be neutral on religious matters.²⁴⁵ This theory was articulated by Mr. Justice Clark in the case of *Abington School District v. Schempp*,²⁴⁶ where he stated that what the Constitution requires is “wholesome neutrality,” i.e., laws and governmental programs must be directed to secular ends and must have a primary effect that neither advances nor inhibits religion.²⁴⁷ This test as stated by Mr. Justice Clark embodies a theory of strict neutrality²⁴⁸ - thus, the government may not use the religious factor as a basis for classification with the purpose of advancing or inhibiting religion:

The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the state is firmly committed to a position of neutrality.²⁴⁹

However, the concept of governmental neutrality can be interpreted in various ways - to some, anything but total neutrality is anathema; to others, “neutrality can only mean that government policy must place religion at neither a special advantage nor a special disadvantage.”²⁵⁰

Schempp struck down a Pennsylvania law allowing the recitation of the Lord’s Prayer and the reading of the Bible without comment in public schools, although the recitation and reading were voluntary and did not favor any sect. *Schempp* did not involve religiously motivated conduct that constituted a violation of a criminal statute.

The accommodation theory provides that any limitation derived from the establishment clause on cannot be rigidly applied so as to preclude all aid to religion and that in some situations government must, and in other situations may, accommodate

²⁴⁵ Abraham, H. And Perry, B., *Freedom And The Court: Civil Rights And Liberties In The United States* 272-73 (7th ed., 1998).

²⁴⁶ 374 U.S. 203 (1963).

²⁴⁷ Kauper, op. cit., at 64.

²⁴⁸ Id. at 65.

²⁴⁹ *Abington School District v. Schempp*, 374 U.S. 203, 226 (1963).

²⁵⁰ Abraham, H. And Perry, B., op. cit., at 280.

its policies and laws in the furtherance of religious freedom.²⁵¹ The accommodation theory found its first expression in *Zorach v. Clauson*.²⁵² The U.S. Supreme Court held in *Zorach* that a state could authorize an arrangement whereby public school children could be released one hour a week for religious instruction off the school premises. *Zorach* did not involve religiously motivated conduct that constituted a violation of a criminal statute.

In his book *Religion and the Constitution* published in 1964, Professor Paul G. Kauper used the term “benevolent neutrality” in the following context:

It would be a mistake, however, to suggest that the theory of accommodation ... is unrelated to other ideas and theories that have been developed, notably the no-aid and neutrality concepts. Rather, accommodation, instead of being viewed as a wholly independent theory of interpretation, should be seen as a modification of the no-aid or neutrality concepts. ... These ideas cannot be pressed to their absolute limit. Not only must the no-aid or neutrality concept be subordinated to the necessities of free exercise, but an area of legislative discretion must be allowed where a state may choose to advance the cause of religious freedom even at the expense of not being completely neutral. Indeed, this may be described as the larger or benevolent neutrality.²⁵³

Six years later, the U.S. Supreme Court used the term “benevolent neutrality” for the first time in *Walz v. Tax Commission*.²⁵⁴ In *Walz*, the U.S. Supreme Court sustained the constitutionality of tax exemption of property used exclusively for religious purposes on the basis of “benevolent neutrality,” as follows:

The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other. ... The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that

²⁵¹ Kauper, *op. cit.*, at 59.

²⁵² 343 U.S. 306 (1952).

²⁵³ *Id.* at 75.

²⁵⁴ 397 U.S. 664 (1970).

has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.²⁵⁵

At issue in *Walz* was a provision in New York's Constitution authorizing property tax exemptions to religious organizations for religious properties used solely for religious worship. *Walz* did not involve religiously motivated conduct that constituted a violation of a criminal statute.

The majority opinion cited the case of *Walz* in support of its assertion that the framers of the 1935 Constitution intended to adopt the benevolent neutrality approach in the interpretation of the religion clauses, viz.:

... With the inclusion of the church property tax exemption in the body of the 1935 Constitution and not merely as an ordinance appended to the Constitution, the benevolent neutrality referred to in the *Walz* case was given constitutional imprimatur under the regime of the 1935 Constitution. ...

The U.S. Supreme Court decided *Walz* only in 1970, more than three decades after the adoption of our 1935 Constitution. It is certainly doubtful whether the framers of our 1935 Constitution intended to give "constitutional imprimatur" to a theory of interpretation espoused in a case that was yet to be formulated. Moreover, when the U.S. Supreme Court upheld the constitutionality of church property tax exemption on the basis of "benevolent neutrality," it did so on grounds that no particular religion is singled out for favorable treatment, and partly on historical grounds that church tax exemptions have been accepted without challenge in all states for most of the nation's history.²⁵⁶

The majority opinion vigorously argues the merits of adopting the theory of accommodation in the interpretation of our Constitution's religion clauses. However, the majority opinion fails to mention that a distinction is often drawn by courts and commentators between mandatory accommodation and

²⁵⁵ Id. at 668-669.

²⁵⁶ Abraham, H. And Perry, B., op. cit., at Table 6.3.

permissive accommodation. Mandatory accommodation is exemplified by the key idea in *Sherbert* that exemptions from generally applicable laws are required by force of the Free Exercise Clause,²⁵⁷ which the majority opinion adheres to in granting Escritor's claim of free exercise exemption.

Permissive accommodation refers to exercises of political discretion that benefit religion, and that the Constitution neither requires nor forbids.²⁵⁸ The U.S. Supreme Court recognized in *Smith II* that although the Free Exercise Clause did not require permissive accommodation, the political branches could shield religious exercise through legislative accommodation,²⁵⁹ for example, by making an exception to proscriptive drug laws for sacramental *peyote* use.

Professor Michael W. McConnell, whose views on the accommodation theory were frequently quoted by the majority opinion, defends mandatory accommodation.²⁶⁰ However, Prof. Kauper, likewise an accommodationist, favors permissive accommodation, stating that "as a general proposition, no person should be allowed to claim that because of his religion he is entitled as a matter of constitutional right to claim an exemption from general regulatory and tax laws."²⁶¹ Prof. Kauper further explains his position that religious liberty furnishes no ground for claiming immunity to laws which place reasonable restrictions on overt conduct in the furtherance of public interests protected by the state's police power, as follows:

Where the issue is not the use of governmental power to sanction religious belief and practices by some positive program but the granting of exemption on religious grounds from laws of general operation, what determines whether the government is required, or permitted, to make the accommodation? While a state may appropriately grant exemptions from its general police and tax laws, it should not be constitutionally required to do so unless this immunity can properly be claimed as part of the constitutional guarantee

²⁵⁷ Ira C. Lupu, *The Trouble with Accommodation*, 60(3) Geo. Wash. L. Rev. 743, 751 (1992).

²⁵⁸ *Ibid.*

²⁵⁹ Anne Y. Chiu, *When Prisoners Are Weary and Their Religious Exercise Burdened, RLUIPA Provides Some Rest for their Souls*, 79 Wash. L. Rev. 999 (2004). In this article, Chiu defines "legislative accommodation" as a statute enacted by the legislature to lift a neutral, generally applicable burden on religion imposed by the government.

²⁶⁰ Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60(3) Geo. Wash. L. Rev. 685, 687-688 (1992).

²⁶¹ Kauper, *op. cit.*, at 17.

of religious liberty. Thus, exemptions from property tax and military service, health and labor laws should be at the discretion of government. Whether *Sherbert* carried the principle of required accommodation too far is debatable. It may well be that the court here undertook a determination of questions better left to the legislature and that in this area, ... the policy of granting exemptions on religious grounds should be left to legislative discretion.²⁶²

It is true that a test needs to be applied by the Court in determining the validity of a free exercise claim of exemption as made here by Escritor. The compelling state interest test in *Sherbert* pushes the limits of religious liberty too far, and so too does the majority opinion insofar as it grants Escritor immunity to a law of general operation on the ground of religious liberty. Making a distinction between permissive accommodation and mandatory accommodation is more critically important in analyzing free exercise exemption claims. Such limitations forces the Court to confront how far it can validly set the limits of religious liberty under the Free Exercise Clause, rather than presenting the separation theory and accommodation theory as opposite concepts, and then rejecting relevant and instructive American jurisprudence (such as the *Smith* cases) just because it does not espouse the theory selected.

Theories are only guideposts and “there is no magic formula to settle all disputes between religion and the law, no legal pill to ease the pain of perceived injustice and religious oppression, and certainly no perfect theory to bind judges or legislators.”²⁶³ The *Smith* cases, particularly *Smith II*, cannot be so easily dismissed by the majority opinion and labeled as “best exemplifying the strict neutrality approach.” The *Smith* Court affirmed the power and the discretion of legislatures to enact statutory protection beyond what the Free Exercise Clause required. The U.S. Supreme Court indicated in *Smith II* that legislatures could enact accommodations to protect religion beyond the Free Exercise Clause minimum without “establishing” religion and thereby running afoul of the Establishment Clause.²⁶⁴ What the *Smith* cases espouse, therefore, is not really the strict neutrality

²⁶² Id. at 78-79.

²⁶³ P. Weber, *Equal Separation: Understanding The Religion Clauses Of The First Amendment* 154 (1990).

²⁶⁴ Anne Y. Chiu, *op. cit.*

approach, but more of permissive accommodation.²⁶⁵

Even assuming that the theory of benevolent neutrality and the compelling state interest test are applicable, the State has a compelling interest in exacting from everyone connected with the dispensation of justice, from the highest magistrate to the lowest of its personnel, the highest standard of conduct. This Court has repeatedly held that “the image of a court of justice is necessarily mirrored in the conduct, official or otherwise, of the men and women who work thereat.”²⁶⁶ While arguably not constituting “disgraceful and immoral conduct,” Escritor’s cohabitation with Quilapio is a patent violation of our penal law on concubinage that vitiates “the integrity of court personnel and the court itself.”²⁶⁷ The public’s faith and confidence in the administration of justice would certainly be eroded and undermined if tolerated within the judiciary’s ranks are court employees blatantly violating our criminal laws.

I therefore maintain that Escritor’s admitted cohabitation with Quilapio is sufficient basis to hold her guilty of conduct prejudicial to the best interest of the service and to impose upon her the appropriate penalty.

...

By choosing to turn a blind eye to Escritor’s criminal conduct, the majority is in fact recognizing and according judicial imprimatur to a practice, custom or agreement that subverts marriage, albeit one that is sanctioned by a particular religious sect. ... This is another problem that arises in free exercise exemption analysis - the benevolent neutrality approach fails to take into account the role that equality plays in free exercise theory.²⁶⁸ While the text of the Free Exercise Clause is consistent with protecting religion from discrimination, it does not compel discrimination in favor of religion.²⁶⁹ However, the benevolent neutrality approach promotes its own form of inequality when under it, exemptions are granted only to religious claimants like Escritor, whose religiously-sanctioned but otherwise illegal conjugal arrangement with Quilapio acquires a veneer of “special judicial reinforcement.”²⁷⁰

²⁶⁵ Ira C. Lupu, *op. cit.*, at 751, note 33.

²⁶⁶ *Villaraza v. Atienza*, 195 Phil. 383, 390 (1981).

²⁶⁷ *Ganaden v. Bolasco*, 64 SCRA 50, 53 (1975).

²⁶⁸ William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. Chi. L. Rev. 308, 319 (1991).

²⁶⁹ *Id.* at 325.

²⁷⁰ *Ibid.*

...

Finally, there is even no claim here that concubinage is central to the religious belief of the Jehovah's Witnesses, or even a part of the religious belief of the Jehovah's Witnesses. Escritor merely claims that her live-in arrangement with a married man is, in the words of the majority opinion, "in conformity with her and her partner's religious belief." This case is not an issue of a statute colliding with centrally or vitally held beliefs of a religious denomination, as in the case of *Sherbert*. This case is about a religious cover for an obviously criminal act.

In *Sherbert*, the conduct in question was the refusal of a member of the Seventh Day Adventist Church to work on the Sabbath Day or on Saturdays, which prevented prospective employers from giving petitioner in *Sherbert* employment. Petitioner in *Sherbert* then claimed unemployment benefits, which the State denied because the law withheld benefits to those who failed without good cause to accept available suitable work. In *Sherbert*, the questioned conduct - the refusal to work on Saturdays - was part of the religious tenets of the Seventh Day Adventists. The questioned conduct in *Sherbert* was not a criminal conduct, unlike the questioned conduct of Escritor in this case. Clearly, even assuming for the sake of argument that *Sherbert* remains good law in the United States and thus has some persuasive force here, still *Sherbert* is patently inapplicable to the present case.

The positive law and the institutions of government are concerned not with correct belief but with overt conduct related to good order, peace, justice, freedom, and community welfare.²⁷¹ Hence, while there are times when government must adapt to, or acquiesce to meet the needs of religious exercise, there are also times when the exercises a religion wishes to pursue must be adapted or even prohibited in order to meet the needs of public policy.²⁷² For indeed, even religious liberty has its limits. And certainly, "there is a price to be paid, even by religion, for living in a constitutional democracy."²⁷³

Certainly, observance of provisions of the Revised Penal Code, whose validity or constitutionality are not even challenged, is a price that all religions in the Philippines must willingly pay

²⁷¹ Kauper, op. cit., at 83.

²⁷² P. Weber, op. cit., at 150.

²⁷³ Id. at 47.

for the sake of good order and peace in the community. To hold otherwise would, as aptly stated in *Reynolds v. U.S.*,²⁷⁴ “make the professed doctrines of religious belief superior to the law of the land,” and in effect “permit every citizen to become a law unto himself.” **The majority opinion will make every religion a separate republic, making religion a haven for criminal conduct that otherwise would be punishable under the laws of the land. Today concubinage, tomorrow bigamy, will enjoy protection from criminal sanction under the new doctrine foisted by the majority opinion.**

Section 6. The liberty of abode and of changing the same within the limits prescribed by law shall not be impaired except upon lawful order of the court. Neither shall the right to travel be impaired except in the interest of national security, public safety, or public health, as may be provided by law.

In **LEAVE DIVISION, OCA-OAS v. HEUSDENS**, A.M. No. P-11-2927, December 13, 2011, 678 Phil. 328, the Court *en banc* admonished Wilma Salvacion P. Heusdens, then a clerk of the Municipal Trial Court, for having traveled abroad without travel authority as required by Office of the Court Administrator (OCA) Circular No. 49-2003. Justice Carpio **dissented** from the majority opinion based on the **constitutional right to travel**:

The majority²⁷⁵ states that although respondent submitted her leave application for foreign travel, she failed to comply with the clearance and accountability requirements because she “failed to secure clearance from the Supreme Court Savings and Loan Association (SCSLA) where she had an outstanding loan.” Thus, since OCA Circular No. 49-2003 specifically provides that “no action shall be taken on requests for travel authority with incomplete requirements,” the majority rationalizes that respondent should have expected that her leave application would be disapproved.

I disagree with the majority’s view that clearance from the SCSLA is required before a court employee can exercise his or her constitutional right to travel abroad. The SCSLA is a private association with private funds, even if some of its

²⁷⁴ 98 U.S. 145, 167 (1878).

²⁷⁵ Majority opinion, Mendoza, J.

investors are Supreme Court officials. The OCA has no power to enforce the collection of loans extended by a private lender, under pain of denying a constitutional right of a citizen if he does not secure clearance from the private lender. Although OCA Circular No. 49-2003 provides that “clearance as to money and property accountability” is one of the requirements to be submitted, this refers to accountability to the government, not to a private company like the SCSLA. Even if the OCA’s Certificate of Clearance Form requires the SCSLA’s conformity, such requirement has no legal basis. The OCA does not have jurisdiction to require such clearance because that would be tantamount to making the Court a collecting agent of the SCSLA which is a private association.

Indeed, the OCA has no right to deny a court employee’s constitutional right to travel just to enforce collection of the SCSLA’s loans to its members. **There is no law prohibiting a person from traveling abroad just because he has an existing debt or financial obligation. Requiring the court employee clearance from the SCSLA is no different from requiring the court employee to secure a clearance from his or her creditor banks before he or she can travel abroad. That would unduly restrict a citizen’s right to travel which is guaranteed by Section 6, Article III of the 1987 Constitution...**

Although the constitutional right to travel is not absolute, it can only be restricted in the interest of national security, public safety, or public health, as may be provided by law. As held in *Silverio v. Court of Appeals*:²⁷⁶

Article III, Section 6 of the 1987 Constitution should be interpreted to mean that while the liberty of travel may be impaired even without court order, the appropriate executive officers or administrative authorities are not armed with arbitrary discretion to impose limitations. They can impose limits only on the basis of “national security, public safety, or public health” and “as may be provided by law,” a limitative phrase which did not appear in the 1973 text (The Constitution, Bernas, Joaquin G., S.J., Vol. I, First Edition, 1987, p. 263). Apparently, the phraseology in the 1987 Constitution was a reaction to the ban on international travel imposed under the previous regime when there was a Travel

²⁷⁶ G.R. No. 94284, 8 April 1991, 195 SCRA 760.

Processing Center, which issued certificates of eligibility to travel upon application of an interested party (See *Salonga v. Hermoso & Travel Processing Center*, No. L-53622, 25 April 1980, 97 SCRA 121).²⁷⁷

The constitutional right to travel cannot be impaired without due process of law. Here, due process of law requires the existence of a law regulating travel abroad, in the interest of national security, public safety or public health. There is no such law applicable to the travel abroad of respondent. Neither the OCA nor the majority can point to the existence of such a law. In the absence of such a law, the denial of respondent's right to travel abroad is a gross violation of a fundamental constitutional right. The only exception recognized so far is when a court orders the impairment of the right to travel abroad in connection with a pending criminal case.²⁷⁸ Another possible exception is if Congress, pursuant to its power of legislative inquiry, issues a subpoena or arrest order against a person. These exceptions, however, do not apply in the present case. Here, respondent was not even facing a preliminary investigation or an administrative complaint when she left the country.

The SCSLA clearance is not required by any law before a court employee can travel abroad. The SCSLA clearance is not even specifically required under OCA Circular No. 49-2003. Clearly, respondent has submitted to the OCA all the requirements for her leave application two months prior to her intended leave. Thus, respondent's leave application was deemed approved as of 15 July 2009 pursuant to Section 49, Rule XVI of the Omnibus Rules on Leave and the Omnibus Rules Implementing Book V of EO 292.²⁷⁹

During her approved leave of absence, respondent's time was her own personal time and she could be wherever she wanted to be. The Court cannot inquire what respondent does during her leave of absence since that would constitute unwarranted

²⁷⁷ Id. at 765.

²⁷⁸ Dr. Cruz v. Judge Iturralde, 450 Phil. 77 (2003); Hold-Departure Order issued by Judge Occiano, 431 Phil. 408 (2002); Silverio v. Court of Appeals, G.R. No. 94284, 8 April 1991, 195 SCRA 760.

²⁷⁹ Sec. 49, Rule XVI of the Omnibus Rules on Leave reads: Sec. 49. Period within which to act on leave application. - Whenever the application for leave of absence, including terminal leave, is not acted upon by the head of agency or his duly authorized representative within five (5) working days after receipt thereof, the application for leave of absence shall be deemed approved.

interference into her private affairs and would encroach on her right to privacy. The right to privacy is “the right of an individual to be let alone, or to be free from unwarranted publicity, or to live without unwarranted interference by the public in matters in which the public is not necessarily concerned.”²⁸⁰ Under Article 26 of the Civil Code, the right to privacy is expressly protected:

Art. 26. Every person shall respect the dignity, personality, privacy and peace of mind of his neighbors and other persons. The following and similar acts, though they may not constitute a criminal offense, shall produce a cause of action for damages, prevention and other relief:

- (1) Prying into the privacy of another’s residence;
- (2) Meddling with or disturbing the private life or family relations of another;
- (3) Intriguing to cause another to be alienated from his friends;
- (4) Vexing or humiliating another on account of his religious beliefs, lowly station in life, place of birth, physical defect, or other personal condition.

Furthermore, respondent’s travel abroad, during her approved leave, did not require approval from anyone because respondent, like any other citizen, enjoys the constitutional right to travel within the Philippines or abroad. Respondent’s right to travel abroad, during her approved leave, cannot be impaired “except in the interest of national security, public safety, or public health, as may be provided by law.” Not one of these grounds is present in this case.

There is no doubt that the use of leave of absence can be regulated without impairing the employees’ right to privacy and to travel. In fact, the Civil Service Commission has promulgated the Omnibus Rules Implementing Book V of Executive Order No. 292, of which Rule XVI is the Omnibus Rules on Leave. Such rules and regulations are adopted to balance the well-being and benefit of the government employees and the efficiency and productivity in the government service. Thus, the requirement of securing approval for any leave of absence is a reasonable and valid regulation to insure continuity of service in the government. However, once a leave of absence is approved, any restriction during the approved leave on the right to travel of the government employee violates

²⁸⁰ 1 Arturo Tolentino, *Commentaries And Jurisprudence On The Civil Code Of The Philippines* 108 (1990).

his or her constitutional right to travel.

This Court should be the first to protect the right to travel of its employees, a right enshrined not only in the Bill of Rights but also in the United Nations Universal Declaration of Human Rights as well as in the International Covenant on Civil and Political Rights.²⁸¹ The Philippines is a signatory to the Declaration²⁸² and a state party to the Covenant. In fact, the duty of this Court under Section 5(5), Article VIII of the Constitution is to “promulgate rules concerning the protection and enforcement of constitutional rights,” not to curtail such rights. Neither can this Court promulgate rules that “diminish” or even “modify” substantive rights like the constitutional right to travel.

Section 7. The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law.

In **CHAVEZ v. PUBLIC ESTATES AUTHORITY**, G.R. No. 133250, July 9, 2002,²⁸³ Justice Carpio referred to **Section 7, Article III** as the twin of Section 28, Article II, and, on the basis of these provisions, ruled that the constitutional right to information includes official information on **on-going negotiations** before a final contract:

PEA asserts, citing *Chavez v. PCGG*,²⁸⁴ that in cases of on-going negotiations the right to information is limited to “definite propositions of the government.” PEA maintains the right does not include access to “intra-agency or inter-agency recommendations or communications during the stage when common assertions are still in the process of being formulated or are in the ‘exploratory stage.’”

²⁸¹ Art. 13 of the UN Universal Declaration of Human Rights provides: Everyone has the right to leave any country, including his own, and to return to his country.

Art. 12 of the International Covenant on Civil and Political Rights provides: Everyone shall be free to leave any country, including his own.

²⁸² In *Mejoff v. Director of Prisons* (90 Phil. 70 [1951]), this Court held that the principles set forth in the Declaration are part of the law of the land. See also *Government of Hongkong Special Administrative Region v. Olalia, Jr. and Muñoz*, G.R. No. 153675, 19 April 2007, 521 SCRA 470.

²⁸³ See discussion under Arts. VIII, Sec. 5(1), XI, Sec. 1, and XII, Secs. 2 and 3.

²⁸⁴ 299 SCRA 744 (1998).

Also, AMARI contends that petitioner cannot invoke the right at the pre-decisional stage or before the closing of the transaction. To support its contention, AMARI cites the following discussion in the 1986 Constitutional Commission:

MR. SUAREZ. And when we say ‘transactions’ which should be distinguished from contracts, agreements, or treaties or whatever, does the Gentleman refer to the steps leading to the consummation of the contract, or does he refer to the contract itself?

MR. OPLE: The ‘transactions’ used here, I suppose is generic and therefore, it can cover both steps leading to a contract and already a consummated contract, Mr. Presiding Officer.

MR. SUAREZ: This contemplates inclusion of negotiations leading to the consummation of the transaction.

MR. OPLE: Yes, subject only to reasonable safeguards on the national interest.

MR. SUAREZ: Thank you.²⁸⁵

AMARI argues there must first be a consummated contract before petitioner can invoke the right. Requiring government officials to reveal their deliberations at the pre-decisional stage will degrade the quality of decision-making in government agencies. Government officials will hesitate to express their real sentiments during deliberations if there is immediate public dissemination of their discussions, putting them under all kinds of pressure before they decide.

We must first distinguish between information the law on public bidding requires PEA to disclose publicly, and information the constitutional right to information requires PEA to release to the public. Before the consummation of the contract, PEA must, on its own and without demand from anyone, disclose to the public matters relating to the disposition of its property. These include the size, location, technical description and nature of the property being disposed of, the terms and conditions of the disposition, the parties qualified to bid, the minimum price and similar information. PEA must prepare all these data and disclose them to the public at the start of the disposition process, long before the consummation of the contract, because the Government Auditing Code requires public bidding. If PEA fails to make this disclosure, any citizen can demand from PEA this information at any time during the bidding process.

²⁸⁵ V Record, Constitutional Commission 24-25, (1986).

Information, however, on on-going evaluation or review of bids or proposals being undertaken by the bidding or review committee is not immediately accessible under the right to information. While the evaluation or review is still on-going, there are no “official acts, transactions, or decisions” on the bids or proposals. **However, once the committee makes its official recommendation, there arises a “definite proposition” on the part of the government. From this moment, the public’s right to information attaches, and any citizen can access all the non-proprietary information leading to such definite proposition.** In *Chavez v. PCGG*,²⁸⁶ the Court ruled as follows:

Considering the intent of the framers of the Constitution, we believe that it is incumbent upon the PCGG and its officers, as well as other government representatives, to disclose sufficient public information on any proposed settlement they have decided to take up with the ostensible owners and holders of ill-gotten wealth. Such information, though, must pertain to definite propositions of the government, not necessarily to intra-agency or inter-agency recommendations or communications during the stage when common assertions are still in the process of being formulated or are in the “exploratory” stage. There is need, of course, to observe the same restrictions on disclosure of information in general, as discussed earlier - such as on matters involving national security, diplomatic or foreign relations, intelligence and other classified information.

Contrary to AMARI’s contention, the commissioners of the 1986 Constitutional Commission understood that the right to information **“contemplates inclusion of negotiations leading to the consummation of the transaction.”** Certainly, a consummated contract is not a requirement for the exercise of the right to information. Otherwise, the people can never exercise the right if no contract is consummated, and if one is consummated, it may be too late for the public to expose its defects.

Requiring a consummated contract will keep the public in the dark until the contract, which may be grossly disadvantageous to the government or even illegal, becomes a *fait accompli*. This negates the State policy of full transparency on matters of public concern, a

²⁸⁶ 299 SCRA 744 (1998).

situation which the framers of the Constitution could not have intended. Such a requirement will prevent the citizenry from participating in the public discussion of any proposed contract, effectively truncating a basic right enshrined in the Bill of Rights. We can allow neither an emasculation of a constitutional right, nor a retreat by the State of its avowed “policy of full disclosure of all its transactions involving public interest.”

The right covers three categories of information which are “matters of public concern,” namely: (1) official records; (2) documents and papers pertaining to official acts, transactions and decisions; and (3) government research data used in formulating policies. The first category refers to any document that is part of the public records in the custody of government agencies or officials. The second category refers to documents and papers recording, evidencing, establishing, confirming, supporting, justifying or explaining official acts, transactions or decisions of government agencies or officials. The third category refers to research data, whether raw, collated or processed, owned by the government and used in formulating government policies.

The information that petitioner may access on the renegotiation of the JVA includes evaluation reports, recommendations, legal and expert opinions, minutes of meetings, terms of reference and other documents attached to such reports or minutes, all relating to the JVA. However, the right to information does not compel PEA to prepare lists, abstracts, summaries and the like relating to the renegotiation of the JVA.²⁸⁷ The right only affords access to records, documents and papers, which means the opportunity to inspect and copy them. One who exercises the right must copy the records, documents and papers at his expense. The exercise of the right is also subject to reasonable regulations to protect the integrity of the public records and to minimize disruption to government operations, like rules specifying when and how to conduct the inspection and copying.²⁸⁸

The right to information, however, does not extend to matters recognized as privileged information under the separation of powers.²⁸⁹ The right does not also apply to information on military and diplomatic secrets, information affecting national security, and information on investigations of crimes by law enforcement

²⁸⁷ Ibid.

²⁸⁸ *Legaspi v. Civil Service Commission*, 150 SCRA 530 (1987).

²⁸⁹ *Almonte v. Vasquez*, 244 SCRA 286 (1995).

agencies before the prosecution of the accused, which courts have long recognized as confidential.²⁹⁰ The right may also be subject to other limitations that Congress may impose by law.

There is no claim by PEA that the information demanded by petitioner is privileged information rooted in the separation of powers. The information does not cover Presidential conversations, correspondences, or discussions during closed-door Cabinet meetings which, like internal deliberations of the Supreme Court and other collegiate courts, or executive sessions of either house of Congress,²⁹¹ are recognized as confidential. This kind of information cannot be pried open by a co-equal branch of government. A frank exchange of exploratory ideas and assessments, free from the glare of publicity and pressure by interested parties, is essential to protect the independence of decision-making of those tasked to exercise Presidential, Legislative and Judicial power.²⁹² This is not the situation in the instant case.

We rule, therefore, that the constitutional right to information includes official information on on-going negotiations before a final contract. The information, however, must constitute definite propositions by the government and should not cover recognized exceptions like privileged information, military and diplomatic secrets and similar matters affecting national security and public order.²⁹³ Congress has also prescribed other limitations on the right to information in several legislations.²⁹⁴

²⁹⁰ 299 SCRA 744 (1998).

²⁹¹ *Chavez v. PCGG*, 299 SCRA 744 (1998); *Aquino-Sarmiento v. Morato*, 203 SCRA 515 (1991).

²⁹² *Almonte v. Vasquez*, 244 SCRA 286 (1995).

²⁹³ *People's Movement for Press Freedom v. Hon. Raul Manglapus*, G.R. No. 84642, *en banc* Resolution dated April 13, 1988; *Chavez v. PCGG*, 299 SCRA 744 (1998).

²⁹⁴ Sec. 270 of the National Internal Revenue Code punishes any officer or employee of the Bureau of Internal Revenue who divulges to any person, except as allowed by law, information regarding the business, income, or estate of any taxpayer, the secrets, operation, style of work, or apparatus of any manufacturer or producer, or confidential information regarding the business of any taxpayer, knowledge of which was acquired by him in the discharge of his official duties. Sec. 14 of R.A. No. 8800 (Safeguard Measures Act) prohibits the release to the public of confidential information submitted in evidence to the Tariff Commission. Sec. 3 (n) of R.A. No. 8504 (Philippine AIDS Prevention and Control Act) classifies as confidential the medical records of HIV patients. Sec. 6 (j) of R.A. No. 8043 (Inter-Country Adoption Act) classifies as confidential the records of the adopted child, adopting parents, and natural parents. Sec. 94 (f) of R.A. No. 7942 (Philippine Mining Act) requires the Department of Environment and Natural Resources to maintain the confidentiality of confidential information supplied by contractors who

Section 8. The right of the people, including those employed in the public and private sectors, to form unions, associations, or societies for purposes not contrary to law shall not be abridged.

Section 9. Private property shall not be taken for public use without just compensation.

In **REPUBLIC OF THE PHILIPPINES v. COURT OF APPEALS**, G.R. No. 160379, August 14, 2009, 612 Phil. 965, a petition for review of the Court of Appeals' decision and resolution affirming with modifications the amended decision of the Regional Trial Court, the First Division, through Justice Carpio, affirmed the Court of Appeals and discussed the right of **eminent domain**:

Eminent domain is the authority and right of the State, as sovereign, to take private property for public use upon observance of due process of law and payment of just compensation.²⁹⁵ The Constitution provides that, “[p]rivate property shall not be taken for public use without just compensation.”

Just compensation is the full and fair equivalent of the property sought to be expropriated.²⁹⁶ Among the factors to be considered in arriving at the fair market value of the property are the cost of acquisition, the current value of like properties, its actual or potential uses, and in the particular case of lands, their size, shape, location, and the tax declarations thereon.²⁹⁷ The measure is not the taker's gain but the owner's loss.²⁹⁸ To be just, the compensation must be fair not only to the owner but also to the taker.²⁹⁹

Just compensation is based on the price or value of the property at the time it was taken from the owner and appropriated by the government.³⁰⁰ However, if

are parties to mineral agreements or financial and technical assistance agreements.

²⁹⁵ *National Power Corporation v. Court of Appeals*, 479 Phil. 850, 860 (2004), citing *Visayan Refining Co. v. Camus*, 40 Phil. 550 (1919).

²⁹⁶ *B.H. Berkenkotter & Co. v. Court of Appeals*, G.R. No. 89980, 14 December 1992, 216 SCRA 584, 586.

²⁹⁷ *Id.* at 587, citing *Cruz*, Constitutional Law 74 (1991).

²⁹⁸ *Id.* at 586.

²⁹⁹ *Ibid.*

³⁰⁰ *National Power Corporation v. Court of Appeals*, 214 Phil. 583, 590 (1984), citing *Alfonso v. Pasay City*, 106 Phil. 1017 (1960).

the government takes possession before the institution of expropriation proceedings, the value should be fixed as of the time of the taking of said possession, not of the filing of the complaint. The value at the time of the filing of the complaint should be the basis for the determination of the value when the taking of the property involved coincides with or is subsequent to the commencement of the proceedings.³⁰¹

The procedure for determining just compensation is set forth in Rule 67 of the 1997 Rules of Civil Procedure. Section 5 of Rule 67 partly states that “[u]pon the rendition of the order of expropriation, the court shall appoint not more than three (3) competent and disinterested persons as commissioners to ascertain and report to the court the just compensation for the property sought to be taken.”

However, we held in *Republic v. Court of Appeals*³⁰² that Rule 67 presupposes a prior filing of complaint for eminent domain with the appropriate court by the expropriator. If no such complaint is filed, the expropriator is considered to have violated procedural requirements, and hence, waived the usual procedure prescribed in Rule 67, including the appointment of commissioners to ascertain just compensation. In *National Power Corporation v. Court of Appeals*,³⁰³ we clarified that when there is no action for expropriation and the case involves only a complaint for damages or just compensation, the provisions of the Rules of Court on ascertainment of just compensation (i.e., provisions of Rule 67) are no longer applicable, and a trial before commissioners is dispensable, thus:

In this case, NPC appropriated Pobre’s Property without resort to expropriation proceedings. NPC dismissed its own complaint for the second expropriation. At no point did NPC institute expropriation proceedings for the lots outside the 5,554 square-meter portion subject of the second expropriation. The only issues that the trial court had to settle were the amount of just compensation and damages that NPC had to pay Pobre.

This case ceased to be an action for expropriation when NPC dismissed its complaint for expropriation. Since this case has

³⁰¹ Municipality of La Carlota v. Spouses Gan, 150-A Phil. 588, 594 (1972).

³⁰² G.R. No. 147245, 31 March 2005, 454 SCRA 516, 530.

³⁰³ 479 Phil. 850, 860 (2004).

been reduced to a simple case of recovery of damages, the provisions of the Rules of Court on the ascertainment of the just compensation to be paid were no longer applicable. A trial before commissioners, for instance, was dispensable.

In this case, petitioner took possession of the subject property without initiating expropriation proceedings. Consequently, private respondent filed the instant case for just compensation and damages. To determine just compensation, the trial court appointed three commissioners pursuant to Section 5 of Rule 67 of the 1997 Rules of Civil Procedure. None of the parties objected to such appointment.

The trial court's appointment of commissioners in this particular case is not improper. The appointment was done mainly to aid the trial court in determining just compensation, and it was not opposed by the parties. Besides, the trial court is not bound by the commissioners' recommended valuation of the subject property. The court has the discretion on whether to adopt the commissioners' valuation or to substitute its own estimate of the value as gathered from the records.³⁰⁴

However, we agree with the appellate court that the trial court's decision is not clear as to its basis for ascertaining just compensation. The trial court mentioned in its decision the valuations in the reports of the City Appraisal Committee and of the commissioners appointed pursuant to Rule 67. But whether the trial court considered these valuations in arriving at the just compensation, or the court made its own independent valuation based on the records, was obscure in the decision. The trial court simply gave the total amount of just compensation due to the property owner without laying down its basis. Thus, there is no way to determine whether the adjudged just compensation is based on competent evidence. For this reason alone, a remand of the case to the trial court for proper determination of just compensation is in order. In *National Power Corporation v. Bongbong*,³⁰⁵ we held that although the determination of just compensation lies within the trial court's discretion, it should not be done arbitrarily or capriciously. The decision of the trial court must be based on all established rules, correct legal principles, and competent evidence.³⁰⁶ The court is proscribed from basing its

³⁰⁴ Republic of the Philippines v. Santos, 225 Phil. 29, 35 (1986), citing Manila Railroad Company v. Velasquez, 32 Phil. 286 (1915).

³⁰⁵ G.R. No. 164079, 3 April 2007, 520 SCRA 290, 304.

³⁰⁶ Manansan v. Republic, G.R. No. 140091, 10 August 2006, 498 SCRA 348, 363, citing Manila Railway Company v. Fabie, 17 Phil. 206, 209 (1910).

judgment on speculations and surmises.³⁰⁷...

Section 10. No law impairing the obligation of contracts shall be passed.

BARANGAY ASSOCIATION FOR NATIONAL ADVANCEMENT AND TRANSPARENCY (BANAT) PARTY-LIST v. COMMISSION ON ELECTIONS, G.R. No. 177508, August 7, 2009, 612 Phil. 793, was a petition for prohibition, which assailed the constitutionality of Republic Act No. 9369,³⁰⁸ or the law on the automated election system, on several grounds,³⁰⁹ and prayed that the COMELEC be enjoined from implementing the statute. One of the assailed provisions of RA 9369 was Section 34 which provides:

Sec. 34. Section 26 of Republic Act No. 7166 is hereby amended to read as follows:

Sec. 26. Official Watchers. - Every registered political party or coalition of political parties, and every candidate shall each be entitled to one watcher in every polling place and canvassing center: Provided That, candidates for the Sangguniang Panlalawigan, Sangguniang Panlungsod, or Sangguniang Bayan belonging to the same slate or ticket shall collectively be entitled to only one watcher.

The dominant majority party and dominant minority party, which the Commission shall determine in accordance with law, shall each be entitled to one official watcher who shall be paid a fixed *per diem* of four hundred pesos (400.00).

There shall also recognized six principal watchers, representing the six accredited major political parties excluding the dominant majority and minority parties, who shall be designated by the Commission upon nomination of

³⁰⁷ Ibid.

³⁰⁸ An Act Amending Republic Act No. 8436, Entitled An Act Authorizing The Commission On Elections To Use An Automated Election System In The May 11, 1998 National Or Local Elections And In Subsequent National And Local Electoral Exercises, To Encourage Transparency, Credibility, Fairness And Accuracy Of Elections, Amending For The Purpose Batas Pambansa Blg. 881, As Amended, Republic Act No. 7166 And Other Related Election Laws, Providing Funds Therefor And For Other Purposes (2007). As noted by the Court: "RA 9369 is a consolidation of Senate Bill No. 2231 and House Bill No. 5352 passed by the Senate on 7 December 2006 and the House of Representatives on 19 December 2006. On 23 January 2007, less than four months before the 14 May 2007 local elections, the President signed RA 9369. Two newspapers of general circulation, *Malaya* and *Business Mirror*, published RA 9369 on 26 January 2007. RA 9369 thus took effect on 10 February 2007."

³⁰⁹ See discussions under Art. VI, Secs. 17 and 26, Art. VII, Sec. 4, and Art. IX-C, Sec. 2.

the said parties. These political parties shall be determined by the Commission upon notice and hearing on the basis of the following circumstances:

- (a) The established record of the said parties, coalition of groups that now composed them, taking into account, among other things, their showing in past election;
- (b) The number of incumbent elective officials belonging to them ninety (90) days before the date of election;
- (c) Their identifiable political organizations and strengths as evidenced by their organized/chapters;
- (d) The ability to fill a complete slate of candidates from the municipal level to the position of President; and
- (e) Other analogous circumstances that may determine their relative organizations and strengths.

The issue raised in **BANAT Party-List** with respect to Section 34 was whether it violated the **non-impairment clause** of the Constitution. In ruling that the petition had no merit, Justice Carpio, speaking for the Court *en banc*, first ruled:

It is settled that every statute is presumed to be constitutional.³¹⁰ The presumption is that the legislature intended to enact a valid, sensible and just law. Those who petition the Court to declare a law unconstitutional must show that there is a clear and unequivocal breach of the Constitution, not merely a doubtful, speculative or argumentative one; otherwise, the petition must fail.³¹¹

In this case, petitioner failed to justify why RA 9369 and the assailed provisions should be declared unconstitutional.

Justice Carpio then specifically discussed the **non-impairment clause** as it applied in **BANAT Party-List**:

Section 34 does not violate Section 10, Article III of the Constitution

Petitioner assails the constitutionality of the provision which

³¹⁰ *Lacson v. Executive Secretary*, 361 Phil. 251 (1999); *Alvarez v. Guingona, Jr.*, 322 Phil. 774 (1996); *Basco v. Philippine Amusements and Gaming Corp.*, 274 Phil. 323 (1991); *Abbas v. COMELEC*, G.R. No. 89651, 10 November 1989, 179 SCRA 287; *Peralta v. COMELEC*, 172 Phil. 31 (1978); *Salas v. Jarencio*, 150-B Phil. 670 (1972); *Yu Cong Eng v. Trinidad*, 47 Phil. 385 (1925).

³¹¹ *Arceta v. Mangrobang*, 476 Phil. 106 (2004); *Lacson v. Executive Secretary*, 361 Phil. 251 (1999).

fixes the *per diem* of poll watchers of the dominant majority and dominant minority parties on election day. Petitioner argues that this violates the freedom of the parties to contract and their right to fix the terms and conditions of the contract they see as fair, equitable and just. Petitioner adds that this is a purely private contract using private funds which cannot be regulated by law.

The OSG argues that petitioner erroneously invoked the non-impairment clause because this only applies to previously perfected contracts. In this case, there is no perfected contract and, therefore, no obligation will be impaired.

Both the COMELEC and the OSG argue that the law is a proper exercise of police power and it will prevail over a contract. According to the COMELEC, poll watching is not just an ordinary contract but is an agreement with the solemn duty to ensure the sanctity of votes. The role of poll watchers is vested with public interest which can be regulated by Congress in the exercise of its police power. The OSG further argues that the assurance that the poll watchers will receive fair and equitable compensation promotes the general welfare. The OSG also states that this was a reasonable regulation considering that the dominant majority and minority parties will secure a copy of the election returns and are given the right to assign poll watchers inside the polling precincts.

There is no violation of the non-impairment clause. First, the non-impairment clause is limited in application to laws that derogate from prior acts or contracts by enlarging, abridging or in any manner changing the intention of the parties.³¹² There is impairment if a subsequent law changes the terms of a contract between the parties, imposes new conditions, dispenses with those agreed upon or withdraws remedies for the enforcement of the rights of the parties.³¹³

As observed by the OSG, there is no existing contract yet and, therefore, no enforceable right or demandable obligation will be impaired. RA 9369 was enacted more than three months prior to the 14 May 2007 elections. Hence, when the dominant majority and minority parties hired their respective poll watchers for the

³¹² *Serrano v. Gallant Maritime Services, Inc.*, G.R. No. 167614, 24 March 2009.

³¹³ *Clemons v. Nolting*, 42 Phil. 702 (1922).

14 May 2007 elections, they were deemed to have incorporated in their contracts all the provisions of RA 9369.

Second, it is settled that police power is superior to the non-impairment clause.³¹⁴ The constitutional guaranty of non-impairment of contracts is limited by the exercise of the police power of the State, in the interest of public health, safety, morals, and general welfare of the community.

Section 8 of COMELEC Resolution No. 1405³¹⁵ specifies the rights and duties of poll watchers:

The watchers shall have the right to stay in the space reserved for them inside the polling place. They shall have the right to witness and inform themselves of the proceedings of the board; to take notes of what they may see or hear, to take photographs of the proceedings and incidents, if any, during the counting of votes, as well as the election returns, tally board and ballot boxes; to file a protest against any irregularity or violation of law which they believe may have been committed by the board or by any of its members or by any person; to obtain from the board a certificate as to the filing of such protest and/or of the resolution thereon; to read the ballots after they shall have been read by the chairman, as well as the election returns after they shall have been completed and signed by the members of the board without touching them, but they shall not speak to any member of the board, or to any voter, or among themselves, in such a manner as would disturb the proceedings of the board; and to be furnished, upon request, with a certificate of votes for the candidates, duly signed and thumbmarked by the chairman and all the members of the board of election inspectors.

Additionally, the poll watchers of the dominant majority and minority parties in a precinct shall, if available, affix their signatures and thumbmarks on the election returns for that precinct.³¹⁶ The dominant majority and minority parties shall also be given a copy of the certificates of canvass³¹⁷ and election

³¹⁴ *Philippine National Bank v. Remigio*, G.R. No. 78508, 21 March 1994, 231 SCRA 362; *Anglo-Fil Trading Corporation v. Lazaro*, 209 Phil. 400 (1983); *Ortigas & Co., Ltd. Partnership v. Feati Bank and Trust Co.*, 183 Phil. 176 (1979).

³¹⁵ Dated 30 March 1992.

³¹⁶ RA No. 6646, An Act Introducing Additional Reforms In The Electoral System And For Other Purposes, (1988), Sec. 12.

³¹⁷ RA No. 9369, Sec. 21.

returns³¹⁸ through their respective poll watchers. Clearly, poll watchers play an important role in the elections.

Moreover, while the contracting parties may establish such stipulations, clauses, terms, and conditions as they may deem convenient, such stipulations should not be contrary to law, morals, good customs, public order, or public policy.³¹⁹

In *Beltran v. Secretary of Health*,³²⁰ we said:

Furthermore, the freedom to contract is not absolute; all contracts and all rights are subject to the police power of the State and not only may regulations which affect them be established by the State, but all such regulations must be subject to change from time to time, as the general well-being of the community may require, or as the circumstances may change, or as experience may demonstrate the necessity.

Therefore, assuming there were existing contracts, Section 34 would still be constitutional because the law was enacted in the exercise of the police power of the State to promote the general welfare of the people. We agree with the COMELEC that the role of poll watchers is invested with public interest. In fact, even petitioner concedes that poll watchers not only guard the votes of their respective candidates or political parties but also ensure that all the votes are properly counted. Ultimately, poll watchers aid in fair and honest elections. Poll watchers help ensure that the elections are transparent, credible, fair, and accurate. The regulation of the *per diem* of the poll watchers of the dominant majority and minority parties promotes the general welfare of the community and is a valid exercise of police power.

Section 11. Free access to the courts and quasi-judicial bodies and adequate legal assistance shall not be denied to any person by reason of poverty.

Section 12. (1) Any person under investigation for the commission of an offense shall have the right to be informed of his right to remain silent and to have competent and independent counsel preferably of his own choice. If the person

³¹⁸ RA No. 9369, Sec. 33.

³¹⁹ Civil Code, Art. 1306.

³²⁰ G.R. Nos. 133640, 133661 and 139147, 25 November 2005, 476 SCRA 168.

cannot afford the services of counsel, he must be provided with one. These rights cannot be waived except in writing and in the presence of counsel.

(2) No torture, force, violence, threat, intimidation, or any other means which vitiate the free will shall be used against him. Secret detention places, solitary, incommunicado, or other similar forms of detention are prohibited.

(3) Any confession or admission obtained in violation of this or Section 17 hereof shall be inadmissible in evidence against him.

(4) The law shall provide for penal and civil sanctions for violations of this Section as well as compensation to the rehabilitation of victims of torture or similar practices, and their families.

Section 13. All persons, except those charged with offenses punishable by *reclusion perpetua* when evidence of guilt is strong, shall, before conviction, be bailable by sufficient sureties, or be released on recognizance as may be provided by law. The right to bail shall not be impaired even when the privilege of the writ of *habeas corpus* is suspended. Excessive bail shall not be required.

Section 14. (1) No person shall be held to answer for a criminal offense without due process of law.

(2) In all criminal prosecutions, the accused shall be presumed innocent until the contrary is proved, and shall enjoy the right to be heard by himself and counsel, to be informed of the nature and cause of the accusation against him, to have a speedy, impartial, and public trial, to meet the witnesses face to face, and to have compulsory process to secure the attendance of witnesses and the production of evidence in his behalf. However, after arraignment, trial may proceed notwithstanding the absence of the accused: Provided, that he has been duly notified and his failure to appear is unjustifiable.

Right to Counsel

Speaking for the First Division of the Court in A.M. No. MTJ-99-1231, March 17, 2004, **GAMAS v. OCO**, 469 Phil. 633, Justice

Carpio discussed the **constitutional right to counsel under paragraph 1, Section 12 and paragraph 2, Section 14 of this Article III:**

... Indeed, the accused has a right to representation by counsel from the custodial investigation all the way up to the appellate proceedings.³²¹ At the arraignment stage, Section 6 of Rule 116 of the Revised Rules of Criminal Procedure provides:

Sec. 6. Duty of court to inform accused of his right to counsel.
- Before arraignment, the court shall inform the accused of his right to counsel and ask him if he desires to have one. Unless the accused is allowed to defend himself in person or has employed counsel of his choice, the court must assign a counsel *de officio* to defend him.

Section 6 of Rule 116 means that:

[W]hen a defendant appears [at the arraignment] without [an] attorney, the court has four important duties to comply with: 1 - It must inform the defendant that it is his right to have [an] attorney before being arraigned; 2 - After giving him such information the court must ask him if he desires the aid of [an] attorney; 3 - If he desires and is unable to employ [an] attorney, the court must assign [an] attorney *de officio* to defend him; and 4 - If the accused desires to procure an attorney of his own the court must grant him a reasonable time therefor.³²²

Compliance with these four duties is mandatory.³²³ The only instance when the court can arraign an accused without the benefit of counsel is if the accused waives such right and the court, finding the accused capable, allows him to represent himself in person. However, to be a valid waiver, the accused must make the waiver voluntarily, knowingly, and intelligently.³²⁴ In determining whether the accused can make a valid waiver, the court must take into account all the relevant circumstances, including the educational attainment of the accused. In the present case, however, respondent judge contends that complainants waived their right to counsel and insisted on their

³²¹ Const., Art. III, Sec. 12(1); see *People v. Serzo*, G.R. No. 118435, 20 June 1997, 274 SCRA 553.

³²² *People v. Holgado*, 85 Phil. 752 (1950).

³²³ See *Sayson v. People*, G.R. No. L-51745, 28 October 1988, 166 SCRA 680.

³²⁴ *People v. Bodoso*, G.R. Nos. 149382-149383, 5 March 2003, 398 SCRA 642.

immediate arraignment.

After reviewing the records and taking into account the circumstances obtaining in this case, we find that respondent judge did not properly apprise complainants of their right to counsel prior to their arraignment. Consequently, there was no basis for complainants' alleged waiver of such right.

In his Answer, respondent judge does not deny that when he "arraigned" complainants, no lawyer assisted the complainants. However, respondent judge asserted that the attendance of a "lawyer was their (complainants') problem." Respondent judge stated that before arraigning complainants, he gave a "discourse [of] their rights as accused." Respondent judge also stated that since the police caught complainants *in flagrante delicto*, complainants told him "a lawyer would not have much use." Respondent judge further stated that complainants "expressed that they have no money to pay for a lawyer." Respondent judge informed complainants "he can give them a PAO lawyer" if they so desired. However, respondent judge did not appoint a PAO lawyer despite being informed by complainants that they could not afford a lawyer.

These do not amount to compliance with Section 6 of Rule 116. **Respondent judge has the duty to insure that there is no violation of the constitutional right of the accused to counsel. Respondent judge is grossly mistaken in saying that securing a "lawyer was their (complainants') problem." Once the accused informs the judge that he cannot afford a lawyer and the court has not allowed the accused to represent himself, or the accused is incapable of representing himself, the judge has the duty to appoint a counsel *de officio* to give meaning and substance to the constitutional right of the accused to counsel.**

Respondent judge knew that complainants are mere tricycle drivers. Respondent judge could not have expected complainants to be conversant with the rules on criminal procedure. Respondent judge should not only have followed Section 6 of Rule 116 to the letter, but should also have ascertained that complainants understood the import of the proceedings. Respondent judge should not have proceeded with complainants' arraignment until he had ascertained that complainants' waiver of their right to counsel was made voluntarily, knowingly, and intelligently and that they were capable of representing themselves.

Right to Speedy Trial

The **right to a speedy trial, provided in this Section 14(2), Article III**, was discussed by Justice Carpio for the Second Division in **VILLA v. FERNANDEZ**, G.R. No. 219548, October 17, 2018. The case was a petition for review on *certiorari* filed by Gerarda H. Villa that sought the reversal of the decision and resolution of the Court of Appeals, which dismissed the criminal cases against Stanley Fernandez, Florentino Ampil, Jr., and Noel Cabangon. Justice Carpio denied the petitions, thereby affirming the decision and resolution of the Court of Appeals:

The Facts

The present case stemmed from the death of Leonardo “Lenny” H. Villa, a neophyte-participant at the initiation rites of the *Aquila Legis* Fraternity (*Aquila*) in 1991.

Because of his death, an Amended Information charging 35 members of the *Aquila* with the crime of Homicide was filed on 15 November 1991. Out of the 35 members, 26 members were charged with homicide in Criminal Case No. C-38340(91), while 9 members were charged with homicide in Criminal Case No. C-38340. The 26 members were jointly tried, while the trial against the remaining 9 members was held in abeyance.

After the promulgation of the decision against the 26 members who were tried separately, the Regional Trial Court of Caloocan City (RTC), Branch 121, ordered for: (a) the issuance of warrants of arrest against five of the nine members, namely: Enrico de Vera III (de Vera), Anselmo Adriano (Adriano), Marcus Joel Ramos (Ramos), Fernandez, and Cabangon; and (b) the arraignment of four of the nine members, namely: Crisanto Saruca, Jr. (Saruca), Manuel Escalona II (Escalona), Reynaldo Concepcion (Concepcion), and Ampil on 24 November 1993. A few days after, all of the nine members entered a plea of not guilty.

On 5 August 2002, the RTC Branch 130 granted the Motion to Dismiss Criminal Case No. C-38340 against Concepcion, upon finding that the failure of the prosecution to prosecute the case for an unreasonable period of time violated his right to speedy trial.

On the other hand, on 29 October 2003, the RTC Branch 130 denied the separate Motions to Dismiss filed by Saruca, Escalona, and Adriano. On 18 January 2005, the RTC Branch 130 also denied the Motion to Dismiss filed by Ramos. The RTC

Branch 130 reasoned out that the trial against the remaining eight members could now proceed, since the prosecution could already obtain the original records of the case from the CA, which already decided the appeal of the 26 members. Upon denial of their motions to dismiss, Ramos, Saruca, Escalona, and Adriano appealed to the CA.

Meanwhile, on 8 March 2005, the RTC Branch 130 denied: (1) the “Motion to Quash Amended Information” filed by Ampil on 10 October 1994; and (2) the “Urgent Omnibus Motion (a) To Adopt the Motion to Quash Amended Information of Accused Florentino L. Ampil; and (b) To Quash Amended Information” filed by Fernandez on 19 October 1994.

On 25 October 2006, the CA granted the appeal of Ramos, Saruca, Escalona, and Adriano and dismissed Criminal Case No. C-38340 against them after finding that their right to speedy trial was violated.

On 5 December 2006, Fernandez, Ampil, and Cabangon filed a Joint Motion to Dismiss with the RTC Branch 130, alleging that: (1) their constitutional right to a speedy trial was violated because the suit has been pending for more than 15 years, or since the filing of the Amended Information on 15 November 1991; (2) the CA’s Decision dismissing Criminal Case No. C-38340 against Ramos, Saruca, Escalona, and Adriano due to the violation of their right to speedy trial should also apply to them because they are similarly situated with Ramos, Saruca, Escalona, and Adriano; and (3) their participation in the initial stages of the trial did not preclude the filing of a motion to dismiss on the ground of violation of their right to speedy trial.

In its Comment and/or Opposition, the private prosecutor alleged that: (1) Fernandez, Ampil, and Cabangon are not similarly situated with Ramos, Saruca, Escalona, and Adriano, because they only raised the alleged violation of their right to speedy trial after the promulgation of the CA Decision dismissing Criminal Case No. C-38340 against Ramos, Saruca, Escalona, and Adriano; and (2) considering that Fernandez, Ampil and Cabangon did not promptly raise the issue of the alleged violation of their right to speedy trial, they are deemed to have waived and abandoned their right.

On 1 February 2012, the Court, in *Villareal v. People of the*

Philippines (Villareal),³²⁵ convicted 5 of the 26 members of *Aquila* charged in Criminal Case No. C-3 8340(91) with reckless imprudence resulting in homicide, and affirmed the acquittal of 20 of the 26 members. The case against one of the 26 members was closed and terminated due to his death during the pendency of the case. In the same case, the Court affirmed the dismissal of Criminal Case No. C-38340 against Ramos, Saruca, Escalona, and Adriano due to violation of the right to speedy trial.³²⁶

The Decision of the RTC

Meanwhile, on 9 January 2012, the RTC Branch 130 issued an Order denying the Joint Motion to Dismiss filed by Fernandez, Ampil, and Cabangon.

The RTC Branch 130 explained that the following incidents caused the slow progress of Criminal Case No. C-38340: (1) Presiding Judge Jaime T. Hamoy (Judge Hamoy), who handled the case, was dismissed from the service; (2) while Acting Presiding Judge Luisito Sardillo (Judge Sardillo) continued the proceedings of the case, nothing much was accomplished as he had to attend to both the proceedings in this sala as well as that of in his own sala; (3) another accused in this case filed a petition for certiorari before the CA, and the CA issued a restraining order enjoining the trial court from proceeding with the hearing of the case; and (4) the private prosecutor filed a Motion for Transfer of Trial Venue and Motion for Inhibition. Finding that the pending incidents were already resolved, the RTC Branch 130 held that it can now continue with the trial of the case. The dispositive portion of its Order reads:

WHEREFORE, premises considered, the Motion to Dismiss filed by accused Farley (sic) Ampil, Stanley Fernandez and Noel Cabangon is hereby DENIED for lack of merit. The Motion for Inhibition filed by the Private Prosecutor is likewise ordered DENIED for lack [of] merit.

In the meantime the continuation of the prosecution evidence is hereby set on February 9 and 24, and March 2, 9, and 23, 2012 at 8:30 o'clock in the morning.

Notify all the parties concerned thru the Sheriff of this Court with proper return. ...

³²⁵ 680 Phil. 527 (2012).

³²⁶ *Id.* at 607-608.

Thereafter, the RTC Branch 130, in another Order dated 18 September 2012, denied the Motion for Partial Reconsideration filed by Fernandez, Ampil, and Cabangon.

The Decision of the CA

In a Decision dated 13 February 2015, the CA reversed the findings of the RTC Branch 130 and dismissed Criminal Case No. C-38340 against Fernandez, Ampil, and Cabangon. The CA held that the RTC Branch 130 committed grave abuse of discretion in denying the Joint Motion to Dismiss filed by Fernandez, Ampil, and Cabangon, because it failed to recognize and uphold their constitutional right to speedy trial. The CA found that the delays in the proceedings against Fernandez, Ampil, and Cabangon were unjustified and not attributable to them. The CA also held that their active participation in the initial stages of trial was not deemed a waiver of their right to speedy trial.

The CA also found that Fernandez, Ampil, and Cabangon are similarly situated with Ramos, Saruca, Escalona, and Adriano, since they all experienced the same delay in the proceedings in Criminal Case No. C-38340. Thus, since the Court in *Villareal* already dismissed Criminal Case No. C-38340 against Ramos, Saruca, Escalona, and Adriano for violation of their right to speedy trial, Criminal Case No. C-38340 against Fernandez, Ampil, and Cabangon should also be dismissed applying the principle of equal protection of the law.

In a Resolution dated 23 July 2015, the CA denied Villa's motion for reconsideration, upon finding that there is no valid ground to modify, reverse, or set aside its decision. The CA also held that Villa has no personality to move for a reconsideration, because it is only the Solicitor General who may bring or defend actions on behalf of the State in all criminal proceedings before the appellate courts.

The Issues

Villa raises the following issues for resolution:

- I. With all due respect, the Court of Appeals committed grave, serious and reversible errors in finding that the delay in the proceedings in Criminal Case No. 38340 is of such nature that violates the right of respondents to speedy trial.
- II. With all due respect, the Court of Appeals committed grave, serious and reversible errors in finding that respondents are

similarly situated with their former co-accused Reynaldo Concepcion, Manuel Escalona II, Marcus Joel Ramos, Crisanto Saruca, Jr., and Anselmo Adriano, whose cases, in Criminal Case No. C-38340, were dismissed by the Court of Appeals in its Decision in CA G.R. S.P. No. 89060 and S.P. No. 901532, on the ground of violation of their right to speedy trial.

The Ruling of the Court

We do not find merit in the petition.

An accused's right to "have a speedy, impartial, and public trial" is guaranteed in criminal cases by Section 14(2) of Article III of the 1987 Constitution. Its salutary objective being to assure that an innocent person may be free from the anxiety and expense of a court litigation or, if otherwise, of having his or her guilt determined within the shortest possible time compatible with the presentation and consideration of whatsoever legitimate defense he or she may interpose.³²⁷ Thus, the right to speedy trial is deemed violated when the proceeding is attended by vexatious, capricious, and oppressive delays; or when unjustified postponements of the trial are asked for and secured; or when without cause or justifiable motive a long period of time is allowed to elapse without the party having one's case tried.³²⁸ Equally applicable is the balancing test used to determine whether a person has been denied the right to speedy trial, in which the conduct of both the prosecution and the defendant is weighed, and such factors as length of the delay, reason for the delay, the assertion or non-assertion of the right, and prejudice resulting from the delay, are considered.³²⁹

In *Villareal*, we held that the right to speedy trial of Ramos, Saruca, Escalona, and Adriano was violated, because the prosecution failed to comply with the Orders of the trial court requiring it to secure certified true copies of the records of the

³²⁷ *Almeda v. Office of the Ombudsman*, 791 Phil. 129, 143 (2016), citing *Coscolluela v. Sandiganbayan*, 714 Phil. 55 (2013); *Tan v. People of the Philippines*, 604 Phil. 68, 78-79 (2009).

³²⁸ *Almeda v. Office of the Ombudsman*, *supra*, citing *Gonzales v. Sandiganbayan*, 276 Phil. 323 (1991).

³²⁹ *Id.*; *Tan v. People of the Philippines*, *supra*, citing *Corpuz v. Sandiganbayan*, 484 Phil. 899 (2004).

case from the CA and there was no action at all on the part of the trial court for a period of almost seven years. We also pointed out that: “on 10 January 1992, the final amended Information was filed against Escalona, Ramos, Saruca, Ampil S. Fernandez, Adriano, Cabangon, Concepcion, and De Vera. On 29 November 1993, they were all arraigned. Unfortunately, the initial trial of the case did not commence until 28 March 2005 or almost 12 years after arraignment.”³³⁰

In the present petition, Villa insists that the right to speedy trial of Fernandez, Ampil, and Cabangon was not violated because the reasons for the delay were attributable to them, and they failed to timely invoke their right, unlike Ramos, Saruca, Escalona, and Adriano.

Contrary to Villa’s assertion, the CA’s ruling, as supported by the records, reveals that the following circumstances delayed the proceedings against Fernandez, Ampil, and Cabangon: (1) the prosecution failed to comply with the Order of the RTC Branch 130 dated 21 September 1995, reiterated in another Order dated 27 December 1995, requiring it to secure the records of Criminal Case No. [C-]38340 from the CA; (2) from Ampil’s and Cabangon’s arraignment on 29 November 1993 and Fernandez’s arraignment on 3 December 1993, the initial trial of the case commenced only on 28 March 2005, or more than 11 years later; (3) the RTC Branch 130 resolved Ampil’s motion to quash filed on 10 October 1994, and Fernandez’s omnibus motion filed on 19 October 1994, only on 8 March 2005 or more than 10 years after the motions were filed; and (4) the RTC Branch 130 resolved Fernandez, Ampil, and Cabangon’s Joint Motion to Dismiss filed on 5 December 2006, only on 9 January 2012, or more than five years after the motion was filed. Moreover, the RTC Branch 130, in its Order, stated the reasons for the delay of the proceedings before it, such as: (1) the dismissal from the service of Judge Hamoy; (2) Judge Sardillo’s heavy workload; (3) the CA’s order restraining the proceeding of the case; and (4) the Motion for Transfer of Trial Venue and the Motion for Inhibition filed by the prosecution. Clearly, the reasons for the delay of the proceedings against Fernandez, Ampil, and Cabangon are not attributable to them.

Moreover, the reasons for the delay in the proceedings against Ramos, Saruca, Escalona, and Adriano are similar to the reasons

³³⁰ 680 Phil. 527 (2012).

for the delay in the proceedings against Fernandez, Ampil, and Cabangon. In *Villareal*, we held that the prosecution's failure to comply with the Orders of the trial court and the inaction of the trial court for almost seven years amount to a violation of the right to speedy trial of Ramos, Saruca, Escalona, and Adriano. In this case, not only were the reasons for the delay in the proceedings against Ramos, Saruca, Escalona, and Adriano present as to Fernandez, Ampil, and Cabangon, but also more unjustifiable circumstances added delay to the proceedings against them, such as the RTC's delayed resolution of the motions to quash and motion to dismiss. Thus, there is more reason to apply our ruling in *Villareal* to Fernandez, Ampil, and Cabangon, and find that their right to speedy trial has been violated.

Furthermore, contrary to Villa's contention that Fernandez, Ampil, and Cabangon failed to invoke their right, Villa's petition before us states that: "[o]n 19 April 2005, Ampil filed a Manifestation vehemently objecting to the indefinite suspension of the pre-trial and trial proceedings of the case, ... On 09 May 2005, Fernandez and Cabangon filed their Manifestation posting no objection to the Manifestation and/or Motion for Resumption of Hearing." Moreover, Fernandez, Ampil, and Cabangon filed with RTC Branch 130 on 5 December 2006 the Joint Motion to Dismiss invoking violation of their right to speedy trial, which Motion to Dismiss was resolved only on 9 January 2012 or five years later. In *Almeda v. Office of the Ombudsman*,³³¹ we held that petitioner's letter and manifestations seeking the immediate resolution of her case cannot be considered late, and no waiver of her right to speedy trial or acquiescence may be attached to the same, as she was not required as a rule to follow up on her case; instead, it is the State's duty to expedite the same. Similarly in this case, we find that Fernandez, Ampil, and Cabangon timely invoked and did not waive their right to speedy trial.

Section 15. The privilege of the writ of habeas corpus shall not be suspended except in cases of invasion or rebellion, when the public safety requires it.

Section 16. All persons shall have the right to a speedy disposition of their cases before all judicial, quasi-judicial, or administrative bodies.

³³¹ 791 Phil. 129, 143 (2016).

Section 17. No person shall be compelled to be a witness against himself.

Section 18. (1) No person shall be detained solely by reason of his political beliefs and aspirations.

(2) No involuntary servitude in any form shall exist except as a punishment for a crime whereof the party shall have been duly convicted.

Section 19. (1) Excessive fines shall not be imposed, nor cruel, degrading or inhuman punishment inflicted. Neither shall death penalty be imposed, unless, for compelling reasons involving heinous crimes, the Congress hereafter provides for it. Any death penalty already imposed shall be reduced to *reclusion perpetua*.

(2) The employment of physical, psychological, or degrading punishment against any prisoner or detainee or the use of substandard or inadequate penal facilities under subhuman conditions shall be dealt with by law.

CORPUZ v. PEOPLE OF THE PHILIPPINES, G.R. No. 180016, April 29, 2014, 734 Phil. 352, was a petition for review on *certiorari*, which sought to reverse and set aside a decision and resolution of the Court of Appeals that affirmed, with modification, a decision of the Regional Trial Court finding Lito Corpuz guilty of the crime of estafa under Article 315(1)(b) of the Revised Penal Code. The Court *en banc* had occasion to discuss the continued validity of imposing, on persons convicted of crimes involving property, penalties pegged to the value of money and property in 1932, the year when the Revised Penal Code was enacted. Although the majority agreed that there was “a perceived injustice brought about by the range of penalties that the courts continue to impose on crimes against property committed today, based on the amount of damage measured by the value of money eighty years ago” the Court concluded that it could not modify the range of penalties because that would constitute judicial legislation. Justice Carpio **dissented** and discussed the **cruel punishment clause contained in this Section 19, Article III**:

I vote to grant the petition in part by declaring unconstitutional that portion of the first paragraph of Article 315 of Act No. 3815, as amended (Code), mandating the imposition of maximum penalty based on the amount of the fraud exceeding P22,000.

I do so on the ground that imposing the **maximum period of the penalty prescribed in Article 315 of the Code in such a manner, unadjusted to inflation, amounts to cruel punishment within the purview of Section 19(1), Article III of the Constitution.**

Cruel Punishment Clause Bans Odious and Disproportionate Punishments

The Cruel Punishment Clause first appeared in the English Bill of Rights of 1689 which mandated that “excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” The prohibition restrained the King from punishing convicts in ways inconsistent with human dignity.³³² Over a century later, the Americans adopted the Clause as the Eighth Amendment³³³ to their Bill of Rights of 1791. When the United States acquired these Islands in 1898 under the Treaty of Paris (following the defeat of Spain in the Spanish-American War), the Eighth Amendment was extended to this jurisdiction, first under President McKinley’s Instructions to the Second Philippine Commission and later under the Organic Acts passed by the US Congress.³³⁴ The Clause was retained as part of the Bill of Rights of succeeding Philippine Constitutions during the Commonwealth and post-independence eras.

Early on, the question arose whether the Clause serves only to limit the legislature’s power to inflict certain forms of punishment (e.g., torture) or whether it also prohibits the legislature from imposing punishments whose extent is excessive or disproportionate to the crime.³³⁵ It did not take long for the US Supreme Court to settle the debate. In reviewing a 1902 ruling of this Court sentencing an accused to 15 years of *cadena temporal* with fine and accessory penalties for falsification of a public document, the US Supreme Court set aside the judgment, holding that the punishment was “cruel in its excess of imprisonment and that which accompanies and follows the imprisonment.”³³⁶ In refusing to give a narrow interpretation to

³³² Thus, it is thought that “the principle it represents can be traced back to the Magna Carta.” *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

³³³ Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

³³⁴ The Philippine Bill Of 1902 and The Autonomy Act Of 1916.

³³⁵ For an exhaustive historical treatment of the subject, see *Furman v. Georgia*, 408 U.S. 238, 258-269 (1972) (Brennan, J., concurring).

³³⁶ *Weems v. US*, 217 U.S. 349, 377 (1910).

the Clause, that court observed that the “meaning and vitality of the Constitution have developed against narrow and restrictive construction.”³³⁷ Proportionality is now a staple analytical tool in the US jurisdiction to test claims of cruel punishment under penal statutes imposing the death penalty.³³⁸

Our own jurisprudence subscribe to such construction of the Cruel Punishment Clause. During the US colonial occupation, this Court was expectedly bound by the US Supreme Court’s interpretation of the Eighth Amendment as “the exact language of the Constitution of the United States [in the Eighth Amendment] is used in the Philippine Bill [of 1902]”³³⁹ and later, in the Autonomy Act of 1916. Hence, in its rulings interpreting the Clause, the Court read the provision as a limitation on the power of the colonial legislature not only on the form but also on the extent of punishments it can enact.³⁴⁰

During the Commonwealth period, the text of the Eighth Amendment was substantially adopted as Section 1(19), Article III of the 1935 Constitution. Owing in no small measure to the dearth of discussion on the meaning of the Clause during the deliberations of the 1934 Constitutional Convention, the Court saw no reason to deviate from its colonial-era jurisprudence.³⁴¹

The 1973 Constitution, replacing the 1935 Charter, retained the Clause as part of the Bill of Rights. The Court, however, had no occasion to pass upon any matter calling for the interpretation of the Clause until after the new Constitution, which carried over the Clause as Section 19(1) of Article III, took effect in February

³³⁷ *Id.* at 373.

³³⁸ In the sense that aggravating circumstances (qualifying a class of criminals for the death penalty) and mitigating circumstances (tempering sentences) must be legislated and carefully weighed. See *Furman v. Georgia*, 408 U.S. 238 (1972) (Douglas, J., concurring) and progeny, e.g., *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion); *Buchanan v. Angelone*, 522 U.S. 269 (1998).

³³⁹ *US v. Borromeo*, 23 Phil. 279, 286 (1923). In *Weems*, the US Supreme Court was more direct to the point: [T]he provision of the Philippine bill of rights, prohibiting the infliction of cruel and unusual punishment, was taken from the Constitution of the United States and must have the same meaning. *Weems v. US*, 217 U.S. 349, 367 (1910).

³⁴⁰ *US v. Borromeo*, 23 Phil. 279 (1923); *People v. Constantino*, G.R. No. L-19290, 11 January 1923 (Unrep.); *US v. Pico*, 18 Phil. 386 (1911). *Pico* and *Constantino* dwelt on the question of extent (severity) of the punishment as criterion for breaching the Clause.

....

³⁴¹ *People v. De la Cruz*, 92 Phil. 906, 908 (1953); *People v. Estoista*, 93 Phil. 647 (1953); *People v. Dionisio*, 131 Phil. 409 (1968). In his commentary on the 1935 Constitution, Dean Sinco considered the Clause as “forbid[ding] punishments greatly disproportionate to the offense.” Vicente Sinco, *Philippine Political Law* 674 (1954).

1987. In its post-1987 jurisprudence, the Court continued to rely on its rulings rendered under the 1935 Constitution.³⁴²

Clearly then, the proposition that the Cruel Punishment Clause limits the legislature's power to inflict certain forms of punishment only, allowing it to impose penalties disproportionate to the offense committed, runs counter to the grain of decades-old jurisprudence here and abroad. Such interpretation, which rests on a strict originalist reading of the Eighth Amendment of the US Constitution,³⁴³ never gained traction in the United States³⁴⁴ and it makes no sense to insist that such view applies in this jurisdiction. In the first place, the US Constitution, unlike our present Constitution, has essentially remained unchanged since its adoption in 1787 (save for the inclusion of the Bill of Rights in 1791 and other later piecemeal amendments). The 1987 Constitution is already the third in the 20th century, following the 1935 Commonwealth Constitution and the 1973 Martial Law Constitution. When the present Constitution was ratified in 1987, nearly two millennia after the US adopted the Eighth Amendment, the Filipino people who voted for its approval could not have intended Section 19(1) of Article III to embody the US originalists' interpretation of the Eighth Amendment. It is more consistent with reason and common sense to say that the Filipino people understood the Clause to embrace "cruel, degrading and inhuman" punishments in its 20th century, Filipino conception, grounded on their collective experiences and sense of humanity.

Indeed, the Filipino people who ratified the present Constitution could not have intended to limit the reach of the Cruel Punishment Clause to cover torture and other forms of odious punishments only because nearly four decades before the present Constitution took effect, the Philippine government joined the community of nations in approving the Universal Declaration of Human Rights (UDHR) in 1948 which bans "torture or ...

³⁴² *Baylosis v. Chavez*, 279 Phil. 448 (1991); *People v. Tongko*, 353 Phil. 37 (1998); and *Lim v. People*, 438 Phil. 744 (2002) all citing *People v. Estoista*, 93 Phil. 647 (1953) and *People v. De la Cruz*, 92 Phil. 906, 908 (1953) (for *Lim* and *Tongko*). Although these cases emphasize the "form only" school of thought, all relied on pre-1973 jurisprudence recognizing disproportionality as ground for breaching the Clause.

³⁴³ Adherents of this school of thought insist that the Eighth Amendment forbids only "those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted" in 1791. *Atkins v. Virginia*, 536 U.S. 304, 339 (2002) (Scalia, J., dissenting). See also D. Strauss, *The Living Constitution* (2010).

³⁴⁴ Consistent with its interpretative approach in *Weems*, the US Supreme Court considers the Eighth Amendment to "draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

cruel, inhuman or degrading treatment or punishment.”³⁴⁵ In 1986, shortly before the Constitution took effect, the Philippines ratified the International Covenant for Civil and Political Rights (ICCPR) containing an identically worded prohibition.³⁴⁶ These international norms formed part of Philippine law as generally accepted principles of international law³⁴⁷ and binding treaty obligation, respectively.³⁴⁸

Standards to Determine Impermissible Disproportionality

This Court has had occasion to devise standards of disproportionality to set the threshold for the breach of the Cruel Punishment Clause. Punishments whose extent “shock public sentiment and violate the judgment of reasonable people”³⁴⁹ or “[are] flagrantly and plainly oppressive”³⁵⁰ are considered violative of the Clause. Other than the cursory mention of these standards, however, we have made no attempt to explore their parameters to turn them into workable judicial tools to adjudicate claims of cruel punishment. Even if we did, it would have been well-nigh impossible to draw the line separating “cruel” from legitimate punishments simply because these standards are overly broad and highly subjective.³⁵¹ As a result, they ratchet

³⁴⁵ Art. 5 of the UDHR, approved by the UN General Assembly on 10 December 1948.

³⁴⁶ Art. 7 of the ICCPR, ratified by the Philippines on 23 October 1986.

³⁴⁷ Although the UDHR is a non-binding instrument, this Court treated the UDHR as embodying generally accepted principles of international law, hence, forming part of the law of the land under the 1935 Constitution’s Incorporation Clause (Art. II, Sec. 3, reiterated in Const. (1979) Art. II, Sec. 3). *Mejoff v. Director of Prisons*, 90 Phil. 70 (1951); *Borovsky v. Commissioner of Immigration*, 90 Phil. 107 (1951); *Chirskoff v. Commissioner of Immigration*, 90 Phil. 256 (1951). The provision was retained in Const., Art. II, Sec. 2.

³⁴⁸ These norms are buttressed by the Convention Against Torture and other Cruel, Inhuman, Degrading Treatment or Punishment which entered into force on 26 June 1987 and to which the Philippines acceded on 18 June 1986. The Convention binds states parties to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction” (Art. 2) and “prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture” as defined in the Convention (Art. 16).

³⁴⁹ *US v. Borromeo*, 23 Phil. 279, 286 (1923). A variation sets the standard at disproportionality which “shock[s] the moral sense of all reasonable men as to what is right and proper under the circumstances.” (*People v. De la Cruz*, 92 Phil. 906, 908 [1953], citing *Am. Jur.* 178) or which “shock[s] the moral sense of the community” (*People v. Estoista*, 93 Phil. 647, 655 [1953] [Res.] citing 24 C.J.S. 1187-1188).

³⁵⁰ *People v. Estoista*, 93 Phil. 647, 655 (1953) (Res.) citing 24 C.J.S. 1187-1188, cited in *People v. Dionisio*, 131 Phil. 409 (1968); *Baylosis v. Chavez*, 279 Phil. 448 (1991); *People v. Tongko*, 353 Phil. 37 (1998) and *Lim v. People*, 438 Phil. 749 (2002).

³⁵¹ The standard of public outrage (“shock[ing to the] public sentiment” or “shock[ing to the] moral sense of the community”) is no different from that which “shocks the most

the bar for the breach of the Clause to unreasonably high levels. Unsurprisingly, no litigant has successfully mounted a challenge against statutes for violation of the Clause.

Impermissible disproportionality is better gauged by testing punishments against the following alternative parameters: (1) whether more serious crimes are equally or less severely punished; or (2) whether the punishment reasonably advances the state interest behind the penalty.³⁵² These parameters strike the proper balance of providing practical tools of adjudication to weigh claims of cruel punishment while at the same time affording Congress discretionary leeway to craft penal statutes addressing societal evils.

Value-based, Maximum Penalty Calibration Under Article 315 Disproportionate to the Crime of Estafa

More Serious Crimes Equally Punished as Estafa

Article 315 of the Code calibrates the maximum penalty for estafa on an escalated basis once a threshold amount of fraud is crossed (P22,000). The penalty escalates on a ratio of one year imprisonment for every P10,000 fraud, with 20 years as ceiling. Accordingly, for a fraud of P98,000, the trial court sentenced petitioner to a maximum term of 15 years.

This punishment, however, is within the range of the penalty imposable on petitioner under the Code had he “killed the [private complainant] jeweler in an angry confrontation.” The same penalty would also be within the range prescribed by the Code had petitioner kidnapped the private complainant and kept him detained for three days. By any objective standard of comparison, crimes resulting in the deprivation of life or liberty are unquestionably more serious than crimes resulting in the deprivation of property.³⁵³ By imposing a level of punishment

fundamental instincts of civilized man.” *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 473 [1947] (Burton, J., dissenting) which “[invites] the danger of subjective judgment ... acute[ly].” *Furman v. Georgia*, 408 U.S. 238, 279 (1972), (Brennan, J., concurring).

³⁵² Save for some modifications, these are drawn from the “principles” crafted by Mr. Justice William J. Brennan, Jr. in his concurring opinion in *Furman v. Georgia*, 408 U.S. 238, 274-277, 279-282 (1972), to aid in the interpretation of the Eighth Amendment.

³⁵³ This merely reflects the ordering of rights under our constitutional system with the right to life and liberty occupying a higher tier of protection than the right to property (thus claims of infringement of each right are subjected to different levels of scrutiny).

for estafa equal to more serious crimes such as homicide and kidnapping, Article 315's system of calibrating the maximum penalty based on the amount of fraud is plainly arbitrary and disproportionate to the severity of the crime punished.

Maximum Penalty for Estafa Unrelated to its Purpose

The felonies defined and penalized under Title 10, Book Two of the Code, as amended, as crimes against property, including estafa under Article 315, are legislative measures safeguarding the right to property of private individuals and the state. The penalties of imprisonment and/or fine attached to each crime are meant to deter and incapacitate criminals from infringing such right. The Cruel Punishment Clause ensures that the state interest is advanced without sacrificing proportionality between the crime and punishment. In short, the Clause acts as constitutional brake whenever Congress enacts punishment whose severity is gratuitous, wholly unconnected to the purpose of the law.

Of the more than two dozen crimes originally defined by Congress in Title 10, Book Two of the Code, only two crimes, estafa and theft, consider the amount of the property involved to calibrate the maximum range of the penalty. All the rest either impose penalties irrespective of the amount of the property involved or provide a threshold amount based on the property involved for the imposition of a straight (as opposed to calibrated) penalty. Crucially, the calibration does not take into account the real value of the peso.

Admittedly, Congress has ample discretion to fix penalties in the Code according to its best light. At the time the Code took effect in 1932, when US\$1.00 was equivalent to P1.00, the system of calibrated penalty under Article 315 based on the amount appropriated arguably stayed clear of the Cruel Punishment Clause. After 82 years, however, when the real value of the peso has depreciated substantially with the current rate of US\$1.00 to P40.00, an estafa of P142,000 in 1932, meriting a 20-year penalty, should today require P5.6 million to merit a 20-year penalty. Put differently, P142,000 in 1932 is worth only P3,550 today, which should merit only a maximum penalty of six months and one day to two years and four months imprisonment. The

See *Ermita-Malate Hotel & Motel Operations, Ass'n., Inc. v. Hon. City Mayor of Manila*, 127 Phil. 306, 324 (1967).

enormous disparity in the values of fraud between these points in time (exceeding 100%) and the imposition of the same level of maximum punishment in both instances remove any semblance of reasonability in the manner by which the punishment is derived and its connection to the purpose of the law. The arbitrary differential treatment of estafa (and theft) crosses the line separating the exercise of valid legislative discretion and the Cruel Punishment Clause.

This conclusion stands notwithstanding our holding in *People v. Tongko*³⁵⁴ and *Lim v. People*³⁵⁵ that the system of calculating the maximum penalty under Article 315 does not offend the Cruel Punishment Clause. Those cases involved paragraph 2(d) of Article 315, as amended by Presidential Decree No. 818 (PD 818), penalizing as estafa the issuance of unfunded or underfunded checks (not paragraph 1(b), the provision violated by petitioner). Our conclusion in those cases was grounded on the fact that criminalizing the issuance of bouncing checks reasonably advances the state interest behind the law, that is, ensuring the stability of commercial and banking transactions. Such state interest is not implicated here. The clause in Article 315 petitioner violated, penalizing the failure to return property delivered in trust for disposition, secures the entirely different government interest of protecting private property. To consider *Tongko* and *Lim* as binding precedents, precluding a different conclusion, is to expand their *ratio decidendi* beyond the facts presented in those cases.

Penalty Imposable Under Article 315

The breach of the Cruel Punishment Clause by Article 315's system of calculating the maximum penalty for estafa in excess of P22,000 means that only the minimum term of imprisonment provided under Article 315 for such crime can be imposed on petitioner, namely, *prision correccional* in its maximum period. This level of penalty is covered by the Indeterminate Sentence Law which renders the next lower penalty, namely, *prision correccional* in its medium period, as the minimum of the sentence. The entirety of the sentence will be anywhere within the range of these maximum and minimum penalties. Hence, petitioner's term of imprisonment should be modified to three (3) years, one (1) month and eleven (11) days of *prision correccional*,

³⁵⁴ 353 Phil. 37 (1998).

³⁵⁵ 438 Phil. 744 (2002).

as minimum, to four (4) years, nine (9) months and eleven (11) days of *prision correccional*, as maximum.

The same range of penalty applies to all other persons found guilty of violating Article 315. Thus, whether an estafa involves money or property worth P22,000 or P1 million, the minimum term of imprisonment under Article 315 - *prision correccional* in its maximum period - will be imposed on the accused.

The penalty for the felony of syndicated estafa under Presidential Decree No. 1689 (PD 1689) is, however, an altogether different matter. PD 1689 amended Article 315 of the Code by adding a new mode of committing estafa and imposing the penalty of “life imprisonment to death” or “*reclusion temporal* to *reclusion perpetua* if the amount of the fraud exceeds P100,000.” Unlike Article 315, PD 1689 does not calibrate the duration of the maximum range of imprisonment on a fixed time-to-peso ratio (1 year for every P10,000 in excess of P22,000), but rather provides a straight maximum penalty of death or *reclusion perpetua*. This places PD 1689 outside of the ambit of the proscription of the Cruel Punishment Clause on the imposition of prison terms calibrated based on the value of the money or property swindled, unadjusted to inflation.

Effect of Ruling on Convicts Serving Time under Article 315

This opinion relieves petitioner of the harsh effect of the penalty for estafa under Article 315 by lowering the entire range of imprisonment and monetary liability of petitioner or imposing only the minimum range of imprisonment, respectively. It is akin to our 1956 ruling in *People v. Hernandez*³⁵⁶ decriminalizing rebellion complexed with ordinary crimes to the benefit not only of the accused in that case but also of those already serving time for rebellion complexed with other crimes.³⁵⁷ Hernandez and today’s ruling amount to laws favoring convicts, which, under Article 22 of the Code, have retroactive effect. Convicts benefitting from such ruling and falling within the terms of Article 22 may invoke it in their favor and, if proper, avail of remedies to secure their release from detention.

³⁵⁶ *People v. Hernandez*, 99 Phil. 515 (1956); *People v. Lava*, 138 Phil. 77 (1969).

³⁵⁷ *Gumabon v. Director of the Bureau of Prisons*, 147 Phil. 362 (1971).

Conclusion not Precluded by Article 5 of the Code

Testing Article 315 against the Cruel Punishment Clause under the standards espoused in this opinion does not make a dead letter law of the second paragraph of Article 5 of the Code. Such provision, mandating courts to recommend executive clemency -

when a strict enforcement of the provisions of th[e] Code would result in the imposition of a clearly excessive penalty, taking into consideration the degree of malice and the injury caused by the offense.

operates within the realm of criminal law, requiring fact-based judicial evaluation on the degree of malice of the accused and the injury sustained by the victim or his heirs. The Cruel Punishment Clause, on the other hand, is the constitutional yardstick against which penal statutes are measured using relevant standards unrelated to questions of criminal malice and injury. Far from overlapping, the conclusions yielded by analyses under these two rules are distinct - a penal statute may well avoid the taint of unconstitutionality under the Clause but, applying such statute under peculiar set of facts, may justify a recommendation for the grant of clemency.

Legislative Review of Article 315 and Related Provisions Overdue

The constitutional infirmity not only of Article 315 but also of related provisions in the Code calls for a comprehensive review by Congress of such 82-year old legislation. Pending such congressional review, this Court should decline to enforce the incremental penalty in Article 315 because such continued enforcement of the incremental penalty violates the Cruel Punishment Clause.

Section 20. No person shall be imprisoned for debt or non-payment of a poll tax.

Section 21. No person shall be twice put in jeopardy of punishment for the same offense. If an act is punished by a law and an ordinance, conviction or acquittal under either shall constitute a bar to another prosecution for the same act.

The constitutional prohibition on **double jeopardy** was discussed by Justice Carpio, for the Third Division of the Court, in **LONEY v. PEOPLE OF THE PHILIPPINES**, G.R. No. 152644, February 10, 2006, 517 Phil. 408. The case was a petition for review of the decision and resolution of the Court of Appeals, which affirmed the ruling of the Regional Trial Court in a suit to quash Informations filed against petitioners. The Court denied the petition, affirming the Court of Appeals:

The Facts

Petitioners John Eric Loney, Steven Paul Reid, and Pedro B. Hernandez are the President and Chief Executive Officer, Senior Manager, and Resident Manager for Mining Operations, respectively, of Marcopper Mining Corporation (Marcopper), a corporation engaged in mining in the province of Marinduque.

Marcopper had been storing tailings from its operations in a pit in Mt. Tapian, Marinduque. At the base of the pit ran a drainage tunnel leading to the Boac and Makalupnit³⁵⁸ rivers. It appears that Marcopper had placed a concrete plug at the tunnel's end. On 24 March 1994, tailings gushed out of or near the tunnel's end. In a few days, the Mt. Tapian pit had discharged millions of tons of tailings into the Boac and Makalupnit rivers.

In August 1996, the Department of Justice separately charged petitioners in the Municipal Trial Court of Boac, Marinduque (MTC) with violation of Article 91(B), sub-paragraphs 5 and 6 of Presidential Decree No. 1067 or the Water Code of the Philippines (PD 1067), Section 8 of Presidential Decree No. 984 or the National Pollution Control Decree of 1976 (PD 984), Section 108 of Republic Act No. 7942 or the Philippine Mining Act of 1995 (RA 7942), and Article 365 of the Revised Penal Code (RPC) for Reckless Imprudence Resulting in Damage to Property.

Petitioners moved to quash the Informations on the following grounds: (1) the Informations were “duplicitous” as the Department of Justice charged more than one offense for a single act; (2) petitioners John Eric Loney and Steven Paul Reid were not yet officers of Marcopper when the incident subject of the Informations took place; and (3) the Informations contain allegations which constitute legal excuse or justification.

³⁵⁸ Referred to as the Makalupnit River in the decisions of the lower courts.

The Ruling of the MTC

... (O)n petitioners' motion, the MTC issued a Consolidated Order on 28 April 1997 (Consolidated Order), granting partial reconsideration (of) its Joint Order and quashing the Informations for violation of PD 1067 and PD 984. The MTC maintained the Informations for violation of RA 7942 and Article 365 of the RPC. The MTC held:

[T]he 12 Informations have common allegations of pollutants pointing to "mine tailings" which were precipitately discharged into the Makulapnit and Boac Rivers due to breach caused on the Tapan drainage/tunnel due to negligence or failure to institute adequate measures to prevent pollution and siltation of the Makulapnit and Boac River systems, the very term and condition required to be undertaken under the Environmental Compliance Certificate issued on April 1, 1990.

The allegations in the Informations point to same set [sic] of evidence required to prove the single fact of pollution constituting violation of the Water Code and the Pollution Law which are the same set of evidence necessary to prove the same single fact of pollution, in proving the elements constituting violation of the conditions of ECC, issued pursuant to the Philippine Mining Act. In both instances, the terms and conditions of the Environmental Compliance Certificate were allegedly violated. In other words, the same set of evidence is required in proving violations of the three (3) special laws.

After carefully analyzing and weighing the contending arguments of the parties and after taking into consideration the applicable laws and jurisprudence, the Court is convinced that as far as the three (3) aforesaid laws are concerned, only the Information for [v]iolation of Philippine Mining Act should be maintained. In other words, the Informations for [v]iolation of Anti-Pollution Law (PD 984) and the Water Code (PD 1067) should be dismissed/quashed because the elements constituting the aforesaid violations are absorbed by the same elements which constitute violation of the Philippine Mining Act (RA 7942).

Therefore, ... Criminal Case Nos. 96-44, 96-45 and 96-46 for [v]iolation of the Water Code; and Criminal Case Nos. 96-47, 96-48 and 96-49 for [v]iolation of the Anti-Pollution Law ... are hereby DISMISSED or QUASHED and Criminal Case Nos. 96-50, 96-51 and 96-52 for [v]iolation of the Philippine Mining Act are hereby retained to be tried on the merits.

The Information for [v]iolation of Article 365 of the Revised Penal Code should also be maintained and heard in a full blown trial because the common accusation therein is reckless imprudence resulting to [sic] damage to property. It is the damage to property which the law punishes not the negligent act of polluting the water system. The prosecution for the [v]iolation of Philippine Mining Act is not a bar to the prosecution for reckless imprudence resulting to [sic] damage to property.

... Petitioners subsequently filed a petition for *certiorari* with the Regional Trial Court, Boac, Marinduque, assailing that portion of the Consolidated Order maintaining the Informations for violation of RA 7942. Petitioners' petition was raffled to Branch 94. For its part, public respondent filed an ordinary appeal with the same court assailing that portion of the Consolidated Order quashing the Informations for violation of PD 1067 and PD 984. Public respondent's appeal was raffled to Branch 38. On public respondent's motion, Branch 38 ordered public respondent's appeal consolidated with petitioners' petition in Branch 94.

The Ruling of Branch 94

In its Resolution of 20 March 1998, Branch 94 granted public respondent's appeal but denied petitioners' petition. Branch 94 set aside the Consolidated Order in so far as it quashed the Informations for violation of PD 1067 and PD 984 and ordered those charges reinstated. Branch 94 affirmed the Consolidated Order in all other respects. Branch 94 held:

After a careful perusal of the laws concerned, this court is of the opinion that there can be no absorption by one offense of the three other offenses, as [the] acts penalized by these laws are separate and distinct from each other. The elements of proving each violation are not the same with each other. Concededly, the single act of dumping mine tailings which resulted in the pollution of the Makulapnit and Boac rivers was the basis for the information[s] filed against the accused each charging a distinct offense. But it is also a well-established rule in this jurisdiction that -

“A single act may offend against two or more entirely distinct and unrelated provisions of law, and if one provision requires proof of an additional fact or element which the other does not, an acquittal or conviction or a dismissal of the information under one does not bar

prosecution under the other. ...”

...

[T]he different laws involve cannot absorb one another as the elements of each crime are different from one another. Each of these laws require [sic] proof of an additional fact or element which the other does not although they stemmed from a single act.

Petitioners filed a petition for *certiorari* with the Court of Appeals alleging that Branch 94 acted with grave abuse of discretion because (1) the Informations for violation of PD 1067, PD 984, RA 7942 and Article 365 of the RPC “proceed from and are based on a single act or incident of polluting the Boac and Makalupnit rivers thru dumping of mine tailings” and (2) the duplicitous nature of the Informations contravenes the ruling in *People v. Relova*.³⁵⁹ Petitioners further contended that since the acts complained of in the charges for violation of PD 1067, PD 984, and RA 7942 are “the very same acts complained of” in the charge for violation of Article 365 of the RPC, the latter absorbs the former. Hence, petitioners should only be prosecuted for violation of Article 365 of the RPC.

The Ruling of the Court of Appeals

In its Decision of 5 November 2001, the Court of Appeals affirmed Branch 94’s ruling. The appellate court held:

The records of the case disclose that petitioners filed a motion to quash the aforementioned Informations for being duplicitous in nature. Section 3 of Rule 117 of the Revised Rules of Court specifically provides the grounds upon which an information may be quashed. ... [D]uplicity of Informations is not among those included in ... [Section 3, Rule 117]. ...

We now go to petitioners’ claim that the resolution of the public respondent contravened the doctrine laid down in *People v. Relova* for being violative of their right against multiple prosecutions.

In the said case, the Supreme Court found the People’s argument with respect to the variances in the *mens rea* of the two offenses being charged to be correct. The Court, however, decided the case in the context of the second sentence of Article IV (22) of the 1973 Constitution (now under Section

³⁵⁹ No. L-45129, 6 March 1987, 148 SCRA 292.

21 of Article III of the 1987 Constitution), rather than the first sentence of the same section. ...

[T]he doctrine laid down in the *Relova* case does not squarely apply to the case at bench since the Informations filed against the petitioners are for violation of four separate and distinct laws which are national in character. ...

This Court firmly agrees in the public respondent's understanding that the laws by which the petitioners have been [charged] could not possibly absorb one another as the elements of each crime are different. Each of these laws require [sic] proof of an additional fact or element which the other does not, although they stemmed from a single act. ...

[T]his Court finds that there is not even the slightest indicia of evidence that would give rise to any suspicion that public respondent acted with grave abuse of discretion amounting to excess or lack of jurisdiction in reversing the Municipal Trial Court's quashal of the Informations against the petitioners for violation of P.D. 1067 and P.D. 984. This Court equally finds no error in the trial court's denial of the petitioner's motion to quash R.A. 7942 and Article 365 of the Revised Penal Code.

Petitioners sought reconsideration but the Court of Appeals denied their motion in its Resolution of 14 March 2002...

The Issues

The petition raises these issues:

- (1) Whether all the charges filed against petitioners except one should be quashed for duplicity of charges and only the charge for Reckless Imprudence Resulting in Damage to Property should stand; and
- (2) Whether Branch 94's ruling, as affirmed by the Court of Appeals, contravenes *People v. Relova*.

The Ruling of the Court

The petition has no merit.

No Duplicity of Charges in the Present Case

Duplicity of charges simply means a single complaint or information charges more than one offense, as Section 13 of Rule 110[20] of the 1985 Rules of Criminal Procedure clearly states:

Duplicity of offense. - A complaint or information must charge but one offense, except only in those cases in which existing laws prescribe a single punishment for various offenses.

In short, there is duplicity (or multiplicity) of charges when a single Information charges more than one offense.³⁶⁰

Under Section 3(e), Rule 117 of the 1985 Rules of Criminal Procedure, duplicity of offenses in a single information is a ground to quash the Information. The Rules prohibit the filing of such Information to avoid confusing the accused in preparing his defense.³⁶¹ Here, however, the prosecution charged each petitioner with four offenses, with each Information charging only one offense. Thus, petitioners erroneously invoke duplicity of charges as a ground to quash the Informations. On this score alone, the petition deserves outright denial.

The Filing of Several Charges is Proper

Petitioners contend that they should be charged with one offense only - Reckless Imprudence Resulting in Damage to Property - because (1) all the charges filed against them “proceed from and are based on a single act or incident of polluting the Boac and Makalupnit rivers thru dumping of mine tailings” and (2) the charge for violation of Article 365 of the RPC “absorbs” the other charges since the element of “lack of necessary or adequate (precaution), negligence, recklessness and imprudence” is common among them.

The contention has no merit.

As early as the start of the last century, this Court had ruled that a single act or incident might offend against two or more entirely distinct and unrelated provisions of law thus justifying the prosecution of the accused for more than one offense.³⁶² The only limit to this rule is the Constitutional prohibition that no person shall be twice put in jeopardy of punishment for “the same offense.” In *People v. Doriquez*,³⁶³ we held that two (or more) offenses arising from the same act are not “the same” -

³⁶⁰ See *Reodica v. CA*, 354 Phil. 90 (1998).

³⁶¹ *People v. Ferrer*, 101 Phil. 234 (1957).

³⁶² See *Nierras v. Dacuyucuy*, G.R. Nos. 59568-76, 11 January 1990, 181 SCRA 1; *People v. Doriquez*, 133 Phil. 295 (1968); *People v. Alvarez*, 45 Phil. 472 (1923); *People v. Cabrera*, 43 Phil. 64 (1922); *United States v. Capurro*, 7 Phil. 24 (1906).

³⁶³ 133 Phil. 295 (1968).

... if one provision [of law] requires proof of an additional fact or element which the other does not, ... Phrased otherwise, where two different laws (or articles of the same code) define two crimes, prior jeopardy as to one of them is no obstacle to a prosecution of the other, although both offenses arise from the same facts, if each crime involves some important act which is not an essential element of the other...

Here, double jeopardy is not at issue because not all of its elements are present.³⁶⁴ However, for the limited purpose of controverting petitioners' claim that they should be charged with one offense only, we quote with approval Branch 94's comparative analysis of PD 1067, PD 984, RA 7942, and Article 365 of the RPC showing that in each of these laws on which petitioners were charged, there is one essential element not required of the others, thus:

In P.D. 1067 (Philippines Water Code), the additional element to be established is the dumping of mine tailings into the Makulapnit River and the entire Boac River System without prior permit from the authorities concerned. The gravamen of the offense here is the absence of the proper permit to dump said mine tailings. This element is not indispensable in the prosecution for violation of PD 984 (Anti-Pollution Law), [RA] 7942 (Philippine Mining Act) and Art. 365 of the Revised Penal Code. One can be validly prosecuted for violating the Water Code even in the absence of actual pollution, or even [if] it has complied with the terms of its Environmental Compliance Certificate, or further, even [if] it did take the necessary precautions to prevent damage to property.

In P.D. 984 (Anti-Pollution Law), the additional fact that must be proved is the existence of actual pollution. The gravamen is the pollution itself. In the absence of any pollution, the accused must be exonerated under this law although there was unauthorized dumping of mine tailings or lack of precaution on its part to prevent damage to property.

In R.A. 7942 (Philippine Mining Act), the additional fact

³⁶⁴ Under Sec. 7, Rule 117 of the 1985 Rules of Criminal Procedure (substantially reiterated in Sec. 7, Rule 117 of the Revised Rules), the following requisites must obtain for the accused to claim protection against double jeopardy: (1) a valid complaint or Information or other formal charge sufficient in form and substance to sustain a conviction, (2) a competent court; (3) the defendant had pleaded to the charge; (4) the defendant had been convicted, or acquitted, or the case against him dismissed or otherwise terminated without his express consent; (5) the second offense charged is the same as the first, or is an attempt to commit the same or a frustration thereof, or that the second offense necessarily includes or is necessarily included in the offense or information. Only the first three elements are present in this case.

that must be established is the willful violation and gross neglect on the part of the accused to abide by the terms and conditions of the Environmental Compliance Certificate, particularly that Marcopper should ensure the containment of run-off and silt materials from reaching the Mogpog and Boac Rivers. If there was no violation or neglect, and that the accused satisfactorily proved [sic] that Marcopper had done everything to ensure containment of the run-off and silt materials, they will not be liable. It does not follow, however, that they cannot be prosecuted under the Water Code, Anti-Pollution Law and the Revised Penal Code because violation of the Environmental Compliance Certificate is not an essential element of these laws.

On the other hand, the additional element that must be established in Art. 365 of the Revised Penal Code is the lack of necessary or adequate precaution, negligence, recklessness and imprudence on the part of the accused to prevent damage to property. This element is not required under the previous laws. Unquestionably, it is different from dumping of mine tailings without permit, or causing pollution to the Boac river system, much more from violation or neglect to abide by the terms of the Environmental Compliance Certificate. Moreover, the offenses punished by special law are *mal[a] prohibita* in contrast with those punished by the Revised Penal Code which are *mala in se*.

Consequently, the filing of the multiple charges against petitioners, although based on the same incident, is consistent with settled doctrine.

On petitioners' claim that the charge for violation of Article 365 of the RPC "absorbs" the charges for violation of PD 1067, PD 984, and RA 7942, suffice it to say that a *mala in se* felony (such as Reckless Imprudence Resulting in Damage to Property) cannot absorb *mala prohibita* crimes (such as those violating PD 1067, PD 984, and RA 7942). What makes the former a felony is criminal intent (*dolo*) or negligence (*culpa*); what makes the latter crimes are the special laws enacting them.

People v. Relova not in Point

Petitioners reiterate their contention in the Court of Appeals that their prosecution contravenes this Court's ruling in *People v. Relova*. In particular, petitioners cite the Court's statement in *Relova* that the law seeks to prevent harassment of the accused

by “multiple prosecutions for offenses which though different from one another are nonetheless each constituted by a common set or overlapping sets of technical elements.”

This contention is also without merit.

The issue in *Relova* is whether the act of the Batangas Acting City Fiscal in charging one Manuel Opulencia (Opulencia) with theft of electric power under the RPC, after the latter had been acquitted of violating a City Ordinance penalizing the unauthorized installation of electrical wiring, violated Opulencia’s right against double jeopardy. We held that it did, not because the offenses punished by those two laws were the same but because the act giving rise to the charges was punished by an ordinance and a national statute, thus falling within the proscription against multiple prosecutions for the same act under the second sentence in Section 22, Article IV of the 1973 Constitution, now **Section 21, Article III of the 1987 Constitution**. We held:

The petitioner concludes that:

The unauthorized installation punished by the ordinance [of Batangas City] is not the same as theft of electricity [under the Revised Penal Code]; that the second offense is not an attempt to commit the first or a frustration thereof and that the second offense is not necessarily included in the offense charged in the first information.

The above argument[] made by the petitioner [is] of course correct. This is clear both from the express terms of the constitutional provision involved... and from our case law on this point. The basic difficulty with the petitioner’s position is that it must be examined, not under the terms of the first sentence of Article IV (22) of the 1973 Constitution, but rather under the second sentence of the same section. The first sentence of Article IV (22) sets forth the general rule: the constitutional protection against double jeopardy is not available where the second prosecution is for an offense that is different from the offense charged in the first or prior prosecution, although both the first and second offenses may be based upon the same act or set of acts. The second sentence of Article IV (22) embodies an exception to the general proposition: the constitutional protection, against double jeopardy is available although the prior offense charged under an ordinance be different from the offense charged subsequently under a national statute such as the Revised Penal Code, provided that both offenses spring from the same act or set of acts. ...³⁶⁵

³⁶⁵ No. L-45129, 6 March 1987, 148 SCRA 292, 301-302.

Thus, *Relova* is no authority for petitioners' claim against multiple prosecutions based on a single act not only because the question of double jeopardy is not at issue here, but also because, as the Court of Appeals held, petitioners are being prosecuted for an act or incident punished by four national statutes and not by an ordinance and a national statute. In short, petitioners, if ever, fall under the first sentence of Section 21, Article III which prohibits multiple prosecution for the same offense, and not, as in *Relova*, for offenses arising from the same incident.

It was in **IVLER v. MODESTO-SAN PEDRO**, G.R. No. 172716, November 17, 2010, 649 Phil. 478, where Justice Carpio, for the Second Division, discussed in-depth the **double jeopardy** clause in relation to quasi-offenses. **Ivler** was a petition for review of the orders of the Regional Trial Court affirming *sub-silencio* a lower court's ruling finding inapplicable the double jeopardy clause to bar a second prosecution for reckless imprudence resulting in homicide and damage to property, despite the accused's previous conviction for reckless imprudence resulting in slight physical injuries arising from the same incident grounding the second prosecution. Justice Carpio granted the petition, reversed the orders of the RTC and dismissed the Informations against Jason Ivler on the ground of **double jeopardy**:

The Facts

Following a vehicular collision in August 2004, petitioner Jason Ivler (petitioner) was charged before the Metropolitan Trial Court of Pasig City, Branch 71 (MeTC), with two separate offenses: (1) Reckless Imprudence Resulting in Slight Physical Injuries (Criminal Case No. 82367) for injuries sustained by respondent Evangeline L. Ponce (respondent Ponce); and (2) Reckless Imprudence Resulting in Homicide and Damage to Property (Criminal Case No. 82366) for the death of respondent Ponce's husband Nestor C. Ponce and damage to the spouses Ponce's vehicle. Petitioner posted bail for his temporary release in both cases.

On 7 September 2004, petitioner pleaded guilty to the charge in Criminal Case No. 82367 and was meted out the penalty of public censure. Invoking this conviction, petitioner moved to quash the Information in Criminal Case No. 82366 for placing him in jeopardy of second punishment for the same offense of reckless imprudence.

The MeTC refused quashal, finding no identity of offenses in the two cases.

After unsuccessfully seeking reconsideration, petitioner elevated the matter to the Regional Trial Court of Pasig City, Branch 157 (RTC), in a petition for *certiorari* (S.C.A. No. 2803). Meanwhile, petitioner sought from the MeTC the suspension of proceedings in Criminal Case No. 82366, including the arraignment on 17 May 2005, invoking S.C.A. No. 2803 as a prejudicial question. Without acting on petitioner's motion, the MeTC proceeded with the arraignment and, because of petitioner's absence, cancelled his bail and ordered his arrest. Seven days later, the MeTC issued a resolution denying petitioner's motion to suspend proceedings and postponing his arraignment until after his arrest.

Petitioner sought reconsideration but as of the filing of this petition, the motion remained unresolved.

Relying on the arrest order against petitioner, respondent Ponce sought in the RTC the dismissal of S.C.A. No. 2803 for petitioner's loss of standing to maintain the suit. Petitioner contested the motion.

The Ruling of the Trial Court

In an Order dated 2 February 2006, the RTC dismissed S.C.A. No. 2803, narrowly grounding its ruling on petitioner's forfeiture of standing to maintain S.C.A. No. 2803 arising from the MeTC's order to arrest petitioner for his non-appearance at the arraignment in Criminal Case No. 82366. Thus, without reaching the merits of S.C.A. No. 2803, the RTC effectively affirmed the MeTC. Petitioner sought reconsideration but this proved unavailing.

Hence, this petition.

Petitioner denies absconding. He explains that his petition in S.C.A. No. 2803 constrained him to forego participation in the proceedings in Criminal Case No. 82366. Petitioner distinguishes his case from the line of jurisprudence sanctioning dismissal of appeals for absconding appellants because his appeal before the RTC was a special civil action seeking a pre-trial relief, not a post-trial appeal of a judgment of conviction.

Petitioner laments the RTC's failure to reach the merits of his petition in S.C.A. 2803. Invoking jurisprudence, petitioner argues that his constitutional right not to be placed twice in jeopardy of punishment for the same offense bars his prosecution in Criminal Case No. 82366, having been previously convicted in Criminal Case No. 82367 for the same offense of reckless imprudence charged in Criminal Case No. 82366. Petitioner submits that the multiple consequences of such crime are material only to determine his penalty.

Respondent Ponce finds no reason for the Court to disturb the RTC's decision forfeiting petitioner's standing to maintain his petition in S.C.A. 2803. On the merits, respondent Ponce calls the Court's attention to jurisprudence holding that light offenses (e.g. slight physical injuries) cannot be complexed under Article 48 of the Revised Penal Code with grave or less grave felonies (e.g. homicide). Hence, the prosecution was obliged to separate the charge in Criminal Case No. 82366 for the slight physical injuries from Criminal Case No. 82367 for the homicide and damage to property.

In the Resolution of 6 June 2007, we granted the Office of the Solicitor General's motion not to file a comment to the petition as the public respondent judge is merely a nominal party and private respondent is represented by counsel.

The Issues

Two questions are presented for resolution: (1) whether petitioner forfeited his standing to seek relief in S.C.A. 2803 when the MeTC ordered his arrest following his non-appearance at the arraignment in Criminal Case No. 82366; and (2) if in the negative, whether petitioner's constitutional right under the Double Jeopardy Clause bars further proceedings in Criminal Case No. 82366.

The Ruling of the Court

We hold that (1) petitioner's non-appearance at the arraignment in Criminal Case No. 82366 did not divest him of personality to maintain the petition in S.C.A. 2803; and (2) the protection afforded by the Constitution shielding petitioner from prosecutions placing him in jeopardy of second punishment for the same offense bars further proceedings in Criminal Case No. 82366.

Having ruled in **Ivler** that petitioner's non-appearance at the arraignment in Criminal Case No. 82366 did not divest him of standing to maintain the petition in S.C.A. 2803, Justice Carpio then proceeded to discuss this **"negative constitutional right:"**

**Petitioner's Conviction in Criminal Case No.
82367 Bars his Prosecution in Criminal Case
No. 82366**

The accused's negative constitutional right not to be "twice put in jeopardy of punishment for the same offense" protects him from, among others, post-conviction prosecution for the same offense, with the prior verdict rendered by a court of competent jurisdiction upon a valid information.³⁶⁶ It is not disputed that petitioner's conviction in Criminal Case No. 82367 was rendered by a court of competent jurisdiction upon a valid charge. Thus, the case turns on the question whether Criminal Case No. 82366 and Criminal Case No. 82367 involve the "same offense." Petitioner adopts the affirmative view, submitting that the two cases concern the same offense of reckless imprudence. The MeTC ruled otherwise, finding that Reckless Imprudence Resulting in Slight Physical Injuries is an entirely separate offense from Reckless Imprudence Resulting in Homicide and Damage to Property "as the [latter] requires proof of an additional fact which the other does not."

We find for petitioner.

**Reckless Imprudence is a Single Crime, its
Consequences on Persons and Property are
Material Only to Determine the Penalty**

The two charges against petitioner, arising from the same facts, were prosecuted under the same provision of the Revised Penal Code, as amended, namely, Article 365 defining and penalizing quasi-offenses. The text of the provision reads:

Imprudence and negligence. - Any person who, by reckless imprudence, shall commit any act which, had it been intentional, would constitute a grave felony, shall suffer the penalty of *arresto mayor* in its maximum period to *prision*

³⁶⁶ Sec. 7, Rule 117 Revised Rules of Criminal Procedure. The right has, of course, broader scope to cover not only prior guilty pleas but also acquittals and unconsented dismissals to bar prosecutions for the same, lesser or graver offenses covered in the initial proceedings.

correccional in its medium period; if it would have constituted a less grave felony, the penalty of *arresto mayor* in its minimum and medium periods shall be imposed; if it would have constituted a light felony, the penalty of *arresto menor* in its maximum period shall be imposed.

Any person who, by simple imprudence or negligence, shall commit an act which would otherwise constitute a grave felony, shall suffer the penalty of *arresto mayor* in its medium and maximum periods; if it would have constituted a less serious felony, the penalty of *arresto mayor* in its minimum period shall be imposed.

When the execution of the act covered by this article shall have only resulted in damage to the property of another, the offender shall be punished by a fine ranging from an amount equal to the value of said damages to three times such value, but which shall in no case be less than twenty-five pesos.

A fine not exceeding two hundred pesos and censure shall be imposed upon any person who, by simple imprudence or negligence, shall cause some wrong which, if done maliciously, would have constituted a light felony.

In the imposition of these penalties, the court shall exercise their sound discretion, without regard to the rules prescribed in Article 64.

The provisions contained in this article shall not be applicable:

1. When the penalty provided for the offense is equal to or lower than those provided in the first two paragraphs of this article, in which case the courts shall impose the penalty next lower in degree than that which should be imposed in the period which they may deem proper to apply.
2. When, by imprudence or negligence and with violation of the Automobile Law, death of a person shall be caused, in which case the defendant shall be punished by *prision correccional* in its medium and maximum periods.

Reckless imprudence consists in voluntary, but without malice, doing or failing to do an act from which material damage results by reason of inexcusable lack of precaution on the part of the person performing or failing to perform such act, taking into consideration his employment or occupation, degree of intelligence, physical condition and other circumstances regarding persons, time and place.

Simple imprudence consists in the lack of precaution displayed in those cases in which the damage impending to be caused is not immediate nor the danger clearly manifest.

The penalty next higher in degree to those provided for in this article shall be imposed upon the offender who fails to lend

on the spot to the injured parties such help as may be in his hand to give.

Structurally, these nine paragraphs are collapsible into four sub-groupings relating to (1) the penalties attached to the quasi-offenses of “imprudence” and “negligence” (paragraphs 1-2); (2) a modified penalty scheme for either or both quasi-offenses (paragraphs 3-4, 6 and 9); (3) a generic rule for trial courts in imposing penalties (paragraph 5); and (4) the definition of “reckless imprudence” and “simple imprudence” (paragraphs 7-8). Conceptually, quasi-offenses penalize “the mental attitude or condition behind the act, the dangerous recklessness, lack of care or foresight, the *imprudencia punible*,”³⁶⁷ unlike willful offenses which punish the intentional criminal act. These structural and conceptual features of quasi-offenses set them apart from the mass of intentional crimes under the first 13 Titles of Book II of the Revised Penal Code, as amended.

Indeed, the notion that quasi-offenses, whether reckless or simple, are distinct species of crime, separately defined and penalized under the framework of our penal laws, is nothing new. As early as the middle of the last century, we already sought to bring clarity to this field by rejecting in *Quizon v. Justice of the Peace of Pampanga* the proposition that “reckless imprudence is not a crime in itself but simply a way of committing it ...”³⁶⁸ on three points of analysis: (1) the object of punishment in quasi-crimes (as opposed to intentional crimes); (2) the legislative intent to treat quasi-crimes as distinct offenses (as opposed to subsuming them under the mitigating circumstance of minimal intent); and (3) the different penalty structures for quasi-crimes and intentional crimes:

The proposition (inferred from Art. 3 of the Revised Penal Code) that “reckless imprudence” is not a crime in itself but simply a way of committing it and merely determines a lower degree of criminal liability is too broad to deserve unqualified assent. There are crimes that by their structure cannot be committed through imprudence: murder, treason, robbery, malicious mischief, etc. In truth, criminal negligence in our Revised Penal Code is treated as a mere quasi offense, and dealt with separately from willful offenses. It is not a mere question of classification or terminology. In intentional crimes,

³⁶⁷ *Quizon v. Justice of the Peace of Pampanga*, 97 Phil. 342, 345 (1955).

³⁶⁸ *Ibid.*

the act itself is punished; in negligence or imprudence, what is principally penalized is the mental attitude or condition behind the act, the dangerous recklessness, lack of care or foresight, the *imprudencia punible*. ...

Were criminal negligence but a modality in the commission of felonies, operating only to reduce the penalty therefor, then it would be absorbed in the mitigating circumstances of Art. 13, specially the lack of intent to commit so grave a wrong as the one actually committed. Furthermore, the theory would require that the corresponding penalty should be fixed in proportion to the penalty prescribed for each crime when committed willfully. For each penalty for the willful offense, there would then be a corresponding penalty for the negligent variety. But instead, our Revised Penal Code (Art. 365) fixes the penalty for reckless imprudence at *arresto mayor* maximum, to *prision correccional* [medium], if the willful act would constitute a grave felony, notwithstanding that the penalty for the latter could range all the way from *prision mayor* to death, according to the case. It can be seen that the actual penalty for criminal negligence bears no relation to the individual willful crime, but is set in relation to a whole class, or series, of crimes.

This explains why the technically correct way to allege quasi-crimes is to state that their commission results in damage, either to person or property.

Accordingly, we found the Justice of the Peace in *Quizon* without jurisdiction to hear a case for “Damage to Property through Reckless Imprudence,” its jurisdiction being limited to trying charges for Malicious Mischief, an intentional crime conceptually incompatible with the element of imprudence obtaining in quasi-crimes.

Quizon, rooted in Spanish law³⁶⁹ (the normative ancestry of our present day penal code) and since repeatedly reiterated,³⁷⁰ stands on solid conceptual foundation. The contrary doctrinal pronouncement in *People v. Faller*³⁷¹ that “[r]eckless impudence

³⁶⁹ See *People v. Buan*, 131 Phil. 498, 500-502 (1968).

³⁷⁰ E.g. *Samson v. Court of Appeals*, 103 Phil. 277 (1958); *People v. Cano*, 123 Phil. 1086 (1966); *Pabulario v. Palarca*, 129 Phil. 1 (1967); *Corpus v. Paje*, 139 Phil. 429 (1969).

³⁷¹ 67 Phil. 529 (1939) (affirming a conviction for malicious mischief upon a charge for “damage [to property] through reckless imprudence”). A logical consequence of a Fallerian conceptualization of quasi-crimes is the sanctioning of the split prosecution of the consequences of a single quasi offense such as those allowed in *El Pueblo de Filipinas*

is not a crime in itself ... [but] simply a way of committing it...”³⁷² has long been abandoned when the Court *en banc* promulgated *Quizon* in 1955 nearly two decades after the Court decided *Faller* in 1939. *Quizon* rejected *Faller*’s conceptualization of quasi-crimes by holding that quasi-crimes under Article 365 are distinct species of crimes and not merely methods of committing crimes. *Faller* found expression in post-*Quizon* jurisprudence³⁷³ only by dint of lingering doctrinal confusion arising from an indiscriminate fusion of criminal law rules defining Article 365 crimes and the complexing of intentional crimes under Article 48 of the Revised Penal Code which, as will be shown shortly, rests on erroneous conception of quasi-crimes. Indeed, the *Quizonian* conception of quasi-crimes undergirded a related branch of jurisprudence applying the Double Jeopardy Clause to quasi-offenses, barring second prosecutions for a quasi-offense alleging one resulting act after a prior conviction or acquittal of a quasi-offense alleging another resulting act but arising from the same reckless act or omission upon which the second prosecution was based.

Prior Conviction or Acquittal of Reckless Imprudence Bars Subsequent Prosecution for the Same Quasi-Offense

The doctrine that reckless imprudence under Article 365 is a single quasi-offense by itself and not merely a means to commit other crimes such that conviction or acquittal of such quasi-offense bars subsequent prosecution for the same quasi-offense, regardless of its various resulting acts, undergirded this Court’s unbroken chain of jurisprudence on double jeopardy as applied to Article 365 starting with *People v. Diaz*,³⁷⁴ decided in 1954. There, a full Court, speaking through Mr. Justice Montemayor, ordered the dismissal of a case for “damage to property thru reckless imprudence” because a prior

v. Estipona, 70 Phil. 513 (1940) (finding the separate prosecutions of damage to property and multiple physical injuries arising from the same recklessness in the accused’s operation of a motor vehicle not violative of the Double Jeopardy Clause).

³⁷² 67 Phil. 529 (1939).

³⁷³ E.g. *Lontok v. Gorgonio*, 178 Phil. 525, 528 (1979) (holding that the “less grave offense” of “damage to property through reckless imprudence” (for P2,340) cannot be complexed under Article 48 of the penal code with a prescribed “slight offense” of “*lesiones leves* through reckless imprudence,” citing *Faller*); *Arcaya v. Teleron*, 156 Phil. 354, 362 (1974) (noting, by way of dicta in a ruling denying relief to an appeal against the splitting of two charges for “less serious physical injuries and damage to property amounting to P10,000 through reckless imprudence” and “slight physical injuries through reckless imprudence,” that the *Quizon* doctrine, as cited in *Corpus v. Paje*, 139 Phil. 429 (1969) and *People v. Buan*, 131 Phil. 498 (1968), “may not yet be settled in view of the contrary dictum” in *Faller*).

³⁷⁴ 94 Phil. 715 (1954).

case against the same accused for “reckless driving,” arising from the same act upon which the first prosecution was based, had been dismissed earlier. Since then, whenever the same legal question was brought before the Court, that is, whether prior conviction or acquittal of reckless imprudence bars subsequent prosecution for the same quasi-offense, regardless of the consequences alleged for both charges, the Court unfailingly and consistently answered in the affirmative in *People v. Belga*³⁷⁵ (promulgated in 1957 by the Court *en banc*, per Reyes, J.), *Yap v. Lutero*³⁷⁶ (promulgated in 1959, unreported, per Concepcion, J.), *People v. Narvasa*³⁷⁷ (promulgated in 1960 by the Court *en banc*, per Bengzon J.), *People v. Silva*³⁷⁸ (promulgated in 1962 by the Court *en banc*, per Paredes, J.), *People v. Macabuhay*³⁷⁹ (promulgated in 1966 by the Court *en banc*, per Makalintal, J.), *People v. Buan*³⁸⁰ (promulgated in 1968 by the Court *en banc*, per Reyes, J.B.L., acting C.J.), *Buerano v. Court of Appeals*³⁸¹ (promulgated in 1982 by the Court *en banc*, per Relova, J.), and *People v. City Court of Manila*³⁸² (promulgated in 1983 by the First Division, per Relova, J.).

These cases uniformly barred the second prosecutions as constitutionally impermissible under the Double Jeopardy Clause.

The reason for this consistent stance of extending the constitutional protection under the Double Jeopardy Clause

³⁷⁵ 100 Phil. 996 (1957) (barring subsequent prosecutions for physical injuries thru reckless imprudence and damage to property thru reckless imprudence following an acquittal for “reckless imprudence with physical injury”).

³⁷⁶ 105 Phil. 1307 (1959) (Unrep.) (barring subsequent prosecution for “serious physical injuries” following an acquittal for “reckless driving”).

³⁷⁷ 107 Phil. 737 (1960) (barring subsequent prosecution for “damage to property thru reckless imprudence” following a conviction for “multiple slight and serious physical injuries thru reckless imprudence.”)

³⁷⁸ No. L-15974, 30 January 1962, 4 SCRA 95 (barring subsequent prosecution for “homicide thru reckless imprudence” following an acquittal for “slight physical injuries thru reckless imprudence”).

³⁷⁹ 123 Phil. 48 (1966) (barring subsequent prosecution for “damage to property thru reckless imprudence” following an acquittal for two counts of “slight physical injuries thru reckless imprudence.”)

³⁸⁰ 131 Phil. 498 (1968) (barring subsequent prosecution for “serious physical injuries and damage to property thru reckless imprudence” following an acquittal for “slight physical injuries thru reckless imprudence”).

³⁸¹ 200 Phil. 486 (1982) (reversing a subsequent conviction for “damage to property thru reckless imprudence” following a conviction for “slight and serious physical injuries thru reckless imprudence”).

³⁸² 206 Phil. 555 (1983) (barring subsequent prosecution for “homicide thru reckless imprudence” following a conviction for “serious physical injuries thru reckless imprudence”).

to quasi-offenses was best articulated by Mr. Justice J.B.L. Reyes in *Buan*, where, in barring a subsequent prosecution for “serious physical injuries and damage to property thru reckless imprudence” because of the accused’s prior acquittal of “slight physical injuries thru reckless imprudence,” with both charges grounded on the same act, the Court explained:³⁸³

Reason and precedent both coincide in that once convicted or acquitted of a specific act of reckless imprudence, the accused may not be prosecuted again for that same act. For the essence of the quasi offense of criminal negligence under article 365 of the Revised Penal Code lies in the execution of an imprudent or negligent act that, if intentionally done, would be punishable as a felony. The law penalizes thus the negligent or careless act, not the result thereof. The gravity of the consequence is only taken into account to determine the penalty, it does not qualify the substance of the offense. And, as the careless act is single, whether the injurious result should affect one person or several persons, the offense (criminal negligence) remains one and the same, and cannot be split into different crimes and prosecutions. ...

Evidently, the *Diaz* line of jurisprudence on double jeopardy merely extended to its logical conclusion the reasoning of *Quizon*.

There is in our jurisprudence only one ruling going against this unbroken line of authority. Preceding *Diaz* by more than a decade, *El Pueblo de Filipinas v. Estipona*,³⁸⁴ decided by the pre-war colonial Court in November 1940, allowed the subsequent prosecution of an accused for reckless imprudence resulting in damage to property despite his previous conviction for multiple physical injuries arising from the same reckless operation of a motor vehicle upon which the second prosecution was based. *Estipona*’s inconsistency with the post-war *Diaz* chain of jurisprudence suffices to impliedly overrule it.

At any rate, all doubts on this matter were laid to rest in 1982 in *Buerano*.³⁸⁵ There, we reviewed the Court of Appeals’ conviction of an accused for “damage to property thru reckless imprudence” despite his prior conviction for “slight and less serious physical injuries thru reckless imprudence,” arising from the same act

³⁸³ 131 Phil. 498, 500 (1968).

³⁸⁴ 70 Phil. 513 (1940), also cited in other sources as *People v. Estipona*.

³⁸⁵ 200 Phil. 486 (1982).

upon which the second charge was based. The Court of Appeals had relied on *Estipona*. We reversed on the strength of *Buan*³⁸⁶... Thus, for all intents and purposes, *Buerano* had effectively overruled *Estipona*.

It is noteworthy that the Solicitor General in *Buerano*, in a reversal of his earlier stance in *Silva*, joined causes with the accused, a fact which did not escape the Court's attention:

Then Solicitor General, now Justice Felix V. Makasiar, in his MANIFESTATION dated December 12, 1969 (page 82 of the Rollo) admits that the Court of Appeals erred in not sustaining petitioner's plea of double jeopardy and submits that "its affirmatory decision dated January 28, 1969, in Criminal Case No. 05123-CR finding petitioner guilty of damage to property through reckless imprudence should be set aside, without costs." He stressed that "if double jeopardy exists where the reckless act resulted into homicide and physical injuries, then the same consequence must perforce follow where the same reckless act caused merely damage to property-not death-and physical injuries. Verily, the value of a human life lost as a result of a vehicular collision cannot be equated with any amount of damages caused to a motor vehicle arising from the same mishap."³⁸⁷

Hence, we find merit in petitioner's submission that the lower courts erred in refusing to extend in his favor the mantle of protection afforded by the Double Jeopardy Clause. A more fitting jurisprudence could not be tailored to petitioner's case than *People v. Silva*,³⁸⁸ a *Diaz* progeny. There, the accused, who was also involved in a vehicular collision, was charged in two separate Informations with "Slight Physical Injuries thru Reckless Imprudence" and "Homicide with Serious Physical Injuries thru Reckless Imprudence." Following his acquittal of the former, the accused sought the quashal of the latter, invoking the Double Jeopardy Clause. The trial court initially denied relief, but, on reconsideration, found merit in the accused's claim and dismissed the second case. In affirming the trial court, we quoted with approval its analysis of the issue following *Diaz* and its progeny *People v. Belga*.³⁸⁹

On June 26, 1959, the lower court reconsidered its Order of

³⁸⁶ 131 Phil. 498 (1968).

³⁸⁷ *Buerano v. Court of Appeals*, 200 Phil. 486, 491-492 (1982).

³⁸⁸ No. L-15974, 30 January 1962, 4 SCRA 95.

³⁸⁹ 100 Phil. 996 (1957).

May 2, 1959 and dismissed the case, holding: -

[T]he Court believes that the case falls squarely within the doctrine of double jeopardy enunciated in *People v. Belga*, ... In the case cited, Ciriaco Belga and Jose Belga were charged in the Justice of the Peace Court of Malilipot, Albay, with the crime of physical injuries through reckless imprudence arising from a collision between the two automobiles driven by them (Crim. Case No. 88). Without the aforesaid complaint having been dismissed or otherwise disposed of, two other criminal complaints were filed in the same justice of the peace court, in connection with the same collision one for damage to property through reckless imprudence (Crim. Case No. 95) signed by the owner of one of the vehicles involved in the collision, and another for multiple physical injuries through reckless imprudence (Crim. Case No. 96) signed by the passengers injured in the accident. Both of these two complaints were filed against Jose Belga only. After trial, both defendants were acquitted of the charge against them in Crim. Case No. 88. Following his acquittal, Jose Belga moved to quash the complaint for multiple physical injuries through reckless imprudence filed against him by the injured passengers, contending that the case was just a duplication of the one filed by the Chief of Police wherein he had just been acquitted. The motion to quash was denied and after trial Jose Belga was convicted, whereupon he appealed to the Court of First Instance of Albay. In the meantime, the case for damage to property through reckless imprudence filed by one of the owners of the vehicles involved in the collision had been remanded to the Court of First Instance of Albay after Jose Belga had waived the second stage of the preliminary investigation. After such remand, the Provincial Fiscal filed in the Court of First Instance two informations against Jose Belga, one for physical injuries through reckless imprudence, and another for damage to property through reckless imprudence. Both cases were dismissed by the Court of First Instance, upon motion of the defendant Jose Belga who alleged double jeopardy in a motion to quash. On appeal by the Prov. Fiscal, the order of dismissal was affirmed by the Supreme Court in the following language:

The question for determination is whether the acquittal of Jose Belga in the case filed by the chief of police constitutes a bar to his subsequent prosecution for multiple physical injuries and damage to property

through reckless imprudence.

In the case of *People v. F. Diaz*, G. R. No. L-6518, prom. March 30, 1954, the accused was charged in the municipal court of Pasay City with reckless driving under sec. 52 of the Revised Motor Vehicle Law, for having driven an automobile in a 'fast and reckless manner ... thereby causing an accident.' After the accused had pleaded not guilty the case was dismissed in that court for 'failure of the Government to prosecute'. But some time thereafter the city attorney filed an information in the Court of First Instance of Rizal, charging the same accused with damage to property thru reckless imprudence. The amount of the damage was alleged to be P249.50. Pleading double jeopardy, the accused filed a motion, and on appeal by the Government we affirmed the ruling. Among other things we there said through Mr. Justice Montemayor -

The next question to determine is the relation between the first offense of violation of the Motor Vehicle Law prosecuted before the Pasay City Municipal Court and the offense of damage to property thru reckless imprudence charged in the Rizal Court of First Instance. One of the tests of double jeopardy is whether or not the second offense charged necessarily includes or is necessarily included in the offense charged in the former complaint or information (Rule 113, Sec. 9). Another test is whether the evidence which proves one would prove the other that is to say whether the facts alleged in the first charge if proven, would have been sufficient to support the second charge and vice versa; or whether one crime is an ingredient of the other. ...

The foregoing language of the Supreme Court also disposes of the contention of the prosecuting attorney that the charge for slight physical injuries through reckless imprudence could not have been joined with the charge for homicide with serious physical injuries through reckless imprudence in this case, in view of the provisions of Art. 48 of the Revised Penal Code, as amended. The prosecution's contention might be true. But neither was the prosecution obliged to first prosecute the accused for slight physical injuries through reckless imprudence before pressing the more serious charge of homicide with serious physical injuries through reckless imprudence. Having first prosecuted the defendant for the lesser offense in the Justice of the Peace Court of Meycauayan, Bulacan, which acquitted the defendant, the prosecuting attorney is not

now in a position to press in this case the more serious charge of homicide with serious physical injuries through reckless imprudence which arose out of the same alleged reckless imprudence of which the defendant has been previously cleared by the inferior court.³⁹⁰

Significantly, the Solicitor General had urged us in *Silva* to reexamine *Belga* (and hence, *Diaz*) “for the purpose of delimiting or clarifying its application.”³⁹¹ We declined the invitation, thus:

The State in its appeal claims that the lower court erred in dismissing the case, on the ground of double jeopardy, upon the basis of the acquittal of the accused in the JP court for Slight Physical Injuries, thru Reckless Imprudence. In the same breath said State, thru the Solicitor General, admits that the facts of the case at bar, fall squarely on the ruling of the *Belga* case ... upon which the order of dismissal of the lower court was anchored. The Solicitor General, however, urges a re-examination of said ruling, upon certain considerations for the purpose of delimiting or clarifying its application. We find, nevertheless, that further elucidation or disquisition on the ruling in the *Belga* case, the facts of which are analogous or similar to those in the present case, will yield no practical advantage to the government. On one hand, there is nothing which would warrant a delimitation or clarification of the applicability of the *Belga* case. It was clear. On the other, this Court has reiterated the views expressed in the *Belga* case, in the identical case of *Yap v. Hon. Lutero*, L-12669, April 30, 1959.

Article 48 Does not Apply to Acts Penalized Under Article 365 of the Revised Penal Code

The confusion bedeviling the question posed in this petition, to which the MeTC succumbed, stems from persistent but awkward attempts to harmonize conceptually incompatible substantive and procedural rules in criminal law, namely, Article 365 defining and penalizing quasi-offenses and Article 48 on complexing of crimes, both under the Revised Penal Code. Article 48 is a procedural device allowing single prosecution of multiple felonies falling under either of two categories: (1) when a single act constitutes two or more grave or less grave felonies (thus excluding from its operation light felonies); and (2) when

³⁹⁰ No. L-15974, 30 January 1962, 4 SCRA 95, 97-100.

³⁹¹ No. L-15974, 30 January 1962, 4 SCRA 95, 100.

an offense is a necessary means for committing the other. The legislature crafted this procedural tool to benefit the accused who, in lieu of serving multiple penalties, will only serve the maximum of the penalty for the most serious crime.

In contrast, Article 365 is a substantive rule penalizing not an act defined as a felony but “the mental attitude ... behind the act, the dangerous recklessness, lack of care or foresight ...”³⁹² a single mental attitude regardless of the resulting consequences. Thus, Article 365 was crafted as one quasi-crime resulting in one or more consequences.

Ordinarily, these two provisions will operate smoothly. Article 48 works to combine in a single prosecution multiple intentional crimes falling under Titles 1-13, Book II of the Revised Penal Code, when proper; Article 365 governs the prosecution of imprudent acts and their consequences. However, the complexities of human interaction can produce a hybrid quasi-offense not falling under either models - that of a single criminal negligence resulting in multiple non-crime damages to persons and property with varying penalties corresponding to light, less grave or grave offenses. The ensuing prosecutorial dilemma is obvious: how should such a quasi-crime be prosecuted? Should Article 48’s framework apply to “complex” the single quasi-offense with its multiple (non-criminal) consequences (excluding those amounting to light offenses which will be tried separately)? Or should the prosecution proceed under a single charge, collectively alleging all the consequences of the single quasi-crime, to be penalized separately following the scheme of penalties under Article 365?

Jurisprudence adopts both approaches. Thus, one line of rulings (none of which involved the issue of double jeopardy) applied Article 48 by “complexing” one quasi-crime with its multiple consequences³⁹³ unless one consequence amounts to a light felony, in which case charges were split by grouping, on the one hand, resulting acts amounting to grave or less grave felonies and filing the charge with the second level courts and, on the other hand, resulting acts amounting to light felonies and filing the charge with the first level courts.³⁹⁴ Expectedly, this is the approach the

³⁹² *Quizon v. Justice of the Peace of Pampanga*, 97 Phil. 342, 345 (1955).

³⁹³ E.g. *People v. Lara*, 75 Phil. 786 (1946) (involving “*homicidio por imprudencia temeraria*” with several victims [or, roughly, “multiple homicide thru reckless imprudence”]); *People v. Agito*, 103 Phil. 526 (1958) (involving “triple homicide and serious physical injuries through reckless imprudence”).

³⁹⁴ E.g. *People v. Turla*, 50 Phil. 1001 (1927) (sustaining a dismissal on demurrer of a

MeTC impliedly sanctioned (and respondent Ponce invokes), even though under Republic Act No. 7691, the MeTC has now exclusive original jurisdiction to impose the most serious penalty under Article 365 which is *prision correccional* in its medium period.

Under this approach, the issue of double jeopardy will not arise if the “complexing” of acts penalized under Article 365 involves only resulting acts penalized as grave or less grave felonies because there will be a single prosecution of all the resulting acts. The issue of double jeopardy arises if one of the resulting acts is penalized as a light offense and the other acts are penalized as grave or less grave offenses, in which case Article 48 is not deemed to apply and the act penalized as a light offense is tried separately from the resulting acts penalized as grave or less grave offenses.

The second jurisprudential path nixes Article 48 and sanctions a single prosecution of all the effects of the quasi-crime collectively alleged in one charge, regardless of their number or severity,³⁹⁵

criminal case for the prosecutor’s failure to amend a charge for “damage to property and of *lesiones leves* [slight physical injuries] through negligence and imprudence” to remove the charge for the slight offense, under Article 89 of the penal code, the precursor of Article 48); *Arcaya v. Teleron*, 156 Phil. 354 (1974) (finding no grave abuse of discretion in the filing of separate charges for “less serious physical injuries and damage to property amounting to P10,000 through reckless imprudence” and “slight physical injuries through reckless imprudence” arising from the same facts); *Lontok v. Gorgonio*, 178 Phil. 525 (1979) (granting a petition to split a single charge for “reckless imprudence resulting in damage to property and multiple [slight] physical injuries” by limiting the petitioner’s trial to “reckless imprudence resulting in damage to property”); See also *Reodica v. Court of Appeals*, 354 Phil. 90 (1998) (holding that the “less grave felony of reckless imprudence resulting in damage to property” (for P8,542) cannot be complexed under Article 48 of the Revised Penal Code with “the light felony of reckless imprudence resulting in physical injuries,” citing *Lontok*); *People v. De Los Santos*, 407 Phil. 724 (2001) (applying Article 48 of the penal code to hold the accused liable for the “complex crime of reckless imprudence resulting in multiple homicide with serious physical injuries and less serious physical injuries” [upon an information charging “multiple murder, multiple frustrated murder and multiple attempted murder.”]) In a dicta, the decision stated that separate informations should have been filed for the slight physical injuries the victims sustained which cannot be complexed with the more serious crimes under Article 48.)

³⁹⁵ E.g. *Angeles v. Jose*, 96 Phil. 151 (1954) (reversing the ruling of the then Court of First Instance of Manila which dismissed for lack of jurisdiction a complaint for “damage to property in the sum of P654.22, and with less serious physical injuries through reckless negligence,” holding improper the splitting of the charge). We relied on *Angeles* for our ruling in *People v. Villanueva*, 111 Phil. 897 (1962) resolving similar jurisdictional issue and *People v. Cano*, 123 Phil. 1086, 1090 (1966) (reversing a dismissal order which found the complexing of “damage to property with multiple [slight] physical injuries through reckless imprudence” improper, holding that the Information did not and could not have complexed the effect of a single quasi-offense per *Quizon*. The Court noted that “it is merely alleged in the information that, thru reckless negligence of the defendant, the bus driven by him hit another bus causing upon some of its passengers serious physical

penalizing each consequence separately. Thus, in *Angeles v. Jose*,³⁹⁶ we interpreted paragraph three of Article 365, in relation to a charge alleging “reckless imprudence resulting in damage to property and less serious physical injuries,” as follows:

[T]he third paragraph of said article, ... reads as follows:

When the execution of the act covered by this article shall have only resulted in damage to the property of another, the offender shall be punished by a fine ranging from an amount equal to the value of said damage to three times such value, but which shall in no case be less than 25 pesos.

The above-quoted provision simply means that if there is only damage to property the amount fixed therein shall be imposed, but if there are also physical injuries there should be an additional penalty for the latter. The information cannot be split into two; one for the physical injuries, and another for the damage to property...

By “additional penalty,” the Court meant, logically, the penalty scheme under Article 365.

Evidently, these approaches, while parallel, are irreconcilable. Coherence in this field demands choosing one framework over the other. Either (1) we allow the “complexing” of a single quasi-crime by breaking its resulting acts into separate offenses (except for light felonies), thus re-conceptualize a quasi-crime, abandon its present framing under Article 365, discard its conception under the *Quizon* and *Diaz* lines of cases, and treat the multiple consequences of a quasi-crime as separate intentional felonies defined under Titles 1-13, Book II under the penal code; or (2) we forbid the application of Article 48 in the prosecution and sentencing of quasi-crimes, require single prosecution of all the resulting acts regardless of their number and severity, separately penalize each as provided in Article 365, and thus maintain the distinct concept of quasi-crimes as crafted under Article 365, articulated in *Quizon* and applied to double jeopardy adjudication in the *Diaz* line of cases.

A becoming regard of this Court’s place in our scheme of government denying it the power to make laws constrains us to keep inviolate the conceptual distinction between quasi-crimes and intentional felonies under our penal code. Article 48 is incongruent to the notion

injuries, upon others less serious physical injuries and upon still others slight physical injuries, in addition to damage to property”).

³⁹⁶ 96 Phil. 151, 152 (1954).

of quasi-crimes under Article 365. It is conceptually impossible for a quasi-offense to stand for (1) a single act constituting two or more grave or less grave felonies; or (2) an offense which is a necessary means for committing another. This is why, way back in 1968 in *Buan*, we rejected the Solicitor General's argument that double jeopardy does not bar a second prosecution for slight physical injuries through reckless imprudence allegedly because the charge for that offense could not be joined with the other charge for serious physical injuries through reckless imprudence following Article 48 of the Revised Penal Code:

The Solicitor General stresses in his brief that the charge for slight physical injuries through reckless imprudence could not be joined with the accusation for serious physical injuries through reckless imprudence, because Article 48 of the Revised Penal Code allows only the complexing of grave or less grave felonies. This same argument was considered and rejected by this Court in the case of *People v. Silva*...

[T]he prosecution's contention might be true. But neither was the prosecution obliged to first prosecute the accused for slight physical injuries through reckless imprudence before pressing the more serious charge of homicide with serious physical injuries through reckless imprudence. Having first prosecuted the defendant for the lesser offense in the Justice of the Peace Court of Meycauayan, Bulacan, which acquitted the defendant, the prosecuting attorney is not now in a position to press in this case the more serious charge of homicide with serious physical injuries through reckless imprudence which arose out of the same alleged reckless imprudence of which the defendant has been previously cleared by the inferior court.

[W]e must perforce rule that the exoneration of this appellant ... by the Justice of the Peace ... of the charge of slight physical injuries through reckless imprudence, prevents his being prosecuted for serious physical injuries through reckless imprudence in the Court of First Instance of the province, where both charges are derived from the consequences of one and the same vehicular accident, because the second accusation places the appellant in second jeopardy for the same offense.³⁹⁷

Indeed, this is a constitutionally compelled choice. By prohibiting the splitting of charges under Article 365, irrespective of the number and severity of the resulting acts, rampant occasions of constitutionally impermissible

³⁹⁷ 131 Phil. 498 (1968).

second prosecutions are avoided, not to mention that scarce state resources are conserved and diverted to proper use.

Hence, we hold that prosecutions under Article 365 should proceed from a single charge regardless of the number or severity of the consequences. In imposing penalties, the judge will do no more than apply the penalties under Article 365 for each consequence alleged and proven. In short, there shall be no splitting of charges under Article 365, and only one information shall be filed in the same first level court.

Our ruling today secures for the accused facing an Article 365 charge a stronger and simpler protection of their constitutional right under the Double Jeopardy Clause. True, they are thereby denied the beneficent effect of the favorable sentencing formula under Article 48, but any disadvantage thus caused is more than compensated by the certainty of non-prosecution for quasi-crime effects qualifying as “light offenses” (or, as here, for the more serious consequence prosecuted belatedly). If it is so minded, Congress³⁹⁸ can re-craft Article 365 by extending to quasi-crimes the sentencing formula of Article 48 so that only the most severe penalty shall be imposed under a single prosecution of all resulting acts, whether penalized as grave, less grave or light offenses. This will still keep intact the distinct concept of quasi-offenses. Meanwhile, the lenient schedule of penalties under Article 365, befitting crimes occupying a lower rung of culpability, should cushion the effect of this ruling.

Section 22. No *ex post facto* law or bill of attainder shall be enacted.



³⁹⁸ For this reason, Justice Carpio included in the dispositive portion an order that a copy of the ruling be served on the President of the Senate and the Speaker of the House of Representatives.



ARTICLE IV

CITIZENSHIP

Section 1. The following are citizens of the Philippines:

- (1) Those who are citizens of the Philippines at the time of the adoption of this Constitution;**
- (2) Those whose fathers or mothers are citizens of the Philippines;**
- (3) Those born before January 17, 1973, of Filipino mothers, who elect Philippine Citizenship upon reaching the age of majority; and**
- (4) Those who are naturalized in the accordance with law.**

Section 2. Natural-born citizens are those who are citizens of the Philippines from birth without having to perform any act to acquire or perfect their Philippine citizenship. Those who elect Philippine citizenship in accordance with paragraph (3), Section 1 hereof shall be deemed natural-born citizens.

POE-LLAMANZARES v. COMMISSION ON ELECTIONS, G.R. No. 221697 and G.R. Nos. 221698-700, March 8, 2016, 786 SCRA 1,¹ were consolidated petitions that assailed resolutions of the COMELEC that had cancelled the certificate of candidacy of then Senator Mary Grace Natividad Sonora Poe-Llamanzares for the May 2016 Presidential elections, primarily on the ground that she had misrepresented her status as a natural-born citizen of the Philippines. The Court *en banc* granted the petition, annulled and set aside the COMELEC resolutions, and declared that Poe-Llamanzares was qualified to be a candidate for President in the May 2016 elections.

Justice Carpio **dissented** from the majority and, as explained by Atty. Eleanor S. Francisco-Anunciacion, Deputy Secretary, Senate Electoral Tribunal, “pointed out what the Constitution expressly

¹ See discussion under Art. II, Sec. 2.

requires for Presidential candidates, that is, natural-born Filipino citizenship.” Although the provisions of the 1935 Constitution were applied based on the facts in **Poe-Llamanzares**, Justice Carpio’s discussion on **citizenship** as provided in this **Article IV**, was illuminating:

Citizens of the Philippines

It is the sovereign power and inherent right of every independent state to determine who are its nationals. The Philippines, and no other state, shall determine who are its citizens in accordance with its Constitution and laws.

In this case, the 1935 Philippine Constitution shall be applied to determine whether petitioner is a natural-born citizen of the Philippines since she was born in 1968 when the 1935 Constitution was in effect.

Section 1, Article IV of the 1935 Constitution identifies who are Filipino citizens, thus:

Art. IV. Citizenship

Sec. 1. The following are citizens of the Philippines:

1. Those who are citizens of the Philippine Islands at the time of the adoption of this Constitution.
2. Those born in the Philippine Islands of foreign parents who, before the adoption of this Constitution, had been elected to public office in the Philippine Islands.
3. Those whose fathers are citizens of the Philippines.
4. Those whose mothers are citizens of the Philippines and, upon reaching the age of majority, elect Philippine citizenship.
5. Those who are naturalized in accordance with law.

From this constitutional provision, we find that, except for those who were already considered citizens at the time of the adoption of the Constitution, there were, as there are still now, only two methods of acquiring Philippine citizenship: (1) by blood relation to the father (or the mother under the 1987 Constitution) who must be a Filipino citizen; and (2) by naturalization according to law.²

² Eduardo Abaya, *A Critical Study on the Effect of Adoption on Citizenship Status in the Philippines*, Vol. 23 No. 1 Philippine Law Journal 444 (February 1948).

The Philippines adheres to the *jus sanguinis* principle or the “law of the blood” to determine citizenship at birth. An individual acquires Filipino citizenship at birth solely by virtue of biological descent from a Filipino father or mother. The framers of the 1935 Constitution clearly intended to make the acquisition of citizenship available on the basis of the *jus sanguinis* principle. This view is made evident by the suppression from the Constitution of the *jus soli* principle, and further, by the fact that the Constitution has made definite provisions for cases not covered by the *jus sanguinis* principle, such as those found in paragraph 1, Section 1 of Article IV, i.e., those who are citizens of the Philippines at the time of the adoption of the Constitution, and in paragraph 2, Section 1 of the same Article, i.e., those born in the Philippines of foreign parents who, before the adoption of the Constitution, had been elected to public office in the Philippines.³

In terms of jurisprudence, there was a period when the Court was uncertain regarding the application of *jus soli* or “law of the soil” as a principle of acquisition of Philippine citizenship at birth.⁴ In *Tan Chong v. Secretary of Labor*,⁵ decided in 1947, the Court finally abandoned the *jus soli* principle, and *jus sanguinis* has been exclusively adhered to in the Philippines since then.⁶

Based on Section 1, Article IV of the 1935 Constitution, petitioner’s citizenship may be determined only under paragraphs (3), (4) and (5). Paragraph (1) of Section 1 is not applicable since petitioner is not a Filipino citizen at the time of the adoption of the 1935 Constitution as petitioner was born after the adoption of the 1935 Constitution. Paragraph (2) of Section 1 is likewise inapplicable since petitioner was not born in the Philippines of foreign parents who, before the adoption of the Constitution, had been elected to public office in the Philippines.

Of the Filipino citizens falling under paragraphs (3), (4) and (5), only those in paragraph (3) of Section 1, whose fathers are citizens of the Philippines, can be considered natural-born

³ Id. at 448.

⁴ Some of the cases applying the *jus soli* principle - *Roa v. Collector of Customs*, 23 Phil. 315 (1912), *Vaño v. Collector of Customs*, 23 Phil. 480 (1912), *US v. Ang*, 36 Phil. 858 (1917), *US v. Lim Bin*, 36 Phil. 924 (1917), *Go Julian v. Government of the Philippines*, 45 Phil. 289 (1923).

⁵ 79 Phil. 249 (1947).

⁶ See Irene R. Cortes and Raphael Perpetuo M. Lotilla, *Nationality and International Law from the Philippine Perspective*, Vol. 60 No. 1 Philippine Law Journal, Supplemental Issue, 18 (1985).

Filipino citizens since they are Filipino citizens from birth without having to perform any act to acquire or perfect their Philippine citizenship. In short, they are Filipino citizens by the mere fact of birth.

Under paragraph (4) of Section 1, those Filipino citizens whose mothers are Filipinos and whose fathers are aliens cannot be considered natural-born Filipino citizens since they are still required to elect Philippine citizenship upon reaching the age of majority - they are not Filipino citizens by the mere fact of birth.

However, under paragraph (2), Section 1 of Article IV of the 1987 Constitution, those whose fathers are Filipino citizens and those whose mothers are Filipino citizens are treated equally. They are considered natural-born Filipino citizens. Moreover, under Section 2, Article IV of the 1987 Constitution, in relation to paragraph (3), Section 1 of the same Article, those born before 17 January 1973 of Filipino mothers and who elected Philippine citizenship upon reaching the age of majority are also deemed natural-born Filipino citizens.

In *Co v. Electoral Tribunal of the House of Representatives*,⁷ the Court held that the constitutional provision treating as natural-born Filipino citizens those born before 17 January 1973 of Filipino mothers and alien fathers, and who elected Philippine citizenship upon reaching the age of majority, has a retroactive effect. The Court declared that this constitutional provision was enacted “to correct the anomalous situation where one born of a Filipino father and an alien mother was automatically granted the status of a natural-born citizen while one born of a Filipino mother and an alien father would still have to elect Philippine citizenship. If one so elected, he was not, under earlier laws, conferred the status of a natural-born.”⁸ The Court explained:

The provision in Paragraph 3 was intended to correct an unfair position which discriminates against Filipino women. There is no ambiguity in the deliberations of the Constitutional Commission, viz:

MR. AZCUNA: With respect to the provision of section 4, would this refer only to those who elect Philippine citizenship after the effectivity of the 1973 Constitution or would it also cover those who elected it under the 1973 Constitution?

⁷ 276 Phil. 758 (1991).

⁸ Id. at 784.

FR. BERNAS: It would apply to anybody who elected Philippine citizenship by virtue of the provision of the 1935 Constitution whether the election was done before or after January 17, 1973. (Records of the Constitutional Commission, Vol. 1, p. 228)

...

MR. TRENAS: The Committee on Citizenship, Bill of Rights, Political Rights and Obligations and Human Rights has more or less decided to extend the interpretation of who is a natural-born citizen as provided in section 4 of the 1973 Constitution by adding that persons who have elected Philippine citizenship under the 1935 Constitution shall be natural-born? Am I right Mr. Presiding Officer?

FR. BERNAS: Yes.

...

MR. NOLLEDO: And I remember very well that in the Reverend Father Bernas' well written book, he said that the decision was designed merely to accommodate former delegate Ernesto Ang and that the definition on natural-born has no retroactive effect. Now it seems that the Reverend Father Bernas is going against this intention by supporting the amendment?

FR. BERNAS: As the Commissioner can see, there has been an evolution in my thinking. (Records of the Constitutional Commission, Vol. 1, p. 189)...

MR. RODRIGO: But this provision becomes very important because his election of Philippine citizenship makes him not only a Filipino citizen but a natural-born Filipino citizen entitling him to run for Congress...

FR. BERNAS: Correct. We are quite aware of that and for that reason we will leave it to the body to approve that provision of section 4.

MR. RODRIGO: I think there is a good basis for the provision because it strikes me as unfair that the Filipino citizen who was born a day before January 17, 1973 cannot be a Filipino citizen or a natural-born citizen. (Records of the Constitutional Commission, Vol. 1, p. 231)

...

MR. RODRIGO: The purpose of that provision is to remedy an inequitable situation. Between 1935 and 1973 when we were under the 1935 Constitution, those born of Filipino fathers but alien mothers were natural-born Filipinos. However, those born of Filipino mothers but alien fathers would have to elect Philippine citizenship upon reaching the age of majority; and if they do elect, they become

Filipino citizens but not natural-born Filipino citizens.
(Records of the Constitutional Commission, Vol. 1, p. 356)

The foregoing significantly reveals the intent of the framers. To make the provision prospective from February 3, 1987 is to give a narrow interpretation resulting in an inequitable situation. It must also be retroactive.⁹

Therefore, the following are deemed natural-born Filipino citizens: (1) those whose fathers or mothers are Filipino citizens, and (2) those whose mothers are Filipino citizens and were born before 17 January 1973 and who elected Philippine citizenship upon reaching the age of majority. Stated differently, those whose fathers or mothers are neither Filipino citizens are not natural-born Filipino citizens. If they are not natural-born Filipino citizens, they can acquire Philippine citizenship only under paragraph (5), Section 1 of Article IV of the 1935 Constitution which refers to Filipino citizens who are naturalized in accordance with law.

...

Definition of the Term “Natural-Born Citizens”

The term “natural-born citizen” was first discussed by the framers of the 1935 Constitution in relation to the qualifications of the President and Vice-President. In particular, Delegate Roxas elaborated on this term, explaining that a natural-born citizen is a “citizen by birth” - a person who is a citizen by reason of his or her birth and not by operation of law. Delegate Roxas explained:

DELEGATE ROXAS. Mr. President, the phrase, ‘natural-born citizen,’ appears in the Constitution of the United States; but the authors say that this phrase has never been authoritatively interpreted by the Supreme Court of the United States in view of the fact that there has never been raised the question of whether or not an elected President fulfilled this condition. The authors are uniform in the fact that the words, ‘natural-born citizen,’ means a citizen by birth, a person who is a citizen by reason of his birth, and not by naturalization or by a further declaration required by law for his citizenship. In the Philippines, for example, under the provisions of the article on citizenship which we have

⁹ Id. at 782-783.

approved, all those born of a father who is a Filipino citizen, be they persons born in the Philippines or outside, would be citizens by birth or 'natural-born.'

And with respect to one born of a Filipino mother but of a foreign father, the article which we approved about citizenship requires that, upon reaching the age of majority, this child needs to indicate the citizenship which he prefers, and if he elects Philippine citizenship upon reaching the age of majority, then he shall be considered a Filipino citizen. According to this interpretation, the child of a Filipino mother with a foreign father would not be a citizen by birth, because the law or the Constitution requires that he make a further declaration after his birth. Consequently, the phrase, 'natural-born citizen,' as it is used in the English text means a Filipino citizen by birth, regardless of where he was born.¹⁰

Clearly, it was the intent of the framers of the 1935 Constitution to refer to natural-born citizens as only those who were Filipino citizens by the mere fact of being born to fathers who were Filipino citizens -nothing more and nothing less. To repeat, under the 1935 Constitution, only children whose fathers were Filipino citizens were natural-born Filipino citizens. Those who were born of alien fathers and Filipino mothers were not considered natural-born Filipino citizens, despite the fact that they had a blood relation to a Filipino parent. Since a natural-born citizen is a citizen by birth who need not perform any act to acquire or perfect Philippine citizenship, then those born of Filipino mothers and alien fathers and who had to elect citizenship upon reaching the age of majority, an overt act to perfect citizenship, were not considered natural-born Filipino citizens. As a matter of course, those whose parents are neither Filipino citizens or are both unknown, such as in the case of foundlings, cannot be considered natural-born Filipino citizens.

Foundlings and International Law

Each State Determines its Citizens

Fundamental is the principle that every independent state has the right and prerogative to determine who are its citizens. In *United States v. Wong Kim Ark*,¹¹ decided in 1898, the United

¹⁰ This is the English translation of the explanation given by Delegate Roxas during the deliberations. 1 Jose M. Aruego, *The Framing Of The Philippine Constitution* 404-405 (1949).

¹¹ 169 U.S. 649 (1898).

States Supreme Court enunciated this principle:

It is the inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what classes of persons shall be entitled to its citizenship.

In our jurisdiction, the Court similarly echoed in the 1912 case of *Roa v. Collector of Customs*¹² this incontrovertible right of each state to determine who are its citizens. Hence, every independent state cannot be denied this inherent right to determine who are its citizens according to its own constitution and laws.

Article 1, Chapter I of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws explicitly provides:

It is for each state to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality.

This means that municipal law, both constitutional and statutory, determines and regulates the conditions on which citizenship is acquired.¹³ There is no such thing as international citizenship or international law by which citizenship may be acquired.¹⁴ Whether an individual possesses the citizenship of a particular state shall be determined in accordance with the constitution and statutory laws of that state.

...

There is No Customary International Law Presuming a Foundling as a Citizen of the Country Where the Foundling is Found

Petitioner claims that under customary international law and generally accepted principles of international law, she (1) has a right to a nationality from birth; (2) has a right to be protected against statelessness; and (3) is presumed to be a citizen of the Philippines where she was found.

¹² 23 Phil. 315, 330-331 (1912).

¹³ Eduardo Abaya, *A Critical Study on the Effect of Adoption on Citizenship Status in the Philippines*, Vol. 23 No. 1 Philippine Law Journal 443 (February 1948).

¹⁴ Ibid.

Petitioner anchors her claims on the (1) 1989 Convention on the Rights of the Child (CRC), (2) 1966 International Covenant on Civil and Political Rights (ICCPR), (3) 1948 Universal Declaration of Human Rights (UDHR), (4) 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws (1930 Hague Convention), and (5) the 1961 Convention on the Reduction of Statelessness (CRS), among others.

The 1989 Convention on the Rights of the Child

Art. 7. 1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

The Philippines signed the Convention on the Rights of the Child on 26 January 1990 and ratified the same on 21 August 1990. The Convention defines a child to mean every human being below the age of eighteen years unless, under the law applicable to the child, the age of majority is attained earlier.

Since petitioner was born in 1968 or more than 20 years before the Convention came into existence, the Convention could not have applied to the status of her citizenship at the time of her birth in 1968. Petitioner's citizenship at birth could not be affected in any way by the Convention.

The Convention guarantees a child the right to acquire a nationality, and requires the contracting states to ensure the implementation of this right, in particular where the child would otherwise be stateless. Thus, as far as nationality is concerned, the Convention guarantees the right of the child to acquire a nationality so that the child will not be stateless. The Convention does not guarantee a child a nationality at birth, much less a natural-born citizenship at birth as understood under the Philippine Constitution, but merely the right to acquire a nationality in accordance with municipal law.

The 1966 International Covenant on Civil and Political Rights

Art. 24. 1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

...

3. Every child has the right to acquire a nationality.

Adopted on 16 December 1966 and entered into force on 23 March 1976, the International Covenant on Civil and Political Rights recognizes “the ideal of free human beings enjoying civil and political freedom and freedom from fear and want which can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.”

The Philippines is a signatory to this international treaty. Similar to the text of the Convention on the Rights of the Child, the ICCPR does not obligate states to automatically grant a nationality to children at birth. The Covenant merely recognizes the right of a child to acquire a nationality. In short, the Covenant does not guarantee a foundling a nationality at birth, much less natural-born citizenship at birth as understood under the Philippine Constitution.

The 1948 Universal Declaration of Human Rights

Art. 15. (1) Everyone has the right to a nationality.

(2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

The Universal Declaration of Human Rights was adopted by the United Nations General Assembly on 10 December 1948 whereby “Member States (including the Philippines) have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms.” It sets out, for the first time, fundamental human rights to be universally protected.

Article 15(1) of the UDHR simply affirms the right of every human being to a nationality. Being a mere declaration, such

right guaranteed by the UDHR does not obligate states to automatically confer nationality to a foundling at birth, much less natural-born citizenship at birth as understood under the Philippine Constitution.

*The 1930 Hague Convention on Certain
Questions Relating to the Conflict of
Nationality Laws*

Art. 14. A child whose parents are both unknown shall have the nationality of the country of birth. If the child's parentage is established, its nationality shall be determined by the rules applicable in cases where the parentage is known.

A foundling is, until the contrary is proved, presumed to have been born on the territory of the State in which it was found.

Art. 15. Where the nationality of a State is not acquired automatically by reason of birth on its territory, a child born on the territory of that State of parents having no nationality, or of unknown nationality, may obtain the nationality of the said State. The law of that State shall determine the conditions governing the acquisition of its nationality in such cases.

The Philippines is not a signatory to this Convention, and therefore, it is not bound by the Convention. Petitioner, however, claims that this Convention is evidence of "generally accepted principles of international law," which allegedly created the presumption that a foundling is a citizen at birth of the state in which the foundling is found.

Article 14 merely states that a foundling "shall have the nationality of the country of birth." It does not say that a foundling shall have the nationality at birth of the country where the foundling is found. Nowhere in Article 14 is nationality guaranteed to a foundling at birth, much less natural-born citizenship at birth as understood under the Philippine Constitution. Likewise, Article 14 merely lays down the presumption that a foundling is born in the territory of the state in which the foundling is found. This is the only presumption that Article 14 establishes.

Article 15 acknowledges the fact that acquisition of nationality by reason of birth in a state's territory is not automatic. Article 15 expressly states that municipal law shall "determine the conditions governing the acquisition of its nationality" by a foundling. Thus, to implement the Convention the contracting

parties have to enact statutory legislation prescribing the conditions for the acquisition of citizenship by a foundling. This rules out any automatic acquisition of citizenship at birth by a foundling.

The 1961 Convention on the Reduction of Statelessness

Art. 1. 1. A Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless. Such nationality shall be granted: (a) at birth, by operation of law, or (b) upon an application being lodged with the appropriate authority, by or on behalf of the person concerned, in the manner prescribed by the national law. Subject to the provisions of paragraph 2 of this Article, no such application may be rejected.

A Contracting State which provides for the grant of its nationality in accordance with sub-paragraph (b) of this paragraph may also provide for the grant of its nationality by operation of law at such age and subject to such conditions as may be prescribed by the national law.

...

Art. 2. A foundling found in the territory of a Contracting State shall, in the absence of proof to the contrary, be considered to have been born within that territory of parents possessing the nationality of that State.

A 1961 United Nations multilateral treaty, the primary aim of the Convention is the prevention of statelessness by requiring states to grant citizenship to children born in their territory, or born to their nationals abroad, who would otherwise be stateless. To prevent statelessness in such cases, states have the option to grant nationality (1) at birth by operation of law, or (2) subsequently by application. In short, a contracting state to the Convention must enact an implementing law choosing one of the two options before the Convention can be implemented in that state.

The Philippines is not a signatory to this Convention, and thus, the Philippines is a non-contracting state. The Convention does not bind the Philippines. Moreover, this Convention does not provide automatically that a foundling is a citizen at birth of the country in which the foundling is found.

Article 2 of the Convention provides, "A foundling found in the territory of a Contracting State shall, in the absence of proof

to the contrary, be considered to have been born of parents possessing the nationality of that state.” Dr. Laura van Waas explains the meaning of Article 2 of the Convention, as follows:

Once more, the wording of this provision is evidence of the compromise reached between *jus soli* and *jus sanguinis* countries. Rather than determining that a child found abandoned on the territory of the state will automatically acquire the nationality of that state, it declares that the child will be assumed to have both the necessary *jus soli* and *jus sanguinis* links with the state: born on the territory to parents possessing the nationality of the state. This means that the child will then simply acquire nationality *ex lege* under the normal operation of the state’s nationality regulations - the effect being the same in both *jus soli* and *jus sanguinis* regimes. No attempt is made to further define the type of evidence that may be accepted as “proof to the contrary”, this being left to the discretion of the contracting states.¹⁵

First, Article 2 applies only to a “foundling found in the territory of a Contracting State.” The Philippines is not a contracting state to the Convention and thus Article 2, and the entire Convention, does not apply to the Philippines.

Second, there must be “absence of proof” that the parents of the foundling do not possess the nationality of another state. This means there must be an administrative or judicial proceeding to determine this factual issue, an act necessary to acquire the citizenship of the state where the foundling is found. This also means that the grant of citizenship under Article 2 is not automatic, as Dr. Laura van Waas explains. This factual determination prevents the foundling from acquiring natural-born citizenship at birth as understood under our Constitution, assuming Article 2 applies to the Philippines.

Third, the grant of citizenship under Article 2 is *ex lege* which means by operation of law - referring to municipal statutory law. Assuming Article 2 applies to the Philippines, and it does not, this grant of citizenship refers to naturalization by operation of law, the category of citizens under paragraph (5), Section 1 of Article IV of the 1935 Constitution (now Section 1(4), Article IV of the 1987 Constitution), or “[t]hose who are naturalized in accordance with law.”

¹⁵ Laura van Waas, *Nationality Matters: Statelessness under International Law*, Volume 29, School of Human Rights Research Series, Intersentia, 69-70 (2008).

Nationality at birth may result because the law applicable is either *jus soli* or *jus sanguinis*. A child born in the United States to foreign parents is a citizen of the United States at birth because the United States adopts the *jus soli* principle. Under the *jus soli* principle, the place of birth determines citizenship at birth, not blood relation to the parents. In contrast, a child born in the Philippines to foreign parents is not a Philippine citizen at birth but a foreigner because the Philippines follows the *jus sanguinis* principle. Under the *jus sanguinis* principle, citizenship at birth is determined by blood relation to the parents.

Nationality at birth does not necessarily mean natural-born citizenship as prescribed under the Philippine Constitution. The Constitution recognizes natural-born citizens at birth only under the principle of *jus sanguinis* there must be a blood relation by the child to a Filipino father or mother. Even assuming, and there is none, that there is an international law granting a foundling citizenship, at birth, of the country where the foundling is found, it does not necessarily follow that the foundling qualifies as a natural-born citizen under the Philippine Constitution. In the Philippines, any citizenship granted at birth to a child with no known blood relation to a Filipino parent can only be allowed by way of naturalization as mandated by the Constitution, under paragraph 5, Section 1 of Article IV of the 1935 Constitution, paragraph 4, Section 1 of Article III of the 1973 Constitution, and paragraph 4, Section 1 of Article IV of the 1987 Constitution. Such a child is a naturalized Filipino citizen, not a natural-born Filipino citizen.

In sum, there is no international treaty to which the Philippines is a contracting party, which provides expressly or impliedly that a foundling is deemed a natural-born citizen of the country in which the foundling is found.¹⁶ There is also obviously no international treaty, to which the Philippines is not a party, obligating the Philippines to confer automatically Philippine citizenship to a foundling at birth.

Since the Philippines is not a signatory to the various international conventions regulating nationality, we shall scrutinize whether the relevant provisions on foundlings contained in the international conventions cited by petitioner

¹⁶ See Jaime S. Bautista, *No customary international law automatically confers nationality to foundlings*, The Manila Times Online (<http://www.manilatimes.net/no-customary-international-law-automaticallyconfers-nationality-to-foundlings/221126>).

have become part of customary international law or generally accepted principles of international law on nationality.

We shall first lay down the basic premise for an international rule to be considered customary international law. Such a rule must comply with the twin elements of widespread and consistent state practice, the objective element; and *opinio juris sive necessitatis*, the subjective element. State practice refers to the continuous repetition of the same or similar kind of acts or norms by states. It is demonstrated upon the existence of the following elements: (1) generality or widespread practice; (2) uniformity and consistency; and (3) duration. On the other hand, *opinio juris*, the psychological element, requires that the state practice or norm be carried out in the belief that this practice or norm is obligatory as a matter of law.¹⁷

The pertinent provisions on foundlings are found in the 1930 Hague Convention and the 1961 Convention on the Reduction of Statelessness. Article 14 of the 1930 Hague Convention and Article 2 of the 1961 Convention on the Reduction of Statelessness state, respectively: (1) “A foundling is, until the contrary is proved, presumed to have been born on the territory of the State in which it was found”; and (2) “A foundling found in the territory of a Contracting State shall, in the absence of proof to the contrary, be considered to have been born within that territory of parents possessing the nationality of that State.”

We shall limit our discussion to Article 2 of the Convention on the Reduction of Statelessness since the presumption in Article 14 of the 1930 Hague Convention concerns merely the place of birth of foundlings. In this case, the parties admit that petitioner was born in Jaro, Iloilo in the Philippines, which is the same place where she was found. Therefore, it is no longer presumed that petitioner was born in the territory of the Philippines since it is already an admitted fact that she was born in the Philippines.

There are only 64 States which have ratified the Convention on the Reduction of Statelessness as of February 2016.¹⁸ Out of the 193 Member-States of the United Nations, far less than a majority signified their agreement to the Convention.

¹⁷ Bayan Muna v. Romulo, 656 Phil. 246, 303 (2011).

¹⁸ See Dean Ralph A. Sarmiento, *The Right to Nationality of Foundlings in International Law*, (<http://attyralph.com/2015/12/03/foundlingsnationality/>)

One of the essential elements of customary international law is the widespread and consistent practice by states of a specific international principle, in this case, that foundlings are presumed to be born to parents who are citizens of the state where the foundling is found. Petitioner failed to prove this objective element. Prof. Malcolm N. Shaw, in his widely used textbook *International Law*, explains the meaning of widespread and consistent practice in this way:

One particular analogy that has been used to illustrate the general nature of customary law as considered by de Visscher. He likened the growth of custom to the gradual formation of a road across vacant land. After an initial uncertainty as to direction, the majority of users begin to follow the same line which becomes a single path. Not long elapses before that path is transformed into a road accepted as the only regular way, even though it is not possible to state at which precise moment this latter change occurs. And so it is with the formation of a custom. De Visscher develops this idea by reflecting that just as some make heavier footprints than others due to their greater weight, the more influential states of the world mark the way with more vigour and tend to become the guarantors and defenders of the way forward.¹⁹

Prof. Shaw concludes, “Accordingly, custom should to some extent mirror the perceptions of the majority of states, since it is based upon usages which are practiced by nations as they express their power and their hopes and fears.”²⁰

Petitioner manifestly failed to show that Article 2 of the Convention on the Reduction of Statelessness is an “established, widespread and consistent practice” of a majority of sovereign states. There is no showing that this Convention was in fact enforced or practiced by at least a majority of the members of the United Nations. Petitioner claims that “ratification by a majority of states is not essential for a principle contained in an international treaty or convention to be ‘customary international law.’” On the other hand, it is generally accepted by international law writers that the Convention on the Reduction

¹⁹ Malcolm N. Shaw, *International Law* 56 (Seventh Edition, 2014), citing De Visscher, *Theory and Reality* 149. See also Hersch Lauterpacht, *The Development Of International Law* 368; Pitt Cobbett, *Leading Cases On International Law* 5 (4th Edition, 1922), and Michael Akehurst, *Custom as a Source of International Law*, Vol. 47 *British Yearbook of International Law* 22-3 (1975).

²⁰ *Ibid.*

of Statelessness does not constitute customary international law precisely because of the small number of states that have ratified the Convention. Dr. Laura van Waas summarizes the state of the law on this issue:

In order to contend that a rule of customary international law has thereby been established, we must also prove that states are legislating in this way due to the conviction that they are legally compelled to do so - the *opinio juris sive necessitatis*. The codification of the obligation to grant nationality to foundlings in the 1930 Hague Convention and the 1961 Statelessness Convention cannot be taken as sufficient evidence due, mainly, to the low number of state parties to both instruments.²¹

It is hornbook law that there is no general international law, whether customary international law or generally accepted principle of international law, obligating the Philippines, or any state for that matter, to automatically confer citizenship to foundlings at birth. As Prof. Serena Forlati writes: “It is thus not possible to conclude that every child who would otherwise be stateless is automatically entitled to the nationality of her or his country of birth under the ICCPR, the CRC or general international law.”²²

Out of the 64 parties to the Convention on the Reduction of Statelessness, only 13 states provide for the automatic and unconditional acquisition of nationality by foundlings. This means that the majority of the contracting states to the Convention do not automatically confer nationality to foundlings at birth. In fact, the majority of the contracting states impose various conditions for the acquisition of nationality to prevent statelessness, such as proof of unknown parentage, the specific place where the foundling is found, and whether the foundling is a newborn infant or a child of a certain age, among others. These conditions must necessarily be established in the appropriate proceeding before the foundling can acquire citizenship. These conditions for the acquisition of citizenship effectively prevent a foundling from being automatically considered a citizen at birth. In the Philippines, such conditions will prevent a foundling from being considered a natural-born citizen as defined under the Philippine Constitution.

²¹ Laura van Waas, *Nationality Matters: Statelessness under International Law*, Volume 29, School of Human Rights Research Series, Intersentia, 70-71 (2008).

²² Serena Forlati, *Nationality as a Human Right, The Changing Role of Nationality in International Law*, Routledge Research International Law 22-23 (2015).

Since the first essential element for an international rule to be considered a customary international law is missing in this case, the second essential element of *opinio juris* is logically lacking as well. In fact, petitioner failed to demonstrate that any compliance by member states with the Convention on the Reduction of Statelessness was obligatory in nature. In *Bayan Muna v. Romulo*,²³ the Court held:

Absent the widespread/consistent-practice-of-states factor, the second or the psychological element must be deemed non-existent, for an inquiry on why states behave the way they do presupposes, in the first place, that they are actually behaving, as a matter of settled and consistent practice, in a certain manner. This implicitly requires belief that the practice in question is rendered obligatory by the existence of a rule of law requiring it. Like the first element, the second element has likewise not been shown to be present.

Moreover, aside from the fact that the Philippines is not a contracting party to the Convention on the Reduction of Statelessness, Article 2 of the Convention is inapplicable to this case because the Convention, which took effect after the birth of petitioner, does not have retroactive effect. Paragraph 3, Article 12 of the Convention explicitly states:

3. The provisions of Article 2 of this Convention shall apply only to foundlings found in the territory of a Contracting State after the entry into force of the Convention for that State.

In short, even if the Philippines were to ratify the Convention today, the Convention would still not benefit petitioner who was born in 1968.

Applicable Customary International Law on Citizenship of Foundlings

While there is no customary international law conferring nationality to foundlings at birth, there is no dispute that petitioner has the right to a nationality and the corollary right to be protected against statelessness.

The Philippines is not a signatory to the 1930 Hague Convention or to the Convention on the Reduction of Statelessness. However,

²³ 656 Phil. 246, 306 (2011).

the Philippines is a signatory to the Convention on the Rights of the Child and to the International Covenant on Civil and Political Rights. The Philippines also adheres to the Universal Declaration of Human Rights.

The salient provisions of the CRC, the ICCPR and the UDHR on nationality establish principles that are considered customary international law because of the widespread and consistent practice of states and their obligatory nature among states. Generally, most states recognize the following core nationality provisions: (1) every human being has a right to a nationality; (2) states have the obligation to avoid statelessness; and (3) states have the obligation to facilitate the naturalization of stateless persons, including foundlings living within such states.

Right to a Nationality

Article 15 of the Universal Declaration of Human Rights affirms that “everyone has the right to a nationality.” With these words, the international community recognizes that every individual, everywhere in the world, should hold a legal bond of nationality with a state. The right to a nationality is a fundamental human right from which springs the realization of other cardinal human rights. Possession of a nationality carries with it the diplomatic protection of the country of nationality and is also often a legal or practical requirement for the exercise of political and civil rights. Consequently, the right to a nationality has been described as the “right to have rights.”

Obligation to Avoid Statelessness

Closely linked to the right of the individual to a nationality is every state’s obligation to avoid statelessness since the non-fulfillment of such right results in statelessness. In determining who are its nationals, every state has an obligation to avoid cases of statelessness.

Obligation to Facilitate the Naturalization of Stateless Persons, Including Foundlings

The right to confer nationality, being an inherent right of every independent state, carries with it the obligation to grant nationality to individuals who would otherwise be stateless. To do this, states must facilitate the naturalization of stateless

persons, including foundlings. Therefore, states must institute the appropriate processes and mechanisms, through the passage of appropriate statutes or guidelines, to comply with this obligation.

Most states recognize as customary international law the right of every human being to a nationality which in turn, requires those states to avoid statelessness, and to facilitate the naturalization of stateless persons, including foundlings. However, there is no customary international law conferring automatically citizenship at birth to foundlings, much less natural-born citizenship at birth as understood under the Philippine Constitution.

General Principle of International Law Applicable to Foundlings

Considering that there is no conventional or customary international law automatically conferring nationality to foundlings at birth, there are only two general principles of international law applicable to foundlings. First is that a foundling is deemed domiciled in the country where the foundling is found. A foundling is merely considered to have a domicile at birth, not a nationality at birth. Stated otherwise, a foundling receives at birth a domicile of origin which is the country in which the foundling is found.²⁴

Second, in the absence of proof to the contrary, a foundling is deemed born in the country where the foundling is found.²⁵ These two general principles of international law have nothing to do with conferment of nationality.

Status of International Law Principles in the Philippines

...

Treaties, customary international law and the generally accepted principles of international law concerning citizenship cannot prevail over the provisions of the Constitution on

²⁴ See The Law Commission and the Scottish Law Commission, Private International Law, The Law of Domicile 4 (<http://www.scotlawcom.gov.uk/files/321217989/6557/repl07.pdf>). See also M.W. Jacobs, A Treatise On The Law Of Domicile 167 (1887), ([http://famguardian.org/Publications/TreatOnLawOfDomicile/ A_Treatise_on_the_Law_of_Domicil_Nation.pdf](http://famguardian.org/Publications/TreatOnLawOfDomicile/A_Treatise_on_the_Law_of_Domicil_Nation.pdf), citations omitted).

²⁵ 3 John Bassett Moore, A Digest Of International Law, 281 (1906) (<http://www.unz.org/Pub/MooreJohn-1906v03:289>).

citizenship in case of conflict with the latter.²⁶ Treaties, customary international law or generally accepted international law principles on acquisition of citizenship that contravene the language and intent of the Constitution cannot be given effect in the Philippines for being unconstitutional.

Assuming *arguendo* that there was in 1935 and thereafter a customary international law conferring nationality to foundlings at birth, still foundlings could not be considered as natural-born Filipino citizens since to treat them as such would conflict with the concept of *jus sanguinis* under the 1935 Constitution. As stated, in case of conflict between customary international law and the Constitution, it is the Constitution that prevails. The 1935 Constitution clearly required blood relation to the father to establish the natural-born citizenship of a child. The 1935 Constitution did not contain any provision expressly or impliedly granting Filipino citizenship to foundlings on the basis of birth in the Philippines (*jus soli* or law of the soil),²⁷ with the presumption of Filipino parentage so as to make them natural-born citizens.

Even assuming there was in 1935 and thereafter a customary international law granting to foundlings citizenship at birth, such citizenship at birth is not identical to the citizenship of a child who is biologically born to Filipino parents. The citizenship of a foundling can be granted at birth by operation of law, but the foundling is considered “naturalized in accordance with law” and not a natural-born citizen. Since a foundling’s nationality is merely granted by operation of statutory law, specifically customary international law (which has the status of statutory law) assuming such exists, a foundling can only be deemed a Filipino citizen under paragraph 5, Section 1 of Article IV of the 1935 Constitution which refers to naturalized Filipino citizens. To add another category of natural-born Filipino citizens, particularly foundlings born in the Philippines whose parents are unknown, conflicts with the express language and intent of the 1935 Constitution to limit natural-born Filipino citizens to those whose fathers are Filipino citizens.

²⁶ See Irene R. Cortes and Raphael Perpetuo M. Lotilla, *Nationality and International Law from the Philippine Perspective*, Vol. 60, No. 1, Philippine Law Journal, Supplemental Issue, 1 (1985).

²⁷ See Jaime S. Bautista, *No customary international law automatically confers nationality to foundlings*, The Manila Times, 28 September 2015 (<http://www.manilatimes.net/no-customary-international-law-automatically-confers-nationality-to-foundlings/221126/>). See also Joel Ruiz Butuyan, *Legal and emotional entanglements in Poe issue*, 6 October 2015, Philippine Daily Inquirer (<http://opinion.inquirer.net/89141/legal-and-emotional-entanglements-in-poe-issue>).

In short, there is a difference between citizenship at birth because of *jus soli*, and citizenship at birth because of *jus sanguinis*. The former may be granted to foundlings under Philippine statutory law pursuant to paragraph (5), Section 1 of Article IV of the 1935 Constitution but the Philippine citizenship thus granted is not that of a natural-born citizen but that of a naturalized citizen. Only those citizens at birth because of *jus sanguinis*, which requires blood relation to a parent, are natural-born Filipino citizens under the 1935, 1973 and 1987 Constitutions.

Foundlings as Naturalized Filipino Citizens

If a child's parents are neither Filipino citizens, the only way that the child may be considered a Filipino citizen is through the process of naturalization in accordance with statutory law under paragraph (5), Section 1 of Article IV of the 1935 Constitution. If a child's parents are unknown, as in the case of a foundling, there is no basis to consider the child as a natural-born Filipino citizen since there is no proof that either the child's father or mother is a Filipino citizen. Thus, the only way that a foundling can be considered a Filipino citizen under the 1935 Constitution, as well as under the 1973 and 1987 Constitutions, is for the foundling to be naturalized in accordance with law.

In the Philippines, there are laws which provide for the naturalization of foreigners. These are Commonwealth Act No. 473,²⁸ as amended by Republic Act No. 530, known as the Revised Naturalization Law, which refers to judicial naturalization, and Republic Act No. 9139,²⁹ which pertains to administrative naturalization.

Significantly, there is no Philippine statute which provides for the grant of Filipino citizenship specifically to foundlings who are found in the Philippines. The absence of a domestic law on the naturalization of foundlings can be sufficiently addressed by customary international law, which recognizes the right of every human being to a nationality and obligates states to grant nationality to avoid statelessness. Customary international law can fill the gap in our municipal statutory law on naturalization of foundlings in order to prevent foundlings from being stateless.

²⁸ An Act To Provide For The Acquisition Of Philippine Citizenship By Naturalization, And To Repeal Acts Numbered Twenty-Nine Hundred And Twenty-Seven And Thirty-Four Hundred And Forty-Eight.

²⁹ An Act Providing For The Acquisition Of Philippine Citizenship For Certain Aliens By Administrative Naturalization And For Other Purposes.

Otherwise, a foundling found in the Philippines with no known parents will be stateless on the sole ground that there is no domestic law providing for the grant of nationality. This not only violates the right of every human being to a nationality but also derogates from the Philippines' obligation to grant nationality to persons to avoid statelessness.

Customary international law has the same status as a statute enacted by Congress. Thus, it must not run afoul with the Constitution. Customary international law cannot validly amend the Constitution by adding another category of natural-born Filipino citizens, specifically by considering foundlings with no known parents as natural-born citizens. Again, under paragraphs (3) and (4) of Section 1, Article IV of the 1935 Constitution, in relation to Sections 1 and 2, Article IV of the 1987 Constitution, only those born of Filipino fathers or Filipino mothers are considered natural-born Filipino citizens.

Applying customary international law to the present case, specifically the right of every human being to a nationality and the Philippines' obligation to grant citizenship to persons who would otherwise be stateless, a foundling may be naturalized as a Filipino citizen upon proper application for citizenship. This application should not be interpreted in the strictest sense of the word. On the contrary, the term "application" for purposes of acquiring citizenship must be construed liberally in order to facilitate the naturalization of foundlings. The application for citizenship may be any overt act which involves recognition by the Philippines that the foundling is indeed its citizen. Thus, the application for citizenship may be as simple as applying for a Philippine passport, which serves as evidence of citizenship.³⁰ An application for a passport is an application for recognition that the holder is a citizen of the state issuing such passport. In the case of petitioner, she applied for, and was issued a Philippine passport on the following dates: (1) 4 April 1988; (2) 5 April 1993; (3) 19 May 1998; (4) 13 October 2009; (5) 19 December 2013; and (6) 18 March 2014.

In any event, for a foundling to be granted citizenship, it is necessary that the child's status as a foundling be first established. It must be proven that the child has no known

³⁰ See Francis Wharton, LL.D., 2 A Digest Of The International Law Of The United States 465 (1886), § 192 (Mr. Fish, Secretary of State, to Mr. Davis, January 14, 1875, MSS. Inst., Germ. XVI 6). See also Paul Weis, *Nationality And Statelessness In International Law* 228 (Second Edition, 1979).

parentage before the state can grant citizenship on account of the child being a foundling. In the Philippines, a child is determined to be a foundling after an administrative investigation verifying that the child is of unknown parentage. The Implementing Rules and Regulations (IRR) of Act No. 3753³¹ and Other Laws on Civil Registration provide that the barangay captain or police authority shall certify that no one has claimed the child or no one has reported a missing child with the description of the foundling.³² Rule 29 of the said IRR provides:

Rule 29. Requirements for Registration of Foundling. - No foundling shall be recorded in the civil registrar unless the following requirements are complied with: a) Certificate of Foundling (OCRG Form No. 101, Revised January 1993) accomplished correctly and completely; b) Affidavit of the finder stating the facts and circumstances surrounding the finding of the child, and the fact that the foundling has been reported to the barangay captain or to the police authority, as the case may be; and c) Certification of the barangay captain or police authority regarding the report made by the finder, stating among other things, that no one has claimed the child or no one has reported a missing child whose description may be the same as the foundling as of the date of the certification.

Before a foundling is conferred Philippine citizenship, there must first be a factual determination of the child's status as a foundling after an administrative investigation. Once factually determined that a child is a foundling, that child through its guardian may thereafter initiate proceedings to apply for Philippine citizenship, e.g., apply for a Philippine passport.

This need for a factual determination prevents the foundling from automatically acquiring Philippine citizenship at birth. The fact of unknown parentage must first be proven in an administrative proceeding before a foundling is granted citizenship on account of the child's foundling status. Such factual determination is a necessary act to acquire Philippine citizenship, preventing the foundling from being a natural-born Filipino citizen. In contrast, for natural-born Filipino citizens, no factual determination in an administrative proceeding is required to grant citizenship

³¹ Civil Registry Law, 27 February 1931.

³² See Rules 26-30, IRR of Act No. 3753 and Other Laws on Civil Registration, 18 December 1992.

since the certificate of live birth speaks for itself - it establishes natural-born citizenship.

Erroneous Interpretation of Statistics

During the Oral Arguments, the Solicitor General insisted that petitioner is a natural-born Filipino citizen based on the 99.93% statistical probability that any child born in the Philippines from 2010 to 2014 would be a natural-born Filipino citizen. From 1965 to 1975, there is a 99.83% statistical probability that a child born in the Philippines would be a natural-born Filipino citizen. To buttress his position, the Solicitor General presented a certification from the Philippine Statistics Authority showing the “number of foreign and Filipino children born in the Philippines: 1965-1975 and 2010-2014.”

This is grave error.

There is no law or jurisprudence which supports the Solicitor General’s contention that natural-born citizenship can be conferred on a foundling based alone on statistical probability. Absent any legal foundation for such argument, the Solicitor General cannot validly conclude that a 99.93% (or 99.83%) statistical probability that a foundling born in the Philippines is a natural-born Filipino citizen legally confers on such foundling natural-born citizenship. There is no constitutional provision or statute that confers natural-born citizenship based on statistical probability.

The Solicitor General’s data speak of foreign and Filipino births in the Philippines. The data collected show the number of foreign and Filipino children born in the Philippines during the periods covered. This means that the figures reflect the total number of children born in the Philippines with known parents, either Filipino or foreigner. The data do not show the number of foundlings (those with unknown parentage) born in the Philippines from 1965 to 1975 and from 2010 to 2014. The data also do not show the number of foundlings who were later determined to have Filipino parentage. This is precisely because foundlings have unknown parents. A foundling’s unknown parentage renders it quite difficult, if not impossible, to collect data on “the number of foreign and Filipino foundlings.”

For the Solicitor General’s proposition to be correct, he should have presented statistics specifically based on the number of

foundlings born in the Philippines, and not on the number of children born in the Philippines with known foreign or Filipino parents. Children with known parents constitute a class entirely different from foundlings with unknown parents. Gathering data from the number of children born in the Philippines with known parents to determine the number of foundlings born in the Philippines to confer natural-born citizenship on foundlings resembles comparing apples with oranges and avocados. Since the figures were collected from the universe of children with known parents, either Filipinos or foreigners, and not from the universe of foundlings, the Solicitor General's proposition is fallacious in concluding that foundlings in the Philippines are natural-born Filipino citizens.

Further, if there is a 99.93% (or 99.83%) probability that a child born in the Philippines is a natural-born Filipino citizen, it does not automatically follow that there is a 99.93% (or 99.83%) probability that a foundling born in the Philippines is a natural-born Filipino citizen. The data, if any, on the universe of foundlings may show a different statistical probability. There is evidently no such statistical data. Therefore, the Solicitor General's argument that the probability that a foundling born in the Philippines would be a natural-born Filipino is 99.93% (or 99.83%) based on the number of children born in the Philippines with known parents is glaringly *non sequitur*.

The following exchange between Justice Carpio and the Solicitor General illustrates the fallacy of the so-called 99.93% (99.83%) statistical probability advanced by the Solicitor General. Such statistical probability would result in patent absurdities.

JUSTICE CARPIO: Now, how does the Constitution define natural-born citizen?

...

SOLICITOR GENERAL HILBAY: Natural-born citizens of the Philippines from birth without having to perform any act to acquire or perfect their citizenship.

JUSTICE CARPIO: Okay. Let us assume that an infant is found, a three day infant is found today in front of the Manila Cathedral. The infant has blue eyes, blonde hair, milky white skin. The parish priest looks around and doesn't find any one claiming the child. So, the parish priest goes to the DSWD, turns over the child to the DSWD. The DSWD conducts an investigation, a formal investigation, to find out if the biological parents are around if they can be found. Nobody

comes out, so the DSWD issues a foundling certificate, okay. What is the nationality of the child? Is the child a natural-born citizen of the Philippines?

SOLICITOR GENERAL HILBAY: I would consider the child a natural-born citizen of the Philippines because 99.9 percent of the time, that child will be a natural born citizen.

JUSTICE CARPIO: So even if the child has blue eyes, blonde hair, Caucasian skin...

SOLICITOR GENERAL HILBAY: It's possible for Filipinos to have blue eyes, Your Honor.

JUSTICE CARPIO: Blonde hair?

SOLICITOR GENERAL HILBAY: It's possible Your Honor.

JUSTICE CARPIO: How many percent?

SOLICITOR GENERAL HILBAY: Again, Your Honor, if we are looking at percentage...

JUSTICE CARPIO: How many percent of Filipinos, natural-born, have blue eyes, blonde hair, white skin, 99.9 percent?

SOLICITOR GENERAL HILBAY: I don't know about the specific numbers...

...

JUSTICE CARPIO: You don't have the statistics.

...

SOLICITOR GENERAL HILBAY: I don't, Your Honor, I don't.

...

JUSTICE CARPIO: So, you would say that every child born in the Philippines who has blue eyes, blonde hair, white skin, whose parents cannot be found, and there is a certificate by the DSWD that's a foundling, they are all natural-born citizens of the Philippines. If Filipino...

SOLICITOR GENERAL HILBAY: Your Honor, I am not threatened by people with blue eyes and, you know, blonde...

JUSTICE CARPIO: Yes, but my question is, what is the nationality of those children, of those infants?

SOLICITOR GENERAL HILBAY: Natural-born Filipinos still, Your Honor.

...

JUSTICE CARPIO: Supposing now, there is a DNA taken from the child[ren], you say they are natural-born citizens. The DNA shows that they have Caucasian genes, no Asian genes at all, would you say they are natural-born citizens of the Philippines?

SOLICITOR GENERAL HILBAY: Well, it's possible for Caucasians to be Filipinos, Your Honor, and natural-born Filipinos.

JUSTICE CARPIO: If their parents are Filipinos.

SOLICITOR GENERAL HILBAY: Yes, exactly, Your Honor.

JUSTICE CARPIO: But if you don't know who their parents...

SOLICITOR GENERAL HILBAY: Then I, again, would go back to 99.9 percent, which is a rather comfortable number for me.

JUSTICE CARPIO: Yes, but how many percent of Filipinos have blue eyes, blonde hair and white skin?

SOLICITOR GENERAL HILBAY: That is an irrelevant fact for me, Your Honor. I'm not looking at the class of citizens...

...

JUSTICE CARPIO: You have to look at the statistics also.

SOLICITOR GENERAL HILBAY: Yes, Your Honor, of course.

For the Solicitor General to assert that a foundling with blond hair, blue eyes, and milky white Caucasian skin, with no Asian gene in the foundling's DNA, is a natural-born Filipino citizen, is the height of absurdity. The Solicitor General's position amends the Constitution and makes *jus soli* the governing principle for foundlings, contrary to the *jus sanguinis* principle enshrined in the 1935, 1973, and 1987 Constitutions.

...

Burden of Proof

Any person who claims to be a citizen of the Philippines has the burden of proving his or her Philippine citizenship.³³ Any person who claims to be qualified to run for the position of President of the Philippines because he or she is, among others, a natural-born Filipino citizen, has the burden of proving he or she is a natural-born Filipino citizen. Any doubt whether or not he or she is natural-born Filipino citizen is resolved against him or her. The constitutional requirement of a natural-born citizen, being an express qualification for election as President, must be complied with strictly. As the Court ruled in *Paa v. Chan*:³⁴

It is incumbent upon the respondent, who claims Philippine citizenship, to prove to the satisfaction of the court that he is really a Filipino. No presumption can be indulged in favor of the claimant of Philippine citizenship, and any doubt regarding citizenship must be resolved in favor of the State.³⁵

³³ Dissenting opinion, Carpio, J., *Tecson v. Comelec*, 468 Phil. 421, 634 (2004).

³⁴ 128 Phil. 815 (1967).

³⁵ *Id.* at 825.

This statement in *Paa* was reiterated in the 2009 case of *Go, Sr. v. Ramos*.³⁶ *Paa* and *Go* lay down three doctrines: First, a person claiming Philippine citizenship has the burden of proving his claim. Second, there can be no presumption in favor of Philippine citizenship. This negates petitioner's claim to any presumption that she is a natural-born Filipino Citizen. Third, any doubt on citizenship is resolved against the person claiming Philippine citizenship. Therefore, a person claiming to be a Filipino citizen, whether natural-born or naturalized, cannot invoke any presumption of citizenship but must establish such citizenship as a matter of fact and not by presumptions, with any doubt resolved against him or her.

While it is the burden of the private respondents to first prove the fact of disqualification before the petitioner is called upon to defend herself with countervailing evidence,³⁷ in this case, there is no dispute that petitioner is a foundling with unknown biological parents. Since petitioner's parentage is unknown as shown in her Certificate of Live Birth, such birth certificate does not show on its face that she is a natural-born Filipino citizen. This shifted the burden of evidence to petitioner to prove that she is a natural-born Filipino citizen eligible to run as President of the Philippines.

Since the Constitution requires that the President of the Philippines shall be a natural-born citizen of the Philippines, it is imperative that petitioner prove that she is a natural-born Filipino citizen, despite the fact that she is a foundling. The burden of evidence shifted to her when she admitted her status as a foundling with no known biological parents. At that moment, it became her duty to prove that she is a natural-born Filipino citizen.³⁸

...

Petitioner is Not a Natural-Born Filipino Citizen

The 1987 Philippine Constitution is clear: "No person may be elected President unless he is a natural-born citizen of the Philippines, ... and a resident of the Philippines for at least ten years immediately preceding such election." Is petitioner, being a foundling, a natural-born Filipino citizen?

³⁶ G.R. No. 167569, 4 September 2009, 598 SCRA 266.

³⁷ *Fernandez v. HRET*, 623 Phil. 628 (2009).

³⁸ See *Reyes v. COMELEC*, G.R. No. 207264, 25 June 2013, 699 SCRA 522.

The answer is clearly no. First, there is no Philippine law automatically conferring Philippine citizenship to a foundling at birth. Even if there were, such a law would only result in the foundling being a naturalized Filipino citizen, not a natural-born Filipino citizen.

Second, there is no legal presumption in favor of Philippine citizenship, whether natural-born or naturalized. Citizenship must be established as a matter of fact and any doubt is resolved against the person claiming Philippine citizenship.

Third, the letter and intent of the 1935 Constitution clearly excluded foundlings from being considered natural-born Filipino citizens. The Constitution adopts the *jus sanguinis* principle, and identifies natural-born Filipino citizens as only those whose fathers or mothers are Filipino citizens. Petitioner failed to prove that either her father or mother is a Filipino citizen.

Fourth, there is no treaty, customary international law or a general principle of international law granting automatically Philippine citizenship to a foundling at birth. Petitioner failed to prove that there is such a customary international law. At best, there exists a presumption that a foundling is domiciled, and born, in the country where the foundling is found.

Fifth, even assuming that there is a customary international law presuming that a foundling is a citizen of the country where the foundling is found, or is born to parents possessing the nationality of that country, such presumption cannot prevail over our Constitution since customary international law has the status merely of municipal statutory law. This means that customary international law is inferior to the Constitution, and must yield to the Constitution in case of conflict. Since the Constitution adopts the *jus sanguinis* principle, and identifies natural-born Filipino citizens as only those whose fathers or mothers are Filipino citizens, then petitioner must prove that either her father or mother is a Filipino citizen for her to be considered a natural-born Filipino citizen. Any international law which contravenes the *jus sanguinis* principle in the Constitution must of course be rejected.

Sixth, petitioner failed to discharge her burden to prove that she is a natural-born Filipino citizen. Being a foundling, she admitted that she does not know her biological parents, and therefore she cannot trace blood relation to a Filipino father or mother.

Without credible and convincing evidence that petitioner's biological father or mother is a Filipino citizen, petitioner cannot be considered a natural-born Filipino citizen.

Seventh, a foundling has to perform an act, that is, prove his or her status as a foundling, to acquire Philippine citizenship. This being so, a foundling can only be deemed a naturalized Filipino citizen because the foundling has to perform an act to acquire Philippine citizenship. Since there is no Philippine law specifically governing the citizenship of foundlings, their citizenship is addressed by customary international law, namely: the right of every human being to a nationality, and the State's obligations to avoid statelessness and to facilitate the naturalization of foundlings.

During the Oral Arguments, the purportedly sad and depressing plight of foundlings if found not to be natural-born Filipino citizens, particularly their disqualification from being elected to high public office and appointed to high government positions, had been pointed out once again. As I have stated, this appeals plainly to human emotions. This emotional plea, however, conveniently forgets the express language of the Constitution reserving those high positions, particularly the Presidency, exclusively to natural-born Filipino citizens. Even naturalized Filipino citizens, whose numbers are far more than foundlings, are not qualified to run for President. The natural-born citizenship requirement under the Constitution to qualify as a candidate for President must be complied with strictly. To rule otherwise amounts to a patent violation of the Constitution. It is basic in Constitutional Law that the qualification requirements prescribed by the Constitution must be complied with by all presidential candidates, regardless of popularity or circumstances. Being sworn to uphold and defend the Constitution, the Members of this Court have no other choice but to apply the clear letter and intent of the Constitution.

However, a decision denying natural-born citizenship to a foundling on the ground of absence of proof of blood relation to a Filipino parent never becomes final.³⁹ *Res judicata* does not apply

³⁹ See *Kilosbayan Foundation v. Ermita*, 553 Phil. 331, 343-344 (2007), where the Court stated in the dispositive portion of the Decision that "respondent Gregory S. Ong ... is hereby ENJOINED from accepting an appointment to the position of Associate Justice of the Supreme Court or assuming the position and discharging the functions of that office, until he shall have successfully completed all necessary steps, through the appropriate adversarial proceedings in court, to show that he is a natural-born Filipino citizen and

to questions of citizenship. In *Moy Ya Lim Yao v. Commissioner of Immigration*,⁴⁰ cited in *Lee v. Commissioner of Immigration*,⁴¹ this Court declared that:

[E]very time the citizenship of a person is material or indispensable in a judicial or administrative case, whatever the corresponding court or administrative authority decides therein as to such citizenship is generally not considered as *res adjudicata*, hence it has to be threshed out again and again as the occasion may demand. ...

Likewise, in *Go, Sr. v. Ramos*,⁴² which involved the citizenship of Jimmy T. Go, as well as his father Carlos, who was alleged to be an illegal and undesirable alien in our country and thus was subjected to deportation proceedings, the Court stated that citizenship cases are *sui generis* and *res judicata* does not apply in such cases:

... Cases involving issues on citizenship are *sui generis*. Once the citizenship of an individual is put into question, it necessarily has to be threshed out and decided upon. In the case of *Fivaldo v. Commission on Elections*, we said that decisions declaring the acquisition or denial of citizenship cannot govern a person's future status with finality. This is because a person may subsequently reacquire, or for that matter, lose his citizenship under any of the modes recognized by law for the purpose. Indeed, if the issue of one's citizenship, after it has been passed upon by the courts, leaves it still open to future adjudication, then there is more reason why the government should not be precluded from questioning one's claim to Philippine citizenship, especially so when the same has never been threshed out by any tribunal.

...

Citizenship proceedings, as aforestated, are a class of its own, in that, unlike other cases, *res judicata* does not obtain as a matter of course. In a long line of decisions, this Court said that every time the citizenship of a person is material or indispensable in a judicial or administrative case, whatever the corresponding court or administrative authority decides therein as to such citizenship is generally not considered as *res judicata*; hence, it has to be threshed out again and again

correct the records of his birth and citizenship.”

⁴⁰ 148-B Phil. 773, 855 (1971).

⁴¹ 149 Phil. 661, 665 (1971).

⁴² G.R. No. 167569, 4 September 2009, 598 SCRA 266.

as the occasion may demand. *Res judicata* may be applied in cases of citizenship only if the following concur:

1. a person's citizenship must be raised as a material issue in a controversy where said person is a party;
2. the Solicitor General or his authorized representative took active part in the resolution thereof; and
3. the finding on citizenship is affirmed by this Court.

Consequently, if in the future, petitioner can find a DNA match to a Filipino parent, or any other credible and convincing evidence showing her Filipino parentage, then petitioner can still be declared a natural-born Filipino citizen.

Not being a natural-born Filipino citizen, petitioner is a nuisance candidate whose certificate of candidacy for President can *motu proprio* be cancelled by the COMELEC. In fact, the COMELEC is duty-bound to cancel petitioner's COC because to allow a person who, as found by the COMELEC is not a natural-born Filipino citizen, to run for President makes a mockery of the election process. ...

A final word. The Constitution defines natural-born citizens as "those who are citizens of the Philippines from birth without having to perform any act to acquire or perfect their Philippine citizenship." "From birth" means that the possession of natural-born citizenship starts at birth and continues to the present without interruption. The phrase "without having to perform any act to acquire or perfect their Philippine citizenship" means that a person is not a natural-born Filipino citizen if he or she has to take an oath of allegiance before a public official to acquire or reacquire Philippine citizenship. This precludes the reacquisition of natural-born citizenship that has been lost through renunciation of Philippine citizenship. The fact that the reacquisition of citizenship is made possible only through legislation by Congress - Republic Act No. 9225⁴³ means that Philippine citizenship is acquired pursuant to paragraph (4), Section 1 of Article IV of the 1987 Constitution, referring to "[t]hose who are naturalized in accordance with law."

In short, natural-born Filipino citizens who have renounced Philippine citizenship and pledged allegiance to a foreign country have become aliens, and can reacquire Philippine citizenship, just like other aliens, only if "naturalized in accordance with law."

⁴³ Citizenship Retention And Re-acquisition Act Of 2003.

Otherwise, a natural-born Filipino citizen who has absolutely renounced and abjured allegiance to the Philippines and pledged sole allegiance to the United States, undertaking to bear arms against any foreign country, including the Philippines, when required by U.S. law, could still become the Commander-in-Chief of the Armed Forces of the Philippines by performing a simple act - taking an oath of allegiance before a Philippine public official to reacquire natural-born Philippine citizenship. The framers of the Constitution, and the Filipino people who ratified the Constitution, could not have intended such an anomalous situation. For this reason, this Court should one day revisit the doctrine laid down in *Bengson III v. HRET*.⁴⁴

Section 3. Philippine citizenship may be lost or reacquired in the manner provided by law.

Section 4. Citizens of the Philippines who marry aliens shall retain their citizenship, unless by their act or omission they are deemed, under the law to have renounced it.

Section 5. Dual allegiance of citizens is inimical to the national interest and shall be dealt with by law.

CORDORA v. COMMISSION ON ELECTIONS, G.R. No. 176947, February 19, 2009, 599 Phil. 168, was a petition for *certiorari* and *mandamus* on the issue of whether “the COMELEC acted with grave abuse of discretion amounting to lack or excess of jurisdiction when it declared that there is no sufficient evidence to support probable cause that may warrant the prosecution of Gustavo S. Tambunting for an election offense.” In the *en banc* decision, Justice Carpio reiterated the ruling that **dual citizenship was not a ground for disqualification** from running for any elective local position:

We have to consider the present case in consonance with our rulings in *Mercado v. Manzano*,⁴⁵ *Valles v. COMELEC*,⁴⁶ and *AASJS v. Datumanong*.⁴⁷ *Mercado* and *Valles* involve similar operative facts as the present case. *Manzano* and *Valles*, like *Tambunting*, possessed dual citizenship by the circumstances of their birth. *Manzano* was born to Filipino parents in the United

⁴⁴ 409 Phil. 633 (2001).

⁴⁵ *Ibid.*

⁴⁶ 392 Phil. 327 (2000).

⁴⁷ G.R. No. 160869, 11 May 2007, 523 SCRA 108.

States which follows the doctrine of *jus soli*. Valles was born to an Australian mother and a Filipino father in Australia. Our rulings in *Manzano* and *Valles* stated that dual citizenship is different from dual allegiance both by cause and, for those desiring to run for public office, by effect. **Dual citizenship is involuntary and arises when, as a result of the concurrent application of the different laws of two or more states, a person is simultaneously considered a national by the said states. Thus, like any other natural-born Filipino, it is enough for a person with dual citizenship who seeks public office to file his certificate of candidacy and swear to the oath of allegiance contained therein. Dual allegiance, on the other hand, is brought about by the individual's active participation in the naturalization process.** *AASJS* states that, under R.A. No. 9225, a Filipino who becomes a naturalized citizen of another country is allowed to retain his Filipino citizenship by swearing to the supreme authority of the Republic of the Philippines. The act of taking an oath of allegiance is an implicit renunciation of a naturalized citizen's foreign citizenship.

R.A. No. 9225, or the Citizenship Retention and Reacquisition Act of 2003, was enacted years after the promulgation of *Manzano* and *Valles*. The oath found in Section 3 of R.A. No. 9225 reads as follows:

I _____, solemnly swear (or affirm) that I will support and defend the Constitution of the Republic of the Philippines and obey the laws and legal orders promulgated by the duly constituted authorities of the Philippines; and I hereby declare that I recognize and accept the supreme authority of the Philippines and will maintain true faith and allegiance thereto; and that I impose this obligation upon myself voluntarily without mental reservation or purpose of evasion.

In Sections 2 and 3 of R.A. No. 9225, the framers were not concerned with dual citizenship *per se*, but with the status of naturalized citizens who maintain their allegiance to their countries of origin even after their naturalization.⁴⁸ Section 5(3) of R.A. No. 9225 states that naturalized citizens who reacquire Filipino citizenship and desire to run for elective public office in the Philippines shall “meet the qualifications for holding such public office as required by the Constitution and existing laws and,

⁴⁸ *Id.* at 117.

at the time of filing the certificate of candidacy, make a personal and sworn renunciation of any and all foreign citizenship before any public officer authorized to administer an oath” aside from the oath of allegiance prescribed in Section 3 of R.A. No. 9225. The twin requirements of swearing to an Oath of Allegiance and executing a Renunciation of Foreign Citizenship served as the bases for our recent rulings in *Jacot v. Dal and COMELEC*,⁴⁹ *Velasco v. COMELEC*,⁵⁰ and *Japzon v. COMELEC*,⁵¹ all of which involve natural-born Filipinos who later became naturalized citizens of another country and thereafter ran for elective office in the Philippines. In the present case, Tambunting, a natural-born Filipino, did not subsequently become a naturalized citizen of another country. Hence, the twin requirements in R.A. No. 9225 do not apply to him.



⁴⁹ G.R. No. 179848, 27 November 2008, 592 Phil. 661.

⁵⁰ G.R. No. 180051, 24 December 2008, 595 Phil. 1172.

⁵¹ G.R. No. 180088, 19 January 2009, 596 Phil. 354.



ARTICLE V

SUFFRAGE

Section 1. Suffrage may be exercised by all citizens of the Philippines, not otherwise disqualified by law, who are at least eighteen years of age, and who shall have resided in the Philippines for at least one year and in the place wherein they propose to vote, for at least six months immediately preceding the election. No literacy, property, or other substantive requirement shall be imposed on the exercise of suffrage.

The **right of suffrage** was briefly referenced by Justice Carpio in **SAMBARANI v. COMMISSION ON ELECTIONS**, G.R. No. 160427, September 15, 2004, 481 Phil. 661,¹ a petition for *certiorari*, with prayer for temporary restraining order and preliminary injunction, that challenged the resolution of the COMELEC *en banc*, which declared a failure of election but failed to call another special election. Justice Carpio, speaking for the Court *en banc*, ruled as void COMELEC's reasons for refusing to hold a special election as these "cannot defeat the **right of suffrage** of the people as guaranteed by the Constitution."

An election is the embodiment of the popular will, the expression of the sovereign power of the people.² It involves the choice or selection of candidates to public office by popular vote.³ **The right of suffrage is enshrined in the Constitution because through suffrage the people exercise their sovereign authority to choose their representatives in the governance of the State.**

Section 2. The Congress shall provide a system for securing the secrecy and sanctity of the ballot as well as a system for absentee voting by qualified Filipinos abroad.

¹ See discussion under Art. IX-C, Sec. 2.

² Taule v. Santos, G.R. No. 90336, 12 August 1991, 200 SCRA 512.

³ Ibid.

The Congress shall also design a procedure for the disabled and the illiterates to vote without the assistance of other persons. Until then, they shall be allowed to vote under existing laws and such rules as the Commission on Elections may promulgate to protect the secrecy of the ballot.

Absentee Voting

In **MACALINTAL v. COMMISSION ON ELECTIONS**, G.R. No. 157013, July 10, 2003, 453 Phil. 586, a petition for *certiorari* and prohibition, Romulo B. Macalintal sought a declaration that certain provisions of Republic Act No. 9189, or the Overseas Absentee Voting Act of 2003, were unconstitutional. Moreover, Macalintal sought the imposition of a double residency requirement on **absentee Filipino voters**. Although certain provisions of RA 9189 were voided by the Court *en banc*, the law itself was upheld as constitutional. Justice Carpio **concurred** with the majority⁴ and voted, “like the framers of the 1987 Constitution and the members of Congress,” to “enfranchise our 7 million overseas Filipinos:”

The case before this Court is historic and momentous. Historic because the right of suffrage, which through the centuries painstakingly evolved into universal right,⁵ stands at the crossroads in this country. Should the right of suffrage continue its march forward and reach overseas Filipinos, or should this Court turn back this historic march here at our gates?

Momentous because the core issue is the enfranchisement or disenfranchisement of some 7 million overseas Filipinos. The annual contribution of these overseas Filipinos to the national economy, in terms of hard-earned foreign exchange remitted through the banking system, equals almost 50 percent of the country’s national budget. The total remittances, recorded and unrecorded, of overseas Filipinos may even reach 18 percent of GNP, almost the same percentage that agriculture at 20 percent contributes to the GNP.

The nation has hailed the overseas Filipinos as the modern-day heroes and saviors of the economy. Their blood, toil, tears and sweat have propped up the Philippine peso through all the recurring financial crises that have battered the nation. Although scattered in foreign lands across the globe, these overseas

⁴ Majority opinion, Austria-Martinez, J.

⁵ International Covenant on Civil and Political Rights, Art. 25.

Filipinos keep abreast with developments in the Philippines through the Internet, cable and satellite TV, and even texting.

In recognition of the immense contribution of overseas Filipinos to the nation, the framers of the 1987 Constitution introduced the **absentee voting system, novel in this country, purposely to enfranchise the overseas Filipinos.** Commissioner Blas Ople, the former Minister of Labor who started deploying abroad large numbers of Filipino workers, triggered the introduction of the absentee voting with this discourse during the deliberations of the Constitutional Commission:

MR. OPLE: ... In a previous hearing of the Committee on Constitutional Commissions and Agencies, the Chairman of the Commission on Elections, Ramon Felipe, said that there was no insuperable obstacle to making effective the right of suffrage for Filipinos overseas. Those who have adhered to their Filipino citizenship notwithstanding strong temptations are exposed to embrace a more convenient foreign citizenship. And those who on their own or under pressure of economic necessity here, find that they have to detach themselves from their families to work in other countries with definite tenures of employment. Many of them are on contract employment for one, two, or three years. They have no intention of changing their residence on a permanent basis, but are technically disqualified from exercising the right of suffrage in their countries of destination by the residential requirement in Section 1 which says:

Suffrage shall be exercised by all citizens of the Philippines not otherwise disqualified by law, who are eighteen years of age or over, and who shall have resided in the Philippines for at least one year and in the place wherein they propose to vote for at least six months preceding the election.

I, therefore, ask the Committee whether at the proper time they might entertain an amendment that will make this exercise of the right to vote abroad for Filipino citizens an effective, rather than merely a nominal right under this proposed Constitution.

...

It gives me scant comfort thinking of about two million Filipinos who should enjoy the right of suffrage, at least a substantial segment of these overseas Filipino communities. The Committee, of course, is aware that when this Article of the Constitution explicitly and unequivocally extends the right of effective suffrage to Filipinos abroad, this will call

for a logistical exercise of global proportions. In effect, this will require budgetary and administrative commitments on the part of the Philippine government, mainly through the COMELEC and the Ministry of Foreign Affairs, and perhaps, a more extensive elaboration of this mechanism that will be put in place to make effective the right to vote. Therefore, seeking shelter in some wise jurisprudence of the past may not be sufficient to meet the demands of the right of suffrage for Filipinos abroad that I have mentioned. But I want to thank the Committee for saying that an amendment to this effect may be entertained at the proper time.⁶

From the start, the framers of the Constitution knew that the absentee voting system for overseas Filipinos would have to be an exception to the double residency requirement in Section 1, Article V of the Constitution. This was the basic premise for introducing an express provision on absentee voting in the Constitution. Unless there is such an exception in the Constitution itself, overseas Filipinos could never vote as absentee voters in view of the double residency requirement in Section 1. Because of this double residency requirement, Congress could not enfranchise through ordinary legislation overseas Filipinos who do not comply with the double residency requirement.

Thus, the framers of the Constitution, by an overwhelming vote of 28 in favor and only one against, approved Section 2, Article V of the Constitution ...

After sixteen long years of debates, Congress finally enacted RA No. 9189 (the Overseas Absentee Voting Act of 2003), precisely to implement the constitutional mandate to enfranchise overseas Filipinos. Petitioner now asks the Court to strike down this law as unconstitutional mainly because it enfranchises overseas Filipinos who do not comply with the double residency requirement in Section 1, Article V of the 1987 Constitution ...

Like the 1973 Constitution, Section 1, Article V of the 1987 Constitution imposes a double residency requirement before a Filipino 18 years or over may exercise the right to vote, namely: (1) one year residence in the Philippines; and (2) six months residence in the locality in the

⁶ II Record, Constitutional Commission 11-12 (19 July 1986).

Philippines where he proposes to vote.

The threshold issue is whether overseas Filipinos should comply with the double residency requirement in Section 1 of Article V to vote under the absentee voting system in Section 2 of the same Article. Stated another way, the issue is whether overseas Filipinos, many of whom are not registered voters in the Philippines, should come home twice to the Philippines just so they could vote in a foreign country as absentee Filipino voters. The first time they should come home is one year before the elections to establish residence in the Philippines. The second time is six months before the elections to establish residence in the locality in the Philippines where they propose to vote.

Did the framers of the 1987 Constitution intend to inflict on overseas Filipinos such a burdensome requirement as an essential feature of the absentee voting system in Section 2 of Article V? To require absentee voters to comply with the double residency requirement is to impose an impractical and even an impossible condition to the exercise of the constitutional right to vote. In the first place, the second residency requirement of establishing residence in a locality in the Philippines where the voters propose to vote is impossible to comply since overseas Filipinos will obviously not vote in any locality in the Philippines. Imposing the double residency requirement makes the absentee voting an empty right of overseas Filipinos. Certainly, the wise framers of the Constitution were incapable of such absurd scheme.

If the framers of the Constitution did not intend such an absurd requirement, should this Court now impose such absurdity on overseas Filipinos? How many overseas Filipinos would comply with the double residency requirement just to vote in Presidential and Senatorial elections? How much will overseas Filipinos spend just to come home twice within 12 months just so they could vote when they go back abroad?

The concept of absentee voting negates a residency requirement in the country of citizenship of the voter. By definition, an absentee voter is a non-resident voter. Obviously, the double residency requirement in Section 1 of Article V applies only to resident or non-absentee Filipino voters. To impose the double residency requirement on absentee Filipino voters is an egregious anomaly for it will require absentee Filipino voters to

comply with the same residency requirement imposed on resident or non-absentee Filipino voters. If absentee Filipino voters are required to reside in the Philippines just like resident or non-absentee Filipino voters, why create an absentee voting system for overseas Filipinos in the first place? Applying the double residency requirement on absentee voters will render the provision on absentee voting in Section 2 a surplusage, a constitutional mandate devoid of meaning.

Even without the absentee voting provision in Section 2, Congress can validly enact a law allowing resident or non-absentee Filipino voters - those who comply with the double residency requirement - to vote abroad in Philippine embassies or consulates. There is no constitutional prohibition on registered Filipino voters who comply with the double residency requirement to cast their ballots at a Philippine embassy or consulate abroad where they happen to be on election day. If the absentee voting system in Section 2 were for the benefit only of resident or non-absentee Filipinos, then there would be no need to provide for it in the Constitution.

The framers of the 1987 Constitution specifically introduced the absentee voting provision in Section 2 precisely to enfranchise overseas Filipinos who do not comply with the double residency requirement in Section 1. Without the absentee voting provision in Section 2, Congress could not validly enact a law enfranchising overseas Filipinos who do not comply with the double residency requirement. As succinctly explained by Commissioner Christian Monsod during the deliberations in the Constitutional Commission:

MR. MONSOD: ... The reason we want absentee voting to be in the Constitution as a mandate to the legislature is that there could be inconsistency on the residence rule if it is just a question of legislation by Congress. So, by allowing it and saying that this is possible, then legislation can take care of the rest.⁷

Evidently, the framers of the Constitution intended the absentee voting provision as an exception to the double residency requirement.

The question of how a Filipino, who has become a permanent resident or immigrant in a foreign country, may reacquire his

⁷ II Record, Constitutional Commission 33 (19 July 1986).

domicile or residence in the Philippines is a matter for ordinary legislation. The reacquisition of the Philippine domicile or residence that a Filipino had lost is within the power of Congress to legislate. The Constitution does not define what domicile or residence means. There is also no constitutional prohibition against the enactment of legislation prescribing the reacquisition of domicile or residence in the Philippines, just as there is no constitutional prohibition against the enactment of legislation prescribing the reacquisition of Philippine citizenship.

Thus, RA No. 8171⁸ allows a former natural-born Filipino who became a foreigner to reacquire Philippine citizenship by filing a simplified administrative petition and taking an oath of allegiance to the Philippines. Section 5(d) of RA No. 9189, which prescribes the reacquisition of residence by a Filipino through the execution of an affidavit stating he is resuming residence in the Philippines, is similarly well within the power of Congress to enact and is thus constitutional.

...

“The right of suffrage is the cornerstone of a representative government like that established in the 1987 Constitution. A representative government is legitimate when those represented elect their representatives in government. The consent of the governed is what stamps legitimacy on those who govern. This consent is expressed through the right of suffrage. It is a precious right for which many have fought and died so that others may freely exercise it. A government that denies such right on flimsy or meaningless grounds does so at its peril.”

The International Covenant on Civil and Political Rights, to which the Philippines is a signatory, requires the Philippines to respect the people’s right of suffrage “without unreasonable restrictions.” Thus, Article 25 of the Covenant provides:

Art. 25. Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections

⁸ An Act Providing For The Repatriation Of Filipino Women Who Have Lost Their Philippine Citizenship By Marriage To Aliens And Of Natural-Born Filipinos.

which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; ...

The Philippines is duty bound under international law to comply in good faith with its treaty obligations under the Covenant. To require overseas Filipinos to return to the Philippines twice within 12 months so they may vote abroad as absentee voters is plainly an unreasonable restriction outlawed by the Covenant.

When the framers of the Constitution introduced absentee voting in Section 2 of Article V, they were aware of the country's obligations under the Covenant. In their discussions on the death penalty, human rights and the Bill of Rights, the framers of the Constitution often referred to the country's obligations under the Covenant.⁹ It is inconceivable that the framers intended overseas Filipinos to comply with the double residency requirement, an unreasonable restriction that would patently violate Article 25 of the Covenant and practically negate the overseas Filipinos' right of suffrage.

There are some 40 countries in the world, including our ASEAN neighbors Indonesia and Thailand, which grant their overseas citizens the right to vote while residing abroad. The inexorable direction of history is to bestow on every person the right to vote wherever he may be in this global village. Modern technology and telecommunications are making this happen even now. Those who insist on the double residency requirement as an essential condition for absentee voting by overseas Filipinos are turning back in vain the clock of history.

The framers of the Constitution expressly mandated Congress to enact an absentee voting law to enfranchise overseas Filipinos. Congress has enacted such a law after a long and difficult struggle by overseas Filipinos who patiently waited for 16 years for the enactment of the law. That struggle is now part of the world history of the evolution of the right of suffrage as a universal right. No frivolous, absurd or impractical conditions should stand in the way of enfranchising overseas Filipinos whose contribution to the national economy is immeasurable.



⁹ 1 Record, Constitutional Commission No. 32, 17 July 1986; Vol. 2, No. 43, 30 July 1986; Vol. 3, No. 66, 26 August 1986; Vol. 3, No. 67, 27 August 1986; Vol. 4, No. 68, 28 August 1986; Vol. 4, No. 69, 29 August 1986.



ARTICLE VI

THE LEGISLATIVE DEPARTMENT

Section 1. The legislative power shall be vested in the Congress of the Philippines which shall consist of a Senate and a House of Representatives, except to the extent reserved to the people by the provision on initiative and referendum.

In **REVIEW CENTER ASSOCIATION OF THE PHILIPPINES v. ERMITA**, G.R. No. 180046, April 2, 2009, 602 Phil. 342, the petition for prohibition and *mandamus*, which assailed Executive Order No. 566¹ and Commission on Higher Education Memorandum Order No. 30, series of 2007 (RIRR),² was granted by the Court *en banc*, resulting in the declaration of EO 566 and the RIRR as void for being an unconstitutional usurpation of **legislative power**. The principal ground relied on by Justice Carpio was **Section 1 of Article VI**:

Usurpation of Legislative Power

The OSG argues that President Arroyo was merely exercising her executive power to ensure that the laws are faithfully executed. The OSG further argues that President Arroyo was exercising her residual powers under Executive Order No. 292 (EO 292),³ particularly Section 20, Title I of Book III, thus:

Sec. 20. Residual Powers. - Unless Congress provides otherwise, the President shall exercise such other powers and functions vested in the President which are provided for under the laws and which are not specifically enumerated above, or which are not delegated by the President in accordance with law.

Section 20, Title I of Book III of EO 292 speaks of other powers

¹ Directing The Commission On Higher Education To Regulate The Establishment And Operation Of Review Centers And Similar Entities. Signed on 8 September 2006.

² Revised Implementing Rules And Regulations Governing The Establishment And Operation Of Review Centers And Similar Entities In The Philippines Pursuant To Executive Order No. 566. Approved on 7 May 2007.

³ The Administrative Code of 1987.

vested in the President under the law.⁴ The exercise of the President's residual powers under this provision requires legislation,⁵ as the provision clearly states that the exercise of the President's other powers and functions has to be "provided for under the law." There is no law granting the President the power to amend the functions of the CHED. The President may not amend RA 7722 through an Executive Order without a prior legislation granting her such power.

The President has no inherent or delegated legislative power to amend the functions of the CHED under RA 7722. **Legislative power is the authority to make laws and to alter or repeal them,⁶ and this power is vested with the Congress under Section 1, Article VI of the 1987 Constitution...**

In *Ople v. Torres*,⁷ the Court declared void, as a usurpation of legislative power, Administrative Order No. 308 (AO 308) issued by the President to create a national identification system. AO 308 mandates the adoption of a national identification system even in the absence of an enabling legislation. The Court distinguished between Legislative and Executive powers, as follows:

The line that delineates Legislative and Executive power is not indistinct. Legislative power is "the authority, under the Constitution, to make laws, and to alter and repeal them." The Constitution, as the will of the people in their original, sovereign and unlimited capacity, has vested this power in the Congress of the Philippines. The grant of legislative power to Congress is broad, general and comprehensive. The legislative body possesses plenary power for all purposes of civil government. Any power, deemed to be legislative by usage and tradition, is necessarily possessed by Congress, unless the Constitution has lodged it elsewhere. In fine, except as limited by the Constitution, either expressly or impliedly, legislative power embraces all subjects and extends to matters of general concern or common interest.

While Congress is vested with the power to enact laws, the President executes the laws. The executive power is vested in

⁴ See *Larin v. Executive Secretary*, 345 Phil. 962 (1997).

⁵ See *Kilusang Mayo Uno v. Director-General, National Economic Development Authority*, G.R. No. 167798, 19 April 2006, 487 SCRA 623, penned by Justice Carpio and excerpted previously and again subsequently.

⁶ *Ibid.*

⁷ 354 Phil. 948 (1998).

the President. It is generally defined as the power to enforce and administer laws. It is the power of carrying the laws into practical operation and enforcing their due observance.

As head of the Executive Department, the President is the Chief Executive. He represents the government as a whole and sees to it that all laws are enforced by the officials and employees of his department. He has control over the executive department, bureaus and offices. This means that he has the authority to assume directly the functions of the executive department, bureau and office, or interfere with the discretion of its officials.

Corollary to the power of control, the President also has the duty of supervising the enforcement of laws for the maintenance of general peace and public order. Thus, he is granted administrative power over bureaus and offices under his control to enable him to discharge his duties effectively.

Administrative power is concerned with the work of applying policies and enforcing orders as determined by proper governmental organs. It enables the President to fix a uniform standard of administrative efficiency and check the official conduct of his agents. To this end, he can issue administrative orders, rules and regulations.

...

An administrative order is:

Sec. 3. Administrative Orders. - Acts of the President which relate to particular aspects of governmental operation in pursuance of his duties as administrative head shall be promulgated in administrative orders.

An administrative order is an ordinance issued by the President which relates to specific aspects in the administrative operation of government. It must be in harmony with the law and should be for the sole purpose of implementing the law and carrying out the legislative policy. ...

Just like AO 308 in *Ople v. Torres*, EO 566 in this case is not supported by any enabling law. The Court further stated in *Ople*:

... As well stated by Fisher: "... Many regulations however, bear directly on the public. It is here that administrative legislation must be restricted in its scope and application. Regulations are not supposed to be a substitute for the general policy-making that Congress enacts in the form of a public law. Although administrative regulations are entitled to respect, the authority to prescribe rules and regulations is not an independent source of power to make laws."

Since EO 566 is an invalid exercise of legislative power, the RIRR is also an invalid exercise of the CHED's quasi-legislative power.

Administrative agencies exercise their quasi-legislative or rule-making power through the promulgation of rules and regulations.⁸ The CHED may only exercise its rule-making power within the confines of its jurisdiction under RA 7722. The RIRR covers review centers and similar entities which are neither institutions of higher education nor institutions offering degree-granting programs.

Exercise of Police Power

Police power to prescribe regulations to promote the health, morals, education, good order or safety, and the general welfare of the people flows from the recognition that *salus populi est suprema lex* - the welfare of the people is the supreme law.⁹ Police power primarily rests with the legislature although it may be exercised by the President and administrative boards by virtue of a valid delegation.¹⁰ Here, no delegation of police power exists under RA 7722 authorizing the President to regulate the operations of non-degree granting review centers.

The antecedent facts, preliminary issues, and the justification for the conclusion arrived at in **Review Center Association of the Philippines** were detailed in Justice Carpio's *ponencia*:

The Antecedent Facts

On 11 and 12 June 2006, the Professional Regulation Commission (PRC) conducted the Nursing Board Examinations nationwide. In June 2006, licensure applicants wrote the PRC to report that handwritten copies of two sets of examinations were circulated during the examination period among the examinees reviewing at the R.A. Gapuz Review Center and Inress Review Center. George Cordero, Inress Review Center's President, was then the incumbent President of the Philippine Nurses Association. The examinees were provided with a list of 500 questions and answers in two of the examinations' five subjects, particularly Tests III (Psychiatric Nursing) and

⁸ *Metropolitan Bank and Trust Company, Inc. v. National Wages and Productivity Commission*, G.R. No. 144322, 6 February 2007, 514 SCRA 346.

⁹ *Metropolitan Manila Development Authority v. Viron Transportation Co., Inc.*, G.R. No. 170656, 15 August 2007, 530 SCRA 341.

¹⁰ *Ibid.*

V (Medical-Surgical Nursing). The PRC later admitted the leakage and traced it to two Board of Nursing members. On 19 June 2006, the PRC released the results of the Nursing Board Examinations. On 18 August 2006, the Court of Appeals restrained the PRC from proceeding with the oath-taking of the successful examinees set on 22 August 2006.

Consequently, President Gloria Macapagal-Arroyo (President Arroyo) replaced all the members of the PRC's Board of Nursing. President Arroyo also ordered the examinees to re-take the Nursing Board Examinations.

On 8 September 2006, President Arroyo issued EO 566 which authorized the CHED to supervise the establishment and operation of all review centers and similar entities in the Philippines.

On 3 November 2006, the CHED, through its then Chairman Carlito S. Puno (Chairman Puno), approved CHED Memorandum Order No. 49, series of 2006 (IRR).

In a letter dated 24 November 2006, the Review Center Association of the Philippines (petitioner), an organization of independent review centers, asked the CHED to "amend, if not withdraw" the IRR arguing, among other things, that giving permits to operate a review center to Higher Education Institutions (HEIs) or consortia of HEIs and professional organizations will effectively abolish independent review centers.

In a letter dated 3 January 2007, Chairman Puno wrote petitioner, through its President Jose Antonio Fudolig (Fudolig), that to suspend the implementation of the IRR would be inconsistent with the mandate of EO 566. Chairman Puno wrote that the IRR was presented to the stakeholders during a consultation process prior to its finalization and publication on 13 November 2006. Chairman Puno also wrote that petitioner's comments and suggestions would be considered in the event of revisions to the IRR.

In view of petitioner's continuing request to suspend and re-evaluate the IRR, Chairman Puno, in a letter dated 9 February 2007, invited petitioner's representatives to a dialogue on 14 March 2007. In accordance with what was agreed upon during the dialogue, petitioner submitted to the CHED its position paper on the IRR. Petitioner also requested the CHED to confirm

in writing Chairman Puno's statements during the dialogue, particularly on lowering of the registration fee from P400,000 to P20,000 and the requirement for reviewers to have five years' teaching experience instead of five years' administrative experience. Petitioner likewise requested for a categorical answer to their request for the suspension of the IRR. The CHED did not reply to the letter.

On 7 May 2007, the CHED approved the RIRR. On 22 August 2007, petitioner filed before the CHED a Petition to Clarify/Amend Revised Implementing Rules and Regulations praying for a ruling:

1. Amending the RIRR by excluding independent review centers from the coverage of the CHED;
2. Clarifying the meaning of the requirement for existing review centers to tie-up or be integrated with HEIs, consortium or HEIs and PRC-recognized professional associations with recognized programs, or in the alternative, to convert into schools; and
3. Revising the rules to make it conform with Republic Act No. 7722 (RA 7722)¹¹ limiting the CHED's coverage to public and private institutions of higher education as well as degree-granting programs in post-secondary educational institutions.

On 8 October 2007, the CHED issued Resolution No. 718-2007 referring petitioner's request to exclude independent review centers from CHED's supervision and regulation to the Office of the President as the matter requires the amendment of EO 566. In a letter dated 17 October 2007, then CHED Chairman Romulo L. Neri (Chairman Neri) wrote petitioner regarding its petition to be excluded from the coverage of the CHED in the RIRR. Chairman Neri stated:

While it may be true that regulation of review centers is not one of the mandates of CHED under Republic Act 7722, however, on September 8, 2006, Her Excellency, President Gloria Macapagal-Arroyo, issued Executive Order No. 566 directing the Commission on Higher Education to regulate the establishment and operation of review centers and similar entities in the entire country.

With the issuance of the aforesaid Executive Order, the

¹¹ An Act Creating The Commission On Higher Education, Appropriating Funds Therefor And For Other Purposes.

CHED now is the agency that is mandated to regulate the establishment and operation of all review centers as provided for under Section 4 of the Executive Order which provides that “No review center or similar entities shall be established and/or operate review classes without the favorable expressed indorsement of the CHED and without the issuance of the necessary permits or authorizations to conduct review classes. ...”

To exclude the operation of independent review centers from the coverage of CHED would clearly contradict the intention of the said Executive Order No. 566.

Considering that the requests requires the amendment of Executive Order No. 566, the Commission, during its 305th Commission Meeting, resolved that the said request be directly referred to the Office of the President for appropriate action.

As to the request to clarify what is meant by tie-up/be integrated with an HEI, as required under the Revised Implementing Rules and Regulations, tie-up/be integrated simply means, to be in partner with an HEI.

On 26 October 2007, petitioner filed a petition for Prohibition and Mandamus before this Court praying for the annulment of the RIRR, the declaration of EO 566 as invalid and unconstitutional, and the prohibition against CHED from implementing the RIRR.

Dr. Freddie T. Bernal, Director III, Officer-In-Charge, Office of the Director IV of CHED, sent a letter to the President of Northcap Review Center, Inc., a member of petitioner, that it had until 27 November 2007 to comply with the RIRR.

On 15 February 2008, PIMSAT Colleges (respondent-intervenor) filed a Motion for Leave to Intervene and To Admit Comment-in-Intervention and a Comment-in-Intervention praying for the dismissal of the petition. Respondent-intervenor alleges that the Office of the President and the CHED did not commit any act of grave abuse of discretion in issuing EO 566 and the RIRR. Respondent-intervenor alleges that the requirements of the RIRR are reasonable, doable, and are not designed to deprive existing review centers of their review business. The Court granted the Motion for Leave to Intervene and to Admit Comment-in-Intervention in its 11 March 2008 Resolution.

On 23 April 2008, a Motion for Leave of Court for Intervention in Support of the Petition and a Petition in Intervention were

filed by CPA Review School of the Philippines, Inc. (CPAR), Professional Review and Training Center, Inc. (PRTC), ReSA Review School, Inc. (ReSA), CRC-ACE Review School, Inc. (CRC-ACE), all independent CPA review centers operating in Manila (collectively, petitioners-intervenors). Petitioners-intervenors pray for the declaration of EO 566 and the RIRR as invalid on the ground that both constitute an unconstitutional exercise of legislative power. The Court granted the intervention in its 29 April 2008 Resolution.

On 21 May 2008, the CHED issued CHED Memorandum Order No. 21, Series of 2008 (CMO 21, s. 2008) extending the deadline for six months from 27 May 2008 for all existing independent review centers to tie-up or be integrated with HEIs in accordance with the RIRR.

In its 25 November 2008 Resolution, this Court resolved to require the parties to observe the *status quo* prevailing before the issuance of EO 566, the RIRR, and CMO 21, s. 2008.

The Assailed Executive Order and the RIRR

Executive Order No. 566 states in full:

EXECUTIVE ORDER NO. 566

DIRECTING THE COMMISSION ON HIGHER EDUCATION TO REGULATE THE ESTABLISHMENT AND OPERATION OF REVIEW CENTERS AND SIMILAR ENTITIES

WHEREAS, the State is mandated to protect the right of all citizens to quality education at all levels and shall take appropriate steps to make education accessible to all, pursuant to Section 1, Article XIV of the 1987 Constitution;

WHEREAS, the State has the obligation to ensure and promote quality education through the proper supervision and regulation of the licensure examinations given through the various Boards of Examiners under the Professional Regulation Commission;

WHEREAS, the lack of regulatory framework for the establishment and operation of review centers and similar entities, as shown in recent events, have adverse consequences and affect public interest and welfare;

WHEREAS, the overriding necessity to protect the public against substandard review centers and unethical practices committed by some review centers demand that a regulatory

framework for the establishment and operation of review centers and similar entities be immediately instituted;

WHEREAS, Republic Act No. 7722, otherwise known as the Higher Education Act of 1994, created the Commission on Higher Education, which is best equipped to carry out the provisions pertaining to the regulation of the establishment and operation of review centers and similar entities.

NOW, THEREFORE, I, GLORIA MACAPAGAL-ARROYO, the President of the Republic of the Philippines, by virtue of the powers vested in me by law, do hereby order:

Sec. 1. Establishment of a System of Regulation for Review Centers and Similar Entities. The Commission on Higher Education (CHED), in consultation with other concerned government agencies, is hereby directed to formulate a framework for the regulation of review centers and similar entities, including but not limited to the development and institutionalization of policies, standards, guidelines for the establishment, operation and accreditation of review centers and similar entities; maintenance of a mechanism to monitor the adequacy, transparency and propriety of their operations; and reporting mechanisms to review performance and ethical practice.

Sec. 2. Coordination and Support. The Professional Regulation Commission (PRC), Technical Skills Development Authority (TESDA), Securities and Exchange Commission (SEC), the various Boards of Examiners under the PRC, as well as other concerned non- government organizations life professional societies, and various government agencies, such as the Department of Justice (DOJ), National Bureau of Investigation (NBI), Office of the Solicitor General (OSG), and others that may be tapped later, shall provide the necessary assistance and technical support to the CHED in the successful operationalization of the System of Regulation envisioned by this Executive Order.

Sec. 3. Permanent Office and Staff. To ensure the effective implementation of the System of Regulation, the CHED shall organize a permanent office under its supervision to be headed by an official with the rank of Director and to be composed of highly competent individuals with expertise in educational assessment, evaluation and testing; policies and standards development, monitoring, legal and enforcement; and statistics as well as curriculum and instructional materials development. The CHED shall submit the staffing pattern and budgetary requirements to the Department of Budget and Management (DBM) for approval.

Sec. 4. Indorsement Requirement. No review center or similar entities shall be established and/or operate review classes without the favorable expressed indorsement of the CHED and without the issuance of the necessary permits or authorizations to conduct review classes. After due consultation with the stakeholders, the concerned review centers and similar entities shall be given a reasonable period, at the discretion of the CHED, to comply with the policies and standards, within a period not exceeding three (3) years, after due publication of this Executive Order. The CHED shall see to it that the System of Regulation including the implementing mechanisms, policies, guidelines and other necessary procedures and documentation for the effective implementation of the System, are completed within sixty days (60) upon effectivity of this Executive Order.

Sec. 5. Funding. The initial amount necessary for the development and implementation of the System of Regulation shall be sourced from the CHED Higher Education Development Fund (HEDF), subject to the usual government accounting and auditing practices, or from any applicable funding source identified by the DBM. For the succeeding fiscal year, such amounts as may be necessary for the budgetary requirement of implementing the System of Regulation and the provisions of this Executive Order shall be provided for in the annual General Appropriations Act in the budget of the CHED. Whenever necessary, the CHED may tap its Development Funds as supplemental source of funding for the effective implementation of the regulatory system. In this connection, the CHED is hereby authorized to create special accounts in the HEDF exclusively for the purpose of implementing the provisions of this Executive Order.

Sec. 6. Review and Reporting. The CHED shall provide for the periodic review performance of review centers and similar entities and shall make a report to the Office of the President of the results of such review, evaluation and monitoring.

Sec. 7. Separability. Any portion or provision of this Executive Order that may be declared unconstitutional shall not have the effect of nullifying other provisions hereof, as long as such remaining provisions can still subsist and be given effect in their entirety.

Sec. 8. Repeal. All rules and regulations, other issuances or parts thereof, which are inconsistent with this Executive Order, are hereby repealed or modified accordingly.

Sec. 9. Effectivity. This Executive Order shall take effect

immediately upon its publication in a national newspaper of general circulation....

The pertinent provisions of the RIRR affecting independent review centers are as follows:

Rule VII

IMPLEMENTING GUIDELINES AND PROCEDURES

Sec. 1. Authority to Establish and Operate - Only CHED recognized, accredited and reputable HEIs may be authorized to establish and operate review center/course by the CHED upon full compliance with the conditions and requirements provided herein and in other pertinent laws, rules and regulations. In addition, a consortium or consortia of qualified schools and/or entities may establish and operate review centers or conduct review classes upon compliance with the provisions of these Rules.

Rule XIV

TRANSITORY PROVISIONS

Sec. 1. Review centers that are existing upon the approval of Executive Order No. 566 shall be given a grace period of up to one (1) year, to tie-up/be integrated with existing HEIs[,] consortium of HEIs and PRC recognized Professional Associations with recognized programs under the conditions set forth in this Order and upon mutually acceptable covenants by the contracting parties. In the alternative, they may convert as a school and apply for the course covered by the review subject to rules and regulations of the CHED and the SEC with respect to the establishment of schools. In the meantime, no permit shall be issued if there is non-compliance with these conditions or non-compliance with the requirements set forth in these rules.

Sec. 2. Only after full compliance with the requirements shall a Permit be given by the CHED to review centers contemplated under this Rule.

Sec. 3. Failure of existing review centers to fully comply with the above shall bar them from existing as review centers and they shall be deemed as operating illegally as such. In addition, appropriate administrative and legal proceedings shall be commence[d] against the erring entities that continue to operate and appropriate sanctions shall be imposed after due process.

The Issues

The issues raised in this case are the following:

1. Whether EO 566 is an unconstitutional exercise by the Executive of legislative power as it expands the CHED's jurisdiction; and
2. Whether the RIRR is an invalid exercise of the Executive's rule-making power.

The Ruling of this Court

The petition has merit.

Violation of Judicial Hierarchy

The Office of the Solicitor General (OSG) prays for the dismissal of the petition. Among other grounds, the OSG alleges that petitioner violated the rule on judicial hierarchy in filing the petition directly with this Court.

This Court's original jurisdiction to issue a writ of *certiorari*, prohibition, *mandamus*, *quo warranto*, *habeas corpus*, and injunction is not exclusive but is concurrent with the Regional Trial Courts and the Court of Appeals in certain cases.¹² The Court has explained:

This concurrence of jurisdiction is not, however, to be taken as according to parties seeking any of the writs an absolute, unrestrained freedom of choice of the court to which application therefor will be directed. There is after all a hierarchy of courts. That hierarchy is determinative of the venue of appeals, and also serves as a general determinant of the appropriate forum for petitions for the extraordinary writs. A becoming regard of that judicial hierarchy most certainly indicates that petitions for the issuance of extraordinary writs against first level (inferior) courts should be filed with the Regional Trial Court, and those against the latter, with the Court of Appeals. A direct invocation of the Supreme Court's original jurisdiction to issue these writs should be allowed only when there are special and important reasons therefor, clearly and specifically set out in the petition. This is [an] established

¹² LPBS Commercial, Inc. v. Amila, G.R. No. 147443, 11 February 2008, 544 SCRA 199.

policy. It is a policy necessary to prevent inordinate demands upon the Court's time and attention which are better devoted to those matters within its exclusive jurisdiction, and to prevent further over-crowding of the Court's docket.¹³

The Court has further explained:

The propensity of litigants and lawyers to disregard the hierarchy of courts in our judicial system by seeking relief directly from this Court must be put to a halt for two reasons: (1) it would be an imposition upon the precious time of this Court; and (2) it would cause an inevitable and resultant delay, intended or otherwise, in the adjudication of cases, which in some instances had to be remanded or referred to the lower court as the proper forum under the rules of procedure, or as better equipped to resolve the issues because this Court is not a trier of facts.¹⁴

The rule, however, is not absolute, as when exceptional and compelling circumstances justify the exercise of this Court of its primary jurisdiction. In this case, petitioner alleges that EO 566 expands the coverage of RA 7722 and in doing so, the Executive Department usurps the legislative powers of Congress. The issue in this case is not only the validity of the RIRR. Otherwise, the proper remedy of petitioner and petitioners-intervenors would have been an ordinary action for the nullification of the RIRR before the Regional Trial Court.¹⁵ The alleged violation of the Constitution by the Executive Department when it issued EO 566 justifies the exercise by the Court of its primary jurisdiction over the case. The Court is not precluded from brushing aside technicalities and taking cognizance of an action due to its importance to the public and in keeping with its duty to determine whether the other branches of the Government have kept themselves within the limits of the Constitution.¹⁶

...

¹³ *Liga ng mga Barangay National v. City Mayor of Manila*, 465 Phil. 529, 542-543 (2004), citing *People v. Cuaserna*, G.R. No. 67787, 18 April 1989, 172 SCRA 415.

¹⁴ *LPBS Commercial, Inc. v. Amila*, G.R. No. 147443, 11 February 2008, 544 SCRA 199, 205, citing *Santiago v. Vasquez*, G.R. Nos. 99289-90, 27 January 1993, 217 SCRA 633.

¹⁵ *Holy Spirit Homeowners Association, Inc. v. Defensor*, G.R. No. 163980, 3 August 2006, 497 SCRA 581.

¹⁶ *Executive Secretary v. Southwing Heavy Industries, Inc.*, G.R. No. 164171, 20 February 2006, 482 SCRA 673.

EO 566 Expands the Coverage of RA 7722

The OSG alleges that Section 3 of RA 7722 should be read in conjunction with Section 8, enumerating the CHED's powers and functions. In particular, the OSG alleges that the CHED has the power under paragraphs (e) and (n) of Section 8 to:

- (e) monitor and evaluate the performance of programs and institutions of higher learning for appropriate incentives as well as the imposition of sanctions such as, but not limited to, diminution or withdrawal of subsidy, recommendation on the downgrading or withdrawal of accreditation, program termination or school closure;
- (n) promulgate such rules and regulations and exercise such other powers and functions as may be necessary to carry out effectively the purpose and objectives of this Act[.]

The OSG justifies its stand by claiming that the term “programs ... of higher learning” is broad enough to include programs offered by review centers.

We do not agree.

Section 3 of RA 7722 provides:

Sec. 3. Creation of Commission on Higher Education. - In pursuance of the abovementioned policies, the Commission on Higher Education is hereby created, hereinafter referred to as the Commission.

The Commission shall be independent and separate from the Department of Education, Culture and Sports (DECS), and attached to the Office of the President for administrative purposes only. Its coverage shall be both public and private institutions of higher education as well as degree-granting programs in all post-secondary educational institutions, public and private.

Neither RA 7722 nor CHED Order No. 3, series of 1994 (Implementing Rules of RA 7722)¹⁷ defines an institution of higher learning or a program of higher learning.

“Higher education,” however, is defined as “education beyond

¹⁷ Rules and Regulations Implementing RA 7722, as amended.

the secondary level”¹⁸ or “education provided by a college or university.”¹⁹ Under the “plain meaning” or *verba legis* rule in statutory construction, if the statute is clear, plain, and free from ambiguity, it must be given its literal meaning and applied without interpretation.²⁰ The legislature is presumed to know the meaning of the words, to have used words advisedly, and to have expressed its intent by use of such words as are found in the statute.²¹ Hence, the term “higher education” should be taken in its ordinary sense and should be read and interpreted together with the phrase “degree-granting programs in all post-secondary educational institutions, public and private.” Higher education should be taken to mean tertiary education or that which grants a degree after its completion.

Further, Articles 6 and 7 of the Implementing Rules provide:

Art. 6. Scope of Application. - The coverage of the Commission shall be both public and private institutions of higher education as well as degree-granting programs in all post-secondary educational institutions, public and private.

These Rules shall apply to all public and private educational institutions offering tertiary degree programs.

The establishment, conversion, or elevation of degree-granting institutions shall be within the responsibility of the Commission.

Art. 7. Jurisdiction. - Jurisdiction over institutions of higher learning primarily offering tertiary degree programs shall belong to the Commission.

Clearly, HEIs refer to degree-granting institutions, or those offering tertiary degree or post-secondary programs. In fact, Republic Act No. 8292 or the Higher Education Modernization Act of 1997 covers chartered state universities and colleges. State universities and colleges primarily offer degree courses and programs.

Sections 1 and 8, Rule IV of the RIRR define a review center and similar entities as follows:

Sec. 1. REVIEW CENTER. - refers to a center operated and

¹⁸ Webster’s Third New International Dictionary 1068 (1986 ed.).

¹⁹ Ibid.

²⁰ Republic v. Lacap, G.R. No. 158253, 2 March 2007, 517 SCRA 255.

²¹ Ibid.

owned by a duly authorized entity pursuant to these Rules intending to offer to the public and/or to specialized groups whether for a fee or for free a program or course of study that is intended to refresh and enhance the knowledge and competencies and skills of reviewees obtained in the formal school setting in preparation for the licensure examinations given by the Professional Regulations Commission (PRC). The term review center as understood in these rules shall also embrace the operation or conduct of review classes or courses provided by individuals whether for a fee or not in preparation for the licensure examinations given by the Professional Regulations Commission.

...

Sec. 8. SIMILAR ENTITIES - the term refer to other review centers providing review or tutorial services in areas not covered by licensure examinations given by the Professional Regulations Commission including but not limited to college entrance examinations, Civil Service examinations, tutorial services in specific fields like English, Mathematics and the like.

The same Rule defines a review course as follows:

Sec. 3. REVIEW COURSE - refers to the set of non-degree instructional program of study and/or instructional materials/module, offered by a school with a recognized course/program requiring licensure examination, that are intended merely to refresh and enhance the knowledge or competencies and skills of reviewees.

The scopes of EO 566 and the RIRR clearly expand the CHED's coverage under RA 7722. The CHED's coverage under RA 7722 is limited to public and private institutions of higher education and degree-granting programs in all public and private post-secondary educational institutions. EO 566 directed the CHED to formulate a framework for the regulation of review centers and similar entities.

The definition of a review center under EO 566 shows that it refers to one which offers "a program or course of study that is intended to refresh and enhance the knowledge or competencies and skills of reviewees obtained in the formal school setting in preparation for the licensure examinations" given by the PRC. It also covers the operation or conduct of review classes or courses provided by individuals whether

for a fee or not in preparation for the licensure examinations given by the PRC.

A review center is not an institution of higher learning as contemplated by RA 7722. It does not offer a degree-granting program that would put it under the jurisdiction of the CHED. A review course is only intended to “refresh and enhance the knowledge or competencies and skills of reviewees.” A reviewee is not even required to enroll in a review center or to take a review course prior to taking an examination given by the PRC. Even if a reviewee enrolls in a review center, attendance in a review course is not mandatory. The reviewee is not required to attend each review class. He is not required to take or pass an examination, and neither is he given a grade. He is also not required to submit any thesis or dissertation. Thus, programs given by review centers could not be considered “programs ... of higher learning” that would put them under the jurisdiction of the CHED.

Further, the “similar entities” in EO 566 cover centers providing “review or tutorial services” in areas not covered by licensure examinations given by the PRC, which include, although not limited to, college entrance examinations, Civil Service examinations, and tutorial services. These review and tutorial services hardly qualify as programs of higher learning.

...

Republic Act No. 8981 is Not the Appropriate Law

It is argued that the President of the Philippines has adequate powers under the law to regulate review centers and this could have been done under an existing validly delegated authority, and that the appropriate law is Republic Act No. 8981²² (RA 8981). Under Section 5 of RA 8981, the PRC is mandated to “establish and maintain a high standard of admission to the practice of all professions and at all times ensure and safeguard the integrity of all licensure examinations.” Section 7 of RA 8981 further states that the PRC shall adopt “measures to preserve the integrity and inviolability of licensure examinations.”

There is no doubt that a principal mandate of the PRC is to preserve the integrity of licensure examinations. The PRC

²² Philippine Regulation Commission Modernization Act Of 2000.

has the power to adopt measures to preserve the integrity and inviolability of licensure examinations. However, this power should properly be interpreted to refer to the conduct of the examinations. The enumeration of PRC's powers under Section 7(e) includes among others, the fixing of dates and places of the examinations and the appointment of supervisors and watchers. The power to preserve the integrity and inviolability of licensure examinations should be read together with these functions. These powers of the PRC have nothing to do at all with the regulation of review centers.

The PRC has the power to investigate any of the members of the Professional Regulatory Boards (PRB) for "commission of any irregularities in the licensure examinations which taint or impugn the integrity and authenticity of the results of the said examinations." This is an administrative power which the PRC exercises over members of the PRB. However, this power has nothing to do with the regulation of review centers. The PRC has the power to bar PRB members from conducting review classes in review centers. However, to interpret this power to extend to the power to regulate review centers is clearly an unwarranted interpretation of RA 8981. The PRC may prohibit the members of the PRB from conducting review classes at review centers because the PRC has administrative supervision over the members of the PRB. However, such power does not extend to the regulation of review centers.

Section 7(y) of RA 8981 giving the PRC the power to perform "such other functions and duties as may be necessary to carry out the provisions" of RA 8981 does not extend to the regulation of review centers. There is absolutely nothing in RA 8981 that mentions regulation by the PRC of review centers.

The Court cannot likewise interpret the fact that RA 8981 penalizes "any person who manipulates or rigs licensure examination results, secretly informs or makes known licensure examination questions prior to the conduct of the examination or tampers with the grades in the professional licensure examinations" as a grant of power to regulate review centers. The provision simply provides for the penalties for manipulation and other corrupt practices in the conduct of the professional examinations.

The assailed EO 566 seeks to regulate not only review centers but also "similar entities." The questioned CHED RIRR defines

“similar entities” as referring to “other review centers providing review or tutorial services in areas not covered by licensure examinations given by the PRC including but not limited to college entrance examinations, Civil Service examinations, tutorial services in specific fields like English, Mathematics and the like.” The PRC has no mandate to supervise review centers that give courses or lectures intended to prepare examinees for licensure examinations given by the PRC. It is like the Court regulating bar review centers just because the Court conducts the bar examinations. Similarly, the PRC has no mandate to regulate similar entities whose reviewees will not even take any licensure examination given by the PRC. ...

Unconstitutional Enlargement of Legislative Power

Republic Act No. 9355 (2006), created the province of Dinagat Islands, and the mandatory plebiscite for the ratification of the creation of the province under the Local Government Code resulted in an approval vote. Rodolfo G. Navarro, Victor F. Bernal and Rene O. Medina, as taxpayers and residents of the province of Surigao del Norte, filed a petition for *certiorari* seeking to nullify RA No. 9355 for being unconstitutional - the creation of Dinagat Islands as a new province, violated Section 10, Article X of the Constitution and Section 461 of the Local Government Code (LGC), and deprived Surigao del Norte of provincial territory, internal revenue allocation, and resources. On February 10, 2010, the Court rendered its first decision in **NAVARRO v. ERMITA**, G.R. No. 180050, 626 Phil 23, with Justice Carpio as the *ponente*, which declared RA No. 9355 unconstitutional for failure to comply with the requirements on population and land area in the creation of a province under the LGC, declared the proclamation of Dinagat Islands and the election of its officials null and void, and declared null and void the provision in Article 9(2) of the Rules and Regulations Implementing the LGC (LGC-IRR) that exempted proposed provinces composed of one or more islands from the land area requirement of the LGC. On October 5, 2010, the Court issued an order for entry of judgment, stating that the decision had become final and executory.

The movants-intervenors in **Navarro**, elected officials of the province of Surigao del Norte in the May 2010 elections, filed on June 18, 2010, a motion for leave to intervene and for reconsideration, on the ground that, since Dinagat Islands would revert to the first legislative district of Surigao del Norte, their election to their respective offices would be nullified and

a special election would be called.²³ In a resolution dated July 20, 2010, the Court denied these motions. Nevertheless, the movant-intervenors filed an urgent motion to recall the entry of judgment, and to resolve their motion for reconsideration of the July 20, 2010 resolution. Acting on this motion, the Supreme Court *en banc*, on April 12, 2011,²⁴ reversed itself and declared in **Navarro**, that the provision in Article 9(2) of the LGC-IRR was valid, RA No. 9355 was valid and constitutional, and the proclamation of the Province of Dinagat Islands, with the election of its officials, was valid.

Justice Carpio, in his **dissenting opinion** in **Navarro**, voted to reinstate the first decision of February 10, 2010. His second argument is relevant to a discussion on **legislative power**:

... Having conjured a “congressional oversight” in Section 461 of the Local Government Code, the majority²⁵ seizes on its implementing rule (Article 9[2]) crafted by the Code’s Oversight Committee, gives it the force and effect of a statute, and uses it to “fill the void” in Section 461.

They reason:

These State policies [on decentralization] are the very reason for the enactment of the LGC, with the view to attain decentralization and countryside development. Congress saw that the old LGC, Batas Pambansa Bilang 337, had to be replaced with a new law, now the LGC of 1991, which is more dynamic and cognizant of the needs of the Philippines as an archipelagic country. This accounts for the exemption from the land area requirement of local government units composed of one or more islands, as expressly stated under Sections 442 and 450 of the LGC, with respect to the creation of municipalities and cities, but inadvertently omitted from Section 461 with respect to the creation of provinces. Hence, the void or missing detail was filled in by the Oversight Committee in the LGC-IRR.

With three (3) members each from both the Senate and the House of Representatives, particularly the chairpersons of their respective Committees on Local Government, it cannot be gainsaid that the inclusion by the Oversight Committee of

²³ COMELEC Resolution No. 8790

²⁴ 663 Phil. 547.

²⁵ Majority opinion, Nachura, J.

the exemption from the land area requirement with respect to the creation of provinces consisting of one (1) or more islands was intended by Congress, but unfortunately not expressly stated in Section 461 of the LGC, and this intent was echoed through an express provision in the LGC-IRR. To be sure, the Oversight Committee did not just arbitrarily and whimsically insert such an exemption in Article 9(2) of the LGC-IRR. The Oversight Committee evidently conducted due deliberation and consultations with all the concerned sectors of society and considered the operative principles of local autonomy as provided in the LGC when the IRR was formulated. Undoubtedly, this amounts not only to an executive construction, entitled to great weight and respect from this Court, but to legislative construction as well, especially with the inclusion of representatives from the four leagues of local government units as members of the Oversight Committee.

In two paragraphs, the majority succeeded where a previous attempt by political groups in this country failed²⁶ - to revise the 1987 Constitution. **Here, the majority re-structures the Philippine government, adding a fourth branch, a veritable mini-legislature with members from the legislature, executive and local government units. This mini-legislature acts as a roving commission to “fill in” “void[s]” and “missing detail[s]” in statutes duly passed by the legislative branch.**

In the first place, the **vesting of rule-making powers in a statutorily created Oversight Committee, consisting of members of the two Houses of Congress only or with representatives from other government entities, is an unconstitutional enlargement of Congress’ legislative power. Although Congress retains residual post-enactment oversight powers, this does not include the power to draw up implementing rules or to veto such rules as drafted by the Executive branch or other government bodies.** Thus, in *Macalintal v. Commission on Elections*,²⁷ we struck down a statutory provision authorizing a congressional oversight committee to approve the implementing rules of the Overseas Voting Act of 2003 drafted by the Commission on Elections. Here, Section 533 of the Local Government Code

²⁶ *Lambino v. Commission on Elections*, G.R. No. 174153, 25 October 2006, 505 SCRA 160, penned by Justice Carpio and excerpted under Art. XVII.

²⁷ 453 Phil. 586 (2003), see concurring opinion of Justice Carpio excerpted under Art. V.

authorizing an Oversight Committee consisting of members of the Senate, the House of Representatives and other government officials to “formulate and issue the appropriate rules and regulations necessary for ... implementation of any and all provisions of th[e] Code,” is a clear expansion of Congress’ legislative power outlawed in *Macalintal*.

Nor does such Oversight Committee possess the power to construe the provisions of the Local Government Code. The power to make final construction of the law lies with this Court, not with any other government entity. Congress may provide in the law itself a definition of terms but it cannot define or construe the law through its Oversight Committee after it has enacted the law because such power belongs to the courts. Any statutory construction non-judicial entities undertake is only preliminary, never conclusive on this Court.

At any rate, what the Local Government Code vested in the Oversight Committee was the narrow power to “formulate ... rules ... for the implementation” of the Code:

Sec. 533. Formulation of Implementing Rules and Regulations.

-

(a) Within one (1) month after the approval of this Code, the President shall convene the Oversight Committee as herein provided for. The said Committee shall formulate and issue the appropriate rules and regulations necessary for the efficient and effective implementation of any and all provisions of this Code, thereby ensuring compliance with the principles of local autonomy as defined under the Constitution.

As understood in the English language, the word “implement” means to “carry out, accomplish, fulfill.”²⁸ To treat, therefore, the word “implement” as appearing in Section 533, to mean “filling in” a “void” and “missing detail” in a provision of law not only does violence to the language of the law but also perverts the will of the legislature which crafted Section 533. It converts the Oversight Committee into a mini-legislature in and of itself, defeating the limitation contained in the delegated power under Section 533 and, crucially, wreaks havoc on our government of separated powers. Jurisprudence on Philippine administrative law is replete with rulings of this very Court striking down implementing rules which alter, revise or amend the text of the

²⁸ Webster’s Third New International Dictionary 1134 (1986).

statute they were supposed to merely implement.

Section 2. The Senate shall be composed of twenty-four Senators who shall be elected at large by the qualified voters of the Philippines, as may be provided by law.

Section 3. No person shall be a Senator unless he is a natural-born citizen of the Philippines and, on the day of the election, is at least thirty-five years of age, able to read and write, a registered voter, and a resident of the Philippines for not less than two years immediately preceding the day of the election.

Section 4. The term of office of the Senators shall be six years and shall commence, unless otherwise provided by law, at noon on the thirtieth day of June next following their election. No Senator shall serve for more than two consecutive terms. Voluntary renunciation of the office for any length of time shall not be considered as an interruption in the continuity of his service for the full term of which he was elected.

Section 5. (1) The House of Representatives shall be composed of not more than two hundred and fifty members, unless otherwise fixed by law, who shall be elected from legislative districts apportioned among the provinces, cities, and the Metropolitan Manila area in accordance with the number of their respective inhabitants, and on the basis of a uniform and progressive ratio, and those who, as provided by law, shall be elected through a party-list system of registered national, regional, and sectoral parties or organizations.

(2) The party-list representatives shall constitute twenty per centum of the total number of representatives including those under the party list. For three consecutive terms after the ratification of this Constitution, one-half of the seats allocated to party-list representatives shall be filled, as provided by law, by selection or election from the labor, peasant, urban poor, indigenous cultural communities, women, youth, and such other sectors as may be provided by law, except the religious sector.

(3) Each legislative district shall comprise, as far as practicable,

contiguous, compact, and adjacent territory. Each city with a population of at least two hundred fifty thousand, or each province, shall have at least one representative.

(4) Within three years following the return of every census, the Congress shall make a reapportionment of legislative districts based on the standards provided in this section.

The consolidated petitions²⁹ in **SEMA v. COMMISSION ON ELECTIONS**, G.R. No. 177597, July 16, 2008, 580 Phil. 623, sought to annul a resolution of the COMELEC that treated Cotabato City as part of the legislative district of the province of Shariff Kabunsuan. The *ponencia* of Justice Carpio in this *en banc* case is landmark because it clearly delimits **local autonomy vis a vis the powers of the legislative department**. The antecedent facts were as follows:

The Ordinance appended to the 1987 Constitution apportioned two legislative districts for the Province of Maguindanao. The first legislative district consists of Cotabato City and eight municipalities. Maguindanao forms part of the Autonomous Region in Muslim Mindanao (ARMM), created under its Organic Act, Republic Act No. 6734 (RA 6734), as amended by Republic Act No. 9054 (RA 9054). Although under the Ordinance, Cotabato City forms part of Maguindanao's first legislative district, it is not part of the ARMM but of Region XII, having voted against its inclusion in the ARMM in the plebiscite held in November 1989.

On 28 August 2006, the ARMM's legislature, the ARMM Regional Assembly, exercising its power to create provinces under Section 19, Article VI of RA 9054, enacted Muslim Mindanao Autonomy Act No. 201 (MMA Act 201) creating the Province of Shariff Kabunsuan composed of the eight municipalities in the first district of Maguindanao. MMA Act 201 provides:

Sec. 1. The Municipalities of Barira, Buldon, Datu Odin Sinsuat, Kabuntalan, Matanog, Parang, Sultan Kudarat, Sultan Mastura, and Upi are hereby separated from the Province of Maguindanao and constituted into a distinct and independent province, which is hereby created, to be known as the Province of Shariff Kabunsuan.

...

²⁹ Consolidated with *Marquez v. COMELEC*, G.R. No. 178628.

Sec. 5. The corporate existence of this province shall commence upon the appointment by the Regional Governor or election of the governor and majority of the regular members of the Sangguniang Panlalawigan.

The incumbent elective provincial officials of the Province of Maguindanao shall continue to serve their unexpired terms in the province that they will choose or where they are residents: Provided, that where an elective position in both provinces becomes vacant as a consequence of the creation of the Province of Shariff Kabunsuan, all incumbent elective provincial officials shall have preference for appointment to a higher elective vacant position and for the time being be appointed by the Regional Governor, and shall hold office until their successors shall have been elected and qualified in the next local elections; Provided, further, that they shall continue to receive the salaries they are receiving at the time of the approval of this Act until the new readjustment of salaries in accordance with law. Provided, furthermore, that there shall be no diminution in the number of the members of the Sangguniang Panlalawigan of the mother province.

Except as may be provided by national law, the existing legislative district, which includes Cotabato as a part thereof, shall remain.

Later, three new municipalities were carved out of the original nine municipalities constituting Shariff Kabunsuan, bringing its total number of municipalities to 11. Thus, what was left of Maguindanao were the municipalities constituting its second legislative district. Cotabato City, although part of Maguindanao's first legislative district, is not part of the Province of Maguindanao.

The voters of Maguindanao ratified Shariff Kabunsuan's creation in a plebiscite held on 29 October 2006.

On 6 February 2007, the Sangguniang Panlungsod of Cotabato City passed Resolution No. 3999 requesting the COMELEC to "clarify the status of Cotabato City in view of the conversion of the First District of Maguindanao into a regular province" under MMA Act 201.

In answer to Cotabato City's query, the COMELEC issued Resolution No. 07-0407 on 6 March 2007 "maintaining the *status quo* with Cotabato City as part of Shariff Kabunsuan in the First Legislative District of Maguindanao." Resolution No. 07-0407,

which adopted the recommendation of the COMELEC's Law Department under a Memorandum dated 27 February 2007, provides in pertinent parts:

Considering the foregoing, the Commission RESOLVED, as it hereby resolves, to adopt the recommendation of the Law Department that pending the enactment of the appropriate law by Congress, to maintain the *status quo* with Cotabato City as part of Shariff Kabunsuan in the First Legislative District of Maguindanao.

However, in preparation for the 14 May 2007 elections, the COMELEC promulgated on 29 March 2007 Resolution No. 7845 stating that Maguindanao's first legislative district is composed only of Cotabato City because of the enactment of MMA Act 201.

On 10 May 2007, the COMELEC issued Resolution No. 7902, subject of these petitions, amending Resolution No. 07-0407 by renaming the legislative district in question as "Shariff Kabunsuan Province with Cotabato City (formerly First District of Maguindanao with Cotabato City)."

In G.R. No. 177597, Sema, who was a candidate in the 14 May 2007 elections for Representative of "Shariff Kabunsuan with Cotabato City," prayed for the nullification of COMELEC Resolution No. 7902 and the exclusion from canvassing of the votes cast in Cotabato City for that office. Sema contended that Shariff Kabunsuan is entitled to one representative in Congress under Section 5 (3), Article VI of the Constitution and Section 3 of the Ordinance appended to the Constitution. Thus, Sema asserted that the COMELEC acted without or in excess of its jurisdiction in issuing Resolution No. 7902 which maintained the *status quo* in Maguindanao's first legislative district despite the COMELEC's earlier directive in Resolution No. 7845 designating Cotabato City as the lone component of Maguindanao's reapportioned first legislative district. Sema further claimed that in issuing Resolution No. 7902, the COMELEC usurped Congress' power to create or reapportion legislative districts.

In its Comment, the COMELEC, through the Office of the Solicitor General (OSG), chose not to reach the merits of the case and merely contended that (1) Sema wrongly availed of the writ of *certiorari* to nullify COMELEC Resolution No. 7902

because the COMELEC issued the same in the exercise of its administrative, not quasi-judicial, power and (2) Sema's prayer for the writ of prohibition in G.R. No. 177597 became moot with the proclamation of respondent Didagen P. Dilangalen (respondent Dilangalen) on 1 June 2007 as representative of the legislative district of Shariff Kabunsuan Province with Cotabato City.

In his Comment, respondent Dilangalen countered that Sema is estopped from questioning COMELEC Resolution No. 7902 because in her certificate of candidacy filed on 29 March 2007, Sema indicated that she was seeking election as representative of "Shariff Kabunsuan including Cotabato City." Respondent Dilangalen added that COMELEC Resolution No. 7902 is constitutional because it did not apportion a legislative district for Shariff Kabunsuan or reapportion the legislative districts in Maguindanao but merely renamed Maguindanao's first legislative district. Respondent Dilangalen further claimed that the COMELEC could not reapportion Maguindanao's first legislative district to make Cotabato City its sole component unit as the power to reapportion legislative districts lies exclusively with Congress, not to mention that Cotabato City does not meet the minimum population requirement under Section 5(3), Article VI of the Constitution for the creation of a legislative district within a city.

Sema filed a Consolidated Reply controverting the matters raised in respondents' Comments and reiterating her claim that the COMELEC acted *ultra vires* in issuing Resolution No. 7902.

In the Resolution of 4 September 2007, the Court required the parties in G.R. No. 177597 to comment on the issue of whether a province created by the ARMM Regional Assembly under Section 19, Article VI of RA 9054 is entitled to one representative in the House of Representatives without need of a national law creating a legislative district for such new province. The parties submitted their compliance as follows:

(1) Sema answered the issue in the affirmative on the following grounds: (a) the Court in *Felwa v. Salas*³⁰ stated that "when a province is created by statute, the corresponding representative district comes into existence neither by authority of that statute - which cannot provide otherwise - nor by apportionment, but

³⁰ 124 Phil. 1226 (1966).

by operation of the Constitution, without a reapportionment”; (b) Section 462 of Republic Act No. 7160 (RA 7160) “affirms” the apportionment of a legislative district incident to the creation of a province; and (c) Section 5(3), Article VI of the Constitution and Section 3 of the Ordinance appended to the Constitution mandate the apportionment of a legislative district in newly created provinces.

(2) The COMELEC, again represented by the OSG, apparently abandoned its earlier stance on the propriety of issuing Resolution Nos. 07-0407 and 7902 and joined causes with Sema, contending that Section 5 (3), Article VI of the Constitution is “self-executing.” Thus, every new province created by the ARMM Regional Assembly is ipso facto entitled to one representative in the House of Representatives even in the absence of a national law; and

(3) Respondent Dilangalen answered the issue in the negative on the following grounds: (a) the “province” contemplated in Section 5(3), Article VI of the Constitution is one that is created by an act of Congress taking into account the provisions in RA 7160 on the creation of provinces; (b) Section 3, Article IV of RA 9054 withheld from the ARMM Regional Assembly the power to enact measures relating to national elections, which encompasses the apportionment of legislative districts for members of the House of Representatives; (c) recognizing a legislative district in every province the ARMM Regional Assembly creates will lead to the disproportionate representation of the ARMM in the House of Representatives as the Regional Assembly can create provinces without regard to the requirements in Section 461 of RA 7160; and (d) Cotabato City, which has a population of less than 250,000, is not entitled to a representative in the House of Representatives.

On 27 November 2007, the Court heard the parties in G.R. No. 177597 in oral arguments on the following issues: (1) whether Section 19, Article VI of RA 9054, delegating to the ARMM Regional Assembly the power to create provinces, is constitutional; and (2) if in the affirmative, whether a province created under Section 19, Article VI of RA 9054 is entitled to one representative in the House of Representatives without need of a national law creating a legislative district for such new province.

In compliance with the Resolution dated 27 November 2007, the

parties in G.R. No. 177597 filed their respective Memoranda on the issues raised in the oral arguments. On the question of the constitutionality of Section 19, Article VI of RA 9054, the parties in G.R. No. 177597 adopted the following positions:

(1) Sema contended that Section 19, Article VI of RA 9054 is constitutional (a) as a valid delegation by Congress to the ARMM of the power to create provinces under Section 20 (9), Article X of the Constitution granting to the autonomous regions, through their organic acts, legislative powers over “other matters as may be authorized by law for the promotion of the general welfare of the people of the region” and (b) as an amendment to Section 6 of RA 7160.³¹ However, Sema concedes that, if taken literally, the grant in Section 19, Article VI of RA 9054 to the ARMM Regional Assembly of the power to “prescribe standards lower than those mandated” in RA 7160 in the creation of provinces contravenes Section 10, Article X of the Constitution. Thus, Sema proposed that Section 19 “should be construed as prohibiting the Regional Assembly from prescribing standards ... that do not comply with the minimum criteria” under RA 7160.

(2) Respondent Dilangalen contended that Section 19, Article VI of RA 9054 is unconstitutional on the following grounds: (a) the power to create provinces was not among those granted to the autonomous regions under Section 20, Article X of the Constitution and (b) the grant under Section 19, Article VI of RA 9054 to the ARMM Regional Assembly of the power to prescribe standards lower than those mandated in Section 461 of RA 7160 on the creation of provinces contravenes Section 10, Article X of the Constitution and the Equal Protection Clause; and

(3) The COMELEC, through the OSG, joined causes with respondent Dilangalen (thus effectively abandoning the position the COMELEC adopted in its Compliance with the Resolution of 4 September 2007) and contended that Section 19, Article VI of RA 9054 is unconstitutional because (a) it contravenes Section 10 and Section 6, Article X of the Constitution and (b) the power to create provinces was withheld from the autonomous regions

³¹ Sec. 6. Authority to Create Local Government Units. - A local government unit may be created, divided, merged, abolished, or its boundaries substantially altered either by law enacted by Congress in the case of a province, city or municipality, or any other political subdivision, or by ordinance passed by the sangguniang panlalawigan or sangguniang panlungsod concerned in the case of a barangay located within its territorial jurisdiction, subject to such limitations and requirements prescribed in this Code.

under Section 20, Article X of the Constitution.

On the question of whether a province created under Section 19, Article VI of RA 9054 is entitled to one representative in the House of Representatives without need of a national law creating a legislative district for such new province, Sema and respondent Dilangalen reiterated in their Memoranda the positions they adopted in their Compliance with the Resolution of 4 September 2007. The COMELEC deemed it unnecessary to submit its position on this issue considering its stance that Section 19, Article VI of RA 9054 is unconstitutional.

The pendency of the petition in G.R. No. 178628 was disclosed during the oral arguments on 27 November 2007. Thus, in the Resolution of 19 February 2008, the Court ordered G.R. No. 178628 consolidated with G.R. No. 177597. The petition in G.R. No. 178628 echoed Sema's contention that the COMELEC acted *ultra vires* in issuing Resolution No. 7902 depriving the voters of Cotabato City of a representative in the House of Representatives. In its Comment to the petition in G.R. No. 178628, the COMELEC, through the OSG, maintained the validity of COMELEC Resolution No. 7902 as a temporary measure pending the enactment by Congress of the "appropriate law."

Justice Carpio's *ponencia* first identified the preliminary issues of **Sema** - whether the writs of *certiorari*, prohibition, and *mandamus* were proper to test the constitutionality of COMELEC Resolution No. 7902, and whether the proclamation of respondent Dilangalen as representative of Shariff Kabunsuan Province with Cotabato City mooted the petition - and ruled thereon:

The Writ of Prohibition is Appropriate to Test the Constitutionality of Election Laws, Rules and Regulations

The purpose of the writ of *Certiorari* is to correct grave abuse of discretion by "any tribunal, board, or officer exercising judicial or quasi-judicial functions." On the other hand, the writ of *Mandamus* will issue to compel a tribunal, corporation, board, officer, or person to perform an act "which the law specifically enjoins as a duty." True, the COMELEC did not issue Resolution No. 7902 in the exercise of its judicial or

quasi-judicial functions.³² Nor is there a law which specifically enjoins the COMELEC to exclude from canvassing the votes cast in Cotabato City for representative of “Shariff Kabunsuan Province with Cotabato City.” These, however, do not justify the outright dismissal of the petition in G.R. No. 177597 because Sema also prayed for the issuance of the writ of Prohibition and we have long recognized this writ as proper for testing the constitutionality of election laws, rules, and regulations.³³

Respondent Dilangalen’s Proclamation Does Not Moot the Petition

There is also no merit in the claim that respondent Dilangalen’s proclamation as winner in the 14 May 2007 elections for representative of “Shariff Kabunsuan Province with Cotabato City” mooted this petition. This case does not concern respondent Dilangalen’s election. Rather, it involves an inquiry into the validity of COMELEC Resolution No. 7902, as well as the constitutionality of MMA Act 201 and Section 19, Article VI of RA 9054. Admittedly, the outcome of this petition, one way or another, determines whether the votes cast in Cotabato City for representative of the district of “Shariff Kabunsuan Province with Cotabato City” will be included in the canvassing of ballots. However, this incidental consequence is no reason for us not to proceed with the resolution of the novel issues raised here. The Court’s ruling in these petitions affects not only the recently concluded elections but also all the other succeeding elections for the office in question, as well as the power of the ARMM Regional Assembly to create in the future additional provinces.

It is Justice Carpio’s ruling on the main issues in **Sema** that makes this case landmark, citing specifically **Section 5, paragraphs (1), (3), and (4) of Article VI**:

The Issues

...

I. In G.R. No. 177597...

(1) whether Section 19, Article VI of RA 9054, delegating to the

³² See, however, *Macabago v. COMELEC* (440 Phil. 683 [2002]) where the Court held that a petition for *certiorari* under Rule 65 will lie to question the constitutionality of an election regulation if the COMELEC has acted capriciously or whimsically, with grave abuse of discretion amounting to lack or excess of jurisdiction.

³³ *Social Weather Stations, Inc. v. COMELEC*, 409 Phil. 571 (2001); *Mutuc v. COMELEC*, G.R. No. L-32717, 26 November 1970, 36 SCRA 228.

ARMM Regional Assembly the power to create provinces, cities, municipalities and barangays, is constitutional; and

(2) if in the affirmative, whether a province created by the ARMM Regional Assembly under MMA Act 201 pursuant to Section 19, Article VI of RA 9054 is entitled to one representative in the House of Representatives without need of a national law creating a legislative district for such province.

II. In G.R. No. 177597 and G.R. No. 178628, whether COMELEC Resolution No. 7902 is valid for maintaining the *status quo* in the first legislative district of Maguindanao (as “Shariff Kabunsuan Province with Cotabato City [formerly First District of Maguindanao with Cotabato City]”), despite the creation of the Province of Shariff Kabunsuan out of such district (excluding Cotabato City).

The Ruling of the Court

The petitions have no merit. We rule that (1) Section 19, Article VI of RA 9054 is unconstitutional insofar as it grants to the ARMM Regional Assembly the power to create provinces and cities; (2) MMA Act 201 creating the Province of Shariff Kabunsuan is void; and (3) COMELEC Resolution No. 7902 is valid.

On the Main Issues

Whether the ARMM Regional Assembly Can Create the Province of Shariff Kabunsuan

The creation of local government units is governed by Section 10, Article X of the Constitution...

Thus, the creation of any of the four local government units - province, city, municipality or barangay - must comply with three conditions. First, the creation of a local government unit must follow the criteria fixed in the Local Government Code. Second, such creation must not conflict with any provision of the Constitution. Third, there must be a plebiscite in the political units affected.

There is neither an express prohibition nor an express grant of authority in the Constitution for Congress to delegate to regional or local legislative bodies the power to create local government units. However, under its plenary legislative powers, Congress can delegate to local legislative bodies the power to create local

government units, subject to reasonable standards and provided no conflict arises with any provision of the Constitution. In fact, Congress has delegated to provincial boards, and city and municipal councils, the power to create barangays within their jurisdiction, subject to compliance with the criteria established in the Local Government Code, and the plebiscite requirement in Section 10, Article X of the Constitution. However, under the Local Government Code, “only ... an Act of Congress” can create provinces, cities or municipalities.

Under Section 19, Article VI of RA 9054, Congress delegated to the ARMM Regional Assembly the power to create provinces, cities, municipalities and barangays within the ARMM. Congress made the delegation under its plenary legislative powers because the power to create local government units is not one of the express legislative powers granted by the Constitution to regional legislative bodies.³⁴ In the present case, the question arises whether the delegation to the ARMM Regional Assembly of the power to create provinces, cities, municipalities and barangays conflicts with any provision of the Constitution.

There is no provision in the Constitution that conflicts with the delegation to regional legislative bodies of the power to create municipalities and barangays, provided Section 10, Article X of the Constitution is followed. **However, the creation of provinces and cities is another matter. Section 5(3), Article VI of the Constitution provides, “Each city with a population of at least two hundred fifty thousand, or each province, shall have at least one representative” in the House of Representatives. Similarly, Section 3 of the Ordinance appended to the Constitution provides, “Any province that may hereafter be created, or any city whose population may hereafter increase to more than two hundred fifty thousand shall be entitled in the immediately following election to at least one Member ...”**

Clearly, a province cannot be created without a legislative district because it will violate Section 5(3), Article VI of the Constitution as well as Section 3 of the Ordinance appended to the Constitution. For the same reason, a city with a population of 250,000 or more cannot also be

³⁴ See discussion under Art. X, Sec. 20.

created without a legislative district. Thus, the power to create a province, or a city with a population of 250,000 or more, requires also the power to create a legislative district. Even the creation of a city with a population of less than 250,000 involves the power to create a legislative district because once the city's population reaches 250,000, the city automatically becomes entitled to one representative under Section 5(3), Article VI of the Constitution and Section 3 of the Ordinance appended to the Constitution. Thus, the power to create a province or city inherently involves the power to create a legislative district.

For Congress to delegate validly the power to create a province or city, it must also validly delegate at the same time the power to create a legislative district. The threshold issue then is, can Congress validly delegate to the ARMM Regional Assembly the power to create legislative districts for the House of Representatives? The answer is in the negative.

Legislative Districts are Created or Reapportioned Only by an Act of Congress

Under the present Constitution, as well as in past³⁵ Constitutions, the power to increase the allowable membership in the House of Representatives, and to reapportion legislative districts, is vested exclusively in Congress (citing paragraphs 1, 3 and 4 of) Section 5, Article VI of the Constitution...

Section 5(1), Article VI of the Constitution vests in Congress the power to increase, through a law, the allowable membership in the House of Representatives. Section 5(4) empowers Congress to reapportion legislative districts. The power to reapportion legislative districts necessarily includes the power to create legislative districts out of existing ones. Congress exercises these powers through a law that Congress itself enacts, and not through a law that regional or local legislative bodies enact. The allowable membership of the House of Representatives can be increased, and new legislative districts of Congress can be created, only through a national law

³⁵ Const. (1973), Art. VIII, Sec. 2, and Const. (1935), Art. VI, Sec. 5.

passed by Congress. In *Montejo v. COMELEC*,³⁶ we held that the “power of redistricting ... is traditionally regarded as part of the power (of Congress) to make laws,” and thus is vested exclusively in Congress.

This textual commitment to Congress of the exclusive power to create or reapportion legislative districts is logical. Congress is a national legislature and any increase in its allowable membership or in its incumbent membership through the creation of legislative districts must be embodied in a national law. Only Congress can enact such a law. It would be anomalous for regional or local legislative bodies to create or reapportion legislative districts for a national legislature like Congress. An inferior legislative body, created by a superior legislative body, cannot change the membership of the superior legislative body.

The creation of the ARMM, and the grant of legislative powers to its Regional Assembly under its organic act, did not divest Congress of its exclusive authority to create legislative districts. This is clear from the Constitution and the ARMM Organic Act, as amended... (citing) Section 20, Article X of the Constitution ...³⁷

The ARMM Regional Assembly itself, in creating Shariff Kabunsuan, recognized the exclusive nature of Congress’ power to create or reapportion legislative districts by abstaining from creating a legislative district for Shariff Kabunsuan. Section 5 of MMA Act 201 provides that:

Except as may be provided by national law, the existing legislative district, which includes Cotabato City as a part thereof, shall remain.

However, a province cannot legally be created without a legislative district because the Constitution mandates that “each province shall have at least one representative.” Thus, the creation of the Province of Shariff Kabunsuan without a legislative district is unconstitutional.

Sema, petitioner in G.R. No. 177597, contends that Section 5(3),

³⁶ 312 Phil. 492, 501 (1995).

³⁷ See discussion under Art. X, Sec. 20.

Article VI of the Constitution ... and Section 3 of the Ordinance appended to the Constitution, which states:

Any province that may hereafter be created, or any city whose population may hereafter increase to more than two hundred fifty thousand shall be entitled in the immediately following election to at least one Member or such number of Members as it may be entitled to on the basis of the number of its inhabitants and according to the standards set forth in paragraph (3), Section 5 of Article VI of the Constitution. The number of Members apportioned to the province out of which such new province was created or where the city, whose population has so increased, is geographically located shall be correspondingly adjusted by the Commission on Elections but such adjustment shall not be made within one hundred and twenty days before the election.

serve as bases for the conclusion that the Province of Shariff Kabunsuan, created on 29 October 2006, is automatically entitled to one member in the House of Representatives in the 14 May 2007 elections. As further support for her stance, petitioner invokes the statement in *Felwa* that “when a province is created by statute, the corresponding representative district comes into existence neither by authority of that statute - which cannot provide otherwise - nor by apportionment, but by operation of the Constitution, without a reapportionment.”

The contention has no merit.

First. The issue in *Felwa*, among others, was whether Republic Act No. 4695 (RA 4695), creating the provinces of Benguet, Mountain Province, Ifugao, and Kalinga-Apayao and providing for congressional representation in the old and new provinces, was unconstitutional for “creati[ng] congressional districts without the apportionment provided in the Constitution.” The Court answered in the negative, thus:

The Constitution ordains:

The House of Representatives shall be composed of not more than one hundred and twenty Members who shall be apportioned among the several provinces as nearly as may be according to the number of their respective inhabitants, but each province shall have at least one Member. The Congress shall by law make an apportionment within three years after the return of every enumeration, and not otherwise. Until

such apportionment shall have been made, the House of Representatives shall have the same number of Members as that fixed by law for the National Assembly, who shall be elected by the qualified electors from the present Assembly districts. Each representative district shall comprise as far as practicable, contiguous and compact territory.

Pursuant to this Section, a representative district may come into existence: (a) indirectly, through the creation of a province - for “each province shall have at least one member” in the House of Representatives; or (b) by direct creation of several representative districts within a province. The requirements concerning the apportionment of representative districts and the territory thereof refer only to the second method of creation of representative districts, and do not apply to those incidental to the creation of provinces, under the first method. This is deducible, not only from the general tenor of the provision above quoted, but, also, from the fact that the apportionment therein alluded to refers to that which is made by an Act of Congress. Indeed, when a province is created by statute, the corresponding representative district comes into existence neither by authority of that statute - which cannot provide otherwise - nor by apportionment, but by operation of the Constitution, without a reapportionment.

There is no constitutional limitation as to the time when, territory of, or other conditions under which a province may be created, except, perhaps, if the consequence thereof were to exceed the maximum of 120 representative districts prescribed in the Constitution, which is not the effect of the legislation under consideration. As a matter of fact, provinces have been created or subdivided into other provinces, with the consequent creation of additional representative districts, without complying with the aforementioned requirements.³⁸

Thus, the Court sustained the constitutionality of RA 4695 because (1) it validly created legislative districts “indirectly” through a special law enacted by Congress creating a province and (2) the creation of the legislative districts will not result in breaching the maximum number of legislative districts provided under the 1935 Constitution. *Felwa* does not apply to the present case because in *Felwa* the new provinces were created by a national law enacted by Congress itself. Here, the new province

³⁸ 124 Phil. 1226, 1235-1236 (1966).

was created merely by a regional law enacted by the ARMM Regional Assembly.

What *Felwa* teaches is that the creation of a legislative district by Congress does not emanate alone from Congress' power to reapportion legislative districts, but also from Congress' power to create provinces which cannot be created without a legislative district. **Thus, when a province is created, a legislative district is created by operation of the Constitution because the Constitution provides that "each province shall have at least one representative" in the House of Representatives. This does not detract from the constitutional principle that the power to create legislative districts belongs exclusively to Congress. It merely prevents any other legislative body, except Congress, from creating provinces because for a legislative body to create a province such legislative body must have the power to create legislative districts. In short, only an act of Congress can trigger the creation of a legislative district by operation of the Constitution. Thus, only Congress has the power to create, or trigger the creation of, a legislative district.**

Moreover, if as Sema claims MMA Act 201 apportioned a legislative district to Shariff Kabunsuan upon its creation, this will leave Cotabato City as the lone component of the first legislative district of Maguindanao. However, Cotabato City cannot constitute a legislative district by itself because as of the census taken in 2000, it had a population of only 163,849. **To constitute Cotabato City alone as the surviving first legislative district of Maguindanao will violate Section 5(3), Article VI of the Constitution...**

Second. Sema's theory also undermines the composition and independence of the House of Representatives. Under Section 19, Article VI of RA 9054, the ARMM Regional Assembly can create provinces and cities within the ARMM with or without regard to the criteria fixed in Section 461 of RA 7160, namely: minimum annual income of P20,000,000, and minimum contiguous territory of 2,000 square kilometers or minimum population of 250,000. The following scenarios thus become distinct possibilities:

(1) An inferior legislative body like the ARMM Regional Assembly can create 100 or more provinces and thus increase

the membership of a superior legislative body, the House of Representatives, beyond the maximum limit of 250 fixed in the Constitution (unless a national law provides otherwise);

(2) The proportional representation in the House of Representatives based on one representative for at least every 250,000 residents will be negated because the ARMM Regional Assembly need not comply with the requirement in Section 461(a)(ii) of RA 7160 that every province created must have a population of at least 250,000; and

(3) Representatives from the ARMM provinces can become the majority in the House of Representatives through the ARMM Regional Assembly's continuous creation of provinces or cities within the ARMM.

The following exchange during the oral arguments of the petition in G.R. No. 177597 highlights the absurdity of Sema's position that the ARMM Regional Assembly can create provinces:

JUSTICE CARPIO: So, you mean to say [a] Local Government can create legislative district[s] and pack Congress with their own representatives [?]

ATTY. VISTAN II: Yes, Your Honor, because the Constitution allows that.

JUSTICE CARPIO: So, [the] Regional Assembly of [the] ARMM can create and create ... provinces ... and, therefore, they can have thirty-five (35) new representatives in the House of Representatives without Congress agreeing to it, is that what you are saying? That can be done, under your theory[?]

ATTY. VISTAN II: Yes, Your Honor, under the correct factual circumstances.

JUSTICE CARPIO: Under your theory, the ARMM legislature can create thirty-five (35) new provinces, there may be ... [only] one hundred thousand (100,000) [population], ..., and they will each have one representative ... to Congress without any national law, is that what you are saying?

ATTY. VISTAN II: Without law passed by Congress, yes, Your Honor, that is what we are saying. ...

JUSTICE CARPIO: So, they can also create one thousand (1000) new provinces, sen[d] one thousand (1000) representatives to the House of Representatives without a national law[,] that is legally possible, correct?

ATTY. VISTAN II: Yes, Your Honor.

Neither the framers of the 1987 Constitution in adopting the provisions in Article X on regional autonomy,³⁹ nor Congress in enacting RA 9054, envisioned or intended these disastrous consequences that certainly would wreck the tri-branch system of government under our Constitution. Clearly, the power to create or reapportion legislative districts cannot be delegated by Congress but must be exercised by Congress itself. Even the ARMM Regional Assembly recognizes this.

The Constitution empowered Congress to create or reapportion legislative districts, not the regional assemblies. Section 3 of the Ordinance to the Constitution which states, “[a]ny province that may hereafter be created ... shall be entitled in the immediately following election to at least one Member,” refers to a province created by Congress itself through a national law. The reason is that the creation of a province increases the actual membership of the House of Representatives, an increase that only Congress can decide. Incidentally, in the present 14th Congress, there are 219 district representatives out of the maximum 250 seats in the House of Representatives. Since party-list members shall constitute 20 percent of the total membership of the House, there should at least be 50 party-list seats available in every election in case 50 party-list candidates are proclaimed winners. This leaves only 200 seats for district representatives, much less than the 219 incumbent district representatives. Thus, there is a need now for Congress to increase by law the allowable membership of the House, even before Congress can create new provinces.

It is axiomatic that organic acts of autonomous regions cannot prevail over the Constitution. Section 20, Article X of the Constitution expressly provides that the legislative powers of regional assemblies are limited “[w]ithin its territorial jurisdiction and subject to the provisions of the Constitution and national laws, ...” The Preamble of the ARMM Organic Act (RA 9054) itself states that the ARMM Government is established “within the framework of the Constitution.” This follows Section 15, Article X of the Constitution which mandates that the ARMM “shall be created ... within the framework of this Constitution and the national sovereignty as well as territorial integrity of the Republic of the Philippines.”

³⁹ Unlike the 1935 and the 1973 Constitutions, the 1987 Constitution mandates, in Section 15, Article X, the creation of autonomous regions in the Cordilleras and Muslim Mindanao to foster political autonomy. See *Cordillera Broad Coalition v. Commission on Audit*, G.R. No. 79956, 29 January 1990, 181 SCRA 495.

The present case involves the creation of a local government unit that necessarily involves also the creation of a legislative district. The Court will not pass upon the constitutionality of the creation of municipalities and barangays that does not comply with the criteria established in Section 461 of RA 7160, as mandated in Section 10, Article X of the Constitution, because the creation of such municipalities and barangays does not involve the creation of legislative districts. We leave the resolution of this issue to an appropriate case.

In summary, we rule that Section 19, Article VI of RA 9054, insofar as it grants to the ARMM Regional Assembly the power to create provinces and cities, is void for being contrary to Section 5 of Article VI and Section 20 of Article X of the Constitution, as well as Section 3 of the Ordinance appended to the Constitution. Only Congress can create provinces and cities because the creation of provinces and cities necessarily includes the creation of legislative districts, a power only Congress can exercise under Section 5, Article VI of the Constitution and Section 3 of the Ordinance appended to the Constitution. The ARMM Regional Assembly cannot create a province without a legislative district because the Constitution mandates that every province shall have a legislative district. Moreover, the ARMM Regional Assembly cannot enact a law creating a national office like the office of a district representative of Congress because the legislative powers of the ARMM Regional Assembly operate only within its territorial jurisdiction as provided in Section 20, Article X of the Constitution. Thus, we rule that MMA Act 201, enacted by the ARMM Regional Assembly and creating the Province of Shariff Kabunsuan, is void.

Resolution No. 7902 Complies with the Constitution

Consequently, we hold that COMELEC Resolution No. 7902, preserving the geographic and legislative district of the First District of Maguindanao with Cotabato City, is valid as it merely complies with Section 5 of Article VI and Section 20 of Article X of the Constitution, as well as Section 1 of the Ordinance appended to the Constitution.

Section 5 of this Article VI was also referenced in Justice Carpio's **dissenting opinion** in **NAVARRO v. ERMITA**, G.R. No. 180050, April 12, 2011, 663 Phil. 547, 615. As discussed previously, the

Supreme Court *en banc* declared that Article 9(2) of the Rules and Regulations Implementing the Local Government Code, which stated that the land area requirement shall not apply where the proposed province is composed of one or more islands, was valid; RA 9355 (An Act Creating the Province of Dinagat Islands) was valid and constitutional; and the proclamation of the Province of Dinagat Islands, with the election of its officials, was valid. Justice Carpio **dissented** and argued:

... The majority affirms *sub silencio* an unconstitutional legislation sanctioning the creation of grossly malapportioned legislative districts.⁴⁰ Section 7 of RA 9355 states:

Sec. 7. Legislative District - The Province of Dinagat Islands shall constitute one separate legislative district to commence in the next national election after the effectivity of this Act.

By validating the creation of a severely underpopulated province, the majority also validates the apportionment of a grossly underpopulated legislative district for that province, following the constitutional rule requiring each province to have at least one representative in the Lower House [referencing Section 5(3)]. The majority thus continues the lamentable trend of flouting the Constitution's directive for the apportionment of legislative districts based on uniform and progressive population ratio, and, ultimately, the principle of one man, one vote underpinning it.

Under a democratic republic which this country professes to be, each person's vote is no more and no less valuable than his neighbor's. At the level of representative politics, such as in the election of representatives per legislative district, the one man, one vote rule is preserved by the Constitution's requirement that the population among legislative districts must be "uniform and progressive," that is, proportionate and constantly adjusted to account for overall population growth. The Constitution could not be any clearer (in Section 5(1), Article VI) ...

The Equal Protection Clause's proscription against vote

⁴⁰ First enunciated in *Aquino III v. Commission on Elections*, G.R. No. 189793, 7 April 2010, 617 SCRA 623.

discrimination applies equally in prohibiting wide fluctuations in the population sizes of legislative districts to prevent impermissible undervaluation or overvaluation of votes among districts. Members of the Lower House must represent districts whose populations are, within limits, proportionately uniform.

With the requirement under the Constitution that legislative districts in cities must have a population of at least 250,000, [referencing Section 5(3)] it follows that all the other legislative districts throughout the country, whether located in provinces or in metropolitan Manila, must also have a population of at least 250,000, to maintain uniformity. Indeed, the Local Government Code requires provinces to have a population of at least 250,000.

The legislative district of Dinagat Islands fails the constitutional test by a mile. Nearly one year after its creation, the district's population under the 2007 census stood only at 120,813, less than half of the constitutional minimum. **This means that the votes of the constituents of the legislative district of Dinagat Islands are overvalued by more than twice the value of the votes of the constituents in all the other legislative districts complying with the minimum population threshold of 250,000. The representative from this highly favored legislative district now joins the congressman from the other severely malapportioned First Legislative District of Camarines Sur (which had a population of only 176,383 at its creation⁴¹) as members of an ever growing elite club of congressmen representing constitutionally aberrant pygmy districts created at the expense of the Bill of Rights and core democratic republican values.**

Quasi-malapportionment laws like RA 9355 not only favor small districts impermissibly, they also worsen the cancer of dynastic politics infecting local governance in this country. The representative of the Dinagat Islands' legislative district, most likely a scion of an established political family serving concurrently with other related local officials,⁴² has a guaranteed

⁴¹ Validated in *Aquino III v. Commission on Elections*, G.R. No. 189793, 7 April 2010, 617 SCRA 623.

⁴² Indeed, the representative first elected for the district, Ruben Ecleo, Jr., is the son of the incumbent governor, respondent Glenda Ecleo and brother of a town mayor, Gwendolyn Ecleo-Durano (of the municipality of Dinagat). In May 2012, the House of Representatives expelled Ruben Ecleo, Jr. for his conviction of graft related offenses by

access to a steady supply of huge amounts of legislative discretionary funds for distribution at will, entrenching his family's hold on the levers of power in his compact district. The Constitution reviles such dynastic entrenchment, evident from its directive for Congress to "prohibit political dynasties" and for the State to "guarantee equal access to opportunities for public service."⁴³ By validating the creation of Dinagat Islands' underpopulated legislative district, the majority joins hands with that province's ruling politicians in spurning the Constitution, squandering an opportunity to affirm the Constitution's vision of an open, egalitarian society.

... Undoubtedly, the people of Dinagat Islands are entitled to aspire for provincehood. This coveted status, however, with its concomitant responsibilities and benefits, must be attained in accordance with the law and the Constitution which, after all, were ordained to regulate such aspirations in harmony with other cherished constitutional values. Currently, the law and the Constitution bar Dinagat Islands from attaining such status. Instead of affirming core democratic principles and promoting uniform local development by requiring the people of Dinagat Islands to comply with existing rules (by biding their time until they are sufficiently populous), **the majority rewrites the law and ignores the Constitution to grant them provincehood and representation in Congress. No one who has taken an oath to uphold the law and the Constitution can, in good conscience, adhere to such senseless accommodation.**

The Party-List System

The **party-list system** was discussed by Justice Carpio for the Court *en banc* in **BARANGAY ASSOCIATION FOR NATIONAL ADVANCEMENT AND TRANSPARENCY (BANAT) v. COMMISSION ON ELECTIONS**, G.R. No. 179271, April 21, 2009, 604 Phil. 131.⁴⁴ In this case, the two percent threshold in the distribution of additional party-list seats, provided in Section 11 of Republic Act No. 7941, or the Party-List System Act, was declared unconstitutional as an "unwarranted obstacle to the full implementation of **Section 5(2), Article VI** of the Constitution," and instead, a specific procedure for the allocation of additional party-list seats was formulated by Justice

the Sandiganbayan which this Court affirmed.

⁴³ Const., Art. II, Sec. 26.

⁴⁴ Consolidated with Bayan Muna v. COMELEC, G.R. No. 179295.

Carpio, referred to as the **BANAT formula**:

The Case

Petitioner in G.R. No. 179271 - Barangay Association for National Advancement and Transparency (BANAT) - in a petition for *certiorari* and *mandamus*, assails the Resolution promulgated on 3 August 2007 by the Commission on Elections (COMELEC) in NBC No. 07-041 (PL). The COMELEC's resolution in NBC No. 07-041 (PL) approved the recommendation of Atty. Alioden D. Dalaig, Head of the National Board of Canvassers (NBC) Legal Group, to deny the petition of BANAT for being moot. BANAT filed before the COMELEC *en banc*, acting as NBC, a Petition to Proclaim the Full Number of Party-List Representatives Provided by the Constitution.

The following are intervenors in G.R. No. 179271 - Arts Business and Science Professionals (ABS), Aangat Tayo (AT), and Coalition of Associations of Senior Citizens in the Philippines, Inc. (Senior Citizens).

Petitioners in G.R. No. 179295 - BAYAN MUNA, ABONO, and Advocacy for Teacher Empowerment Through Action, Cooperation and Harmony Towards Educational Reforms (A Teacher) - in a petition for *certiorari* with *mandamus* and prohibition, assails NBC Resolution No. 07-60 promulgated on 9 July 2007. NBC No. 07-60 made a partial proclamation of parties, organizations and coalitions that obtained at least two percent of the total votes cast under the Party-List System. The COMELEC announced that, upon completion of the canvass of the party-list results, it would determine the total number of seats of each winning party, organization, or coalition in accordance with *Veterans Federation Party v. COMELEC (Veterans)*.⁴⁵

Estrella DL Santos, in her capacity as President and First Nominee of the Veterans Freedom Party, filed a motion to intervene in both G.R. Nos. 179271 and 179295.

The Facts

The 14 May 2007 elections included the elections for the party-list representatives. The COMELEC counted 15,950,900 votes cast for 93 parties under the Party-List System.

⁴⁵ 396 Phil. 419 (2000).

On 27 June 2002, BANAT filed a Petition to Proclaim the Full Number of Party-List Representatives Provided by the Constitution, docketed as NBC No. 07-041 (PL) before the NBC. BANAT filed its petition because “[t]he Chairman and the Members of the [COMELEC] have recently been quoted in the national papers that the [COMELEC] is duty bound to and shall implement the *Veterans* ruling, that is, would apply the Panganiban formula in allocating party-list seats.” There were no intervenors in BANAT’s petition before the NBC. BANAT filed a memorandum on 19 July 2007.

On 9 July 2007, the COMELEC, sitting as the NBC, promulgated NBC Resolution No. 07-60. NBC Resolution No. 07-60 proclaimed thirteen (13) parties as winners in the party-list elections, namely: Buhay Hayaan Yumabong (BUHAY), BAYAN MUNA, Citizens’ Battle Against Corruption (CIBAC), Gabriela’s Women Party (Gabriela), Association of Philippine Electric Cooperatives (APEC), A Teacher, Akbayan! Citizen’s Action Party (AKBAYAN), Alagad, Luzon Farmers Party (BUTIL), Cooperative-Natco Network Party (COOP-NATCCO), Anak Pawis, Alliance of Rural Concerns (ARC), and ABONO. We quote NBC Resolution No. 07-60 in its entirety below:

WHEREAS, the Commission on Elections sitting *en banc* as National Board of Canvassers, thru its Sub-Committee for Party-List, as of 03 July 2007, had officially canvassed, in open and public proceedings, a total of fifteen million two hundred eighty three thousand six hundred fifty-nine (15,283,659) votes under the Party-List System of Representation, in connection with the National and Local Elections conducted last 14 May 2007;

WHEREAS, the study conducted by the Legal and Tabulation Groups of the National Board of Canvassers reveals that the projected/maximum total party-list votes cannot go any higher than sixteen million seven hundred twenty three thousand one hundred twenty-one (16,723,121) votes given the following statistical data:

Projected/Maximum Party-List Votes for May 2007 Elections	
i. Total party-list votes already canvassed/tabulated	15,283,659

ii. Total party-list votes remaining uncanvassed/untabulated (i.e. canvass deferred)	1,337,032
iii. Maximum party-list votes (based on 100% outcome) from areas not yet submitted for canvass (Bogo, Cebu; Bais City; Pantar, Lanao del Norte; and Pagalungan, Maguindanao)	102,430
Maximum Total Party-List Votes	16,723,121

WHEREAS, Section 11 of Republic Act No. 7941 (Party-List System Act) provides in part:

The parties, organizations, and coalitions receiving at least two percent (2%) of the total votes cast for the party-list system shall be entitled to one seat each: provided, that those garnering more than two percent (2%) of the votes shall be entitled to additional seats in proportion to their total number of votes: provided, finally, that each party, organization, or coalition shall be entitled to not more than three (3) seats.

WHEREAS, for the 2007 Elections, based on the above projected total of party-list votes, the presumptive two percent (2%) threshold can be pegged at three hundred thirty four thousand four hundred sixty-two (334,462) votes;

WHEREAS, the Supreme Court, in *Citizen's Battle Against Corruption (CIBAC) v. COMELEC*, reiterated its ruling in *Veterans Federation Party v. COMELEC* adopting a formula for the additional seats of each party, organization or coalition receiving more than the required two percent (2%) votes, stating that the same shall be determined only after all party-list ballots have been completely canvassed;

WHEREAS, the parties, organizations, and coalitions that have thus far garnered at least three hundred thirty four thousand four hundred sixty-two (334,462) votes are as follows:

Rank	Party/Organization/ Coalition	Votes Received
1	BUHAY	1,163,218
2	BAYAN MUNA	972,730
3	CIBAC	760,260
4	GABRIELA	610,451
5	APEC	538,971
6	A TEACHER	476,036
7	AKBAYAN	470,872
8	ALAGAD	423,076

9	BUTIL	405,052
10	COOP-NATCO	390,029
11	BATAS	386,361
12	ANAK PAWIS	376,036
13	ARC	338,194
14	ABONO	337,046

WHEREAS, except for Bagong Alyansang Tagapagtaguyod ng Adhikaing Sambayanan (BATAS), against which an URGENT PETITION FOR CANCELLATION/REMOVAL OF REGISTRATION AND DISQUALIFICATION OF PARTY-LIST NOMINEE (With Prayer for the Issuance of Restraining Order) has been filed before the Commission, docketed as SPC No. 07-250, all the parties, organizations and coalitions included in the aforementioned list are therefore entitled to at least one seat under the party-list system of representation in the meantime.

NOW, THEREFORE, by virtue of the powers vested in it by the Constitution, the Omnibus Election Code, Executive Order No. 144, Republic Act Nos. 6646, 7166, 7941, and other election laws, the Commission on Elections, sitting *en banc* as the National Board of Canvassers, hereby RESOLVES to PARTIALLY PROCLAIM, subject to certain conditions set forth below, the following parties, organizations and coalitions participating under the Party-List System:

1	Buhay Hayaan Yumabong	BUHAY
2	Bayan Muna	BAYAN MUNA
3	Citizens Battle Against Corruption	CIBAC
4	Gabriela Women’s Party	GABRIELA
5	Association of Philippine Electric Cooperatives	APEC
6	Advocacy for Teacher Empowerment Through Action, Cooperation and Harmony Towards Educational Reforms, Inc.	A TEACHER
7	Akbayan! Citizen’s Action Party	AKBAYAN
8	Alagad	ALAGAD
9	Luzon Farmers Party	BUTIL
10	Cooperative-Natco Network Party	COOP-NATCCO
11	Anak Pawis	ANAKPAWIS

12	Alliance of Rural Concerns	ARC
13	Abono	ABONO

This is without prejudice to the proclamation of other parties, organizations, or coalitions which may later on be established to have obtained at least two percent (2%) of the total actual votes cast under the Party-List System.

The total number of seats of each winning party, organization or coalition shall be determined pursuant to *Veterans Federation Party v. COMELEC* formula upon completion of the canvass of the party-list results.

The proclamation of Bagong Alyansang Tagapagtaguyod ng Adhikaing Sambayanan (BATAS) is hereby deferred until final resolution of SPC No. 07-250, in order not to render the proceedings therein moot and academic.

Finally, all proclamation of the nominees of concerned parties, organizations and coalitions with pending disputes shall likewise be held in abeyance until final resolution of their respective cases.

Let the Clerk of the Commission implement this Resolution, furnishing a copy thereof to the Speaker of the House of Representatives of the Philippines....

Pursuant to NBC Resolution No. 07-60, the COMELEC, acting as NBC, promulgated NBC Resolution No. 07-72, which declared the additional seats allocated to the appropriate parties. We quote from the COMELEC's interpretation of the *Veterans* formula as found in NBC Resolution No. 07-72:

WHEREAS, on July 9, 2007, the Commission on Elections sitting *en banc* as the National Board of Canvassers proclaimed thirteen (13) qualified parties, organization[s] and coalitions based on the presumptive two percent (2%) threshold of 334,462 votes from the projected maximum total number of party-list votes of 16,723,121, and were thus given one (1) guaranteed party-list seat each;

WHEREAS, per Report of the Tabulation Group and Supervisory Committee of the National Board of Canvassers, the projected maximum total party-list votes, as of July 11, 2007, based on the votes actually canvassed, votes canvassed but not included in Report No. 29, votes received but uncanvassed, and maximum votes expected for Pantar, Lanao del Norte, is 16,261,369; and that the projected

maximum total votes for the thirteen (13) qualified parties, organizations and coalition[s] are as follows:

Party-List		Projected total number of votes
1	BUHAY	1,178,747
2	BAYAN MUNA	977,476
3	CIBAC	755,964
4	GABRIELA	621,718
5	APEC	622,489
6	A TEACHER	492,369
7	AKBAYAN	462,674
8	ALAGAD	423,190
9	BUTIL	409,298
10	COOP-NATCO	412,920
11	ANAKPAWIS	370,165
12	ARC	375,846
13	ABONO	340,151

WHEREAS, based on the above Report, Buhay Hayaan Yumabong (Buhay) obtained the highest number of votes among the thirteen (13) qualified parties, organizations and coalitions, making it the “first party” in accordance with *Veterans Federation Party v. COMELEC*, reiterated in *Citizen’s Battle Against Corruption (CIBAC) v. COMELEC*; WHEREAS, qualified parties, organizations and coalitions participating under the party-list system of representation that have obtained one guaranteed (1) seat may be entitled to an additional seat or seats based on the formula prescribed by the Supreme Court in *Veterans*;

WHEREAS, in determining the additional seats for the “first party”, the correct formula as expressed in *Veterans*, is:

Number of votes of first party

Total votes for party-list system

=

Proportion of votes of
first party relative to
total votes for party-list
system

wherein the proportion of votes received by the first party (without rounding off) shall entitle it to additional seats:

Proportion of votes received by the first party	Additional seats
Equal to or at least 6%	Two (2) additional seats

Equal to or greater than 4% but less than 6%	One (1) additional seat
Less than 4%	No additional seat

WHEREAS, applying the above formula, Buhay obtained the following percentage:

$$\frac{1,178,747}{16,261,369} = 0.07248 \text{ - or } 7.2\%$$

which entitles it to two (2) additional seats.

WHEREAS, in determining the additional seats for the other qualified parties, organizations and coalitions, the correct formula as expressed in *Veterans* and reiterated in *CIBAC* is, as follows:

$$\begin{array}{l} \text{Additional} \\ \text{seats for a} \\ \text{concerned} \\ \text{party} \end{array} = \frac{\begin{array}{l} \text{No. of votes of} \\ \text{concerned party} \end{array}}{\begin{array}{l} \text{No. of votes of first} \\ \text{party} \end{array}} \times \begin{array}{l} \text{No. of} \\ \text{additional seats} \\ \text{allocated to} \\ \text{first party} \end{array}$$

WHEREAS, applying the above formula, the results are as follows:

Party List	Percentage	Additional Seat
BAYAN MUNA	1.65	1
CIBAC	1.28	1
GABRIELA	1.05	1
APEC	1.05	1
A TEACHER	0.83	0
AKBAYAN	0.78	0
ALAGAD	0.71	0
BUTIL	0.69	0
COOP-NATCO	0.69	0
ANAKPAWIS	0.62	0
ARC	0.63	0
ABONO	0.57	0

NOW THEREFORE, by virtue of the powers vested in it by the Constitution, Omnibus Election Code, Executive Order No. 144, Republic Act Nos. 6646, 7166, 7941 and other elections laws, the Commission on Elections *en banc* sitting as the National Board of Canvassers, hereby **RESOLVED**, as it hereby

RESOLVES, to proclaim the following parties, organizations or coalitions as entitled to additional seats, to wit:

Party List	Additional Seats
BUHAY	2
BAYAN MUNA	1
CIBAC	1
GABRIELA	1
APEC	1

This is without prejudice to the proclamation of other parties, organizations or coalitions which may later on be established to have obtained at least two per cent (2%) of the total votes cast under the party-list system to entitle them to one (1) guaranteed seat, or to the appropriate percentage of votes to entitle them to one (1) additional seat.

Finally, all proclamation of the nominees of concerned parties, organizations and coalitions with pending disputes shall likewise be held in abeyance until final resolution of their respective cases.

Let the National Board of Canvassers Secretariat implement this Resolution, furnishing a copy hereof to the Speaker of the House of Representatives of the Philippines....

Acting on BANAT's petition, the NBC promulgated NBC Resolution No. 07-88 on 3 August 2007, which reads as follows:

This pertains to the Petition to Proclaim the Full Number of Party-List Representatives Provided by the Constitution filed by the Barangay Association for National Advancement and Transparency (BANAT).

Acting on the foregoing Petition of the Barangay Association for National Advancement and Transparency (BANAT) party-list, Atty. Alioden D. Dalaig, Head, National Board of Canvassers Legal Group submitted his comments/observations and recommendation thereon [NBC 07-041 (PL)], which reads:

COMMENTS / OBSERVATIONS:

Petitioner Barangay Association for National Advancement and Transparency (BANAT), in its Petition to Proclaim the Full Number of Party-List Representatives Provided by the Constitution prayed for the following reliefs, to wit:

1. That the full number -- twenty percent (20%) -- of Party-List representatives as mandated by Section 5, Article VI of the Constitution shall be proclaimed.
2. Paragraph (b), Section 11 of RA 7941 which prescribes the 2% threshold votes, should be harmonized with Section 5, Article VI of the Constitution and with Section 12 of the same RA 7941 in that it should be applicable only to the first party-list representative seats to be allotted on the basis of their initial/first ranking.
3. The 3-seat limit prescribed by RA 7941 shall be applied; and
4. Initially, all party-list groups shall be given the number of seats corresponding to every 2% of the votes they received and the additional seats shall be allocated in accordance with Section 12 of RA 7941, that is, in proportion to the percentage of votes obtained by each party-list group in relation to the total nationwide votes cast in the party-list election, after deducting the corresponding votes of those which were allotted seats under the 2% threshold rule. In fine, the formula/procedure prescribed in the "ALLOCATION OF PARTY-LIST SEATS, ANNEX "A" of COMELEC RESOLUTION 2847 dated 25 June 1996, shall be used for [the] purpose of determining how many seats shall be proclaimed, which party-list groups are entitled to representative seats and how many of their nominees shall seat [sic].
5. In the alternative, to declare as unconstitutional Section 11 of Republic Act No. 7941 and that the procedure in allocating seats for party-list representative prescribed by Section 12 of RA 7941 shall be followed.

RECOMMENDATION:

The petition of BANAT is now moot and academic.

The Commission *en banc* in NBC Resolution No. 07-60 promulgated July 9, 2007 re "In the Matter of the Canvass of Votes and Partial Proclamation of the Parties, Organizations and Coalitions Participating Under the Party-List System During the May 14, 2007 National and Local Elections" resolved among others that the total number of seats of each winning party, organization or coalition shall be determined pursuant to the *Veterans Federation Party v. COMELEC* formula upon completion of the canvass of the party-list results."

WHEREFORE, premises considered, the National Board of Canvassers RESOLVED, as it hereby RESOLVES, to approve and adopt the recommendation of Atty. Alioden D.

Dalaig, Head, NBC Legal Group, to DENY the herein petition of BANAT for being moot and academic.
Let the Supervisory Committee implement this resolution....

BANAT filed a petition for *certiorari* and *mandamus* assailing the ruling in NBC Resolution No. 07-88. BANAT did not file a motion for reconsideration of NBC Resolution No. 07-88.

On 9 July 2007, BAYAN MUNA, ABONO, and A Teacher asked the COMELEC, acting as NBC, to reconsider its decision to use the *Veterans* formula as stated in its NBC Resolution No. 07-60 because the *Veterans* formula is violative of the Constitution and of Republic Act No. 7941 (RA No. 7941). On the same day, the COMELEC denied reconsideration during the proceedings of the NBC.

Aside from the thirteen party-list organizations proclaimed on 9 July 2007, the COMELEC proclaimed three other party-list organizations as qualified parties entitled to one guaranteed seat under the Party-List System: Agricultural Sector Alliance of the Philippines, Inc. (AGAP), Anak Mindanao (AMIN), and An Waray. Per the certification by COMELEC, the following party-list organizations have been proclaimed as of 19 May 2008:

Party-List	No. of Seat(s)
BUHAY	3
BAYAN MUNA	2
CIBAC	2
GABRIELA	2
APEC	2
A TEACHER	1
AKBAYAN	1
ALAGAD	1
BUTIL	1
COOP-NATCO [sic]	1
ANAK PAWIS	1
ARC	1
ABONO	1
AGAP	1
AMIN	1

The proclamation of Bagong Alyansang Tagapagtaguyod ng Adhikaing Sambayanan (BATAS), against which an Urgent Petition for Cancellation/Removal of Registration and Disqualification of Party-list Nominee (with Prayer for the Issuance of Restraining Order) has been filed before the COMELEC, was deferred pending final resolution of SPC No. 07-250.

Issues

BANAT brought the following issues before this Court:

1. Is the twenty percent allocation for party-list representatives provided in Section 5(2), Article VI of the Constitution mandatory or is it merely a ceiling?
2. Is the three-seat limit provided in Section 11(b) of RA 7941 constitutional?
3. Is the two percent threshold and “qualifier” votes prescribed by the same Section 11(b) of RA 7941 constitutional?
4. How shall the party-list representatives be allocated?

BAYAN MUNA, A Teacher, and ABONO, on the other hand, raised the following issues in their petition:

- I. Respondent Commission on Elections, acting as National Board of Canvassers, committed grave abuse of discretion amounting to lack or excess of jurisdiction when it promulgated NBC Resolution No. 07-60 to implement the First Party Rule in the allocation of seats to qualified party-list organizations as said rule:
 - A. Violates the constitutional principle of proportional representation.
 - B. Violates the provisions of RA 7941 particularly:
 1. The 2-4-6 Formula used by the First Party Rule in allocating additional seats for the “First Party” violates the principle of proportional representation under RA 7941.
 2. The use of two formulas in the allocation of additional seats, one for the “First Party” and another for the qualifying parties, violates Section 11(b) of RA 7941.
 3. The proportional relationships under the First Party Rule are different from those required under RA 7941.
 - C. Violates the “Four Inviolable Parameters” of the Philippine party-list system as provided for under the same case of *Veterans Federation Party v. COMELEC*.

II. Presuming that the Commission on Elections did not commit grave abuse of discretion amounting to lack or excess of jurisdiction when it implemented the First Party Rule in the allocation of seats to qualified party-list organizations, the same being merely in consonance with the ruling in *Veterans Federations Party v. COMELEC*, the instant Petition is a justiciable case as the issues involved herein are constitutional in nature, involving the correct interpretation and implementation of RA 7941, and are of transcendental importance to our nation.

Considering the allegations in the petitions and the comments of the parties in these cases, we defined the following issues in our advisory for the oral arguments set on 22 April 2008:

1. Is the twenty percent allocation for party-list representatives in Section 5(2), Article VI of the Constitution mandatory or merely a ceiling?
2. Is the three-seat limit in Section 11(b) of RA 7941 constitutional?
3. Is the two percent threshold prescribed in Section 11(b) of RA 7941 to qualify for one seat constitutional?
4. How shall the party-list representative seats be allocated?
5. Does the Constitution prohibit the major political parties from participating in the party-list elections? If not, can the major political parties be barred from participating in the party-list elections?

The Ruling of the Court

The petitions have partial merit. **We maintain that a Philippine-style party-list election has at least four inviolable parameters as clearly stated in *Veterans*.** For easy reference, these are:

First, the twenty percent allocation - the combined number of all party-list congressmen shall not exceed twenty percent of the total membership of the House of Representatives, including those elected under the party list;

Second, the two percent threshold - only those parties garnering a minimum of two percent of the total valid votes cast for the party-list system are “qualified” to have a seat in

the House of Representatives;

Third, the three-seat limit - each qualified party, regardless of the number of votes it actually obtained, is entitled to a maximum of three seats; that is, one “qualifying” and two additional seats;

Fourth, proportional representation - the additional seats which a qualified party is entitled to shall be computed “in proportion to their total number of votes.”⁴⁶

However, because the formula in *Veterans* has flaws in its mathematical interpretation of the term “proportional representation,” this Court is compelled to revisit the formula for the allocation of additional seats to party-list organizations.

Number of Party-List Representatives: The Formula Mandated by the Constitution

(The formula mandated by the Constitution is provided in) Section 5, Article VI of the Constitution...

The first paragraph of Section 11 of RA No. 7941 reads:

Sec. 11. Number of Party-List Representatives. - The party-list representatives shall constitute twenty per centum (20%) of the total number of the members of the House of Representatives including those under the party-list.

...

Section 5(1), Article VI of the Constitution states that the “House of Representatives shall be composed of not more than two hundred and fifty members, unless otherwise fixed by law.” The House of Representatives shall be composed of district representatives and party-list representatives. The Constitution allows the legislature to modify the number of the members of the House of Representatives.

Section 5(2), Article VI of the Constitution, on the other hand, states the ratio of party-list representatives to the total number of representatives. We compute the number of seats available to party-list representatives from the number of

⁴⁶ 396 Phil. 419, 424 (2000).

legislative districts. On this point, we do not deviate from the first formula in *Veterans*, thus:

$$\begin{array}{rcl} \text{Number of seats} & & \text{Number of} \\ \text{available to} & & \text{seats available} \\ \text{legislative districts} & \times .20 = & \text{to party-list} \\ \hline .80 & & \text{representatives} \end{array}$$

This formula allows for the corresponding increase in the number of seats available for party-list representatives whenever a legislative district is created by law. Since the 14th Congress of the Philippines has 220 district representatives, there are 55 seats available to party-list representatives.

$$\begin{array}{rcl} 220 & & \\ \hline .80 & \times .20 = & 55 \end{array}$$

After prescribing the ratio of the number of party-list representatives to the total number of representatives, the Constitution left the manner of allocating the seats available to party-list representatives to the wisdom of the legislature.

Allocation of Seats for Party-List Representatives: The Statutory Limits Presented by the Two Percent Threshold and the Three-Seat Cap

All parties agree on the formula to determine the maximum number of seats reserved under the Party-List System, as well as on the formula to determine the guaranteed seats to party-list candidates garnering at least two-percent of the total party-list votes. However, there are numerous interpretations of the provisions of RA No. 7941 on the allocation of “additional seats” under the Party-List System. *Veterans* produced the First Party Rule,⁴⁷ and Justice Vicente V. Mendoza’s dissent in *Veterans* presented Germany’s Niemeyer formula⁴⁸ as an alternative.

The Constitution left to Congress the determination of the manner of allocating the seats for party-list representatives.

⁴⁷ Id. at 446-451. Quotation of the explanation of the First Party Rule omitted.

⁴⁸ Id. at 475-481.

Congress enacted RA No. 7941, paragraphs (a) and (b) of Section 11 and Section 12 of which provide:

Sec. 11. Number of Party-List Representatives. - ... In determining the allocation of seats for the second vote,⁴⁹ the following procedure shall be observed:

(a) The parties, organizations, and coalitions shall be ranked from the highest to the lowest based on the number of votes they garnered during the elections.

(b) The parties, organizations, and coalitions receiving at least two percent (2%) of the total votes cast for the party-list system shall be entitled to one seat each: Provided, That those garnering more than two percent (2%) of the votes shall be entitled to additional seats in proportion to their total number of votes: Provided, finally, That each party, organization, or coalition shall be entitled to not more than three (3) seats.

Sec. 12. Procedure in Allocating Seats for Party-List Representatives. - The COMELEC shall tally all the votes for the parties, organizations, or coalitions on a nationwide basis, rank them according to the number of votes received and allocate party-list representatives proportionately according to the percentage of votes obtained by each party, organization, or coalition as against the total nationwide votes cast for the party-list system.

In G.R. No. 179271, BANAT presents two interpretations through three formulas to allocate party-list representative seats.

The first interpretation allegedly harmonizes the provisions of Section 11(b) on the 2% requirement with Section 12 of RA No. 7941. BANAT described this procedure as follows:

(a) The party-list representatives shall constitute twenty percent (20%) of the total Members of the House of Representatives including those from the party-list groups as prescribed by Section 5, Article VI of the Constitution, Section 11 (1st par.) of RA 7941 and COMELEC Resolution No. 2847 dated 25 June 1996. Since there are 220 District Representatives in the 14th Congress, there shall be 55 Party-List Representatives. All seats shall have to be proclaimed.

(b) All party-list groups shall initially be allotted one (1) seat for every two per centum (2%) of the total party-list votes

⁴⁹ The second vote cast by a registered voter is for the party-list candidates as provided in Section 10 of RA No. 7941.

they obtained; provided, that no party-list groups shall have more than three (3) seats (Section 11, RA 7941).

(c) The remaining seats shall, after deducting the seats obtained by the party-list groups under the immediately preceding paragraph and after deducting from their total the votes corresponding to those seats, the remaining seats shall be allotted proportionately to all the party-list groups which have not secured the maximum three (3) seats under the 2% threshold rule, in accordance with Section 12 of RA 7941.

Forty-four (44) party-list seats will be awarded under BANAT's first interpretation.

The second interpretation presented by BANAT assumes that the 2% vote requirement is declared unconstitutional, and apportions the seats for party-list representatives by following Section 12 of RA No. 7941. BANAT states that the COMELEC:

- (a) shall tally all the votes for the parties, organizations, or coalitions on a nationwide basis;
- (b) rank them according to the number of votes received; and,
- (c) allocate party-list representatives proportionately according to the percentage of votes obtained by each party, organization or coalition as against the total nationwide votes cast for the party-list system.

BANAT used two formulas to obtain the same results: one is based on the proportional percentage of the votes received by each party as against the total nationwide party-list votes, and the other is "by making the votes of a party-list with a median percentage of votes as the divisor in computing the allocation of seats." Thirty-four (34) party-list seats will be awarded under BANAT's second interpretation.

In G.R. No. 179295, BAYAN MUNA, ABONO, and A Teacher criticize both the COMELEC's original 2-4-6 formula and the *Veterans* formula for systematically preventing all the party-list seats from being filled up. They claim that both formulas do not factor in the total number of seats allotted for the entire Party-List System. BAYAN MUNA, ABONO, and A Teacher reject the three-seat cap, but accept the 2% threshold. After determining the qualified parties, a second percentage is generated by dividing the votes of a qualified party by the total votes of all qualified parties only. The number of seats allocated to a qualified party is computed by multiplying the

total party-list seats available with the second percentage. There will be a first round of seat allocation, limited to using the whole integers as the equivalent of the number of seats allocated to the concerned party-list. After all the qualified parties are given their seats, a second round of seat allocation is conducted. The fractions, or remainders, from the whole integers are ranked from highest to lowest and the remaining seats on the basis of this ranking are allocated until all the seats are filled up.

We examine what RA No. 7941 prescribes to allocate seats for party-list representatives.

Section 11(a) of RA No. 7941 prescribes the ranking of the participating parties from the highest to the lowest based on the number of votes they garnered during the elections.

Table 1. Ranking of the participating parties from the highest to the lowest based on the number of votes garnered during the elections.

Rank	Party	Votes Garnered	Rank	Party	Votes Garnered
1	BUHAY	1,169,234	48	KALAHI	88,868
2	BAYAN MUNA	979,039	49	APOI	79,386
3	CIBAC	755,686	50	BP	78,541
4	GABRIELA	621,171	51	AHONBAYAN	78,424
5	APEC	619,657	52	BIGKIS	77,327
6	A TEACHER	490,379	53	PMAP	75,200
7	AKBAYAN	466,112	54	AKAPIN	74,686
8	ALAGAD	423,149	55	PBA	71,544
9	COOP- NATCCO	409,883	56	GRECON	62,220
10	BUTIL	409,160	57	BTM	60,993
11	BATAS	385,810	58	A SMILE	58,717
12	ARC	374,288	59	NELFFI	57,872
13	ANAKPAWIS	370,261	60	AKSA	57,012
14	ABONO	339,990	61	BAGO	55,846
15	AMIN	338,185	62	BANDILA	54,751
16	AGAP	328,724	63	AHON	54,522
17	AN WARAY	321,503	64	ASAHAN MO	51,722

18	YACAP	310,889	65	AGBIAG!	50,837
19	FPJPM	300,923	66	SPI	50,478
20	UNI-MAD	245,382	67	BAHANDI	46,612
21	ABS	235,086	68	ADD	45,624
22	KAKUSA	228,999	69	AMANG	43,062
23	KABATAAN	228,637	70	ABAY PARAK	42,282
24	ABA-AKO	218,818	71	BABAE KA	36,512
25	ALIF	217,822	72	SB	34,835
26	SENIOR CITIZENS	213,058	73	ASAP	34,098
27	AT	197,872	74	PEP	33,938
28	VFP	196,266	75	ABA ILONGGO	33,903
29	ANAD	188,521	76	VENDORS	33,691
30	BANAT	177,028	77	ADD-TRIBAL	32,896
31	ANG KASANGGA	170,531	78	ALMANA	32,255
32	BANTAY PILIPINO	169,801	79	AANGAT KA	29,130
33	ABAKADA	166,747	80	AAPS	26,271
34	1-UTAK	164,980	81	HAPI	25,781
35	TUCP	162,647	82	AAWAS	22,946
36	COCOFED	155,920	83	SM	20,744
... ⁵⁰					
			TOTAL 15,950,900		

The first clause of Section 11(b) of RA No. 7941 states that “parties, organizations, and coalitions receiving at least two percent (2%) of the total votes cast for the party-list system shall be entitled to one seat each.” This clause guarantees a seat to the two-percenters. In Table 2 below, we use the first 20 party-list candidates for illustration purposes. The percentage of votes garnered by each party is arrived at by dividing the number of votes garnered by each party by 15,950,900, the total number of votes cast for all party-list candidates.

Table 2. The first 20 party-list candidates and their respective percentage of votes garnered over the total votes for the party-list.

⁵⁰ Ranks 37 to 47 and 84 to 93 were deleted in this presentation.

Rank	Party	Votes Garnered	Votes Garnered over Total Votes for Party-List, in %	Guaranteed Seat
1	BUHAY	1,169,234	7.33%	1
2	BAYAN MUNA	979,039	6.14%	1
3	CIBAC	755,686	4.74%	1
4	GABRIELA	621,171	3.89%	1
5	APEC	619,657	3.88%	1
6	A TEACHER	490,379	3.07%	1
7	AKBAYAN	466,112	2.92%	1
8	ALAGAD	423,149	2.65%	1
9	COOP -NATCCO	409,883	2.57%	1
10	BUTIL	409,160	2.57%	1
11	BATAS	385,810	2.42%	1
12	ARC	374,288	2.35%	1
13	ANAK PAWIS	370,261	2.32%	1
14	ABONO	339,990	2.13%	1
15	AMIN	338,185	2.12%	1
16	AGAP	328,724	2.06%	1
17	AN WARAY	321,503	2.02%	1
	Total			17
18	YACAP	310,889	1.95%	0
19	FPJPM	300,923	1.89%	0
20	UNI-MAD	245,382	1.54%	0

From Table 2 above, we see that only 17 party-list candidates received at least 2% from the total number of votes cast for party-list candidates. The 17 qualified party-list candidates, or the two-percenters, are the party-list candidates that are “entitled to one seat each,” or the guaranteed seat. In this first round of seat allocation, we distributed 17 guaranteed seats.

The second clause of Section 11(b) of RA No. 7941 provides that “those garnering more than two percent (2%) of the votes shall be entitled to additional seats in proportion to their total number of votes.” This is where petitioners’ and intervenors’ problem with the formula in *Veterans* lies. *Veterans* interprets the clause “in proportion to their total number of votes” to be in proportion to

the votes of the first party. This interpretation is contrary to the express language of RA No. 7941.

We rule that, in computing the allocation of additional seats, the continued operation of the two percent threshold for the distribution of the additional seats as found in the second clause of Section 11(b) of RA No. 7941 is unconstitutional. This Court finds that the two percent threshold makes it mathematically impossible to achieve the maximum number of available party list seats when the number of available party list seats exceeds 50. The continued operation of the two percent threshold in the distribution of the additional seats frustrates the attainment of the permissive ceiling that 20% of the members of the House of Representatives shall consist of party-list representatives.

To illustrate: There are 55 available party-list seats. Suppose there are 50 million votes cast for the 100 participants in the party list elections. A party that has two percent of the votes cast, or one million votes, gets a guaranteed seat. Let us further assume that the first 50 parties all get one million votes. Only 50 parties get a seat despite the availability of 55 seats. Because of the operation of the two percent threshold, this situation will repeat itself even if we increase the available party-list seats to 60 seats and even if we increase the votes cast to 100 million. Thus, even if the maximum number of parties get two percent of the votes for every party, it is always impossible for the number of occupied party-list seats to exceed 50 seats as long as the two percent threshold is present.

We therefore strike down the two percent threshold only in relation to the distribution of the additional seats as found in the second clause of Section 11(b) of RA No. 7941. The two percent threshold presents an unwarranted obstacle to the full implementation of Section 5(2), Article VI of the Constitution and prevents the attainment of “the broadest possible representation of party, sectoral or group interests in the House of Representatives.”⁵¹

In determining the allocation of seats for party-list representatives under Section 11 of RA No. 7941, the following procedure shall be observed:

⁵¹ RA No. 7941, Sec. 2.

1. The parties, organizations, and coalitions shall be ranked from the highest to the lowest based on the number of votes they garnered during the elections.
2. The parties, organizations, and coalitions receiving at least two percent (2%) of the total votes cast for the party-list system shall be entitled to one guaranteed seat each.
3. Those garnering sufficient number of votes, according to the ranking in paragraph 1, shall be entitled to additional seats in proportion to their total number of votes until all the additional seats are allocated.
4. Each party, organization, or coalition shall be entitled to not more than three (3) seats.

In computing the additional seats, the guaranteed seats shall no longer be included because they have already been allocated, at one seat each, to every two-percenter. Thus, the remaining available seats for allocation as “additional seats” are the maximum seats reserved under the Party-List System less the guaranteed seats. Fractional seats are disregarded in the absence of a provision in RA No. 7941 allowing for a rounding off of fractional seats.

In declaring the two percent threshold unconstitutional, we do not limit our allocation of additional seats in Table 3 below to the two-percenters. The percentage of votes garnered by each party-list candidate is arrived at by dividing the number of votes garnered by each party by 15,950,900, the total number of votes cast for party-list candidates. There are two steps in the second round of seat allocation. First, the percentage is multiplied by the remaining available seats, 38, which is the difference between the 55 maximum seats reserved under the Party-List System and the 17 guaranteed seats of the two-percenters. The whole integer of the product of the percentage and of the remaining available seats corresponds to a party’s share in the remaining available seats. Second, we assign one party-list seat to each of the parties next in rank until all available seats are completely distributed. We distributed all of the remaining 38 seats in the second round of seat allocation. Finally, we apply the three-seat cap to determine the number of seats each qualified party-list candidate is entitled. Thus:

Table 3. Distribution of Available Party-List Seats

Rank	Party	Votes Garnered	Votes Garnered over Total Votes for Party List, in % (A)	Guaranteed Seat (First Round) (B)	Additional Seats (Second Round) (C)	(B) plus (C), in whole inte- gers (D)	Applying the three seat cap (E)
1	BUHAY	1,169,234	7.33%	1	2.79	3	N.A.
2	BAYAN MUNA	979,039	6.14%	1	2.33	3	N.A.
3	CIBAC	755,686	4.74%	1	1.80	2	N.A.
4	GABRIELA	621,171	3.89%	1	1.48	2	N.A.
5	APEC	619,657	3.88%	1	1.48	2	N.A.
6	A Teacher	490,379	3.07%	1	1.17	2	N.A.
7	AKBAYAN	466,112	2.92%	1	1.11	2	N.A.
8	ALAGAD	423,149	2.65%	1	1.01	2	N.A.
9	COOP-NATCCO	409,883	2.57%	1	1	2	N.A.
10	BUTIL	409,160	2.57%	1	1	2	N.A.
11	BATAS	385,810	2.42%	1	1	2	N.A.
12	ARC	374,288	2.35%	1	1	2	N.A.
13	ANAKPAWIS	370,261	2.32%	1	1	2	N.A.
14	ABONO	339,990	2.13%	1	1	2	N.A.
15	AMIN	338,185	2.12%	1	1	2	N.A.
16	AGAP	328,724	2.06%	1	1	2	N.A.
17	AN WARAY	321,503	2.02%	1	1	2	N.A.
18	YACAP	310,889	1.95%	0	1	1	N.A.

19	FPJPM	300,923	1.89%	0	1	1	N.A.
20	UNI-MAD	245,382	1.54%	0	1	1	N.A.
21	ABS	235,086	1.47%	0	1	1	N.A.
22	KAKUSA	228,999	1.44%	0	1	1	N.A.
23	KABATAAN	228,637	1.43%	0	1	1	N.A.
24	ABA-AKO	218,818	1.37%	0	1	1	N.A.
25	ALIF	217,822	1.37%	0	1	1	N.A.
26	SENIOR CITIZENS	213,058	1.34%	0	1	1	N.A.
27	AT	197,872	1.24%	0	1	1	N.A.
28	VFP	196,266	1.23%	0	1	1	N.A.
29	ANAD	188,521	1.18%	0	1	1	N.A.
30	BANAT	177,028	1.11%	0	1	1	N.A.
31	ANG KASANGGA	170,531	1.07%	0	1	1	N.A.
32	BANTAY	169,801	1.06%	0	1	1	N.A.
33	ABAKADA	166,747	1.05%	0	1	1	N.A.
34	1-UTAK	164,980	1.03%	0	1	1	N.A.
35	TUCP	162,647	1.02%	0	1	1	N.A.
36	COCOFED	155,920	0.98%	0	1	1	N.A.
Total				17		55	

Applying the procedure of seat allocation as illustrated in Table 3 above, there are 55 party-list representatives from the 36 winning party-list organizations. All 55 available party-list seats are filled. The additional seats allocated to the parties with sufficient number of votes for one whole seat, in no case to exceed a total of three seats for each party, are shown in column (D).

...

... On the formula to allocate party-list seats, the Court is unanimous in concurring with this *ponencia*.

Ultimately, the petition in **BANAT** was partially granted - the assailed resolutions of the COMELEC were set aside and the two percent threshold in the distribution of additional party-list seats was declared unconstitutional. Instead, the **BANAT formula** was adopted - the allocation of additional seats under the Party-List System would be in accordance with the procedure used in Table 3 of Justice Carpio's *ponencia*. However, although Justice Carpio wrote the *ponencia* for **BANAT**, he voted with the minority on the issue of **participation of major political parties in party-list elections**:

The Constitutional Commission adopted a multi-party system that allowed all political parties to participate in the party-list elections. ... The deliberations of the Constitutional Commission clearly bear this out, thus:⁵²

...

MR. OPLE. ... In my opinion, this will also create the stimulus for political parties and mass organizations to seek common ground. For example, we have the PDP-Laban and the UNIDO. I see no reason why they should not be able to make common goals with mass organizations so that the very leadership of these parties can be transformed through the participation of mass organizations. And if this is true of the administration parties, this will be true of others like the Partido ng Bayan which is now being formed. There is no question that they will be attractive to many mass organizations. In the opposition parties to which we belong, there will be a stimulus for us to contact mass organizations so that with their participation, the policies of such parties can be radically transformed because this amendment will create conditions that will challenge both the mass

⁵² Deleted portions are repeated in the excerpt of *Atong Paglaum, Inc. v. COMELEC*, G.R. No. 203766, April 2, 2013, 707 Phil. 454, discussed subsequently.

organizations and the political parties to come together. And the party list system is certainly available, although it is open to all the parties. It is understood that the parties will enter in the roll of the COMELEC the names of representatives of mass organizations affiliated with them. So that we may, in time, develop this excellent system that they have in Europe where labor organizations and cooperatives, for example, distribute themselves either in the Social Democratic Party and the Christian Democratic Party in Germany, and their very presence there has a transforming effect upon the philosophies and the leadership of those parties. It is also a fact well known to all that in the United States, the AFL-CIO always vote with the Democratic Party. But the businessmen, most of them, always vote with the Republican Party, meaning that there is no reason at all why political parties and mass organizations should not combine, re-enforce, influence and interact with each other so that the very objectives that we set in this Constitution for sectoral representation are achieved in a wider, more lasting, and more institutionalized way. Therefore, I support this [Monsod-Villacorta] amendment. It installs sectoral representation as a constitutional gift, but at the same time, it challenges the sector to rise to the majesty of being elected representatives later on through a party list system; and even beyond that, to become actual political parties capable of contesting political power in the wider constitutional arena for major political parties. ...⁵³

RA No. 7941 provided the details for the concepts put forward by the Constitutional Commission. Section 3 of RA No. 7941 reads:

Definition of Terms. (a) The party-list system is a mechanism of proportional representation in the election of representatives to the House of Representatives from national, regional and sectoral parties or organizations or coalitions thereof registered with the Commission on Elections (COMELEC). Component parties or organizations of a coalition may participate independently provided the coalition of which they form part does not participate in the party-list system. (b) A party means either a political party or a sectoral party or a coalition of parties. (c) A political party refers to an organized group of citizens advocating an ideology or platform, principles and policies for the general conduct of government and which, as the

⁵³ II Record, Constitutional Commission 256-257 (25 July 1986), 568 (1 August 1986).

most immediate means of securing their adoption, regularly nominates and supports certain of its leaders and members as candidates for public office.

It is a national party when its constituency is spread over the geographical territory of at least a majority of the regions. It is a regional party when its constituency is spread over the geographical territory of at least a majority of the cities and provinces comprising the region.

(d) A sectoral party refers to an organized group of citizens belonging to any of the sectors enumerated in Section 5 hereof whose principal advocacy pertains to the special interests and concerns of their sector.

(e) A sectoral organization refers to a group of citizens or a coalition of groups of citizens who share similar physical attributes or characteristics, employment, interests or concerns.

(f) A coalition refers to an aggrupation of duly registered national, regional, sectoral parties or organizations for political and/or election purposes.

Congress, in enacting RA No. 7941, put the three-seat cap to prevent any party from dominating the party-list elections.

Neither the Constitution nor RA No. 7941 prohibits major political parties from participating in the party-list system. On the contrary, the framers of the Constitution clearly intended the major political parties to participate in party-list elections through their sectoral wings. In fact, the members of the Constitutional Commission voted down, 19-22, any permanent sectoral seats, and in the alternative the reservation of the party-list system to the sectoral groups.⁵⁴ In defining a “party” that participates in party-list elections as either “a political party or a sectoral party,” RA No. 7941 also clearly intended that major political parties will participate in the party-list elections. **Excluding the major political parties in party-list elections is manifestly against the Constitution, the intent of the Constitutional Commission, and RA No. 7941. This Court cannot engage in socio-political engineering and judicially legislate the exclusion of major political parties from the party-list elections in patent violation of the Constitution and the law.**

⁵⁴ Id. at 584 (1 August 1986). Dissenting opinion, Vitug, J., *Ang Bagong Bayani-OFW Labor Party v. COMELEC*, 412 Phil. 308, 350 (2001).

Read together, RA No. 7941 and the deliberations of the Constitutional Commission state that major political parties are allowed to establish, or form coalitions with, sectoral organizations for electoral or political purposes. There should not be a problem if, for example, the Liberal Party participates in the party-list election through the Kabataang Liberal ng Pilipinas (KALIPi), its sectoral youth wing. The other major political parties can thus organize, or affiliate with, their chosen sector or sectors. To further illustrate, the Nacionalista Party can establish a fisherfolk wing to participate in the party-list election, and this fisherfolk wing can field its fisherfolk nominees. Kabalikat ng Malayang Pilipino (KAMPI) can do the same for the urban poor.

The qualifications of party-list nominees are prescribed in Section 9 of RA No. 7941:

Qualifications of Party-List Nominees. - No person shall be nominated as party-list representative unless he is a natural born citizen of the Philippines, a registered voter, a resident of the Philippines for a period of not less than one (1) year immediately preceding the day of the elections, able to read and write, bona fide member of the party or organization which he seeks to represent for at least ninety (90) days preceding the day of the election, and is at least twenty-five (25) years of age on the day of the election.

In case of a nominee of the youth sector, he must at least be twenty-five (25) but not more than thirty (30) years of age on the day of the election. Any youth sectoral representative who attains the age of thirty (30) during his term shall be allowed to continue until the expiration of his term.

Under Section 9 of RA No. 7941, it is not necessary that the party-list organization's nominee "wallow in poverty, destitution and infirmity"⁵⁵ as there is no financial status required in the law. It is enough that the nominee of the sectoral party/organization/coalition belongs to the marginalized and underrepresented sectors,⁵⁶ that is, if the nominee represents the fisherfolk, he or she must be a fisherfolk, or if the nominee represents the senior citizens, he or she must be a senior citizen.

Neither the Constitution nor RA No. 7941 mandates the filling-

⁵⁵ Ang Bagong Bayani-OFW Labor Party v. COMELEC, 412 Phil. 308, 336 (2001).

⁵⁶ RA No. 7941, Sec. 2.

up of the entire 20% allocation of party-list representatives found in the Constitution. The Constitution, in paragraph 1, Section 5 of Article VI, left the determination of the number of the members of the House of Representatives to Congress: “The House of Representatives shall be composed of not more than two hundred and fifty members, unless otherwise fixed by law, ...” The 20% allocation of party-list representatives is merely a ceiling; party-list representatives cannot be more than 20% of the members of the House of Representatives. However, we cannot allow the continued existence of a provision in the law which will systematically prevent the constitutionally allocated 20% party-list representatives from being filled. The three-seat cap, as a limitation to the number of seats that a qualified party-list organization may occupy, remains a valid statutory device that prevents any party from dominating the party-list elections. Seats for party-list representatives shall thus be allocated in accordance with the procedure used in Table 3 above.

However, by a vote of 8-7, the Court decided to continue the ruling in *Veterans* disallowing major political parties from participating in the party-list elections, directly or indirectly.⁵⁷ Those who voted to continue disallowing major political parties from the party-list elections joined Chief Justice Reynato S. Puno in his separate opinion. ...

Subsequently, the **BANAT formula** was clarified in the July 8, 2009 *en banc* resolution of the Court, also penned by Justice Carpio:

The House of Representatives, represented by Speaker Prospero C. Nograles, filed a motion for leave to intervene in G.R. Nos. 179271 and 179295. The House of Representatives filed a motion for clarification in intervention and enumerated the issues for clarification as follows:

- A. There are only 219 legislative districts and not 220. Accordingly, the allotted seats for party-list representation should only be 54 and not 55. The House of Representatives seeks clarification on which of the party-list representatives shall be admitted to the Roll of Members considering that the Court declared as winners 55 party-list representatives.
- B. The House of Representatives wishes to be guided on whether it should enroll in its Roll of Members the 32 named

⁵⁷ But see *Atong Paglaum, Inc. v. COMELEC*, G.R. No. 203766, April 2, 2013, 707 Phil. 454, excerpted subsequently.

party-list representatives enumerated in Table 3 or only such number of representatives that would complete the 250 member maximum prescribed by Article VI, Sec. 5(1) of the Constitution. In the event that it is ordered to admit all 32, will this act not violate the above-cited Constitutional provision considering that the total members would now rise to 270.

C. The Court declared as unconstitutional the 2% threshold only in relation to the distribution of additional seats as found in the second clause of Section 11(b) of RA No. 7941. Yet, it distributed first seats to party-list groups which did not attain the minimum number of votes that will entitle them to one seat. Clarification is, therefore, sought whether the term “additional seats” refer to 2nd and 3rd seats only or all remaining available seats. Corollary thereto, the House of Representatives wishes to be clarified whether there is no more minimum vote requirement to qualify as a party-list representative.

D. For the guidance of the House of Representatives, clarification is sought as to whether the principle laid down in *Veterans* that “the filling up of the allowable seats for party-list representatives is not mandatory,” has been abandoned.

On the other hand, Armi Jane Roa-Borje (Roa-Borje), third nominee of Citizens’ Battle Against Corruption (CIBAC), filed a motion for leave for partial reconsideration-in-intervention, alleging that:

The Supreme Court, in ruling on the procedure for distribution of seats, has deprived without due process and in violation of the equal protection clause, parties with more significant constituencies, such as CIBAC, Gabriela and APEC, in favor of parties who did not even meet the 2% threshold.

Following the Court’s Decision of 21 April 2009, the Commission on Elections (COMELEC) submitted to this Court on 27 April 2009 National Board of Canvassers (NBC) Resolution No. 09-001. NBC Resolution No. 09-001 updated the data used by this Court in its Decision of 21 April 2009. The total votes for party-list is now 15,723,764 following the cancellation of the registration of party-list group Filipinos for Peace, Justice and Progress Movement (FPJPM). Moreover, the total number of legislative districts is now 219 following the annulment of Muslim Mindanao Autonomy Act No. 201 creating the province of Shariff Kabunsuan. Thus, the percentage and ranking of the

actual winning party-list groups are different from Table 3 of the Decision in G.R. Nos. 179271 and 179295.

The Number of Members of the House of Representatives in the 2007 Elections

... The 1987 Constitution (citing Section 5(1), Article VI) fixes the maximum number of members of the House of Representatives at 250. However, the 1987 Constitution expressly allows for an increase in the number of members of the House of Representatives provided a law is enacted for the purpose. This is clear from the phrase “unless otherwise provided by law” in Section 5(1), Article VI of the 1987 Constitution. The Legislature has the option to choose whether the increase in the number of members of the House of Representatives is done by piecemeal legislation or by enactment of a law authorizing a general increase. Legislation that makes piecemeal increases of the number of district representatives is no less valid than legislation that makes a general increase.

In 1987, there were only 200 legislative districts. Twenty legislative districts were added by piecemeal legislation after the ratification of the 1987 Constitution...

Thus, for purposes of the 2007 elections, there were only 219 district representatives. Navotas City became a separate district on 24 June 2007, more than a month after the 14 May 2007 elections.

The Number of Party-List Seats in the 2007 Elections

... The 1987 Constitution (citing Section 5(2), Article VI) fixes the ratio of party-list representatives to district representatives. This ratio automatically applies whenever the number of district representatives is increased by law. The mathematical formula for determining the number of seats available to party-list representatives is

Number of seats available to legislative districts	x	.20	=	Number of seats available to party-list representatives

.80				

As we stated in our Decision of 21 April 2009, “[t]his formula allows for the corresponding increase in the number of seats available for party-list representatives whenever a legislative district is created by law.” Thus, for every four district representatives, the 1987 Constitution mandates that there shall be one party-list representative. **There is no need for legislation to create an additional party-list seat whenever four additional legislative districts are created by law. Section 5(2), Article VI of the 1987 Constitution automatically creates such additional party-list seat. ...**

Any change in the number of legislative districts brings a corresponding change in the number of party-list seats. However, the increase in the number of members of the House of Representatives went unnoticed as the available seats for party-list representatives have never been filled up before. As of the oral arguments in G.R. Nos. 179271 and 179295, there were 220 legislative districts. Fifty-five party-list seats were thus allocated. However, the number of legislative districts was subsequently reduced to 219 with our ruling on 16 July 2008 declaring void the creation of the Province of Sharif Kabunsuan.⁵⁸ Thus, in the 2007 elections, the number of party-list seats available for distribution should be correspondingly reduced from 55 to 54.

The filling-up of all available party-list seats is not mandatory. Actual occupancy of the party-list seats depends on the number of participants in the party-list election. If only ten parties participated in the 2007 party-list election, then, despite the availability of 54 seats, the maximum possible number of occupied party-list seats would only be 30 because of the three-seat cap. In such a case, the three-seat cap prevents the mandatory allocation of all the 54 available seats.

Under Section 11(b) of RA No. 7941, garnering 2% of the total votes cast guarantees a party one seat. This 2% threshold for the first round of seat allocation does not violate any provision of the 1987 Constitution. Thus, the Court upholds this 2% threshold for the guaranteed seats as a valid exercise of legislative power.

In the second round allocation of additional seats, there is no minimum vote requirement to obtain a party-list seat because the Court has struck down the application of the 2% threshold

⁵⁸ *Sema v. COMELEC*, G.R. Nos. 177597 & 178628, 16 July 2008, 558 SCRA 700, penned by Justice Carpio and excerpted above.

in the allocation of additional seats. Specifically, the provision in Section 11(b) of the Party-List Act stating that “those garnering more than two percent (2%) of the votes shall be entitled to additional seats in the proportion to their total number of votes” can no longer be given any effect. Otherwise, the 20 percent party-list seats in the total membership of the House of Representatives as provided in the 1987 Constitution will mathematically be impossible to fill up.

However, a party-list organization has to obtain a sufficient number of votes to gain a seat in the second round of seat allocation. What is deemed a sufficient number of votes is dependent upon the circumstances of each election, such as the number of participating parties, the number of available party-list seats, and the number of parties with guaranteed seats received in the first round of seat allocation. To continue the example above, if only ten parties participated in the 2007 party-list election and each party received only one thousand votes, then each of the ten parties would receive 10% of the votes cast. All are guaranteed one seat, and are further entitled to receive two more seats in the second round of seat allocation.

Similarly, a presidential candidate may win the elections even if he receives only one thousand votes as long as all his opponents receive less than one thousand votes. A winning presidential candidate only needs to receive more votes than his opponents. The same policy applies in every election to public office, from the presidential to the barangay level. Except for the guaranteed party-list seat, there is no minimum vote requirement before a candidate in any election, for any elective office, can be proclaimed the winner. Of course, the winning candidate must receive at least one vote, assuming he has no opponents or all his opponents do not receive a single vote.

In the absence of a minimum vote requirement in the second round of party-list seat allocation, there is no need to belabor the disparity between the votes obtained by the first and last ranked winning parties in the 2007 party-list elections. In the same manner, no one belabors the disparity between the votes obtained by the highest and lowest ranked winners in the senatorial elections. However, for those interested in comparing the votes received by party-list representatives vis-a-vis the votes received by district representatives, the 162,678 votes cast in favor of TUCP, the last party to obtain a party-list seat, is significantly higher than the votes received by 214 of the 218

elected district representatives.

The Actual Number of Party-List Representatives in the 2007 Elections

The data used in Table 3 of our Decision promulgated on 21 April 2009 was based on the submissions of the parties. We used the figures from Party-List Canvass Report No. 32, as of 6:00 p.m. of 31 August 2007. The NBC issued NBC Report No. 33 on 11 June 2008, updating the 31 August 2007 report. The parties did not furnish this Court with a copy of NBC Report No. 33. In any case, we stated in the dispositive portion of our Decision that “[t]he allocation of additional seats under the Party-List System shall be in accordance with the procedure used in Table 3 of this decision.” Party-List Canvass Report No. 32 is not part of the procedure.

The computation of the COMELEC in NBC No. 09-001 applying the procedure laid down in our Decision requires correction for purposes of accuracy. Instead of multiplying the percentage of votes garnered over the total votes for party-list by 36, the COMELEC multiplied the percentage by 37. Thirty-six is the proper multiplier as it is the difference between 54, the number of available party-list seats, and 18, the number of guaranteed seats. Only the figures in column (C) are affected. The allocation of seats to the winning party-list organizations, however, remains the same as in NBC No. 09-001. ...

To address Roa-Borje’s motion for partial reconsideration-in-intervention and for purposes of computing the results in future party-list elections, we reiterate that in the second step of the second round of seat allocation, the preference in the distribution of seats should be in accordance with the higher percentage and higher rank, without limiting the distribution to parties receiving two-percent of the votes. To limit the distribution of seats to the two-percenters would mathematically prevent the filling up of all the available party-list seats. ...

Roa-Borje’s position stems from the perceived need for absolute proportionality in the allocation of party-list seats. However, the 1987 Constitution does not require absolute proportionality in the allocation of party-list seats (citing) Section 5(1), Article VI of the 1987 Constitution...

The phrase “legislative districts apportioned among the provinces, cities, and the Metropolitan Manila area in accordance

with the number of their respective inhabitants, and on the basis of a uniform and progressive ratio” in Section 5(1) of Article VI requires that legislative districts shall be apportioned according to proportional representation. **However, this principle of proportional representation applies only to legislative districts, not to the party-list system. The allocation of seats under the party-list system is governed by the last phrase of Section 5(1), which states that the party-list representatives shall be “those who, as provided by law, shall be elected through a party-list system,” giving the Legislature wide discretion in formulating the allocation of party-list seats. Clearly, there is no constitutional requirement for absolute proportional representation in the allocation of party-list seats in the House of Representatives.**

Section 2, on Declaration of Policy, of RA No. 7941 provides that the “State shall promote proportional representation in the election of representatives to the House of Representatives through a party-list system of registered national, regional and sectoral parties or organizations or coalitions thereof ...” However, this proportional representation in Section 2 is qualified by Section 11(b) of the same law which mandates a three-seat cap, which is intended to bar any single party-list organization from dominating the party-list system. Section 11(b) also qualifies this proportional representation by imposing a two percent cut-off for those entitled to the guaranteed seats. These statutory qualifications are valid because they do not violate the Constitution, which does not require absolute proportional representation for the party-list system.

To summarize, there are **four parameters in a Philippine-style party-list election system:**

- 1. Twenty percent of the total number of the membership of the House of Representatives is the maximum number of seats available to party-list organizations, such that there is automatically one party-list seat for every four existing legislative districts.**
- 2. Garnering two percent of the total votes cast in the party-list elections guarantees a party-list organization one seat. The guaranteed seats shall be distributed in a first round of seat allocation to parties receiving at least two percent of the total party-list votes.**

3. The additional seats, that is, the remaining seats after allocation of the guaranteed seats, shall be distributed to the party-list organizations including those that received less than two percent of the total votes. The continued operation of the two percent threshold as it applies to the allocation of the additional seats is now unconstitutional because this threshold mathematically and physically prevents the filling up of the available party-list seats. The additional seats shall be distributed to the parties in a second round of seat allocation according to the two-step procedure laid down in the Decision of 21 April 2009 as clarified in this Resolution.

4. The three-seat cap is constitutional. The three-seat cap is intended by the Legislature to prevent any party from dominating the party-list system. There is no violation of the Constitution because the 1987 Constitution does not require absolute proportionality for the party-list system. The well-settled rule is that courts will not question the wisdom of the Legislature as long as it is not violative of the Constitution.

These four parameters allow the mathematical and practical fulfillment of the Constitutional provision that party-list representatives shall comprise twenty percent of the members of the House of Representatives. At the same time, these four parameters uphold as much as possible the Party-List Act, striking down only that provision of the Party-List Act that could not be reconciled anymore with the 1987 Constitution.

Finally, in the *en banc* case of **ATONG PAGLAUM, INC. v. COMMISSION ON ELECTIONS**, G.R. No. 203766, April 2, 2013, 707 Phil. 454, Justice Carpio wrote a comprehensive treatise on the **party-list system** of the Philippines, based on a textual and contextual analysis of this constitutional provision. The minority opinion in **BANAT**, discussed above, on the issue of **participation of major political parties in party-list elections** became the majority opinion in this case.

Atong-Paglaum was a consolidation of 54 petitions for *certiorari* and prohibition, filed by party-list groups and organizations that assailed the resolutions issued by the COMELEC disqualifying them from participating in the May 2013 party-list elections, either by denial of their petitions for registration under the party-list system, or cancellation of their registration and accreditation as party-list organizations.

The Issues

We rule upon two issues: first, whether the COMELEC committed grave abuse of discretion amounting to lack or excess of jurisdiction in disqualifying petitioners from participating in the 13 May 2013 party-list elections, either by denial of their new petitions for registration under the party-list system, or by cancellation of their existing registration and accreditation as party-list organizations; and second, whether the criteria for participating in the party-list system laid down in *Ang Bagong Bayani*⁵⁹ and **Barangay Association for National Advancement and Transparency v. Commission on Elections (BANAT)**⁶⁰ should be applied by the COMELEC in the coming 13 May 2013 party-list elections.

The Court's Ruling

We hold that the COMELEC did not commit grave abuse of discretion in following prevailing decisions of this Court in disqualifying petitioners from participating in the coming 13 May 2013 party-list elections. However, since the Court adopts in this Decision new parameters in the qualification of national, regional, and sectoral parties under the party-list system, thereby abandoning the rulings in the decisions applied by the COMELEC in disqualifying petitioners, we remand to the COMELEC all the present petitions for the COMELEC to determine who are qualified to register under the party-list system, and to participate in the coming 13 May 2013 party-list elections, under the new parameters prescribed in this Decision.

The Party-List System

The 1987 Constitution provides the basis for the party-list system of representation. Simply put, the party-list system is intended to democratize political power by giving political parties that cannot win in legislative district elections a chance to win seats in the House of Representatives.⁶¹ The voter elects two representatives in the House of Representatives: one for his or her legislative

⁵⁹ The citation is not provided in the original decision but clearly this refers to *Ang Bagong Bayani-OFW Labor Party v. COMELEC*, G.R. No. 147589, June 26, 2001, 412 Phil. 308.

⁶⁰ G.R. Nos. 179271, 21 April 2009, 586 SCRA 210, penned by Justice Carpio and excerpted above.

⁶¹ II Record, Constitutional Commission 566-567 (1 August 1986).

district, and another for his or her party-list group or organization of choice. (This is provided in Section 5, paragraphs 1 and 2, Article VI of t)he 1987 Constitution... (as well as in) Sections 7 and 8, Article IX-C(:)

Sec. 7. No votes cast in favor of a political party, organization, or coalition shall be valid, except for those registered under the party-list system as provided in this Constitution.

Sec. 8. Political parties, or organizations or coalitions registered under the party-list system, shall not be represented in the voters' registration boards, boards of election inspectors, boards of canvassers, or other similar bodies. However, they shall be entitled to appoint poll watchers in accordance with law.

Commissioner Christian S. Monsod, the main sponsor of the party-list system, stressed that "the party-list system is not synonymous with that of the sectoral representation."⁶² The constitutional provisions on the party-list system should be read in light of the following discussion among its framers:

MR. MONSOD. ... I would like to make a distinction from the beginning that the proposal for the party list system is not synonymous with that of the sectoral representation. Precisely, the party list system seeks to avoid the dilemma of choice of sectors and who constitute the members of the sectors. In making the proposal on the party list system, we were made aware of the problems precisely cited by Commissioner Bacani of which sectors will have reserved seats. In effect, a sectoral representation in the Assembly would mean that certain sectors would have reserved seats; that they will choose among themselves who would sit in those reserved seats. And then, we have the problem of which sector because as we will notice in Proclamation No. 9, the sectors cited were the farmers, fishermen, workers, students, professionals, business, military, academic, ethnic and other similar groups. So these are the nine sectors that were identified here as "sectoral representatives" to be represented in this Commission. The problem we had in trying to approach sectoral representation in the Assembly was whether to stop at these nine sectors or include other sectors. And we went through the exercise in a caucus of which sector should be included which went up to 14 sectors. And as we all know,

⁶² II Record, Constitutional Commission 85-86 (22 July 1986).

the longer we make our enumeration, the more limiting the law become because when we make an enumeration we exclude those who are not in the enumeration. *Second*, we had the problem of who comprise the farmers. Let us just say the farmers and the laborers. These days, there are many citizens who are called “hyphenated citizens.” A doctor may be a farmer; a lawyer may also be a farmer. And so, it is up to the discretion of the person to say “I am a farmer” so he would be included in that sector.

The third problem is that when we go into a reserved seat system of sectoral representation in the Assembly, we are, in effect, giving some people two votes and other people one vote. We sought to avoid these problems by presenting a party list system. Under the party list system, there are no reserved seats for sectors. Let us say, laborers and farmers can form a sectoral party or a sectoral organization that will then register and present candidates of their party. How do the mechanics go? Essentially, under the party list system, every voter has two votes, so there is no discrimination. *First*, he will vote for the representative of his legislative district. That is one vote. In that same ballot, he will be asked: What party or organization or coalition do you wish to be represented in the Assembly? And here will be attached a list of the parties, organizations or coalitions that have been registered with the COMELEC and are entitled to be put in that list. This can be a regional party, a sectoral party, a national party, UNIDO, Magsasaka or a regional party in Mindanao. One need not be a farmer to say that he wants the farmers’ party to be represented in the Assembly. Any citizen can vote for any party. At the end of the day, the COMELEC will then tabulate the votes that had been garnered by each party or each organization - one does not have to be a political party and register in order to participate as a party - and count the votes and from there derive the percentage of the votes that had been cast in favor of a party, organization or coalition.

When such parties register with the COMELEC, we are assuming that 50 of the 250 seats will be for the party list system. So, we have a limit of 30 percent of 50. That means that the maximum that any party can get out of these 50 seats is 15. When the parties register they then submit a list of 15 names. They have to submit these names because these nominees have to meet the minimum qualifications of a Member of the National Assembly. At the end of the day, when the votes are tabulated, one gets the percentages. Let us say, UNIDO gets 10 percent or 15 percent of the votes;

KMU gets 5 percent; a women's party gets 2 1/2 percent and anybody who has at least 2 1/2 percent of the vote qualifies and the 50 seats are apportioned among all of these parties who get at least 2 1/2 percent of the vote.

What does that mean? It means that any group or party who has a constituency of, say, 500,000 nationwide gets a seat in the National Assembly. What is the justification for that? When we allocate legislative districts, we are saying that any district that has 200,000 votes gets a seat. There is no reason why a group that has a national constituency, even if it is a sectoral or special interest group, should not have a voice in the National Assembly. It also means that, let us say, there are three or four labor groups, they all register as a party or as a group. If each of them gets only one percent or five of them get one percent, they are not entitled to any representative. So, they will begin to think that if they really have a common interest, they should band together, form a coalition and get five percent of the vote and, therefore, have two seats in the Assembly. Those are the dynamics of a party list system.

We feel that this approach gets around the mechanics of sectoral representation while at the same time making sure that those who really have a national constituency or sectoral constituency will get a chance to have a seat in the National Assembly. These sectors or these groups may not have the constituency to win a seat on a legislative district basis. They may not be able to win a seat on a district basis but surely, they will have votes on a nationwide basis.

The purpose of this is to open the system. In the past elections, we found out that there were certain groups or parties that, if we count their votes nationwide; have about 1,000,000 or 1,500,000 votes. But they were always third place or fourth place in each of the districts. So, they have no voice in the Assembly. But this way, they would have five or six representatives in the Assembly even if they would not win individually in legislative districts. So, that is essentially the mechanics, the purpose and objectives of the party list system. BISHOP BACANI. Madam President, am I right in interpreting that when we speak now of party list system though we refer to sectors, we would be referring to sectoral party list rather than sectors and party list?

MR. MONSOD. As a matter of fact, if this body accepts the party list system, we do not even have to mention sectors because the sectors would be included in the party list system. They can be sectoral parties within the party list system.

...

MR. MONSOD. Madam President, I just want to say that we suggested or proposed the party list system because we wanted to open up the political system to a pluralistic society through a multiparty system. ... We are for opening up the system, and we would like very much for the sectors to be there. That is why one of the ways to do that is to put a ceiling on the number of representatives from any single party that can sit within the 50 allocated under the party list system. ...

...

MR. MONSOD. Madam President, the candidacy for the 198 seats is not limited to political parties. My question is this: Are we going to classify for example Christian Democrats and Social Democrats as political parties? Can they run under the party list concept or must they be under the district legislation side of it only?

MR. VILLACORTA. In reply to that query, I think these parties that the Commissioner mentioned can field candidates for the Senate as well as for the House of Representatives. Likewise, they can also field sectoral candidates for the 20 percent or 30 percent, whichever is adopted, of the seats that we are allocating under the party list system.

MR. MONSOD. In other words, the Christian Democrats can field district candidates and can also participate in the party list system?

MR. VILLACORTA. Why not? When they come to the party list system, they will be fielding only sectoral candidates.

MR. MONSOD. May I be clarified on that? Can UNIDO participate in the party list system?

MR. VILLACORTA. Yes, why not? For as long as they field candidates who come from the different marginalized sectors that we shall designate in this Constitution.

MR. MONSOD. Suppose Senator Tañada wants to run under BAYAN group and says that he represents the farmers, would he qualify?

MR. VILLACORTA. No, Senator Tañada would not qualify.

MR. MONSOD. But UNIDO can field candidates under the party list system and say Juan dela Cruz is a farmer. Who would pass on whether he is a farmer or not?

MR. TADEO. Kay Commissioner Monsod, gusto ko lamang linawin ito. Political parties, particularly minority political parties, are not prohibited to participate in the party list election if they can prove that they are also organized along sectoral lines.

MR. MONSOD. What the Commissioner is saying is that all

political parties can participate because it is precisely the contention of political parties that they represent the broad base of citizens and that all sectors are represented in them. Would the Commissioner agree?

MR. TADEO. Ang punto lamang namin, pag pinayagan mo ang UNIDO na isang political party, it will dominate the party list at mawawalang saysay din yung sector. Lalamunin mismo ng political parties ang party list system. Gusto ko lamang bigyan ng diin ang “reserve.” Hindi ito reserve seat sa marginalized sectors. Kung titingnan natin itong 198 seats, reserved din ito sa political parties.

MR. MONSOD. Hindi po reserved iyon kasi anybody can run there. But my question to Commissioner Villacorta and probably also to Commissioner Tadeo is that under this system, would UNIDO be banned from running under the party list system?

MR. VILLACORTA. No, as I said, UNIDO may field sectoral candidates. On that condition alone, UNIDO may be allowed to register for the party list system.

MR. MONSOD. May I inquire from Commissioner Tadeo if he shares that answer?

MR. TADEO. The same.

MR. VILLACORTA. Puwede po ang UNIDO, pero sa sectoral lines.

MR. MONSOD. Sino po ang magsasabi kung iyong kandidato ng UNIDO ay hindi talagang labor leader or isang laborer? Halimbawa, abogado ito.

MR. TADEO. Iyong mechanics.

MR. MONSOD. Hindi po mechanics iyon because we are trying to solve an inherent problem of sectoral representation. My question is: Suppose UNIDO fields a labor leader, would he qualify?

MR. TADEO. The COMELEC may look into the truth of whether or not a political party is really organized along a specific sectoral line. If such is verified or confirmed, the political party may submit a list of individuals who are actually members of such sectors. The lists are to be published to give individuals or organizations belonging to such sector the chance to present evidence contradicting claims of membership in the said sector or to question the claims of the existence of such sectoral organizations or parties. This proceeding shall be conducted by the COMELEC and shall be summary in character. In other words, COMELEC decisions

on this matter are final and unappealable.⁶³

Indisputably, the framers of the 1987 Constitution intended the party-list system to include not only sectoral parties but also non-sectoral parties. The framers intended the sectoral parties to constitute a part, but not the entirety, of the party-list system. As explained by Commissioner Wilfredo Villacorta, political parties can participate in the party-list system “[f]or as long as they field candidates who come from the different marginalized sectors that we shall designate in this Constitution.”⁶⁴

In fact, the framers voted down, 19-22, a proposal to reserve permanent seats to sectoral parties in the House of Representatives, or alternatively, to reserve the party-list system exclusively to sectoral parties. As clearly explained by Justice Jose C. Vitug in his Dissenting Opinion in *Ang Bagong Bayani*:

The draft provisions on what was to become Article VI, Section 5, subsection (2), of the 1987 Constitution took off from two staunch positions - the first headed by Commissioner Villacorta, advocating that of the 20 per centum of the total seats in Congress to be allocated to party-list representatives half were to be reserved to appointees from the marginalized and underrepresented sectors. The proposal was opposed by some Commissioners. Mr. Monsod expressed the difficulty in delimiting the sectors that needed representation. He was of the view that reserving seats for the marginalized and underrepresented sectors would stunt their development into full-pledged parties equipped with electoral machinery potent enough to further the sectoral interests to be represented. The Villacorta group, on the other hand, was apprehensive that pitting the unorganized and less-moneyed sectoral groups in an electoral contest would be like placing babes in the lion’s den, so to speak, with the bigger and more established political parties ultimately gobbling them up. RA 7941 recognized this concern when it banned the first five major political parties on the basis of party representation in the House of Representatives from participating in the party-list system for the first party-list elections held in 1998 (and to be automatically lifted starting with the 2001 elections). The advocates for permanent seats for sectoral representatives

⁶³ II Record, Constitutional Commission 85-86 (22 July 1986), 256-257 (25 July 1986).

⁶⁴ II Record, Constitutional Commission 257 (25 July 1986).

made an effort towards a compromise - that the party-list system be open only to underrepresented and marginalized sectors. This proposal was further whittled down by allocating only half of the seats under the party-list system to candidates from the sectors which would garner the required number of votes. The majority was unyielding. Voting 19-22, the proposal for permanent seats, and in the alternative the reservation of the party-list system to the sectoral groups, was voted down. The only concession the Villacorta group was able to muster was an assurance of reserved seats for selected sectors for three consecutive terms after the enactment of the 1987 Constitution, by which time they would be expected to gather and solidify their electoral base and brace themselves in the multi-party electoral contest with the more veteran political groups.⁶⁵

Thus, in the end, the proposal to give permanent reserved seats to certain sectors was outvoted. Instead, the reservation of seats to sectoral representatives was only allowed for the first three consecutive terms.⁶⁶ There can be no doubt whatsoever that the framers of the 1987 Constitution expressly rejected the proposal to make the party-list system exclusively for sectoral parties only, and that they clearly intended the party-list system to include both sectoral and non-sectoral parties.

The common denominator between sectoral and non-sectoral parties is that they cannot expect to win in legislative district elections but they can garner, in nationwide elections, at least the same number of votes that winning candidates can garner in legislative district elections. The party-list system will be the entry point to membership in the House of Representatives for both these non-traditional parties that could not compete in legislative district elections.

The indisputable intent of the framers of the 1987 Constitution to include in the party-list system both sectoral and non-sectoral parties is clearly written in Section 5(1), Article VI of the Constitution...

Section 5(1), Article VI of the Constitution is crystal-clear that there shall be “a party-list system of registered

⁶⁵ 412 Phil. 347, 350 (2001).

⁶⁶ Fritzie Palma Tangkia and Ma. Araceli Basco Habaradas, *Party-List System: The Philippine Experience*, Ateneo School of Government and Friedrich Ebert Stiftung (FES), Philippine Office, April 2001, <http://library.fes.de/pdf-files/bueros/philippinen/50076.pdf>.

national, regional, and sectoral parties or organizations.” The commas after the words “national[,]” and “regional[,]” separate national and regional parties from sectoral parties. Had the framers of the 1987 Constitution intended national and regional parties to be at the same time sectoral, they would have stated “national and regional sectoral parties.” They did not, precisely because it was never their intention to make the party-list system exclusively sectoral.

What the framers intended, and what they expressly wrote in Section 5(1), could not be any clearer: the party-list system is composed of three different groups, and the sectoral parties belong to only one of the three groups. The text of Section 5(1) leaves no room for any doubt that national and regional parties are separate from sectoral parties.

Thus, the party-list system is composed of three different groups: (1) national parties or organizations; (2) regional parties or organizations; and (3) sectoral parties or organizations. National and regional parties or organizations are different from sectoral parties or organizations. National and regional parties or organizations need not be organized along sectoral lines and need not represent any particular sector.

Moreover, Section 5(2), Article VI of the 1987 Constitution mandates that, during the first three consecutive terms of Congress after the ratification of the 1987 Constitution, “one-half of the seats allocated to party-list representatives shall be filled, as provided by law, by selection or election from the labor, peasant, urban poor, indigenous cultural communities, women, youth, and such other sectors as may be provided by law, except the religious sector.” This provision clearly shows again that the party-list system is not exclusively for sectoral parties for two obvious reasons.

First, the other one-half of the seats allocated to party-list representatives would naturally be open to non-sectoral party-list representatives, clearly negating the idea that the party-list system is exclusively for sectoral parties representing the “marginalized and underrepresented.”

Second, the reservation of one-half of the party-list seats to

sectoral parties applies only for the first “three consecutive terms after the ratification of this Constitution,” clearly making the party-list system fully open after the end of the first three congressional terms. This means that, after this period, there will be no seats reserved for any class or type of party that qualifies under the three groups constituting the party-list system.

Hence, the clear intent, express wording, and party-list structure ordained in Section 5(1) and (2), Article VI of the 1987 Constitution cannot be disputed: the party-list system is not for sectoral parties only, but also for non-sectoral parties.

Republic Act No. 7941 or the Party-List System Act, which is the law that implements the party-list system prescribed in the Constitution, provides:

Sec. 3. Definition of Terms. (a) The party-list system is a mechanism of proportional representation in the election of representatives to the House of Representatives from national, regional and sectoral parties or organizations or coalitions thereof registered with the Commission on Elections (COMELEC). Component parties or organizations of a coalition may participate independently provided the coalition of which they form part does not participate in the party-list system.

(b) A party means either a political party or a sectoral party or a coalition of parties.

(c) A political party refers to an organized group of citizens advocating an ideology or platform, principles and policies for the general conduct of government and which, as the most immediate means of securing their adoption, regularly nominates and supports certain of its leaders and members as candidates for public office.

It is a national party when its constituency is spread over the geographical territory of at least a majority of the regions. It is a regional party when its constituency is spread over the geographical territory of at least a majority of the cities and provinces comprising the region.

(d) A sectoral party refers to an organized group of citizens belonging to any of the sectors enumerated in Section 5 hereof whose principal advocacy pertains to the special interest and concerns of their sector.

(e) A sectoral organization refers to a group of citizens or a coalition of groups of citizens who share similar physical

attributes or characteristics, employment, interests or concerns.
(f) A coalition refers to an aggrupation of duly registered national, regional, sectoral parties or organizations for political and/or election purposes.

Section 3(a) of RA No. 7941 defines a “party” as “either a political party or a sectoral party or a coalition of parties.” Clearly, a political party is different from a sectoral party. Section 3(c) of RA No. 7941 further provides that a “political party refers to an organized group of citizens advocating an ideology or platform, principles and policies for the general conduct of government.” On the other hand, Section 3(d) of RA No. 7941 provides that a “sectoral party refers to an organized group of citizens belonging to any of the sectors enumerated in Section 5 hereof whose principal advocacy pertains to the special interest and concerns of their sector.” RA No. 7941 provides different definitions for a political and a sectoral party. Obviously, they are separate and distinct from each other.

RA No. 7941 does not require national and regional parties or organizations to represent the “marginalized and underrepresented” sectors. To require all national and regional parties under the party-list system to represent the “marginalized and underrepresented” is to deprive and exclude, by judicial fiat, ideology-based and cause-oriented parties from the party-list system. How will these ideology-based and cause-oriented parties, who cannot win in legislative district elections, participate in the electoral process if they are excluded from the party-list system? To exclude them from the party-list system is to prevent them from joining the parliamentary struggle, leaving as their only option the armed struggle. To exclude them from the party-list system is, apart from being obviously senseless, patently contrary to the clear intent and express wording of the 1987 Constitution and RA No. 7941.

Under the party-list system, an ideology-based or cause-oriented political party is clearly different from a sectoral party. A political party need not be organized as a sectoral party and need not represent any particular sector. There is no requirement in RA No. 7941 that a national or regional political party must represent a “marginalized and underrepresented” sector. It is sufficient that the political party consists of citizens who advocate the same ideology or platform, or the same governance principles and policies, regardless of their economic status as citizens.

Section 5 of RA No. 7941 states that “the sectors shall include labor, peasant, fisherfolk, urban poor, indigenous cultural communities, elderly, handicapped, women, youth, veterans, overseas workers, and professionals.” The sectors mentioned in Section 5 are not all necessarily “marginalized and underrepresented.” For sure, “professionals” are not by definition “marginalized and underrepresented,” not even the elderly, women, and the youth. However, professionals, the elderly, women, and the youth may “lack well-defined political constituencies,” and can thus organize themselves into sectoral parties in advocacy of the special interests and concerns of their respective sectors.

Section 6 of RA No. 7941 provides another compelling reason for holding that the law does not require national or regional parties, as well as certain sectoral parties in Section 5 of RA No. 7941, to represent the “marginalized and underrepresented.” Section 6 provides the grounds for the COMELEC to refuse or cancel the registration of parties or organizations after due notice and hearing.

Sec. 6. Refusal and/or Cancellation of Registration. - The COMELEC may, *motu proprio* or upon verified complaint of any interested party, refuse or cancel, after due notice and hearing, the registration of any national, regional or sectoral party, organization or coalition on any of the following grounds:

- (1) It is a religious sect or denomination, organization or association organized for religious purposes;
- (2) It advocates violence or unlawful means to seek its goal;
- (3) It is a foreign party or organization;
- (4) It is receiving support from any foreign government, foreign political party, foundation, organization, whether directly or through any of its officers or members or indirectly through third parties for partisan election purposes;
- (5) It violates or fails to comply with laws, rules or regulations relating to elections;
- (6) It declares untruthful statements in its petition;
- (7) It has ceased to exist for at least one (1) year; or
- (8) It fails to participate in the last two (2) preceding elections or fails to obtain at least two per centum (2%) of the votes cast under the party-list system in the two (2) preceding elections for the constituency in which it has registered.

None of the 8 grounds to refuse or cancel registration refers to non-representation of the “marginalized and underrepresented.”

The phrase “marginalized and underrepresented” appears only once in RA No. 7941, in Section 2 on Declaration of Policy. Section 2 seeks “to promote proportional representation in the election of representatives to the House of Representatives through the party-list system,” which will enable Filipinos belonging to the “marginalized and underrepresented sectors, organizations and parties, and who lack well-defined political constituencies,” to become members of the House of Representatives. While the policy declaration in Section 2 of RA No. 7941 broadly refers to “marginalized and underrepresented sectors, organizations and parties,” the specific implementing provisions of RA No. 7941 do not define or require that the sectors, organizations or parties must be “marginalized and underrepresented.” On the contrary, to even interpret that all the sectors mentioned in Section 5 are “marginalized and underrepresented” would lead to absurdities.

How then should we harmonize the broad policy declaration in Section 2 of RA No. 7941 with its specific implementing provisions, bearing in mind the applicable provisions of the 1987 Constitution on the matter?

The phrase “marginalized and underrepresented” should refer only to the sectors in Section 5 that are, by their nature, economically “marginalized and underrepresented.” These sectors are: labor, peasant, fisherfolk, urban poor, indigenous cultural communities, handicapped, veterans, overseas workers, and other similar sectors. For these sectors, a majority of the members of the sectoral party must belong to the “marginalized and underrepresented.” The nominees of the sectoral party either must belong to the sector, or must have a track record of advocacy for the sector represented. Belonging to the “marginalized and underrepresented” sector does not mean one must “wallow in poverty, destitution or infirmity.” It is sufficient that one, or his or her sector, is below the middle class. More specifically, the economically “marginalized and underrepresented” are those who fall in the low income group as classified by the National Statistical Coordination Board.

The recognition that national and regional parties, as well as sectoral parties of professionals, the elderly, women and the youth, need not be “marginalized and underrepresented” will allow small ideology-based and cause-oriented parties who lack “well-defined political constituencies” a chance to win seats in the House of Representatives. On the other hand, limiting to the

“marginalized and underrepresented” the sectoral parties for labor, peasant, fisherfolk, urban poor, indigenous cultural communities, handicapped, veterans, overseas workers, and other sectors that by their nature are economically at the margins of society, will give the “marginalized and underrepresented” an opportunity to likewise win seats in the House of Representatives.

This interpretation will harmonize the 1987 Constitution and RA No. 7941 and will give rise to a multi-party system where those “marginalized and underrepresented,” both in economic and ideological status, will have the opportunity to send their own members to the House of Representatives. This interpretation will also make the party-list system honest and transparent, eliminating the need for relatively well-off party-list representatives to masquerade as “wallowing in poverty, destitution and infirmity,” even as they attend sessions in Congress riding in SUVs.

The major political parties are those that field candidates in the legislative district elections. Major political parties cannot participate in the party-list elections since they neither lack “well-defined political constituencies” nor represent “marginalized and underrepresented” sectors. Thus, the national or regional parties under the party-list system are necessarily those that do not belong to major political parties. This automatically reserves the national and regional parties under the party-list system to those who “lack well-defined political constituencies,” giving them the opportunity to have members in the House of Representatives.

To recall, *Ang Bagong Bayani* expressly declared, in its second guideline for the accreditation of parties under the party-list system, that “while even major political parties are expressly allowed by RA 7941 and the Constitution to participate in the party-list system, they must comply with the declared statutory policy of enabling ‘Filipino citizens belonging to marginalized and underrepresented sectors ... to be elected to the House of Representatives.’” However, the requirement in *Ang Bagong Bayani*, in its second guideline, that “the political party ... must represent the marginalized and underrepresented,” automatically disqualified major political parties from participating in the party-list system. This inherent inconsistency in *Ang Bagong Bayani* has been compounded by the COMELEC’s refusal to register sectoral wings officially organized by major political

parties. **BANAT** merely formalized the prevailing practice when it expressly prohibited major political parties from participating in the party-list system, even through their sectoral wings.

Section 11 of RA No. 7941 expressly prohibited the “first five (5) major political parties on the basis of party representation in the House of Representatives at the start of the Tenth Congress” from participating in the May 1988 party-list elections. Thus, major political parties can participate in subsequent party-list elections since the prohibition is expressly limited only to the 1988 party-list elections. However, major political parties should participate in party-list elections only through their sectoral wings. The participation of major political parties through their sectoral wings, a majority of whose members are “marginalized and underrepresented” or lacking in “well-defined political constituencies,” will facilitate the entry of the “marginalized and underrepresented” and those who “lack well-defined political constituencies” as members of the House of Representatives.

The 1987 Constitution and RA No. 7941 allow major political parties to participate in party-list elections so as to encourage them to work assiduously in extending their constituencies to the “marginalized and underrepresented” and to those who “lack well-defined political constituencies.” The participation of major political parties in party-list elections must be geared towards the entry, as members of the House of Representatives, of the “marginalized and underrepresented” and those who “lack well-defined political constituencies,” giving them a voice in law-making. Thus, to participate in party-list elections, a major political party that fields candidates in the legislative district elections must organize a sectoral wing, like a labor, peasant, fisherfolk, urban poor, professional, women or youth wing, that can register under the party-list system.

Such sectoral wing of a major political party must have its own constitution, by-laws, platform or program of government, officers and members, a majority of whom must belong to the sector represented. The sectoral wing is in itself an independent sectoral party, and is linked to a major political party through a coalition. This linkage is allowed by Section 3 of RA No. 7941, which provides that “component parties or organizations of a coalition may participate independently (in party-list elections) provided the coalition of which they form part does not participate in the party-list system.”

Section 9 of RA No. 7941 prescribes the qualifications of party-list nominees. This provision prescribes a special qualification only for the nominee from the youth sector.

Sec. 9. Qualifications of Party-List Nominees. No person shall be nominated as party-list representative unless he is a natural-born citizen of the Philippines, a registered voter, a resident of the Philippines for a period of not less than one (1) year immediately preceding the day of the election, able to read and write, a bona fide member of the party or organization which he seeks to represent for at least ninety (90) days preceding the day of the election, and is at least twenty-five (25) years of age on the day of the election.

In case of a nominee of the youth sector, he must at least be twenty-five (25) but not more than thirty (30) years of age on the day of the election. Any youth sectoral representative who attains the age of thirty (30) during his term shall be allowed to continue in office until the expiration of his term.

A party-list nominee must be a bona fide member of the party or organization which he or she seeks to represent. In the case of sectoral parties, to be a bona fide party-list nominee one must either belong to the sector represented, or have a track record of advocacy for such sector.

In disqualifying petitioners, the COMELEC used the criteria prescribed in *Ang Bagong Bayani* and **BANAT**. *Ang Bagong Bayani* laid down the guidelines for qualifying those who desire to participate in the party-list system:

First, the political party, sector, organization or coalition must represent the marginalized and underrepresented groups identified in Section 5 of RA 7941. ...

Second, while even major political parties are expressly allowed by RA 7941 and the Constitution to participate in the party-list system, they must comply with the declared statutory policy of enabling “Filipino citizens belonging to marginalized and underrepresented sectors ... to be elected to the House of Representatives.” ...

Third, ... the religious sector may not be represented in the party-list system. ...

Fourth, a party or an organization must not be disqualified under Section 6 of RA 7941, which enumerates the grounds for disqualification as follows:

(1) It is a religious sect or denomination, organization or

- association, organized for religious purposes;
- (2) It advocates violence or unlawful means to seek its goal;
- (3) It is a foreign party or organization;
- (4) It is receiving support from any foreign government, foreign political party, foundation, organization, whether directly or through any of its officers or members or indirectly through third parties for partisan election purposes;
- (5) It violates or fails to comply with laws, rules or regulations relating to elections;
- (6) It declares untruthful statements in its petition;
- (7) It has ceased to exist for at least one (1) year; or
- (8) It fails to participate in the last two (2) preceding elections or fails to obtain at least two per centum (2%) of the votes cast under the party-list system in the two (2) preceding elections for the constituency in which it has registered.

Fifth, the party or organization must not be an adjunct of, or a project organized or an entity funded or assisted by, the government. ...

Sixth, the party must not only comply with the requirements of the law; its nominees must likewise do so. Section 9 of RA 7941 reads as follows:

Sec. 9. Qualifications of Party-List Nominees. - No person shall be nominated as party-list representative unless he is a natural-born citizen of the Philippines, a registered voter, a resident of the Philippines for a period of not less than one (1) year immediately preceding the day of the election, able to read and write, a bona fide member of the party or organization which he seeks to represent for at least ninety (90) days preceding the day of the election, and is at least twenty-five (25) years of age on the day of the election.

In case of a nominee of the youth sector, he must at least be twenty-five (25) but not more than thirty (30) years of age on the day of the election. Any youth sectoral representative who attains the age of thirty (30) during his term shall be allowed to continue in office until the expiration of his term.

Seventh, not only the candidate party or organization must represent marginalized and underrepresented sectors; so also must its nominees. ...

Eighth, ... the nominee must likewise be able to contribute to the formulation and enactment of appropriate legislation that will benefit the nation as a whole.

In 2009, by a vote of 8-7 in **BANAT**, this Court stretched the *Ang Bagong Bayani* ruling further. In **BANAT**, the majority officially

excluded major political parties from participating in party-list elections,⁶⁷ abandoning even the lip-service that *Ang Bagong Bayani* accorded to the 1987 Constitution and RA No. 7941 that major political parties can participate in party-list elections.

The minority in **BANAT**, however, believed that major political parties can participate in the party-list system through their sectoral wings. The minority expressed that “[e]xcluding the major political parties in party-list elections is manifestly against the Constitution, the intent of the Constitutional Commission, and RA No. 7941. This Court cannot engage in socio-political engineering and judicially legislate the exclusion of major political parties from the party-list elections in patent violation of the Constitution and the law.”⁶⁸ **The experimentations in socio-political engineering have only resulted in confusion and absurdity in the party-list system. Such experimentations, in clear contravention of the 1987 Constitution and RA No. 7941, must now come to an end.**

We cannot, however, fault the COMELEC for following prevailing jurisprudence in disqualifying petitioners. In following prevailing jurisprudence, the COMELEC could not have committed grave abuse of discretion. However, for the coming 13 May 2013 party-list elections, we must now impose and mandate the party-list system actually envisioned and authorized under the 1987 Constitution and RA No. 7941. In **BANAT**, this Court devised a new formula in the allocation of party-list seats, reversing the COMELEC’s allocation which followed the then prevailing formula in *Ang Bagong Bayani*. In **BANAT**, however, the Court did not declare that the COMELEC committed grave abuse of discretion. Similarly, even as we acknowledge here that the COMELEC did not commit grave abuse of discretion, we declare that it would not be in accord with the 1987 Constitution and RA No. 7941 to apply the criteria in *Ang Bagong Bayani* and **BANAT** in determining who are qualified to participate in the coming 13 May 2013 party-list elections. For this purpose, we suspend our rule⁶⁹ that a party may appeal to this Court from decisions or orders of the COMELEC only if the COMELEC committed grave abuse of discretion.

⁶⁷ G.R. Nos. 179271 and 179295, April 21, 2009, 586 SCRA 210, 258 citing Const., Art. XIII, Sec. 1, penned by Justice Carpio and excerpted above. As previously pointed out, although Justice Carpio was the *ponente* of the **BANAT** decision, he was part of the minority on this issue.

⁶⁸ *Id.* at 251, excerpted above.

⁶⁹ Rule 64 in relation to Rule 65, 1997 Rules of Civil Procedure.

Consequently, in **Atong Paglaum**, Justice Carpio for the Court *en banc*, granted the 54 petitions and remanded all of them to the COMELEC:

... In determining who may participate in the coming 13 May 2013 and subsequent party-list elections, the COMELEC shall adhere to the following parameters:

1. **Three different groups may participate in the party-list system: (1) national parties or organizations, (2) regional parties or organizations, and (3) sectoral parties or organizations.**
2. **National parties or organizations and regional parties or organizations do not need to organize along sectoral lines and do not need to represent any “marginalized and underrepresented” sector.**
3. **Political parties can participate in party-list elections provided they register under the party-list system and do not field candidates in legislative district elections. A political party, whether major or not, that fields candidates in legislative district elections can participate in party-list elections only through its sectoral wing that can separately register under the party-list system. The sectoral wing is by itself an independent sectoral party, and is linked to a political party through a coalition.**
4. **Sectoral parties or organizations may either be “marginalized and underrepresented” or lacking in “well-defined political constituencies.” It is enough that their principal advocacy pertains to the special interest and concerns of their sector. The sectors that are “marginalized and underrepresented” include labor, peasant, fisherfolk, urban poor, indigenous cultural communities, handicapped, veterans, and overseas workers. The sectors that lack “well-defined political constituencies” include professionals, the elderly, women, and the youth.**
5. **A majority of the members of sectoral parties or organizations that represent the “marginalized and underrepresented” must belong to the “marginalized and underrepresented” sector they represent. Similarly, a majority of the members of sectoral**

parties or organizations that lack “well-defined political constituencies” must belong to the sector they represent. The nominees of sectoral parties or organizations that represent the “marginalized and underrepresented,” or that represent those who lack “well-defined political constituencies,” either must belong to their respective sectors, or must have a track record of advocacy for their respective sectors. The nominees of national and regional parties or organizations must be bona-fide members of such parties or organizations.

6. National, regional, and sectoral parties or organizations shall not be disqualified if some of their nominees are disqualified, provided that they have at least one nominee who remains qualified.

The COMELEC excluded from participating in the 13 May 2013 party-list elections those that did not satisfy these two criteria: (1) all national, regional, and sectoral groups or organizations must represent the “marginalized and underrepresented” sectors, and (2) all nominees must belong to the “marginalized and underrepresented” sector they represent. Petitioners may have been disqualified by the COMELEC because as political or regional parties they are not organized along sectoral lines and do not represent the “marginalized and underrepresented.” Also, petitioners’ nominees who do not belong to the sectors they represent may have been disqualified, although they may have a track record of advocacy for their sectors. Likewise, nominees of non-sectoral parties may have been disqualified because they do not belong to any sector. Moreover, a party may have been disqualified because one or more of its nominees failed to qualify, even if the party has at least one remaining qualified nominee. As discussed above, the disqualification of petitioners, and their nominees, under such circumstances is contrary to the 1987 Constitution and RA No. 7941.

This Court is sworn to uphold the 1987 Constitution, apply its provisions faithfully, and desist from engaging in socio-economic or political experimentations contrary to what the Constitution has ordained. Judicial power does not include the power to re-write the Constitution. Thus, the present petitions should be remanded to the COMELEC not because the COMELEC committed grave abuse of discretion in disqualifying petitioners, but because petitioners may now

possibly qualify to participate in the coming 13 May 2013 party-list elections under the new parameters prescribed by this Court.

Legislative Districts

In the *en banc* decision in **ALDABA v. COMMISSION ON ELECTIONS**, G.R. No. 188078, January 25, 2010, 624 Phil. 805, an original action for prohibition, Justice Carpio applied **Section 5(3) of this Article VI** to declare unconstitutional Republic Act No. 9591, creating a legislative district for the city of Malolos, Bulacan, for violating the **minimum population requirement for the creation of a legislative district in a city**:

Before 1 May 2009, the province of Bulacan was represented in Congress through four legislative districts. The First Legislative District comprised of the city of Malolos and the municipalities of Hagonoy, Calumpit, Pulilan, Bulacan, and Paombong. On 1 May 2009, RA 9591 lapsed into law, amending Malolos' City Charter, by creating a separate legislative district for the city. At the time the legislative bills for RA 9591 were filed in Congress in 2007, namely, House Bill No. 3162 (later converted to House Bill No. 3693) and Senate Bill No. 1986, the population of Malolos City was 223,069. The population of Malolos City on 1 May 2009 is a contested fact but there is no dispute that House Bill No. 3693 relied on an undated certification issued by a Regional Director of the National Statistics Office (NSO) that "the projected population of the Municipality of Malolos will be 254,030 by the year 2010 using the population growth rate of 3.78 between 1995 to 2000."

Petitioners, taxpayers, registered voters and residents of Malolos City, filed this petition contending that RA 9591 is unconstitutional for failing to meet the minimum population threshold of 250,000 for a city to merit representation in Congress as provided under Section 5(3), Article VI of the 1987 Constitution and Section 3 of the Ordinance appended to the 1987 Constitution.

In its Comment to the petition, the Office of the Solicitor General (OSG) contended that Congress' use of projected population is non-justiciable as it involves a determination on the "wisdom of the standard adopted by the legislature to determine compliance with [a constitutional requirement]."

... The only issue here is whether the City of Malolos has a population of at least 250,000, whether actual or projected, for the

purpose of creating a legislative district for the City of Malolos in time for the 10 May 2010 elections. If not, then RA 9591 creating a legislative district in the City of Malolos is unconstitutional.

House Bill No. 3693 cites the undated Certification of Regional Director Alberto N. Miranda of Region III of the National Statistics Office (NSO) as authority that the population of the City of Malolos “will be 254,030 by the year 2010.” The Certification states that the population of “Malolos, Bulacan as of May 1, 2000 is 175,291.” The Certification further states that it was “issued upon the request of Mayor Danilo A. Domingo of the City of Malolos in connection with the proposed creation of Malolos City as a lone congressional district of the Province of Bulacan.”

The Certification of Regional Director Miranda, which is based on demographic projections, is without legal effect because Regional Director Miranda has no basis and no authority to issue the Certification. The Certification is also void on its face because based on its own growth rate assumption, the population of Malolos will be less than 250,000 in the year 2010. In addition, intercensal demographic projections cannot be made for the entire year. In any event, a city whose population has increased to 250,000 is entitled to have a legislative district only in the “immediately following election”⁷⁰ after the attainment of the 250,000 population.

First, certifications on demographic projections can be issued only if such projections are declared official by the National Statistics Coordination Board (NSCB). Second, certifications based on demographic projections can be issued only by the NSO Administrator or his designated certifying officer. Third, intercensal population projections must be as of the middle of every year.

Section 6 of Executive Order No. 135⁷¹ dated 6 November 1993 issued by President Fidel V. Ramos provides:

Sec. 6. Guidelines on the Issuance of Certification of Population sizes Pursuant to Section 7, 386, 442, 450, 452, and 461 of the New Local Government Code.

(a) The National Statistics Office shall issue certification on

⁷⁰ Sec. 3, Ordinance Appended To The 1987 Constitution

⁷¹ Providing For The Establishment Of A Well-Coordinated Local Level Statistical

data that it has collected and processed as well as on statistics that it has estimated.

(b) For census years, certification on population size will be based on actual population census counts; while for the intercensal years, the certification will be made on the basis of a set of demographic projections or estimates declared official by the National Statistical Coordination Board (NSCB).

(c) Certification of population census counts will be made as of the census reference date, such as May 1, 1990, while those of intercensal population estimates will be as of middle of every year.

(d) Certification of population size based on projections may specify the range within which the true count is deemed likely to fall. The range will correspond to the official low and high population projections.

(e) The smallest geographic area for which a certification on population size may be issued will be the barangay for census population counts, and the city or municipality for intercensal estimates. If an LGU wants to conduct its own population census, during off- census years, approval must be sought from the NSCB and the conduct must be under the technical supervision of NSO from planning to data processing.

(f) Certifications of population size based on published census results shall be issued by the Provincial Census Officers or by the Regional Census Officers. Certifications based on projections or estimates, however, will be issued by the NSO Administrator or his designated certifying officer.

The Certification of Regional Director Miranda does not state that the demographic projections he certified have been declared official by the NSCB. The records of this case do not also show that the Certification of Regional Director Miranda is based on demographic projections declared official by the NSCB. The Certification, which states that the population of Malolos “will be 254,030 by the year 2010,” violates the requirement that intercensal demographic projections shall be “as of the middle of every year.” In addition, there is no showing that Regional Director Miranda has been designated by the NSO Administrator as a certifying officer for demographic projections in Region III. In the absence of such official designation, only the certification of the NSO Administrator can be given credence by this Court.

Moreover, the Certification states that “the total population of

Malolos, Bulacan as of May 1, 2000 is 175,291.” The Certification also states that the population growth rate of Malolos is 3.78% per year between 1995 and 2000. Based on a growth rate of 3.78% per year, the population of Malolos of 175,291 in 2000 will grow to only 241,550 in 2010.

Also, the 2007 Census places the population of Malolos at 223,069 as of 1 August 2007. Based on a growth rate of 3.78%, the population of Malolos will grow to only 248,365 as of 1 August 2010. Even if the growth rate is compounded yearly, the population of Malolos of 223,069 as of 1 August 2007 will grow to only 249,333 as of 1 August 2010.

All these conflict with what the Certification states that the population of Malolos “will be 254,030 by the year 2010.” Based on the Certification’s own growth rate assumption, the population of Malolos will be less than 250,000 before the 10 May 2010 elections. Incidentally, the NSO has no published population projections for individual municipalities or cities but only for entire regions and provinces.

Executive Order No. 135 cannot simply be brushed aside. The OSG, representing respondent Commission on Elections, invoked Executive Order No. 135 in its Comment, thus:

Here, based on the NSO projection, “the population of the Municipality of Malolos will be 254,030 by the year 2010 using the population growth rate of 3.78 between 1995-2000.” This projection issued by the authority of the NSO Administrator is recognized under Executive Order No. 135 (The Guidelines on the Issuance of Certification of Population Sizes), which states:

...

(d) Certification of population size based on projections may specify the range within which the true count is deemed likely to fall. The range will correspond to the official low and high population projections.

...

(f) Certifications of population size based on published census results shall be issued by the Provincial Census Officers or by the Regional Census Officers. Certifications based on projections or estimates, however, will be issued by the NSO Administrator or his designated certifying officer.

Any population projection forming the basis for the creation of a legislative district must be based on an official and credible

source. That is why the OSG cited Executive Order No. 135, otherwise the population projection would be unreliable or speculative.

Section 3 of the Ordinance appended to the 1987 Constitution provides:

Any province that may be created, or any city whose population may hereafter increase to more than two hundred fifty thousand shall be entitled in the immediately following election to at least one Member or such number of members as it may be entitled to on the basis of the number of its inhabitants and according to the standards set forth in paragraph (3), Section 5 of Article VI of the Constitution. ...

A city that has attained a population of 250,000 is entitled to a legislative district only in the “immediately following election.” In short, a city must first attain the 250,000 population, and thereafter, in the immediately following election, such city shall have a district representative. There is no showing in the present case that the City of Malolos has attained or will attain a population of 250,000, whether actual or projected, before the 10 May 2010 elections.

Clearly, there is no official record that the population of the City of Malolos will be at least 250,000, actual or projected, prior to the 10 May 2010 elections, the immediately following election after the supposed attainment of such population. **Thus, the City of Malolos is not qualified to have a legislative district of its own under Section 5(3), Article VI of the 1987 Constitution and Section 3 of the Ordinance appended to the 1987 Constitution.**

On the OSG’s contention that Congress’ choice of means to comply with the population requirement in the creation of a legislative district is non-justiciable, suffice it to say that questions calling for judicial determination of compliance with constitutional standards by other branches of the government are fundamentally justiciable. The resolution of such questions falls within the checking function of this Court under the 1987 Constitution to determine whether there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.⁷²

⁷² Const., Art. VIII, Sec. 1.

Even under the 1935 Constitution, this Court had already ruled, “The overwhelming weight of authority is that district apportionment laws are subject to review by the courts.”⁷³ Compliance with constitutional standards on the creation of legislative districts is important because the “aim of legislative apportionment is ‘to equalize population and voting power among districts.’”⁷⁴

Section 6. No person shall be a Member of the House of Representatives unless he is a natural-born citizen of the Philippines and, on the day of the election, is at least twenty-five years of age, able to read and write, and, except the party-list representatives, a registered voter in the district in which he shall be elected, and a resident thereof for a period of not less than one year immediately preceding the day of the election.

Section 7. The Members of the House of Representatives shall be elected for a term of three years which shall begin, unless otherwise provided by law, at noon on the thirtieth day of June next following their election. No Member of the House of Representatives shall serve for more than three consecutive terms. Voluntary renunciation of the office for any length of time shall not be considered as an interruption in the continuity of his service for the full term for which he was elected.

Section 8. Unless otherwise provided by law, the regular election of the Senators and the Members of the House of Representatives shall be held on the second Monday of May.

Section 9. In case of vacancy in the Senate or in the House of Representatives, a special election may be called to fill such vacancy in the manner prescribed by law, but the Senator or Member of the House of Representatives thus elected shall serve only for the unexpired term.

TOLENTINO v. COMMISSION ON ELECTIONS, G.R. No. 148334, January 21, 2004, 465 Phil. 385, was a petition for prohibition to set aside resolutions of the COMELEC that proclaimed the 13 candidates elected as Senators in the May 2001 elections, and declared “official

⁷³ *Macias v. COMELEC*, G.R. No. L-18684, 14 September 1961, 3 SCRA 1.

⁷⁴ *Bagabuyo v. COMELEC*, G.R. No. 176970, 8 December 2008, 573 SCRA 290.

and final” the ranking of the 13 Senators, including the Senator who was to fill **the vacancy in the Senate**. The vacancy arose because of the nomination by then President Gloria Macapagal-Arroyo of then Senator Teofisto T. Guingona, Jr. as Vice-President, and his eventual confirmation by Congress. In the *en banc* decision penned by Justice Carpio, the facts and the arguments of the parties were presented as follows:

Following Senator Guingona’s confirmation, the Senate on 8 February 2001 passed Resolution No. 84 (Resolution No. 84) certifying to the existence of a vacancy in the Senate. Resolution No. 84 called on COMELEC to fill the vacancy through a special election to be held simultaneously with the regular elections on 14 May 2001. Twelve Senators, with a 6-year term each, were due to be elected in that election. Resolution No. 84 further provided that the “Senatorial candidate garnering the 13th highest number of votes shall serve only for the unexpired term of former Senator Teofisto T. Guingona, Jr.,” which ends on 30 June 2004.

On 5 June 2001, after COMELEC had canvassed the election results from all the provinces but one (Lanao del Norte), COMELEC issued Resolution No. 01-005 provisionally proclaiming 13 candidates as the elected Senators. Resolution No. 01-005 also provided that “the first twelve (12) Senators shall serve for a term of six (6) years and the thirteenth (13th) Senator shall serve the unexpired term of three (3) years of Senator Teofisto T. Guingona, Jr. who was appointed Vice-President.” Respondents Ralph Recto (Recto) and Gregorio Honasan (Honasan) ranked 12th and 13th, respectively, in Resolution No. 01-005.

On 20 June 2001, petitioners Arturo Tolentino and Arturo Mojica (petitioners), as voters and taxpayers, filed the instant petition for prohibition, impleading only COMELEC as respondent. Petitioners sought to enjoin COMELEC from proclaiming with finality the candidate for Senator receiving the 13th highest number of votes as the winner in the special election for a single three-year term seat. Accordingly, petitioners prayed for the nullification of Resolution No. 01-005 in so far as it makes a proclamation to such effect.

Petitioners contend that COMELEC issued Resolution No. 01-005 without jurisdiction because: (1) it failed to notify the electorate of the position to be filled in the special election as

required under Section 2 of Republic Act No. 6645 (RA No. 6645); (2) it failed to require senatorial candidates to indicate in their certificates of candidacy whether they seek election under the special or regular elections as allegedly required under Section 73 of Batas Pambansa Blg. 881; and, consequently, (3) it failed to specify in the Voters Information Sheet the candidates seeking election under the special or regular senatorial elections as purportedly required under Section 4, paragraph 4 of Republic Act No. 6646 (RA No. 6646). Petitioners add that because of these omissions, COMELEC canvassed all the votes cast for the senatorial candidates in the 14 May 2001 elections without distinction such that “there were no two separate Senate elections held simultaneously but just a single election for thirteen seats, irrespective of term.”

Stated otherwise, petitioners claim that if held simultaneously, a special and a regular election must be distinguished in the documentation as well as in the canvassing of their results. To support their claim, petitioners cite the special elections simultaneously held with the regular elections of 13 November 1951 and 8 November 1955 to fill the seats vacated by Senators Fernando Lopez and Carlos P. Garcia, respectively, who became Vice-Presidents during their tenures in the Senate. Petitioners point out that in those elections, COMELEC separately canvassed the votes cast for the senatorial candidates running under the regular elections from the votes cast for the candidates running under the special elections. COMELEC also separately proclaimed the winners in each of those elections.

Petitioners sought the issuance of a temporary restraining order during the pendency of their petition.

Without issuing any restraining order, we required COMELEC to Comment on the petition.

On 20 July 2001, after COMELEC had canvassed the results from all the provinces, it issued Resolution No. 01-006 declaring “official and final” the ranking of the 13 Senators proclaimed in Resolution No. 01-005. The 13 Senators took their oaths of office on 23 July 2001.

In view of the issuance of Resolution No. 01-006, the Court required petitioners to file an amended petition impleading Recto and Honasan as additional respondents. Petitioners accordingly filed an amended petition in which they reiterated

the contentions raised in their original petition and, in addition, sought the nullification of Resolution No. 01-006.

In their Comments, COMELEC, Honasan, and Recto all claim that a special election to fill the seat vacated by Senator Guingona was validly held on 14 May 2001. COMELEC and Honasan further raise preliminary issues on the mootness of the petition and on petitioners' standing to litigate. Honasan also claims that the petition, which seeks the nullity of his proclamation as Senator, is actually a *quo warranto* petition and the Court should dismiss the same for lack of jurisdiction. For his part, Recto, as the 12th ranking Senator, contends he is not a proper party to this case because the petition only involves the validity of the proclamation of the 13th placer in the 14 May 2001 senatorial elections.

Although the Court decided that the petition in **Tolentino** had no merit, Justice Carpio issued:

A Word to COMELEC

The calling of a **special election**, if necessary, and **the giving of notice to the electorate of necessary information regarding a special election, are central to an informed exercise of the right of suffrage**. While the circumstances attendant to the present case have led us to conclude that COMELEC's failure to so call and give notice did not invalidate the special senatorial election held on 14 May 2001, COMELEC should not take chances in future elections. We remind COMELEC to comply strictly with all the requirements under applicable laws relative to the conduct of regular elections in general and special elections in particular.

Justice Carpio identified the issues in **Tolentino** and then proceeded to discuss each:

(1) Procedurally –

- (a) whether the petition is in fact a petition for *quo warranto* over which the Senate Electoral Tribunal is the sole judge;
- (b) whether the petition is moot; and
- (c) whether petitioners have standing to litigate.

(2) On the merits, whether a special election to fill a vacant three-year term Senate seat was validly held on 14 May 2001...

On the Preliminary Matters

The Nature of the Petition and the Court's Jurisdiction

A *quo warranto* proceeding is, among others, one to determine the right of a public officer in the exercise of his office and to oust him from its enjoyment if his claim is not well-founded.⁷⁵ Under Section 17, Article VI of the Constitution, the Senate Electoral Tribunal is the sole judge of all contests relating to the qualifications of the members of the Senate.

A perusal of the allegations contained in the instant petition shows, however, that what petitioners are questioning is the validity of the special election on 14 May 2001 in which Honasan was elected. Petitioners' various prayers are, namely: (1) a "declaration" that no special election was held simultaneously with the general elections on 14 May 2001; (2) to enjoin COMELEC from declaring anyone as having won in the special election; and (3) to annul Resolution Nos. 01-005 and 01-006 in so far as these Resolutions proclaim Honasan as the winner in the special election. Petitioners anchor their prayers on COMELEC's alleged failure to comply with certain requirements pertaining to the conduct of that special election. Clearly then, the petition does not seek to determine Honasan's right in the exercise of his office as Senator. Petitioners' prayer for the annulment of Honasan's proclamation and, ultimately, election is merely incidental to petitioners' cause of action. Consequently, the Court can properly exercise jurisdiction over the instant petition.

On the Mootness of the Petition

COMELEC contends that its proclamation on 5 June 2001 of the 13 Senators and its subsequent confirmation on 20 July 2001 of the ranking of the 13 Senators render the instant petition to set aside Resolutions Nos. 01-005 and 01-006 moot and academic.

Admittedly, the office of the writ of prohibition is to command a tribunal or board to desist from committing an act threatened to be done without jurisdiction or with grave abuse of discretion amounting to lack or excess of jurisdiction. Consequently, the writ will not lie to enjoin acts already done.⁷⁶ However, as an

⁷⁵ Castro v. Del Rosario, 125 Phil. 611 (1967).

⁷⁶ Gil v. Benipayo, G.R. No. 148179, 26 June 2001 (minute resolution).

exception to the rule on mootness, courts will decide a question otherwise moot if it is capable of repetition yet evading review.⁷⁷ Thus, in *Alunan III v. Mirasol*,⁷⁸ we took cognizance of a petition to set aside an order canceling the general elections for the Sangguniang Kabataan (SK) on 4 December 1992 despite that at the time the petition was filed, the SK election had already taken place. We noted in *Alunan* that since the question of the validity of the order sought to be annulled “is likely to arise in every SK elections and yet the question may not be decided before the date of such elections,” the mootness of the petition is no bar to its resolution. This observation squarely applies to the instant case. The question of the validity of a special election to fill a vacancy in the Senate in relation to COMELEC’s failure to comply with requirements on the conduct of such special election is likely to arise in every such election. Such question, however, may not be decided before the date of the election.

On Petitioners’ Standing

Honasan questions petitioners’ standing to bring the instant petition as taxpayers and voters because petitioners do not claim that COMELEC illegally disbursed public funds. Neither do petitioners claim that they sustained personal injury because of the issuance of Resolution Nos. 01-005 and 01-006.

“Legal standing” or *locus standi* refers to a personal and substantial interest in a case such that the party has sustained or will sustain direct injury because of the challenged governmental act.⁷⁹ The requirement of standing, which necessarily “sharpens the presentation of issues,”⁸⁰ relates to the constitutional mandate that this Court settle only actual cases or controversies.⁸¹ Thus, generally, a party will be allowed to litigate only when (1) he can show that he has personally suffered some actual or threatened injury because of the allegedly illegal conduct of the government; (2) the injury is fairly traceable to the challenged action; and (3) the injury is likely to be redressed by a favorable action.⁸²

⁷⁷ *Acop v. Guingona*, G.R. No. 134856, 2 July 2002, 383 SCRA 577; *Viola v. Hon. Alunan III*, 343 Phil. 184 (1997); *Alunan III v. Mirasol*, 342 Phil. 467 (1997).

⁷⁸ 342 Phil. 467 (1997).

⁷⁹ *Joya v. Presidential Commission on Good Government*, G.R. No. 96541, 24 August 1993, 225 SCRA 568.

⁸⁰ *Kilosbayan, Incorporated v. Morato*, 316 Phil. 652 (1995).

⁸¹ Const., Art. VIII, Secs. 1 and 5(2).

⁸² *Telecommunications and Broadcast Attorneys of the Philippines, Inc. v. COMELEC*, 352 Phil. 153 (1998).

Applied strictly, the doctrine of standing to litigate will indeed bar the instant petition. In questioning, in their capacity as voters, the validity of the special election on 14 May 2001, petitioners assert a harm classified as a “generalized grievance.” This generalized grievance is shared in substantially equal measure by a large class of voters, if not all the voters, who voted in that election.⁸³ Neither have petitioners alleged, in their capacity as taxpayers, that the Court should give due course to the petition because in the special election held on 14 May 2001 “tax money [was] ‘... extracted and spent in violation of specific constitutional protections against abuses of legislative power’ or that there [was] misapplication of such funds by COMELEC or that public money [was] deflected to any improper purpose.”⁸⁴

On the other hand, we have relaxed the requirement on standing and exercised our discretion to give due course to voters’ suits involving the right of suffrage.⁸⁵ Also, in the recent case of *Integrated Bar of the Philippines v. Zamora*,⁸⁶ we gave the same liberal treatment to a petition filed by the Integrated Bar of the Philippines (IBP). The IBP questioned the validity of a Presidential directive deploying elements of the Philippine National Police and the Philippine Marines in Metro Manila to conduct patrols even though the IBP presented “too general an interest.” We held:

[T]he IBP primarily anchors its standing on its alleged responsibility to uphold the rule of law and the Constitution. Apart from this declaration, however, the IBP asserts no other basis in support of its *locus standi*. The mere invocation by the IBP of its duty to preserve the rule of law and nothing more, while undoubtedly true, is not sufficient to clothe it with standing in this case. This is too general an interest which is shared by other groups and the whole citizenry...

Having stated the foregoing, this Court has the discretion to take cognizance of a suit which does not satisfy the requirement of legal standing when paramount interest is involved. In not a few cases, the court has adopted a liberal attitude on the *locus standi* of a petitioner where the petitioner is able to craft an issue of transcendental significance to the people. Thus,

⁸³ See *Warth v. Seldin*, 442 U.S. 490, 45 L.Ed.2d 343 (1975).

⁸⁴ *Dumlao v. COMELEC*, G.R. No. L-52245, 22 January 1980, 95 SCRA 392.

⁸⁵ *De Guia v. COMELEC*, G.R. No. 104712, 6 May 1992, 208 SCRA 420; *Gonzales v. COMELEC*, 129 Phil. 7 (1967). See also *Telecom & Broadcast Attys. of the Phils., Inc. v. COMELEC*, 352 Phil. 153 (1998).

⁸⁶ G.R. No. 141284, 15 August 2000, 338 SCRA 81.

when the issues raised are of paramount importance to the public, the Court may brush aside technicalities of procedure. In this case, a reading of the petition shows that the IBP has advanced constitutional issues which deserve the attention of this Court in view of their seriousness, novelty and weight as precedents. Moreover, because peace and order are under constant threat and lawless violence occurs in increasing tempo, undoubtedly aggravated by the Mindanao insurgency problem, the legal controversy raised in the petition almost certainly will not go away. It will stare us in the face again. It, therefore, behooves the Court to relax the rules on standing and to resolve the issue now, rather than later.⁸⁷

We accord the same treatment to petitioners in the instant case in their capacity as voters since they raise important issues involving their right of suffrage, considering that the issue raised in this petition is likely to arise again.

Whether a Special Election for a Single, Three-Year Term Senatorial Seat was Validly Held on 14 May 2001

Under Section 9, Article VI of the Constitution, a special election may be called to fill any vacancy in the Senate and the House of Representatives “in the manner prescribed by law” ...

To implement this provision of the Constitution, Congress passed RA No. 6645, which provides in pertinent parts:

Sec. 1. In case a vacancy arises in the Senate at least eighteen (18) months or in the House of Representatives at least one (1) year before the next regular election for Members of Congress, the Commission on Elections, upon receipt of a resolution of the Senate or the House of Representatives, as the case may be, certifying to the existence of such vacancy and calling for a special election, shall hold a special election to fill such vacancy. If Congress is in recess, an official communication on the existence of the vacancy and call for a special election by the President of the Senate or by the Speaker of the House of Representatives, as the case may be, shall be sufficient for such purpose.

⁸⁷ Integrated Bar of the Philippines v. Zamora, G.R. No. 141284, 15 August 2000, 338 SCRA 81.

The Senator or Member of the House of Representatives thus elected shall serve only for the unexpired term.

Sec. 2. The Commission on Elections shall fix the date of the special election, which shall not be earlier than forty-five (45) days nor later than ninety (90) days from the date of such resolution or communication, stating among other things the office or offices to be voted for: Provided, however, That if within the said period a general election is scheduled to be held, the special election shall be held simultaneously with such general election.

Section 4 of Republic Act No. 7166 subsequently amended Section 2 of RA No. 6645, as follows:

Postponement, Failure of Election and Special Elections.
- ... In case a permanent vacancy shall occur in the Senate or House of Representatives at least one (1) year before the expiration of the term, the Commission shall call and hold a special election to fill the vacancy not earlier than sixty (60) days nor longer than ninety (90) days after the occurrence of the vacancy. However, in case of such vacancy in the Senate, the special election shall be held simultaneously with the next succeeding regular election.

Thus, in case a vacancy arises in Congress at least one year before the expiration of the term, Section 2 of RA No. 6645, as amended, requires COMELEC: (1) to call a special election by fixing the date of the special election, which shall not be earlier than sixty (60) days nor later than ninety (90) after the occurrence of the vacancy but in case of a vacancy in the Senate, the special election shall be held simultaneously with the next succeeding regular election; and (2) to give notice to the voters of, among other things, the office or offices to be voted for.

Did COMELEC, in conducting the special senatorial election simultaneously with the 14 May 2001 regular elections, comply with the requirements in Section 2 of RA No. 6645?

A survey of COMELEC's resolutions relating to the conduct of the 14 May 2001 elections reveals that they contain nothing which would amount to a compliance, either strict or substantial, with the requirements in Section 2 of RA No. 6645, as amended. Thus, nowhere in its resolutions or even in its press releases did COMELEC state that it would hold a special election for a single three-year term Senate seat simultaneously with the regular

elections on 14 May 2001. Nor did COMELEC give formal notice that it would proclaim as winner the senatorial candidate receiving the 13th highest number of votes in the special election.

The controversy thus turns on whether COMELEC's failure, assuming it did fail, to comply with the requirements in Section 2 of RA No. 6645, as amended, invalidated the conduct of the special senatorial election on 14 May 2001 and accordingly rendered Honasan's proclamation as the winner in that special election void. More precisely, the question is whether the special election is invalid for lack of a "call" for such election and for lack of notice as to the office to be filled and the manner by which the winner in the special election is to be determined. For reasons stated below, the Court answers in the negative.

COMELEC's Failure to Give Notice of the Time of the Special Election Did Not Negate the Calling of such Election

The calling of an election, that is, the giving notice of the time and place of its occurrence, whether made by the legislature directly or by the body with the duty to give such call, is indispensable to the election's validity.⁸⁸ In a general election, where the law fixes the date of the election, the election is valid without any call by the body charged to administer the election.⁸⁹

In a special election to fill a vacancy, the rule is that a statute that expressly provides that an election to fill a vacancy shall be held at the next general elections fixes the date at which the special election is to be held and operates as the call for that election. Consequently, an election held at the time thus prescribed is not invalidated by the fact that the body charged by law with the duty of calling the election failed to do so.⁹⁰ This is because the right and duty to hold the election emanate from the statute and not from any call for the election by some authority⁹¹ and the law thus charges voters with knowledge of the time and place of the election.⁹²

Conversely, where the law does not fix the time and place for

⁸⁸ 26 Am. Jur. 2d Elections § 281 (1996); 29 C.J.S. Elections § 70 (1965).

⁸⁹ Ibid.

⁹⁰ 26 Am. Jur. 2d Elections § 282 (1996).

⁹¹ Ibid.

⁹² *McCoy v. Fisher*, 67 S.E. 2d 543 (1951).

holding a special election but empowers some authority to fix the time and place after the happening of a condition precedent, the statutory provision on the giving of notice is considered mandatory, and failure to do so will render the election a nullity.⁹³

In the instant case, Section 2 of RA No. 6645 itself provides that in case of vacancy in the Senate, the special election to fill such vacancy shall be held simultaneously with the next succeeding regular election. Accordingly, the special election to fill the vacancy in the Senate arising from Senator Guingona's appointment as Vice-President in February 2001 could not be held at any other time but must be held simultaneously with the next succeeding regular elections on 14 May 2001. The law charges the voters with knowledge of this statutory notice and COMELEC's failure to give the additional notice did not negate the calling of such special election, much less invalidate it.

Our conclusion might be different had the present case involved a special election to fill a vacancy in the House of Representatives. In such a case, the holding of the special election is subject to a condition precedent, that is, the vacancy should take place at least one year before the expiration of the term. The time of the election is left to the discretion of COMELEC subject only to the limitation that it holds the special election within the range of time provided in Section 2 of RA No. 6645, as amended. This makes mandatory the requirement in Section 2 of RA No. 6645, as amended, for COMELEC to "call ... a special election ... not earlier than 60 days nor longer than 90 days after the occurrence of the vacancy" and give notice of the office to be filled. The COMELEC's failure to so call and give notice will nullify any attempt to hold a special election to fill the vacancy. Indeed, it will be well-nigh impossible for the voters in the congressional district involved to know the time and place of the special election and the office to be filled unless the COMELEC so notifies them.

No Proof that COMELEC's Failure to Give Notice of the Office to be Filled and the Manner of Determining the Winner in the Special Election Misled Voters

The test in determining the validity of a special election in relation to the failure to give notice of the special election is whether the want of notice has resulted in misleading a sufficient number

⁹³ 26 Am. Jur. 2d Elections § 281 (1996); 29 C.J.S. Elections § 70 (1965).

of voters as would change the result of the special election. If the lack of official notice misled a substantial number of voters who wrongly believed that there was no special election to fill a vacancy, a choice by a small percentage of voters would be void.⁹⁴

The required notice to the voters in the 14 May 2001 special senatorial election covers two matters. *First*, that COMELEC will hold a special election to fill a vacant single three-year term Senate seat simultaneously with the regular elections scheduled on the same date. *Second*, that COMELEC will proclaim as winner the senatorial candidate receiving the 13th highest number of votes in the special election. Petitioners have neither claimed nor proved that COMELEC's failure to give this required notice misled a sufficient number of voters as would change the result of the special senatorial election or led them to believe that there was no such special election.

Instead, what petitioners did is conclude that since COMELEC failed to give such notice, no special election took place. This bare assertion carries no value. Section 2 of RA No. 6645, as amended, charged those who voted in the elections of 14 May 2001 with the knowledge that the vacancy in the Senate arising from Senator Guingona's appointment as Vice-President in February 2001 was to be filled in the next succeeding regular election of 14 May 2001. Similarly, the absence of formal notice from COMELEC does not preclude the possibility that the voters had actual notice of the special election, the office to be voted in that election, and the manner by which COMELEC would determine the winner. Such actual notice could come from many sources, such as media reports of the enactment of RA No. 6645 and election propaganda during the campaign.

More than 10 million voters cast their votes in favor of Honasan, the party who stands most prejudiced by the instant petition. We simply cannot disenfranchise those who voted for Honasan, in the absence of proof that COMELEC's omission prejudiced voters in the exercise of their right of suffrage so as to negate the holding of the special election. Indeed, this Court is loathe to annul elections and will only do so when it is "impossible to distinguish what votes are lawful and what are unlawful, or to arrive at any certain result whatever, or that the great body of the voters have been prevented by violence, intimidation, and

⁹⁴ See 26 Am. Jur. 2d Elections § 292 (1996); 29 C.J.S. Elections § 72 (1965).

threats from exercising their franchise.”⁹⁵

Otherwise, the consistent rule has been to respect the electorate’s will and let the results of the election stand, despite irregularities that may have attended the conduct of the elections.⁹⁶ This is but to acknowledge the purpose and role of elections in a democratic society such as ours, which is:

to give the voters a direct participation in the affairs of their government, either in determining who shall be their public officials or in deciding some question of public interest; and for that purpose all of the legal voters should be permitted, unhampered and unmolested, to cast their ballot. When that is done and no frauds have been committed, the ballots should be counted and the election should not be declared null. Innocent voters should not be deprived of their participation in the affairs of their government for mere irregularities on the part of the election officers, for which they are in no way responsible. A different rule would make the manner and method of performing a public duty of greater importance than the duty itself.⁹⁷

Separate Documentation and Canvassing not Required under Section 2 of RA No. 6645

Neither is there basis in petitioners’ claim that the manner by which COMELEC conducted the special senatorial election on 14 May 2001 is a nullity because COMELEC failed to document separately the candidates and to canvass separately the votes

⁹⁵ Florendo, Sr. v. Buyser, 129 Phil. 353 (1967); Capalla v. Tabiana, 63 Phil. 95 (1936); Kiamzon v. Pugeda, 54 Phil. 755 (1930); Cailles v. Gomez, 42 Phil. 852 (1924). Batas Pambansa Blg. 881, as amended, (Omnibus Election Code), on failure of elections (resulting to the annulment of elections), provides: Sec. 6. Failure of election. - If, on account of force majeure, violence, terrorism, fraud, or other analogous causes the election in any polling place had not been held on the date fixed, or had been suspended before the hour fixed by law for the closing of the voting, or after the voting and during the preparation and the transmission of the election returns or in the custody or canvass thereof, such election results in a failure to elect, and in any of such cases the failure or suspension of election would affect the result of the election, the Commission shall, on the basis of a verified petition by an interested party and after due notice and hearing, call for the holding or continuation of the election not held, suspended or which resulted in a failure to elect on a date reasonably close to the date of the election not held, suspended or which resulted in a failure to elect but not later than thirty days after the cessation of the cause of such postponement or suspension of the election or failure to elect.

⁹⁶ Alcala v. COMELEC, 218 Phil. 322 (1984); Villareal v. Fornier, 84 Phil. 756 (1949); Lucero v. De Guzman, 45 Phil. 852 (1924).

⁹⁷ Lino Luna v. Rodriguez, 39 Phil. 208 (1918).

cast for the special election. No such requirements exist in our election laws. What is mandatory under Section 2 of RA No. 6645 is that COMELEC “fix the date of the election,” if necessary, and “state, among others, the office or offices to be voted for.” Similarly, petitioners’ reliance on Section 73 of B.P. Blg. 881 on the filing of certificates of candidacy, and on Section 4(4) of RA No. 6646 on the printing of election returns and tally sheets, to support their claim is misplaced. These provisions govern elections in general and in no way require separate documentation of candidates or separate canvass of votes in a jointly held regular and special elections.

Significantly, the method adopted by COMELEC in conducting the special election on 14 May 2001 merely implemented the procedure specified by the Senate in Resolution No. 84. Initially, the original draft of Resolution No. 84 as introduced by Senator Francisco Tatad (Senator Tatad) made no mention of the manner by which the seat vacated by former Senator Guingona would be filled. However, upon the suggestion of Senator Raul Roco (Senator Roco), the Senate agreed to amend Resolution No. 84 by providing, as it now appears, that “the senatorial candidate garnering the thirteenth (13th) highest number of votes shall serve only for the unexpired term of former Senator Teofisto T. Guingona, Jr.” Senator Roco introduced the amendment to spare COMELEC and the candidates needless expenditures and the voters further inconvenience...

Evidently, COMELEC, in the exercise of its discretion to use means and methods to conduct the special election within the confines of RA No. 6645, merely chose to adopt the Senate’s proposal, as embodied in Resolution No. 84. This Court has consistently acknowledged and affirmed COMELEC’s wide latitude of discretion in adopting means to carry out its mandate of ensuring free, orderly, and honest elections subject only to the limitation that the means so adopted are not illegal or do not constitute grave abuse of discretion.⁹⁸ COMELEC’s decision to abandon the means it employed in the 13 November 1951 and 8 November 1955 special elections and adopt the method embodied in Resolution No. 84 is but a legitimate exercise of its discretion. Conversely, this Court will not interfere should COMELEC, in subsequent special senatorial elections, choose to revert to the means it followed in the 13 November 1951 and 8 November 1955 elections. That COMELEC adopts means that are novel

⁹⁸ E.g. *Cauton v. COMELEC*, 126 Phil. 291 (1967).

or even disagreeable is no reason to adjudge it liable for grave abuse of discretion. As we have earlier noted:

The Commission on Elections is a constitutional body. It is intended to play a distinct and important part in our scheme of government. In the discharge of its functions, it should not be hampered with restrictions that would be fully warranted in the case of a less responsible organization. The Commission may err, so may this Court also. It should be allowed considerable latitude in devising means and methods that will insure the accomplishment of the great objective for which it was created - free, orderly and honest elections. We may not agree fully with its choice of means, but unless these are clearly illegal or constitute gross abuse of discretion, this court should not interfere.⁹⁹

Section 10. The salaries of Senators and Members of the House of Representatives shall be determined by law. No increase in said compensation shall take effect until after the expiration of the full term of all the Members of the Senate and the House of Representatives approving such increase.

Section 11. A Senator or Member of the House of Representatives shall, in all offenses punishable by not more than six years imprisonment, be privileged from arrest while the Congress is in session. No Member shall be questioned nor be held liable in any other place for any speech or debate in the Congress or in any committee thereof.

Section 12. All Members of the Senate and the House of Representatives shall, upon assumption of office, make a full disclosure of their financial and business interests. They shall notify the House concerned of a potential conflict of interest that may arise from the filing of a proposed legislation of which they are authors.

Section 13. No Senator or Member of the House of Representatives may hold any other office or employment in the Government, or any subdivision, agency, or instrumentality thereof, including government-owned or controlled corporations or their subsidiaries, during his term

⁹⁹ Puñgutan v. Abubakar, 150 Phil. 1 (1972) citing Sumulong v. COMELEC, 73 Phil. 237 (1941).

without forfeiting his seat. Neither shall he be appointed to any office which may have been created or the emoluments thereof increased during the term for which he was elected.

LIBAN v. GORDON, G.R. No. 175352, July 15, 2009, 610 Phil. 476,¹⁰⁰ was a petition to declare then Senator Richard J. Gordon, after being elected Chairman of the Philippine National Red Cross (PNRC), as having **forfeited his seat in the Senate**. Petitioners alleged that by accepting the chairmanship of the PNRC Board of Governors, respondent had **ceased to be a member of the Senate as provided in Section 13, Article VI**:

Petitioners cite *Camporedondo v. NLRC*,¹⁰¹ which held that the PNRC is a government-owned or controlled corporation. Petitioners claim that in accepting and holding the position of Chairman of the PNRC Board of Governors, respondent has automatically forfeited his seat in the Senate, pursuant to *Flores v. Drilon*,¹⁰² which held that incumbent national legislators lose their elective posts upon their appointment to another government office.

In his Comment, respondent asserts that petitioners have no standing to file this petition which appears to be an action for *quo warranto*, since the petition alleges that respondent committed an act which, by provision of law, constitutes a ground for forfeiture of his public office. Petitioners do not claim to be entitled to the Senate office of respondent. Under Section 5, Rule 66 of the Rules of Civil Procedure, only a person claiming to be entitled to a public office usurped or unlawfully held by another may bring an action for *quo warranto* in his own name. If the petition is one for *quo warranto*, it is already barred by prescription since under Section 11, Rule 66 of the Rules of Civil Procedure, the action should be commenced within one year after the cause of the public officer's forfeiture of office. In this case, respondent has been working as a Red Cross volunteer for the past 40 years. Respondent was already Chairman of the PNRC Board of Governors when he was elected Senator in May 2004, having been elected Chairman in 2003 and re-elected in 2005.

¹⁰⁰ In *Liban v. Gordon*, G. R. No. 175352, January 18, 2011, 654 Phil. 680, on a motion for reconsideration, the Court *en banc* modified the decision penned by Justice Carpio, but only with respect to the portion that declared the PNRC Charter void. Justice Carpio dissented from the modified decision.

¹⁰¹ 370 Phil. 901 (1999).

¹⁰² G.R. No. 104732, 22 June 1993, 223 SCRA 568.

Respondent contends that even if the present petition is treated as a taxpayer's suit, petitioners cannot be allowed to raise a constitutional question in the absence of any claim that they suffered some actual damage or threatened injury as a result of the allegedly illegal act of respondent. Furthermore, taxpayers are allowed to sue only when there is a claim of illegal disbursement of public funds, or that public money is being diverted to any improper purpose, or where petitioners seek to restrain respondent from enforcing an invalid law that results in wastage of public funds.

Respondent also maintains that if the petition is treated as one for declaratory relief, this Court would have no jurisdiction since original jurisdiction for declaratory relief lies with the Regional Trial Court.

Respondent further insists that the PNRC is not a government-owned or controlled corporation and that the prohibition under Section 13, Article VI of the Constitution does not apply in the present case since volunteer service to the PNRC is neither an office nor an employment.

In their Reply, petitioners claim that their petition is neither an action for *quo warranto* nor an action for declaratory relief. Petitioners maintain that the present petition is a taxpayer's suit questioning the unlawful disbursement of funds, considering that respondent has been drawing his salaries and other compensation as a Senator even if he is no longer entitled to his office. Petitioners point out that this Court has jurisdiction over this petition since it involves a legal or constitutional issue which is of transcendental importance.

The Issues

Petitioners raise the following issues:

1. Whether the Philippine National Red Cross (PNRC) is a government-owned or controlled corporation;
2. Whether Section 13, Article VI of the Philippine Constitution applies to the case of respondent who is Chairman of the PNRC and at the same time a Member of the Senate;
3. Whether respondent should be automatically removed as a Senator pursuant to Section 13, Article VI of the Philippine Constitution; and
4. Whether petitioners may legally institute this petition against respondent.

In **Liban**, Justice Carpio chose to disregard “the infirmities of the petition” and treated it as a taxpayer’s suit. Justice Carpio concluded that the “substantial issue boils down to whether the office of the PNRC Chairman is a government office or an office in a government-owned or controlled corporation for purposes of the prohibition” contained in this constitutional provision:

PNRC is a Private Organization Performing Public Functions

On 22 March 1947, President Manuel A. Roxas signed Republic Act No. 95,¹⁰³ otherwise known as the PNRC Charter. The PNRC is a non-profit, donor-funded, voluntary, humanitarian organization, whose mission is to bring timely, effective, and compassionate humanitarian assistance for the most vulnerable without consideration of nationality, race, religion, gender, social status, or political affiliation. The PNRC provides six major services: Blood Services, Disaster Management, Safety Services, Community Health and Nursing, Social Services and Voluntary Service.

The Republic of the Philippines, adhering to the Geneva Conventions, established the PNRC as a voluntary organization for the purpose contemplated in the Geneva Convention of 27 July 1929.¹⁰⁴ The Whereas clauses of the PNRC Charter read:

WHEREAS, there was developed at Geneva, Switzerland, on August 22, 1864, a convention by which the nations of the world were invited to join together in diminishing, so far lies within their power, the evils inherent in war;

WHEREAS, more than sixty nations of the world have ratified or adhered to the subsequent revision of said convention, namely the “Convention of Geneva of July 29 [sic], 1929 for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field” (referred to in this Charter as the Geneva Red Cross Convention);

WHEREAS, the Geneva Red Cross Convention envisages the establishment in each country of a voluntary organization to assist in caring for the wounded and sick of the armed forces and to furnish supplies for that purpose;

WHEREAS, the Republic of the Philippines became an independent nation on July 4, 1946 and proclaimed its

¹⁰³ An Act To Incorporate The Philippine National Red Cross, as amended by Presidential Decree No. 1264.

¹⁰⁴ Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field.

adherence to the Geneva Red Cross Convention on February 14, 1947, and by that action indicated its desire to participate with the nations of the world in mitigating the suffering caused by war and to establish in the Philippines a voluntary organization for that purpose as contemplated by the Geneva Red Cross Convention;

WHEREAS, there existed in the Philippines since 1917 a Charter of the American National Red Cross which must be terminated in view of the independence of the Philippines; and

WHEREAS, the volunteer organizations established in the other countries which have ratified or adhered to the Geneva Red Cross Convention assist in promoting the health and welfare of their people in peace and in war, and through their mutual assistance and cooperation directly and through their international organizations promote better understanding and sympathy among the peoples of the world.

The PNRC is a member of the National Society of the International Red Cross and Red Crescent Movement (Movement), which is composed of the International Committee of the Red Cross (ICRC), the International Federation of Red Cross and Red Crescent Societies (International Federation), and the National Red Cross and Red Crescent Societies (National Societies). The Movement is united and guided by its seven Fundamental Principles:

1. **HUMANITY** - The International Red Cross and Red Crescent Movement, born of a desire to bring assistance without discrimination to the wounded on the battlefield, endeavors, in its international and national capacity, to prevent and alleviate human suffering wherever it may be found. Its purpose is to protect life and health and to ensure respect for the human being. It promotes mutual understanding, friendship, cooperation and lasting peace amongst all peoples.
2. **IMPARTIALITY** - It makes no discrimination as to nationality, race, religious beliefs, class or political opinions. It endeavors to relieve the suffering of individuals, being guided solely by their needs, and to give priority to the most urgent cases of distress.
3. **NEUTRALITY** - In order to continue to enjoy the confidence of all, the Movement may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature.

4. **INDEPENDENCE** - The Movement is independent. The National Societies, while auxiliaries in the humanitarian services of their governments and subject to the laws of their respective countries, must always maintain their autonomy so that they may be able at all times to act in accordance with the principles of the Movement.
5. **VOLUNTARY SERVICE** - It is a voluntary relief movement not prompted in any manner by desire for gain.
6. **UNITY** - There can be only one Red Cross or one Red Crescent Society in any one country. It must be open to all. It must carry on its humanitarian work throughout its territory.
7. **UNIVERSALITY** - The International Red Cross and Red Crescent Movement, in which all Societies have equal status and share equal responsibilities and duties in helping each other, is worldwide.

The Fundamental Principles provide a universal standard of reference for all members of the Movement. The PNRC, as a member of the Movement, has the duty to uphold the Fundamental Principles and ideals of the Movement. In order to be recognized as a National Society, the PNRC has to be autonomous and must operate in conformity with the Fundamental Principles of the Movement.

The reason for this autonomy is fundamental. To be accepted by warring belligerents as neutral workers during international or internal armed conflicts, the PNRC volunteers must not be seen as belonging to any side of the armed conflict. In the Philippines where there is a communist insurgency and a Muslim separatist rebellion, the PNRC cannot be seen as government-owned or controlled, and neither can the PNRC volunteers be identified as government personnel or as instruments of government policy. Otherwise, the insurgents or separatists will treat PNRC volunteers as enemies when the volunteers tend to the wounded in the battlefield or the displaced civilians in conflict areas.

Thus, the PNRC must not only be, but must also be seen to be, autonomous, neutral and independent in order to conduct its activities in accordance with the Fundamental Principles. The PNRC must not appear to be an instrument or agency that implements government policy; otherwise, it cannot merit the trust of all and cannot effectively carry out its mission as a National Red Cross Society. It is imperative that the PNRC must be autonomous, neutral, and independent in relation to the State.

To ensure and maintain its autonomy, neutrality, and independence, the PNRC cannot be owned or controlled by the government. Indeed, the Philippine government does not own the PNRC. The PNRC does not have government assets and does not receive any appropriation from the Philippine Congress. The PNRC is financed primarily by contributions from private individuals and private entities obtained through solicitation campaigns organized by its Board of Governors, as provided under Section 11 of the PNRC Charter:

Sec. 11. As a national voluntary organization, the Philippine National Red Cross shall be financed primarily by contributions obtained through solicitation campaigns throughout the year which shall be organized by the Board of Governors and conducted by the Chapters in their respective jurisdictions. These fund raising campaigns shall be conducted independently of other fund drives by other organizations.

The government does not control the PNRC. Under the PNRC Charter, as amended, only six of the thirty members of the PNRC Board of Governors are appointed by the President of the Philippines. Thus, twenty-four members, or four-fifths (4/5), of the PNRC Board of Governors are not appointed by the President. Section 6 of the PNRC Charter, as amended, provides:

Sec. 6. The governing powers and authority shall be vested in a Board of Governors composed of thirty members, six of whom shall be appointed by the President of the Philippines, eighteen shall be elected by chapter delegates in biennial conventions and the remaining six shall be selected by the twenty-four members of the Board already chosen. ...

Thus, of the twenty-four members of the PNRC Board, eighteen are elected by the chapter delegates of the PNRC, and six are elected by the twenty-four members already chosen -- a select group where the private sector members have three-fourths majority. Clearly, an overwhelming majority of four-fifths of the PNRC Board are elected or chosen by the private sector members of the PNRC.

The PNRC Board of Governors, which exercises all corporate powers of the PNRC, elects the PNRC Chairman and all other officers of the PNRC. The incumbent Chairman of PNRC, respondent Senator Gordon, was elected, as all PNRC Chairmen are elected, by a private sector-controlled PNRC Board four-

fifths of whom are private sector members of the PNRC. The PNRC Chairman is not appointed by the President or by any subordinate government official.

Under Section 16, Article VII of the Constitution, the President appoints all officials and employees in the Executive branch whose appointments are vested in the President by the Constitution or by law. The President also appoints those whose appointments are not otherwise provided by law. Under this Section 16, the law may also authorize the “heads of departments, agencies, commissions, or boards” to appoint officers lower in rank than such heads of departments, agencies, commissions or boards... (as explained in) **Rufino v. Endriga**,¹⁰⁵...

The President does not appoint the Chairman of the PNRC. Neither does the head of any department, agency, commission or board appoint the PNRC Chairman. Thus, the PNRC Chairman is not an official or employee of the Executive branch since his appointment does not fall under Section 16, Article VII of the Constitution. Certainly, the PNRC Chairman is not an official or employee of the Judiciary or Legislature. This leads us to the obvious conclusion that the PNRC Chairman is not an official or employee of the Philippine Government. Not being a government official or employee, the PNRC Chairman, as such, does not hold a government office or employment.

Under Section 17, Article VII of the Constitution, the President exercises control over all government offices in the Executive branch. If an office is legally not under the control of the President, then such office is not part of the Executive branch... (as explained in) **Rufino v. Endriga**...¹⁰⁶

An overwhelming four-fifths majority of the PNRC Board are private sector individuals elected to the PNRC Board by the private sector members of the PNRC. The PNRC Board exercises all corporate powers of the PNRC. The PNRC is controlled by private sector individuals. Decisions or actions of the PNRC Board are not reviewable by the President. The President cannot reverse or modify the decisions or actions of the PNRC Board. Neither can the President reverse or modify the decisions or actions of the PNRC Chairman. It is the PNRC Board that

¹⁰⁵ G.R. Nos. 139554 & 139565, 21 July 2006, 496 SCRA 13, also penned by Justice Carpio and excerpted under Art. VII.

¹⁰⁶ Ibid.

can review, reverse or modify the decisions or actions of the PNRC Chairman. This proves again that the office of the PNRC Chairman is a private office, not a government office.

Although the State is often represented in the governing bodies of a National Society, this can be justified by the need for proper coordination with the public authorities, and the government representatives may take part in decision-making within a National Society. However, the freely-elected representatives of a National Society's active members must remain in a large majority in a National Society's governing bodies.

The PNRC is not government-owned but privately owned. The vast majority of the thousands of PNRC members are private individuals, including students. Under the PNRC Charter, those who contribute to the annual fund campaign of the PNRC are entitled to membership in the PNRC for one year. Thus, any one between 6 and 65 years of age can be a PNRC member for one year upon contributing P35, P100, P300, P500 or P1,000 for the year. Even foreigners, whether residents or not, can be members of the PNRC. Section 5 of the PNRC Charter, as amended by Presidential Decree No. 1264, reads:

Sec. 5. Membership in the Philippine National Red Cross shall be open to the entire population in the Philippines regardless of citizenship. Any contribution to the Philippine National Red Cross Annual Fund Campaign shall entitle the contributor to membership for one year and said contribution shall be deductible in full for taxation purposes.

Thus, the PNRC is a privately owned, privately funded, and privately run charitable organization. The PNRC is not a government-owned or controlled corporation.

Petitioners anchor their petition on the 1999 case of *Camporeddo v. NLRC*,¹⁰⁷ which ruled that the PNRC is a government-owned or controlled corporation. In ruling that the PNRC is a government-owned or controlled corporation, the simple test used was whether the corporation was created by its own special charter for the exercise of a public function or by incorporation under the general corporation law. Since the PNRC was created under a special charter, the Court then ruled that it is a government corporation. However, the *Camporeddo*

¹⁰⁷ 370 Phil. 901 (1999).

ruling failed to consider the definition of a government-owned or controlled corporation as provided under Section 2(13) of the Introductory Provisions of the Administrative Code of 1987:

Sec. 2. General Terms Defined. - ...

(13) Government-owned or controlled corporation refers to any agency organized as a stock or non-stock corporation, vested with functions relating to public needs whether governmental or proprietary in nature, and owned by the Government directly or through its instrumentalities either wholly, or where applicable as in the case of stock corporations, to the extent of at least fifty-one (51) percent of its capital stock: Provided, That government-owned or controlled corporations may be further categorized by the Department of the Budget, the Civil Service Commission, and the Commission on Audit for purposes of the exercise and discharge of their respective powers, functions and responsibilities with respect to such corporations.

A government-owned or controlled corporation must be owned by the government, and in the case of a stock corporation, at least a majority of its capital stock must be owned by the government. In the case of a non-stock corporation, by analogy at least a majority of the members must be government officials holding such membership by appointment or designation by the government. Under this criterion, and as discussed earlier, the government does not own or control PNRC....

In sum, we hold that the office of the PNRC Chairman is not a government office or an office in a government-owned or controlled corporation for purposes of the prohibition in Section 13, Article VI of the 1987 Constitution...

Section 14. No Senator or Member of the House of Representatives may personally appear as counsel before any court of justice or before the Electoral Tribunals, or quasi-judicial and other administrative bodies. Neither shall he, directly or indirectly, be interested financially in any contract with, or in any franchise or special privilege granted by the Government, or any subdivision, agency, or instrumentality thereof, including any government-owned or controlled corporation, or its subsidiary, during his term of office. He shall not intervene in any matter before any office of the Government for his pecuniary benefit or where he may be called upon to act on account of his office.

Section 15. The Congress shall convene once every year on the fourth Monday of July for its regular session, unless a different date is fixed by law, and shall continue to be in session for such number of days as it may determine until thirty days before the opening of its next regular session, exclusive of Saturdays, Sundays, and legal holidays. The President may call a special session at any time.

Section 16. (1) The Senate shall elect its President and the House of Representatives its Speaker, by a majority vote of all its respective Members. Each House shall choose such other officers as it may deem necessary.

(2) A majority of each House shall constitute a quorum to do business, but a smaller number may adjourn from day to day and may compel the attendance of absent Members in such manner, and under such penalties, as such House may provide.

(3) Each House may determine the rules of its proceedings, punish its Members for disorderly behavior, and, with the concurrence of two-thirds of all its Members, suspend or expel a Member. A penalty of suspension, when imposed, shall not exceed sixty days.

(4) Each House shall keep a Journal of its proceedings, and from time to time publish the same, excepting such parts as may, in its judgment, affect national security; and the yeas and nays on any question shall, at the request of one-fifth of the Members present, be entered in the Journal.

Each House shall also keep a Record of its proceedings.

(5) Neither House during the sessions of the Congress shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

PIMENTEL v. SENATE COMMITTEE OF THE WHOLE, G.R. No. 187714, March 8, 2011, 660 Phil. 202, was a petition for prohibition with prayer for issuance of a writ of preliminary injunction or temporary restraining order filed by then Senators Aquilino Q. Pimentel, Jr., Manuel B. Villar, Joker P. Arroyo, Francis N. Pangilinan, Pia S. Cayetano, and Alan Peter S. Cayetano, which sought to enjoin the Senate Committee of the Whole from conducting further hearings on the complaint filed by then Senator Maria Ana Consuelo A.S. Madrigal

against Senator Villar on the alleged double insertion of P200 million for the C-5 Road Extension Project in the 2008 General Appropriations Act. Speaking for the Court *en banc*, Justice Carpio had occasion to discuss **paragraph 3 of this Section 16, Article VI** on the **internal rules** of the Senate:

The Antecedents

On 15 September 2008, Senator Panfilo Lacson (Senator Lacson) delivered a privilege speech entitled “Kaban ng Bayan, Bantayan!” In his privilege speech, Senator Lacson called attention to the congressional insertion in the 2008 General Appropriations Act, particularly the P200 million appropriated for the construction of the President Carlos P. Garcia Avenue Extension from Sucat Luzon Expressway to Sucat Road in Parañaque City including Right-of-Way (ROW), and another P200 million appropriated for the extension of C-5 road including ROW. Senator Lacson stated that C-5 is what was formerly called President Carlos P. Garcia Avenue and that the second appropriation covers the same stretch - from Sucat Luzon Expressway to Sucat Road in Parañaque City. Senator Lacson inquired from DBM Secretary Rolando Andaya, Jr. about the double entry and was informed that it was on account of a congressional insertion. Senator Lacson further stated that when he followed the narrow trail leading to the double entry, it led to Senator Villar, then the Senate President.

On 8 October 2008, Senator Madrigal introduced P.S. Resolution 706, the full text of which reads:

WHEREAS the Senate President has repeatedly and publicly “advocated” (sic) the construction of the C-5 Road/Pres. C.P. Garcia Avenue Extension linking Sucat Road in Parañaque City to the South Luzon Expressway;
WHEREAS it was discovered that there was a double insertion of P200 million for the C-5 Road Extension project in the 2008 General Appropriations Act;
WHEREAS Committee on Finance Chair Sen. Juan Ponce Enrile confirmed that the double insertion for the C-5 Road Extension Project was made by the Senate President;
WHEREAS this double insertion is only the tip of the iceberg;
WHEREAS there is overwhelming evidence to show that the Senate President, from the time he was member of the House of Representatives, used his influence on the executive to cause the realignment of the C-5 Road Extension project to ensure that his properties in Barangay San Dionisio, Parañaque

City and Barangays Pulang Lupa and Mayuno Uno, Las Piñas would be financially benefited by the construction of the new road;

WHEREAS there is overwhelming evidence to show that the Senate President, through his corporations, negotiated the sale of his properties as roads right of way to the government, the same properties affected by the projects he proposed;

WHEREAS there is overwhelming evidence to show that the Senate President caused the sale of his landholdings to government as a grossly overpriced cost prejudicial to other lot owners in the area, the government, and the Filipino people;

WHEREAS there is overwhelming evidence to show that the Senate President, in the overpriced sale of another property, used his power and influence to extort from the original landowner the profit made from the overprice by the Villar owned corporations;

WHEREAS these acts of the Senate President are in direct violation of the Constitution, the Anti-Graft and Corrupt Practices Act, the Code of Conduct and Ethical Standards of Public Officers;

WHEREAS the Senate President has violated the public trust of the people in order to serve his personal interests thereby sacrificing the people's welfare;

WHEREAS the illegal and unethical conduct of the Senate President has betrayed the trust of the people, and by doing so has shamed the Philippine Senate;

WHEREAS it is incumbent upon the members of the Senate now to reclaim the people's trust and confidence and show that the illegal conduct of any of its member, even of its leaders, shall not go unpunished;

WHEREFORE, BE IT RESOLVED AS IT IS HEREBY RESOLVED, to direct the Committee on Ethics and Privileges to investigate the conduct of Senate President Manuel B. Villar, Jr. for using his position of power to influence public officials in relocating the C-5 Road Extension project to deliberately pass thru his properties, and to negotiate the overpriced purchase of road rights of way thru several properties also owned by his corporations redounding in huge personal financial benefits for him to the detriment of the Filipino people, thereby resulting in a blatant conflict of interest. ...

On even date, P.S. Resolution 706 was referred to the Committee on Ethics and Privileges (Ethics Committee) which at that time

was composed of the following members:

Sen. Pia S. Cayetano - Chairperson
Sen. Loren Legarda - Member in lieu of Sen. Madrigal
Sen. Joker Arroyo - Member
Sen. Alan Peter Cayetano - Member
Sen. Miriam Defensor-Santiago - Member
Sen. Gregorio Honasan - Member
Sen. Panfilo Lacson - Inhibited and replaced by Sen. Rodolfo Biazon

On 17 November 2008, Senator Juan Ponce Enrile (Senator Enrile) was elected Senate President. The Ethics Committee was reorganized with the election of Senator Lacson as Chairperson, and Senators Richard Gordon, Gregorio Honasan, Loren Legarda, and Mar Roxas as members for the Majority. On 16 December 2008, Senator Lacson inquired whether the Minority was ready to name their representatives to the Ethics Committee. After consultation with the members of the Minority, Senator Pimentel informed the body that there would be no member from the Minority in the Ethics Committee. On 26 January 2009, Senator Lacson reiterated his appeal to the Minority to nominate their representatives to the Ethics Committee. Senator Pimentel stated that it is the stand of the Minority not to nominate any of their members to the Ethics Committee, but he promised to convene a caucus to determine if the Minority's decision on the matter is final. Thereafter, the Senate adopted the Rules of the Senate Committee on Ethics and Privileges (Committee Rules) which was published in the Official Gazette on 23 March 2009.

On 20 April 2009, Senator Villar delivered a privilege speech where he stated that he would answer the accusations against him on the floor and not before the Ethics Committee. On 27 April 2009, Senator Lacson delivered another privilege speech where he stated that the Ethics Committee was not a kangaroo court. However, due to the accusation that the Ethics Committee could not act with fairness on Senator Villar's case, Senator Lacson moved that the responsibility of the Ethics Committee be undertaken by the Senate, acting as a Committee of the Whole. The motion was approved with ten members voting in favor, none against, and five abstentions.

Respondent Senate Committee of the Whole conducted its hearings on 4 May 2009, with eleven Senators present, and on 7 May 2009, with eight Senators present. On both hearings,

petitioners objected to the application of the Rules of the Ethics Committee to the Senate Committee of the Whole. In particular, petitioners questioned the determination of the quorum. On 11 May 2009, petitioners proposed 11 amendments to the Rules of the Ethics Committee that would constitute the Rules of the Senate Committee of the Whole, out of which three amendments were adopted. On 14 May 2009, Senator Pimentel raised as an issue the need to publish the proposed amended Rules of the Senate Committee of the Whole. On even date, respondent proceeded with the Preliminary Inquiry on P.S. Resolution 706. On 18 May 2009, the Chairman submitted a report on the Preliminary Inquiry with a directive to all Senators to come up with a decision on the preliminary report on 21 May 2009. On 21 May 2009, respondent declared that there was substantial evidence to proceed with the adjudicatory hearing. The preliminary conference was set on 26 May 2009.

Petitioners came to this Court for relief, raising the following grounds:

1. The transfer of the complaint against Senator Villar from the Ethics Committee to the Senate Committee of the Whole is violative of Senator Villar's constitutional right to equal protection;
2. The Rules adopted by the Senate Committee of the Whole for the investigation of the complaint filed by Senator Madrigal against Senator Villar is violative of Senator Villar's right to due process and of the majority quorum requirement under Art. VI, Sec. 16(2) of the Constitution; and
3. The Senate Committee of the Whole likewise violated the due process clause of the Constitution when it refused to publish the Rules of the Senate Committee of the Whole in spite of its own provision [which] require[s] its effectivity upon publication.

In its Comment, respondent argues that:

1. The instant petition should be dismissed for failure to join or implead an indispensable party. In the alternative, the instant petition should be archived until such time that the said indispensable party has been joined or impleaded and afforded the opportunity to be heard;
2. There was no grave abuse of discretion on the part of respondent Committee;
3. Petitioners are not entitled to a writ of prohibition for failure

to prove grave abuse of discretion on the part of respondent Committee of the Whole;

4. The principle of separation of powers must be upheld;

5. The instant petition must be dismissed for being premature. Petitioners failed to observe the doctrine or primary jurisdiction or prior resort;

6. It is within the power of Congress to discipline its members for disorderly behavior;

7. The determination of what constitutes disorderly behavior is a political question which exclusively pertains to Congress;

8. The Internal Rules of the Senate are not subject to judicial review in the absence of grave abuse of discretion; [and]

9. The Rules of the Ethics Committee, which have been duly published and adopted[,] allow the adoption of supplementary rules to govern adjudicatory hearings.

The Issues

The issues for the Court's resolution are the following:

1. Whether Senator Madrigal, who filed the complaint against Senator Villar, is an indispensable party in this petition;

2. Whether the petition is premature for failure to observe the doctrine of primary jurisdiction or prior resort;

3. Whether the transfer of the complaint against Senator Villar from the Ethics Committee to the Senate Committee of the Whole is violative of Senator Villar's right to equal protection;

4. Whether the adoption of the Rules of the Ethics Committee as Rules of the Senate Committee of the Whole is a violative of Senator Villar's right to due process and of the majority quorum requirement under Art. VI, Section 16(2) of the Constitution; and

5. Whether publication of the Rules of the Senate Committee of the Whole is required for their effectivity.

The Ruling of this Court

Indispensable Party

Section 7, Rule 3 of the 1997 Rules of Civil Procedure provides:

Sec. 7 - Compulsory joinder of indispensable parties. - Parties in interest without whom no final determination can be had

of an action shall be joined as plaintiffs or defendants.

The test to determine if a party is an indispensable party is as follows:

An indispensable party is a party who has an interest in the controversy or subject matter that a final adjudication cannot be made, in his absence, without injuring or affecting that interest, a party who has not only an interest in the subject matter of the controversy, but also has an interest of such nature that a final decree cannot be made without affecting his interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. It has also been considered that an indispensable party is a person in whose absence there cannot be a determination between the parties already before the court which is effective, complete or equitable. Further, an indispensable party is one who must be included in an action before it may properly go forward.

A person who is not an indispensable party, however, if his interest in the controversy or subject matter is separable from the interest of the other parties, so that it will not necessarily be directly or injuriously affected by a decree which does complete justice between them. Also, a person is not an indispensable party if his presence would merely permit a complete relief between him and those already parties to the action, or if he has no interest in the subject matter of the action. It is not a sufficient reason to declare a person to be an indispensable party that his presence will avoid multiple litigation.¹⁰⁸

In this case, Senator Madrigal is not an indispensable party to the petition before the Court. While it may be true that she has an interest in the outcome of this case as the author of P.S. Resolution 706, the issues in this case are matters of jurisdiction and procedure on the part of the Senate Committee of the Whole which can be resolved without affecting Senator Madrigal's interest. The nature of Senator Madrigal's interest in this case is not of the nature that this case could not be resolved without her participation.

¹⁰⁸ *Lagunilla v. Velasco*, G.R. No. 169276, 16 June 2009, 589 SCRA 224, 232-233 citing *Regner v. Logarta*, G.R. No. 168747, 19 October 2007, 537 SCRA 277 and *Arcelona v. Court of Appeals*, 345 Phil. 250 (1997).

Doctrine of Primary Jurisdiction

Respondent asserts that the doctrine of primary jurisdiction “simply calls for the determination of administrative questions, which are ordinarily questions of fact, by administrative agencies rather than by courts of justice.” Citing *Pimentel v. HRET*,¹⁰⁹ respondent avers that primary recourse of petitioners should have been to the Senate and that this Court must uphold the separation of powers between the legislative and judicial branches of the government.

The doctrine of primary jurisdiction does not apply to this case. The Court has ruled:

... It may occur that the Court has jurisdiction to take cognizance of a particular case, which means that the matter involved is also judicial in character. However, if the case is such that its determination requires the expertise, specialized skills and knowledge of the proper administrative bodies because technical matters or intricate questions of fact are involved, then relief must first be obtained in an administrative proceeding before a remedy will be supplied by the courts even though the matter is within the proper jurisdiction of the court. ...¹¹⁰

The issues presented here do not require the expertise, specialized skills and knowledge of respondent for their resolution. On the contrary, the issues here are purely legal questions which are within the competence and jurisdiction of the Court, and not an administrative agency or the Senate to resolve.¹¹¹

As regards respondent’s invocation of separation of powers, the Court reiterates that “the inviolate doctrine of separation of powers among the legislative, executive or judicial branches of government by no means prescribes for absolute autonomy in the discharge by each of that part of the governmental power assigned to it by the sovereign people.”¹¹² Thus, it has been held that “the power of judicial review is not so much power as it is [a] duty imposed on this Court by the Constitution and that we would be remiss in the performance of that duty if we decline to look behind

¹⁰⁹ 441 Phil. 492 (2002).

¹¹⁰ *Industrial Enterprises, Inc. v. Court of Appeals*, G.R. No. 88550, 18 April 1990, 184 SCRA 426, 431-432.

¹¹¹ *Arimao v. Taher*, G.R. No. 152651, 7 August 2006, 498 SCRA 74.

¹¹² *Francisco, Jr. v. House of Representatives*, 460 Phil. 830 (2003).

the barriers set by the principle of separation of powers.”¹¹³ The Court, therefore, is not precluded from resolving the legal issues raised by the mere invocation by respondent of the doctrine of separation of powers. On the contrary, the resolution of the legal issues falls within the exclusive jurisdiction of this Court.

Transfer of the Complaint from the Ethics Committee to the Senate Committee on the Whole

Petitioners allege that the transfer of the complaint against Senator Villar to the Senate Committee of the Whole violates his constitutional right to equal protection. Petitioners allege that the Senate Committee of the Whole was constituted solely for the purpose of assuming jurisdiction over the complaint against Senator Villar. Petitioners further allege that the act was discriminatory and removed Senator Villar’s recourse against any adverse report of the Ethics Committee to the Senate as a body.

We do not agree with petitioners.

Reviewing the events that led to the constitution of the Senate Committee of the Whole, the Court notes that upon the election of Senator Enrile as Senate President on 17 November 2008, the Ethics Committee was also reorganized. Senator Lacson, who first called the Senate’s attention to the alleged irregularities committed by Senator Villar, was elected as Chairperson. On 16 December 2008, when Senator Lacson inquired whether the Minority was ready to name their representatives to the Ethics Committee, Senator Pimentel informed the body that there would be no member from the Minority in the Ethics Committee. On 26 January 2009, Senator Lacson reiterated his appeal to the Minority to nominate their representatives to the Ethics Committee. Senator Pimentel informed him that it is the stand of the Minority not to nominate any of their members to the Ethics Committee. Senator Pimentel promised to convene a caucus to determine if the Minority’s decision on the matter is final but the records did not show that a caucus was convened.

On 20 April 2009, Senator Villar delivered a privilege speech where he stated that he would answer the accusations against him on the floor and not before the Ethics Committee. It was because of the accusation that the Ethics Committee could not

¹¹³ Tolentino v. Secretary of Finance, G.R. No. 115455, 25 August 1994, 235 SCRA 630.

act with fairness on Senator Villar's case that Senator Lacson moved that the responsibility of the Ethics Committee be undertaken by the Senate acting as a Committee of the Whole, which motion was approved with ten members voting in favor, none against, and five abstentions.

The Rules of the Ethics Committee provide that "all matters relating to the conduct, rights, privileges, safety, dignity, integrity and reputation of the Senate and its Members shall be under the exclusive jurisdiction of the Senate Committee on Ethics and Privileges." However, in this case, the refusal of the Minority to name its members to the Ethics Committee stalled the investigation. In short, while ordinarily an investigation about one of its members' alleged irregular or unethical conduct is within the jurisdiction of the Ethics Committee, the Minority effectively prevented it from pursuing the investigation when they refused to nominate their members to the Ethics Committee. Even Senator Villar called the Ethics Committee a kangaroo court and declared that he would answer the accusations against him on the floor and not before the Ethics Committee. Given the circumstances, the referral of the investigation to the Committee of the Whole was an extraordinary remedy undertaken by the Ethics Committee and approved by a majority of the members of the Senate.

Adoption of the Rules of the Ethics Committee by the Senate Committee of the Whole

Petitioners allege that the adoption of the Rules of the Ethics Committee by the Senate Committee of the Whole is violative of Senator Villar's right to due process.

We do not agree.

Again, we reiterate that, considering the circumstances of this case, the referral of the investigation by the Ethics Committee to the Senate Committee of the Whole is an extraordinary remedy that does not violate Senator Villar's right to due process. In the same manner, the adoption by the Senate Committee of the Whole of the Rules of the Ethics Committee does not violate Senator Villar's right to due process.

The Constitutional right of the Senate to promulgate its own rules of proceedings has been recognized and affirmed by this Court. Thus (citing Section 16(3), Article VI):

... This provision has been traditionally construed as a grant of full discretionary authority to the House of Congress in the formulation, adoption and promulgation of its own rules. As such, the exercise of this power is generally exempt from judicial supervision and interference, except on a clear showing of such arbitrary and improvident use of the power as will constitute a denial of due process.

... The issue partakes of the nature of a political question which, under the Constitution, is to be decided by the people in their sovereign capacity, or in regard to which full discretionary authority has been delegated to the legislative or executive branch of the government. Further, pursuant to his constitutional grant of virtually unrestricted authority to determine its own rules, the Senate is at liberty to alter or modify these rules at any time it may see fit, subject only to the imperatives of quorum, voting and publication.¹¹⁴

The only limitation to the power of Congress to promulgate its own rules is the observance of quorum, voting, and publication when required. As long as these requirements are complied with, the Court will not interfere with the right of Congress to amend its own rules.

Prior Publication

Petitioners assail the non-publication of the Rules of the Senate Committee of the Whole. Respondent counters that publication is not necessary because the Senate Committee of the Whole merely adopted the Rules of the Ethics Committee which had been published in the Official Gazette on 23 March 2009. Respondent alleges that there is only one set of Rules that governs both the Ethics Committee and the Senate Committee of the Whole.

...

The Constitution does not require publication of the internal rules of the House or Senate. Since rules of the House or the Senate that affect only their members are internal to the House or Senate, such rules need not be published, unless such rules expressly provide for their publication before the rules can take effect.

¹¹⁴ Dela Paz v. Senate Committee on Foreign Relations, G.R. No. 184849, 13 February 2009, 579 SCRA 521, 525.

In this case, the proceedings before the Senate Committee of the Whole affect only members of the Senate since the proceedings involve the Senate's exercise of its disciplinary power over one of its members. Clearly, the Rules of the Senate Committee of the Whole are internal to the Senate. However, Section 81, Rule 15 of the Rules of the Senate Committee of the Whole provides:

Sec. 81. EFFECTIVITY. These Rules shall be effective after publication in the Official Gazette or in a newspaper of general circulation.

Hence, in this particular case, the Rules of the Senate Committee of the Whole itself provide that the Rules must be published before the Rules can take effect. Thus, even if publication is not required under the Constitution, publication of the Rules of the Senate Committee of the Whole is required because the Rules expressly mandate their publication. The majority of the members of the Senate approved the Rules of the Senate Committee of the Whole, and the publication requirement which they adopted should be considered as the will of the majority. Respondent cannot dispense with the publication requirement just because the Rules of the Ethics Committee had already been published in the Official Gazette. To reiterate, the Rules of the Senate Committee of the Whole expressly require publication before the Rules can take effect. To comply with due process requirements, the Senate must follow its own internal rules if the rights of its own members are affected.

Incidentally, we note that Section 4, Rule 1 of the Rules of the Senate Committee of the Whole is an exact reproduction of Section 4, Rule 1 of the Rules of the Senate Committee on Ethics and Privileges which states that the Ethics Committee shall be composed of seven members, contrary to the fact that the Senate Committee of the Whole consists of all members of the Senate. In addition, Section 5(B), Rule 1 of the Rules of the Senate Committee of the Whole is an exact reproduction of Section 5(B), Rule 1 of the Rules of the Senate Committee on Ethics and Privileges which states that only two members of the Ethics Committee shall constitute a quorum, contrary to respondent's allegation in its Comment that eight members of the Senate Committee of the Whole shall constitute a quorum.

However, if the Senate is constituted as a Committee of the Whole, a majority of the Senate is required to

constitute a quorum to do business pursuant to Section 16(2), Article VI of the Constitution. Otherwise, there will be a circumvention of this express provision of the Constitution on quorum requirement. Obviously, the Rules of the Senate Committee of the Whole require modification to comply with requirements of quorum and voting which the Senate must have overlooked in this case. In any event, in case of conflict between the Rules of the Senate Committee of the Whole and the Constitution, the latter will of course prevail.

Section 17. The Senate and the House of Representatives shall each have an Electoral Tribunal which shall be the sole judge of all contests relating to the election, returns, and qualifications of their respective Members. Each Electoral Tribunal shall be composed of nine Members, three of whom shall be Justices of the Supreme Court to be designated by the Chief Justice, and the remaining six shall be Members of the Senate or the House of Representatives, as the case may be, who shall be chosen on the basis of proportional representation from the political parties and the parties or organizations registered under the party-list system represented therein. The senior Justice in the Electoral Tribunal shall be its Chairman.

BARBERS v. COMMISSION ON ELECTIONS, G.R. No. 165691, June 22, 2005, 499 Phil. 570, was a petition for *certiorari* and prohibition, with prayer for temporary restraining order and preliminary injunction, to nullify a resolution of the Special Division of the COMELEC and a resolution of the COMELEC *en banc*, both of which affirmed the proclamation by the COMELEC (sitting *en banc* as the National Board of Canvassers) of Rodolfo G. Biazon as the then duly elected 12th Senator in the May 2004 National and Local Elections:

The Facts

Robert Z. Barbers (Barbers) and Biazon were candidates for re-election to the Senate of the Philippines in the 10 May 2004 Synchronized National and Local Elections (elections).

On 24 May 2004, the COMELEC sitting *en banc* as the NBC for the election of Senators promulgated Resolution No. NBC 04-002 proclaiming the first 11 duly elected Senators in the elections. The COMELEC as the NBC promulgated the Resolution based on the Certificates of Canvass (COCs) submitted by the following:

(a) 78 Provincial Boards of Canvassers; (b) 7 City Boards of Canvassers of cities comprising one or more legislative districts; (c) 13 City Board of Canvassers from the National Capital Region; (d) 2 District Boards of Canvassers from Metro Manila; (e) 74 Special Boards of Canvassers for Overseas Absentee Voting; and (f) 1 Board of Canvassers for Local Absentee Voting. The COMELEC declared that it would proclaim the remaining 12th winning candidate for Senator after canvassing the remaining unsubmitted COCs.

On 2 June 2004, the COMELEC promulgated Resolution No. NBC 04-005 proclaiming Biazon as “the 12th ranking duly elected 12th Senator of the Republic of the Philippines in the May 10, 2004 national and local elections, to serve for a term of 6 years, beginning on June 30, 2004 in accordance with Article VI, Section IV of the Constitution of the Philippines.” The COMELEC stated that after the canvass of the supplemental Provincial COCs from Maguindanao (Cotabato City), Lanao del Sur and one barangay in Nueva Vizcaya, Biazon obtained 10,635,270 votes nationwide. On the other hand, Barbers obtained 10,624,585 votes. Thus, Biazon obtained 10,685 more votes than Barbers. The COMELEC stated that this “difference will not materially be affected by the votes in certain precincts where there was failure of elections.”

Claiming that Biazon’s proclamation was void, Barbers filed a petition to annul the proclamation of Biazon as Senator of the Republic of the Philippines with the COMELEC on 7 June 2004. The petition, docketed as SPC Case No. 04-258, was assigned to a Special Division of the COMELEC.

In his petition, Barbers asserted that the proclamation of Biazon was “illegal and premature being based on an incomplete canvass.” Barbers asserted that the remaining uncanvassed COCs and votes and the results of the special elections, which were still to be conducted, would undoubtedly affect the results of the elections.

In his Comment/Answer, Biazon asserted that: (1) the First Division of the COMELEC has no jurisdiction to review, modify, or set aside what the COMELEC sitting *en banc* as the NBC for Senators has officially performed, which is the promulgation of Resolution No. NBC 04-005; (2) since the COMELEC has proclaimed Biazon on 2 June 2004 in Resolution No. NBC 04-005 as the duly elected 12th Senator and Biazon has taken his oath

of office on 30 June 2004, the Senate Electoral Tribunal, not the COMELEC, has jurisdiction to entertain the present petition; (3) with Biazon's admitted and established margin of 10,685 votes, the votes from the alleged uncanvassed COCs and the votes still to be cast in the special elections which were still to be conducted would not substantially affect the results of the election for the 12th and last slot for Senator; and (4) the NBC committed a manifest error in crediting to Barbers a total of 34,711 votes from the province of Lanao del Sur while crediting to Biazon only 1,428 votes from the supplemental Provincial COCs for Lanao del Sur despite the existence and availability of the Municipal COCs for Balabagan and Tagoloan, Lanao del Sur.

On 9 June 2004, Barbers filed an Omnibus Motion for Immediate Service of Summons, for Suspension of the Effects of Proclamation, and to Set Case for Hearing. Barbers asserted that an immediate resolution of the present case was necessary because the term of office of Senators would commence on 30 June 2004. Barbers further claimed that there were Municipal COCs still to be included in the senatorial canvass and special elections still to be held in certain municipalities involving a total of 29,219 votes. Thus, Barbers insisted that "suspension of the effects of the proclamation" of Biazon was necessary. Barbers stressed that there could be no valid proclamation based on an incomplete canvass.

On 6 July 2004, the COMELEC issued the first assailed Resolution, disposing as follows:

WHEREFORE, premises considered, the Commission (Special Division) hereby DENIES the petition to annul the proclamation of respondent RODOLFO G. BIAZON for LACK OF MERIT.

ACCORDINGLY, the Special Division RESTATES the proclamation of the Commission on Elections sitting *en banc* as the National Board of Canvassers declaring RODOLFO G. BIAZON as the duly elected 12th Senator of the Republic of Philippines in the May 10, 2004 National and Local Elections. SO ORDERED.

Barbers filed a motion for reconsideration which the COMELEC *en banc* denied in the second assailed 25 October 2004 Resolution.

The COMELEC's Ruling

In its 6 July 2004 Resolution, the COMELEC (Special Division) denied Barbers' petition, thus:

The instant petition is not a pre-proclamation case as the issues raised herein clearly are not among those enumerated under Section 34 of COMELEC Resolution No. 6669. Neither is it a protest case because the ground cited in the petition is not proper for protest although a proclamation has already been made. It is a petition, as entitled, to annul proclamation based on alleged incomplete canvass.

The power to annul proclamation is an exclusive power of the Commission vested upon it by the Constitution, which states that the Commission shall exercise the power to "Decide except those involving the right to vote, all questions affecting elections ..." (Article IX-C, Section 2 (3)).

As held in the Case of *Aguam v. COMELEC*, the COMELEC shall have exclusive charge of the enforcement and administration of all laws relative to the conduct of elections and shall exercise all other functions which may be conferred upon it by law. The Constitution enjoins the COMELEC to decide, saving those involving the right to vote, all administrative questions, affecting elections. Corollary thereto, the court has given its imprimatur on the principle that COMELEC is with authority to annul any canvass and proclamation illegally made.

Records reveal that on June 2, 2004, the National Board of Canvassers (NBC), on the basis of the Certificates of Canvass submitted by seventy-eight (78) Provincial Board of Canvassers; seven (7) City Boards of Canvassers of cities comprising one or more legislative districts; thirteen (13) from the National Capital Region (NCR); two (2) from the District Boards of Canvassers of Metro Manila; seventy-four (74) from the Special Board of Canvassers for Overseas Absentee Voting; and one (1) from the Board of Canvassers for Local Absentee Voting, including the supplemental Provincial Certificates of Canvass from Maguindanao (Cotabato City), Lanao del Sur and Nueva Vizcaya (one barangay), declared that private respondent obtained ten million six hundred thirty-five thousand two hundred seventy (10,635,270) votes as against the ten million six hundred twenty-four thousand five hundred eighty-five (10,624,585) votes garnered by petitioner.

On the basis of the number of votes garnered by private

respondent, he was proclaimed on June 2, 2004 as the duly elected Senator in the recently concluded May 10, 2004 National and Local Elections.

However, after his proclamation, the Commission received Certificates of Canvass from the aforementioned provinces... (And)... the lead of private respondent over petitioner undoubtedly was reduced to six thousand two hundred twelve (6,212). Assuming that the remaining uncanvassed votes of two thousand nine hundred thirty-one (2,931) in places where special elections are yet to be held were all votes in favor of petitioner Barbers, nevertheless, this will not materially affect the results of the election. To say the least, even if private respondent's lead was decreased to three thousand two hundred ninety-nine (3,299) votes, he remains to be the winner and therefore the lawful occupant of the 12th slot for the senatorial position.

In its 25 October 2004 Resolution, the COMELEC *en banc* denied Barbers' motion for reconsideration, thus:

We maintain Our declaration and findings as established by the Special Division. After a judicious and thorough scrutiny of the records, We are more than convinced that respondent's proclamation was indeed, valid and operative. In the questioned resolution issued by the Special Division, We based our ruling on the official COMELEC records, revealing that respondent's lead over petitioner was insurmountable regardless of the results from the delayed certificates of canvass and from the uncanvassed votes for the special elections. This ratiocination was very well explained in the assailed resolution and need not be reiterated herein. Unfortunately for petitioner, he failed in this motion to adduce evidence sufficient to overturn Our ruling and justify the prayer for reliefs.

It must be noted that, in a pleading, petitioner has raised the Report/Recommendation of the Supervisory Committee to buttress his claim that, indeed, there was incomplete canvass. Petitioner is invited to examine the said report closer, for the same shows the extent of irregularities that transpired in the subject towns and provinces such as Columbio, Sultan Kudarat, and Talitay, Maguindanao, rendering the supplemental provincial certificates of canvass dubious at the very least.

For the town of Columbio, the Committee reported that:

... Records with the ERSD show that the MCOC and

corresponding SOV dated June 18 and 17, 2004, respectively, for the twenty-one (21) precincts used as basis for the supplemental PCOC are unsigned by the chairman of the municipal board of canvassers, but signed by the two other members. Please note that the two other members of the MBC who signed the SOV and MCOC used as basis of the supplemental PCOC are the members of the Pangamadun board all of whom were replaced by the Radam board as early as May 20, 2004.

On the other hand, the Committee noted that for the town of Talitay, thus:

Atty. Wyne Asdala, Chairman of the Provincial Board of Canvassers for the Province of Maguindanao then submitted a supplemental provincial certificate of canvass dated June 16, 2004 containing the results from the municipalities of South Upi and Talitay. Per SOV attached to the supplemental PCOC, Barbers obtained 4,472 votes and Biazon, 455 votes for the municipality of Talitay. Records do not show which MCOC was used as basis by the Asdala board for the preparation of the supplemental PCOC.

And by exercising its prerogative and discretion, the Commission duly noted the said Committee's recommendation to "use only the MCOCs prepared by the duly constituted municipal boards of canvassers as basis for the provincial canvass in Sultan Kudarat and Maguindanao."

At any rate, We likewise confirm the opinion of Commissioner Florentino A. Tuason, Jr., on the nature and ramifications of herein SPC Case for Annulment of Proclamation.

Citing the case of *Rasul v. COMELEC*, the Honorable Supreme Court declared that - In *Pangilinan v. Commission on Elections*, this Court has ruled that 'where the candidate has already been proclaimed winner in the congressional elections, the remedy of petitioner is to file an electoral protest with the Electoral Tribunal of the House of Representatives.' In like manner, whereas in this case, petitioner assails the Commission's resolution proclaiming the twelfth (12th) winning senatorial candidate, petitioner's proper recourse was to file a regular election protest which under the Constitution and the Omnibus Election Code exclusively pertains to the Senate Electoral Tribunal.

Under the Omnibus Election Code (OEC), following the clear enunciation of Section 242 and the immediately succeeding sections, it is clear that annulment of proclamation, be it partial or total, arises from the Commission's jurisdiction over

pre-proclamation controversies. Republic Act (RA) No. 7166, qualifies such power of the Commission by so stating that a pre-proclamation contest may only apply in cases where there are “manifest errors” in the election returns or certificates of canvass, with respect to national elective positions such as herein case.

To prove that the same is manifest, the errors must appear on the certificates of canvass or election returns sought to be corrected and/or objections thereto must have been made before the board of canvassers and specifically noted in the minutes of their administrative proceedings. (*Chavez v. COMELEC*, G.R. No. 150799, 03 February 2004)

Parties, therefore, ought to be careful in availing themselves of remedies lest they fall into a trap of their own making - one that they cannot escape from.

Nevertheless, granting *arguendo* that the present case is not a pre-proclamation case, as so painstakingly pointed out by petitioner, but one that is due to an incomplete canvass, and the relief sought emanates from the plenary power of the Commission, herein petitioner, sadly, failed to present convincing and legitimate evidence in support of his petition (including this motion for reconsideration).

Hence, this petition.

The Issues

Barbers raises the following issues for resolution:

Whether or not public respondent COMELEC gravely abused its discretion, amounting to lack or excess of jurisdiction when it deliberately insisted in resorting to and in using and considering, for purposes of tallying/tabulation of the still uncanvassed election results, MERE improvised Municipal COCs, which are NON-CANVASSED election documents, unauthentic, unreliable and dubious on their faces which documents were submitted, not to the NBC, but to a mere COMELEC Department [ERSD]; instead of availing and relying on official CANVASS documents - PROVINCIAL COCs submitted to COMELEC, as the National Board of Canvassers for Senators.

Whether or not the public respondent COMELEC gravely abused its discretion amounting to lack or excess of jurisdiction when it first correctly recognized the undisputed fact that there was an INCOMPLETE CANVASS at the time that respondent Biazon was initially “proclaimed”

PREMATURELY on June 2, 2004, but adamantly refused to rectify its VOID premature proclamation when it opted to reinstate the said sham proclamation of respondent Biazon, by anomalously resorting to and relying on, unauthentic, dubious and non-canvassed documents [Municipal COCs], rather than on the legal and lawful canvassed documents [PROVINCIAL COCs].

The petition must fail.

Speaking for the Court *en banc*, Justice Carpio identified the “basic issue” in **Barbers** as whether the Court could take cognizance of the petition:

Certiorari as a special civil action is available only if there is concurrence of the essential requisites, to wit: (a) the tribunal, board or officer exercising judicial or quasi-judicial functions has acted without or in excess of jurisdiction or with grave abuse of discretion amounting to lack of jurisdiction, and (b) there is no appeal or any plain, speedy and adequate remedy in the ordinary course of law to annul or modify the proceeding. There must be capricious, arbitrary and whimsical exercise of power for *certiorari* to prosper.¹¹⁵

On the other hand, prohibition as a special civil action is available only if the following essential requisites concur: (a) the proceedings of the tribunal, corporation, board, officer or person exercising judicial, quasi-judicial or ministerial functions are without or in excess of its or his jurisdiction or with grave abuse of discretion amounting to lack or excess of jurisdiction, and (b) there is no appeal or any other plain, speedy, and adequate remedy in the ordinary course of law to compel the respondent to desist from further proceedings in the action.¹¹⁶

In dismissing the **Barbers** petition, Justice Carpio discussed **Section 17 of this Article VI**, as reiterated in Rule 12 of the Revised Rules of the Senate Electoral Tribunal - that the Senate Electoral Tribunal is the **sole judge of all contests relating to the election, returns, and qualifications of the Members of the Senate**:

In *Pangilinan v. Commission on Elections*,¹¹⁷ we ruled that:

¹¹⁵ 1997 Rules of Civil Procedure, Rule 65, Sec. 1; *Aggabao v. COMELEC*, G.R. No. 163756, 26 January 2005; *Garcia v. House of Representatives Electoral Tribunal*, 371 Phil. 280 (1999).

¹¹⁶ 1997 Rules of Civil Procedure, Rule 65, Sec. 2.

¹¹⁷ G.R. No. 105278, 18 November 1993, 228 SCRA 36.

The Senate and the House of Representatives now have their respective Electoral Tribunals which are the “sole judge of all contests relating to the election, returns, and qualifications of their respective Members,” thereby divesting the Commission on Elections of its jurisdiction under the 1973 Constitution over election cases pertaining to the election of the Members of the Batasang Pambansa (Congress).

In *Javier v. COMELEC*,¹¹⁸ we interpreted the phrase “election, returns and qualifications” as follows:

The phrase “election, returns and qualifications” should be interpreted in its totality as referring to all matters affecting the validity of the contestee’s title. But if it is necessary to specify, we can say that “election” referred to the conduct of the polls, including the listing of voters, the holding of the electoral campaign, and the casting and counting of the votes; “returns” to the canvass of the returns and the proclamation of the winners, including questions concerning the composition of the board of canvassers and the authenticity of the election returns; and “qualifications” to matters that could be raised in a *quo warranto* proceeding against the proclaimed winner, such as his disloyalty or ineligibility or the inadequacy of his certificate of candidacy.

The word “sole” in Section 17, Article VI of the 1987 Constitution and Rule 12 of the Revised Rules of the Senate Electoral Tribunal (SET) underscores the exclusivity of the SET’s jurisdiction over election contests relating to members of the Senate. The authority conferred upon the SET is categorical and complete. It is therefore clear that this Court has no jurisdiction to entertain the instant petition.¹¹⁹ Since Barbers contests Biazon’s proclamation as the 12th winning senatorial candidate, it is the SET which has exclusive jurisdiction to act on Barbers’ complaint.¹²⁰

In *Pangilinan*,¹²¹ we ruled that “where the candidate has

¹¹⁸ 228 Phil. 193 (1986).

¹¹⁹ *Chavez v. COMELEC*, G.R. No. 105323, 3 July 1992, 211 SCRA 315; *Co v. Electoral Tribunal of the House of Representatives*, G.R. Nos. 92191-92, 92202-03, 30 July 1991, 199 SCRA 692; *Lazatin v. House Electoral Tribunal*, No. L-84297, 8 December 1988, 168 SCRA 391.

¹²⁰ *Rasul v. COMELEC*, 371 Phil. 760 (1999); Ruben E. Agpalo, *Comments On The Omnibus Election Code*, 523 (Revised Edition, 2004).

¹²¹ G.R. No. 105278, 18 November 1993, 228 SCRA 36.

already been proclaimed winner in the congressional elections, the remedy of petitioner is to file an electoral protest with the Electoral Tribunal of the House of Representatives.”¹²² In like manner, whereas in the present case, Barbers assails Biazon’s proclamation as the 12th duly elected Senator, Barbers’ proper recourse is to file a regular election protest with the SET.¹²³

Certiorari and prohibition will not lie in this case considering that there is an available and adequate remedy in the ordinary course of law to annul the COMELEC’s assailed proceedings. We take pains to emphasize that after the proclamation, Barbers should have filed an electoral protest before the SET.

While the resolution of the issues presented in this petition falls within the sole jurisdiction of the SET, still we opt to discuss them to show the absence of grave abuse of discretion on the part of COMELEC.

Barbers claims that Biazon’s 2 June 2004 proclamation as the 12th winning senatorial candidate is a nullity because it was based on an incomplete canvass. Barbers asserts that the COMELEC’s act of making such premature proclamation constituted grave abuse of discretion amounting to lack or excess of jurisdiction. Barbers also claims that the COMELEC gravely abused its discretion when, after having used Provincial Certificates of Canvass (PCOCs) in the canvass of election results for Senators up to 2 June 2004, the COMELEC used the Municipal Certificates of Canvass (MCOCs) in the “final tabulation of the uncanvassed results and that of the special elections yet to be held in certain parts of the country.”

Barbers’ arguments are specious.

An incomplete canvass of votes is illegal and cannot be the basis of a subsequent proclamation. A canvass is not reflective of the true vote of the electorate unless the board of canvassers considers all returns and omits none. However, this is true only where the election returns missing or not counted will affect the results of the election.¹²⁴

¹²² See *Magno v. COMELEC*, 439 Phil. 339 (2002); *Guerrero v. COMELEC*, 391 Phil. 344 (2000); *Caruncho III v. COMELEC*, 374 Phil. 308 (1999); *Lazatin v. COMELEC*, No. L-80007, 25 January 1988, 157 SCRA 337.

¹²³ *Rasul v. COMELEC*, 371 Phil. 760 (1999); Ruben E. Agpalo, *Comments on the Omnibus Election Code 523* (Revised Edition, 2004).

¹²⁴ *Nasser Immam v. COMELEC*, 379 Phil. 953 (2000); *Caruncho III v. COMELEC*, 374

The COMELEC, in promulgating its 2 June 2004 Resolution No. NBC 04-005 proclaiming Biazon as the 12th duly elected Senator, observed the following provisions of the Omnibus Election Code:

Sec. 233. When the election returns are delayed, lost or destroyed. - In case its copy of the election returns is missing, the board of canvassers shall, by messenger or otherwise, obtain such missing election returns from the board of election inspectors concerned, or if said returns have been lost or destroyed, the board of canvassers, upon prior authority of the Commission, may use any of the authentic copies of said election returns or certified copy of said election returns issued by the Commission, and forthwith direct its representative to investigate the case and immediately report the matter to the Commission.

The board of canvassers, notwithstanding the fact that not all the election returns have been received by it, may terminate the canvass and proclaim the candidates elected on the basis of the available election returns if the missing election returns will not affect the results of the election.

On 5 May 2004, the COMELEC promulgated Resolution No. 6749, i.e., “General Instructions for the Canvass of Votes and Proclamation of the Results for Senators and Party List in the May 10, 2004 National and Local Elections.” Section 9 of the Resolution provides:

Sec. 9. Proclamation of results. - Upon completion of the canvass, the Supervisory Committee and the watchers if available shall certify the final printout of results as canvassed. On the basis of the certified final printout, the NBC shall cause the preparation of, sign and approve the Certificate of Canvass and Proclamation, and proclaim the winning candidates for senators, certify the results of the election of the party-list system and proclaim the nominees of the parties which obtained the required percentage of votes. Notwithstanding the fact that not all of the COCs have been received or canvassed, the NBC may terminate the canvass if the missing COCs would no longer affect the results of the elections.

In the present case, the report which the COMELEC Supervisory Committee submitted on 29 June 2004 shows that Barbers

obtained 6,736 votes in areas where results were not included in the national canvass. As for Biazon, he garnered 2,263 votes. Also, the Supervisory Committee's report shows that the total number of registered voters in areas where special elections were still to be conducted was only 2,931, covering only 19 precincts in three municipalities.

As correctly stated by the COMELEC:

From the above summation, the lead of private respondent over petitioner undoubtedly was reduced to six thousand two hundred twelve (6,212). Assuming that the remaining uncanvassed votes of two thousand nine hundred thirty-one (2,931) in places where special elections are yet to be held were all votes in favor of petitioner Barbers, nevertheless, this will not materially affect the results of the election. To say the least, even if private respondent's lead was decreased to three thousand two hundred ninety-nine (3,299) votes, he remains to be the winner and therefore the lawful occupant of the 12th slot for the senatorial position.

It suffices to say that the COMELEC based its ruling in the assailed Resolutions on official COMELEC records. The COMELEC enjoys the presumption of good faith and regularity in the performance of official duty.¹²⁵

Since the election returns not included in the national canvass as well as the results of the special elections to be held would not materially affect the results of the elections, it is immaterial whether the COMELEC used PCOCs or MCOCs in the subsequent canvass.

The alleged invalidity of Biazon's proclamation involves a dispute or contest relating to the election returns of members of the Senate. Indisputably, the resolution of such dispute falls within the sole jurisdiction of the SET. For this Court to take cognizance of the electoral protest against Biazon would usurp the constitutional functions of the SET. In addition, the COMELEC did not commit any grave abuse of discretion in issuing the assailed Resolutions affirming Biazon's proclamation since the uncanvassed returns and the results of the special elections to be held would not materially affect the results of the elections.

¹²⁵ Nasser Immam v. COMELEC, 379 Phil. 953 (2000).

In **BARANGAY ASSOCIATION FOR NATIONAL ADVANCEMENT AND TRANSPARENCY (BANAT) PARTY-LIST v. COMMISSION ON ELECTIONS**, G.R. No. 177508, August 7, 2009, 612 Phil. 793, a petition for prohibition, which assailed the constitutionality of Republic Act No. 9369,¹²⁶ or the law on the automated election system, on several grounds,¹²⁷ two of the assailed provisions were Sections 37 and 38:

Sec. 37. Section 30 of Republic Act No. 7166 is hereby amended to read as follows:

Sec. 30. Congress as the National Board of Canvassers for the Election of President and Vice President: The Commission *en banc* as the National Board of Canvassers for the election of senators: Determination of Authenticity and Due Execution of Certificates of Canvass. - Congress and the Commission *en banc* shall determine the authenticity and due execution of the certificate of canvass for president and vice president and senators, respectively, as accomplished and transmitted to it by the local boards of canvassers, on a showing that: (1) each certificate of canvass was executed, signed and thumbmarked by the chairman and members of the board of canvassers and transmitted or caused to be transmitted to Congress by them; (2) each certificate of canvass contains the names of all of the candidates for president and vice president or senator, as the case may be, and their corresponding votes in words and their corresponding votes in words and in figures; (3) there exists no discrepancy in other authentic copies of the certificates of canvass or any of its supporting documents such as statement of votes by city/municipality/by precinct or discrepancy in the votes of any candidate in words and figures in the certificate; and (4) there exist no discrepancy in the votes of any candidate in words and figures in the certificates of canvass against the aggregate number of votes appearing in the election returns of precincts covered by the certificate of canvass: Provided, That certified print copies of election returns or certificates of canvass may be used for the purpose of verifying the existence of the discrepancy.

¹²⁶ An Act Amending Republic Act No. 8436, Entitled An Act Authorizing The Commission On Elections To Use An Automated Election System In The May 11, 1998 National Or Local Elections And In Subsequent National And Local Electoral Exercises, To Encourage Transparency, Credibility, Fairness And Accuracy Of Elections, Amending For The Purpose Batas Pambansa Blg. 881, As Amended, Republic Act No. 7166 And Other Related Election Laws, Providing Funds Therefor And For Other Purposes (2007).

¹²⁷ See discussions under Art. III, Sec. 10, Art. VI, Sec. 26, Art. VII, Sec. 4, and Art. IX-C, Sec. 2.

When the certificate of canvass, duly certified by the board of canvassers of each province, city or district, appears to be incomplete, the Senate President or the Chairman of the Commission, as the case may be, shall require the board of canvassers concerned to transmit by personal delivery, the election returns from polling places that were not included in the certificate of canvass and supporting statements. Said election returns shall be submitted by personal delivery within two (2) days from receipt of notice.

When it appears that any certificate of canvass or supporting statement of votes by city/municipality or by precinct bears erasures or alteration which may cast doubt as to the veracity of the number of votes stated herein and may affect the result of the election, upon request of the presidential, vice presidential or senatorial candidate concerned or his party, Congress or the Commission *en banc*, as the case may be, shall, for the sole purpose of verifying the actual number of votes cast for president, vice president or senator, count the votes as they appear in the copies of the election returns submitted to it.

In case of any discrepancy, incompleteness, erasure or alteration as mentioned above, the procedure on pre-proclamation controversies shall be adopted and applied as provided in Sections 17, 18, 19 and 20.

Any person who presents in evidence a simulated copy of an election return, certificate of canvass or statement of votes, or a printed copy of an election return, certificate of canvass or statement of votes bearing a simulated certification or a simulated image, shall be guilty of an election offense and shall be penalized in accordance with Batas Pambansa Blg. 881.

...

Sec. 38. Section 15 of Republic Act No. 7166 is hereby amended to read as follows:

Sec. 15. Pre-proclamation Cases in Elections for President, Vice President, Senator, and Member of the House of Representatives. - For purposes of the elections for president, vice president, senator, and member of the House of Representatives, no pre-proclamation cases shall be allowed on matters relating to the preparation, transmission, receipt, custody and appreciation of election returns or the certificates of canvass, as the case may be, except as provided for in Section 30 hereof. However, this does not preclude the authority of the appropriate canvassing body *motu proprio* or upon written complaint of an interested person to correct manifest errors in the certificate of canvass or election returns before it.

Questions affecting the composition or proceedings of the board of canvassers may be initiated in the board or directly with the Commission in accordance with Section 19 hereof. Any objection on the election returns before the city or municipal board of canvassers, or on the municipal certificates of canvass before the provincial board of canvassers or district board of canvassers in Metro Manila Area, shall be specifically noticed in the minutes of the respective proceedings.

The issue raised in the **BANAT Party-list** case, with respect to these two provisions of RA 9369, was whether they violated **Section 17, Article VI and Section 4 (7), Article VII** of the Constitution. Justice Carpio, for the Court *en banc*, ruled:

Sections 37 and 38 do not violate Section 17, Article VI and Paragraph 7, Section 4, Article VII of the Constitution

Petitioner argues that Sections 37 and 38 violate the Constitution by impairing the powers of the Presidential Electoral Tribunal (PET) and the Senate Electoral Tribunal (SET). According to petitioner, under the amended provisions, Congress as the National Board of Canvassers for the election of President and Vice President (Congress), and the COMELEC *en banc* as the National Board of Canvassers (COMELEC *en banc*), for the election of Senators may now entertain pre-proclamation cases in the election of the President, Vice President, and Senators. Petitioner concludes that in entertaining pre-proclamation cases, Congress and the COMELEC *en banc* undermine the independence and encroach upon the jurisdiction of the PET and the SET.

The COMELEC maintains that the amendments introduced by Section 37 pertain only to the adoption and application of the procedures on pre-proclamation controversies in case of any discrepancy, incompleteness, erasure or alteration in the certificates of canvass. The COMELEC adds that Section 37 does not provide that Congress and the COMELEC *en banc* may now entertain pre-proclamation cases for national elective posts.

OSG argues that the Constitution does not prohibit pre-proclamation cases involving national elective posts. According to the OSG, only Section 15 of RA 7166¹²⁸ expressly disallows

¹²⁸ Sec. 15 of RA 7166 provides: Sec. 15. Pre-proclamation Cases Not Allowed in Elections

pre-proclamation cases involving national elective posts but this provision was subsequently amended by Section 38 of RA 9369.

In *Pimentel III v. COMELEC*,¹²⁹ we already discussed the implications of the amendments introduced by Sections 37 and 38 to Sections 15 and 30¹³⁰ of RA 7166, respectively and we declared:

Indeed, this Court recognizes that by virtue of the amendments introduced by Republic Act No. 9369 to Sections 15 and 30 of Republic Act No. 7166, pre-proclamation cases involving the

for President, Vice President, Senator, and Member of the House of Representatives. - For purposes of the election for President, Vice President, Senator and Member of the House of Representatives, no pre-proclamation cases shall be allowed on matters relating to the preparation, transmission, receipt, custody and appreciation of the election returns or the certificates of canvass, as the case may be. However, this does not preclude the authority of the appropriate canvassing body *motu proprio* or upon written complaint of an interested person to correct manifest errors in the certificate of canvass or election returns before it.

Questions affecting the composition or proceedings of the board of canvassers may be initiated in the board or directly with the Commission in accordance with Section 19 hereof.

Any objection on the election returns before the city or municipal board of canvassers, or on the municipal certificates of canvass before the provincial board of canvassers or district board of canvassers in Metro Manila Area, shall be specifically noticed in the minutes of their respective proceedings.

¹²⁹ G.R. No. 178413, 13 March 2008, 548 SCRA 169.

¹³⁰ Sec. 30 of RA 7166 provides: Sec. 30. Congress as the National Board of Canvassers for the Election of President and Vice President; Determination of Authenticity and Due Execution of Certificates of Canvass. - Congress shall determine the authenticity and due execution of the certificates of canvass for President and Vice President as accomplished and transmitted to it by the local board of canvassers, on a showing that: (1) each certificate of canvass was executed, signed and thumbmarked by the chairman and members of the board of canvassers and transmitted or caused to be transmitted to Congress by them; (2) each certificate of canvass contains the name of all of the candidates for President and Vice President and their corresponding votes in words and in figures; and (3) there exists no discrepancies in other authentic copies of the certificate of canvass or discrepancy in the votes of any candidate in words and figures in the same certificate.

When the certificate of canvass, duly certified by the board of canvassers of each province, city or district, appears to be incomplete, the Senate President shall require the board of canvassers concerned to transmit by personal delivery, the election returns from polling places that were not included in the certificate of canvass and supporting statements. Said election returns shall be submitted by personal delivery within two days from receipt of notice.

When it appears that any certificate of canvass or supporting statement of votes by precinct bears erasures or alterations which may cast doubt as to the veracity of the number of votes stated therein and may affect the result of the election, upon request of the Presidential or Vice Presidential candidate concerned or his party, Congress shall, for the sole purpose of verifying the actual number of votes cast for President and Vice President, count the votes as they appear in the copies of the election returns submitted to it.

authenticity and due execution of certificates of canvass are now allowed in elections for President, Vice-President, and Senators. The intention of Congress to treat a case falling under Section 30 of Republic Act No. 7166, as amended by Republic Act No. 9369, as a pre-proclamation case is apparent in the fourth paragraph of the said provision which adopts and applies to such a case the same procedure provided under Sections 17, 18, 19 and 20 of Republic Act No. 7166 on pre-proclamation controversies.

In sum, in [the] elections for President, Vice-President, Senators and Members of the House of Representatives, the general rule is still that pre-proclamation cases on matters relating to the preparation, transmission, receipt, custody and appreciation of election returns or certificates of canvass are still prohibited. As with other general rules, there are recognized exceptions to the prohibition, namely: (1) correction of manifest errors; (2) questions affecting the composition or proceeding of the board of canvassers; and (3) determination of the authenticity and due execution of certificates of canvass as provided in Section 30 of Republic Act No. 7166, as amended by Republic Act No. 9369.¹³¹

In the present case, Congress and the COMELEC *en banc* do not encroach upon the jurisdiction of the PET and the SET. **There is no conflict of jurisdiction since the powers of Congress and the COMELEC *en banc*, on one hand, and the PET and the SET, on the other, are exercised on different occasions and for different purposes.** The PET is the sole judge of all contests relating to the election, returns and qualifications of the President or Vice President. The SET is the sole judge of all contests relating to the election, returns, and qualifications of members of the Senate. The jurisdiction of the PET and the SET can only be invoked once the winning presidential, vice presidential or senatorial candidates have been proclaimed. On the other hand, under Section 37, Congress and the COMELEC *en banc* shall determine only the authenticity and due execution of the certificates of canvass. Congress and the COMELEC *en banc* shall exercise this power before the proclamation of the winning presidential, vice presidential, and senatorial candidates.

¹³¹ Pimentel III v. COMELEC, G.R. No. 178413, 13 March 2008, 548 SCRA 169, 189-191.

Section 18. There shall be a Commission on Appointments consisting of the President of the Senate, as *ex officio* Chairman, twelve Senators, and twelve Members of the House of Representatives, elected by each House on the basis of proportional representation from the political parties and parties or organizations registered under the party-list system represented therein. The Chairman of the Commission shall not vote, except in case of a tie. The Commission shall act on all appointments submitted to it within thirty session days of the Congress from their submission. The Commission shall rule by a majority vote of all the Members.

Composition

PIMENTEL v. HOUSE OF REPRESENTATIVES ELECTORAL TRIBUNAL, G.R. No. 141489, and **PIMENTEL v. COMMISSION ON APPOINTMENTS**, G.R. No. 141490, November 29, 2002, 441 Phil. 492, were two original petitions for prohibition and *mandamus* with prayer for writ of preliminary injunction. Petitioners assailed the composition of the HRET and the CA, and prayed that respondents “alter, reorganize, reconstitute and reconfigure” the composition of the HRET and the CA to include party-list representatives in accordance with Sections 17 and 18, Article VI of the Constitution and Republic Act No. 7941, otherwise known as the Party-List System Act. The petitions were dismissed by the Court *en banc*. Speaking through Justice Carpio, the Court, nevertheless, had occasion to discuss **Sections 17 and 18 of this Article VI, on the composition of the HRET and CA:**

... the House (of Representatives) constituted its HRET and CA contingent¹³² by electing its representatives to these two constitutional bodies. In practice, the procedure involves the nomination by the political parties of House members who are to occupy seats in the HRET and the CA. From available records, it does not appear that after the May 11, 1998 elections the party-list groups in the House nominated any of their representatives to the HRET or the CA. As of the date of filing of the instant petitions, the House contingents to the HRET and the CA were composed solely of district representatives belonging to the different political parties.

On January 18, 2000, Senator Aquilino Q. Pimentel, Jr. wrote two letters addressed to then Senate President Blas F. Ople, as

¹³² Const., Art. VI, Sec. 19.

Chairman of the CA, and to Associate Justice of the Supreme Court Jose A. R. Melo (now retired), as Chairman of the HRET. The letters requested Senate President Ople and Justice Melo to cause the restructuring of the CA and the HRET, respectively, to include party-list representatives to conform to Sections 17 and 18, Article VI of the 1987 Constitution.

In its meeting of January 20, 2000, the HRET resolved to direct the Secretary of the Tribunal to refer Senator Pimentel's letter to the Secretary-General of the House of Representatives. On the same day, HRET Secretary Daisy B. Panga-Vega, in an Indorsement of even date, referred the letter to House of Representatives Secretary General Roberto P. Nazareno.

On February 2, 2000, petitioners filed with this Court their Petitions for Prohibition, *Mandamus* and Preliminary Injunction (with Prayer for Temporary Restraining Order) against the HRET, its Chairman and Members, and against the CA, its Chairman and Members. Petitioners contend that, under the Constitution and the Party-List System Act, party-list representatives should have 1.2 or at least 1 seat in the HRET, and 2.4 seats in the CA. Petitioners charge that respondents committed grave abuse of discretion in refusing to act positively on the letter of Senator Pimentel. In its Resolution of February 8, 2000, the Court *en banc* directed the consolidation of G.R. No. 141490 with G.R. No. 141489.

On February 11, 2000, petitioners filed in both cases a motion to amend their petitions to implead then Speaker Manuel B. Villar, Jr. as an additional respondent, in his capacity as Speaker of the House and as one of the members of the CA. The Court granted both motions and admitted the amended petitions.

Senator Pimentel filed the instant petitions on the strength of his oath to protect, defend and uphold the Constitution and in his capacity as taxpayer 'and as a member of the CA. He was joined by 5 party-list representatives from APEC, ABA, ABANSE, AKBAYAN and COOP-NATCCO as co-petitioners.

Petitioners cite as basis Sections 17 and 18, Article VI of the 1987 Constitution...

Petitioners also invoke the following provision of Section 11 of Republic Act No. 7941:

Sec. 11. Number of Party-List Representatives. - The party-list representatives shall constitute twenty per centum (20%) of the total number of the members of the House of Representatives including those under the party-list. ...¹³³

According to the Solicitor General's Consolidated Comment, at the time petitioners filed the instant petitions the House had 220 members, 14 of whom were party-list representatives, constituting 6.3636% of the House. Of the remaining 206 district representatives affiliated with different political parties, 151 belonged to LAMP (68.6354%), 36 belonged to LAKAS (16.3636%), 13 to the Liberal Party (5.9090%), 1 member (0.4545%) each to KBL, PDRLM, Aksyon Demokratiko, Reporma and PROMDI, and 1 representative was an independent.

In their Reply to Consolidated Comment, petitioners alleged that, following the Solicitor General's computation, the LP and LAKAS were over-represented in the HRET and the CA. Petitioners particularly assail the presence of one LP representative each in the HRET and the CA, and maintain that the LP representatives should be ousted and replaced with nominees of the 14 party-list representatives.

The Issues

Petitioners raise the following issues:

1. Whether the present composition of the House Electoral Tribunal violates the constitutional requirement of proportional representation because there are no party-list representatives in the HRET.
2. Whether the present membership of the House in the Commission on Appointments violates the constitutional requirement of proportional representation because there are no party-list representatives in the CA.
3. Whether the refusal of the HRET and the CA to reconstitute themselves to include party-list representatives constitutes grave abuse of discretion.

On the other hand, the Solicitor General argues that the instant petitions are procedurally defective and substantially lacking in merit for having been filed prematurely, thus:

¹³³ RA No. 7941.

It is a generally accepted principle that the averments in the pleading determine the existence of a cause of action. In the instant petitions, petitioners failed to aver that they or any one of them was elected by a party or organization registered under the party-list system as a Member of the HRET or CA to represent said party or organization under the party-list system of the House of Representatives.

The Ruling of the Court

Petitioners urge the Court to rule on the issues raised in the petitions under review, citing the following pronouncement in *Guingona Jr. v. Gonzales*:¹³⁴

Where constitutional issues are properly raised in the context of the alleged facts, procedural questions acquire a relatively minor significance, and the transcendental importance to the public of the case demands that they be settled promptly and definitely brushing aside ... technicalities of procedure.

Petitioners' reliance on *Guingona, Jr. v. Gonzales* is misplaced. The "procedural questions" that petitioners want the Court to brush aside are not mere technicalities but substantive matters that are specifically provided for in the constitutional provisions cited by petitioners.

The Constitution expressly grants to the House of Representatives the prerogative, within constitutionally defined limits, to choose from among its district and party-list representatives those who may occupy the seats allotted to the House in the HRET and the CA. Section 18, Article VI of the Constitution explicitly confers on the Senate and on the House the authority to elect among their members those who would fill the 12 seats for Senators and 12 seats for House members in the Commission on Appointments. Under Section 17, Article VI of the Constitution, each chamber of Congress exercises the power to choose, within constitutionally defined limits, who among their members would occupy the allotted 6 seats of each chamber's respective electoral tribunal.

These constitutional provisions are reiterated in Rules 3 and 4

¹³⁴ 214 SCRA 789 (1992).

(a) of the 1998 Rules of the House of Representatives Electoral Tribunal, to wit:

Rule 3. Composition. - The Tribunal shall be composed of nine Members, three of whom shall be Justices of the Supreme Court to be designated by the Chief Justice, and the remaining six shall be Members of the House of Representatives who shall be chosen on the basis of proportional representation from the political parties and the parties or organizations registered under the party-list system represented therein. The Senior Justice in the Tribunal shall be its Chairman.

Rule 4. Organization. - (a) Upon the designation of the Justices of the Supreme Court and the election of the Members of the House of Representatives who are to compose the House of Representatives Electoral Tribunal pursuant to Sections 17 and 19 of Article VI of the Constitution, the Tribunal shall meet for its organization and adoption of such resolutions as it may deem proper.

Likewise, Section 1 of the Rules of the Commission on Appointments provides:

Sec. 1. Composition of the Commission On Appointments. Within thirty (30) days after both Houses of Congress shall have organized themselves with the election of the Senate President and the Speaker of the House of Representatives, the Commission on Appointments shall be constituted. It shall be composed of twelve (12) Senators and twelve (12) members of the House of Representatives, elected by each House on the basis of proportional representation from the political parties and parties or organizations registered under the party-list system represented herein.

Thus, even assuming that party-list representatives comprise a sufficient number and have agreed to designate common nominees to the HRET and the CA, their primary recourse clearly rests with the House of Representatives and not with this Court. **Under Sections 17 and 18, Article VI of the Constitution, party-list representatives must first show to the House that they possess the required numerical strength to be entitled to seats in the HRET and the CA. Only if the House fails to comply with the directive of the Constitution on proportional representation of political parties in the HRET and the CA can the party-list representatives seek recourse to this Court under its**

power of judicial review. Under the doctrine of primary jurisdiction, prior recourse to the House is necessary before petitioners may bring the instant case to the court. Consequently, petitioners' direct recourse to this Court is premature.

The discretion of the House to choose its members to the HRET and the CA is not absolute, being subject to the mandatory constitutional rule on proportional representation.¹³⁵ However, under the doctrine of separation of powers, the Court may not interfere with the exercise by the House of this constitutionally mandated duty, absent a clear violation of the Constitution or grave abuse of discretion amounting to lack or excess of jurisdiction.¹³⁶ Otherwise, the doctrine of separation of powers calls for each branch of government to be left alone to discharge its duties as it sees fit.¹³⁷ Neither can the Court speculate on what action the House may take if party-list representatives are duly nominated for membership in the HRET and the CA.

The instant petitions are bereft of any allegation that respondents prevented the party-list groups in the House from participating in the election of members of the HRET and the CA. Neither does it appear that after the May 11, 1998 elections, the House barred the party-list representatives from seeking membership in the HRET or the CA. Rather, it appears from the available facts that the party-list groups in the House at that time simply refrained from participating in the election process. The party-list representatives did not designate their nominees even up to the time they filed the instant petitions, with the predictable result that the House did not consider any party-list representative for election to the HRET or the CA. As the primary recourse of the party-list representatives lies with the House of Representatives, the Court cannot resolve the issues presented by petitioners at this time.

Moreover, it is a well-settled rule that a constitutional question will not be heard and resolved by the courts unless the following requirements of judicial inquiry concur: (1) there must be an actual controversy; (2) the person or party raising

¹³⁵ Guingona, Jr. v. Gonzales, 219 SCRA 326 (1993); Daza v. Singson, 180 SCRA 496 (1989).

¹³⁶ Const., Art. VIII, Sec. 1.

¹³⁷ Guingona, Jr. v. CA, 292 SCRA 402 (1998).

the constitutional issue must have a personal and substantial interest in the resolution of the controversy; (3) the controversy must be raised at the earliest reasonable opportunity; and (4) the resolution of the constitutional issue must be indispensable to the final determination of the controversy.¹³⁸

The five party-list representatives who are petitioners in the instant case have not alleged that they are entitled to, and have been unlawfully deprived of, seats in the HRET or the CA. Neither have they claimed that they have been nominated by the party-list groups in the House to the HRET or the CA. As such, they do not possess the personal and substantial interest required to confer them with *locus standi*. The party raising the constitutional issue must have “such personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court depends for illumination of difficult constitutional questions.”¹³⁹

We likewise find no grave abuse in the action or lack of action by the HRET and the CA in response to the letters of Senator Pimentel. Under Sections 17 and 18 of Article VI of the 1987 Constitution and their internal rules, the HRET and the CA are bereft of any power to reconstitute themselves.

Finally, the issues raised in the petitions have been rendered academic by subsequent events. On May 14, 2001, a new set of district and party-list representatives were elected to the House. The Court cannot now resolve the issue of proportional representation in the HRET and the CA based on the “present composition” of the House of Representatives as presented by petitioners and the Solicitor General. With the May 14, 2001 elections, it is certain that the composition of the House has changed. In the absence of a proper petition assailing the present composition of the HRET and the CA, the instant petitions must fail. Otherwise, for the Court to rule on the instant petitions at this time would be tantamount to rendering an advisory opinion, which is outside our jurisdiction.¹⁴⁰

¹³⁸ Integrated Bar of the Philippines v. Zamora, 338 SCRA 81 (2000); Board of Optometry v. Colet, 260 SCRA 88 (1996); Fernandez v. Torres, 215 SCRA 489 (1992); Garcia v. Executive Secretary, 204 SCRA 516 (1991); People v. Vera, 65 Phil. 56 (1937).

¹³⁹ Integrated Bar of the Philippines v. Zamora, 338 SCRA 81 (2000)

¹⁴⁰ Guingona, Jr. v. CA, 292 SCRA 402 (1998).

Commission on Appointments

In **PIMENTEL v. ERMITA**, G.R. No. 164978, October 13, 2005, 509 Phil. 567,¹⁴¹ a petition for *certiorari* and prohibition to declare unconstitutional the appointments issued by then President Gloria Macapagal-Arroyo to acting secretaries of certain departments, Justice Carpio explained:

The power to appoint is essentially executive in nature, and the legislature may not interfere with the exercise of this executive power except in those instances when the Constitution expressly allows it to interfere¹⁴²... However, even if the Commission on Appointments is composed of members of Congress, the exercise of its powers is executive and not legislative. The Commission on Appointments does not legislate when it exercises its power to give or withhold consent to presidential appointments. Thus:

... The Commission on Appointments is a creature of the Constitution. Although its membership is confined to members of Congress, said Commission is independent of Congress. The powers of the Commission do not come from Congress, but emanate directly from the Constitution. Hence, it is not an agent of Congress. In fact, the functions of the Commissioner are purely executive in nature. ...¹⁴³

Section 19. The Electoral Tribunals and the Commission on Appointments shall be constituted within thirty days after the Senate and the House of Representatives shall have been organized with the election of the President and the Speaker. The Commission on Appointments shall meet only while the Congress is in session, at the call of its Chairman or a majority of all its Members, to discharge such powers and functions as are herein conferred upon it.

Section 20. The records and books of accounts of the Congress shall be preserved and be open to the public in accordance with law, and such books shall be audited by the Commission on

¹⁴¹ See discussion under Art. VII.

¹⁴² See Joaquin G. Bernas, S.J., *The 1987 Constitution Of The Republic Of The Philippines: A Commentary* 768 (1996).

¹⁴³ *Cunanan v. Tan, Jr.*, G.R. No. L-19721, 10 May 1962, 5 SCRA 1. But see Justice Concepcion's Concurring Opinion in *Guevara v. Inocentes*, 123 Phil. 201, 211 (1966).

Audit which shall publish annually an itemized list of amounts paid to and expenses for each Member.

Section 21. The Senate or the House of Representatives or any of its respective committees may conduct inquiries in aid of legislation in accordance with its duly published rules of procedure. The rights of persons appearing in, or affected by, such inquiries shall be respected.

In NERI v. SENATE COMMITTEE ON ACCOUNTABILITY OF PUBLIC OFFICERS AND INVESTIGATIONS, G.R. No. 180643, March 25, 2008, 572 Phil. 554,¹⁴⁴ Justice Carpio had occasion to discuss inquiries in aid of legislation in his dissenting and concurring¹⁴⁵ opinion:

Overview of Legislative Power of Inquiry

The Legislature's fundamental function is to enact laws and oversee the implementation of existing laws. The Legislature must exercise this fundamental function consistent with the people's right to information on the need for the enactment of laws and the status of their implementation. The principal tool used by the Legislature in exercising this fundamental function is the power of inquiry which is inherent in every legislative body.¹⁴⁶ Without the power of inquiry, the Legislature cannot discharge its fundamental function and thus becomes inutile.

The Constitution expressly grants to the "Senate,

¹⁴⁴ See discussion under Art. VII, Sec. 1.

¹⁴⁵ Justice Carpio dissented from the majority opinion's ruling on the issue of executive privilege but concurred with the ruling that the rules of procedure were void for lack of published rules governing the conduct of inquiries in aid of legislation and the contempt order against Secretary Romulo L. Neri was, consequently, void. See discussion under Art. VII, Sec. 1.

¹⁴⁶ *McGrain v. Daugherty*, 273 U.S. 135, 174-175 (1927). The U.S. Supreme Court stated: We are of opinion that the power of inquiry - with process to enforce it - is an essential and appropriate auxiliary to the legislative function. It was so regarded and employed in American Legislatures before the Constitution was framed and ratified. ... A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information - which not infrequently is true - recourse must be had to others who possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed.

the House of Representatives or any of its respective committees” the power to “conduct inquiries in aid of legislation.” This power of legislative inquiry is so searching and extensive in scope that the inquiry need not result in any potential legislation,¹⁴⁷ and may even end without any predictable legislation.¹⁴⁸ The phrase “inquiries in aid of legislation” refers to inquiries to aid the enactment of laws, inquiries to aid in overseeing the implementation of laws, and even inquiries to expose corruption, inefficiency or waste in executive departments.¹⁴⁹

Thus, the Legislature can conduct inquiries not specifically to enact laws, but specifically to oversee the implementation of laws. This is the mandate of various legislative oversight committees which admittedly can conduct inquiries on the status of the implementation of laws. In the exercise of the legislative oversight function, there is always the potential, even if not expressed or predicted, that the oversight committees may discover the need to improve the laws they oversee and thus recommend amendment of the laws. This is sufficient reason for the valid exercise of the power of legislative inquiry. Indeed, the oversight function of the Legislature may at times be as

¹⁴⁷ *McGrain v. Daugherty*, 273 U.S. 135, 177 (1927). The U.S. Supreme Court stated: It is quite true that the resolution directing the investigation does not in terms avow that it is intended to be in aid of legislation; but it does show that the subject to be investigated was the administration of the Department of Justice - whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes and enforce appropriate remedies against the wrongdoers; specific instances of alleged neglect being recited. Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit. This becomes manifest when it is reflected that the functions of the Department of Justice, the powers and duties of the Attorney General, and the duties of his assistants are all subject to regulation by congressional legislation, and that the department is maintained and its activities are carried on under such appropriations as in the judgment of Congress are needed from year to year.

¹⁴⁸ *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 509 (1975). The U.S. Supreme Court declared: To be a valid legislative inquiry there need be no predictable end result.

¹⁴⁹ *Watkins v. United States*, 354 U.S. 178, 187 (1957). The U.S. Supreme Court declared: [T]he power of Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.

important as its law-making function.¹⁵⁰

Aside from the purpose of the inquiry, the Constitution imposes two other limitations on the power of legislative inquiry. One, the rules of procedure for the inquiry must be duly published. Publication of the rules of the inquiry is an essential requirement of due process. Two, the rights of persons appearing before the investigating committees, or affected by such inquiries, must be respected. These rights include the right against self-incrimination,¹⁵¹ as well as the right to privacy of communications and correspondence of a private nature.¹⁵² The power of legislative inquiry does not reach into the private affairs of citizens.¹⁵³

Also protected is the right to due process, which means that a witness must be given “fair notice” of the subject of the legislative inquiry. Fair notice is important because the witness may be cited in contempt, and even detained, if he refuses or fails to answer.¹⁵⁴ Moreover, false testimony before a legislative body is a crime.¹⁵⁵ Thus, the witness must be sufficiently informed of the nature of the inquiry so the witness can reasonably prepare for possible questions of the legislative committee. To avoid doubts on whether there is fair notice, the witness must be given in advance the questions pertaining to the basic nature of the inquiry.¹⁵⁶ From these advance questions, the witness can infer other follow-up or relevant questions that the legislative committee may ask in the course of the inquiry.

The Legislature has the inherent power to enforce by compulsion its power of inquiry.¹⁵⁷ The Legislature can enforce its power of

¹⁵⁰ 1 Laurence H. Tribe, *American Constitutional Law* 784, 790-791 (3rd Edition). Professor Tribe comments thus: ... it is important to note an implicit or ancillary power belonging to Congress that is at times every bit as important as the power to which it is supposedly appurtenant. That, of course, is the power of investigation, typically and most dramatically exemplified by hearings, some of them in executive session but most of them in the glare of klieg lights and with the whole nation watching. Such investigations have served an important role in ventilating issues of profound national concern.;

Louis Fisher & David Gray Adler, *American Constitutional Law* 227 (7th Edition). Fisher and Adler write: Oversight is not subordinate to legislation.

¹⁵¹ Const., Art. III, Sec. 17.

¹⁵² Const., Art. III, Sec. 3(1).

¹⁵³ *Kilbourn v. Thompson*, 103 U.S. 168 (1880).

¹⁵⁴ *Watkins v. United States*, 354 U.S. 178 (1957).

¹⁵⁵ Article 183, Revised Penal Code.

¹⁵⁶ *Watkins v. United States*, 354 U.S. 178 (1957).

¹⁵⁷ *Arnault v. Nazareno*, 87 Phil. 29 (1950).

inquiry through its own sergeant-at-arms without the aid of law enforcement officers of the Executive¹⁵⁸ or resort to the courts.¹⁵⁹ The two principal means of enforcing the power of inquiry are for the Legislature to order the arrest of a witness who refuses to appear,¹⁶⁰ and to detain a witness who refuses to answer.¹⁶¹ A law that makes a crime the refusal to appear before the Legislature does not divest the Legislature of its inherent power to arrest a recalcitrant witness.¹⁶²

The inherent power of the Legislature to arrest a recalcitrant witness remains despite the constitutional provision that “no warrant of arrest shall issue except upon probable cause to be determined personally by the judge.” The power being inherent in the Legislature, essential for self-preservation,¹⁶³ and not expressly withdrawn in the Constitution, the power forms part of the “legislative power ... vested in the Congress.” The Legislature asserts this power independently of the Judiciary.¹⁶⁴ A grant of legislative power in the Constitution is a grant of all legislative powers, including inherent powers.¹⁶⁵

¹⁵⁸ *McGrain v. Daugherty*, 273 U.S. 135 (1927). See also *Negros Oriental II Electric Cooperative, Inc. v. Sangguniang Panlungsod of Dumaguete*, G.R. No. 72492, 5 November 1987, 155 SCRA 421, which ruled that local government legislative councils have no inherent power to enforce by compulsion their power of inquiry in aid of ordinance-making.

¹⁵⁹ *Arnault v. Balagtas*, 97 Phil. 358, 370 (1955). The Court stated: When the framers of the Constitution adopted the principle of separation of powers, making each branch supreme within the realm of its respective authority, it must have intended each department's authority to be full and complete, independently of the other's authority or power. And how could the authority and power become complete if for every act of refusal, every act of defiance, every act of contumacy against it, the legislative body must resort to the judicial department for the appropriate remedy, because it is impotent by itself to punish or deal therewith, with the affronts committed against its authority or dignity.

¹⁶⁰ *Lopez v. De los Reyes*, 55 Phil. 170 (1930).

¹⁶¹ *Arnault v. Nazareno*, 87 Phil. 29 (1950).

¹⁶² *McGrain v. Daugherty*, 273 U.S. 135 (1927). The U.S. Supreme Court quoted *In re Chapman* (166 U.S. 661), thus: We grant that Congress could not divest itself, or either of its houses, of the essential and inherent power to punish for contempt, in cases to which the power of either house properly extended ...;

Lopez v. De los Reyes, 55 Phil. 170 (1930). The Court stated that “the Philippine Legislature could not divest either of its Houses of the inherent power to punish for contempt.”

¹⁶³ *Lopez v. De los Reyes*, 55 Phil. 170, 179-180 (1930). The Court declared that the Legislature's “power to punish for contempt rests solely upon the right of self-preservation.”; *Negros Oriental II Electric Cooperative v. Sangguniang Panlungsod of Dumaguete*, G.R. No. 72492, 5 November 1987, 155 SCRA 421, 430. The Court stated: The exercise by the legislature of the contempt power is a matter of self-preservation as that branch of the government vested with the legislative power, independently of the judicial branch, asserts its authority and punishes contempts thereof.

¹⁶⁴ *Lopez v. De los Reyes*, 55 Phil. 170 (1930).

¹⁶⁵ *Marcos v. Manglapus*, G.R. No. 88211, 15 September 1989, 177 SCRA 668, and 27 October 1989, 178 SCRA 760.

The Legislature can cite in contempt and order the arrest of a witness who fails to appear pursuant to a subpoena *ad testificandum*. There is no distinction between direct and indirect contempt of the Legislature because both can be punished *motu proprio* by the Legislature upon failure of the witness to appear or answer. Contempt of the Legislature is different from contempt of court.¹⁶⁶

...

Whether the Senate's Rules of Procedure on Inquiries Have Been Published

The Constitution requires that the Legislature publish its rules of procedure on the conduct of legislative inquiries in aid of legislation. There is no dispute that the last publication of the Rules of Procedure of the Senate Governing the Inquiries in Aid of Legislation was on 1 December 2006 in the Philippine Star and Philippine Daily Inquirer during the 13th Congress. There is also no dispute that the Rules of Procedure have not been published in newspapers of general circulation during the current 14th Congress. However, the Rules of Procedure have been published continuously in the website of the Senate since at least the 13th Congress. In addition, the Senate makes the Rules of Procedure available to the public in pamphlet form.

Petitioner assails the validity of the Rules of Procedure because they have not been duly published for the 14th Congress. Respondents counter that the Senate is a continuing legislative

¹⁶⁶ Lopez v. De los Reyes, 55 Phil. 170, 178 (1930). The Court declared: ... In the second place, the same act could be made the basis for contempt proceedings and for a criminal prosecution. It has been held that a conviction and sentence of a person, not a member, by the House of Representatives of the United States Congress, for an assault and battery upon a member, is not a bar to a subsequent criminal prosecution by indictment for the offense. (U.S. v. Houston [1832], 26 Fed. Cas., 379.) In the third place, and most important of all, the argument fails to take cognizance of the purpose of punishment for contempt, and of the distinction between punishment for contempt and punishment for crime. Let us reflect on this last statement for a moment. The implied power to punish for contempt is coercive in nature. The power to punish crimes is punitive in nature. The first is a vindication by the House of its own privileges. The second is a proceeding brought by the State before the courts to punish offenders. The two are distinct, the one from the other.; Arnault v. Balagtas, 97 Phil. 358, 370 (1955). The Court declared: The process by which a contumacious witness is dealt with by the legislature in order to enable it to exercise its legislative power or authority must be distinguished from the judicial process by which offenders are brought to the courts of justice for the meting of the punishment which the criminal law imposes upon them. The former falls exclusively within the legislative authority, the latter within the domain of the courts; because the former is a necessary concomitant of the legislative power or process, while the latter has to do with the enforcement and application of the criminal law.

body. Respondents argue that as a continuing body, the Senate does not have to republish the Rules of Procedure because publication of the Rules of Procedure in the 13 Congress dispenses with republication of the Rules of Procedure in subsequent Congresses. The issue then turns on whether the Senate under the 1987 Constitution is a continuing body.

In *Arnault v. Nazareno*,¹⁶⁷ decided under the 1935 Constitution, this Court ruled that “the Senate of the Philippines is a continuing body whose members are elected for a term of six years and so divided that the seats of only one-third become vacant every two years, two-thirds always continuing into the next Congress save as vacancies may occur thru death or resignation.” To act as a legislative body, the Senate must have a quorum, which is a majority of its membership.¹⁶⁸ Since the Senate under the 1935 Constitution always had two-thirds of its membership filled up except for vacancies arising from death or resignation, the Senate always maintained a quorum to act as a legislative body. Thus, the Senate under the 1935 Constitution continued to act as a legislative body even after the expiry of the term of one-third of its members. This is the rationale in holding that the Senate under the 1935 Constitution was a continuing legislative body.¹⁶⁹

The present Senate under the 1987 Constitution is no longer a continuing legislative body. The present Senate has twenty-four members, twelve of whom are elected every three years for a term of six years each. Thus, the term of twelve Senators expires every three years, leaving less than a majority of Senators to continue into the next Congress. The 1987 Constitution, like the 1935 Constitution, requires a majority of Senators to “constitute a quorum to do business.” Applying the same reasoning in *Arnault v. Nazareno*, the Senate under the 1987 Constitution is

¹⁶⁷ 87 Phil. 29 (1950).

¹⁶⁸ Const. (1935), Art. VI, Sec. 10(2); Const. Art. VI, Sec. 16(2). Both the 1935 and 1987 Constitutions provide that “[a] majority of each House shall constitute a quorum to do business.”

¹⁶⁹ See also Attorney General Ex. Rel. *Werts v. Rogers, et al*, 56 N.J.L. 480, 652 (1844). The Supreme Court of New Jersey declared: [T]he vitality of the body depends upon the existence of a quorum capable of doing business. That quorum constitutes a senate. Its action is the expression of the will of the senate, and no authority can be found which states any other conclusion. All difficulty and confusion in constitutional construction is avoided by applying the rule ... that the continuity of the body depends upon the fact that in the senate a majority constitutes a quorum, and, as there is always more than a quorum of qualified senators holding seats in that body, its organic existence is necessarily continuous. ... The senate of the United States remains a continuous body because two-thirds of its members are always, in contemplation of the constitution, in existence.

not a continuing body because less than majority of the Senators continue into the next Congress. The consequence is that the Rules of Procedure must be republished by the Senate after every expiry of the term of twelve Senators.

The publication of the Rules of Procedure in the website of the Senate, or in pamphlet form available at the Senate, is not sufficient under the *Tañada v. Tuvera*¹⁷⁰ ruling which requires publication either in the Official Gazette or in a newspaper of general circulation. The Rules of Procedure even provide that the rules “shall take effect seven (7) days after publication in two (2) newspapers of general circulation,” precluding any other form of publication. Publication in accordance with *Tañada* is mandatory to comply with the due process requirement because the Rules of Procedure put a person’s liberty at risk. A person who violates the Rules of Procedure could be arrested and detained by the Senate.

Due process requires that “fair notice” be given to citizens before rules that put their liberty at risk take effect. The failure of the Senate to publish its Rules of Procedure as required in Section 21, Article VI of the Constitution renders the Rules of Procedure void. Thus, the Senate cannot enforce its Rules of Procedure.

Whether the Senate Committees Validly Ordered the Arrest of Petitioner

The Senate and its investigating committees have the implied power to cite in contempt and order the arrest of a witness who refuses to appear despite the issuance of a subpoena. The Senate can enforce the power of arrest through its own Sergeant-at-Arms. In the present case, based on the Minutes of Meetings and other documents submitted by respondents, the majority of the regular members of each of the respondent Committees voted to cite petitioner in contempt and order his arrest. However, the Senate’s Order of 30 January 2008 citing petitioner in contempt and ordering his arrest is void due to the non-publication of the Rules of Procedure.

The arrest of a citizen is a deprivation of liberty. The Constitution prohibits deprivation of liberty without due process of law. The

¹⁷⁰ 230 Phil. 528 (1986), reiterated in *National Electrification Administration, v. Gonzaga*, G.R. No. 158761, 4 December 2007; *NASECORE v. Energy Regulatory Commission*, G.R. No. 163935, 2 February 2006, 481 SCRA 480; *Dadole v. Commission on Audit*, 441 Phil. 532 (2002).

Senate or its investigating committees can exercise the implied power to arrest only in accordance with due process which requires publication of the Senate's Rules of Procedure. This Court has required judges to comply strictly with the due process requirements in exercising their express constitutional power to issue warrants of arrest.¹⁷¹ This Court has voided warrants of arrest issued by judges who failed to comply with due process. This Court can do no less for arrest orders issued by the Senate or its committees in violation of due process.

In **PIMENTEL v. SENATE COMMITTEE OF THE WHOLE**, G.R. No. 187714, March 8, 2011, 660 Phil. 202, discussed under Section 16 above, one of the issues raised in the petition for prohibition was whether publication of the Rules of the Senate Committee of the Whole was required for effectivity. Justice Carpio, for the Court *en banc*, again discussed **publication as a constitutional requirement** as being applicable only under this provision on **legislative inquiries**:

In Neri v. Senate Committee on Accountability of Public Officers and Investigations,¹⁷² the Court declared void unpublished rules of procedure in Senate inquiries insofar as such rules affect the rights of witnesses. The Court cited Section 21, Article VI of the Constitution...

The Court explained in the Resolution¹⁷³ denying the motion for reconsideration:

The language of Section 21, Article VI of the Constitution requiring that the inquiry be conducted in accordance with the duly published rules of procedure is categorical. It is incumbent upon the Senate to publish the rules of its legislative inquiries in each Congress or otherwise make the published rules clearly state that the same shall be effective in the subsequent Congresses or until they are amended or repealed to sufficiently put public on notice.

If it was the intention of the Senate for its present rules on legislative inquiries to be effective even in the next Congress, it could have easily adopted the same language it had used in its main rules regarding effectivity.

Lest the Court be misconstrued, it should likewise be stressed

¹⁷¹ Allado v. Diokno, G.R. No. 113630, 5 May 1994, 232 SCRA 192; Abdula v. Guiani, 382 Phil. 757 (2000).

¹⁷² G.R. No. 180643, 25 March 2008, 549 SCRA 77. See dissenting and concurring opinion of Justice Carpio excerpted above.

¹⁷³ G.R. No. 180643, 4 September 2008, 564 SCRA 152.

that not all orders issued or proceedings conducted pursuant to the subject Rules are null and void. Only those that result in violation of the rights of witnesses should be considered null and void, considering that the rationale for the publication is to protect the rights of the witnesses as expressed in Section 21, Article VI of the Constitution. Sans such violation, orders and proceedings are considered valid and effective.¹⁷⁴

In the recent case of *Gutierrez v. The House of Representatives Committee on Justice*,¹⁷⁵ the Court further clarified:

... inquiries in aid of legislation under Section 21, Article VI of the Constitution is the sole instance in the Constitution where there is a categorical directive to duly publish a set of rules of procedure. Significantly notable in *Neri* is that with respect to the issue of publication, the Court anchored its ruling on the 1987 Constitution's directive, without any reliance on or reference to the 1986 case of *Tañada v. Tuvera*. *Tañada* naturally could neither have interpreted a forthcoming 1987 Constitution nor had kept a tight rein on the Constitution's intentions as expressed through the allowance of either a categorical term or a general sense of making known the issuances.

Section 22. The heads of departments may, upon their own initiative, with the consent of the President, or upon the request of either House, as the rules of each House shall provide, appear before and be heard by such House on any matter pertaining to their departments. Written questions shall be submitted to the President of the Senate or the Speaker of the House of Representatives at least three days before their scheduled appearance. Interpellations shall not be limited to written questions, but may cover matters related thereto. When the security of the State or the public interest so requires and the President so states in writing, the appearance shall be conducted in executive session.

Section 23. (1) The Congress, by a vote of two-thirds of both Houses in joint session assembled, voting separately, shall have the sole power to declare the existence of a state of war.

¹⁷⁴ *Id.* at 230-231.

¹⁷⁵ G.R. No. 193459, 15 February 2011.

(2) In times of war or other national emergency, the Congress may, by law, authorize the President, for a limited period and subject to such restrictions as it may prescribe, to exercise powers necessary and proper to carry out a declared national policy. Unless sooner withdrawn by resolution of the Congress, such powers shall cease upon the next adjournment thereof.

In **LAGMAN v. MEDIALDEA**, G.R. No. 231658, July 04, 2017, 812 Phil. 179,¹⁷⁶ consolidated petitions¹⁷⁷ were filed with the Court for the review of the sufficiency of the factual basis of Proclamation No. 216 of President Rodrigo Roa Duterte, which declared a state of martial law and suspended the privilege of the writ of *habeas corpus* in the whole of Mindanao. The Court *en banc* found sufficient factual bases for the issuance of Proclamation No. 216 and declared the same constitutional. Justice Caprio **dissented**, and voted to partially grant the petitions, declare Proclamation No. 216 unconstitutional as to geographic areas of Mindanao outside of Marawi City, and constitutional only within Marawi City. In his **dissent**, Justice Carpio discussed the consequences of the proclamation of martial law. One such consequence was the application of this **Section 23, Article VI**:

... with the declaration of martial law, Congress may by law delegate to the President emergency powers such as the takeover of privately-owned public utilities or businesses affected with public interest.

Section 23, Article VI of the 1987 Constitution authorizes Congress to delegate by law powers to the President in times of “national emergency” ...

Of course, such time-bound delegation of emergency powers to the President must be embodied in a law enacted by Congress.

In *David v. Macapagal-Arroyo*,¹⁷⁸ this Court held that the term “emergency” in the above-quoted constitutional provision includes rebellion, to wit:

Emergency, as a generic term, connotes the existence of conditions suddenly intensifying the degree of existing danger to life or well-being beyond that which is accepted as normal.

¹⁷⁶ See discussion under Art. VII, Sec. 18.

¹⁷⁷ Consolidated with Cullamat v. Duterte, G.R. No. 231771 and Mohamad v. Medialdea, G.R. No. 231774.

¹⁷⁸ 522 Phil. 705 (2006).

Implicit in the definition are the elements of intensity, variety, and perception. Emergencies, as perceived by legislature or executive in the United States since 1933, have been occasioned by a wide range of situations, classifiable under three (3) principal heads: a) economic, b) natural disaster, and c) national security.

“Emergency,” as contemplated in our Constitution, is of the same breadth. It may include rebellion, economic crisis, pestilence or epidemic, typhoon, flood, or other similar catastrophe of nationwide proportions or effect. This is evident in the Records of the Constitutional Commission, thus:

MR. GASCON. Yes. What is the Committee’s definition of ‘national emergency’ which appears in Section 13, page 5? It reads:

When the common good so requires, the State may temporarily take over or direct the operation of any privately owned public utility or business affected with public interest.

MR. VILLEGAS. What I mean is threat from external aggression, for example, calamities or natural disasters.

MR. GASCON. There is a question by Commissioner de los Reyes. What about strikes and riots?

MR. VILLEGAS. Strikes, no; those would not be covered by the term ‘national emergency.’

MR. BENGZON. Unless they are of such proportions such that they would paralyze government service.

...

MR. TINGSON. May I ask the committee if ‘national emergency’ refers to military national emergency or could this be economic emergency?

MR. VILLEGAS. Yes, it could refer to both military or economic dislocations.

MR. TINGSON. Thank you very much.

As to what emergency powers can by law be delegated by Congress to the President, Section 17, Article XII of the 1987 Constitution (provides for the same) ...¹⁷⁹

In *David v. Macapagal-Arroyo*, the Court expressly held that the takeover of privately owned public utilities or businesses affected with public interest is one of the emergency powers that Congress can validly delegate by law to the President, thus:

¹⁷⁹ See discussion under Art. XII, Sec. 17.

Generally, Congress is the repository of emergency powers. This is evident in the tenor of Section 23 (2), Article VI authorizing it to delegate such powers to the President. Certainly, a body cannot delegate a power not reposed upon it. However, knowing that during grave emergencies, it may not be possible or practicable for Congress to meet and exercise its powers, the Framers of our Constitution deemed it wise to allow Congress to grant emergency powers to the President, subject to certain conditions, ...

To illustrate, in 1989, Congress enacted Republic Act No. 6826 delegating emergency powers to former President Corazon C. Aquino on account of “a rebellion committed by certain elements of the Armed Forces of the Philippines aided and abetted by civilians (giving) rise to an emergency of national proportions.” Among the emergency powers granted to former President Corazon C. Aquino was the takeover of privately-owned public utilities or businesses affected with public interest, thus:

Sec. 3. Authorized Powers. - Pursuant to Article VI, Section 23 (2) of the Constitution, and to implement the declared national policy, the President is hereby authorized to issue such rules and regulations as may be necessary to carry out any or all of the following powers:

...

(3) To temporarily take over or direct the operation of any privately-owned public utility or business affected with public interest that violates the herein declared national policy: Provided, however, That to the extent feasible, management shall be retained, under the direction and supervision of the President or her duly designated representative who shall render a full accounting to the President of the operations of the utility or business taken over: Provided, further, That whenever the President shall determine that the further use or operation by the Government of any such public service or enterprise is no longer necessary under existing conditions, the same shall be restored to the person entitled to the possession thereof; ...

Section 24. All appropriation, revenue or tariff bills, bills authorizing increase of the public debt, bills of local application, and private bills, shall originate exclusively in the House of Representatives, but the Senate may propose or concur with amendments.

Section 25. (1) The Congress may not increase the appropriations recommended by the President for the operation of the Government as specified in the budget. The form, content, and manner of preparation of the budget shall be prescribed by law.

(2) No provision or enactment shall be embraced in the general appropriations bill unless it relates specifically to some particular appropriation therein. Any such provision or enactment shall be limited in its operation to the appropriation to which it relates.

(3) The procedure in approving appropriations for the Congress shall strictly follow the procedure for approving appropriations for other departments and agencies.

(4) A special appropriations bill shall specify the purpose for which it is intended, and shall be supported by funds actually available as certified by the National Treasurer, or to be raised by a corresponding revenue proposal therein.

(5) No law shall be passed authorizing any transfer of appropriations; however, the President, the President of the Senate, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court, and the heads of Constitutional Commissions may, by law, be authorized to augment any item in the general appropriations law for their respective offices from savings in other items of their respective appropriations.

(6) Discretionary funds appropriated for particular officials shall be disbursed only for public purposes to be supported by appropriate vouchers and subject to such guidelines as may be prescribed by law.

(7) If, by the end of any fiscal year, the Congress shall have failed to pass the general appropriations bill for the ensuing fiscal year, the general appropriations law for the preceding fiscal year shall be deemed reenacted and shall remain in force and effect until the general appropriations bill is passed by the Congress.

GOH v. BAYRON, G.R. No. 212584, November 25, 2014, 748 Phil. 282, a petition for *certiorari*, with prayer for the issuance of a preliminary mandatory injunction, assailed the resolutions of the COMELEC that suspended all proceedings for the recall petition of then Mayor Lucilo R. Bayron of Puerto Princesa City for lack of funds. In the *en banc*

decision, the COMELEC was directed to immediately carry out the recall elections of Bayron in accordance with the provisions of the Local Government Code. Justice Carpio discussed the import of the **authority to augment provided in Section 25(5) insofar as it applies to the COMELEC as a Constitutional Commission:**

The Facts

On 17 March 2014, Goh filed before the COMELEC a recall petition, docketed as SPA EM No. 14-004 (RCL), against Mayor Bayron due to loss of trust and confidence brought about by “gross violation of pertinent provisions of the Anti-Graft and Corrupt Practices Act, gross violation of pertinent provisions of the Code of Conduct and Ethical Standards for Public Officials, Incompetence, and other related gross inexcusable negligence/dereliction of duty, intellectual dishonesty and emotional immaturity as Mayor of Puerto Princesa City.”

On 1 April 2014, the COMELEC promulgated Resolution No. 9864. Resolution No. 9864 found the recall petition sufficient in form and substance, but suspended the funding of any and all recall elections until the resolution of the funding issue. We reproduce the text of Resolution No. 9864 below:

WHEREAS, the Commission is mandated to enforce all laws and regulations relative to the conduct of an election, plebiscite, initiative, referendum, and recall;

WHEREAS, a petition for the recall of Mayor Lucilo Bayron of Puerto Princesa City, Palawan, is pending before this Commission, and has been reviewed by the [ODEDO] and submitted to the en banc through a Memorandum dated 24 March 2014, to wit:

After review of the reports/findings of EO Gapulao, the ODEDO recommends to the Commission the issuance of a Resolution certifying to the SUFFICIENCY of the petition for recall of Mayor Lucilo R. Baron [sic] of Puerto Princesa City, Palawan.

WHEREAS, Section 75 of the Local Government Code (LGC) of 1991 provides for the source of funding for the conduct of recall elections, to wit:

Sec. 75. Expenses Incident to Recall Elections. - All expenses incidental to recall elections shall be borne by the COMELEC. For this purpose, there shall be included in the annual General Appropriations Act a contingency fund at the disposal of the COMELEC for the conduct of recall elections.

WHEREAS, Section 31 of COMELEC Resolution No. 7505 decrees that all expenses incident to recall elections shall be borne by the Commission, pursuant to Section 75 of the LGC. WHEREAS, a Memorandum from the Finance Services Department dated 24 March 2014 raised an issue as to the funding of the entire process of recall;

NOW THEREFORE, the Commission on Elections, by virtue of the powers vested in it by the Constitution, the Local Government Code, as amended, the Omnibus Election Code, Republic Act No. 9244, and other elections laws, RESOLVED, as it hereby RESOLVES, to AFFIRM the recommendation of the ODED0 as to the SUFFICIENCY of the Recall Petition filed against Mayor Lucilo R. Bayron of Puerto Princesa City, Palawan.

RESOLVED FURTHER, considering that the FSD has raised an issue as to the funding of any and all recall elections, any proceeding in furtherance thereof, including the verification process, is hereby SUSPENDED until the funding issue shall have been resolved.

SO ORDERED.

On 28 April 2014, Mayor Bayron filed with the COMELEC an Omnibus Motion for Reconsideration and for Clarification which prayed for the dismissal of the recall petition for lack of merit.

On 19 May 2014, Goh filed a Comment/Opposition (To the 27 April 2014 Omnibus Motion for Reconsideration and for Clarification) with Motion to Lift Suspension which prayed for the COMELEC's denial of Mayor Bayron's 27 April 2014 Omnibus Motion, as well as to direct COMELEC's authorized representative to immediately carry out the publication of the recall petition against Mayor Bayron, the verification process, and the recall election of Mayor Bayron.

On 27 May 2014, COMELEC promulgated Resolution No. 9882, as follows:

This refers to the petition for recall against Mayor Lucilo Bayron of the City of Puerto Princesa, Province of Palawan. In Resolution No. 9864, while the Commission en banc affirmed the recommendation of the Office of the Deputy Executive Director for Operations (ODEDO) as to the sufficiency of the Recall Petition, it suspended further proceedings on recall until the funding issue raised by the Finance Services Department shall have been resolved. ...

WHEREFORE, in view of all the foregoing, the Commission RESOLVED, as it hereby RESOLVES, not to continue with any proceedings relative to recall as it does not have a line item budget or legal authority to commit public funds for the purpose. Hence, until a law is passed by Congress appropriating funds for recall elections - either by approving the Commission's budget proposal for FY 2015 or through a supplemental (special) appropriations for FY 2014 - any proceeding relative to the instant petition for recall should be suspended further.

RESOLVED, further, that this Resolution shall be applied consistently to all other petitions for recall now pending or to be pursued by interested parties subsequent hereto.

SO ORDERED.

Resolution No. 9882 was signed, without comment or separate opinion, by Chairman Sixto S. Brillantes, Jr. and Commissioner Elias R. Yusoph. Commissioner Lucenito N. Tagle voted in favor of the resolution and filed a comment. Commissioner Christian Robert S. Lim concurred in the resolution, with the comment that "malversation should be under Article 217 not 220 [of the Revised Penal Code]." Commissioners Maria Gracia Cielo M. Padaca, Al A. Parreño, and Luie Tito F. Guia wrote separate opinions.

Commissioner Tagle stated that "in order for the Commission to effectively undertake actions relative to recall petitions, *First*, the budget proposal to Congress for the FY 2015 should contain a specific line item appropriated for the funding of the conduct of recall elections; or *Second*, if feasible, we can request a supplemental budget from Congress for the FY 2014 to specifically answer for the funding of recall proceedings."

Commissioner Padaca called for a holistic look of the GAA. She submitted that "the allocation for the Commission in the GAA is primarily geared toward our Constitutional mandate, that is, the enforcement and administration of all laws and regulations relative to the conduct of an election, plebiscite, initiative, referendum, and recall..." Therefore, the interpretation of the provisions of the GAA should be read with the intent to pursue COMELEC's mandate. Commissioner Padaca further pointed out that the COMELEC was "able to conduct special elections in the first district of Ilocos Sur in 2011, Zambales in 2012, and a plebiscite for the creation of Davao Occidental in 2013, all of which lack a specific line item in the applicable GAA. The lack of a specific appropriation or line item in the GAA did not

deter [COMELEC] from conducting and supervising an electoral exercise that was legally called upon by the people.” However, Commissioner Padaca recognized the limitations set by Section 2 of the 2014 GAA on the COMELEC’s use of its savings.

In his separate opinion, Commissioner Parreño agreed with the factual findings of the FSD of the COMELEC and the Office of the Chairman that the budget for the conduct of recall elections was not in the 2014 GAA. He quoted from the 24 March 2014 Memorandum to the FSD which stated that the Department of Budget and Management (DBM) did not include a provision for expenses for recall elections for Fiscal Years 2013 and 2014. The memorandum stated that:

Please be informed that for the FY 2013 and 2014, there is no provision made by the DBM for any expenses for the recall elections. A provision was made only in the previous years in the total amount of P1,000,000.00. What was provided for in our FY 2014 budget was the regular expenses for the election activities - regular salaries of field employees and the corresponding expenses for the regular activities of our office.

The Office of the Chairman, on the other hand, submits the COMELEC’s annual budget for the COMELEC En Banc’s approval and directs and supervises the operations and internal administrations of the COMELEC.

Commissioner Guia states that the majority opinion suggests that recall elections can only be funded through a supplemental budget law. He opines that the majority adopts a strict interpretation of the budget law when it states that there is no line item for the conduct of recall elections in the 2014 GAA. Commissioner Guia proposes a liberal approach: that the 2014 GAA should be construed as merely failing to provide sufficient funds for the actual conduct of recall elections, and not as preventing COMELEC from exercising its constitutional mandate of conducting recall elections. Commissioner Guia’s liberal approach to interpreting the budget law makes the remedy of funding recall elections by way of augmenting an existing line item from savings a theoretical possibility. Commissioner Guia, however, recognizes that the GAA’s Sec. 69 of the General Provisions and Sec. 2 of the Special Provisions for the COMELEC limit the items that can be funded from the COMELEC’s savings. He suggests that curative legislation be made to enable COMELEC to perform its constitutional mandate.

Goh filed the present Petition on 6 June 2014.

The Issues

In his Grounds for filing the Petition, Goh stated:

26. Petitioner respectfully moves for (a) the PARTIAL ANNULMENT and REVERSAL of Resolution No. 9864, insofar as the same directed the suspension of further action on the instant Recall Petition, and (b) the ANNULMENT AND REVERSAL of Resolution No. 9882, on the ground that in their issuance, the respondent Commission committed grave abuse of discretion amounting to lack or excess of jurisdiction when it failed to rule that:

I. The 2014 GAA provides for an appropriation or line item budget to serve as a contingency fund for the conduct of recall elections.

II. The Respondent Commission may lawfully augment any supposed insufficiency in funding for the conduct of recall elections by utilizing its savings.

III. The proper, orderly and lawful exercise of the process of recall is within the exclusive power and authority of the Respondent Commission.

IV. The factual backdrop of this case does not warrant nor justify the deferment of all proceedings on recall petitions.

27. Petitioner respectfully submits that an examination of the merits of this case, as well as the applicable laws and entrenched legal precepts on the legal issues presented, will clearly establish an undeniable basis for the reversal of the questioned Resolution Nos. 9864 and 9882.

28. Indeed, notwithstanding its finding that the Recall Petition filed by Petitioner Goh is sufficient in form and substance, Respondent Commission nevertheless suspended the holding of a recall election supposedly through lack of funding. Petitioner respectfully submits that the same is a grave abdication and wanton betrayal of the Constitutional mandate of the Respondent Commission and a grievous violation of the sovereign power of the people. What the Resolution Nos. 9864 and 9882 have given with one hand (the affirmation of the sufficiency of the Recall Petition), they have taken away with the other (the funding issue, later claimed the issue of lack funding).

In his comment, Mayor Bayron provided the following grounds for the dismissal of the petition:

- I. The 2014 General Appropriations Act does not carry any specific particular item for the conduct of recall elections in the City of Puerto Princesa, Province of Palawan or elsewhere;
 - A. The “power of the purse” belongs to the Congress and not with the Commission on Elections;
 - B. Fiscal autonomy of the Commission on Elections operates within the parameters of the Constitution;
 - C. There is no particular item for the Conduct of Recall Elections in which to apply the provision on budget augmentation; [and]
 - D. It is the Commission, in line with the present budget, that has the authority to determine the presence and possibility of augmentation.
- II. Program and project have been clearly differentiated by the Commission on Elections;
- III. The 2014 General Appropriations Act presents a special provision which was absent in the previous general appropriations act thereby further limiting the COMELEC’s exercise of augmentation;
- IV. Budget can still be allocated by Congress through the enactment and passage of a 2014 Supplemental Budget or through the 2015 General Appropriations Act;
- V. Government funds should not be spent to support illegal and premature institution of recall; [and]
- VI. Politics is a practical matter, and political questions must be dealt with realistically.

The COMELEC, through the Office of the Solicitor General, argued that:

- I. Respondent COMELEC *en banc* did not commit grave abuse of discretion in suspending proceedings relative to the recall petition filed against respondent Mayor Lucilo R. Bayron of Puerto Princesa City.
 - A. The 2014 GAA does not provide for an appropriation or line item to serve as contingency fund for the conduct of Recall Elections.
 - B. Any activity falling within the definition of a “Project,” such as Recall Elections, cannot validly proceed by using the budget intended to finance the activities within the scope of “Programs.”
 - C. Respondent COMELEC may not lawfully utilize its savings to augment any insufficiency in the funding for recall elections.
- II. The recall elections being sought by Petitioner may proceed

only if a law is enacted appropriating funds therefor.
III. Petitioner is not entitled to the issuance of a writ of preliminary mandatory injunction.

The Court’s Ruling

We grant the petition. We hold that the COMELEC committed grave abuse of discretion in issuing Resolution Nos. 9864 and 9882. The 2014 GAA provides the line item appropriation to allow the COMELEC to perform its constitutional mandate of conducting recall elections. There is no need for supplemental legislation to authorize the COMELEC to conduct recall elections for 2014.

The COMELEC’s Fiscal Autonomy

The 1987 Constitution expressly provides the COMELEC with the power to “[e]nforce and administer all laws and regulations relative to the conduct of an election, plebiscite, initiative, referendum, and recall.”¹⁸⁰ The 1987 Constitution not only guaranteed the COMELEC’s fiscal autonomy,¹⁸¹ but also granted its head, as authorized by law, to augment items in its appropriations from its savings [referencing Section 25(5)] The 2014 GAA provides such authorization to the COMELEC Chairman.¹⁸²

The COMELEC’s budget in the 2014 GAA

Goh asserts that the 2014 GAA provided COMELEC with an appropriation for the conduct of recall elections in the total amount of Php2,735,321,000. As evidence, Goh reproduced the COMELEC’s budget allocation in the 2014 GAA:

	PS	MOOE	CO ¹⁸³	TOTAL
PROGRAMS	1,937,544,000	450,937,000		2,388,481,000
General Administration & Support	454,457,000	276,749,000		731,206,000
Operations	1,483,087,000	174,184,000		1,657,275,000

¹⁸⁰ Const., Art. IX-C, Sec 2(1).
¹⁸¹ Const., Art. IX-A, Sec. 5.
¹⁸² GAA, Sec. 67.
¹⁸³ PS stands for Personal Services, MOOE for Maintenance and Other Operating Expenses, and CO for Capital Outlay.

PROJECTS	500,000	120,816,000	225,524,000	346,840,000
Locally-funded Projects	500,000	120,816,000	225,524,000	346,840,000
TOTAL NEW APPRO.	1,938,044,000	571,753,000	225,524,000	2,735,321,000

Goh further pointed out that the COMELEC has PhP1,483,087,000 appropriated under Operations, and that the PhP1,401,501,000 for current operating expenditure is allocated per region as follows:

National Capital Region	74,356,000
Region I - Ilocos	97,350,000
Region II - Cagayan Valley	69,302,000
Cordillera Administrative Region (CAR)	63,120,000
Region III - Central Luzon	112,896,000
Region IV-A - CALABARZON	183,390,000
Region V - Bicol	92,944,000
Region VI - Western Visayas	23,252,000
Region VII - Central Visayas	108,093,000
Region VIII - Eastern Visayas	106,144,000
Region IX - Zamboanga Peninsula	56,636,000
Region X - Northern Mindanao	76,864,000
Region XI - Davao	51,639,000
Region XII - SOCCSKSARGEN	44,982,000
Region XIII - CARAGA	59,481,000
Autonomous Region in Muslim Mindanao (ARMM)	81,052,000

Goh further states that COMELEC's personnel themselves admitted to the existence of a contingency fund for the lawful conduct of recall elections. Atty. Maria Lea R. Alarkon, Acting Director III of the COMELEC's FSD, during the 3 September 2013 budget hearing before the Senate's Subcommittee A of the Committee on Finance, stated:

Your Honors, for the specifics of our MFO [Major Final Output] budget, ... conduct and supervision of elections, referenda, recall and plebiscites, 1,527,815,000; ...

Goh also cited an online news article which quoted COMELEC

spokesperson James Jimenez saying that “lack of budget (should) not (be) an issue. ... We always have a ‘standby’ budget for recall, plebiscite, etc.” and adding that the successful holding of any recall elections, referendum or plebiscite is the fundamental mandate of the COMELEC.

Finally, Goh presented a letter dated 28 May 2014 from Rep. Isidro T. Ungab, Chairman of the House of Representatives’ Committee on Appropriations, addressed to Hon. Douglas S. Hagedorn, Representative of the Third District of Palawan. The letter stated that “[t]he FY 2014 budget of the COMELEC as authorized in the FY 2014 General Appropriations Act amounts to P2,735,321,000, of which P1,401,501,000 is appropriated for the conduct and supervision of elections, referenda, recall votes and plebiscites.”

The COMELEC, through the Solicitor General, classifies Goh’s assertions as misleading. To illustrate the lack of appropriation or line item for a contingency fund for the conduct of recall elections in the 2014 GAA, the COMELEC countered:

The amount of PhP1,483,087,000 referred to by [Goh] allegedly for the conduct and supervision of election, referenda, recall votes and plebiscites, actually refers to operating expenditures for “Personnel Services,” under the program “Regulation of Elections.”

The amount of PhP1,401,501,000, on the other hand, is the total amount allotted for “Personnel Services” (PhP1,360,975,000) and “Maintenance and Other Operating Expenses” (PhP40,526,000) for Regional Allocation.

The COMELEC reiterated pertinent portions of Resolution No. 9882, thus:

... While ... the Commission has a line item for the “Conduct and supervision of elections, referenda, recall votes and plebiscites” under the Program category of its 2014 budget in the amount of Php1,401,501,000.00, the said amount cannot be considered as “an appropriation made by law” as required by the Constitution [Art. VI, Section 29 (1)] nor a contingent fund provided under the LGC considering that the said line item is legally intended to finance the basic continuing staff support and administrative operations of the Commission such as salaries of officials and employees as well as essential office maintenance and other operating expenses. As such, it

cannot be used for the actual conduct of recall elections.

...

In prior years, including election years such as 2007, 2010 and 2013, the Commission had a line item for the “Conduct and Supervision of Elections and other Political Exercises” under the Program category of its budget. However, the said line item was never utilized for the actual conduct of any elections or other political exercises including recall elections. Again, the said line item has been consistently spent for the basic continuing staff support and administrative operations of the Commission. This is because the top of the line item for the “Conduct and Supervision of Elections and other Political Exercises” under the Program category, separate line items were provided by Congress for the conduct of the “National and Local Elections,” “SK and Barangay Elections” as well as “Overseas Absentee Voting” under the Locally Funded Projects (Project) category of the Commission’s 2007, 2010 and 2013 budget, to wit:

Year/ GAA	Item Budget under Program	Amount	Item Budget under Projects	Amount
2007	Conduct and Supervision of Elections and Other Political Exercises	P957,294,000	National and Local Elections	P5,128,969,000
			SK and Barangay Elections	P2,130,969,000
			Overseas Absentee Voting	P238,421,000
2010	Conduct and Supervision of Elections and Other Political Exercises	P1,101,072,000	Automated National and Local Elections	P5,216,536,000
			SK and Barangay Elections	P3,241,535,000
			Overseas Absentee Voting	P188,086,000
2013	Conduct and Supervision of Elections and Other Political Exercises	P1,452,752,000	Synchronized National, Local and ARMM Elections	P4,585,314,000
			SK and Barangay Elections	P1,175,098,000
			Overseas Absentee Voting	P105,036,000

Despite Resolution No. 9882's statement about the alleged failure of the 2014 GAA to provide for a line item appropriation for the conduct of recall elections, we hold that the 2014 GAA actually expressly provides for a line item appropriation for the conduct and supervision of recall elections. This is found in the Programs category of its 2014 budget, which the COMELEC admits in its Resolution No. 9882 is a "line item for the 'Conduct and supervision of elections, referenda, recall votes and plebiscites.'" In addition, one of the specific constitutional functions of the COMELEC is to conduct recall elections. When the COMELEC receives a budgetary appropriation for its "Current Operating Expenditures," such appropriation includes expenditures to carry out its constitutional functions, including the conduct of recall elections. Thus, in *Socrates v. COMELEC*¹⁸⁴ (Socrates), recall elections were conducted even without a specific appropriation for recall elections in the 2002 GAA.

In *Socrates*, the COMELEC conducted recall elections for mayor of Puerto Princesa City, Palawan on 24 September 2002. At the time, the COMELEC found no reason to raise any concern as to the funding of the 24 September 2002 recall elections. ...

In the 2002 GAA, the COMELEC had PhP910,854,000 appropriated under Operations, and that the PhP788,659,000 for current operating expenditure was allocated per region...

Under these factual circumstances, we find it difficult to justify the COMELEC's reasons why it is unable to conduct recall elections in 2014 when the COMELEC was able to conduct recall elections in 2002 despite lack of the specific words "Conduct and supervision of ... recall votes ..." in the 2002 GAA. In the 2002 GAA, the phrase "Conduct and supervision of elections and other political exercises" was sufficient to fund the conduct of recall elections. In the 2014 GAA, there is a specific line item appropriation for the "Conduct and supervision of ... recall votes..."

More importantly, the COMELEC admits in its Resolution No. 9882 that the COMELEC has "a line item for the 'Conduct and supervision of elections, referenda, recall votes and plebiscites.'" This admission of the COMELEC is a correct interpretation of this specific budgetary appropriation. **To be valid, an appropriation must indicate a specific amount and a**

¹⁸⁴ 440 Phil. 106 (2002), penned by Justice Carpio and excerpted under Art. X.

specific purpose. However, the purpose may be specific even if it is broken down into different related sub-categories of the same nature. For example, the purpose can be to “conduct elections,” which even if not expressly spelled out covers regular, special, or recall elections. The purpose of the appropriation is still specific - to fund elections, which naturally and logically include, even if not expressly stated, not only regular but also special or recall elections.

The COMELEC’s Savings

Nowhere in the COMELEC’s comment, however, does it dispute the existence of savings. In the transcript of the hearing for the COMELEC’s 2014 budget, the COMELEC estimated to have PhP10.7 billion savings around the end of 2013. However, since the DBM did not include a line budget for certain items, Chairman Brillantes estimated that the PhP10.7 billion savings will be reduced to about PhP2 billion after the COMELEC augments expenses for the purchase of its land, warehouse, building, and the overseas absentee voting. This estimate was made under the assumption that the 2014 GAA will provide a line item budget for the COMELEC’s land, warehouse, building, and the overseas absentee voting.

In his opening remarks before the Senate Committee on Finance, Chairman Brillantes underscored the need for a line item budget for certain items that the COMELEC can subsequently augment based on its savings. Chairman Brillantes was aware that an item without a line budget cannot be funded by savings.

MR. BRILLANTES. 2014 is a non-election year, your Honor. Therefore, the budget that the Commission on Elections would be asking will not really be too much. We, in fact, asked for five billion, which is much, much lower than all of our previous budgets but this has been cut by the DBM to only 2.8.

Now, 2.8 is already acceptable to the Commission on Elections. There are only some slight requests that we are going to ask. Since the 2.8 reduction actually cut off our projects, like we intend to set up our own building and purchase land. All that we are asking is that in previous years we have been given a line budget for one million at least which we can augment based on our savings. All that we ask is that we be given another line item for land, building and warehouse. Even at one million each or two million each and we will take care of

the augmentation as we have enough savings which we have tried to accumulate during the past years which we can set up our own land, building and warehouse. So we would request that we realign, not necessarily getting from other agencies, the amount of three million or six million as the case may be, but get it from the same budget that we have so that we will not touch the budget of other agencies. We have special budget for ISSP, and this is at 226 million. We can reduce this to 220 million and put the six million to two million each for land, building and warehouse so we can cover it.

THE CHAIRMAN (SEN. [FRANCIS G.] ESCUDERO).

Noted. Noted, Mr. Chairman. Thank you.

MR. BRILLANTES. Yes, Your Honor. In addition to this let me just point out, Your Honor, that this year, we are holding the barangay elections this coming October 28. While we did, in fact, ask for a budget last year for the 2013 elections for barangay, we were only given by Congress as well as the President 1.1 billion. What we intend [for] our budget for the October 28 barangay elections is based on our computations, 3.4 billion. So on the basis of that, we are going to have to set aside from our own savings 2.3 billion to cover for the entire barangay elections. So we are setting aside 2.3 billion from our own savings so that we can cover the 3.4 billion that we expect to actually spend for the October 2013 barangay elections, meaning that the 1.1 plus 2.3 would be the 3.4. Therefore, that would cut off into our savings but we are willing to sacrifice for this.

With this, Your Honor, we are ready to present our budget which is not really much. It is only 2.8 billion.

Now, we are also - we would like also to mention by way of an addition [sic] final statement, Your Honor. We were given zero budget for the COAV [Committee on Overseas Absentee Voting], the overseas voting, zero budget. We can understand that there has been some, well, reservations in Congress as well as the President because of the poor performance in the COAV. However, there is a new law now which requires the establishment of an office for the overseas voting. And this new law provides that the coverage is supposed to allocate a certain amount for the appropriation for this new office for COAV. However, this law was passed after DBM had already submitted its budget to Congress and therefore it is not allocated. It is not provided for under the submitted budget. Now, we have some - we can provide for some amounts again for COAV but we would need at least another line item for this no matter how big. We were asking for about 60 million

which is really not much. We can take it out from our own savings but we have to have a line item also for this and then we would ask that Congress provide - as provided for by the new law that new amounts be given to us, even another 60 million, so we can cover our preparations for the overseas voting for the 2016. ...

THE CHAIRMAN (SEN. ESCUDERO). ... *Second*, Mr. Chairman, you were mentioning a while ago the savings of the COMELEC. May we know how much exactly is the savings of the COMELEC? Kasi kaya n'yo palang punuan yung kulang ng barangay election. Kaya n'yo palang magpagawa ng building.

MR. BRILLANTES. Tama ho iyon. Kaya ho namin kaya lang masasaktan ho yung bibilhin naman naming lupa at saka building. Kasi ho 2.3 ang iaabono namin sa barangay. That is why if you will notice, as soon as we finished the May elections, May 2013 elections, I immediately announced that we were praying na kung pwede i-postpone na natin yung barangay saka SK.

THE CHAIRMAN (SEN. ESCUDERO). I heard that but how?

MR. BRILLANTES. Pero sinabi ng Presidente tuloy, so tuloy tayong kako. Because we only have 1.1 billion budget and we need about three billion plus, so we know it will cut on our savings. Yung savings ho namin pag titignan ho, mahaba hong kwento yung savings namin. Pag makikita ninyo yung notes ninyo, nag-uumpisa sa 10.7 billion, parang napakalaki. Pero hindi ho totoo iyon. Ten point seven billion, marami hong natatanggal diyan. Natanggalan kami ng 2.3 sa barangay, marami pa ho kaming utang na hindi binabayaran, sa Smartmatic meron pa -

THE CHAIRMAN (SEN. ESCUDERO). Wala pa ho tayong duon. Sa ngayon lang ho, magkano ho yung savings ng COMELEC?

MR. BRILLANTES. Ngayon ho siguro mga 2B.

THE CHAIRMAN (SEN. ESCUDERO). Binawas n'yo na yung 2.4 sa barangay.

MR. BRILLANTES. Tanggal ng lahat po yung barangay, yung mga utang na dapat naming bayaran, obligasyon. At saka iyon ni-reserve namin, in-obligate na namin para sa lupa at saka sa building...

THE CHAIRMAN (SEN. ESCUDERO). Sa building.

MR. BRILLANTES. ... which is about three. ...

THE CHAIRMAN (SEN. ESCUDERO). Now, two more points, Mr. Chairman. On the use of savings within the NEP

as provided for, nakalagay ho dito yung reuse of savings ninyo for repair, for printing, for purchase of equipment. Ang sinasabi niyo po, ang kailangan may provision. Are you asking for a provision in the special provisions to allow you to use savings for your building or do you want an item or is it the same?

MR. BRILLANTES. We need a line item for it, Your Honor, because we had some debates with then - of the Senate President, who was then the Committee Finance chairman during previous proceedings...

THE CHAIRMAN (SEN. ESCUDERO). Na?

MR. BRILLANTES. ... na meron - bumibili na ho kami ng lupa, nakapag-down payment na nga kami ng 200 million, pero wala pala kaming line budget for purchase of land.

THE CHAIRMAN (SEN. ESCUDERO). But was there a use of savings provisions similar to what we have in the proposed 2014 budget in 2013?

MR. BRILLANTES. Meron ho kami, yeah, we have the savings.

THE CHAIRMAN (SEN. ESCUDERO). May use of savings provision din?

MR. BRILLANTES. Yes, we can use to augment but there has to be a line budget. We cannot augment if it is zero. Yun ang naging argument nun. So we ask for the Committee on Finance then for a one million kuwan, kami na ang bahalang mag-augment. Binigyan naman kami for 2013 for the land at saka warehouse. Binigyan kami tigwa-one million, so we can augment. But we did not have time to work on it ngayong 2013 because of the elections at saka meron pa hong barangay. So we might have to make - apply this in 2014...

THE CHAIRMAN (SEN. ESCUDERO). For that matter ...

MR. BRILLANTES. ... If we don't have any line item now, we might have a problem in 2014.

THE CHAIRMAN (SEN. ESCUDERO). For that matter, pwede rin naman piso po yun, 'di ba? Pareho lang naman. It's the same.

MR. BRILLANTES. Pwede rin ho. Pero sinasabi nga namin -

THE CHAIRMAN (SEN. ESCUDERO). All you need is an item, right?

MR. BRILLANTES. Sina-suggest ko nga ho kanina sa opening statement ko, meron kami dun sa ISSP na 226 million...

THE CHAIRMAN (SEN. ESCUDERO). Yun na lang din ang pagkunan.

MR. BRILLANTES. ... yung six million na lang ang tanggalin, gawin na lang 220, kasya na yun dun sa ISSP namin, bigyan

na lang kami ng tigto-two million dun sa six, hindi kami kukuha sa ibang agencies, sa amin din.

THE CHAIRMAN (SEN. ESCUDERO). Within the agency din?

MR. BRILLANTES. Yes, para hindi ho tayo magkaproblema.

THE CHAIRMAN (SEN. ESCUDERO). That's for two items, right?

MR. BRILLANTES. Yes.

THE CHAIRMAN (SEN. ESCUDERO). Two or three items?

MR. BRILLANTES. Actually, four ho yun, tatlo sa -

THE CHAIRMAN (SEN. ESCUDERO). Land, building -

MR. BRILLANTES. Land, building and warehouse, tapos yung overseas kasama pa ho.

THE CHAIRMAN (SEN. ESCUDERO). Pang-apat yung OAV?

MR. BRILLANTES. Pang-apat ho yun.

The COMELEC's Alleged Lack of Authority to Augment the "Project" "Recall Elections" from Savings

Despite the PhP2 billion to PhP10.7 billion savings existing in the COMELEC's coffers, the COMELEC asserts that it cannot legally fund the exercise of recall elections. The power to augment from savings lies dormant until authorized by law.¹⁸⁵ Flexibility in the use of public funds operates only upon legislative fiat.

... However, to afford the heads of the different branches of the government and those of the constitutional commissions considerable flexibility in the use of public funds and resources, the constitution allowed the enactment of a law authorizing the transfer of funds for the purpose of augmenting an item from savings in another item in the appropriation of the government branch or constitutional body concerned. The leeway granted was thus limited. The purpose and conditions for which funds may be transferred were specified, i.e. transfer may be allowed for the purpose of augmenting an item and such transfer may be made only if there are savings from another item in the appropriation of the government branch or constitutional body.¹⁸⁶

The COMELEC cited the following provisions in the 2014 GAA to

¹⁸⁵ Brillantes, Jr. v. COMELEC, 476 Phil. 294, 334 (2004) citing Gonzales v. Macaraig, Jr., G.R. No. 87636, 19 November 1990, 191 SCRA 452, 470.

¹⁸⁶ Demetria v. Hon. Alba, 232 Phil. 222, 229 (1987).

justify its lack of authority to augment expenses for the conduct of recall elections from its existing savings:

Special Provisions for the COMELEC

2. Use of Savings. The COMELEC, through its Chairperson, is hereby authorized to use savings from its appropriations to cover actual deficiencies incurred for the current year and for the following purposes: (i) printing and/or publication of decisions, resolutions, and training information materials; (ii) repair, maintenance and improvement of central and regional offices, facilities and equipment; (iii) purchase of equipment, books, journals and periodicals; (iv) necessary expenses for the employment of temporary, contractual and casual employees; and (v) payment of extraordinary and miscellaneous expenses, representation and transportation allowances, and other authorized benefits of its officials and employees, subject to pertinent budgeting, accounting and auditing rules and regulations.

General Provisions in the 2014 GAA

Sec. 67. Use of Savings. The President of the Philippines, the Senate President, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court, the Heads of Constitutional Commissions enjoying fiscal autonomy, and the Ombudsman are hereby authorized to use savings in their respective appropriations to augment actual deficiencies incurred for the current year in any item of their respective appropriations.

Sec. 68. Meaning of Savings and Augmentation. Savings refer to portions or balances of any programmed appropriation in this Act free from any obligation or encumbrance which are (i) still available after the completion or final discontinuance or abandonment of the work, activity or purpose for which the appropriation is authorized; (ii) from appropriation balances arising from unpaid compensation and related costs pertaining to vacant positions and leaves of absence without pay; and (iii) from appropriation balances realized from the implementation of measures resulting in improved systems and efficiencies and thus enabled agencies to meet and deliver the required or planned targets, programs and services approved in this Act at a lesser cost.

Augmentation implies the existence in this Act of a program, activity, or project with an appropriation, which upon implementation or subsequent evaluation of needed resources, is determined to be deficient. In no case shall a non-existent program, activity, or project be funded by augmentation from

savings or by the use of appropriations otherwise authorized in this Act.

Sec. 69. Priority in the Use of Savings. In the use of savings, priority shall be given to the augmentation of the amounts set aside for the payment of compensation, year-end bonus and cash gift, retirement gratuity, terminal leave benefits, old-age pension of veterans and other personnel benefits authorized by law, and those expenditure items authorized in agency special provisions and in other sections of the General Provisions in this Act.

Commissioner Guia, in his Separate Opinion, stressed the disconnection between the COMELEC's mandate and the lack of a line budget item for the conduct of recall elections.

At this point let it be stated that there is a provision in the GAA limiting the items that can be funded from realignment of savings. See Section 69 of the General Provisions and Section 2 of the Special Provision for COMELEC in the 2014 GAA. Providing for the conduct of recall votes is not one of them. This limitation effectively establishes a clash between the COMELEC's constitutional mandate as an independent constitutional body to administer recall elections and the power of Congress to appropriate public funds.

This clash can simply be avoided by a curative legislation that would enable COMELEC to perform its constitutional mandate while at the same time recognizing the power of Congress to allocate public funds. Unless there are other lawful means by which the conduct of recall elections can be funded, COMELEC's hands are tied by the way the GAA is worded. The ball is now in the hands of Congress.

Resolution No. 9882 proposed alternative sources for funding recall elections:

One solution to the Commission's predicament on recall is the inclusion in the 2015 GAA of a contingency fund that may be used by the Commission for the conduct of recall elections pursuant to Section 75 of the LGC. Hence, in the Commission's budget proposal for 2015, the Commission included a budget in the amount of Php321,570,000.00 for possible recall elections in 2015 considering that recall elections can still be conducted up to May of 2015.

An alternative solution is for persons interested in pursuing recall elections to adopt actions that may lead to the passage

by Congress of a supplemental (special) appropriations law for the FY 2014 for the conduct of recall elections. The same may be supported by the Commission by certifying that such funds, which are presently lacking, are necessary to defray expenses for the holding of recall elections, pursuant to Section 11, Art. IX(C) of the Constitution.

There is no clash between the COMELEC and Congress. We reiterate that the 2014 GAA provides a line item appropriation for the COMELEC's conduct of recall elections. Since the COMELEC now admits that it does not have sufficient funds from its current line item appropriation for the "Conduct and supervision of ... recall votes ..." to conduct an actual recall election, then there is therefore an actual deficiency in its operating funds for the current year. This is a situation that allows for the exercise of the COMELEC Chairman's power to augment actual deficiencies in the item for the "Conduct and supervision of ... recall votes ..." in its budget appropriation.

The COMELEC, in Resolution No. 9882, admitted the existence of a line item appropriation for the "Conduct and supervision of ... recall votes ...":

A careful review of the Commission's budget under the 2014 GAA reveals that it does not have any appropriation or line item budget (line item) to serve as a contingency fund for the conduct of recall elections. While the Commission has a line item for the "Conduct and supervision of elections, referenda, recall votes and plebiscites" under the Program category of its 2014 budget in the amount of Php1,401,501,000.00, the said amount cannot be considered as "an appropriation made by law" as required by the Constitution [Footnote 4 - Art. VI, Section 29 (1)] nor a contingent fund provided under the LGC considering that the said line item is legally intended to finance the basic continuing staff support and administrative operations of the Commission such as salaries of officials and employees as well as essential office maintenance and other operating expenses. As such, it cannot be used for the actual conduct of recall elections.

However, contrary to the COMELEC's assertion, the appropriations for personnel services and maintenance and other operating expenses falling under "Conduct and supervision

of elections, referenda, recall votes and plebiscites” constitute a line item which can be augmented from the COMELEC’s savings to fund the conduct of recall elections in 2014. The conduct of recall elections requires only operating expenses, not capital outlays. The COMELEC’s existing personnel in Puerto Princesa are the same personnel who will evaluate the sufficiency of the recall petitions and conduct the recall elections.

Moreover, the line item appropriation for the “Conduct and supervision of ... recall votes ...” in the 2014 GAA is sufficient to fund recall elections. There is no constitutional requirement that the budgetary appropriation must be loaded in “contingent funds.” The Congress has plenary power to lodge such appropriation in current operating expenditures.

Going back to the circumstances of the 2002 recall elections in Puerto Princesa, the 2002 GAA provided for the following:

1. Special Audit. The appropriations herein authorized for the Commission for registration, plebiscite, referendum and election purposes shall be used exclusively for the purpose for which these are intended. Special Audit shall be undertaken by the Commission on Audit (COA) on all expenses for printing jobs, materials and paraphernalia to be used for registration, plebiscite, referendum and election purposes. Copies of the COA report shall be furnished the Legislature within one month after such audit.

2. Augmentation of the Appropriations for Barangay Elections. The appropriations authorized herein for the holding of barangay elections may be augmented by COMELEC savings not exceeding Three Hundred Million Pesos (P300,000,000.00) if upon implementation or subsequent evaluation, the needed resources for the holding of said election is determined to be deficient.

3. Appropriations for Programs and Specific Activities. The amounts herein appropriated for the programs of the agency shall be used specifically for the following activities in the indicated amounts and conditions: ...

General Provisions in the 2002 GAA

Sec. 51. Modification of Expenditure Components. Unless specifically authorized in this Act, no change or modification shall be made in the expenditure items authorized in this Act and other appropriations laws unless in cases of augmentations from savings in appropriations as authorized under Section 25(5), Article VI of the 1987 Philippine Constitution.

53. Use of Savings. The President of the Philippines, the President of the Senate, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court, the Heads of Constitutional Commissions under Article IX of the 1987 Constitution, the Ombudsman, and the Chairman of the Commission on Human Rights are hereby authorized to augment any item in this Act for their respective offices from savings in other items of their respective appropriations.

Sec. 54. Meaning of Savings and Augmentation. Savings refer to portions or balances of any programmed appropriation in this Act free from any obligation or encumbrance still available after the completion or final discontinuance or abandonment of the work, activity or purpose for which the appropriation is authorized, or arising from unpaid compensation and related costs pertaining to vacant positions and leaves of absence without pay.

Augmentation implies the existence in this Act of an item, project, activity, or purpose with an appropriation which upon implementation or subsequent evaluation of needed resources is determined to be deficient. In no case, therefore, shall a non-existent item, project, activity, purpose or object of expenditure be funded by augmentation from savings or by the use of appropriations otherwise authorized in this Act.

Sec. 55. Priority in the Use of Savings. In the use of savings, priority shall be given to the augmentation of the amounts set aside for compensation, year-end bonus and cash gift, retirement gratuity, terminal leave benefit, old-age pension of veterans and other personnel benefits authorized by law, and those expenditure items authorized in agency Special Provisions and in Section 16 and in other Sections of the General Provisions of this Act.

We thus find unnecessary the COMELEC's protests regarding the difference between "Projects" and "Programs" for their failure to allocate funds for any recall process in 2014.

... The constitutional test for validity is not how itemized the appropriation is down to the project level but whether the purpose of the appropriation is specific enough to allow the President to exercise his line-item veto power. Section 23, Chapter 4, Book VI of the Administrative Code provides a stricter requirement by mandating that there must be a corresponding appropriation for each program and for each project. A project is a component of a program which may

have several projects. A program is equivalent to the specific purpose of an appropriation. An item of appropriation for school-building is a program, while the specific schools to be built, being the identifiable outputs of the program, are the projects. The Constitution only requires a corresponding appropriation for a specific purpose or program, not for the sub-set of projects or activities.¹⁸⁷

Considering that there is an existing line item appropriation for the conduct of recall elections in the 2014 GAA, we see no reason why the COMELEC is unable to perform its constitutional mandate to “enforce and administer all laws and regulations relative to the conduct of ... recall.”¹⁸⁸ Should the funds appropriated in the 2014 GAA be deemed insufficient, then the COMELEC Chairman may exercise his authority to augment such line item appropriation from the COMELEC’s existing savings, as this augmentation is expressly authorized in the 2014 GAA.

Section 26. (1) Every bill passed by the Congress shall embrace only one subject which shall be expressed in the title thereof.

(2) No bill passed by either House shall become a law unless it has passed three readings on separate days, and printed copies thereof in its final form have been distributed to its Members three days before its passage, except when the President certifies to the necessity of its immediate enactment to meet a public calamity or emergency. Upon the last reading of a bill, no amendment thereto shall be allowed, and the vote thereon shall be taken immediately thereafter, and the yeas and nays entered in the Journal.

As previously discussed, **BARANGAY ASSOCIATION FOR NATIONAL ADVANCEMENT AND TRANSPARENCY (BANAT) PARTY-LIST v. COMMISSION ON ELECTIONS**, G.R. No. 177508, August 7, 2009, 612 Phil. 793, was a petition for prohibition, which assailed the constitutionality of Republic Act No. 9369,¹⁸⁹ or the law on

¹⁸⁷ Concurring opinion, Carpio, J., *Belgica v. Ochoa, Jr.*, G.R. No. 208566, 19 November 2013, 710 SCRA 1, 228-229, excerpted below.

¹⁸⁸ Const., Art. IX-C, Sec. 2(1).

¹⁸⁹ An Act Amending Republic Act No. 8436, Entitled An Act Authorizing The Commission On Elections To Use An Automated Election System In The May 11, 1998 National Or Local Elections And In Subsequent National And Local Electoral Exercises,

the automated election system, on several grounds.¹⁹⁰ One of the issues raised by the petition was whether RA 9369 violated **paragraph 1 of this Section 26, Article VI**:

RA 9369 does not violate Section 26(1), Article VI of the Constitution

Petitioner alleges that the title of RA 9369 is misleading because it speaks of poll automation but contains substantial provisions dealing with the manual canvassing of election returns. Petitioner also alleges that Sections 34, 37, 38, and 43 are neither embraced in the title nor germane to the subject matter of RA 9369.

Both the COMELEC and the OSG maintain that the title of RA 9369 is broad enough to encompass topics which deal not only with the automation process but with everything related to its purpose encouraging a transparent, credible, fair, and accurate elections.

The constitutional requirement that “every bill passed by the Congress shall embrace only one subject which shall be expressed in the title thereof” has always been given a practical rather than a technical construction.¹⁹¹ The requirement is satisfied if the title is comprehensive enough to include subjects related to the general purpose which the statute seeks to achieve.¹⁹²

The title of a law does not have to be an index of its contents and will suffice if the matters embodied in the text are relevant to each other and may be inferred from the title.¹⁹³ Moreover, a title which declares a statute to be an act to amend a specified code is sufficient and the precise nature of the amendatory act need not be further stated.¹⁹⁴

RA 9369 is an amendatory act entitled “An Act Amending Republic Act No. 8436, Entitled ‘An Act Authorizing the Commission on

To Encourage Transparency, Credibility, Fairness And Accuracy Of Elections, Amending For The Purpose Batas Pambansa Blg. 881, As Amended, Republic Act No. 7166 And Other Related Election Laws, Providing Funds Therefor And For Other Purposes (2007).

¹⁹⁰ See discussions under Art. III, Sec. 10, Art. VI, Sec. 17, Art. VII, Sec. 4, and Art. IX-C, Sec. 2.

¹⁹¹ *Chiongbian v. Orbos*, 315 Phil. 251 (1995).

¹⁹² *Tio v. Videogram Regulatory Board*, 235 Phil. 198 (1987).

¹⁹³ *Association of Small Landowners in the Phils., Inc. v. Secretary of Agrarian Reform*, G.R. No. 78742, 14 July 1989, 175 SCRA 343.

¹⁹⁴ *Manila Trading & Supply Co. v. Reyes*, 62 Phil. 461 (1935).

Elections to Use an Automated Election System in the May 11, 1998 National or Local Elections and in Subsequent National and Local Electoral Exercises, to Encourage Transparency, Credibility, Fairness and Accuracy of Elections, Amending for the Purpose Batas Pambansa Blg. 881, as Amended, Republic Act No. 7166 and Other Related Election Laws, Providing Funds Therefor and For Other Purposes.” Clearly, the subject matter of RA 9369 covers the amendments to RA 8436, Batas Pambansa Blg. 881 (BP 881),¹⁹⁵ Republic Act No. 7166 (RA 7166),¹⁹⁶ and other related election laws to achieve its purpose of promoting transparency, credibility, fairness, and accuracy in the elections. The provisions of RA 9369 assailed by petitioner deal with amendments to specific provisions of RA 7166 and BP 881, specifically: (1) Sections 34, 37 and 38 amend Sections 26, 30 and 15 of RA 7166, respectively; and (2) Section 43 of RA 9369 amends Section 265 of BP 881. Therefore, the assailed provisions are germane to the subject matter of RA 9369 which is to amend RA 7166 and BP 881, among others.

Section 27. (1) Every bill passed by the Congress shall, before it becomes a law, be presented to the President. If he approves the same, he shall sign it; otherwise, he shall veto it and return the same with his objections to the House where it originated, which shall enter the objections at large in its Journal and proceed to reconsider it. If, after such reconsideration, two-thirds of all the Members of such House shall agree to pass the bill, it shall be sent, together with the objections, to the other House by which it shall likewise be reconsidered, and if approved by two-thirds of all the Members of that House, it shall become a law. In all such cases, the votes of each House shall be determined by yeas or nays, and the names of the Members voting for or against shall be entered in its Journal. The President shall communicate his veto of any bill to the House where it originated within thirty days after the date of receipt thereof, otherwise, it shall become a law as if he had signed it.

(2) The President shall have the power to veto any particular item or items in an appropriation, revenue, or tariff bill, but the veto shall not affect the item or items to which he does not object.

¹⁹⁵ Omnibus Election Code Of The Philippines (1985).

¹⁹⁶ An Act Providing For Synchronized National And Local Elections And For Electoral Reforms, Authorizing Appropriations Therefor And For Other Purposes (1991).

In **BELGICA v. OCHOA**, G.R. No. 208566, November 19, 2013, 721 Phil. 416, consolidated petitions¹⁹⁷ that assailed the constitutionality of the Pork Barrel System, including the Priority Development Assistance Fund (PDAF) appearing in the General Appropriations Act (GAA), the Court *en banc*, struck down the entire system as unconstitutional. Justice Carpio **concurred** with the majority:

This is again another time in our nation's history when this Court is called upon to resolve a grave national crisis. The corruption in the pork barrel system, as starkly documented in the Commission on Audit Report on the 2007-2009 Priority Development Assistance Fund, has shown that there is something terribly wrong in the appropriation and expenditure of public funds. Taxes from the hard-earned wages of working class Filipinos are brazenly looted in the implementation of the annual appropriation laws. The Filipino people are in despair, groping for a way to end the pork-barrel system. The present petitions test the limits of our Constitution - whether this grave national crisis can be resolved within, or outside, the present Constitution.

...

The PDAF bluntly demonstrates how a breakdown in the finely crafted constitutional check-and-balance system could lead to gross abuse of power and to wanton wastage of public funds. When the Executive and the Legislature enter into a constitutionally forbidden arrangement - the former proposing lump-sum expenditures in negation of its own line-item veto power and the latter enacting lump-sum appropriations to implement with facility its own chosen projects - the result can be extremely detrimental to the Filipino people.

We have seen the outrage of the Filipino people to the revulsive pork-barrel system spawned by this forbidden Executive-Legislative arrangement. The Filipino people now realize that there are billions of pesos in the annual budget that could lift a large number of Filipinos out of abject poverty but that money is lost to corruption annually. The Filipino people are now desperately in search of a solution to end this blighted pork-barrel system.

¹⁹⁷ Consolidated with *Alcantara v. Drilon*, G.R. No. 208493, and *Nepomuceno v. Aquino*, G.R. No. 209251.

The solution lies with this Court, which must rise to this historic challenge. The supreme duty of this Court is to restore the constitutional check-and-balance that was precisely intended to banish lump-sum appropriations and the pork-barrel system. The peaceful and constitutional solution to banish all forms of the pork-barrel system from our national life is for this Court to declare all lump-sum appropriations, whether proposed by the Executive or enacted by the Legislature, as unconstitutional.

Consequently, in his **concurring opinion** in **Belgica**, Justice Carpio discussed, *inter alia*, **Section 27 of this Article VI, in relation to Sections 25(6) and 29(3)**, as a ground for the unconstitutionality of the PDAF:

Section 27, Article VI of the Constitution provides for the presentment clause and the President's veto power ...

In *Gonzales v. Macaraig, Jr.*,¹⁹⁸ the Court explained the President's veto power, thus:

Paragraph (1) refers to the general veto power of the President and if exercised would result in the veto of the entire bill, as a general rule. Paragraph (2) is what is referred to as the item-veto power or the line-veto power. It allows the exercise of the veto over a particular item or items in an appropriation, revenue or tariff bill. As specified, the President may not veto less than all of an item of an Appropriations Bill. In other words, the power given the executive to disapprove any item or items in an Appropriations Bill does not grant the authority to veto a part of an item and to approve the remaining portion of the same item.

In *Gonzales*, the Court defined the term “item” as used in appropriation laws as “an indivisible sum of money dedicated to a stated purpose.” The amount in an item is “indivisible” because the amount cannot be divided for any purpose other than the specific purpose stated in the item. The item must be for a specific purpose so that the President can determine whether the specific purpose is wasteful or not. This is the “item” that can be the subject of the President's line-item veto power. Any other kind of item will circumvent or frustrate the President's line-item veto power in violation of the Constitution.

¹⁹⁸ G.R. No. 87636, 19 November 1990, 191 SCRA 452, 464.

In contrast, a lump-sum appropriation is a single but divisible sum of money which is the source to fund several purposes in the same appropriation. For example, the 2013 PDAF provision appropriates a single amount - P24.79 billion - to be divided to fund several purposes of appropriation, like scholarships, roads, bridges, school buildings, medicines, livelihood training and equipment, police surveillance and communication equipment, flood control, school fences and stages, and a variety of other purposes.

In her Comment, COA Chairperson Tan stated:

For the most part, appropriations are itemized in the GAA, following line-item budgeting, which provides the line by line allocation of inputs defined as the amount of resources used to produce outputs. The resources are usually expressed in money.

The PDAF, on the other hand, is appropriated as a lump-sum amount, and is broken down by allotment class only. While the projects and programs to be funded and the corresponding agencies are specified, there is no allocation of specific amounts for each project or program, or per agency where there are multiple IAs (implementing agencies) for the same class of projects.

In place of lump-sum appropriations, COA Chairperson Tan recommends a “line by line budget or amount per proposed program, activity, or project, and per implementing agency.”

For the President to exercise his constitutional power to veto a particular item of appropriation, the GAA must provide line-item, instead of lump-sum, appropriations. **This means Congress has the constitutional duty to present to the President a GAA containing items, instead of lump-sums, stating in detail the specific purpose for each amount of appropriation, precisely to enable the President to exercise his line-item veto power. Otherwise, the President’s line-item veto power is negated by Congress in violation of the Constitution.**

The President’s line-item veto in appropriation laws¹⁹⁹ is

¹⁹⁹ Const., Art. VI, Sec. 27(2), the President’s line-item veto power extends to revenue and tariff bills.

intended to eliminate “wasteful parochial spending,”²⁰⁰ primarily the pork-barrel. Historically, the pork-barrel meant “appropriation yielding rich patronage benefits.”²⁰¹ In the Philippines, the pork-barrel has degenerated further as shown in the COA Audit Report on the 2007-2009 PDAF. The pork-barrel is mischievously included in lump-sum appropriations that fund much needed projects. The President is faced with the difficult decision of either vetoing the lump-sum appropriation that includes beneficial programs or approving the same appropriation that includes the wasteful pork-barrel.²⁰² To banish the evil of the pork-barrel, the Constitution vests the President with the line-item veto power, which for its necessary and proper exercise requires the President to propose, and Congress to enact, only line-item appropriations.

The President should not frustrate his own constitutional line-item veto power by proposing to Congress lump-sum expenditures in the NEP. Congress should not also negate the President’s constitutional line-item veto power by enacting lump-sum appropriations in the GAA. When the President submits lump-sum expenditures in the NEP, and Congress enacts lump-sum appropriations in the GAA, both in effect connive to violate the Constitution. This wreaks havoc on the check-and-balance system between the Executive and Legislature with respect to appropriations. **While Congress has the power to appropriate, that power should always be subject to the President’s line-item veto power. If the President exercises his line-item veto power unreasonably, Congress can override such veto by two-thirds vote of the House of Representatives and the Senate voting separately. This constitutional check-and-balance should at all times be maintained to avoid wastage of taxpayers’ money.**

The President has taken a constitutionally prescribed oath to “preserve and defend” the Constitution. Thus, the President has

²⁰⁰ Bernard L. McNamee, *Executive Veto: The Power of the Pen in Virginia*, 9 Regent U.L. Rev. 9, Fall 1997.

²⁰¹ <http://www.merriam-webster.com/dictionary/pork%20barrel>; See footnote no. 13 in Denise C. Twomey, *The Constitutionality of a Line-Item Veto: A Comparison with Other Exercises of Executive Discretion Not to Spend*, 19 Golden Gate U. L. Rev. (1989), <http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1454&context=ggulrev>.

²⁰² See Catherine M. Lee, *The Constitutionality of the Line Item Veto Act of 1996: Three Potential Sources for Presidential Line Item Veto Power*, Hastings Constitutional Law Quarterly, V.25:119, 123, Fall 1997, <http://www.hastingsconlawquarterly.org/archives/V25/I1/Lee.pdf>.

a constitutional duty to preserve and defend his constitutional line-item veto power by submitting to Congress only a line-item NEP without lump-sum expenditures, and then by demanding that Congress approve only a line-item GAA without lump-sum appropriations. Congress violates the Constitution if it circumvents the President's line-item veto power by enacting lump-sum appropriations in the GAA. To repeat, the President has a constitutional duty to submit to Congress only a line-item NEP without lump-sum expenditures, while Congress has a constitutional duty to enact only a line-item GAA without lump-sum appropriations.

In fact, the law governing the "content" of the GAA already mandates that there must be "corresponding appropriations for each program and project," or line-item budgeting, in the GAA. Section 23, Chapter 4, Book VI of the Administrative Code of 1987 provides:

Sec. 23. Content of the General Appropriations Act. - The General Appropriations Act shall be presented in the form of budgetary programs and projects for each agency of the government, with the corresponding appropriations for each program and project, including statutory provisions of specific agency or general applicability. The General Appropriations Act shall not contain any itemization of personal services, which shall be prepared by the Secretary after enactment of the General Appropriations Act, for consideration and approval of the President.

Under Section 23, "each program and project" in the GAA must have "corresponding appropriations." Indisputably, the Administrative Code mandates line-item appropriations in the GAA. There can be no lump-sum appropriations in the GAA because the Administrative Code requires "corresponding appropriations for each program and project." This means a corresponding appropriation for each program, and a corresponding appropriation for each project of the program. To repeat, lump-sum appropriations are not allowed in the GAA. Appropriations for personal services need not be itemized further, as long as the specific purpose, which is personal services, has a specific corresponding amount. Section 35, Chapter 5, Book VI of the Administrative Code of 1987 explains how appropriations for personal services shall be itemized further, thus:

Sec. 35. Special Budgets for Lump-Sum Appropriations.—

Expenditures from lump-sum appropriations authorized for any purpose or for any department, office or agency in any annual General Appropriations Act or other Act and from any fund of the National Government, shall be made in accordance with a special budget to be approved by the President, which shall include but shall not be limited to the number of each kind of position, the designations, and the annual salary proposed for which an appropriation is intended. This provision shall be applicable to all revolving funds, receipts which are automatically made available for expenditure for certain specific purposes, aids and donations for carrying out certain activities, or deposits made to cover to cost of special services to be rendered to private parties. Unless otherwise expressly provided by law, when any Board, head of department, chief of bureau or office, or any other official, is authorized to appropriate, allot, distribute or spend any lump-sum appropriation or special, bond, trust, and other funds, such authority shall be subject to the provisions of this section.

In case of any lump-sum appropriation for salaries and wages of temporary and emergency laborers and employees, including contractual personnel, provided in any General Appropriation Act or other Acts, the expenditure of such appropriation shall be limited to the employment of persons paid by the month, by the day, or by the hour.

Thus, appropriations for personal services need not be further itemized or broken down in the GAA as the purpose for such appropriation is sufficiently specific satisfying the constitutional requirement for a valid appropriation. The constitutional test for validity is not how itemized the appropriation is down to the project level but whether the purpose of the appropriation is specific enough to allow the President to exercise his line-item veto power. Section 23, Chapter 4, Book VI of the Administrative Code provides a stricter requirement by mandating that there must be a corresponding appropriation for each program and for each project. A project is a component of a program which may have several projects.²⁰³ A program is equivalent to the specific purpose of an appropriation.²⁰⁴ An item of appropriation for school-building is a program, while the specific schools to be built, being the identifiable outputs of the program, are the projects. The Constitution only requires a corresponding appropriation

²⁰³ Administrative Code of 1987, Book VI, Chap. 1, Sec. 2(12) and (13).

²⁰⁴ *Ibid.*

for a specific purpose or program, not for the sub-set of projects or activities.

All GAAs must conform to Section 23, Chapter 4, Book VI of the Administrative Code of 1987 because Section 23 implements the constitutional requirement that the “form, content, and manner of preparation of the budget shall be prescribed by law” (as provided in Section 25[1], Article VI) ...

Since the Constitution mandates that the budget, or the GAA, must adopt the “content” prescribed by law, and that law is Section 23, Chapter 4, Book VI of the Administrative Code of 1987, then all GAAs must adopt only line-item appropriations, as expressly prescribed in Section 23. Any provision of the GAA that violates Section 23 also violates Section 25(1), Article VI of the Constitution, and is thus unconstitutional.

Section 25(1) of Article VI is similar to Section 10, Article X of the same Constitution which provides that a local government unit can be created, divided, merged or abolished only “in accordance with the criteria established in the local government code.” A law creating a new local government unit must therefore comply with the Local Government Code of 1991,²⁰⁵ even if such law is later in time than the Local Government Code. In the same manner, all GAAs must comply with Section 23, Chapter 4, Book VI of the Administrative Code, even if the GAAs are later in time than the Administrative Code. GAAs that provide lump-sum appropriations, even though enacted after the effectivity of the Administrative Code of 1987, cannot prevail over Section 23, Chapter 4, Book VI of the Administrative Code.

The OSG maintains that “there is nothing in the Constitution that mandates Congress to pass only line-item appropriations.” In fact, according to the OSG, the Constitution allows the creation of “discretionary funds” and “special funds,” which are allegedly lump-sum appropriations.

This is plain error. The Constitution allows the creation of discretionary and special funds but with certain specified conditions. The Constitution requires that these funds must have specific purposes and can be used only for

²⁰⁵ Cawaling, Jr. v. Comelec, 420 Phil. 524 (2001).

such specific purposes.²⁰⁶ ...

The “discretionary funds” and “special funds” mentioned in the Constitution are *sui generis* items of appropriation because they are regulated by special provisions of the Constitution.

“Discretionary funds” are appropriated for particular officials who must use the funds only for public purposes in relation to the functions of their public office. The particular public officials must support the use of discretionary funds with appropriate vouchers under guidelines prescribed by law. “Discretionary funds” already existed in GAAs under the 1935 and 1973 Constitutions. They are items, and not lump-sums, with specified conditions and guidelines. A valid appropriation includes the payment of funds.²⁰⁷ **The framers of the 1987 Constitution decided to regulate in the Constitution itself (in Section 25(6), Article VI) the disbursement of discretionary funds “to avoid abuse of discretion in the use of discretionary funds”²⁰⁸ in the light of the experience during the Martial Law regime when discretionary funds “were spent for the personal aggrandizement of the First Family and some of their cronies.”²⁰⁹**

The “special funds” mentioned in the Constitution (in Section 29(3), Article VI) do not come from the General Funds as in the case of ordinary special funds, but from a corresponding “tax levied for a special purpose.” Unlike ordinary special funds, the “special funds” mentioned in the Constitution cannot be commingled with other funds and must be “paid out for such (special) purpose only.” The “special funds” mentioned in the Constitution are also not subject to realignment because once the special purpose of the fund is accomplished or abandoned, any balance “shall be transferred to the general funds of the Government.”

It must be stressed that the “calamity fund,” “contingent fund,” and “intelligence fund” in the GAAs are not lump-sum appropriations because they have specific purposes and corresponding amounts. The “calamity fund” can be used only

²⁰⁶ Const., Art. VI, Secs. 25(6), and 29(3).

²⁰⁷ Administrative Code of 1987, Book VI, Chap. 1, Sec. 2.

²⁰⁸ I Journal, Constitutional Commission, No. 37, 391, 23 July 1986.

²⁰⁹ Ibid.

if there are calamities, a use of fund that is sufficiently specific. A “contingent fund” is ordinary and necessary in the operations of both the private and public sectors, and the use of such fund is limited to actual contingencies. The “intelligence fund” has a specific purpose - for use in intelligence operations. All these funds are the proper subject of line-item appropriations.

An appropriation must specify the purpose and the corresponding amount which will be expended for that specific purpose. The purpose of the appropriation must be sufficiently specific to allow the President to exercise his line-item veto power. The appropriation may have several related purposes that are by accounting and budgeting practice considered as one purpose, e.g. MOOE (maintenance and other operating expenses), in which case the related purposes shall be deemed sufficiently specific for the exercise of the President’s line-item veto power. However, if the appropriation has several purposes which are normally divisible but there is only a single amount for all such purposes, and the President cannot veto the use of funds for one purpose without vetoing the entire appropriation, then the appropriation is a lump-sum appropriation.

In the 2013 GAA, the PDAF is a lump-sum appropriation, the purpose of which is the “support for priority programs and projects,” with a menu of programs and projects listed in the PDAF provision that does not itemize the amount for each listed program or project. Such non-itemization of the specific amount for each listed program or project fails to satisfy the requirement for a valid appropriation. To repeat, the PDAF merely provides a lump sum without stating the specific amount allocated for each listed program or project. The PDAF ties the hands of the President since he has no choice except to accept the entire PDAF or to veto it entirely. Even if the PDAF undeniably contains pork-barrel projects, the President might hesitate to veto the entire PDAF for to veto it would result not only in rejecting the pork barrel projects, but also in denying financial support to legitimate projects. This dilemma is the evil in lump-sum appropriations. The President’s line-item veto, which necessarily requires line-item appropriations from the Legislature, is intended precisely to exorcise this evil from appropriation laws.

Clearly, the PDAF negates the President’s constitutional line-item veto power, and also violates the constitutional duty of Congress to enact a line-item GAA. Thus, Article XLIV, on the Priority Development Assistance Fund, of the 2013 GAA is

unconstitutional. Whatever funds that are still remaining from this invalid appropriation shall revert to the unappropriated surplus or balances of the General Fund.

The balance of the 2013 PDAF, having reverted to the unappropriated surplus or balances of the General Fund, can be the subject of an emergency supplemental appropriation to aid the victims of Typhoon Yolanda as well as to fund the repair and reconstruction of facilities damaged by the typhoon. ... There is nothing that prevents President Benigno S. Aquino III from submitting an emergency supplemental appropriation bill that could be approved on the same day by the Congress of the Philippines. The President can certify such bill for immediate enactment to meet the public calamity caused by Typhoon Yolanda.²¹⁰

Section 28. (1) The rule of taxation shall be uniform and equitable. The Congress shall evolve a progressive system of taxation.

(2) The Congress may, by law, authorize the President to fix within specified limits, and subject to such limitations and restrictions as it may impose, tariff rates, import and export quotas, tonnage and wharfage dues, and other duties or imposts within the framework of the national development program of the Government.

(3) Charitable institutions, churches and parsonages or convents appurtenant thereto, mosques, non-profit cemeteries, and all lands, buildings, and improvements, actually, directly, and exclusively used for religious, charitable, or educational purposes shall be exempt from taxation.

(4) No law granting any tax exemption shall be passed without the concurrence of a majority of all the Members of the Congress.

COMMISSIONER OF INTERNAL REVENUE v. ST. LUKE'S MEDICAL CENTER, INC., G.R. No. 195909, September 26, 2012, 695 Phil. 867,²¹¹ was a petition for review on *certiorari* that assailed

²¹⁰ Const., Art. VI, Sec. 26(2).

²¹¹ Consolidated with *St. Luke's Medical Center, Inc. v. Commissioner of Internal*

the decision and resolution of the Court of Tax Appeals *en banc* on the **income tax treatment** of proprietary **non-profit hospitals**. The Second Division of the Court, through Justice Carpio, explained the third and fourth paragraphs of **Section 28, Article VI**:

The Facts

St. Luke's Medical Center, Inc. (St. Luke's) is a hospital organized as a non-stock and non-profit corporation. Under its articles of incorporation, among its corporate purposes are:

- (a) To establish, equip, operate and maintain a non-stock, non-profit Christian, benevolent, charitable and scientific hospital which shall give curative, rehabilitative and spiritual care to the sick, diseased and disabled persons; provided that purely medical and surgical services shall be performed by duly licensed physicians and surgeons who may be freely and individually contracted by patients;
- (b) To provide a career of health science education and provide medical services to the community through organized clinics in such specialties as the facilities and resources of the corporation make possible;
- (c) To carry on educational activities related to the maintenance and promotion of health as well as provide facilities for scientific and medical researches which, in the opinion of the Board of Trustees, may be justified by the facilities, personnel, funds, or other requirements that are available;
- (d) To cooperate with organized medical societies, agencies of both government and private sector; establish rules and regulations consistent with the highest professional ethics;
- ...

On 16 December 2002, the Bureau of Internal Revenue (BIR) assessed St. Luke's deficiency taxes amounting to P76,063,116.06 for 1998, comprised of deficiency income tax, value-added tax, withholding tax on compensation and expanded withholding tax. The BIR reduced the amount to P63,935,351.57 during trial in the First Division of the CTA.

On 14 January 2003, St. Luke's filed an administrative protest

Revenue, G.R. No. 195960, which was denied for raising factual issues in violation of Section 1, Rule 45 of the Rules of Court.

with the BIR against the deficiency tax assessments. The BIR did not act on the protest within the 180-day period under Section 228 of the NIRC. Thus, St. Luke's appealed to the CTA.

The BIR argued before the CTA that Section 27(B) of the NIRC, which imposes a 10% preferential tax rate on the income of proprietary non-profit hospitals, should be applicable to St. Luke's. According to the BIR, Section 27(B), introduced in 1997, "is a new provision intended to amend the exemption on non-profit hospitals that were previously categorized as non-stock, non-profit corporations under Section 26 of the 1997 Tax Code ..." It is a specific provision which prevails over the general exemption on income tax granted under Section 30(E) and (G) for non-stock, non-profit charitable institutions and civic organizations promoting social welfare.

The BIR claimed that St. Luke's was actually operating for profit in 1998 because only 13% of its revenues came from charitable purposes. Moreover, the hospital's board of trustees, officers and employees directly benefit from its profits and assets. St. Luke's had total revenues of P1,730,367,965 or approximately P1.73 billion from patient services in 1998.

St. Luke's contended that the BIR should not consider its total revenues, because its free services to patients was P218,187,498 or 65.20% of its 1998 operating income (i.e., total revenues less operating expenses) of P334,642,615. St. Luke's also claimed that its income does not inure to the benefit of any individual.

St. Luke's maintained that it is a non-stock and non-profit institution for charitable and social welfare purposes under Section 30(E) and (G) of the NIRC. It argued that the making of profit per se does not destroy its income tax exemption.

The petition of the BIR before this Court in G.R. No. 195909 reiterates its arguments before the CTA that Section 27(B) applies to St. Luke's. The petition raises the sole issue of whether the enactment of Section 27(B) takes proprietary non-profit hospitals out of the income tax exemption under Section 30 of the NIRC and instead, imposes a preferential rate of 10% on their taxable income. The BIR prays that St. Luke's be ordered to pay P57,659,981.19 as deficiency income and expanded withholding tax for 1998 with surcharges and interest for late payment.

...

The Ruling of the Court of Tax Appeals

The CTA *en banc* Decision on 19 November 2010 affirmed *in toto* the CTA First Division Decision dated 23 February 2009 which held:

WHEREFORE, the Amended Petition for Review [by St. Luke's] is hereby PARTIALLY GRANTED. Accordingly, the 1998 deficiency VAT assessment issued by respondent against petitioner in the amount of P110,000.00 is hereby CANCELLED and WITHDRAWN. However, petitioner is hereby ORDERED to PAY deficiency income tax and deficiency expanded withholding tax for the taxable year 1998 in the respective amounts of P5,496,963.54 and P778,406.84 or in the sum of P6,275,370.38, ...

...

In addition, petitioner is hereby ORDERED to PAY twenty percent (20%) delinquency interest on the total amount of P6,275,370.38 counted from October 15, 2003 until full payment thereof, pursuant to Section 249(C)(3) of the NIRC of 1997.

SO ORDERED.

The deficiency income tax of P5,496,963.54, ordered by the CTA *en banc* to be paid, arose from the failure of St. Luke's to prove that part of its income in 1998 (declared as "Other Income-Net") came from charitable activities. The CTA cancelled the remainder of the P63,113,952.79 deficiency assessed by the BIR based on the 10% tax rate under Section 27(B) of the NIRC, which the CTA *en banc* held was not applicable to St. Luke's.

The CTA ruled that St. Luke's is a non-stock and non-profit charitable institution covered by Section 30(E) and (G) of the NIRC. This ruling would exempt all income derived by St. Luke's from services to its patients, whether paying or non-paying. The CTA reiterated its earlier decision in *St. Luke's Medical Center, Inc. v. Commissioner of Internal Revenue*, which examined the primary purposes of St. Luke's under its articles of incorporation and various documents identifying St. Luke's as a charitable institution.

The CTA adopted the test in *Hospital de San Juan de Dios, Inc. v. Pasay City*,²¹² which states that "a charitable institution does

²¹² 123 Phil. 38 (1966).

not lose its charitable character and its consequent exemption from taxation merely because recipients of its benefits who are able to pay are required to do so, where funds derived in this manner are devoted to the charitable purposes of the institution ...”²¹³ The generation of income from paying patients does not per se destroy the charitable nature of St. Luke’s.

Hospital de San Juan cited *Jesus Sacred Heart College v. Collector of Internal Revenue*,²¹⁴ which ruled that the old NIRC (Commonwealth Act No. 466, as amended) “positively exempts from taxation those corporations or associations which, otherwise, would be subject thereto, because of the existence of ... net income.”²¹⁵ The NIRC of 1997 substantially reproduces the provision on charitable institutions of the old NIRC. Thus, in rejecting the argument that tax exemption is lost whenever there is net income, the Court in *Jesus Sacred Heart College* declared: “[E]very responsible organization must be run to at least insure its existence, by operating within the limits of its own resources, especially its regular income. In other words, it should always strive, whenever possible, to have a surplus.”²¹⁶

The CTA held that Section 27(B) of the present NIRC does not apply to St. Luke’s. The CTA explained that to apply the 10% preferential rate, Section 27(B) requires a hospital to be “non-profit.” On the other hand, Congress specifically used the word “non-stock” to qualify a charitable “corporation or association” in Section 30(E) of the NIRC. According to the CTA, this is unique in the present tax code, indicating an intent to exempt this type of charitable organization from income tax. Section 27(B) does not require that the hospital be “non-stock.” The CTA stated, “it is clear that non-stock, non-profit hospitals operated exclusively for charitable purpose are exempt from income tax on income received by them as such, applying the provision of Section 30(E) of the NIRC of 1997, as amended.”

The Issue

The sole issue is whether St. Luke’s is liable for deficiency income tax in 1998 under Section 27(B) of the NIRC, which imposes a preferential tax rate of 10% on the income of proprietary non-profit hospitals.

²¹³ Id. at 41 citing 51 Am. Jur. 607.

²¹⁴ 95 Phil. 16 (1954).

²¹⁵ *Jesus Sacred Heart College v. Collector of Internal Revenue*, 95 Phil. 16, 21 (1954).

²¹⁶ Ibid.

The Ruling of the Court

...

The Main Issue

The issue raised by the BIR is a purely legal one. It involves the effect of the introduction of Section 27(B) in the NIRC of 1997 *vis-à-vis* Section 30(E) and (G) on the income tax exemption of charitable and social welfare institutions. The 10% income tax rate under Section 27(B) specifically pertains to proprietary educational institutions and proprietary non-profit hospitals. The BIR argues that Congress intended to remove the exemption that non-profit hospitals previously enjoyed under Section 27(E) of the NIRC of 1977, which is now substantially reproduced in Section 30(E) of the NIRC of 1997. Section 27(B) of the present NIRC provides:

Sec. 27. Rates of Income Tax on Domestic Corporations. -

...

(B) Proprietary Educational Institutions and Hospitals. - Proprietary educational institutions and hospitals which are non-profit shall pay a tax of ten percent (10%) on their taxable income except those covered by Subsection (D) hereof: Provided, That if the gross income from unrelated trade, business or other activity exceeds fifty percent (50%) of the total gross income derived by such educational institutions or hospitals from all sources, the tax prescribed in Subsection (A) hereof shall be imposed on the entire taxable income. For purposes of this Subsection, the term 'unrelated trade, business or other activity' means any trade, business or other activity, the conduct of which is not substantially related to the exercise or performance by such educational institution or hospital of its primary purpose or function. A 'proprietary educational institution' is any private school maintained and administered by private individuals or groups with an issued permit to operate from the Department of Education, Culture and Sports (DECS), or the Commission on Higher Education (CHED), or the Technical Education and Skills Development Authority (TESDA), as the case may be, in accordance with existing laws and regulations.

St. Luke's claims tax exemption under Section 30(E) and (G) of the NIRC. It contends that it is a charitable institution and an organization promoting social welfare. The arguments of St. Luke's focus on the wording of Section 30(E) exempting from

income tax non-stock, non-profit charitable institutions. St. Luke's asserts that the legislative intent of introducing Section 27(B) was only to remove the exemption for "proprietary non-profit" hospitals. The relevant provisions of Section 30 state:

Sec. 30. Exemptions from Tax on Corporations. - The following organizations shall not be taxed under this Title in respect to income received by them as such:

...

(E) Nonstock corporation or association organized and operated exclusively for religious, charitable, scientific, athletic, or cultural purposes, or for the rehabilitation of veterans, no part of its net income or asset shall belong to or inure to the benefit of any member, organizer, officer or any specific person;

...

(G) Civic league or organization not organized for profit but operated exclusively for the promotion of social welfare;

...

Notwithstanding the provisions in the preceding paragraphs, the income of whatever kind and character of the foregoing organizations from any of their properties, real or personal, or from any of their activities conducted for profit regardless of the disposition made of such income, shall be subject to tax imposed under this Code.

The Court partly grants the petition of the BIR but on a different ground. We hold that Section 27(B) of the NIRC does not remove the income tax exemption of proprietary non-profit hospitals under Section 30(E) and (G). Section 27(B) on one hand, and Section 30(E) and (G) on the other hand, can be construed together without the removal of such tax exemption. The effect of the introduction of Section 27(B) is to subject the taxable income of two specific institutions, namely, proprietary non-profit educational institutions and proprietary non-profit hospitals, among the institutions covered by Section 30, to the 10% preferential rate under Section 27(B) instead of the ordinary 30% corporate rate under the last paragraph of Section 30 in relation to Section 27(A)(1).

Section 27(B) of the NIRC imposes a 10% preferential tax rate on the income of (1) proprietary non-profit educational institutions and (2) proprietary non-profit hospitals. The only qualifications for hospitals are that they must be proprietary and non-profit. "Proprietary" means private, following the definition of a

“proprietary educational institution” as “any private school maintained and administered by private individuals or groups” with a government permit. “Non-profit” means no net income or asset accrues to or benefits any member or specific person, with all the net income or asset devoted to the institution’s purposes and all its activities conducted not for profit.

“Non-profit” does not necessarily mean “charitable.” In *Collector of Internal Revenue v. Club Filipino Inc. de Cebu*,²¹⁷ this Court considered as non-profit a sports club organized for recreation and entertainment of its stockholders and members. The club was primarily funded by membership fees and dues. If it had profits, they were used for overhead expenses and improving its golf course.²¹⁸ The club was non-profit because of its purpose and there was no evidence that it was engaged in a profit-making enterprise.²¹⁹

The sports club in *Club Filipino Inc. de Cebu* may be non-profit, but it was not charitable. The Court defined “charity” in *Lung Center of the Philippines v. Quezon City*²²⁰ as “a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds and hearts under the influence of education or religion, by assisting them to establish themselves in life or [by] otherwise lessening the burden of government.” A non-profit club for the benefit of its members fails this test. An organization may be considered as non-profit if it does not distribute any part of its income to stockholders or members. However, despite its being a tax exempt institution, any income such institution earns from activities conducted for profit is taxable, as expressly provided in the last paragraph of Section 30.

To be a charitable institution, however, an organization must meet the substantive test of charity in *Lung Center*. The issue in *Lung Center* concerns exemption from real property tax and not income tax. However, it provides for the test of charity in our jurisdiction. Charity is essentially a gift to an indefinite number of persons which lessens the burden of government. In other words, charitable institutions provide for free goods and services to the public which would otherwise fall on the shoulders of government. Thus, as a matter of efficiency, the government forgoes taxes which should have been spent to address public needs, because certain private entities already assume a part

²¹⁷ 115 Phil. 310 (1962).

²¹⁸ Id. at 311.

²¹⁹ Id. at 314.

²²⁰ G.R. No. 144104, 29 June 2004, 433 SCRA 119.

of the burden. This is the rationale for the tax exemption of charitable institutions. The loss of taxes by the government is compensated by its relief from doing public works which would have been funded by appropriations from the Treasury.

Charitable institutions, however, are not *ipso facto* entitled to a tax exemption. The requirements for a tax exemption are specified by the law granting it. The power of Congress to tax implies the power to exempt from tax. Congress can create tax exemptions, subject to [Section 28(4)] ... The requirements for a tax exemption are strictly construed against the taxpayer²²¹ because an exemption restricts the collection of taxes necessary for the existence of the government.

The Court in *Lung Center* declared that the Lung Center of the Philippines is a charitable institution for the purpose of exemption from real property taxes. This ruling uses the same premise as *Hospital de San Juan*²²² and *Jesus Sacred Heart College*²²³ which says that receiving income from paying patients does not destroy the charitable nature of a hospital.

As a general principle, a charitable institution does not lose its character as such and its exemption from taxes simply because it derives income from paying patients, whether out-patient, or confined in the hospital, or receives subsidies from the government, so long as the money received is devoted or used altogether to the charitable object which it is intended to achieve; and no money inures to the private benefit of the persons managing or operating the institution.²²⁴

For real property taxes, the incidental generation of income is permissible because the test of exemption is the use of the property. The Constitution provides [this under Section 28(3)] ... The test of exemption is not strictly a requirement on the intrinsic nature or character of the institution. The test requires that the institution use the property in a certain way, i.e. for a charitable purpose. Thus, the Court held that the Lung Center of

²²¹ *Commissioner of Internal Revenue v. The Philippine American Accident Insurance Company, Inc.*, 493 Phil. 785 (2005); *Lung Center of the Philippines v. Quezon City*, supra note 40 at 133-134; *Mactan Cebu International Airport Authority v. Marcos*, 330 Phil. 392 (1996); *Manila Electric Company v. Vera*, 160-A Phil. 498 (1975).

²²² 123 Phil. 38 (1966).

²²³ 95 Phil. 16 (1954).

²²⁴ *Lung Center of the Philippines v. Quezon City*, supra note 40 at 131-132.

the Philippines did not lose its charitable character when it used a portion of its lot for commercial purposes. The effect of failing to meet the use requirement is simply to remove from the tax exemption that portion of the property not devoted to charity.

The Constitution exempts charitable institutions only from real property taxes. In the NIRC, Congress decided to extend the exemption to income taxes. However, the way Congress crafted Section 30(E) of the NIRC is materially different from Section 28(3), Article VI of the Constitution. Section 30(E) of the NIRC defines the corporation or association that is exempt from income tax. On the other hand, Section 28(3), Article VI of the Constitution does not define a charitable institution, but requires that the institution “actually, directly and exclusively” use the property for a charitable purpose.

Section 30(E) of the NIRC provides that a charitable institution must be:

- (1) A non-stock corporation or association;
- (2) Organized exclusively for charitable purposes;
- (3) Operated exclusively for charitable purposes; and
- (4) No part of its net income or asset shall belong to or inure to the benefit of any member, organizer, officer or any specific person.

Thus, both the organization and operations of the charitable institution must be devoted “exclusively” for charitable purposes. The organization of the institution refers to its corporate form, as shown by its articles of incorporation, by-laws and other constitutive documents. Section 30(E) of the NIRC specifically requires that the corporation or association be non-stock, which is defined by the Corporation Code as “one where no part of its income is distributable as dividends to its members, trustees, or officers” and that any profit “obtain[ed] as an incident to its operations shall, whenever necessary or proper, be used for the furtherance of the purpose or purposes for which the corporation was organized.” However, under *Lung Center*, any profit by a charitable institution must not only be plowed back “whenever necessary or proper,” but must be “devoted or used altogether to the charitable object which it is intended to achieve.”²²⁵

²²⁵ G.R. No. 144104, 29 June 2004, 433 SCRA 119.

The operations of the charitable institution generally refer to its regular activities. Section 30(E) of the NIRC requires that these operations be exclusive to charity. There is also a specific requirement that “no part of [the] net income or asset shall belong to or inure to the benefit of any member, organizer, officer or any specific person.” The use of lands, buildings and improvements of the institution is but a part of its operations.

There is no dispute that St. Luke’s is organized as a non-stock and non-profit charitable institution. However, this does not automatically exempt St. Luke’s from paying taxes. This only refers to the organization of St. Luke’s. Even if St. Luke’s meets the test of charity, a charitable institution is not ipso facto tax exempt. **To be exempt from real property taxes, Section 28(3), Article VI of the Constitution requires that a charitable institution use the property “actually, directly and exclusively” for charitable purposes.** To be exempt from income taxes, Section 30(E) of the NIRC requires that a charitable institution must be “organized and operated exclusively” for charitable purposes. Likewise, to be exempt from income taxes, Section 30(G) of the NIRC requires that the institution be “operated exclusively” for social welfare.

However, the last paragraph of Section 30 of the NIRC qualifies the words “organized and operated exclusively” by providing that:

Notwithstanding the provisions in the preceding paragraphs, the income of whatever kind and character of the foregoing organizations from any of their properties, real or personal, or from any of their activities conducted for profit regardless of the disposition made of such income, shall be subject to tax imposed under this Code.

In short, the last paragraph of Section 30 provides that if a tax exempt charitable institution conducts “any” activity for profit, such activity is not tax exempt even as its not-for-profit activities remain tax exempt. This paragraph qualifies the requirements in Section 30(E) that the “[n]on-stock corporation or association [must be] organized and operated exclusively for ... charitable ... purposes ...” It likewise qualifies the requirement in Section 30(G) that the civic organization must be “operated exclusively” for the promotion of social welfare.

Thus, even if the charitable institution must be “organized and

operated exclusively” for charitable purposes, it is nevertheless allowed to engage in “activities conducted for profit” without losing its tax exempt status for its not-for-profit activities. The only consequence is that the “income of whatever kind and character” of a charitable institution “from any of its activities conducted for profit, regardless of the disposition made of such income, shall be subject to tax.” Prior to the introduction of Section 27(B), the tax rate on such income from for-profit activities was the ordinary corporate rate under Section 27(A). With the introduction of Section 27(B), the tax rate is now 10%.

In 1998, St. Luke’s had total revenues of P1,730,367,965 from services to paying patients. It cannot be disputed that a hospital which receives approximately P1.73 billion from paying patients is not an institution “operated exclusively” for charitable purposes. Clearly, revenues from paying patients are income received from “activities conducted for profit.” Indeed, St. Luke’s admits that it derived profits from its paying patients. St. Luke’s declared P1,730,367,965 as “Revenues from Services to Patients” in contrast to its “Free Services” expenditure of P218,187,498. ...

In *Lung Center*, this Court declared:

“[e]xclusive” is defined as possessed and enjoyed to the exclusion of others; debarred from participation or enjoyment; and “exclusively” is defined, “in a manner to exclude; as enjoying a privilege exclusively.” ... The words “dominant use” or “principal use” cannot be substituted for the words “used exclusively” without doing violence to the Constitution and the law. Solely is synonymous with exclusively.²²⁶

The Court cannot expand the meaning of the words “operated exclusively” without violating the NIRC.

Services to paying patients are activities conducted for profit. They cannot be considered any other way. There is a “purpose to make profit over and above the cost” of services.²²⁷ The P1.73 billion total revenues from paying patients is not even incidental to St. Luke’s charity expenditure of P218,187,498 for non-paying patients.

St. Luke’s claims that its charity expenditure of P218,187,498

²²⁶ G.R. No. 144104, 29 June 2004, 433 SCRA 119, 137.

²²⁷ *Jesus Sacred Heart College v. Collector of Internal Revenue*, 95 Phil. 16, 20-21 (1954).

is 65.20% of its operating income in 1998. However, if a part of the remaining 34.80% of the operating income is reinvested in property, equipment or facilities used for services to paying and non-paying patients, then it cannot be said that the income is “devoted or used altogether to the charitable object which it is intended to achieve.”²²⁸ The income is plowed back to the corporation not entirely for charitable purposes, but for profit as well. In any case, the last paragraph of Section 30 of the NIRC expressly qualifies that income from activities for profit is taxable “regardless of the disposition made of such income.”

Jesus Sacred Heart College declared that there is no official legislative record explaining the phrase “any activity conducted for profit.” However, it quoted a deposition of Senator Mariano Jesus Cuenco, who was a member of the Committee of Conference for the Senate, which introduced the phrase “or from any activity conducted for profit.”

P. Cuando ha hablado de la Universidad de Santo Tomás que tiene un hospital, no cree Vd. que es una actividad esencial dicho hospital para el funcionamiento del colegio de medicina de dicha universidad?

...

*R. Si el hospital se limita a recibir enfermos pobres, mi contestación sería afirmativa; pero considerando que el hospital tiene cuartos de pago, y a los mismos generalmente van enfermos de buena posición social económica, lo que se paga por estos enfermos debe estar sujeto a ‘income tax’, y es una de las razones que hemos tenido para insertar las palabras o frase ‘or from any activity conducted for profit.’*²²⁹

The question was whether having a hospital is essential to an educational institution like the College of Medicine of the University of Santo Tomas. Senator Cuenco answered that if the hospital has paid rooms generally occupied by people of good economic standing, then it should be subject to income tax. He said that this was one of the reasons Congress inserted the phrase “or any activity conducted for profit.”

The question in *Jesus Sacred Heart College* involves an educational institution.²³⁰ However, it is applicable to charitable institutions because Senator Cuenco’s response shows an intent

²²⁸ Lung Center of the Philippines v. Quezon City, G.R. No. 144104, 29 June 2004, 433 SCRA 119.

²²⁹ *Jesus Sacred Heart College v. Collector of Internal Revenue*, 95 Phil. 16, 29 (1954).

²³⁰ *Id.* at 23.

to focus on the activities of charitable institutions. Activities for profit should not escape the reach of taxation. Being a non-stock and non-profit corporation does not, by this reason alone, completely exempt an institution from tax. An institution cannot use its corporate form to prevent its profitable activities from being taxed.

The Court finds that St. Luke's is a corporation that is not "operated exclusively" for charitable or social welfare purposes insofar as its revenues from paying patients are concerned. This ruling is based not only on a strict interpretation of a provision granting tax exemption, but also on the clear and plain text of Section 30(E) and (G). Section 30(E) and (G) of the NIRC requires that an institution be "operated exclusively" for charitable or social welfare purposes to be completely exempt from income tax. An institution under Section 30(E) or (G) does not lose its tax exemption if it earns income from its for-profit activities. Such income from for-profit activities, under the last paragraph of Section 30, is merely subject to income tax, previously at the ordinary corporate rate but now at the preferential 10% rate pursuant to Section 27(B).

A tax exemption is effectively a social subsidy granted by the State because an exempt institution is spared from sharing in the expenses of government and yet benefits from them. Tax exemptions for charitable institutions should therefore be limited to institutions beneficial to the public and those which improve social welfare. A profit-making entity should not be allowed to exploit this subsidy to the detriment of the government and other taxpayers.

St. Luke's fails to meet the requirements under Section 30(E) and (G) of the NIRC to be completely tax exempt from all its income. However, it remains a proprietary non-profit hospital under Section 27(B) of the NIRC as long as it does not distribute any of its profits to its members and such profits are reinvested pursuant to its corporate purposes. St. Luke's, as a proprietary non-profit hospital, is entitled to the preferential tax rate of 10% on its net income from its for-profit activities. St. Luke's is therefore liable for deficiency income tax in 1998 under Section 27(B) of the NIRC. However, St. Luke's has good reasons to rely on the letter dated 6 June 1990 by the BIR, which opined that St. Luke's is "a corporation for purely charitable and social welfare purposes" and thus exempt from income tax. In *Michael J.*

Lhuillier, Inc. v. Commissioner of Internal Revenue,²³¹ the Court said that “good faith and honest belief that one is not subject to tax on the basis of previous interpretation of government agencies tasked to implement the tax law, are sufficient justification to delete the imposition of surcharges and interest.”

Section 29. (1) No money shall be paid out of the Treasury except in pursuance of an appropriation made by law.

(2) No public money or property shall be appropriated, applied, paid, or employed, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, sectarian institution, or system of religion, or of any priest, preacher, minister, other religious teacher, or dignitary as such, except when such priest, preacher, minister, or dignitary is assigned to the armed forces, or to any penal institution, or government orphanage or leprosarium.

(3) All money collected on any tax levied for a special purpose shall be treated as a special fund and paid out for such purpose only. If the purpose for which a special fund was created has been fulfilled or abandoned, the balance, if any, shall be transferred to the general funds of the Government.

STRATEGIC ALLIANCE DEVELOPMENT CORPORATION (STRADEC) v. RADSTOCK SECURITIES LIMITED, G.R. No. 178158, December 4, 2009, 622 Phil. 431, was one of Justice Carpio’s most emphatic *ponencias* for the Court *en banc*, immediately evident in the prologue of the case:

This case is an anatomy of a P6.185 billion pillage of the public coffers that ranks among one of the most brazen and hideous in the history of this country. This case answers the questions why our Government perennially runs out of funds to provide basic services to our people, why the great masses of the Filipino people wallow in poverty, and why a very select few amass unimaginable wealth at the expense of the Filipino people.

On 1 May 2007, the 30-year old franchise of Philippine National Construction Corporation (PNCC) under Presidential Decree No.

²³¹ 533 Phil. 101 (2006).

1113 (PD 1113), as amended by Presidential Decree No. 1894 (PD 1894), expired. During the 13th Congress, PNCC sought to extend its franchise. PNCC won approval from the House of Representatives, which passed House Bill No. 5749²³² renewing PNCC's franchise for another 25 years. However, PNCC failed to secure approval from the Senate, dooming the extension of PNCC's franchise. Led by Senator Franklin M. Drilon, the Senate opposed PNCC's plea for extension of its franchise. Senator Drilon's privilege speech explains why the Senate chose not to renew PNCC's franchise:

I repeat, Mr. President. PNCC has agreed in a compromise agreement dated 17 August 2006 to transfer to Radstock Securities Limited P17,676,063,922, no small money, Mr. President, my dear colleagues, P17.6 billion.

What does it consist of? It consists of the following: 19 pieces of real estate properties with an appraised value of P5,993,689,000. Do we know what is the bulk of this? An almost 13- hectare property right here in the Financial Center. As we leave the Senate, as we go out of this Hall, as we drive thru past the GSIS, we will see on the right a vacant lot, that is PNCC property. As we turn right on Diosdado Macapagal, we see on our right new buildings, these are all PNCC properties. That is 12.9 hectares of valuable asset right in this Financial Center that is worth P5,993,689,000.

What else, Mr. President? The 20% of the outstanding capital stock of PNCC with a par value of P2,300,000,000-- I repeat, 20% of the outstanding capital stock of PNCC worth P2,300 billion - was assigned to Radstock.

In addition, Mr. President and my dear colleagues, please hold on to your seats because part of the agreement is 50% of PNCC's 6% share in the gross toll revenue of the Manila North Tollways Corporation for 27 years, from 2008 to 2035, is being assigned to Radstock. How much is this worth? It is worth P9,382,374,922. I repeat, P9,382,374,922. ...

Mr. President, P17,676,000,000, however, was made to appear in the agreement to be only worth P6,196,156,488. How was this achieved? How was an aggregate amount of P17,676,000,000 made to appear to be only P6,196,156,488?

First, the 19 pieces of real estate worth P5,993,689,000 were

²³² An Act Renewing The Franchise Of The Philippine National Construction Corporation (PNCC), Formerly Known As The Construction And Development Corporation Of The Philippines (CDCP), Granted Under Presidential Decree No. 1113, As Amended By Presidential Decree No. 1894, To Another 25 Years From The Date Of The Approval Of This Act And For Other Purposes.

only assigned a value of P4,195,000,000 or only 70% of their appraised value.

Second, the PNCC shares of stock with a par value of P2.3 billion were marked to market and therefore were valued only at P713 million.

Third, the share of the toll revenue assigned was given a net present value of only P1,287,000,000 because of a 15% discounted rate that was applied.

In other words, Mr. President, the toll collection of P9,382,374,922 for 27 years was given a net present value of only P1,287,000,000 so that it is made to appear that the compromise agreement is only worth P6,196,000,000.

Mr. President, my dear colleagues, this agreement will substantially wipe out all the assets of PNCC. It will be left with nothing else except, probably, the collection for the next 25 years or so from the North Luzon Expressway. This agreement brought PNCC to the cleaners and literally cleaned the PNCC of all its assets. They brought PNCC to the cleaners and cleaned it to the tune of P17,676,000,000. ...

Mr. President, are we not entitled, as members of the Committee, to know who is Radstock Securities Limited?

Radstock Securities Limited was allegedly incorporated under the laws of the British Virgin Islands. It has no known board of directors, except for its recently appointed attorney-in- fact, Mr. Carlos Dominguez.

Mr. President, are the members of the Committee not entitled to know why 20 years after the account to Marubeni Corporation, which gave rise to the compromise agreement 20 years after the obligation was allegedly incurred, PNCC suddenly recognized this obligation in its books when in fact this obligation was not found in its books for 20 years?

In other words, Mr. President, for 20 years, the financial statements of PNCC did not show any obligation to Marubeni, much less, to Radstock. Why suddenly on October 20, 2000, P10 billion in obligation was recognized? Why was it recognized?

During the hearing on December 18, Mr. President, we asked this question to the Asset Privatization Trust (APT) trustee, Atty. Raymundo Francisco, and he was asked: "What is the basis of your recommendation to recognize this?" He said: "I based my recommendation on a legal opinion of Feria and Feria." I asked him: "Who knew of this opinion?" He said: "Only me and the chairman of PNCC, Atty. Renato Valdecantos." I asked him: "Did you share this opinion with the members of the board who recognized the obligation of P10 billion?" He said: "No." "Can you produce this opinion now?" He said: "I

have no copy.”

Mysteriously, Mr. President, an obligation of P10 billion based on a legal opinion which, even Mr. Arthur Aguilar, the chairman of PNCC, is not aware of, none of the members of the PNCC board on October 20, 2000 who recognized this obligation had seen this opinion. It is mysterious.

Mr. President, are the members of our Committee not entitled to know why Radstock Securities Limited is given preference over all other creditors notwithstanding the fact that this is an unsecured obligation? There is no mortgage to secure this obligation.

More importantly, Mr. President, equally recognized is the obligation of PNCC to the Philippine government to the tune of P36 billion. PNCC owes the Philippine government P36 billion recognized in its books, apart from P3 billion in taxes. Why in the face of all of these is Radstock given preference? Why is it that Radstock is given preference to claim P17.676 billion of the assets of PNCC and give it superior status over the claim of the Philippine government, of the Filipino people to the extent of P36 billion and taxes in the amount of P3 billion? Why, Mr. President? Why is Radstock given preference not only over the Philippine government claims of P39 billion but also over other creditors including a certain best merchant banker in Asia, which has already a final and executory judgment against PNCC for about P300 million? Why, Mr. President? Are we not entitled to know why the compromise agreement assigned P17.676 billion to Radstock? Why was it executed?²³³

Aside from Senator Drilon, Senator Sergio S. Osmeña III also saw irregularities in the transactions involving the Marubeni loans, thus:

SEN. OSMEÑA. ... Now, I'd like to point out to the Committee that - it seems that this was a politically driven deal like IMPSA. Because the acceptance of the 10 billion or 13 billion debt came in October 2000 and the Radstock assignment was January 10, 2001. Now, why would Marubeni sell for \$2 million three months after there was a recognition that it was owed P10 billion. Can you explain that, Mr. Dominguez?

MR. DOMINGUEZ. Your Honor, I am not aware of the decision making process of Marubeni. But my understanding was, the Japanese culture is not a litigious one and they

²³³ III Record of the Senate, Session No. 55, 21 December 2006.

didn't want to get into a, you know, a court situation here in the Philippines having a lot of other interest, et cetera.

SEN. OSMENA. Well, but that is beside the point, Mr. Dominguez. All I am asking is does it stand to reason that after you get an acceptance by a debtor that he owes you 10 billion, you sell your note for 100 million.

Now, if that had happened a year before, maybe I would have understood why he sold for such a low amount. But right after, it seems that this was part of an orchestrated deal wherein with certain powerful interest would be able to say, "Yes, we will push through. We'll fix the courts. We'll fix the board. We'll fix the APT. And we will be able to do it, just give us 55 percent of whatever is recovered," am I correct?

MR. DOMINGUEZ. As I said, Your Honor, I am not familiar with the decision making process of Marubeni. But my understanding was, as I said, they didn't want to get into a...

SEN. OSMENA. All right.

MR. DOMINGUEZ. ... litigious situation. ...

SEN. OSMENA. All of these financial things can be arranged. They can hire a local bank, Filipino, to be trustee for the real estate. So...

SEN. DRILON. Well, then, that's a dummy relationship.

SEN. OSMENA. In any case, to me the main point here is that a third party, Radstock, whoever owns it, bought Marubeni's right for \$2 million or P100 million. Then, they are able to go through all these legal machinations and get awarded with the consent of PNCC of 6 billion. That's a 100 million to 6 billion. Now, Mr. Aguilar, you have been in the business for such a long time. I mean, this hedge funds whether it's Radstock or New Bridge or Texas Pacific Group or Carlyle or Avenue Capital, they look at their returns. So if Avenue Capital buys something for \$2 million and you give him \$4 million in one year, it's a 100 percent return. They'll walk away and dance to their stockholders. So here in this particular case, if you know that Radstock only bought it for \$2 million, I would have gotten board approval and say, "Okay, let's settle this for \$4 million." And Radstock would have jumped up and down. So what looks to me is that this was already a scheme. Marubeni wrote it off already. Marubeni wrote everything off. They just got a \$2 million and they probably have no more residual rights or maybe there's a clause there, a secret clause, that says, "I want 20 percent of whatever you're able to eventually collect." So \$2 million. But whatever it is, Marubeni practically wrote it off. Radstock's liability

now or exposure is only \$2 million plus all the lawyer fees, under-the-table, etcetera. All right. Okay. So it's pretty obvious to me that if anybody were using his brain, I would have gone up to Radstock and say, "Here's \$4 million. Here's P200 million. Okay." They would have walked away. But evidently, the "ninongs" of Radstock - See, I don't care who owns Radstock. I want to know who is the ninong here who stands to make a lot of money by being able to get to courts, the government agencies, OGCC, or whoever else has been involved in this, to agree to 6 billion or whatever it was. That's a lot of money. And believe me, Radstock will probably get one or two billion and four billion will go into somebody else's pocket. Or Radstock will turn around, sell that claim for P4 billion and let the new guy just collect the payments over the years. X...

SEN. OSMENÁ. ... I just wanted to know is CDCP Mining a 100 percent subsidiary of PNCC?

MR. AGUILAR. Hindi ho. Ah, no.

SEN. OSMENÁ. If they're not a 100 percent, why would they sign jointly and severally? I just want to plug the loopholes.

MR. AGUILAR. I think it was - if I may just speculate. It was just common ownership at that time.

SEN. OSMENÁ. All right. Now - Also, the...

MR. AGUILAR. Ah, 13 percent daw, Your Honor.

SEN. OSMENÁ. Huh?

MR. AGUILAR. Thirteen percent ho.

SEN. OSMENÁ. What's 13 percent?

MR. AGUILAR. We owned...

SEN. OSMENÁ. ... CDCP Mining, how many percent of the equity of CDCP Mining was owned by PNCC, formerly CDCP?

MS. PASETES. Thirteen percent.

SEN. OSMENÁ. Thirteen. And as a 13 percent owner, they agreed to sign jointly and severally?

MS. PASETES. Yes.

SEN. OSMENÁ. One-three? So poor PNCC and CDCP got taken to the cleaners here. They sign for a 100 percent and they only own 13 percent. ...²³⁴

STRADEC was one of the consolidated petitions for review²³⁵ filed by Strategic Alliance Development Corporation and Luis Sison, which challenged the validity of the compromise agreement between

²³⁴ Transcripts excerpted in the decision are of the Committee Hearings held on 14, 18, and 19 December 2006.

²³⁵ Consolidated with *Sison v. Philippine National Construction Corporation and Radstock Securities Ltd.*, G.R. No. 180428.

PNCC and Radstock, earlier approved by the Court of Appeals. The antecedents were presented as follows:

PNCC was incorporated in 1966 for a term of fifty years under the Corporation Code with the name Construction Development Corporation of the Philippines (CDCP). PD 1113, issued on 31 March 1977, granted CDCP a 30-year franchise to construct, operate and maintain toll facilities in the North and South Luzon Tollways. PD 1894, issued on 22 December 1983, amended PD 1113 to include in CDCP's franchise the Metro Manila Expressway, which would "serve as an additional artery in the transportation of trade and commerce in the Metro Manila area."

Sometime between 1978 and 1981, Basay Mining Corporation (Basay Mining), an affiliate of CDCP, obtained loans from Marubeni Corporation of Japan (Marubeni) amounting to 5,460,000,000 yen and US\$5 million. A CDCP official issued letters of guarantee for the loans, committing CDCP to pay solidarily for the full amount of the 5,460,000,000 yen loan and to the extent of P20 million for the US\$5 million loan. However, there was no CDCP Board Resolution authorizing the issuance of the letters of guarantee. Later, Basay Mining changed its name to CDCP Mining Corporation (CDCP Mining). CDCP Mining secured the Marubeni loans when CDCP and CDCP Mining were still privately owned and managed.

Subsequently in 1983, CDCP changed its corporate name to PNCC to reflect the extent of the Government's equity investment in the company, which arose when government financial institutions converted their loans to PNCC into equity following PNCC's inability to pay the loans. Various government financial institutions held a total of seventy-seven point forty-eight percent (77.48%) of PNCC's voting equity, most of which were later transferred to the Asset Privatization Trust (APT) under Administrative Orders No. 14 and 64, series of 1987 and 1988, respectively. Also, the Presidential Commission on Good Government holds some 13.82% of PNCC's voting equity under a writ of sequestration and through the voluntary surrender of certain PNCC shares. In fine, the Government owns 90.3% of the equity of PNCC and only 9.70% of PNCC's voting equity is under private ownership.

Meanwhile, the Marubeni loans to CDCP Mining remained unpaid. On 20 October 2000, during the short-lived Estrada

Administration, the PNCC Board of Directors (PNCC Board)²³⁶ passed Board Resolution No. BD-092-2000 admitting PNCC's liability to Marubeni for P10,743,103,388 as of 30 September 1999. PNCC Board Resolution No. BD-092-2000 reads as follows:

RESOLUTION NO. BD-092-2000

RESOLVED, That the Board recognizes, acknowledges and confirms PNCC's obligations as of September 30, 1999 with the following entities, exclusive of the interests and other charges that may subsequently accrue and still become due therein, to wit:

- a) the Government of the Republic of the Philippines in the amount of P36,023,784,751.00; and
- b) Marubeni Corporation in the amount of P10,743,103,388.00.

This was the first PNCC Board Resolution admitting PNCC's liability for the Marubeni loans. Previously, for two decades the PNCC Board consistently refused to admit any liability for the Marubeni loans.

Less than two months later, or on 22 November 2000, the PNCC Board passed Board Resolution No. BD-099-2000 amending Board Resolution No. BD-092-2000. PNCC Board Resolution No. BD-099-2000 reads as follows:

RESOLUTION NO. BD-099-2000

RESOLVED, That the Board hereby amends its Resolution No. BD-092-2000 dated October 20, 2000 so as to read as follows:

RESOLVED, That the Board recognizes, acknowledges and confirms its obligations as of September 30, 1999 with the following entities, exclusive of the interests and other charges that may subsequently accrue and still due thereon, subject to the final determination by the Commission on Audit (COA) of the amount of obligation involved, and subject further to the declaration of the legality of said obligations by the Office of the Government Corporate Counsel (OGCC), to wit:

- a) the Government of the Republic of the Philippines in the amount of P36,023,784,751.00; and
- b) Marubeni Corporation in the amount of P10,743,103,388.00.

²³⁶ The members of the PNCC Board who were present during the meeting were Renato B. Valdecantos, Chairman, Rolando L. Macasaet, President and Chief Executive Officer, Braulio B. Balbas, Jr., Romulo F. Coronado, Basilio R. Cruz, Jr., Alfredo F. Laya, Jr., Victor Pineda, Edwin Tanonliong, Jose Luis Vera, Hermogenes Concepcion, Jr., and Raymundo Francisco, Directors.

In January 2001, barely three months after the PNCC Board first admitted liability for the Marubeni loans, Marubeni assigned its entire credit to Radstock for US\$2 million or less than P100 million. In short, Radstock paid Marubeni less than 10% of the P10.743 billion admitted amount. Radstock immediately sent a notice and demand letter to PNCC.

On 15 January 2001, Radstock filed an action for collection and damages against PNCC before the Regional Trial Court of Mandaluyong City, Branch 213 (trial court). In its order of 23 January 2001, the trial court issued a writ of preliminary attachment against PNCC. The trial court ordered PNCC's bank accounts garnished and several of its real properties attached. On 14 February 2001, PNCC moved to set aside the 23 January 2001 Order and to discharge the writ of attachment. PNCC also filed a motion to dismiss the case. The trial court denied both motions. PNCC filed motions for reconsideration, which the trial court also denied. PNCC filed a petition for *certiorari* before the Court of Appeals, docketed as CA-G.R. SP No. 66654, assailing the denial of the motion to dismiss. On 30 August 2002, the Court of Appeals denied PNCC's petition. PNCC filed a motion for reconsideration, which the Court of Appeals also denied in its 22 January 2003 Resolution. PNCC filed a petition for review before this Court, docketed as G.R. No. 156887.

Meanwhile, on 19 June 2001, at the start of the Arroyo Administration, the PNCC Board, under a new President and Chairman, revoked Board Resolution No. BD-099-2000.

The trial court continued to hear the main case. On 10 December 2002, the trial court ruled in favor of Radstock, as follows:

WHEREFORE, premises considered, judgment is hereby rendered in favor of the plaintiff and the defendant is directed to pay the total amount of Thirteen Billion One Hundred Fifty One Million Nine Hundred Fifty Six Thousand Five Hundred Twenty Eight Pesos (P13,151,956,528.00) with interest from October 15, 2001 plus Ten Million Pesos (P10,000,000.00) as attorney's fees. ...

PNCC appealed the trial court's decision to the Court of Appeals, docketed as CA-G.R. CV No. 87971.

On 19 March 2003, this Court issued a temporary restraining order in G.R. No. 156887 forbidding the trial court from implementing the writ of preliminary attachment and ordering

the suspension of the proceedings before the trial court and the Court of Appeals. In its 3 October 2005 Decision, this Court ruled as follows:

WHEREFORE, the petition is partly GRANTED and insofar as the Motion to Set Aside the Order and/or Discharge the Writ of Attachment is concerned, the Decision of the Court of Appeals on August 30, 2002 and its Resolution of January 22, 2003 in CA-G.R. SP No. 66654 are REVERSED and SET ASIDE. The attachments over the properties by the writ of preliminary attachment are hereby ordered LIFTED effective upon the finality of this Decision. The Decision and Resolution of the Court of Appeals are AFFIRMED in all other respects. The Temporary Restraining Order is DISSOLVED immediately and the Court of Appeals is directed to PROCEED forthwith with the appeal filed by PNCC. ...²³⁷

On 17 August 2006, PNCC and Radstock entered into the Compromise Agreement where they agreed to reduce PNCC's liability to Radstock, supposedly from P17,040,843,968, to P6,185,000,000. PNCC and Radstock submitted the Compromise Agreement to this Court for approval. In a Resolution dated 4 December 2006 in G.R. No. 156887, this Court referred the Compromise Agreement to the Commission on Audit (COA) for comment. The COA recommended approval of the Compromise Agreement. In a Resolution dated 22 November 2006, this Court noted the Compromise Agreement and referred it to the Court of Appeals in CA-G.R. CV No. 87971. In its 25 January 2007 Decision, the Court of Appeals approved the Compromise Agreement.

STRADEC moved for reconsideration of the 25 January 2007 Decision. STRADEC alleged that it has a claim against PNCC as a bidder of the National Government's shares, receivables, securities and interests in PNCC. The matter is subject of a complaint filed by STRADEC against PNCC and the Privatization and Management Office (PMO) for the issuance of a Notice of Award of Sale to Dong-A Consortium of which STRADEC is a partner. The case, docketed as Civil Case No. 05-882, is pending before the Regional Trial Court of Makati, Branch 146 (RTC Branch 146).

²³⁷ *Philippine National Construction Corporation v. Dy*, G.R. No. 156887, 3 October 2005, 472 SCRA 1, 12.

The Court of Appeals treated STRADEC's motion for reconsideration as a motion for intervention and denied it in its 31 May 2007 Resolution. STRADEC filed a petition for review before this Court, docketed as G.R. No. 178158.

Rodolfo Cuenca (Cuenca), a stockholder and former PNCC President and Board Chairman, filed an intervention before the Court of Appeals. Cuenca alleged that PNCC had no obligation to pay Radstock. The Court of Appeals also denied Cuenca's motion for intervention in its Resolution of 31 May 2007. Cuenca did not appeal the denial of his motion.

On 2 July 2007, this Court issued an order directing PNCC and Radstock, their officers, agents, representatives, and other persons under their control, to maintain the status quo ante.

Meanwhile, on 20 February 2007, Sison, also a stockholder and former PNCC President and Board Chairman, filed a Petition for Annulment of Judgment Approving Compromise Agreement before the Court of Appeals. The case was docketed as CA-G.R. SP No. 97982.

Asiavest, a judgment creditor of PNCC, filed an Urgent Motion for Leave to Intervene and to File the Attached Opposition and Motion-in-Intervention before the Court of Appeals in CA-G.R. SP No. 97982.

In a Resolution dated 12 June 2007, the Court of Appeals dismissed Sison's petition on the ground that it had no jurisdiction to annul a final and executory judgment also rendered by the Court of Appeals. In the same resolution, the Court of Appeals also denied Asiavest's urgent motion.

Asiavest filed its Urgent Motion for Leave to Intervene and to File the Attached Opposition and Motion-in-Intervention in G.R. No. 178158.

Sison filed a motion for reconsideration. In its 5 November 2007 Resolution, the Court of Appeals denied Sison's motion.

On 26 November 2007, Sison filed a petition for review before this Court, docketed as G.R. No. 180428.

In a Resolution dated 18 February 2008, this Court consolidated G.R. Nos. 178158 and 180428. On 13 January 2009, the Court

held oral arguments on the following issues:

1. Does the Compromise Agreement violate public policy?
2. Does the subject matter involve an assumption by the government of a private entity's obligation in violation of the law and/or the Constitution? Is the PNCC Board Resolution of 20 October 2000 defective or illegal?
3. Is the Compromise Agreement viable in the light of the non-renewal of PNCC's franchise by Congress and its inclusion of all or substantially all of PNCC's assets?
4. Is the Decision of the Court of Appeals annulable even if final and executory on grounds of fraud and violation of public policy and the Constitution?

Before ruling on the merits of **STRADEC**, Justice Carpio first had to resolve the "propriety of actions" that were filed:

The Court of Appeals denied STRADEC's motion for intervention on the ground that the motion was filed only after the Court of Appeals and the trial court had promulgated their respective decisions.

Section 2, Rule 19 of the 1997 Rules of Civil Procedure provides:

Sec. 2. Time to intervene. - The motion to intervene may be filed at any time before rendition of judgment by the trial court. A copy of the pleading-in-intervention shall be attached to the motion and served on the original parties.

The rule is not absolute. The rule on intervention, like all other rules of procedure, is intended to make the powers of the Court completely available for justice.²³⁸ It is aimed to facilitate a comprehensive adjudication of rival claims, overriding technicalities on the timeliness of the filing of the claims.²³⁹ This Court has ruled:

[A]llowance or disallowance of a motion for intervention rests on the sound discretion of the court after consideration of the appropriate circumstances. Rule 19 of the Rules of Court is a rule of procedure whose object is to make the powers of the court fully and completely available for justice. Its purpose is not to hinder or delay but to facilitate and promote the administration of justice. Thus, interventions have been

²³⁸ Pinlac v. Court of Appeals, 457 Phil. 527 (2003).

²³⁹ Ibid.

allowed even beyond the prescribed period in the Rule in the higher interest of justice. Interventions have been granted to afford indispensable parties, who have not been impleaded, the right to be heard even after a decision has been rendered by the trial court, when the petition for review of the judgment was already submitted for decision before the Supreme Court, and even where the assailed order has already become final and executory. In *Lim v. Pacquing* (310 Phil. 722 [1995]), the motion for intervention filed by the Republic of the Philippines was allowed by this Court to avoid grave injustice and injury and to settle once and for all the substantive issues raised by the parties.²⁴⁰

In *Collado v. Court of Appeals*,²⁴¹ this Court reiterated that exceptions to Section 2, Rule 12 could be made in the interest of substantial justice. Citing *Mago v. Court of Appeals*,²⁴² the Court stated:

It is quite clear and patent that the motions for intervention filed by the movants at this stage of the proceedings where trial had already been concluded ... and on appeal ... the same affirmed by the Court of Appeals and the instant petition for *certiorari* to review said judgments is already submitted for decision by the Supreme Court, are obviously and, manifestly late, beyond the period prescribed under ... Section 2, Rule 12 of the Rules of Court.

But Rule 12 of the Rules of Court, like all other Rules therein promulgated, is simply a rule of procedure, the whole purpose and object of which is to make the powers of the Court fully and completely available for justice. The purpose of procedure is not to thwart justice. Its proper aim is to facilitate the application of justice to the rival claims of contending parties. It was created not to hinder and delay but to facilitate and promote the administration of justice. It does not constitute the thing itself which courts are always striving to secure to litigants. It is designed as the means best adopted to obtain that thing. In other words, it is a means to an end.

Concededly, STRADEC has no legal interest in the subject

²⁴⁰ Office of the Ombudsman v. Masing, G.R. No. 165416, 22 January 2008, 542 SCRA 253, 265.

²⁴¹ 439 Phil. 149 (2002), citing *Mago v. Court of Appeals*, 363 Phil. 225 (1999) and *Director of Lands v. Court of Appeals*, No. L-45168, 25 September 1979, 93 SCRA 239.

²⁴² 363 Phil. 225, 234 (1999), which in turn cited *Director of Lands v. Court of Appeals*, No. L-45168, 25 September 1979, 93 SCRA 239, 245-246.

matter of the Compromise Agreement. Section 1, Rule 19 of the 1997 Rules of Civil Procedure states:

Sec. 1. Who may intervene. - A person who has a legal interest in the matter in litigation, or in the success of either of the parties, or an interest against both, or is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof may, with leave of court, be allowed to intervene in the action. The Court shall consider whether or not the intervention will unduly delay or prejudice the adjudication of the rights of the original parties, and whether or not the intervenor's rights may be fully protected in a separate proceeding.

STRADEC's interest is dependent on the outcome of Civil Case No. 05-882. Unless STRADEC can show that RTC Branch 146 had already decided in its favor, its legal interest is simply contingent and expectant.

However, Asiavest has a direct and material interest in the approval or disapproval of the Compromise Agreement. Asiavest is a judgment creditor of PNCC in G.R. No. 110263 and a court has already issued a writ of execution in its favor. Asiavest's interest is actual and material, direct and immediate characterized by either gain or loss from the judgment that this Court may render.²⁴³ Considering that the Compromise Agreement involves the disposition of all or substantially all of the assets of PNCC, Asiavest, as PNCC's judgment creditor, will be greatly prejudiced if the Compromise Agreement is eventually upheld.

Sison has legal standing to challenge the Compromise Agreement. Although there was no allegation that Sison filed the case as a derivative suit in the name of PNCC, it could be fairly deduced that Sison was assailing the Compromise Agreement as a stockholder of PNCC. In such a situation, a stockholder of PNCC can sue on behalf of PNCC to annul the Compromise Agreement. A derivative action is a suit by a stockholder to enforce a corporate cause of action.²⁴⁴ Under the Corporation Code, where a corporation is an injured party, its power to sue is lodged with its board of directors or trustees. However, an individual stockholder may file a derivative suit on behalf of the corporation

²⁴³ National Power Corporation v. Province of Quezon and Municipality of Pagbilao, G.R. No. 171586, 15 July 2009.

²⁴⁴ Hi-Yield Realty Incorporated v. Court of Appeals, G.R. No. 168863, 23 June 2009.

to protect or vindicate corporate rights whenever the officials of the corporation refuse to sue, or are the ones to be sued, or hold control of the corporation. In such actions, the corporation is the real party-in-interest while the suing stockholder, on behalf of the corporation, is only a nominal party.²⁴⁵

In this case, the PNCC Board cannot conceivably be expected to attack the validity of the Compromise Agreement since the PNCC Board itself approved the Compromise Agreement. In fact, the PNCC Board steadfastly defends the Compromise Agreement for allegedly being advantageous to PNCC.

Besides, the circumstances in this case are peculiar. Sison, as former PNCC President and Chairman of the PNCC Board, was responsible for the approval of the Board Resolution issued on 19 June 2001 revoking the previous Board Resolution admitting PNCC's liability for the Marubeni loans. Such revocation, however, came after Radstock had filed an action for collection and damages against PNCC on 15 January 2001. Then, when the trial court rendered its decision on 10 December 2002 in favor of Radstock, Sison was no longer the PNCC President and Chairman, although he remains a stockholder of PNCC.

When the case was on appeal before the Court of Appeals, there was no need for Sison to avail of any remedy, until PNCC and Radstock entered into the Compromise Agreement, which disposed of all or substantially all of PNCC's assets. Sison came to know of the Compromise Agreement only in December 2006. PNCC and Radstock submitted the Compromise Agreement to the Court of Appeals for approval on 10 January 2007. The Court of Appeals approved the Compromise Agreement on 25 January 2007. To require Sison at this stage to exhaust all the remedies within the corporation will render such remedies useless as the Compromise Agreement had already been approved by the Court of Appeals. PNCC's assets are in danger of being dissipated in favor of a private foreign corporation. Thus, Sison had no recourse but to avail of an extraordinary remedy to protect PNCC's assets.

Besides, in the interest of substantial justice and for compelling reasons, such as the nature and importance of the issues raised in this case,²⁴⁶ this Court must take cognizance of Sison's action. This Court should exercise its prerogative to set

²⁴⁵ Ibid.

²⁴⁶ *Del Mar v. PAGCOR*, 400 Phil. 307 (2000).

aside technicalities in the Rules, because after all, the power of this Court to suspend its own rules whenever the interest of justice requires is well recognized.²⁴⁷ In *Solicitor General v. The Metropolitan Manila Authority*,²⁴⁸ this Court held:

Unquestionably, the Court has the power to suspend procedural rules in the exercise of its inherent power, as expressly recognized in the Constitution, to promulgate rules concerning ‘pleading, practice and procedure in all courts.’ In proper cases, procedural rules may be relaxed or suspended in the interest of substantial justice, which otherwise may be miscarried because of a rigid and formalistic adherence to such rules. ...

We have made similar rulings in other cases, thus:

Be it remembered that rules of procedure are but mere tools designed to facilitate the attainment of justice. Their strict and rigid application, which would result in technicalities that tend to frustrate rather than promote substantial justice, must always be avoided. ... Time and again, this Court has suspended its own rules and excepted a particular case from their operation whenever the higher interests of justice so require.

Having resolved the propriety of the actions, Justice Carpio proceeded to discuss the merits of **STRADEC** and eventually ruled:

In sum, the acts of the PNCC Board in (1) issuing Board Resolution Nos. BD-092-2000 and BD-099-2000 expressly admitting liability for the Marubeni loans, and (2) entering into the Compromise Agreement, constitute evident bad faith and gross inexcusable negligence, amounting to fraud, in the management of PNCC’s affairs. **Being public officers, the government nominees in the PNCC Board must answer not only to PNCC and its stockholders, but also to the Filipino people for grossly mishandling PNCC’s finances.**

Under Article 1409 of the Civil Code, the Compromise Agreement is “inexistent and void from the beginning,” and “cannot be ratified,” thus:

Art. 1409. The following contracts are inexistent and void from the beginning:

²⁴⁷ *Agote v. Lorenzo*, G.R. No. 142675, 22 July 2005, 464 SCRA 60.

²⁴⁸ G.R. No. 102782, 11 December 1991, 204 SCRA 837, 842-843.

(1) Those whose cause, object or purpose is contrary to law, morals, good customs, public order or public policy;

...

(7) Those expressly prohibited or declared void by law.

These contracts cannot be ratified. ...

The Compromise Agreement is indisputably contrary to the Constitution, existing laws and public policy.²⁴⁹ Under Article 1409, the Compromise Agreement is expressly declared void and “cannot be ratified.” **No court, not even this Court, can ratify or approve the Compromise Agreement. This Court must perform its duty to defend and uphold the Constitution, existing laws, and fundamental public policy. This Court must not shirk in declaring the Compromise Agreement inexistent and void ab initio.**

WHEREFORE, we GRANT the petition in G.R. No. 180428. We SET ASIDE the Decision dated 25 January 2007 and the Resolutions dated 12 June 2007 and 5 November 2007 of the Court of Appeals. We DECLARE (1) PNCC Board Resolution Nos. BD-092-2000 and BD-099-2000 admitting liability for the Marubeni loans VOID AB INITIO for causing undue injury to the Government and giving unwarranted benefits to a private party, constituting a corrupt practice and unlawful act under Section 3(e) of the Anti-Graft and Corrupt Practices Act, and (2) the Compromise Agreement between the Philippine National Construction Corporation and Radstock Securities Limited INEXISTENT AND VOID AB INITIO for being contrary to Section 29(1), Article VI and Sections 3 and 7, Article XII of the Constitution; Section 20(1), Chapter IV, Subtitle B, Title I, Book V of the Administrative Code of 1987; Sections 4(2), 79, 84(1), and 85 of the Government Auditing Code; and Articles 2241, 2242, 2243 and 2244 of the Civil Code.

We GRANT the intervention of Asiavest Merchant Bankers Berhad in G.R. No. 178158 but DECLARE that Strategic Alliance Development Corporation has no legal standing to sue.

In ruling that the Compromise Agreement in **STRADEC** was contrary to the Constitution, Justice Carpio detailed why this was a “pillage of the public coffers” and discussed the constitutional requirement that **public funds shall be paid only in pursuance of an appropriation made by law:**

²⁴⁹ See discussion under Art. XII, Sec. 7.

The PNCC Board Acted in Bad Faith and with Gross Negligence in Directing the Affairs of PNCC

In this jurisdiction, the members of the board of directors have a three-fold duty: duty of obedience, duty of diligence, and duty of loyalty. Accordingly, the members of the board of directors (1) shall direct the affairs of the corporation only in accordance with the purposes for which it was organized; (2) shall not willfully and knowingly vote for or assent to patently unlawful acts of the corporation or act in bad faith or with gross negligence in directing the affairs of the corporation; and (3) shall not acquire any personal or pecuniary interest in conflict with their duty as such directors or trustees.²⁵⁰

In the present case, the PNCC Board blatantly violated its duty of diligence as it miserably failed to act in good faith in handling the affairs of PNCC.

First. For almost two decades, the PNCC Board had consistently refused to admit liability for the Marubeni loans because of the absence of a PNCC Board resolution authorizing the issuance of the letters of guarantee.

There is no dispute that between 1978 and 1980, Marubeni Corporation extended two loans to Basay Mining (later renamed CDCP Mining): (1) US\$5 million to finance the purchase of copper concentrates by Basay Mining; and (2) Y5.46 billion to finance the completion of the expansion project of Basay Mining including working capital.

There is also no dispute that it was only on 20 October 2000 when the PNCC Board approved a resolution expressly admitting PNCC's liability for the Marubeni loans. This was the first Board Resolution admitting liability for the Marubeni loans, for PNCC never admitted liability for these debts in the past. Even Radstock admitted that PNCC's 1994 Financial Statements did not reflect the Marubeni loans.²⁵¹ Also, former PNCC Chairman Arthur Aguilar stated during the Senate hearings that "the Marubeni claim was never in the balance sheet ... nor was it in a contingent account." Miriam M. Pasetes, SVP Finance of PNCC,

²⁵⁰ Villanueva, Philippine Corporate Law 318-322 (2001), Corporation Code, Secs. 25 and 31.

²⁵¹ Philippine National Construction Corporation v. Dy, G.R. No. 156887, 3 October 2005, 472 SCRA 1, 10.

and Atty. Herman R. Cimafranca of the Office of the Government Corporate Counsel, confirmed this fact, thus:

SEN. DRILON. ... And so, PNCC itself did not recognize this as an obligation but the board suddenly recognized it as an obligation. It was on that basis that the case was filed, is that correct? In fact, the case hinges on - they knew that this claim has prescribed but because of that board resolution which recognized the obligation they filed their complaint, is that correct?

MR. CIMAFRANCA. Apparently, it's like that, Senator, because the filing of the case came after the acknowledgement.

SEN. DRILON. Yes. In fact, the filing of the case came three months after the acknowledgement.

MR. CIMAFRANCA. Yes. And that made it difficult to handle on our part.

SEN. DRILON. That is correct. So, that it was an obligation which was not recognized in the financial statements of PNCC but revived - in the financial statements because it has prescribed but revived by the board effectively. That's the theory, at least, of the plaintiff. Is that correct? Who can answer that? Ms. Pasetes, yes.

MS. PASETES. It is not an obligation of PNCC that is why it is not reflected in the financial statements.

In short, after two decades of consistently refuting its liability for the Marubeni loans, the PNCC Board suddenly and inexplicably reversed itself by admitting in October 2000 liability for the Marubeni loans. Just three months after the PNCC Board recognized the Marubeni loans, Radstock acquired Marubeni's receivable and filed the present collection case.

Second. The PNCC Board admitted liability for the Marubeni loans despite PNCC's total liabilities far exceeding its assets. There is no dispute that the Marubeni loans, once recognized, would wipe out the assets of PNCC, "virtually emptying the coffers of the PNCC." While PNCC insists that it remains financially viable, the figures in the COA Audit Reports tell otherwise. For 2006 and 2005, "the Corporation has incurred negative gross margin of P84.531 Million and P80.180 Million, respectively, and net losses that had accumulated in a deficit of P14.823 Billion as of 31 December 2006." The COA even opined that "unless [PNCC] Management addresses the issue on net losses in its financial rehabilitation plan, ... the Corporation may not be able to continue its operations as a going concern."

Notably, during the oral arguments before this Court, the Government Corporate Counsel admitted the PNCC's huge negative net worth, thus:

JUSTICE CARPIO ... what is the net worth now of PNCC?
Negative what? Negative 6 Billion at least[?]
ATTY. AGRA. Yes, your Honor.

Clearly, the PNCC Board's admission of liability for the Marubeni loans, given PNCC's huge negative net worth of at least P6 billion as admitted by PNCC's counsel, or P14.823 billion based on the 2006 COA Audit Report, would leave PNCC an empty shell, without any assets to pay its biggest creditor, the National Government with an admitted receivable of P36 billion from PNCC.

Third. In a debilitating self-inflicted injury, the PNCC Board revived what appeared to have been a dead claim by abandoning one of PNCC's strong defenses, which is the prescription of the action to collect the Marubeni loans.

Settled is the rule that actions prescribe by the mere lapse of time fixed by law.²⁵² Under Article 1144 of the Civil Code, an action upon a written contract, such as a loan contract, must be brought within ten years from the time the right of action accrues. The prescription of such an action is interrupted when the action is filed before the court, when there is a written extrajudicial demand by the creditor, or when there is any written acknowledgment of the debt by the debtor.²⁵³

In this case, Basay Mining obtained the Marubeni loans sometime between 1978 and 1981. While Radstock claims that numerous demand letters were sent to PNCC, based on the records, the extrajudicial demands to pay the loans appear to have been made only in 1984 and 1986. Meanwhile, the written acknowledgment of the debt, in the form of Board Resolution No. BD-092-2000, was issued only on 20 October 2000.

Thus, more than ten years would have already lapsed between Marubeni's extrajudicial demands in 1984 and 1986 and the acknowledgment by the PNCC Board of the Marubeni loans in 2000. However, the PNCC Board suddenly passed Board

²⁵² Civil Code, Art. 1139.

²⁵³ Civil Code, Art. 1155.

Resolution No. BD-092-2000 expressly admitting liability for the Marubeni loans. In short, the PNCC Board admitted liability for the Marubeni loans despite the fact that the same might no longer be judicially collectible. Although the legal advantage was obviously on its side, the PNCC Board threw in the towel even before the fight could begin. During the Senate hearings, the matter of prescription was discussed, thus:

SEN. DRILON. ... the prescription period is 10 years and there were no payments - the last demands were made, when? The last demands for payment?

MS. OGAN. It was made January 2001 prior to the filing of the case.

SEN. DRILON. Yes, all right. Before that, when was the last demand made? By the time they filed the complaint more than 10 years already lapsed.

MS. OGAN. On record, Mr. Chairman, we have demands starting from - a series of demands which started from May 23, 1984, letter from Marubeni to PNCC, demand payment. And we also have the letter of September 3, 1986, letter of Marubeni to then PNCC Chair Mr. Jaime. We have the June 24, 1986 letter from Marubeni to the PNCC Chairman. Also the March 4, 1988 letter...

SEN. DRILON. The March 4, 1988 letter is not a demand letter.

MS. OGAN. It is exactly addressed to the Asset Privatization Trust.

SEN. DRILON. It is not a demand letter? Okay.

MS. OGAN. And we have also...

SEN. DRILON. Anyway...

THE CHAIRMAN. Please answer when you are asked, Ms. Ogan. We want to put it on the record whether it is "yes" or "no".

MS. OGAN. Yes, sir.

SEN. DRILON. So, even assuming that all of those were demand letters, the 10 years prescription set in and it should have prescribed in 1998, whatever is the date, or before the case was filed in 2001.

MR. CIMAFRANCA. The 10-year period for - if the contract is written, it's 10 years and it should have prescribed in 10 years and we did raise that in our answer, in our motion to dismiss.

SEN. DRILON. I know. You raised this in your motion to dismiss and you raised this in your answer. Now, we are not saying that you were negligent in not raising that. What we

are just putting on the record that indeed there is basis to argue that these claims have prescribed.

Now, the reason why there was a colorable basis on the complaint filed in 2001 was that somehow the board of PNCC recognized the obligation in a special board meeting on October 20, 2000. Hindi ba ganoon 'yon?

MS. OGAN. Yes, that is correct.

SEN. DRILON. Why did the PNCC recognize this obligation in 2000 when it was very clear that at that point more than 10 years have lapsed since the last demand letter?

MR. AGUILAR. May I volunteer an answer?

SEN. DRILON. Please.

MR. AGUILAR. I looked into that, Mr. Chairman, Your Honor. It was as a result of and I go to the folder letter "N." In our own demand research it was not period, Your Honor, that Punongbayan in the big folder, sir, letter "N" it was the period where PMO was selling PNCC and Punongbayan and Araullo Law Office came out with an investment brochure that indicated liabilities both to national government and to Marubeni/Radstock. So, PMO said, "For good order, can you PNCC board confirm that by board resolution?" That's the tone of the letter.

SEN. DRILON. Confirm what? Confirm the liabilities that are contained in the Punongbayan investment prospectus both to the national government and to PNCC. That is the reason at least from the record, Your Honor, how the PNCC board got to deliberate on the Marubeni.

THE CHAIRMAN. What paragraph? Second to the last paragraph?

MR. AGUILAR. Yes. Yes, Mr. Chairman. Ito po 'yong - that's to our recollection, in the records, that was the reason.

SEN. DRILON. Is that the only reason why...

MR. AGUILAR. From just the records, Mr. Chairman, and then interviews with people who are still around.

SEN. DRILON. You mean, you acknowledged a prescribed obligation because of this paragraph?

MR. AGUILAR. I don't know what legal advice we were following at that time, Mr. Chairman.

Besides prescription, the Office of the Government Corporate Counsel (OGCC) originally believed that PNCC had another formidable legal weapon against Radstock, that is, the lack of authority of Alfredo Asuncion, then Executive Vice-President of PNCC, to sign the letter of guarantee on behalf of CDCP. During the Senate hearings, the following exchange reveals the OGCC's

original opinion:

THE CHAIRMAN. What was the opinion of the Office of the Government Corporate Counsel?

MS. OGAN. The opinion of the Office of the Government Corporate Counsel is that PNCC should exhaust all means to resist the case using all defenses available to a guarantee and a surety that there is a valid ground for PNCC's refusal to honor or make good the alleged guarantee obligation. It appearing that from the documents submitted to the OGCC that there is no board authority in favor or authorizing Mr. Asuncion, then EVP, to sign or execute the letter of guarantee in behalf of CDCP and that said letter of guarantee is not legally binding upon or enforceable against CDCP as principals, your Honors. ...

SEN. DRILON. Now that we have read this, what was the opinion of the Government Corporate Counsel, Mr. Cimafranca?

MR. CIMAFRANCA. Yes, Senator, we did issue an opinion upon the request of PNCC and our opinion was that there was no valid obligation, no valid guarantee. And we incorporated that in our pleadings in court.

Clearly, PNCC had strong defenses against the collection suit filed by Radstock, as originally opined by the OGCC. It is quite puzzling, therefore, that the PNCC Board, which had solid grounds to refute the legitimacy of the Marubeni loans, admitted its liability and entered into a Compromise Agreement that is manifestly and grossly prejudicial to PNCC.

Fourth. The basis for the admission of liability for the Marubeni loans, which was an opinion of the Feria Law Office, was not even shown to the PNCC Board.

Atty. Raymundo Francisco, the APT trustee overseeing the proposed privatization of PNCC at the time, was responsible for recommending to the PNCC Board the admission of PNCC's liability for the Marubeni loans. Atty. Francisco based his recommendation solely on a mere alleged opinion of the Feria Law Office. Atty. Francisco did not bother to show this "Feria opinion" to the members of the PNCC Board, except to Atty. Renato Valdecantos, who as the then PNCC Chairman did not also show the "Feria opinion" to the other PNCC Board members. During the Senate hearings, Atty. Francisco could not produce a copy of the "Feria opinion." The Senators grilled Atty. Francisco

on his recommendation to recognize PNCC's liability for the Marubeni loans, thus:

THE CHAIRMAN. ... You were the one who wrote this letter or rather this memorandum dated 17 October 2000 to Atty. Valdecantos. Can you tell us the background why you wrote the letter acknowledging a debt which is non-existent?

MR. FRANCISCO. I was appointed as the trustee in charge of the privatization of the PNCC at that time, sir. And I was tasked to do a study and engage the services of financial advisors as well as legal advisors to do a legal audit and financial study on the position of PNCC. I bidded out these engagements, the financial advisership went to Punongbayan and Araullo. The legal audit went to the Feria Law Offices.

THE CHAIRMAN. Spell it. Boy Feria?

MR. FRANCISCO. Feria-- Feria.

THE CHAIRMAN. Lugto?

MR. FRANCISCO. Yes. Yes, Your Honor. And this was the findings of the Feria Law Office - that the Marubeni account was a legal obligation.

So, I presented this to our board. Based on the findings of the legal audit conducted by the Ferial Law Offices, sir.

THE CHAIRMAN. Why did you not ask the government corporate counsel? Why did you have to ask for the opinion of an outside counsel?

MR. FRANCISCO. That was the - that was the mandate given to us, sir, that we have to engage the...

THE CHAIRMAN. Mandate given by whom?

MR. FRANCISCO. That is what we usually do, sir, in the APT.

THE CHAIRMAN. Ah, you get outside counsel?

MR. FRANCISCO. Yes, we...

THE CHAIRMAN. Not necessarily the government corporate counsel?

MR. FRANCISCO. No, sir.

THE CHAIRMAN. So, on the basis of the opinion of outside counsel, private, you proceeded to, in effect, recognize an obligation which is not even entered in the books of the PNCC? You probably resuscitated a non-existing obligation anymore?

MR. FRANCISCO. Sir, I just based my recommendation on the professional findings of the law office that we engaged, sir.

THE CHAIRMAN. Did you not ask for the opinion of the government corporate counsel?

MR. FRANCISCO. No, sir.

THE CHAIRMAN. Why?

MR. FRANCISCO. I felt that the engagements of the law office was sufficient, anyway we were going to raise it to the Committee on Privatization for their approval or disapproval, sir.

THE CHAIRMAN. The COP?

MR. FRANCISCO. Yes, sir.

THE CHAIRMAN. That's a cabinet level?

MR. FRANCISCO. Yes, sir. And we did that, sir.

THE CHAIRMAN. Now... So you sent your memo to Atty. Renato B. Valdecantos, who unfortunately is not here but I think we have to get his response to this. And as part of the minutes of special meeting with the board of directors on October 20, 2000, the board resolved in its Board Resolution No. 092-2000, the board resolved to recognize, acknowledge and confirm PNCC's obligations as of September 30, 1999, etcetera, etcetera. (A), or rather (B), Marubeni Corporation in the amount of P10,740,000.

Now, we asked to be here because the franchise of PNCC is hanging in a balance because of the - on the questions on this acknowledgement. So we want to be educated.

Now, the paper trail starts with your letter. So, that's it - that's my kuwan, Frank. Yes, Senator Drilon.

SEN. DRILON. Thank you, Mr. Chairman. Yes, Atty. Francisco, you have a copy of the minutes of October 20, 2000?

MR. FRANCISCO. I'm sorry, sir, we don't have a copy.

SEN. DRILON. May we ask the corporate secretary of PNCC to provide us with a copy? Okay naman andiyan siya. (Ms. Ogan handing the document to Mr. Francisco.) You have familiarized yourselves with the minutes, Atty. Francisco?

MR. FRANCISCO. Yes, sir.

SEN. DRILON. Now, mention is made of a memorandum here on line 8, page 3 of this board's minutes. It says, "Director Francisco has prepared a memorandum requesting confirmation, acknowledgement, and ratification of this indebtedness of PNCC to the national government which was determined by Bureau of Treasury as of September 30, 1999 is 36,023,784,751. And with respect to PNCC's obligation to Marubeni, this has been determined to be in the total amount of 10,743,103,388, also as of September 30, 1999; that there is need to ratify this because there has already been a representation made with respect to the review of the financial records of PNCC by Punongbayan and Araullo, which have been included as part of the package of APT's

disposition to the national government's interest in PNCC." You recall having made this representation as found in the minutes, I assume, Atty. Francisco?

MR. FRANCISCO. Yes, sir. But I'd like to be refreshed on the memorandum, sir, because I don't have a copy.

SEN. DRILON. Yes, this memorandum was cited earlier by Senator Arroyo, and maybe the secretary can give him a copy? Give him a copy?

MS. OGAN. (Handing the document to Mr. Francisco.)

MR. FRANCISCO. Your Honor, I have here a memorandum to the PNCC board through Atty. Valdecantos, which says that - in the last paragraph, if I may read? "May we request therefore, that a board resolution be adopted, acknowledging and confirming the aforementioned PNCC obligations with the national government and Marubeni as borne out by the due diligence audit."

SEN. DRILON. This is the memorandum referred to in these minutes. This memorandum dated 17 October 2000 is the memorandum referred to in the minutes.

MR. FRANCISCO. I would assume, Mr. Chairman.

SEN. DRILON. Right. Now, the Punongbayan representative who was here yesterday, Mr...

THE CHAIRMAN. Navarro.

SEN. DRILON. ... Navarro denied that he made this recommendation.

THE CHAIRMAN. He asked for opinion, legal opinion.

SEN. DRILON. He said that they never made this representation and the transcript will bear us out. They said that they never made this representation that the account of Marubeni should be recognized.

MR. FRANCISCO. Mr. Chairman, in the memorandum, I only mentioned here the acknowledgement and confirmation of the PNCC obligations. I was not asking for a ratification. I never mentioned ratification in the memorandum. I just based my memo based on the due diligence audit of the FERIA Law Offices.

SEN. DRILON. Can you say that again? You never asked for a ratification...

MR. FRANCISCO. No. I never mentioned in my memorandum that I was asking for a ratification. I was just - in my memo it says, "acknowledging and confirming the PNCC obligation." This was what...

SEN. DRILON. Isn't it the same as ratification? I mean, what's the difference?

MR. FRANCISCO. I - well, my memorandum was meant

really just to confirm the findings of the legal audit as...

SEN. DRILON. In your mind as a lawyer, Atty. Francisco, there's a difference between ratification and - what's your term? -- acknowledgment and confirmation?

MR. FRANCISCO. Well, I guess there's no difference, Mr. Chairman.

SEN. DRILON. Right. Anyway, just of record, the Punongbayan representatives here yesterday said that they never made such representation.

In any case, now you're saying it's the Feria Law Office who rendered that opinion? Can we - you know, yesterday we were asking for a copy of this opinion but we were never furnished one. The ... no less than the Chairman of this Committee was asking for a copy.

THE CHAIRMAN. Well, copy of the opinion...

MS. OGAN. Yes, Mr. Chairman, we were never furnished a copy of this opinion because it's opinion rendered for the Asset Privatization Trust which is its client, not the PNCC, Mr. Chairman.

THE CHAIRMAN. All right. The question is whether - but you see, this is a memorandum of Atty. Francisco to the Chairman of the Asset Privatization Trust. You say now that you were never furnished a copy because that's supposed to be with the Asset...

MS. OGAN. Yes, Mr. Chairman.

THE CHAIRMAN. ... but yet the action of - or rather the opinion of the Feria Law Offices was in effect adopted by the board of directors of PNCC in its minutes of October 20, 2000 where you are the corporate secretary, Ms. Ogan.

MS. OGAN. Yes, Mr. Chairman.

THE CHAIRMAN. So, what I am saying is that this opinion or rather the opinion of the Feria Law Offices of which you don't have a copy?

MS. OGAN. Yes, sir.

THE CHAIRMAN. And the reason being that, it does not concern the PNCC because that's an opinion rendered for APT and not for the PNCC.

MS. OGAN. Yes, Mr. Chairman, that was what we were told although we made several requests to the APT, sir.

THE CHAIRMAN. All right. Now, since it was for the APT and not for the PNCC, I ask the question why did PNCC adopt it? That was not for the consumption of PNCC. It was for the consumption of the Asset Privatization Trust. And that is what Atty. Francisco says and it's confirmed by you saying that this was a memo - you don't have a copy because this was

sought for by APT and the FERIA Law Offices just provided an opinion - provided the APT with an opinion. So, as corporate secretary, the board of directors of PNCC adopted it, recognized the Marubeni Corporation.

You read the minutes of the October 20, 2000 meeting of the board of directors on Item V. The resolution speaks of ... so, go ahead.

MS. OGAN. I gave my copies. Yes, sir.

THE CHAIRMAN. In effect the FERIA Law Offices' opinion was for the consumption of the APT.

MS. OGAN. That was what we were told, Mr. Chairman.

THE CHAIRMAN. And you were not even provided with a copy.

THE CHAIRMAN. Yet you adopted it.

MS. OGAN. Yes, sir.

SEN. DRILON. Considering you were the corporate secretary.

THE CHAIRMAN. She was the corporate secretary.

SEN. DRILON. She was just recording the minutes.

THE CHAIRMAN. Yes, she was recording.

Now, we are asking you now why it was taken up?

MS. OGAN. Yes, sir, Mr. Chairman, this was mentioned in the memorandum of Atty. Francisco, memorandum to the board.

SEN. DRILON. Mr. Chairman, Mr. Francisco represented APT in the board of PNCC. And is that correct, Mr. Francisco?

THE CHAIRMAN. You're an *ex-officio* member.

SEN. DRILON. Yes.

MR. FRANCISCO. *Ex-officio* member only, sir, as trustee in charge of the privatization of PNCC.

SEN. DRILON. With the permission of Mr. Chair, may I ask a question...

THE CHAIRMAN. Oh, yes, Senator Drilon.

SEN. DRILON. Atty. Francisco, you sat in the PNCC board as APT representative, you are a lawyer, there was a legal opinion of FERIA, FERIA, LUGTO, LAO Law Offices which you cited in your memorandum. Did you discuss - first, did you give a copy of this opinion to PNCC?

MR. FRANCISCO. I gave a copy of this opinion, sir, to our chairman who was also a member of the board of PNCC, Mr. Valdecantos, sir.

SEN. DRILON. And because he was...

MR. FRANCISCO. Because he was my immediate boss in the APT.

SEN. DRILON. Apparently, [it] just ended up in the personal possession of Mr. Valdecantos because the corporate

secretary, Glenda Ogan, who is supposed to be the custodian of the records of the board never saw a copy of this.

MR. FRANCISCO. Well, sir, my - the copy that I gave was to Mr. Valdecantos because he was the one sitting in the PNCC board, sir.

SEN. DRILON. No, you sit in the board.

MR. FRANCISCO. I was just an *ex-officio* member. And all my reports were coursed through our Chairman, Mr. Valdecantos, sir.

SEN. DRILON. Now, did you ever tell the board that there is a legal position taken or at least from the documents it is possible that the claim has prescribed?

MR. FRANCISCO. I took this up in the board meeting of the PNCC at that time and I told them about this matter, sir.

SEN. DRILON. No, you told them that the claim could have, under the law, could have prescribed?

MR. FRANCISCO. No, sir.

SEN. DRILON. Why? You mean, you didn't tell the board that it is possible that this liability is no longer a valid liability because it has prescribed?

MR. FRANCISCO. I did not dwell into the findings anymore, sir, because I found the professional opinion of the FERIA Law Office to be sufficient.

Atty. Francisco's act of recommending to the PNCC Board the acknowledgment of the Marubeni loans based only on an opinion of a private law firm, without consulting the OGCC and without showing this opinion to the members of the PNCC Board except to Atty. Valdecantos, reflects how shockingly little his concern was for PNCC, contrary to his claim that "he only had the interest of PNCC at heart." In fact, if what was involved was his own money, Atty. Francisco would have preferred not just two, but at least three different opinions on how to deal with the matter, and he would have maintained his non-liability.

SEN. OSMENA. ... All right. And lastly, just to clear our minds, there has always been this finger-pointing, of course, whenever - this is typical Filipino. When they're caught in a bind, they always point a finger, they pretend they don't know. And it just amazes me that you have been appointed trustees, meaning, representatives of the Filipino people, that's what you were at APT, right? You were not Erap's representatives, you were representative of the Filipino people and you were tasked to conserve the assets that had been confiscated from various cronies of the previous administration. And

here, you are asked to recognize the P10 billion debt and you point only to one law firm. If you have cancer, don't you to a second opinion, a second doctor or a third doctor? This is just a question. I am just asking you for your opinion if you would take the advice of the first doctor who tells you that he's got to open you up.

MR. FRANCISCO. I would go to three or more doctors, sir.

SEN. OSMENA. Three or more. Yeah, that's right. And in this case the APT did not do so.

MR. FRANCISCO. We relied on the findings of the...

SEN. OSMENA. If these were your money, would you have gone also to obtain a second, third opinion from other law firms. Kung pera mo itong 10 billion na ito. Siguro you're not gonna give it up that easily ano, 'di ba?

MR. FRANCISCO. Yes, sir.

SEN. OSMENA. You'll probably keep it in court for the next 20 years. ...

This is a clear admission by Atty. Francisco of bad faith in directing the affairs of PNCC - that he would not have recognized the Marubeni loans if his own funds were involved or if he were the owner of PNCC.

The PNCC Board admitted liability for the P10.743 billion Marubeni loans without seeing, reading or discussing the "Feria opinion" which was the sole basis for its admission of liability. Such act surely goes against ordinary human nature, and amounts to gross negligence and utter bad faith, even bordering on fraud, on the part of the PNCC Board in directing the affairs of the corporation. Owing loyalty to PNCC and its stockholders, the PNCC Board should have exercised utmost care and diligence in admitting a gargantuan debt of P10.743 billion that would certainly force PNCC into insolvency, a debt that previous PNCC Boards in the last two decades consistently refused to admit.

Instead, the PNCC Board admitted PNCC's liability for the Marubeni loans relying solely on a mere opinion of a private law office, which opinion the PNCC Board members never saw, except for Atty. Valdecantos and Atty. Francisco. The PNCC Board knew that PNCC, as a government owned and controlled corporation (GOCC), must rely "exclusively" on the opinion of the OGCC. Section 1 of Memorandum Circular No. 9 dated 27 August 1998 issued by the President states:

Sec. 1. All legal matters pertaining to government-owned or

controlled corporations, their subsidiaries, other corporate off-springs and government acquired asset corporations (GOCCs) shall be exclusively referred to and handled by the Office of the Government Corporate Counsel (OGCC).

The PNCC Board acted in bad faith in relying on the opinion of a private lawyer knowing that PNCC is required to rely “exclusively” on the OGCC’s opinion. Worse, the PNCC Board, in admitting liability for P10.743 billion, relied on the recommendation of a private lawyer whose opinion the PNCC Board members have not even seen.

During the oral arguments, Atty. Sison explained to the Court that the intention of APT was for the PNCC Board merely to disclose the claim of Marubeni as part of APT’s full disclosure policy to prospective buyers of PNCC. Atty. Sison stated that it was not the intention of APT for the PNCC Board to admit liability for the Marubeni loans, thus:

... It was the Asset Privatization Trust A-P-T that was tasked to sell the company. The A-P-T, for purposes of disclosure statements, tasked the FERIA Law Office to handle the documentation and the study of all legal issues that had to be resolved or clarified for the information of prospective bidders and or buyers. In the performance of its assigned task the FERIA Law Office came upon the Marubeni claim and mentioned that the APTC and/or PNCC must disclose that there is a claim by Marubeni against PNCC for purposes of satisfying the requirements of full disclosure. This seemingly innocent statement or requirement made by the FERIA Law Office was then taken by two officials of the Asset Privatization Trust and with malice aforethought turned it into the basis for a multi-billion peso debt by the now government owned and/or controlled PNCC. ...

While the PNCC Board passed Board Resolution No. BD-099-2000 amending Board Resolution No. BD-092-2000, such amendment merely added conditions for the recognition of the Marubeni loans, namely, subjecting the recognition to a final determination by COA of the amount involved and to the declaration by OGCC of the legality of PNCC’s liability. However, the PNCC Board reiterated and stood firm that it “recognizes, acknowledges and confirms its obligations” for the Marubeni loans. Apparently, Board Resolution No. BD-099-2000 was a futile attempt to “revoke” Board Resolution No. BD-092-

2000. Atty. Alfredo Laya, Jr., a former PNCC Director, spoke on his protests against Board Resolution No. BD-092-2000 at the Senate hearings, thus:

MR. LAYA. Mr. Chairman, if I can...

THE CHAIRMAN. Were you also at the board?

MR. LAYA. At that time, yes, sir.

THE CHAIRMAN. Okay, go ahead.

MR. LAYA. That's why if - maybe this can help clarify the sequence. There was this meeting on October 20. This matter of the Marubeni liability or account was also discussed. Mr. Macasaet, if I may try to refresh. And there was some discussion, sir, and in fact, they were saying even at that stage that there should be a COA or an OGCC audit. Now, that was during the discussion of October 20. Later on, the minutes came out. The practice, then, sir, was for the minutes to come out at the start of the meeting of the subsequent. So the minutes of October 20 came out on November 22 and then we were going over it. And that is in the subsequent minutes of the meeting...

THE CHAIRMAN. May I interrupt. You were taking up in your November 22 meeting the October 20 minutes?

MR. LAYA. Yes, sir.

THE CHAIRMAN. This minutes that we have?

MR. LAYA. Yes, sir.

THE CHAIRMAN. All right, go ahead.

MR. LAYA. Now, in the November 22 meeting, we noticed this resolution already for confirmation of the board - proceedings of October 20. So immediately we made - actually, protest would be a better term for that - we protested the wording of the resolution and that's why we came up with this resolution amending the October 20 resolution.

SEN. DRILON. So you are saying, Mr. Laya, that the minutes of October 20 did not accurately reflect the decisions that you made on October 20 because you were saying that this recognition should be subject to OGCC and COA? You seem to imply and we want to make it - and I want to get that for the record. You seem to imply that there was no decision to recognize the obligation during that meeting because you wanted it to subject it to COA and OGCC, is that correct?

MR. LAYA. Yes, your Honor.

SEN. DRILON. So how did...

MR. LAYA. That's my understanding of the proceedings at that time, that's why in the subsequent November 22 meeting, we raised this point about obtaining a COA and

OGCC opinion.

SEN. DRILON. Yes. But you know, the November 22 meeting repeated the wording of the resolution previously adopted only now you are saying subject to final determination which is completely of different import from what you are saying was your understanding of the decision arrived at on October 20.

MR. LAYA. Yes, sir. Because our thinking then...

SEN. DRILON. What do you mean, yes, sir?

MR. LAYA. It's just a claim under discussion but then the way it is translated, as the minutes of October 20 were not really *verbatim*.

SEN. DRILON. So, you never intended to recognize the obligation.

MR. LAYA. I think so, sir. That was our - personally, that was my position.

SEN. DRILON. How did it happen, Corporate Secretary Ogan, that the minutes did not reflect what the board...

THE CHAIRMAN. Ms. Pasetes...

MS. PASETES. Yes, Mr. Chairman.

THE CHAIRMAN. ... you are the chief financial officer of PNCC.

MS. PASETES. Your Honor, before that November 22 board meeting, management headed by Mr. Rolando Macasaet, myself and Atty. Ogan had a discussion about the recognition of the obligations of 10 billion of Marubeni and 36 billion of the national government on whether to recognize this as an obligation in our books or recognize it as an obligation in the pro forma financial statement to be used for the privatization of PNCC because recognizing both obligations in the books of PNCC would defeat our going concern status and that is where the position of the president then, Mr. Macasaet, stemmed from and he went back to the board and moved to reconsider the position of October 20, 2000, Mr. Chair.

In other words, despite Atty. Laya's objections to PNCC's admitting liability for the Marubeni loans, the PNCC Board still admitted the same and merely imposed additional conditions to temper somehow the devastating effects of Board Resolution No. BD-092-2000.

The act of the PNCC Board in issuing Board Resolution No. BD-092-2000 expressly admitting liability for the Marubeni loans demonstrates the PNCC Board's gross and willful disregard of the requisite care and diligence in managing the affairs of PNCC, amounting to bad faith and resulting in grave and

irreparable injury to PNCC and its stockholders. This reckless and treacherous move on the part of the PNCC Board clearly constitutes a serious breach of its fiduciary duty to PNCC and its stockholders, rendering the members of the PNCC Board liable under Section 31 of the Corporation Code, which provides:

Sec. 31. Liability of directors, trustees or officers. - Directors or trustees who willfully and knowingly vote for or assent to patently unlawful acts of the corporation or who are guilty of gross negligence or bad faith in directing the affairs of the corporation or acquire any personal or pecuniary interest in conflict with their duty as such directors or trustees shall be liable jointly and severally for all damages resulting therefrom suffered by the corporation, its stockholders or members and other persons.

When a director, trustee or officer attempts to acquire or acquires, in violation of his duty, any interest adverse to the corporation in respect of any matter which has been reposed in him in confidence, as to which equity imposes a disability upon him to deal in his own behalf, he shall be liable as a trustee for the corporation and must account for the profits which otherwise would have accrued to the corporation.

Soon after the short-lived Estrada Administration, the PNCC Board revoked its previous admission of liability for the Marubeni loans. During the oral arguments, Atty. Sison narrated to the Court:

... After President Estrada was ousted, I was appointed as President and Chairman of PNCC in April of 2001, this particular board resolution was brought to my attention and I immediately put the matter before the board. I had no problem in convincing them to reverse the recognition as it was illegal and had no basis in fact. The vote to overturn that resolution was unanimous. Strange to say that some who voted to overturn the recognition were part of the old board that approved it. Stranger still, Renato Valdecantos who was still a member of the Board voted in favor of reversing the resolution he himself instigated and pushed. Some of the board members who voted to recognize the obligation of Marubeni even came to me privately and said “pinilit lang kami.” ...

In approving PNCC Board Resolution Nos. BD-092-2000 and BD-099-2000, the PNCC Board caused undue injury to the Government and gave unwarranted benefits to Radstock, through manifest partiality, evident bad faith or gross inexcusable

negligence of the PNCC Board. Such acts are declared under Section 3(e) of RA 3019 or the Anti-Graft and Corrupt Practices Act, as “corrupt practices ... and ... unlawful.” Being unlawful and criminal acts, these PNCC Board Resolutions are void ab initio and cannot be implemented or in any way given effect by the Executive or Judicial branch of the Government.

Not content with forcing PNCC to commit corporate suicide with the admission of liability for the Marubeni loans under Board Resolution Nos. BD-092-2000 and BD-099-2000, the PNCC Board drove the last nail on PNCC’s coffin when the PNCC Board entered into the manifestly and grossly disadvantageous Compromise Agreement with Radstock. This time, the OGCC, headed by Agnes DST Devanadera, reversed itself and recommended approval of the Compromise Agreement to the PNCC Board. As Atty. Sison explained to the Court during the oral arguments:

... While the case was pending in the Court of Appeals, Radstock in a rare display of extreme generosity, conveniently convinced the Board of PNCC to enter into a compromise agreement for 1/2 the amount of the judgment rendered by the RTC or P6.5 Billion Pesos. This time the OGCC, under the leadership of now Solicitor General Agnes Devanadera, approved the compromise agreement abandoning the previous OGCC position that PNCC had a meritorious case and would be hard press to lose the case. What is strange is that although the compromise agreement we seek to stop ostensibly is for P6.5 Billion only, truth and in fact, the agreement agrees to convey to Radstock all or substantially all of the assets of PNCC worth P18 Billion Pesos. There are three items that are undervalued here, the real estate that was turned over as a result of the controversial agreement, the toll revenues that were being assigned and the value of the new shares of PNCC the difference is about P12 Billion Pesos. ...

**The Compromise Agreement is Void for Being
Contrary to the Constitution, Existing Laws,
and Public Policy**

For a better understanding of the present case, the pertinent terms and conditions of the Compromise Agreement between PNCC and Radstock are quoted below:

COMPROMISE AGREEMENT

... This Agreement made and entered into this 17th day of August 2006, in Mandaluyong City, Metro Manila, Philippines, by and between:

PHILIPPINE NATIONAL CONSTRUCTION CORPORATION, a government acquired asset corporation, created and existing under the laws of the Republic of the Philippines, with principal office address at EDSA corner Reliance Street, Mandaluyong City, Philippines, duly represented herein by its Chairman ARTHUR N. AGUILAR, pursuant to a Board Resolution attached herewith as Annex "A" and made an integral part hereof, hereinafter referred to as PNCC;

- and -

RADSTOCK SECURITIES LIMITED, a private corporation incorporated in the British Virgin Islands, with office address at Suite 1402 1 Duddell Street, Central Hongkong duly-represented herein by its Director, CARLOS G. DOMINGUEZ, pursuant to a Board Resolution attached herewith as Annex "B" and made an integral part hereof, hereinafter referred to as RADSTOCK.

WITNESSETH:

WHEREAS, on January 15, 2001, RADSTOCK, as assignee of Marubeni Corporation, filed a complaint for sum of money and damages with application for a writ of preliminary attachment with the Regional Trial Court (RTC), Mandaluyong City, docketed as Civil Case No. MC-01-1398, to collect on PNCC's guarantees on the unpaid loan obligations of CDCP Mining Corporation as provided under an Advance Payment Agreement and Loan Agreement;

WHEREAS, on December 10, 2002, the RTC of Mandaluyong rendered a decision in favor of plaintiff RADSTOCK directing PNCC to pay the total amount of Thirteen Billion One Hundred Fifty One Million Nine Hundred Fifty-Six Thousand Five Hundred Twenty-Eight Pesos (P13,151,956,528.00) with interest from October 15, 2001 plus Ten Million Pesos (P10,000,000.00) as attorney's fees.

WHEREAS, PNCC had elevated the case to the Court of Appeals (CA-G.R. SP No. 66654) on *Certiorari* and thereafter, to the Supreme Court (G.R. No. 156887) which Courts have consistently ruled that the RTC did not commit grave abuse of discretion when it denied PNCC's Motion to Dismiss which sets forth similar or substantially the same grounds or defenses as those raised in PNCC's Answer;

WHEREAS, the case has remained pending for almost six (6)

years even after the main action was appealed to the Court of Appeals;

WHEREAS, on the basis of the RTC Decision dated December 10, 2002, the current value of the judgment debt against PNCC stands at P17,040,843,968.00 as of July 31, 2006 (the "Judgment Debt");

WHEREAS, RADSTOCK is willing to settle the case at the reduced Compromise Amount of Six Billion One Hundred Ninety-Six Million Pesos (P6,196,000,000.00) which may be paid by PNCC, either in cash or in kind to avoid the trouble and inconvenience of further litigation as a gesture of goodwill and cooperation;

WHEREAS, it is an established legal policy or principle that litigants in civil cases should be encouraged to compromise or amicably settle their claims not only to avoid litigation but also to put an end to one already commenced (Articles 2028 and 2029, Civil Code);

WHEREAS, this Compromise Agreement has been approved by the respective Board of Directors of both PNCC and RADSTOCK, subject to the approval of the Honorable Court; NOW, THEREFORE, for and in consideration of the foregoing premises, and the mutual covenants, stipulations and agreements herein contained, PNCC and RADSTOCK have agreed to amicably settle the above captioned Radstock case under the following terms and conditions:

1. RADSTOCK agrees to receive and accept from PNCC in full and complete settlement of the Judgment Debt, the reduced amount of Six Billion, One Hundred Ninety-Six Million Pesos (P6,196,000,000.00) (the "Compromise Amount").

2. This Compromise Amount shall be paid by PNCC to RADSTOCK in the following manner:

a. PNCC shall assign to a third party assignee to be designated by RADSTOCK all its rights and interests to the following real properties provided the assignee shall be duly qualified to own real properties in the Philippines;

(1) PNCC's rights over that parcel of land located in Pasay City with a total area of One Hundred Twenty-Nine Thousand Five Hundred Forty-Eight (129,548) square meters, more or less, and which is covered by and more particularly described in Transfer Certificate of Title No. T-34997 of the Registry of Deeds for Pasay City. The transfer value is P3,817,779,000.00. PNCC's rights and interests in Transfer Certificate of Title No. T-34997 of the Registry of Deeds for Pasay City is defined and delineated by Administrative Order No. 397, Series of 1998, and RADSTOCK is fully aware and recognizes that PNCC has

an undertaking to cede at least 2 hectares of this property to its creditor, the Philippine National Bank; and that furthermore, the Government Service Insurance System has also a current and existing claim in the nature of boundary conflicts, which undertaking and claim will not result in the diminution of area or value of the property. Radstock recognizes and acknowledges the rights and interests of GSIS over the said property.

(2) T-452587 (T-23646) - Parañaque (5,123 sq. m.) subject to the clarification of the Privatization and Management Office (PMO) claims thereon. The transfer value is P45,000,900.00.

(3) T-49499 (529715 including T-68146-G (S-29716) (1,9747-A)-Parañaque (107 sq. m.) (54 sq. m.) subject to the clarification of the Privatization and Management Office (PMO) claims thereon. The transfer value is P1,409,100.00.

(4) 5-29716-Parañaque (27,762 sq. m.) subject to the clarification of the Privatization and Management Office (PMO) claims thereon. The transfer value is P242,917,500.00.

(5) P-169 - Tagaytay (49,107 sq. m.). The transfer value is P13,749,400.00.

(6) P-170 - Tagaytay (49,100 sq. m.). The transfer value is P13,749,400.00.

(7) N-3320 - Town and Country Estate, Antipolo (10,000 sq. m.). The transfer value is P16,800,000.00.

(8) N-7424 - Antipolo (840 sq. m.). The transfer value is P940,800.00.

(9) N-7425 - Antipolo (850 sq. m.). The transfer value is P952,000.00.

(10) N-7426 - Antipolo (958 sq. m.). The transfer value is P1,073,100.00.

(11) T-485276 - Antipolo (741 sq. m.). The transfer value is P830,200.00.

(12) T-485277 - Antipolo (680 sq. m.). The transfer value is P761,600.00.

(13) T-485278 - Antipolo (701 sq. m.). The transfer value is P785,400.00.

(14) T-131500 - Bulacan (CDCP Farms Corp.) (4,945 sq., m.). The transfer value is P6,475,000.00.

(15) T-131501 - Bulacan (678 sq. m.). The transfer value is P887,600.00.

(16) T-26,154 (M) - Bocaue, Bulacan (2,841 sq. m.). The transfer value is P3,779,300.00.

(17) T-29,308 (M) - Bocaue, Bulacan (733 sq. m.). The transfer value is P974,400.00.

(18) T-29,309 (M) Bocaue, Bulacan (1,141 sq. m.). The transfer value is P1,517,600.00.

(19) T-260578 (R. Bengzon) Sta. Rita, Guiguinto, Bulacan (20,000 sq. m.). The transfer value is P25,200,000.00.

The transfer values of the foregoing properties are based on 70% of the appraised value of the respective properties.

b. PNCC shall issue to RADSTOCK or its assignee common shares of the capital stock of PNCC issued at par value which shall comprise 20% of the outstanding capital stock of PNCC after the conversion to equity of the debt exposure of the Privatization Management Office (PMO) and the National Development Company (NDC) and other government agencies and creditors such that the total government holdings shall not fall below 70% voting equity subject to the approval of the Securities and Exchange Commission (SEC) and ratification of PNCC's stockholders, if necessary. The assigned value of the shares issued to RADSTOCK is P713 Million based on the approximate last trading price of PNCC shares in the Philippine Stock Exchange as the date of this agreement, based further on current generally accepted accounting standards which stipulates the valuation of shares to be based on the lower of cost or market value.

Subject to the procurement of any and all necessary approvals from the relevant governmental authorities, PNCC shall deliver to RADSTOCK an instrument evidencing an undertaking of the Privatization and Management Office (PMO) to give RADSTOCK or its assignee the right to match any offer to buy the shares of the capital stock and debts of PNCC held by PMO, in the event the same shares and debt are offered for privatization.

c. PNCC shall assign to RADSTOCK or its assignee 50% of the PNCC's 6% share in the gross toll revenue of the Manila North Tollways Corporation (MNTC), with a Net Present Value of P1.287 Billion computed in the manner outlined in Annex "C" herein attached as an integral part hereof, that shall be due and owing to PNCC pursuant to the Joint Venture Agreement between PNCC and First Philippine Infrastructure Development Corp. dated August 29, 1995 and other related existing agreements, commencing in 2008. It shall be understood that as a result of this assignment, PNCC shall charge and withhold the amounts, if any, pertaining to taxes due on the amounts assigned.

Under the Compromise Agreement, PNCC shall pay Radstock the reduced amount of P6,185,000,000.00 in full settlement of PNCC's guarantee of CDCP Mining's debt allegedly totaling P17,040,843,968.00 as of 31 July 2006. To satisfy its reduced

obligation, PNCC undertakes to (1) “assign to a third party assignee to be designated by Radstock all its rights and interests” to the listed real properties therein; (2) issue to Radstock or its assignee common shares of the capital stock of PNCC issued at par value which shall comprise 20% of the outstanding capital stock of PNCC; and (3) assign to Radstock or its assignee 50% of PNCC’s 6% share, for the next 27 years (2008-2035), in the gross toll revenues of the Manila North Tollways Corporation.

The PNCC Board has no power to compromise the P6.185 billion amount.

Does the PNCC Board have the power to compromise the P6.185 billion “reduced” amount? The answer is in the negative.

The Dissenting Opinion²⁵⁴ asserts that PNCC has the power, citing Section 36(2) of Presidential Decree No. 1445 (PD 1445), otherwise known as the Government Auditing Code of the Philippines, enacted in 1978. Section 36 states:

Sec. 36. Power to Compromise Claims. - (1) When the interest of the government so requires, the Commission may compromise or release in whole or in part, any claim or settled liability to any government agency not exceeding ten thousand pesos and with the written approval of the Prime Minister, it may likewise compromise or release any similar claim or liability not exceeding one hundred thousand pesos, the application for relief therefrom shall be submitted, through the Commission and the Prime Minister, with their recommendations, to the National Assembly.

(2) The respective governing bodies of government-owned or controlled corporations, and self-governing boards, commissions or agencies of the government shall have the exclusive power to compromise or release any similar claim or liability when expressly authorized by their charters and if in their judgment, the interest of their respective corporations or agencies so requires. When the charters do not so provide, the power to compromise shall be exercised by the Commission in accordance with the preceding paragraph.

The Dissenting Opinion asserts that since PNCC is incorporated under the Corporation Code, the PNCC Board has all the powers granted to the governing boards of corporations incorporated

²⁵⁴ Dissenting opinion, Bersamin, J.

under the Corporation Code, which includes the power to compromise claims or liabilities.

Section 36 of PD 1445, enacted on 11 June 1978, has been superseded by a later law -- Section 20(1), Chapter IV, Subtitle B, Title I, Book V of Executive Order No. 292 or the Administrative Code of 1987, which provides:

Sec. 20. Power to Compromise Claims. - (1) When the interest of the Government so requires, the Commission may compromise or release in whole or in part, any settled claim or liability to any government agency not exceeding ten thousand pesos arising out of any matter or case before it or within its jurisdiction, and with the written approval of the President, it may likewise compromise or release any similar claim or liability not exceeding one hundred thousand pesos. In case the claim or liability exceeds one hundred thousand pesos, the application for relief therefrom shall be submitted, through the Commission and the President, with their recommendations, to the Congress[.] ...

Under this provision,²⁵⁵ the authority to compromise a settled claim or liability exceeding P100,000.00 involving a government agency, as in this case where the liability amounts to P6.185 billion, is vested not in COA but exclusively in Congress. Congress alone has the power to compromise the P6.185 billion purported liability of PNCC. Without congressional approval, the Compromise Agreement between PNCC and Radstock involving P6.185 billion is void for being contrary to Section 20(1), Chapter IV, Subtitle B, Title I, Book V of the Administrative Code of 1987.

PNCC is a “government agency” because Section 2 on Introductory Provisions of the Revised Administrative Code of 1987 provides that -

Agency of the Government refers to any of the various units of the Government, including a department, bureau, office, instrumentality, or government-owned or controlled corporation, or a local government or a distinct unit therein.

Thus, Section 20(1), Chapter IV, Subtitle B, Title I, Book V of the Administrative Code of 1987 applies to PNCC, which

²⁵⁵ See *Alexandra Condominium Corporation v. Laguna Lake Development Authority*, G.R. No.169228, 11 September 2009.

indisputably is a government owned or controlled corporation.

In the same vein, the COA's stamp of approval on the Compromise Agreement is void for violating Section 20(1), Chapter IV, Subtitle B, Title I, Book V of the Administrative Code of 1987. Clearly, the Dissenting Opinion's reliance on the COA's finding that the terms and conditions of the Compromise Agreement are "fair and above board" is patently erroneous.

Citing *Benedicto v. Board of Administrators of Television Stations RPN, BBC and IBC*,²⁵⁶ the Dissenting Opinion views that congressional approval is not required for the validity of the Compromise Agreement because the liability of PNCC is not yet "settled."

In *Benedicto*, the PCGG filed in the Sandiganbayan a civil case to recover from the defendants (including Roberto S. Benedicto) their ill-gotten wealth consisting of funds and other properties. The PCGG executed a compromise agreement with Roberto S. Benedicto ceding to the latter a substantial part of his ill-gotten assets and the State granting him immunity from further prosecution. The Court held that prior congressional approval is not required for the PCGG to enter into a compromise agreement with persons against whom it has filed actions for recovery of ill-gotten wealth.

In *Benedicto*, the Court found that the government's claim against Benedicto was not yet settled unlike here where the PNCC Board expressly admitted the liability of PNCC for the Marubeni loans. In *Benedicto*, the ownership of the alleged ill-gotten assets was still being litigated in the Sandiganbayan and no party ever admitted any liability, unlike here where the PNCC Board had already admitted through a formal Board Resolution PNCC's liability for the Marubeni loans. PNCC's express admission of liability for the Marubeni loans is essentially the premise of the execution of the Compromise Agreement. In short, Radstock's claim against PNCC is settled by virtue of PNCC's express admission of liability for the Marubeni loans. The Compromise Agreement merely reduced this settled liability from P17 billion to P6.185 billion.

The provision of the Revised Administrative Code on the power to settle claims or liabilities was precisely enacted to prevent government agencies from admitting liabilities against the

²⁵⁶ G.R. No. 87710, 31 March 1992, 207 SCRA 659.

government, then compromising such “settled” liabilities. The present case is exactly what the law seeks to prevent, a compromise agreement on a creditor’s claim settled through admission by a government agency without the approval of Congress for amounts exceeding P100,000.00. What makes the application of the law even more necessary is that the PNCC Board’s twin moves are manifestly and grossly disadvantageous to the Government. First, the PNCC admitted solidary liability for a staggering P10.743 billion private debt incurred by a private corporation which PNCC does not even control. Second, the PNCC Board agreed to pay Radstock P6.185 billion as a compromise settlement ahead of all other creditors, including the Government which is the biggest creditor.

The Dissenting Opinion further argues that since the PNCC is incorporated under the Corporation Code, it has the power, through its Board of Directors, to compromise just like any other private corporation organized under the Corporation Code. Thus, the Dissenting Opinion states:

Not being a government corporation created by special law, PNCC does not owe its creation to some charter or special law, but to the Corporation Code. Its powers are enumerated in the Corporation Code and its articles of incorporation. As an autonomous entity, it undoubtedly has the power to compromise, and to enter into a settlement through its Board of Directors, just like any other private corporation organized under the Corporation Code. To maintain otherwise is to ignore the character of PNCC as a corporate entity organized under the Corporation Code, by which it was vested with a personality and identity distinct and separate from those of its stockholders or members.

The Dissenting Opinion is woefully wide off the mark. The PNCC is not “just like any other private corporation” precisely because it is not a private corporation but indisputably a government owned corporation. Neither is PNCC “an autonomous entity” considering that PNCC is under the Department of Trade and Industry, over which the President exercises control. To claim that PNCC is an “autonomous entity” is to say that it is a lost command in the Executive branch, a concept that violates the President’s constitutional power of control over the entire Executive branch of government.²⁵⁷

²⁵⁷ *Rufino v. Endriga*, G.R. Nos. 139554 and 139565, 21 July 2006, 496 SCRA 13.

The government nominees in the PNCC Board, who practically compose the entire PNCC Board, are public officers subject to the Anti-Graft and Corrupt Practices Act, accountable to the Government and the Filipino people. To hold that a corporation incorporated under the Corporation Code, despite its being 90.3% owned by the Government, is “an autonomous entity” that could solely through its Board of Directors compromise, and transfer ownership of, substantially all its assets to a private third party without the approval required under the Administrative Code of 1987, is to invite the plunder of all such government owned corporations.

The Dissenting Opinion’s claim that PNCC is an autonomous entity just like any other private corporation is inconsistent with its assertion that Section 36(2) of the Government Auditing Code is the governing law in determining PNCC’s power to compromise. **Section 36(2) of the Government Auditing Code expressly states that it applies to the governing bodies of “government-owned or controlled corporations.”** The phrase “government-owned or controlled corporations” refers to both those created by special charter as well as those incorporated under the Corporation Code (citing) Section 2, Article IX-D of the Constitution... (and) *Feliciano v. Commission on Audit...*²⁵⁸

Clearly, the COA’s audit jurisdiction extends to government owned or controlled corporations incorporated under the Corporation Code. Thus, the COA must apply the Government Auditing Code in the audit and examination of the accounts of such government owned or controlled corporations even though incorporated under the Corporation Code. This means that Section 20(1), Chapter IV, Subtitle B, Title I, Book V of the Administrative Code of 1987 on the power to compromise, which superseded Section 36 of the Government Auditing Code, applies to the present case in determining PNCC’s power to compromise. In fact, the COA has been regularly auditing PNCC on a post-audit basis in accordance with Section 2, Article IX-D of the Constitution, the Government Auditing Code, and COA rules and regulations.

²⁵⁸ 464 Phil. 441, 453, 461-462 (2004), also penned by Justice Carpio. See discussion under Art. IX-D.

PNCC's toll fees are public funds.

PD 1113 granted PNCC a 30-year franchise to construct, operate and maintain toll facilities in the North and South Luzon Expressways. Section 1 of PD 1113²⁵⁹ provides:

Sec. 1. Any provision of law to the contrary notwithstanding, there is hereby granted to the Construction and Development Corporation of the Philippines (CDCP), a corporation duly organized and registered under the laws of the Philippines, hereinafter called the GRANTEE, for a period of thirty (30) years from May 1, 1977 the right, privilege and authority to construct, operate and maintain toll facilities covering the expressways from Balintawak (Station 9 + 563) to Carmen, Rosales, Pangasinan and from Nichols, Pasay City (Station 10 + 540) to Lucena, Quezon, hereinafter referred to collectively as North Luzon Expressway, respectively. The franchise herein granted shall include the right to collect toll fees at such rates as may be fixed and/or authorized by the Toll Regulatory Board hereinafter referred to as the Board created under Presidential Decree No. 1112 for the use of the expressways above- mentioned.

Section 2 of PD 1894,²⁶⁰ which amended PD 1113 to include in PNCC's franchise the Metro Manila expressway, also provides:

Sec. 2. The term of the franchise provided under Presidential Decree No. 1113 for the North Luzon Expressway and the South Luzon Expressway which is thirty (30) years from 1 May 1977 shall remain the same; provided that, the franchise granted for the Metro Manila Expressway and all extensions linkages, stretches and diversions that may be constructed after the date of approval of this decree shall likewise have a term of thirty (30) years commencing from the date of completion of the project.

Based on these provisions, the franchise of the PNCC expired on 1 May 2007 or thirty years from 1 May 1977.

²⁵⁹ Granting The Construction And Development Corporation Of The Philippines (CDCP) A Franchise To Operate, Construct And Maintain Toll Facilities In The North And South Luzon Toll Expressways And For Other Purposes.

²⁶⁰ Amending The Franchise Of The Philippine National Construction Corporation To Construct, Maintain And Operate Toll Facilities In The North Luzon And South Luzon Expressways To Include The Metro Manila Expressway To Serve As An Additional Artery In The Transportation Of Trade And Commerce In The Metro Manila Area.

PNCC, however, claims that under PD 1894, the North Luzon Expressway (NLEX) shall have a term of 30 years from the date of its completion in 2005. PNCC argues that the proviso in Section 2 of PD 1894 gave “toll road projects completed within the franchise period and after the approval of PD No. 1894 on 12 December 1983 their own thirty-year term commencing from the date of the completion of the said project, notwithstanding the expiry of the said franchise.”

This contention is untenable.

The proviso in Section 2 of PD 1894 refers to the franchise granted for the Metro Manila Expressway and all extensions linkages, stretches and diversions constructed after the approval of PD 1894. It does not pertain to the NLEX because the term of the NLEX franchise, “which is 30 years from 1 May 1977, shall remain the same,” as expressly provided in the first sentence of the same Section 2 of PD 1894. To construe that the NLEX franchise had a new term of 30 years starting from 2005 glaringly conflicts with the plain, clear and unequivocal language of the first sentence of Section 2 of PD 1894. That would be clearly absurd.

There is no dispute that Congress did not renew PNCC’s franchise after its expiry on 1 May 2007. However, PNCC asserts that it “remains a viable corporate entity even after the expiration of its franchise under Presidential Decree No. 1113.” PNCC points out that the Toll Regulatory Board (TRB) granted PNCC a “Tollway Operation Certificate” (TOC) which conferred on PNCC the authority to operate and maintain toll facilities, which includes the power to collect toll fees. PNCC further posits that the toll fees are private funds because they represent “the consideration given to tollway operators in exchange for costs they incurred or will incur in constructing, operating and maintaining the tollways.”

This contention is devoid of merit.

With the expiration of PNCC’s franchise, the assets and facilities of PNCC were automatically turned over, by operation of law, to the government at no cost. Sections 2(e) and 9 of PD 1113 and Section 5 of PD 1894 provide:

Sec. 2 [of PD 1113]. In consideration of this franchise, the GRANTEE shall:

(e) Turn over the toll facilities and all equipment directly related thereto to the government upon expiration of the franchise period without cost.

Sec. 9 [of PD 1113]. For the purposes of this franchise, the Government, shall turn over to the GRANTEE (PNCC) not later than April 30, 1977 all physical assets and facilities including all equipment and appurtenances directly related to the operations of the North and South Toll Expressways: Provided, That, the extensions of such Expressways shall also be turned over to GRANTEE upon completion of their construction or of functional sections thereof: Provided, However, That upon termination of the franchise period, said physical assets and facilities including improvements thereon, together with equipment and appurtenances directly related to their operations, shall be turned over to the Government without any cost or obligation on the part of the latter.

Sec. 5 [of PD No. 1894]. In consideration of this franchise, the GRANTEE shall: (a) Construct, operate and maintain at its own expense the Expressways; and

(b) Turn over, without cost, the toll facilities and all equipment, directly related thereto to the Government upon expiration of the franchise period.

The TRB does not have the power to give back to PNCC the toll assets and facilities which were automatically turned over to the Government, by operation of law, upon the expiration of the franchise of the PNCC on 1 May 2007. Whatever power the TRB may have to grant authority to operate a toll facility or to issue a "Tollway Operation Certificate," such power does not obviously include the authority to transfer back to PNCC ownership of National Government assets, like the toll assets and facilities, which have become National Government property upon the expiry of PNCC's franchise. Such act by the TRB would repeal Section 5 of PD 1894 which automatically vested in the National Government ownership of PNCC's toll assets and facilities upon the expiry of PNCC's franchise. The TRB obviously has no power to repeal a law. Further, PD 1113, as amended by PD 1894, granting the franchise to PNCC, is a later law that must necessarily prevail over PD 1112 creating the TRB. Hence, the provisions of PD 1113, as amended by PD 1894, are controlling.

The government's ownership of PNCC's toll assets and facilities inevitably results in the government's ownership of the toll fees and the net income derived from these toll assets and facilities.

Thus, the toll fees form part of the National Government's General Fund, which includes public moneys of every sort and other resources pertaining to any agency of the government.²⁶¹ Even Radstock's counsel admits that the toll fees are public funds, to wit:

ASSOCIATE JUSTICE CARPIO: Okay. Now, when the franchise of PNCC expired on May 7, 2007, under the terms of the franchise under PD 1896, all the assets, toll way assets, equipment, etcetera of PNCC became owned by government at no cost, correct, under the franchise?

DEAN AGABIN: Yes, Your Honor.

ASSOCIATE JUSTICE CARPIO: Okay. So this is now owned by the national government. [A]ny income from these assets of the national government is national government income, correct?

DEAN AGABIN: Yes, Your Honor.

...

ASSOCIATE JUSTICE CARPIO: ... My question is very simple ... Is the income from these assets of the national government (interrupted)

DEAN AGABIN: Yes, Your Honor. ...

ASSOCIATE JUSTICE CARPIO: So, it's the government [that] decides whether it goes to the general fund or another fund. [W]hat is that other fund? Is there another fund where revenues of the government go?

DEAN AGABIN: It's the same fund, Your Honor, except that (interrupted)

ASSOCIATE JUSTICE CARPIO: So it goes to the general fund?

DEAN AGABIN: Except that it can be categorized as a private fund in a commercial sense, and it can be categorized as a public fund in a Public Law sense.

ASSOCIATE JUSTICE CARPIO: Okay. So we agree that, okay, it goes to the general fund. I agree with you, but you are saying it is categorized still as a private funds?

DEAN AGABIN: Yes, Your Honor.

ASSOCIATE JUSTICE CARPIO: But it's part of the general fund. Now, if it is part of the general fund, who has the authority to spend that money?

DEAN AGABIN: Well, the National Government itself.

ASSOCIATE JUSTICE CARPIO: Who in the National Government, the Executive, Judiciary or Legislative?

²⁶¹ Government Auditing Code, Sec. 3, Definition of Terms.

DEAN AGABIN: Well, the funds are usually appropriated by the Congress.

ASSOCIATE JUSTICE CARPIO: ... you mean to say there are exceptions that money from the general fund can be spent by the Executive without going t[hrough] Congress, or ... is [that] the absolute rule?

DEAN AGABIN: Well, in so far as the general fund is concerned, that is the absolute rule set aside by the National Government.

ASSOCIATE JUSTICE CARPIO: ... you are saying this is general fund money - the collection from the assets[?]

DEAN AGABIN: Yes.

Forming part of the General Fund, the toll fees can only be disposed of in accordance with the fundamental principles governing financial transactions and operations of any government agency, to wit: (1) no money shall be paid out of the Treasury except in pursuance of an appropriation made by law, as expressly mandated by Section 29(1), Article VI of the Constitution; and (2) government funds or property shall be spent or used solely for public purposes, as expressly mandated by Section 4(2) of PD 1445 or the Government Auditing Code... (citing) Section 29(1), Article VI of the Constitution... **The power to appropriate money from the General Funds of the Government belongs exclusively to the Legislature. Any act in violation of this iron-clad rule is unconstitutional.**

Reinforcing this Constitutional mandate, Sections 84 and 85 of PD 1445 require that before a government agency can enter into a contract involving the expenditure of government funds, there must be an appropriation law for such expenditure, thus:

Sec. 84. Disbursement of government funds.

1. Revenue funds shall not be paid out of any public treasury or depository except in pursuance of an appropriation law or other specific statutory authority.

...

Sec. 85. Appropriation before entering into contract.

1. No contract involving the expenditure of public funds shall be entered into unless there is an appropriation therefor, the unexpended balance of which, free of other obligations, is sufficient to cover the proposed expenditure.

...

Section 86 of PD 1445, on the other hand, requires that the proper accounting official must certify that funds have been appropriated for the purpose.²⁶² Section 87 of PD 1445 provides that any contract entered into contrary to the requirements of Sections 85 and 86 shall be void, thus:

Sec. 87. Void contract and liability of officer. Any contract entered into contrary to the requirements of the two immediately preceding sections shall be void, and the officer or officers entering into the contract shall be liable to the government or other contracting party for any consequent damage to the same extent as if the transaction had been wholly between private parties.

Applying Section 29(1), Article VI of the Constitution, as implanted in Sections 84 and 85 of the Government Auditing Code, a law must first be enacted by Congress appropriating P6.185 billion as compromise money before payment to Radstock can be made.²⁶³ Otherwise, such payment violates a prohibitory law and thus void under Article 5 of the Civil Code which states that “[a]cts executed against the provisions of mandatory or prohibitory laws shall be void, except when the law itself authorizes their validity.”

Indisputably, without an appropriation law, PNCC cannot lawfully pay P6.185 billion to Radstock. Any contract allowing such payment, like the Compromise Agreement, “shall be void” as provided in Section 87 of the Government Auditing Code. In *COMELEC v. Quijano-Padilla*,²⁶⁴ this Court ruled:

Petitioners are justified in refusing to formalize the contract with PHOTOKINA. Prudence dictated them not to enter into a contract not backed up by sufficient appropriation and available funds. Definitely, to act otherwise would be a futile exercise for the contract would inevitably suffer the vice of nullity. In *Osmeña v. Commission on Audit*, this Court held:

The Auditing Code of the Philippines (P.D. 1445) further provides that no contract involving the expenditure of public funds shall be entered into unless there is an appropriation therefor and the proper accounting official

²⁶² See *Melchor v. COA*, G.R. No. 95398, 16 August 1991, 200 SCRA 704; *Osmeña v. COA*, G.R. No. 98355, 2 March 1994, 230 SCRA 585; *COMELEC v. Quijano-Padilla*, 438 Phil. 72 (2002).

²⁶³ See *Guingona, Jr. v. Carague*, G.R. No. 94571, 22 April 1991, 196 SCRA 221.

²⁶⁴ 438 Phil. 72, 96-98 (2002).

of the agency concerned shall have certified to the officer entering into the obligation that funds have been duly appropriated for the purpose and the amount necessary to cover the proposed contract for the current fiscal year is available for expenditure on account thereof. Any contract entered into contrary to the foregoing requirements shall be VOID.

Clearly then, the contract entered into by the former Mayor Duterte was void from the very beginning since the agreed cost for the project (P8,368,920.00) was way beyond the appropriated amount (P5,419,180.00) as certified by the City Treasurer. Hence, the contract was properly declared void and unenforceable in COA's 2nd Indorsement, dated September 4, 1986. The COA declared and we agree, that:

The prohibition contained in Sec. 85 of PD 1445 (Government Auditing Code) is explicit and mandatory. Fund availability is, as it has always been, an indispensable prerequisite to the execution of any government contract involving the expenditure of public funds by all government agencies at all levels. Such contracts are not to be considered as final or binding unless such a certification as to funds availability is issued (Letter of Instruction No. 767, s. 1978). Antecedent of advance appropriation is thus essential to government liability on contracts (*Zobel v. City of Manila*, 47 Phil. 169). This contract being violative of the legal requirements aforequoted, the same contravenes Sec. 85 of PD 1445 and is null and void by virtue of Sec. 87.

Verily, the contract, as expressly declared by law, is inexistent and void ab initio. This is to say that the proposed contract is without force and effect from the very beginning or from its incipency, as if it had never been entered into, and hence, cannot be validated either by lapse of time or ratification.

Significantly, Radstock's counsel admits that an appropriation law is needed before PNCC can use toll fees to pay Radstock, thus:

ASSOCIATE JUSTICE CARPIO: Okay, I agree with you. Now, you are saying that money can be paid out of the general fund only through an appropriation by Congress, correct? That's what you are saying.

DEAN AGABIN: Yes, Your Honor.

ASSOCIATE JUSTICE CARPIO: I agree with you also. Okay, now, can PNCC ... use this money to pay Radstock without Congressional approval?

DEAN AGABIN: Well, I believe that that may not be

necessary. Your Honor, because earlier, the government had already decreed that PNCC should be properly paid for the reclamation works which it had done. And so (interrupted)

ASSOCIATE JUSTICE CARPIO: No. I am talking of the funds.

DEAN AGABIN: And so it is like a foreign obligation.

ASSOCIATE JUSTICE CARPIO: Counsel, I'm talking of the general funds, collection from the toll fees. Okay. You said, they go to the general fund. You also said, money from the general fund can be spent only if there is an appropriation law by Congress.

DEAN AGABIN: Yes, Your Honor. There is no law.

DEAN AGABIN: Yes, except that, Your Honor, this fund has not yet gone to the general fund.

ASSOCIATE JUSTICE CARPIO: No. It's being collected every day. As of May 7, 2007, national government owned those assets already. All those ... collections that would have gone to PNCC are now national government owned. It goes to the general fund. And anybody who uses that without appropriation from Congress commits malversation, I tell you.

DEAN AGABIN: That is correct, Your Honor, as long as it has already gone into the general fund.

ASSOCIATE JUSTICE CARPIO: Oh, you mean to say that it's still being held now by the agent, PNCC. It has not been remitted to the National Government?

...

DEAN AGABIN: If this is the share that properly belongs to PNCC as a private entity (interrupted)

ASSOCIATE JUSTICE CARPIO: No, no. I am saying that - You just agreed that all those collections now will go to the National Government forming part of the general fund. If, somehow, PNCC is holding this money in the meantime, it holds ... it in trust, correct? Because you said, it goes to the general fund, National Government. So it must be holding this in trust for the National Government.

DEAN AGABIN: Yes, Your Honor.

ASSOCIATE JUSTICE CARPIO: Okay. Can the person holding in trust use it to pay his private debt?

DEAN AGABIN: No, Your Honor.

ASSOCIATE JUSTICE CARPIO: Cannot be.

DEAN AGABIN: But I assume that there must be some portion of the collections which properly pertain to PNCC.

ASSOCIATE JUSTICE CARPIO: If there is some portion that ... may be [for] operating expenses of PNCC. But that is not
DEAN AGABIN: Even profit, Your Honor.

ASSOCIATE JUSTICE CARPIO: Yeah, but that is not the six percent. Out of the six percent, that goes now to PNCC, that's entirely national government. But the National Government and the PNCC can agree on service fees for collecting, to pay toll collectors.

DEAN AGABIN: Yes, Your Honor.

ASSOCIATE JUSTICE CARPIO: But those are expenses. We are talking of the net income. It goes to the general fund. And it's only Congress that can authorize that expenditure. Not even the Court of Appeals can give its stamp of approval that it goes to Radstock, correct?

DEAN AGABIN: Yes, Your Honor.

Without an appropriation law, the use of the toll fees to pay Radstock would constitute malversation of public funds. Even counsel for Radstock expressly admits that the use of the toll fees to pay Radstock constitutes malversation of public funds....

Indisputably, funds held in trust by PNCC for the National Government cannot be used by PNCC to pay a private debt of CDCP Mining to Radstock, otherwise the PNCC Board will be liable for malversation of public funds.

In addition, to pay Radstock P6.185 billion violates the fundamental public policy, expressly articulated in Section 4(2) of the Government Auditing Code,²⁶⁵ that government funds or property shall be spent or used solely for public purposes, thus:

Sec. 4. Fundamental Principles. ... (2) Government funds or property shall be spent or used solely for public purposes.

There is no question that the subject of the Compromise Agreement is CDCP Mining's private debt to Marubeni, which Marubeni subsequently assigned to Radstock. Counsel for Radstock admits that Radstock holds a private debt of CDCP Mining, thus:

ASSOCIATE JUSTICE CARPIO: So your client is holding a private debt of CDCP Mining, correct?

DEAN AGABIN: Correct, Your Honor.

CDCP Mining obtained the Marubeni loans when CDCP Mining

²⁶⁵ The Court applied this provision in *Brgy. Sindalan, San Fernando, Pampanga v. Court of Appeals*, G.R. No. 150640, 22 March 2007, 518 SCRA 649.

and PNCC (then CDCP) were still privately owned and managed corporations. The Government became the majority stockholder of PNCC only because government financial institutions converted their loans to PNCC into equity when PNCC failed to pay the loans. However, CDCP Mining have always remained a majority privately owned corporation with PNCC owning only 13% of its equity as admitted by former PNCC Chairman Arthur N. Aguilar and PNCC SVP Finance Miriam M. Pasetes during the Senate hearings. ...

PNCC cannot use public funds, like toll fees that indisputably form part of the General Fund, to pay a private debt of CDCP Mining to Radstock. Such payment cannot qualify as expenditure for a public purpose. The toll fees are merely held in trust by PNCC for the National Government, which is the owner of the toll fees.

Considering that there is no appropriation law passed by Congress for the P6.185 billion compromise amount, the Compromise Agreement is void for being contrary to law, specifically Section 29(1), Article VI of the Constitution and Section 87 of PD 1445. And since the payment of the P6.185 billion pertains to CDCP Mining's private debt to Radstock, the Compromise Agreement is also void for being contrary to the fundamental public policy that government funds or property shall be spent or used solely for public purposes, as provided in Section 4(2) of the Government Auditing Code.

...

PNCC must follow rules on preference of credit.

Radstock is only one of the creditors of PNCC. Asiavest is PNCC's judgment creditor. In its Board Resolution No. BD-092-2000, PNCC admitted not only its debt to Marubeni but also its debt to the National Government in the amount of P36 billion. During the Senate hearings, PNCC admitted that it owed the Government P36 billion, thus:

SEN. OSMEÑA. All right. Now, second question is, the management of PNCC also recognize the obligation to the national government of 36 billion. It is part of the board resolution.

MS. OGAN. Yes, sir, it is part of the October 20 board resolution.

SEN. OSMEÑA. All right. So if you owe the national

government 36 billion and you owe Marubeni 10 billion, you know, I would just declare bankruptcy and let an orderly disposition of assets be done. What happened in this case to the claim, the 36 billion claim of the national government? How was that disposed of by the PNCC? Mas malaki ang utang ninyo sa national government, 36 billion. Ang gagawin ninyo, babayaran lahat ang utang ninyo sa Marubeni without any assets left to satisfy your obligations to the national government. There should have been, at least, a *pari passu* payment of all your obligations, 'di ba?

MS. PASETES. Mr. Chairman...

SEN. OSMENA. Yes.

MS. PASETES. PNCC still carries in its books an equity account called equity adjustments arising from transfer of obligations to national government - 5.4 billion - in addition to shares held by government amounting to 1.2 billion.

SEN. OSMENA. What is the 36 billion?

THE CHAIRMAN. Ms. Pasetes...

SEN. OSMENA. Wait, wait, wait.

THE CHAIRMAN. Baka ampaw yun eh.

SEN. OSMENA. Teka muna. What is the 36 billion that appear in the resolution of the board in September 2000 (sic)? This is the same resolution that recognizes, acknowledges and confirms PNCC's obligations to Marubeni. And subparagraph (a) says "Government of the Philippines, in the amount of 36,023,784,000 and change. And then (b) Marubeni Corporation in the amount of 10,743,000,000. So, therefore, in the same resolution, you acknowledged that had something like P46.7 billion in obligations. Why did PNCC settle the 10 billion and did not protect the national government's 36 billion? And then, number two, why is it now in your books, the 36 billion is now down to five? If you use that ratio, then Marubeni should be down to one.

MS. PASETES. Sir, the amount of 36 billion is principal plus interest and penalties.

SEN. OSMENA. And what about Marubeni? Is that just principal only?

MS. PASETES. Principal and interest.

SEN. OSMENA. So, I mean, you know, it's equal treatment. Ten point seven billion is principal plus penalties plus interest, hindi ba?

MS. PASETES. Yes, sir. Yes, Your Honor.

SEN. OSMENA. All right. So now, what you are saying is that you gonna pay Marubeni 6 billion and change and the national government is only recognizing 5 billion. I don't think that's

protecting the interest of the national government at all.

In giving priority and preference to Radstock, the Compromise Agreement is certainly in fraud of PNCC's other creditors, including the National Government, and violates the provisions of the Civil Code on concurrence and preference of credits.

This Court has held that while the Corporation Code allows the transfer of all or substantially all of the assets of a corporation, the transfer should not prejudice the creditors of the assignor corporation.²⁶⁶ Assuming that PNCC may transfer all or substantially all its assets, to allow PNCC to do so without the consent of its creditors or without requiring Radstock to assume PNCC's debts will defraud the other PNCC creditors since the assignment will place PNCC's assets beyond the reach of its other creditors.²⁶⁷ As this Court held in *Caltex (Phil.), Inc. v. PNO Shipping and Transport Corporation*:²⁶⁸

While the Corporation Code allows the transfer of all or substantially all the properties and assets of a corporation, the transfer should not prejudice the creditors of the assignor. The only way the transfer can proceed without prejudice to the creditors is to hold the assignee liable for the obligations of the assignor. The acquisition by the assignee of all or substantially all of the assets of the assignor necessarily includes the assumption of the assignor's liabilities, unless the creditors who did not consent to the transfer choose to rescind the transfer on the ground of fraud. To allow an assignor to transfer all its business, properties and assets without the consent of its creditors and without requiring the assignee to assume the assignor's obligations will defraud the creditors. The assignment will place the assignor's assets beyond the reach of its creditors.

Also, the law, specifically Article 1387 of the Civil Code, presumes that there is fraud of creditors when property is alienated by the debtor after judgment has been rendered against him, thus:

Alienations by onerous title are also presumed fraudulent when made by persons against whom some judgment has been rendered in any instance or some writ of attachment

²⁶⁶ *Caltex (Philippines), Inc. v. PNO Shipping and Transport Corporation*, G.R. No. 150711, 10 August 2006, 498 SCRA 400.

²⁶⁷ *Ibid.*

²⁶⁸ *Ibid.*

has been issued. The decision or attachment need not refer to the property alienated, and need not have been obtained by the party seeking rescission.

As stated earlier, Asiavest is a judgment creditor of PNCC in G.R. No. 110263 and a court has already issued a writ of execution in its favor. Thus, when PNCC entered into the Compromise Agreement conveying several prime lots in favor of Radstock, by way of *dacion en pago*, there is a legal presumption that such conveyance is fraudulent under Article 1387 of the Civil Code.²⁶⁹

This presumption is strengthened by the fact that the conveyance has virtually left PNCC's other creditors, including the biggest creditor - the National Government - with no other asset to garnish or levy.

Notably, the presumption of fraud or intention to defraud creditors is not just limited to the two instances set forth in the first and second paragraphs of Article 1387 of the Civil Code. Under the third paragraph of the same article, "the design to defraud creditors may be proved in any other manner recognized by the law of evidence." In *Oria v. McMicking*,²⁷⁰ this Court considered the following instances as badges of fraud:

1. The fact that the consideration of the conveyance is fictitious or is inadequate.
2. A transfer made by a debtor after suit has begun and while it is pending against him.
3. A sale upon credit by an insolvent debtor.
4. Evidence of large indebtedness or complete insolvency.
5. The transfer of all or nearly all of his property by a debtor, especially when he is insolvent or greatly embarrassed financially.
6. The fact that the transfer is made between father and son, when there are present other of the above circumstances.
7. The failure of the vendee to take exclusive possession of all the property.

Among the circumstances indicating fraud is a transfer of all or nearly all of the debtor's assets, especially when the debtor is greatly embarrassed financially. Accordingly, neither a

²⁶⁹ See *China Banking Corporation v. Court of Appeals*, 384 Phil. 116 (2000).

²⁷⁰ 21 Phil. 243 (1912), cited in *China Banking Corporation v. Court of Appeals*, 384 Phil. 116 (2000) and *Caltex v. PNOC Shipping and Transport Corporation*, G.R. No. 150711, 10 August 2006, 498 SCRA 400.

declaration of insolvency nor the institution of insolvency proceedings is a condition *sine qua non* for a transfer of all or nearly all of a debtor's assets to be regarded in fraud of creditors. It is sufficient that a debtor is greatly embarrassed financially.

In this case, PNCC's huge negative net worth - at least P6 billion as expressly admitted by PNCC's counsel during the oral arguments, or P14 billion based on the 2006 COA Audit Report - necessarily translates to an extremely embarrassing financial situation. With its huge negative net worth arising from unpaid billions of pesos in debt, PNCC cannot claim that it is financially stable. As a consequence, the Compromise Agreement stipulating a transfer in favor of Radstock of substantially all of PNCC's assets constitutes fraud. To legitimize the Compromise Agreement just because there is still no judicial declaration of PNCC's insolvency will work fraud on PNCC's other creditors, the biggest creditor of which is the National Government. To insist that PNCC is very much liquid, given its admitted huge negative net worth, is nothing but denial of the truth. The toll fees that PNCC collects belong to the National Government. Obviously, PNCC cannot claim it is liquid based on its collection of such toll fees, because PNCC merely holds such toll fees in trust for the National Government. PNCC does not own the toll fees, and such toll fees do not form part of PNCC's assets.

PNCC owes the National Government P36 billion, a substantial part of which constitutes taxes and fees, thus:

SEN. ROXAS. Thank you, Mr. Chairman. Mr. PNCC Chairman, could you describe for us the composition of your debt of about five billion - there are in thousands, so this looks like five and half billion. Current portion of long-term debt, about five billion. What is this made of?

MS. PASETES. The five billion is composed of what is owed the Bureau of Treasury and the Toll Regulatory Board for concession fees that's almost three billion and another 2.4 billion owed Philippine National Bank.

SEN. ROXAS. So, how much is the Bureau of Treasury?

MS. PASETES. Three billion.

SEN. ROXAS. Three - Why do you owe the Bureau of Treasury three billion?

MS. PASETES. That represents the concession fees due Toll Regulatory Board principal plus interest, Your Honor.

...

In addition, PNCC's 2006 Audit Report by COA states as follows:

TAX MATTERS

The Company was assessed by the Bureau of Internal Revenue (BIR) of its deficiencies in various taxes. However, no provision for any liability has been made yet in the Company's financial statements.

- 1980 deficiency income tax, deficiency contractor's tax and deficiency documentary stamp tax assessments by the BIR totaling P212.523 Million. ...
- Deficiency business tax of P64 Million due the Belgian Consortium, PNCC's partner in its LRT Project.
- 1992 deficiency income tax, deficiency value-added tax and deficiency expanded withholding tax of P1.04 Billion which was reduced to P709 Million after the Company's written protest. ...
- 2002 deficiency internal revenue taxes totaling P72.916 Million. ...

Clearly, PNCC owes the National Government substantial taxes and fees amounting to billions of pesos.

The P36 billion debt to the National Government was acknowledged by the PNCC Board in the same board resolution that recognized the Marubeni loans. Since PNCC is clearly insolvent with a huge negative net worth, the government enjoys preference over Radstock in the satisfaction of PNCC's liability arising from taxes and duties, pursuant to the provisions of the Civil Code on concurrence and preference of credits. Articles 2241, 2242 and 2243 of the Civil Code expressly mandate that taxes and fees due the National Government "shall be preferred" and "shall first be satisfied" over claims like those arising from the Marubeni loans which "shall enjoy no preference" under Article 2244.

However, in flagrant violation of the Civil Code, the PNCC Board favored Radstock over the National Government in the order of credits. This would strip PNCC of its assets leaving virtually nothing for the National Government. This action of the PNCC Board is manifestly and grossly disadvantageous to the National Government and amounts to fraud.

During the Senate hearings, Senator Osmeña pointed out that in the Board Resolution of 20 October 2000, PNCC acknowledged its obligations to the National Government amounting to P36,023,784,000 and to Marubeni amounting to P10,743,000,000. Yet, Senator Osmeña noted that in the PNCC books at the time of the hearing, the P36 billion obligation to the

National Government was reduced to P5 billion. PNCC's Miriam M. Pasetes could not properly explain this discrepancy, except by stating that the P36 billion includes the principal plus interest and penalties, ...

PNCC failed to explain satisfactorily why in its books the obligation to the National Government was reduced when no payment to the National Government appeared to have been made. PNCC failed to justify why it made it appear that the obligation to the National Government was less than the obligation to Marubeni. It is another obvious ploy to justify the preferential treatment given to Radstock to the great prejudice of the National Government.

In **TECHNICAL EDUCATION AND SKILLS DEVELOPMENT AUTHORITY v. COMMISSION ON AUDIT**, G.R. No. 204869, March 11, 2014, 729 Phil. 60, a petition for *certiorari*, with prayer for issuance of temporary restraining order or writ of preliminary injunction, to annul the decision of the COA, which disallowed payments of Extraordinary and Miscellaneous Expenses (EME) by the TESDA to its officials, Justice Carpio, for the Court *en banc*, had occasion to cite **Section 29(1) of this Article VI**. The Court affirmed the COA decision but modified the same in that only the Director-Generals of the TESDA who approved the excess or unauthorized EMEs were ordered to refund the excess:

The Facts

Upon post audit, the TESDA audit team leader discovered that for the calendar years 2004-2007, TESDA paid EME twice each year to its officials from two sources: (1) the General Fund for locally-funded projects, and (2) the Technical Education and Skills Development Project (TESDP) Fund for the foreign-assisted projects. The payment of EME was authorized under the General Provisions of the General Appropriations Acts of 2004, 2005, 2006 and 2007 (2004-2007 GAAs), subject to certain conditions:

... Extraordinary and Miscellaneous Expenses. - Appropriations authorized herein may be used for extraordinary expenses of the following officials and those of equivalent rank as may be authorized by the DBM, not exceeding:

- (a) P180,000 for each Department Secretary;
- (b) P65,000 for each Department Undersecretary;

- (c) P35,000 for each Department Assistant Secretary;
 - (d) P30,000 for each head of bureau or organization of equal rank to a bureau and for each Department Regional Director;
 - (e) P18,000 for each Bureau Regional Director; and
 - (f) P13,000 for each Municipal Trial Court Judge, Municipal Circuit Trial Court Judge, and Shari'a Circuit Court Judge.
- In addition, miscellaneous expenses not exceeding Fifty Thousand Pesos (P50,000) for each of the offices under the above named officials are authorized.

On 15 May 2008, the audit team issued Notice of Disallowance No. 08-002-101 (04-06) disallowing the payment of EME amounting to P5,498,706.60 for being in excess of the amount allowed in the 2004-2007 GAAs. In addition, the EME were disbursed to TESDA officials whose positions were not of equivalent ranks as authorized by the Department of Budget and Management (DBM), contrary to the provisions of the 2004-2007 GAAs. Notice of Disallowance No. 08-002-101 (04-06) indicated the persons liable for the excessive payment of EME: the approving officers, payees and the accountants.

On 4 July 2008, TESDA, through its then Director-General Augusto Boboy Syjucio, Jr., filed an Appeal Memorandum arguing that the 2004-2007 GAAs and the Government Accounting and Auditing Manual allowed the grant of EME from both the General Fund and the TESDP Fund provided the legal ceiling was not exceeded for each fund. According to TESDA, the General Fund and the TESDP Fund are distinct from each other, and TESDA officials who were designated as project officers concurrently with their regular functions were entitled to separate EME from both funds.

The Ruling of the Commission on Audit

In a Decision dated 5 September 2008, the COA Cluster Director, Cluster VII, National Government Sector, denied the appeal for lack of merit. The COA Cluster Director ruled that:

On the first issue, the GAA provision on EME is very clear to the effect that payment of EME may be taken from any authorized appropriation but shall not exceed the ceiling stated therein. It had been consistently held that when the language of the law is clear and unequivocal it should be given its common and ordinary meaning. If the legislative intent is to grant officials EME of unlimited amount, no limit or ceiling

should have been included in the GAA. On the other hand, the Audit Team Leader stated that the inclusion in TESDA budget for EME in TESDP Fund, which was actually found only in the GAA for FY 2005 could not serve as basis for the grant of EME, should not be treated distinctly and separately from EME provision under the General Provisions of the GAA as the officials who were paid the EME from [TESDP Fund] are the same TESDA officials who were already paid EME out [of the General Fund]. It should be emphasized that the designation of TESDA officials as Project Managers in concurrent capacities to offices under TESDP, forms part only of their additional functions without another appointment. The EME is covered by the compensation attached to his principal office and not for every project handled. ...

On the second issue whether officials who are not of equivalent rank as authorized by the DBM, the Audit Team Leader informed that the officials were designated for [positions] which are not included in the Personnel Service Itemization (PSI) and the creation of said positions [was] not supported with authority or approval from the DBM. Neither was there a DBM document identifying the equivalent ranks of these positions as basis for ascertaining the amount of EME to be paid.

On the third issue whether the Regional Directors who were not performing as head of the Bureau or a regional office or organization unit of equal rank, because of their reassignment to the Office of the Director[-]General, the same were not entitled to receive EME since the Director[-]General and its office are already claiming the said amount. There could be no two officials entitled to receive EME although they are listed in the GAA as entitled to receive the same.

On 4 December 2008, TESDA, through its Director-General, filed a petition for review with COA.

In a Decision dated 15 November 2012, COA denied TESDA's petition for lack of merit. The COA adopted the findings of both the TESDA audit team and the COA Cluster Director that the grant of EME exceeded the allowable limit in the 2004-2007 GAAs. The COA emphasized that the provision in the 2004-2007 GAAs that granted EME clearly provided a ceiling for its grant. Accordingly, the COA ruled that the failure of the TESDA officials to adhere to the 2004-2007 GAAs negated their claim of good faith. Thus, the COA ordered them to refund the excess EME they received.

In a Resolution dated 12 March 2013, the Court En Banc resolved to excuse the Office of the Solicitor General from representing the COA due to conflict of interest considering that both COA and TESDA are government agencies being represented by it.

The Issues

In this petition, TESDA seeks a reversal and raises the following issues for resolution:

A. The [COA] gravely erred in disallowing the payments made by TESDA to its officials of their [EME] from both [general fund] and [TESDP Fund];

B. The [COA] likewise gravely erred in holding the officers of TESDA individually liable for the total disallowance in the amount of P5,498,706.60 even if they may be rightfully considered as *de facto* officers in good faith who are entitled to EME for actual services rendered;

C. The [COA] likewise gravely erred in holding that considering the ceiling set forth by sections 23[, 25] and 26 of the general provisions of the [2004-2007 GAAs], the concerned TESDA officials' claims for EME are unauthorized and excessive;

D. Finally, the [COA] gravely erred in holding that the concerned TESDA officials cannot be considered as *de facto* officers in good faith and in disregarding the relevant ruling of the Supreme Court in the case of *Ca[n]tillo vs. Arrieta*.

The Ruling of the Court

The petition is partly meritorious.

...

The COA merely complied with its mandate²⁷¹ when it disallowed the EME that were reimbursed to officers who were not entitled to the EME, or who received EME in excess of the allowable amount. When the law is clear, plain and free from ambiguity, there should be no room for interpretation but only its application.

However, TESDA insists on its interpretation justifying its payment of EME out of the TESDP Fund. It argues that the 2004-2007 GAAs did not prohibit its officials from receiving additional EME chargeable against an authorized funding, the

²⁷¹ See discussion under Art. IX-D, Sec. 2.

TESDP Fund in this case, for another office to which they have been designated.

We do not find merit in TESDA's argument.

The TESDA is an instrumentality of the government established under Republic Act No. 7796 or the TESDA Act of 1994. Under Section 33 of the TESDA Act, the TESDA budget for the implementation of the Act is included in the annual GAA; hence, the TESDP Fund, being sourced from the Treasury, are funds belonging to the government, or any of its departments, in the hands of public officials.²⁷² The Constitution provides, "No money shall be paid out of the Treasury except in pursuance of an appropriation made by law." The State Audit Code, which prescribes the guidelines in disbursing public funds, reiterates this important Constitutional provision that there should be an appropriation law or other statutes specifically authorizing payment out of any public funds.

In this case, TESDA failed to point out the law specifically authorizing it to grant additional reimbursement for EME from the TESDP Fund, contrary to the explicit requirement in the Constitution and the law. In *Yap v. Commission on Audit*,²⁷³ we upheld COA's disallowance of medical expenses and other benefits such as car maintenance, gasoline allowance and driver's subsidy due to petitioner's failure to point out the law specifically authorizing the same. There is nothing in the 2004-2007 GAAs which allows TESDA to grant its officials another set of EME from another source of fund like the TESDP Fund. COA aptly pointed out that not even TESDA's inclusion of EME from both the General Fund and the TESDP Fund in the 2005 GAA justified its payment of excessive EME from 2004 up to 2007. The 2005 GAA provided for a ceiling on EME that TESDA still had to comply despite the grant of EME in the 2005 GAA for foreign-assisted projects.

The position of project officer is not among those listed or authorized to be entitled to EME, namely, the officials named in the GAA, the officers of equivalent rank as may be authorized by the DBM, and the offices under them. The underlying principle

²⁷² Professional Video, Inc. v. Technical Education and Skills Development Authority, G.R. No. 155504, 26 June 2009, 591 SCRA 83.

²⁷³ G.R. No. 158562, 23 April 2010, 619 SCRA 154

behind the EME is to enable those occupying key positions in the government to meet various financial demands. As pointed out by COA, the position of project officer is not even included in the Personnel Service Itemization or created with authority from the DBM. Thus, the TESDA officials were, in fact, merely designated with additional duties, which designation did not entitle them to additional EME. In *Dimaandal v. COA*,²⁷⁴ we held that designation is a mere imposition of additional duties, which does not entail payment of additional benefits. Since the TESDA officials were merely designated with additional duties, the ruling in *Cantillo v. Arrieta*²⁷⁵ on de facto officers need not be discussed.

Having settled that COA properly disallowed the payment of excessive EME by TESDA, we proceed to determine whether the TESDA officials should refund the excess EME granted to them.

In *Blaquera v. Alcala*,²⁷⁶ the Court no longer required the officials and employees of different government departments and agencies to refund the productivity incentive bonus they received because there was no indicia of bad faith and the disbursement was made in the honest belief that the recipients deserved the amounts. We, however, qualified this *Blaquera* ruling in *Casal v. COA*,²⁷⁷ where we held the approving officials liable for the refund of the incentive award due to their patent disregard of the issuances of the President and the directives of COA. In *Casal*, we ruled that the officials' failure to observe the issuances amounted to gross negligence, which is inconsistent with the presumption of good faith. We applied the *Casal* ruling in *Velasco v. COA*,²⁷⁸ to wit:

... the blatant failure of the petitioners-approving officers to abide with the provisions of AO 103 and AO 161 overcame the presumption of good faith. The deliberate disregard of these issuances is equivalent to gross negligence amounting to bad faith. Therefore, the petitioners-approving officers are accountable for the refund of the subject incentives which they received.

However, with regard to the employees who had no participation in the approval of the subject incentives, they were neither in bad faith nor were they grossly negligent for having received the benefits under the circumstances. The approving officers'

²⁷⁴ 353 Phil. 525 (1998).

²⁷⁵ 158 Phil. 714 (1974).

²⁷⁶ 356 Phil. 678 (1998).

²⁷⁷ 538 Phil. 634 (2006).

²⁷⁸ G.R. No. 189774, 18 September 2012, 681 SCRA 102.

allowance of the said awards certainly tended to give it a color of legality from the perspective of these employees. Being in good faith, they are therefore under no obligation to refund the subject benefits which they received.

Applying by analogy the *Blaquera*, *Casal* and *Velasco* rulings, as well as Section 16 of the 2009 Rules and Regulations on Settlement of Accounts, we hold the approving officers of TESDA liable for the excess EME received by them.

The TESDA Act provides that the TESDA Secretariat, headed by the Director-General, shall propose the specific allocation of resources for the programs and projects it shall undertake pursuant to approved national technical education and skills development plan. As chief executive officer of the TESDA Secretariat, the Director-General shall likewise exercise general supervision and control over its technical and administrative personnel.

In the petition filed before the Court, TESDA alleged that the various memoranda issued by the Director-General authorized the TESDA officials designated as TESDP project officers to claim EME under the TESDP Fund. TESDA did not cite a specific provision of law authorizing such EME, but claimed that its grant had been an “institutional practice,” showing the lack of statutory authority to pay such EME. Despite this lack of authority for granting additional EME, the then Director-General still permitted EME in excess of the allowable amount and extended EME to officials not entitled to it, patently contrary to the 2004-2007 GAAs. The then Director-General himself received EME from the TESDP Fund amounting to P809,691.11, contrary to his claim that only executive directors, regional directors or officials holding equivalent positions assigned by him as project officers were entitled to EME from the TESDP Fund. The then Director-General likewise insisted on his own interpretation of the 2004-2007 GAAs disregarding the basic principle of statutory construction that when the law is clear, there should be no room for interpretation but only its application. If there was any ambiguity in the law, the then Director-General should have sought clarification from DBM and should not have simply relied on his own interpretation, which was self-serving.

Accordingly, the Director-General’s blatant violation of the clear provisions of the Constitution, the 2004-2007 GAAs and the COA circulars is equivalent to gross negligence amounting to bad faith. He is required to refund the EME he received from

the TESDP Fund for himself. As for the TESDA officials who had no participation in the approval of the excessive EME, they acted in good faith since they had no hand in the approval of the unauthorized EME. They also honestly believed that the additional EME were reimbursement for their designation as project officers by the Director-General. Being in good faith, they need not refund the excess EME they received.

Section 30. No law shall be passed increasing the appellate jurisdiction of the Supreme Court as provided in this Constitution without its advice and concurrence.

Section 31. No law granting a title of royalty or nobility shall be enacted.

Section 32. The Congress shall, as early as possible, provide for a system of initiative and referendum, and the exceptions therefrom, whereby the people can directly propose and enact laws or approve or reject any act or law or part thereof passed by the Congress or local legislative body after the registration of a petition therefor signed by at least ten per centum of the total number of registered voters, of which every legislative district must be represented by at least three per centum of the registered voters thereof.





ARTICLE VII

EXECUTIVE DEPARTMENT

Section 1. The executive power shall be vested in the President of the Philippines.

NERI v. SENATE COMMITTEE ON ACCOUNTABILITY OF PUBLIC OFFICERS AND INVESTIGATIONS, G.R. No. 180643, March 25, 2008, 572 Phil. 554, a petition for *certiorari* with application for a temporary restraining order, assailed the letter issued by the Senate Committees on Accountability of Public Officers and Investigation (Blue Ribbon), Trade and Commerce, and National Defense and Security, which required former National Economic Development Authority Director General Romulo L. Neri to show cause why he should not be cited in contempt for failure to attend a Blue Ribbon Committee hearing. Also assailed was the consequent order that cited Neri in contempt and directed his arrest and detention in the office of the sergeant-at-arms of the Senate:

The Antecedent Facts¹

On 21 April 2007, with President Gloria Macapagal-Arroyo as witness, the Department of Transportation and Communications, represented by Secretary Leandro R. Mendoza, and Zhong Xing Telecommunications Equipment Company Limited (ZTE), represented by its Vice President Yu Yong, signed in Boao, China, a “Contract for the Supply of Equipment and Services for the National Broadband Network Project” (NBN Project) worth US\$329,481,290. The People’s Republic of China, through its Export and Import Bank, agreed to extend a loan to the Philippines to finance the NBN Project. The NBN Project was supposed to provide landline, cellular and Internet services in all government offices nationwide.

After the signing of the agreement, controversies hounded the NBN Project. There were various reports of alleged bribery, “overpricing” of US\$130 million, payment of “advances” or

¹ Dissenting and concurring opinion, Carpio, J.

“kickback commissions” involving high-ranking government officials, and other anomalies which included the loss of the contract, collusion among executive officials, and political pressures against the participants in the NBN Project.

Considering the serious questions surrounding the NBN Project, respondents called an investigation, in aid of legislation, on the NBN Project based on resolutions introduced by Senators Aquilino Q. Pimentel, Sr., Panfilo M. Lacson, Miriam Defensor Santiago, and Mar Roxas. Several hearings were conducted, one of which was held on 26 September 2007 where petitioner testified before respondents.

During this particular hearing, petitioner testified that then Commission on Elections Chairman Benjamin Abalos, Sr. (Abalos), the alleged broker in the NBN Project, offered petitioner P200 million in exchange for NEDA’s approval of the NBN Project. Petitioner further testified that he told President Arroyo of the bribe attempt by Abalos and that the President instructed him not to accept the bribe offer.

However, when respondents asked petitioner what he and President Arroyo discussed thereafter, petitioner refused to answer, invoking executive privilege. Petitioner claimed executive privilege when he was asked the following questions:

I.

SEN. PANGILINAN: You mentioned earlier that you mentioned this to the President. Did the President after that discussion over the phone, was this ever raised again, the issue of the 200 ka rito?

MR. NERI: We did not discuss it again, Your Honor.

SEN. PANGILINAN: With the President? But the issue, of course, the NBN deal, was raised again? After that, between you and the President. Pinalow up (followed up) ba niya?

MR. NERI: May I claim the executive privilege, Your Honor, because I think this already involves conversations between me and the President, Your Honor, because this is already confidential in nature.

...

II.

SEN. LEGARDA: Has there been any government official higher than you who dictated that the ZTE project be prioritized or given priority? In short, were you dictated upon not to encourage AHI as you’ve previously done ...

MR. NERI: As I said, Your Honor ...

SEN. LEGARDA: ... but to prefer or prioritize the ZTE?

MR. NERI: Yeah. As the question may involve - as I said a conversation/correspondence between the President and a public official, Your Honor.

SEN. LEGARDA: I'm sorry. Can you say that again?

MR. NERI: As I said, I would like to invoke Sec. 2(a) of EO 464.

...

III.

MR. NERI: She said, "Don't accept it," Your Honor.

SEN. CAYETANO: And there was something attached to that like ... "But pursued with a project or go ahead and approve," something like that?

MR. NERI: As I said, I claim the right of executive privilege no further discussions on the ...

SEN. CAYETANO: Ah, so that's the part where you invoke your executive privilege, is that the same thing or is this new, this invocation of executive privilege?

My question is, after you had mentioned the 200 million and she said "Don't accept," was there any other statement from her as to what to do with the project?

MR. NERI: As I said, it was part of a longer conversation, Your Honor, so ...

SEN. CAYETANO: A longer conversation in that same - part of that conversation on an ongoing day-to-day, week-to-week conversation?

MR. NERI: She calls me regularly, Your Honor, to discuss various matters.

SEN. CAYETANO: But in connection with, "Ma'am, na-offer-an ako ng 200." - "Ah, don't accept, next topic," ganoon ba yon? Or was there like, "Alam mo, magandang project sana `yan, eh bakit naman ganyan."

MR. NERI: As I said, Your Honor, beyond that I would not want to go any further, Your Honor.

SEN. CAYETANO: I just can't hear you.

MR. NERI: Beyond what I said, Your Honor, I'd like to invoke the right of executive privilege.

On 13 November 2007, the Blue Ribbon Committee issued a subpoena *ad testificandum* requiring petitioner to appear again before it and testify further on 20 November 2007.

On 15 November 2007, Executive Secretary Eduardo Ermita (Executive Secretary Ermita) addressed a letter (Ermita Letter)

to respondent Blue Ribbon Committee Chair Alan Peter S. Cayetano requesting that petitioner's testimony on 20 November 2007 be dispensed with because he was invoking executive privilege "By Order of the President." Executive Secretary Ermita explained:

Specifically, Sec. Neri sought guidance on the possible invocation of executive privilege on the following questions, to wit:

- a) Whether the President followed up the (NBN) project?
- b) Were you dictated to prioritize the ZTE?
- c) Whether the President said to go ahead and approve the project after being told about the alleged bribe?

Following the ruling in *Senate v. Ermita*, the foregoing questions fall under conversations and correspondence between the President and public officials which are considered executive privilege (*Almonte v Vazquez*, G.R. 95367, 23 May 1995; *Chavez v PEA*, G.R. 133250, July 9, 2002). Maintaining the confidentiality of conversations of the President is necessary in the exercise of her executive and policy decision making process. The expectation of a President to the confidentiality of her conversations and correspondences, like the value which we accord deference for the privacy of all citizens, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making. Disclosure of conversations of the President will have a chilling effect on the President, and will hamper her in the effective discharge of her duties and responsibilities, is she is not protected by the confidentiality of her conversations.

The context in which executive privilege is being invoked is that the information sought to be disclosed might impair our diplomatic as well as economic relations with the People's Republic of China. Given the confidential nature in which these information were conveyed to the President, he cannot provide the Committee any further details of these conversations, without disclosing the very thing the privilege is designed to protect.

In light of the above considerations, this Office is constrained to invoke the settled doctrine of executive privilege as defined in *Senate v. Ermita*, and has advised Secretary Neri accordingly.

Consequently, petitioner did not appear before respondents on 20 November 2007. Petitioner assumed that the only matters on

which respondents would question him were exclusively related to his further discussions with the President relating to the NBN Project.

On 22 November 2007, respondents issued the letter requiring petitioner to show cause why he should not be cited in contempt for his failure to appear at the 20 November 2007 hearing. In a letter dated 29 November 2007, petitioner personally replied to respondents, requesting to be furnished in advance new matters, if any, which respondents would like to ask him other than the three questions for which Executive Secretary Ermita had already claimed executive privilege.

On 7 December 2007, petitioner filed the initial Petition for certiorari with a prayer for the issuance of a temporary restraining order to enjoin respondents from citing him in contempt.

On 30 January 2008, respondents issued an order for the arrest of petitioner for his failure to appear at the hearings of the Senate Committees on 18 September 2007, 20 September 2007, 25 October 2007, and 20 November 2007. On the same day, petitioner wrote respondents and Senate President Manny Villar seeking a reconsideration of the issuance of the arrest order.

On 1 February 2008, petitioner filed with this Court a supplemental petition for certiorari with an urgent application for a temporary restraining order or preliminary injunction seeking to nullify the arrest order and to enjoin respondents from implementing such order.

On 5 February 2008, the Court issued a resolution requiring respondents to Comment on the Petition and supplemental petition and to observe the status quo prevailing prior to respondents' Order of 30 January 2008. The Court further resolved to set the Petition for hearing on the merits and on the Status Quo Ante Order on 4 March 2008.

The Court heard the parties in oral arguments on 4 March 2008, on the following issues:

1. What communications between the President and petitioner Neri are covered by the principle of 'executive privilege'?
 - 1.a Did Executive Secretary Ermita correctly invoke the principle of executive privilege, by order of the

President, to cover (i) conversations of the President in the exercise of her executive and policy decision-making and (ii) information, which might impair our diplomatic as well as economic relations with the People's Republic of China?

1.b Did petitioner Neri correctly invoke executive privilege to avoid testifying on his conversations with the President on the NBN contract on his assertions that the said conversations “dealt with delicate and sensitive national security and diplomatic matters relating to the impact of bribery scandal involving high government officials and the possible loss of confidence of foreign investors and lenders in the Philippines” ... within the principles laid down in *Senate v. Ermita* (488 SCRA 1 [2006])?

1.c Will the claim of executive privilege in this case violate the following provisions of the Constitution:

Sec. 28, Art II (Full public disclosure of all transactions involving public interest)

Sec. 7, Art. III (The right of the people to information on matters of public concern)

Sec. 1, Art. XI (Public office is a public trust)

Sec. 17, Art. VII (The President shall ensure that the laws be faithfully executed)

and the due process clause and the principle of separation of powers?

2. What is the proper procedure to be followed in invoking executive privilege?

3. Did the Senate Committees grave[ly] abuse their discretion in ordering the arrest of petitioner for non-compliance with the subpoena?

After the oral arguments, the Office of the Solicitor General (OSG) filed on 17 March 2008 a Motion for Leave to Intervene and to Admit Attached Memorandum. The OSG argues that petitioner's discussions with the President are covered by executive privilege. The OSG assails the validity of the Senate's Rules of Procedure Governing Inquiries in Aid of Legislation on the ground of lack of publication. On 18 March 2008, the Court granted the OSG's motion to intervene.

In his Petition, petitioner alleges that the invocation of executive privilege is well founded. Petitioner claims that his candid discussions with the President were meant to explore options in crafting policy decisions. Petitioner further argues that the

invocation of executive privilege was “timely, upon authority of the President, and within the parameters laid down in *Senate v. Ermita* and *United States v. Reynolds*.” Petitioner also maintains that his non-appearance at the 20 November 2007 hearing was due to the order of the President herself, invoking executive privilege. Therefore, petitioner asserts that the show cause order was issued with grave abuse of discretion, hence void.

In his supplemental petition, petitioner argues, among others, that the issuance of the arrest order was another grave abuse of discretion because he did not commit any contumacious act. Petitioner contends that Executive Secretary Ermita correctly invoked executive privilege in response to the subpoena issued by respondents for petitioner to testify at the 20 November 2007 hearing. Petitioner also impugns the validity of the Senate’s Rules of Procedure Governing Inquiries in Aid of Legislation for lack of publication for the 14th Congress.

Petitioner also alleges that respondents’ order of arrest preempted this Court’s action on his initial Petition. Petitioner claims that “this order of arrest eludes, and side-steps, the President’s invocation of executive privilege in behalf of petitioner.”

In their Comment, respondents counter that there is no justification for petitioner’s invocation of executive privilege. Respondents assert that petitioner’s sweeping claim of executive privilege does not authorize his absolute refusal to appear and testify before them. Respondents argue that petitioner failed to overcome the presumption against executive secrecy and in favor of disclosure, as required in *Senate v. Ermita*.²

Respondents also claim that petitioner’s justification violates the constitutional and statutory standards for public officers. Respondents further maintain that the grounds invoked by petitioner are mere speculations and presumptions. Likewise, respondents insist that the testimony of petitioner is material and pertinent in aid of legislation. Respondents point out that several bills relating to the inquiry have already been filed in aid of legislation. Respondents also stress that even assuming that petitioner timely invoked executive privilege, this privilege does not extend to criminal activities.

² 488 SCRA 1 (2006).

The Issues

The issues raised in this petition may be summarized as follows:

1. Whether Executive Secretary Ermita correctly invoked executive privilege on the three questions mentioned in his 15 November 2007 letter to the Senate Blue Ribbon Committee;
2. Whether the Senate's Rules of Procedure Governing Inquiries in Aid of Legislation were duly published; and
3. Whether the Senate's Order of 30 January 2008 citing petitioner in contempt and directing his arrest is valid.

Based on the **invocation of executive privilege**, the Court *en banc* nullified the assailed order of contempt. Justice Carpio wrote a **dissenting and concurring opinion**,³ and concluded that the invocation in **Neri** is void because “(1) executive privilege cannot be used to hide a crime; (2) the invocation of executive privilege lacks specificity; and (3) the three questions for which executive privilege is claimed can be answered without disclosing confidential Presidential communications or diplomatic secrets.” In explaining his **dissent** Justice Carpio discussed **executive power as provided in this Article VII**, and the implied power of **executive privilege**:

Overview of Executive Privilege

Executive privilege is the implied constitutional power of the President to withhold information requested by other branches of the government. The Constitution does not expressly grant this power to the President but courts have long recognized implied Presidential powers if “necessary and proper”⁴ in carrying out powers and functions expressly

³ Justice Carpio dissented from the majority opinion's ruling on the issue of executive privilege but concurred with the ruling that the rules of procedure were void for lack of published rules governing the conduct of inquiries in aid of legislation. Consequently, the contempt order against Secretary Romulo L. Neri was void. See discussion under Art. VI, Sec. 21.

⁴ *Marcos v. Manglapus*, G.R. No. 88211, 15 September 1989, 177 SCRA 668, and 27 October 1989, 178 SCRA 760. In resolving the motion for reconsideration, the Court cited *Myers v. United States* (272 U.S. 52 [1926]) where Chief Justice William H. Taft (a former U.S. President and Governor-General of the Philippines), writing for the majority, ruled: The true view of the Executive function is ... that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as necessary and proper for its exercise.

The principle that power can be implied if “necessary and proper” to carry out a power

granted to the Executive under the Constitution.

In the United States, executive privilege was first recognized as an implied constitutional power of the President in the 1973 case of *United States v. Nixon*.⁵ U.S. Presidents, however, have asserted executive privilege since the time of the first President, George Washington.⁶ In this jurisdiction, several decisions have recognized executive privilege starting with the 1995 case of *Almonte v. Vasquez*,⁷ and the most recent being the 2002 case of **Chavez v. Public Estates Authority**⁸ and the 2006 case of *Senate v. Ermita*.⁹

As Commander-in-Chief of the Armed Forces and as Chief Executive, the President is ultimately responsible for military and national security matters affecting the nation. In the discharge of this responsibility, the President may find it necessary to withhold sensitive military and national security secrets from the Legislature or the public.

As the official in control of the nation's foreign service by virtue of the President's control of all executive departments, bureaus and offices, the President is the chief implementer of the foreign policy relations of the State. The President's role as chief implementer of the State's foreign policy is reinforced by the **President's constitutional power to negotiate and enter into treaties and international agreements.** In the discharge of this responsibility, the President may find it necessary to refuse disclosure of sensitive diplomatic secrets to the Legislature or the public. Traditionally, states have conducted diplomacy with considerable secrecy. There is every expectation that a state will not imprudently reveal secrets that its allies have shared with it.

There is also the need to protect the confidentiality of the internal deliberations of the President with his Cabinet and advisers. To encourage candid discussions and thorough exchange of views, the President's communications with his Cabinet and advisers need to be shielded from the glare of publicity. Otherwise, the Cabinet and other presidential advisers may be reluctant to

expressly granted in the Constitution is now a well-settled doctrine.

⁵ 418 U.S. 683 (1974).

⁶ 1 Laurence H. Tribe, *American Constitutional Law* 784 (3rd Edition).

⁷ 244 SCRA 286 (1995).

⁸ 433 Phil. 506 (2002), penned by Justice Carpio and excerpted under Arts. II, III, VIII, XI, and XII.

⁹ 488 SCRA 1 (2006).

discuss freely with the President policy issues and executive matters knowing that their discussions will be publicly disclosed, thus depriving the President of candid advice.

Executive privilege, however, is not absolute. The interest of protecting military, national security and diplomatic secrets, as well as Presidential communications, must be weighed against other constitutionally recognized interests. There is the declared state policy of full public disclosure of all transactions involving public interest, the right of the people to information on matters of public concern, the accountability of public officers, the power of legislative inquiry, and the judicial power to secure testimonial and documentary evidence in deciding cases.

The balancing of interests - between executive privilege on one hand and the other competing constitutionally recognized interests on the other hand - is a function of the courts. The courts will have to decide the issue based on the factual circumstances of each case. This is how conflicts on executive privilege between the Executive and the Legislature,¹⁰ and between the Executive and the Judiciary,¹¹ have been decided by the courts.

The Judiciary, however, will consider executive privilege only if the issues cannot be resolved on some other legal grounds.¹² In conflicts between the Executive and the Legislature involving executive privilege, the Judiciary encourages negotiation between the Executive and Legislature as the preferred route of conflict resolution.¹³ Only if judicial resolution is unavoidable

¹⁰ *Senate v. Ermita*, 488 SCRA 1 (2006).

¹¹ *United States v. Nixon*, 418 U.S. 683 (1974); *Clinton v. Jones*, 520 U.S. 681 (1997).

¹² *Cheney v. U.S. District Court for the District of Columbia*, 542 U.S. 367 (2004).

¹³ *United States v. AT&T*, 551 F.2d 384, 394 (D.C. Cir. 1976). The Court stated: Before moving on to a decision of such nerve-center constitutional questions, we pause to allow for further efforts at a settlement. ... This dispute between the legislative and executive branches has at least some elements of the political-question doctrine. A court decision selects a victor, and tends thereafter to tilt the scales. A compromise worked out between the branches is most likely to meet their essential needs and the country's constitutional balance.

See also *United States v. AT&T*, 567 F.2d 121, 127 (D.C. Cir. 1977). The Court stated: The framers, rather than attempting to define and allocate all governmental power in minute detail, relied, we believe, on the expectation that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system. Under this view, the coordinate branches do not exist in an exclusively adversary relationship to one another when a conflict in authority arises. Rather, each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation

will courts resolve such disputes between the Executive and Legislature.

Information covered by executive privilege remains confidential even after the expiry of the terms of office of the President, Cabinet members and presidential advisers. Thus, a former President can assert executive privilege.¹⁴ The character of executive privilege attaches to the information and not to the person. Executive privilege is for the benefit of the State and not for the benefit of the office holder. Even death does not extinguish the confidentiality of information covered by executive privilege.

Executive privilege must be exercised by the President in pursuance of official powers and functions. Executive privilege cannot be invoked to hide a crime because the President is neither empowered nor tasked to conceal a crime.¹⁵ On the contrary, the President has the constitutional duty to enforce criminal laws and cause the prosecution of crimes.

Executive privilege cannot also be used to hide private matters, like private financial transactions of the President. Private matters are those not undertaken pursuant to the lawful powers and official functions of the Executive. However, like all citizens, the President has a constitutional right to privacy.¹⁶ In conducting inquiries, the Legislature must respect the right to privacy of citizens, including the President's.

Executive privilege is rooted in the separation of powers.¹⁷ Executive privilege is an implied constitutional power because it is necessary and proper to carry out the express constitutional powers and functions of the Executive free from the encroachment of the other co-equal and co-ordinate branches of government. Executive privilege springs from the supremacy of each branch within its own assigned area of constitutional powers and functions.¹⁸

of the needs of the conflicting branches in the particular fact situation. This aspect of constitutional scheme avoids the mischief of polarization of disputes ...

¹⁴ *Nixon v. Administrator of General Services Administration*, 433 U.S. 425 (1977).

¹⁵ *McGrain v. Daugherty*, 273 U.S. 135, 179-180 (1927). The U.S. Supreme Court declared: Nor do we think it a valid objection to the investigation that it might possibly disclose crime or wrongdoing ...

¹⁶ *Nixon v. Administrator of General Services Administration*, 433 U.S. 425 (1977).

¹⁷ *United States v. Nixon*, 418 U.S. 683 (1974).

¹⁸ *Ibid.*

Executive privilege can be invoked only by the President who is the sole Executive in whom is vested all executive power under the Constitution. However, the Executive Secretary can invoke executive privilege “By Order of the President,” which means the President personally instructed the Executive Secretary to invoke executive privilege in a particular circumstance.¹⁹ Executive privilege must be invoked with specificity sufficient to inform the Legislature and the Judiciary that the matter claimed as privileged refers to military, national security or diplomatic secrets, or to confidential Presidential communications.²⁰ A claim of executive privilege accompanied by sufficient specificity gives rise to a presumptive executive privilege. A generalized assertion of executive privilege, without external evidence or circumstances indicating that the matter refers to any of the recognized categories of executive privilege, will not give rise to presumptive executive privilege.

If there is doubt whether presumptive privilege exists, the court may require in camera inspection of so much of the evidence as may be necessary to determine whether the claim of executive privilege is justified.²¹ Once presumptive executive privilege is established, the court will then weigh the need for such executive privilege against the need for other constitutionally recognized interests.

Executive privilege must be invoked after the question is asked by the legislative committee, not before. A witness cannot raise hypothetical questions that the committee may ask, claim executive privilege on such questions, and on that basis refuse to appear before the legislative committee. If the legislative committee furnished in advance the questions to the witness, the witness must bring with him the letter of the President or

¹⁹ *Senate v. Ermita*, 488 SCRA 1 (2006).

²⁰ *Id.* In *Senate v. Ermita*, the Court quoted *Smith v. Federal Trade Commission* (403 F. Supp. 1000 [1975]), thus: [T]he lack of specificity renders an assessment of the potential harm resulting from disclosure impossible, thereby preventing the Court from balancing such harm against plaintiffs’ need to determine whether to override any claims of privilege.

The Court also quoted *U.S. v. Article of Drug* (43 F.R.D. 181, 190 [1976]), thus: Privilege cannot be set up by an unsupported claim. The facts upon which the privilege is based must be established.

²¹ *United States v. Nixon*, 418 U.S. 683 (1974). Professor Lawrence H. Tribe summarizes that “documents defended only by broad claim of confidentiality must be turned over to district court for in camera inspection to assess relevance.” 1 Laurence H. Tribe, *American Constitutional Law*, footnote 35 at 775 (3rd Edition).

Executive Secretary invoking executive privilege and stating the reasons for such claim.

If the legislative committee did not furnish in advance the questions, the witness must first appear before the legislative committee, wait for the question to be asked, and then raise executive privilege. The legislative committee must then give the witness sufficient time to consult the President or Executive Secretary whether the President will claim executive privilege. At the next hearing, the witness can bring with him the letter of the President or Executive Secretary, and if he fails to bring such letter, the witness must answer the question.

There are other categories of government information which are considered confidential but are not strictly of the same status as those falling under the President's executive privilege. An example of such confidential information is the identity of an informer which is made confidential by contract between the government and the informer.²² The privilege character of the information is contractual in nature. There are also laws that classify the identity of an informer as confidential. The privilege character of the information is conferred by the Legislature and not by the Executive's implied power of executive privilege under the Constitution.

There is also the category of government information that is confidential while the deliberative process of agency executives is on-going, but becomes public information once an agency decision or action is taken. Thus, a committee that evaluates bids of government contracts has a right to keep its deliberations and written communications confidential. The purpose of the deliberative process privilege is to give agency executives freedom to discuss competing bids in private without outside pressure. However, once they take a definite action, like deciding the best bid, their deliberations and written communications form part of government records accessible by the public.²³

Confidential information under the deliberative process privilege is different from the President's executive privilege. Military, national security, and diplomatic secrets, as well as Presidential communications, remain confidential without time limit. The

²² *Toten v. United States*, 92 U.S. 105 (1876).

²³ *Const.*, Art. III, Sec. 7; *Chavez v. Public Estates Authority*, 433 Phil. 506, 531-532 (2002), penned by Justice Carpio and excerpted under Arts. II, III, VIII, XI, and XII.

confidentiality of matters falling under the President's executive privilege remains as long as the need to keep them confidential outweighs the need for public disclosure.

Then there is the category of government information that must be kept temporarily confidential because to disclose them immediately would frustrate the enforcement of laws. In an entrapment operation of drug pushers, the identity of the undercover police agents, informers and drug suspects may not be disclosed publicly until after the operation is concluded. However, during the trial, the identity of the undercover police agents and informers must be disclosed if their testimony is introduced in evidence.

...

Whether Executive Privilege Was Correctly Invoked In this Case

The Ermita Letter invokes two grounds in claiming executive privilege. First, the answers to the three questions involve confidential conversations of the President with petitioner. Second, the information sought to be disclosed might impair "diplomatic as well as economic" relations with the People's Republic of China.

However, in his present Petition, which he verified under oath, petitioner declared:

7.03. Petitioner's discussions with the President were candid discussions mean[t] to explore options in making policy decisions (see *Almonte v. Vasquez*, 244 SCRA 286 [1995]). These discussions dwelt on the impact of the bribery scandal involving high Government officials on the country's diplomatic relations and economic and military affairs, and the possible loss of confidence of foreign investors and lenders in the Philippines.

Petitioner categorically admits that his discussions with the President "dwelt on the impact of bribery scandal involving high Government officials." Petitioner's discussions with the President dealt not on simple bribery, but on scandalous bribery involving high Government officials of the Philippines.

In a letter dated 29 November 2007 to the Chairs of the Committees, petitioner's counsel declared:

4. His conversations with the President dealt with delicate and sensitive national security and diplomatic matters relating to the impact of bribery scandal involving high Government officials and the possible loss of confidence of foreign investors and lenders in the Philippines. ...

Petitioner admits, and there can be no dispute about this admission, that his discussions with the President dwelt on a bribery scandal involving high Government officials of the Philippines. Executive privilege can never be used to hide a crime or wrongdoing, even if committed by high government officials. Executive privilege applies only to protect official acts and functions of the President, never to conceal illegal acts by anyone, not even those of the President.²⁴ During the oral arguments on 4 March 2008, counsel for petitioner admitted that executive privilege cannot be invoked to hide a crime. Counsel for petitioner also admitted that petitioner and the President discussed a scandal, and that the “scandal was about bribery.” Thus:

JUSTICE CARPIO: Counsel, in your petition, paragraph 7.03, ... - you are referring to the discussions between Secretary Neri and the President and you state: - [“]This discussion dwelt on the impact of the bribery scandal involving high government officials on the countries diplomatic relations and economic and military affairs and the possible loss of confidence of foreign investors and lenders in the Philippines.[“] You stated the same claim also in your letter of 29 November 2007 to the Senate, is that correct?

ATTY. BAUTISTA: That is true, Your Honor.

JUSTICE CARPIO: Now, can Executive Privilege be invoked to hide a crime or a wrongdoing on the part of government officials?

ATTY. BAUTISTA: Definitely not, Your Honor.

JUSTICE CARPIO: ... Now, you are saying that the discussions between the President and Secretary Neri that you claim[ed] to be privilege[d] refer to bribery scandal involving government officials. So, you are admitting that there is a crime here?

ATTY. BAUTISTA: Only the scandal, Your Honor, not the crime.

JUSTICE CARPIO: But you are saying bribery, bribery is a crime, correct?

²⁴ United States v. Nixon, 418 U.S. 683 (1974).

ATTY. BAUTISTA: That is true, Your Honor.

JUSTICE CARPIO: So, they discuss[ed] about a bribery involving government officials, correct?

ATTY. BAUTISTA: The scandal, Your Honor.

JUSTICE CARPIO: No, [it] says bribery.

ATTY. BAUTISTA: Well, bribery, the scandal was about bribery.

...

Petitioner admits in his Petition, and through his counsel in the 15 November 2007 letter to the Senate Blue Ribbon Committee and during the oral arguments, that he discussed with the President a “bribery scandal involving high government officials.” This particular discussion of petitioner with the President is not covered by executive privilege. The invocation of executive privilege on the three questions dwelling on a bribery scandal is clearly unjustified and void.

Public office is a public trust and not a shield to cover up wrongdoing. Petitioner must answer the three questions asked by the Senate Committees.

The Ermita Letter merely raises a generalized assertion of executive privilege on diplomatic matters. The bare claim that disclosure “might impair” diplomatic relations with China, without specification of external evidence and circumstances justifying such claim, is insufficient to give rise to any presumptive executive privilege.²⁵ A claim of executive privilege is presumptively valid if there is specificity in the claim. The claim of impairment of economic relations with China is invalid because impairment of economic relations, involving “foreign investors and lenders in the Philippines,” is not a recognized ground for invoking executive privilege.

The Ermita Letter does not claim impairment of military or national security secrets as grounds for executive privilege. The Ermita Letter only invokes confidential Presidential conversations and impairment of diplomatic and economic relations. However, in his Petition, petitioner declared that his discussions with the President referred to a bribery scandal affecting “diplomatic relations and economic and military affairs.” Likewise, in his 29 November 2007 letter to the Senate Committees, counsel for petitioner stated that petitioner’s

²⁵ Senate v. Ermita, 488 SCRA 1 (2006).

discussions with the President referred to “sensitive national security and diplomatic matters.”

Apparently, petitioner has expanded the grounds on which Executive Secretary Ermita invoked executive privilege on behalf of the President. Petitioner also confuses military secrets with national security secrets. Petitioner’s claim of executive privilege not only lacks specificity, it is also imprecise and confusing. In any event, what prevails is the invocation of Executive Secretary Ermita since he is the only one authorized to invoke executive privilege “By Order of the President.”²⁶

Thus, the bases for the claim of executive privilege are what the Ermita Letter states, namely, confidential Presidential conversations and impairment of diplomatic and economic relations. However, impairment of economic relations is not even a recognized ground. In short, this Court can only consider confidential Presidential conversations and impairment of diplomatic relations as grounds for the invocation of executive privilege in this petition.

During the oral arguments, counsel for petitioner failed to correct or remedy the lack of specificity in the invocation of executive privilege by Executive Secretary Ermita. Thus:

JUSTICE CARPIO: Okay, was the DFA involved in the negotiation[s] for the NBN contract?

ATTY. BAUTISTA: I do not know, Your Honor.

...

CHIEF JUSTICE PUNO: Do [you] also know whether there is any aspect of the contract relating to diplomatic relations which was referred to the Department of Foreign Affairs for its comment and study?

ATTY. LANTEJAS: As far as I know, Your Honors, there was no referral to the Department of Foreign Affairs, Your Honor.

While claiming that petitioner’s discussions with the President on the NBN Project involved sensitive diplomatic matters, petitioner does not even know if the Department of Foreign Affairs (DFA) was involved in the NBN negotiations. This is incredulous considering that under the Revised Administrative Code, the DFA “shall be the lead agency that shall advise

²⁶ Ibid.

and assist the President in planning, organizing, directing, coordinating and evaluating the total national effort in the field of foreign relations.”²⁷

The three questions that Executive Secretary Ermita claims are covered by executive privilege, if answered by petitioner, will not disclose confidential Presidential communications. Neither will answering the questions disclose diplomatic secrets. Counsel for petitioner admitted this during the oral arguments in the following exchange:

ASSOCIATE JUSTICE CARPIO: Going to the first question ... whether the President followed up the NBN project, is there anything wrong if the President follows up with NEDA the status of projects in government ... is there anything morally or legally wrong with that?

ATTY. LANTEJAS: There is nothing wrong, Your Honor, because (interrupted)

ASSOCIATE JUSTICE CARPIO: That’s normal.

ATTY. LANTEJAS: That’s normal, because the President is the Chairman of the NEDA Board, Your Honor.

ASSOCIATE JUSTICE CARPIO: Yes, so there is nothing wrong. So why is Mr. Neri afraid to be asked this question?

ATTY. LANTEJAS: I just cannot (interrupted)

ASSOCIATE JUSTICE CARPIO: You cannot fathom?

ATTY. LANTEJAS: Yes, Your Honor.

ASSOCIATE JUSTICE CARPIO: You cannot fathom. The second question, were you dictated to prioritize the ZTE [contract], is it the function of NEDA to prioritize specific contract[s] with private parties? No, yes?

ATTY. LANTEJAS: The prioritization, Your Honor, is in the (interrupted).

ASSOCIATE JUSTICE CARPIO: Project?

ATTY. LANTEJAS: In the procurement of financing from abroad, Your Honor.

ASSOCIATE JUSTICE CARPIO: Yes. The NEDA will prioritize a project, housing project, NBN project, the Dam project, but never a specific contract, correct?

ATTY. LANTEJAS: Not a contract, Your Honor.

ASSOCIATE JUSTICE CARPIO: This question that Secretary Neri is afraid to be asked by the Senate, he can easily answer this, that NEDA does not prioritize contract[s], is that correct?

²⁷ Revised Administrative Code of 1987, Book IV, Title 1, Chap. 1, Sec. 2.

ATTY. LANTEJAS: It is the project, Your Honor.

ASSOCIATE JUSTICE CARPIO: So why is he afraid to be asked this question?

ATTY. LANTEJAS: I cannot, I cannot fathom. Your Honor.

ASSOCIATE JUSTICE CARPIO: You cannot fathom also?

ATTY. LANTEJAS: Yes, Your Honor.

ASSOCIATE JUSTICE CARPIO: But is there anything wrong if the President will tell the NEDA Director General, you prioritize this project, is there anything legally or morally wrong with that?

ATTY. LANTEJAS: There is nothing wrong with that, Your Honor.

ASSOCIATE JUSTICE CARPIO: There is nothing [wrong]. It happens all the time?

ATTY. LANTEJAS: The NEDA Board, the Chairman of the NEDA Board, yes, she can.

ASSOCIATE JUSTICE CARPIO: [S]he can always tell that?

ATTY. LANTEJAS: Yes, Your Honor.

ASSOCIATE JUSTICE CARPIO: Okay. Let's go to the third question, whether the President said, to go ahead and approve the project after being told about the alleged bribe. Now, ... it is not the NEDA Director General that approves the project, correct?

ATTY. LANTEJAS: No, no, Your Honor.

ASSOCIATE JUSTICE CARPIO: It is the (interrupted)

ATTY. LANTEJAS: It is the NEDA Board, Your Honor.

ASSOCIATE JUSTICE CARPIO: The NEDA Board headed by the President.

ATTY. LANTEJAS: Yes, Your Honor.

ASSOCIATE JUSTICE CARPIO: So this question, is not correct also, ... whether the President said to Secretary Neri to go ahead and approve the project? Secretary Neri does not approve the project, correct?

ATTY. LANTEJAS: He's just the Vice Chairman, Your Honor.

ASSOCIATE JUSTICE CARPIO: So why is he afraid to be asked this question?

ATTY. LANTEJAS: I cannot tell you, Your Honor.

ASSOCIATE JUSTICE CARPIO: You cannot fathom also?

ATTY. LANTEJAS: Yes, Your Honor.

ASSOCIATE JUSTICE CARPIO: You cannot fathom also.

ATTY. LANTEJAS: Yes, Your Honor.

Petitioner's counsel admits that he "cannot fathom" why petitioner refuses to answer the three questions. Petitioner's counsel admits that the three questions, even if answered by

petitioner, will not disclose confidential Presidential discussions or diplomatic secrets. The invocation of executive privilege is thus unjustified.

Of course, it is possible that the follow-up questions to the three questions may call for disclosure of confidential presidential discussions or diplomatic secrets. However, executive privilege cannot be invoked on possible questions that have not been asked by the legislative committee. Executive privilege can only be invoked after the question is asked, not before, because the legislative committee may after all not ask the question. But even if the follow-up questions call for the disclosure of confidential Presidential discussions or diplomatic secrets, still executive privilege cannot be used to cover up a crime.

Section 2. No person may be elected President unless he is a natural-born citizen of the Philippines, a registered voter, able to read and write, at least forty years of age on the day of the election, and a resident of the Philippines for at least ten years immediately preceding such election.

Section 3. There shall be a Vice-President who shall have the same qualifications and term of office and be elected with, and in the same manner, as the President. He may be removed from office in the same manner as the President.

The Vice-President may be appointed as a Member of the Cabinet. Such appointment requires no confirmation.

Section 4. The President and the Vice-President shall be elected by direct vote of the people for a term of six years which shall begin at noon on the thirtieth day of June next following the day of the election and shall end at noon of the same date, six years thereafter. The President shall not be eligible for any re-election. No person who has succeeded as President and has served as such for more than four years shall be qualified for election to the same office at any time.

No Vice-President shall serve for more than two successive terms. Voluntary renunciation of the office for any length of time shall not be considered as an interruption in the continuity of the service for the full term for which he was elected.

Unless otherwise provided by law, the regular election for

President and Vice-President shall be held on the second Monday of May.

The returns of every election for President and Vice-President, duly certified by the board of canvassers of each province or city, shall be transmitted to the Congress, directed to the President of the Senate. Upon receipt of the certificates of canvass, the President of the Senate shall, not later than thirty days after the day of the election, open all the certificates in the presence of the Senate and the House of Representatives in joint public session, and the Congress, upon determination of the authenticity and due execution thereof in the manner provided by law, canvass the votes.

The person having the highest number of votes shall be proclaimed elected, but in case two or more shall have an equal and highest number of votes, one of them shall forthwith be chosen by the vote of a majority of all the Members of both Houses of the Congress, voting separately.

The Congress shall promulgate its rules for the canvassing of the certificates.

The Supreme Court, sitting *en banc*, shall be the sole judge of all contests relating to the election, returns, and qualifications of the President or Vice-President, and may promulgate its rules for the purpose.

BARANGAY ASSOCIATION FOR NATIONAL ADVANCEMENT AND TRANSPARENCY (BANAT) PARTY-LIST v. COMMISSION ON ELECTIONS, G.R. No. 177508, August 7, 2009, 612 Phil. 793, was a petition for prohibition that assailed the constitutionality of Republic Act No. 9369,²⁸ or the law on the automated election system, on several grounds.²⁹ One of the issues raised with respect to Sections 37 and 38 of RA 9369³⁰ was whether these violated **paragraph 7, Section 4, Article VII** on the **Presidential Electoral Tribunal**. It bears

²⁸ An Act Amending Republic Act No. 8436, Entitled An Act Authorizing The Commission On Elections To Use An Automated Election System In The May 11, 1998 National Or Local Elections And In Subsequent National And Local Electoral Exercises, To Encourage Transparency, Credibility, Fairness And Accuracy Of Elections, Amending For The Purpose Batas Pambansa Blg. 881, As Amended, Republic Act No. 7166 And Other Related Election Laws, Providing Funds Therefor And For Other Purposes (2007).

²⁹ See discussions under Art. III, Sec. 10, Art. VI, Secs. 17 and 26, and Art. IX-C, Sec. 2.

³⁰ See discussion under Art. VI, Sec. 17.

repeating that Justice Carpio, for the Court *en banc*, ruled:

Sections 37 and 38 do not violate ... Paragraph 7, Section 4, Article VII of the Constitution

In the present case, Congress and the COMELEC *en banc* do not encroach upon the jurisdiction of the PET and the SET. There is no conflict of jurisdiction since the powers of Congress and the COMELEC *en banc*, on one hand, and the PET and the SET, on the other, are exercised on different occasions and for different purposes. The PET is the sole judge of all contests relating to the election, returns and qualifications of the President or Vice President. The SET is the sole judge of all contests relating to the election, returns, and qualifications of members of the Senate. The jurisdiction of the PET and the SET can only be invoked once the winning presidential, vice presidential or senatorial candidates have been proclaimed. On the other hand, under Section 37, Congress and the COMELEC *en banc* shall determine only the authenticity and due execution of the certificates of canvass. Congress and the COMELEC *en banc* shall exercise this power before the proclamation of the winning presidential, vice presidential, and senatorial candidates.

Section 5. Before they enter on the execution of their office, the President, the Vice-President, or the Acting President shall take the following oath or affirmation:

“I do solemnly swear (or affirm) that I will faithfully and conscientiously fulfill my duties as President (or Vice-President or Acting President) of the Philippines, preserve and defend its Constitution, execute its laws, do justice to every man, and consecrate myself to the service of the Nation. So help me God.”
(In case of affirmation, last sentence will be omitted.)

Section 6. The President shall have an official residence. The salaries of the President and Vice-President shall be determined by law and shall not be decreased during their tenure. No increase in said compensation shall take effect until after the expiration of the term of the incumbent during which such increase was approved. They shall not receive during their tenure any other emolument from the Government or any other source.

Section 7. The President-elect and the Vice President-elect

shall assume office at the beginning of their terms.

If the President-elect fails to qualify, the Vice President-elect shall act as President until the President-elect shall have qualified.

If a President shall not have been chosen, the Vice President-elect shall act as President until a President shall have been chosen and qualified.

If at the beginning of the term of the President, the President-elect shall have died or shall have become permanently disabled, the Vice President-elect shall become President.

Where no President and Vice-President shall have been chosen or shall have qualified, or where both shall have died or become permanently disabled, the President of the Senate or, in case of his inability, the Speaker of the House of Representatives, shall act as President until a President or a Vice-President shall have been chosen and qualified.

The Congress shall, by law, provide for the manner in which one who is to act as President shall be selected until a President or a Vice-President shall have qualified, in case of death, permanent disability, or inability of the officials mentioned in the next preceding paragraph.

Section 8. In case of death, permanent disability, removal from office, or resignation of the President, the Vice-President shall become the President to serve the unexpired term. In case of death, permanent disability, removal from office, or resignation of both the President and Vice-President, the President of the Senate or, in case of his inability, the Speaker of the House of Representatives, shall then act as President until the President or Vice-President shall have been elected and qualified.

The Congress shall, by law, provide who shall serve as President in case of death, permanent disability, or resignation of the Acting President. He shall serve until the President or the Vice-President shall have been elected and qualified, and be subject to the same restrictions of powers and disqualifications as the Acting President.

Section 9. Whenever there is a vacancy in the Office of the Vice-President during the term for which he was elected, the

President shall nominate a Vice-President from among the Members of the Senate and the House of Representatives who shall assume office upon confirmation by a majority vote of all the Members of both Houses of the Congress, voting separately.

This was the factual setting in **TOLENTINO v. COMMISSION ON ELECTIONS**, G.R. No. 148334, January 21, 2004, 465 Phil. 385, a petition for prohibition to set aside resolutions of the COMELEC that proclaimed, *inter alia*, the Senator who was to fill the vacancy created by the President's **nomination of a Vice-President** from among the members of Congress. As related by Justice Carpio in the antecedent facts of the *en banc* decision:

Shortly after her succession to the Presidency in January 2001, **President Gloria Macapagal-Arroyo nominated then Senator Teofisto T. Guingona, Jr. (Senator Guingona) as Vice-President. Congress confirmed the nomination of Senator Guingona** who took his oath as Vice-President on 9 February 2001.

Following Senator Guingona's confirmation, the Senate on 8 February 2001 passed Resolution No. 84 (Resolution No. 84) certifying to the existence of a vacancy in the Senate. Resolution No. 84 called on COMELEC to fill the vacancy through a special election to be held simultaneously with the regular elections on 14 May 2001. Twelve Senators, with a 6-year term each, were due to be elected in that election. Resolution No. 84 further provided that the "Senatorial candidate garnering the 13th highest number of votes shall serve only for the unexpired term of former Senator Teofisto T. Guingona, Jr.," which ends on 30 June 2004.

Section 10. The Congress shall, at ten o'clock in the morning of the third day after the vacancy in the offices of the President and Vice-President occurs, convene in accordance with its rules without need of a call and within seven days, enact a law calling for a special election to elect a President and a Vice-President to be held not earlier than forty-five days nor later than sixty days from the time of such call. The bill calling such special election shall be deemed certified under paragraph 2, Section 26, Article VI of this Constitution and shall become law upon its approval on third reading by the Congress. Appropriations for the special election shall be charged against any current

appropriations and shall be exempt from the requirements of paragraph 4, Section 25, Article VI of this Constitution. The convening of the Congress cannot be suspended nor the special election postponed. No special election shall be called if the vacancy occurs within eighteen months before the date of the next presidential election.

Section 11. Whenever the President transmits to the President of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice-President as Acting President.

Whenever a majority of all the Members of the Cabinet transmit to the President of the Senate and to the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice-President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President of the Senate and to the Speaker of the House of Representatives his written declaration that no inability exists, he shall reassume the powers and duties of his office. Meanwhile, should a majority of all the Members of the Cabinet transmit within five days to the President of the Senate and to the Speaker of the House of Representatives, their written declaration that the President is unable to discharge the powers and duties of his office, the Congress shall decide the issue. For that purpose, the Congress shall convene, if it is not in session, within forty-eight hours, in accordance with its rules and without need of call.

If the Congress, within ten days after receipt of the last written declaration, or, if not in session, within twelve days after it is required to assemble, determines by a two-thirds vote of both Houses, voting separately, that the President is unable to discharge the powers and duties of his office, the Vice-President shall act as President; otherwise, the President shall continue exercising the powers and duties of his office.

Section 12. In case of serious illness of the President, the public shall be informed of the state of his health. The members of the Cabinet in charge of national security and foreign relations

and the Chief of Staff of the Armed Forces of the Philippines, shall not be denied access to the President during such illness.

Section 13. The President, Vice-President, the Members of the Cabinet, and their deputies or assistants shall not, unless otherwise provided in this Constitution, hold any other office or employment during their tenure. They shall not, during said tenure, directly or indirectly, practice any other profession, participate in any business, or be financially interested in any contract with, or in any franchise, or special privilege granted by the Government or any subdivision, agency, or instrumentality thereof, including government-owned or controlled corporations or their subsidiaries. They shall strictly avoid conflict of interest in the conduct of their office.

The spouse and relatives by consanguinity or affinity within the fourth civil degree of the President shall not, during his tenure, be appointed as Members of the Constitutional Commissions, or the Office of the Ombudsman, or as Secretaries, Undersecretaries, chairmen or heads of bureaus or offices, including government-owned or controlled corporations and their subsidiaries.

Section 14. Appointments extended by an Acting President shall remain effective, unless revoked by the elected President, within ninety days from his assumption or reassumption of office.

Section 15. Two months immediately before the next presidential elections and up to the end of his term, a President or Acting President shall not make appointments, except temporary appointments to executive positions when continued vacancies therein will prejudice public service or endanger public safety.

The **ban on midnight appointments** and, in the first place, the **process of appointment** were discussed by Justice Carpio, for the Court *en banc* in **VELICARIA-GARAFIL v. OFFICE OF THE PRESIDENT**, G.R. No. 203372, June 16, 2015, 760 Phil. 410. The consolidated petitions³¹ questioned the constitutionality of Executive

³¹ Consolidated with *Venturanza v. Office of the President*, G.R. No. 206290, *Villanueva v. Court of Appeals*, G.R. No. 209138, and *Tamandong v. Executive Secretary*, G.R. No. 212030.

Order No. 2 issued on July 30, 2010 by then President Benigno S. Aquino III for being “inconsistent” with this **Section 15, Article VII**. Ultimately, the Court voided the appointments of the petitioners and declared EO 2 valid and constitutional:

Facts of the Cases

Prior to the conduct of the May 2010 elections, then President Gloria Macapagal-Arroyo (President Macapagal-Arroyo) issued more than 800 appointments to various positions in several government offices.

The ban on midnight appointments (is provided) in Section 15, Article VII of the 1987 Constitution...

Thus, for purposes of the 2010 elections, 10 March 2010 was the cut-off date for valid appointments and the next day, 11 March 2010, was the start of the ban on midnight appointments. Section 15, Article VII of the 1987 Constitution recognizes as an exception to the ban on midnight appointments only “temporary appointments to executive positions when continued vacancies therein will prejudice public service or endanger public safety.” None of the petitioners claim that their appointments fall under this exception.

Appointments

...

To summarize, the pertinent dates for each petitioner are as follows:

G.R. No.	Date of Appointment Letter	Date of Transmittal Letter	Date of Receipt by MRO	Date of Oath of Office	Assumption of Office
203372 (Atty. Velicaria-Garafil)	5 March 2010	8 March 2010	13 May 2010	22 March 2010	6 April 2010
206290 (Atty. Venturanza)	23 February 2010	9 March 2010	12 March 2010	15 March 2010	15 March 2010
209138 (Villanueva)	3 March 2010		4 May 2010	13 April 2010	

209138 (Rosquita)	5 March 2010		13 May 2010	18 March 2010	
212030 (Atty. Tamondong)	1 March 2010			25 March 2010 and 6 July 2010	

Issuance of EO 2

On 30 June 2010, President Benigno S. Aquino III (President Aquino) took his oath of office as President of the Republic of the Philippines. On 30 July 2010, President Aquino issued EO 2 recalling, withdrawing, and revoking appointments issued by President Macapagal-Arroyo which violated the constitutional ban on midnight appointments.

The entirety of EO 2 reads:

EXECUTIVE ORDER NO. 2

RECALLING, WITHDRAWING, AND REVOKING APPOINTMENTS ISSUED BY THE PREVIOUS ADMINISTRATION IN VIOLATION OF THE CONSTITUTIONAL BAN ON MIDNIGHT APPOINTMENTS, AND FOR OTHER PURPOSES.

WHEREAS, Sec. 15, Article VII of the 1987 Constitution provides that “Two months immediately before the next presidential elections and up to the end of his term, a President or Acting President shall not make appointments, except temporary appointments to executive positions when continued vacancies therein will prejudice public service or endanger public safety.”;

WHEREAS, in the case of *In re: Appointments dated March 30, 1998 of Hon. Mateo Valenzuela and Hon. Vallarta as Judges of the Regional Trial Court of Branch 62 of Bago City and Branch 24 of Cabanatuan City, respectively* (A.M. No. 98-5-01-SC Nov. 9, 1998), the Supreme Court interpreted this provision to mean that the President is neither required to make appointments nor allowed to do so during the two months immediately before the next presidential elections and up to the end of her term. The only known exceptions to this prohibition are (1) temporary appointments in the executive positions when continued vacancies will prejudice public service or endanger public safety and in the light of

the recent Supreme Court decision in the case of *De Castro v. JBC*, G.R. No. 191002, 17 March 2010, (2) appointments to the Judiciary;

WHEREAS, Section 261 of the Omnibus Election Code provides that:

Sec. 261. Prohibited Acts.- The following shall be guilty of an election offense:

(g) Appointments of new employees, creation of new position, promotion, or giving salary increases. - During the period of forty-five days before a regular election and thirty days before a special election.

(1) Any head, official or appointing officer of a government office, agency or instrumentality, whether national or local, including government-owned or controlled corporations, who appoints or hires any new employee, whether provisional, temporary or casual, or creates and fills any new position, except upon prior authority to the Commission. The Commission shall not grant the authority sought unless it is satisfied that the position to be filled is essential to the proper functioning of the office or agency concerned, and that the position shall not be filled in a manner that may influence the election.

As an exception to the foregoing provisions, a new employee may be appointed in the case of urgent need:

Provided, however, that notice of the appointment shall be given to the Commission within three days from the date of the appointment. Any appointment or hiring in violation of this provision shall be null and void.

(2) Any government official who promotes or gives any increase of salary or remuneration or privilege to any government official or employee, including those in government-owned or controlled corporations.”;

WHEREAS, it appears on record that a number of appointments were made on or about 10 March 2010 in complete disregard of the intent and spirit of the constitutional ban on midnight appointment and which deprives the new administration of the power to make its own appointment;

WHEREAS, based on established jurisprudence, an appointment is deemed complete only upon acceptance of the appointee;

WHEREAS, in order to strengthen the civil service system, it is necessary to uphold the principle that appointments to the civil service must be made on the basis of merit and fitness, it is imperative to recall, withdraw, and revoke all appointments made in violation of the letter and spirit of the law;

NOW, THEREFORE, I, BENIGNO S. AQUINO III, by virtue of the powers vested in me by the Constitution as President of the Philippines, do hereby order and direct that:

Sec. 1. Midnight Appointments Defined. - The following appointments made by the former President and other appointing authorities in departments, agencies, offices, and instrumentalities, including government-owned or controlled corporations, shall be considered as midnight appointments:

(a) Those made on or after March 11, 2010, including all appointments bearing dates prior to March 11, 2010 where the appointee has accepted, or taken his oath, or assumed public office on or after March 11, 2010, except temporary appointments in the executive positions when continued vacancies will prejudice public service or endanger public safety as may be determined by the appointing authority.

(b) Those made prior to March 11, 2010, but to take effect after said date or appointments to office that would be vacant only after March 11, 2010.

(c) Appointments and promotions made during the period of 45 days prior to the May 10, 2010 elections in violation of Section 261 of the Omnibus Election Code.

Sec. 2. Recall, Withdraw, and Revocation of Midnight Appointments. Midnight appointments, as defined under Section 1, are hereby recalled, withdrawn, and revoked. The positions covered or otherwise affected are hereby declared vacant.

Sec. 3. Temporary designations. - When necessary to maintain efficiency in public service and ensure the continuity of government operations, the Executive Secretary may designate an officer-in-charge (OIC) to perform the duties and discharge the responsibilities of any of those whose appointment has been recalled, until the replacement of the OIC has been appointed and qualified.

Sec. 4. Repealing Clause. - All executive issuances, orders, rules and regulations or part thereof inconsistent with the provisions of this Executive Order are hereby repealed or modified accordingly.

Sec. 5. Separability Clause. - If any section or provision of this executive order shall be declared unconstitutional or invalid, the other sections or provision not affected thereby shall remain in full force and effect.

Sec. 6. Effectivity. - This Executive order shall take effect immediately.

DONE in the City of Manila, this 30th day of July, in the year

Two Thousand and Ten. ...

...

Referral to CA

There were several petitions and motions for intervention that challenged the constitutionality of EO 2.

On 31 January 2012, this Court issued a Resolution referring the petitions, motions for intervention, as well as various letters, to the CA for further proceedings, including the reception and assessment of the evidence from all parties. We defined the issues as follows:

1. Whether the appointments of the petitioners and intervenors were midnight appointments within the coverage of EO 2;
2. Whether all midnight appointments, including those of petitioners and intervenors, were invalid;
3. Whether the appointments of the petitioners and intervenors were made with undue haste, hurried maneuvers, for partisan reasons, and not in accordance with good faith; and
4. Whether EO 2 violated the Civil Service Rules on Appointment.

This Court gave the CA the authority to resolve all pending matters and applications, and to decide the issues as if these cases were originally filed with the CA.

Rulings of the CA

Even though the same issues were raised in the different petitions, the CA promulgated separate Decisions for the petitions. The CA consistently ruled that EO 2 is constitutional. The CA, however, issued different rulings as to the evaluation of the circumstances of petitioners' appointments. In the cases of Attys. Velicaria-Garafil and Venturanza, the CA stated that the OP should consider the circumstances of their appointments. In the cases of Villanueva, Rosquita, and Atty. Tamondong, the CA explicitly stated that the revocation of their appointments was proper because they were midnight appointees.

...

The Issues for Resolution

We resolve the following issues in these petitions: (1) whether petitioners' appointments violate Section 15, Article VII of the 1987 Constitution, and (2) whether EO 2 is constitutional.

Ruling of the Court

The petitions have no merit. All of petitioners' appointments are midnight appointments and are void for violation of Section 15, Article VII of the 1987 Constitution. EO 2 is constitutional.

Villanueva and Rosquita, petitioners in G.R. No. 209138, did not appeal the CA's ruling under Rule 45, but instead filed a petition for *certiorari* under Rule 65. This procedural error alone warrants an outright dismissal of G.R. No. 209138. Even if it were correctly filed under Rule 45, the petition should still be dismissed for being filed out of time. There was also no explanation as to why they did not file a motion for reconsideration of the CA's Decision.

Midnight Appointments

This *ponencia* and the dissent³² both agree that the facts in all these cases show that "none of the petitioners have shown that their appointment papers (and transmittal letters) have been issued (and released) before the ban." **The dates of receipt by the MRO, which in these cases are the only reliable evidence of actual transmittal of the appointment papers by President Macapagal-Arroyo, are dates clearly falling during the appointment ban. Thus, this *ponencia* and the dissent both agree that all the appointments in these cases are midnight appointments in violation of Section 15, Article VII of the 1987 Constitution.**

Constitutionality of EO 2

Based on prevailing jurisprudence, **appointment to a government post is a process that takes several steps to complete. Any valid appointment, including one made under the exception provided in Section 15, Article VII of the 1987 Constitution, must consist of the President signing an appointee's appointment paper to a vacant office, the official transmittal of the appointment paper (preferably through the MRO), receipt of the appointment paper by**

³² Dissenting opinion, Brion, J..

the appointee, and acceptance of the appointment by the appointee evidenced by his or her oath of office or his or her assumption to office.

Aytona v. Castillo... (*Aytona*)³³ is the basis for Section 15, Article VII of the 1987 Constitution. *Aytona* defined “midnight or last minute” appointments for Philippine jurisprudence. President Carlos P. Garcia submitted on 29 December 1961, his last day in office, 350 appointments, including that of Dominador R. Aytona for Central Bank Governor. President Diosdado P. Macapagal assumed office on 30 December 1961, and issued on 31 December 1961 Administrative Order No. 2 recalling, withdrawing, and cancelling all appointments made by President Garcia after 13 December 1961 (President Macapagal’s proclamation date). President Macapagal appointed Andres V. Castillo as Central Bank Governor on 1 January 1962. This Court dismissed *Aytona*’s *quo warranto* proceeding against Castillo, and upheld Administrative Order No. 2’s cancellation of the “midnight or last minute” appointments. We wrote:

... But the issuance of 350 appointments in one night and the planned induction of almost all of them a few hours before the inauguration of the new President may, with some reason, be regarded by the latter as an abuse of Presidential prerogatives, the steps taken being apparently a mere partisan effort to fill all vacant positions irrespective of fitness and other conditions, and thereby to deprive the new administration of an opportunity to make the corresponding appointments.

... Now it is hard to believe that in signing 350 appointments in one night, President Garcia exercised such “double care” which was required and expected of him; and therefore, there seems to be force to the contention that these appointments fall beyond the intent and spirit of the constitutional provision granting to the Executive authority to issue *ad interim* appointments.

Under the circumstances above described, what with the separation of powers, this Court resolves that it must decline to disregard the Presidential Administrative Order No. 2, cancelling such “midnight” or “last-minute” appointments.

Of course the Court is aware of many precedents to the effect that once an appointment has been issued, it cannot be reconsidered, specially where the appointee has qualified. But none of them refer to mass *ad interim* appointments (three

³³ G.R. No. L-19313, 19 January 1962, 4 SCRA 1.

hundred and fifty), issued in the last hours of an outgoing Chief Executive, in a setting similar to that outlined herein. On the other hand, the authorities admit of exceptional circumstances justifying revocation and if any circumstances justify revocation, those described herein should fit the exception.

Incidentally, it should be stated that the underlying reason for denying the power to revoke after the appointee has qualified is the latter's equitable rights. Yet it is doubtful if such equity might be successfully set up in the present situation, considering the rush conditional appointments, hurried maneuvers and other happenings detracting from that degree of good faith, morality and propriety which form the basic foundation of claims to equitable relief. The appointees, it might be argued, wittingly or unwittingly cooperated with the stratagem to beat the deadline, whatever the resultant consequences to the dignity and efficiency of the public service. Needless to say, there are instances wherein not only strict legality, but also fairness, justice and righteousness should be taken into account.

During the deliberations for the 1987 Constitution, then Constitutional Commissioner (now retired Supreme Court Chief Justice) Hilario G. Davide, Jr. referred to this Court's ruling in *Aytona* and stated that his proposal seeks to prevent a President, whose term is about to end, from preempting his successor by appointing his own people to sensitive positions.

MR. DAVIDE: The idea of the proposal is that about the end of the term of the President, he may prolong his rule indirectly by appointing people to these sensitive positions, like the commissions, the Ombudsman, the judiciary, so he could perpetuate himself in power even beyond his term of office; therefore foreclosing the right of his successor to make appointments to these positions. We should realize that the term of the President is six years and under what we had voted on, there is no reelection for him. Yet he can continue to rule the country through appointments made about the end of his term to these sensitive positions.

The 1986 Constitutional Commission put a definite period, or an empirical value, on *Aytona's* intangible "stratagem to beat the deadline," and also on the act of "preempting the President's successor," which shows a lack of "good faith, morality and propriety." **Subject to only one exception, appointments made during this period are thus automatically prohibited**

under the Constitution, regardless of the appointee's qualifications or even of the President's motives. The period for prohibited appointments covers two months before the elections until the end of the President's term. The Constitution, with a specific exception, ended the President's power to appoint "two months immediately before the next presidential elections." For an appointment to be valid, it must be made outside of the prohibited period or, failing that, fall under the specified exception.

The dissent insists that, during the prohibited period, an appointment should be viewed in its "narrow sense." In its narrow sense, an appointment is not a process, but is only an "executive act that the President unequivocally exercises pursuant to his discretion." The dissent makes acceptance of the appointment inconsequential. The dissent holds that an appointment is void if the appointment is made before the ban but the transmittal and acceptance are made after the ban. However, the dissent holds that an appointment is valid, or "efficacious," if the appointment and transmittal are made before the ban even if the acceptance is made after the ban. In short, the dissent allows an appointment to take effect during the ban, as long as the President signed and transmitted the appointment before the ban, even if the appointee never received the appointment paper before the ban and accepted the appointment only during the ban.

The dissent's view will lead to glaring absurdities. Allowing the dissent's proposal that an appointment is complete merely upon the signing of an appointment paper and its transmittal, excluding the appointee's acceptance from the appointment process, will lead to the absurdity that, in case of non-acceptance, the position is considered occupied and nobody else may be appointed to it. Moreover, an incumbent public official, appointed to another public office by the President, will automatically be deemed to occupy the new public office and to have automatically resigned from his first office upon transmittal of his appointment paper, even if he refuses to accept the new appointment. This will result in chaos in public service.

Even worse, a President who is unhappy with an incumbent public official can simply appoint him to another public office, effectively removing him from his first office without due process. The mere transmittal of his appointment paper will remove the public official from office without due process and even without cause, in violation of the Constitution.

The dissent's proffered excuse (that the appointee is not alluded to in Section 15, Article VII) for its rejection of "acceptance by the appointee" as an integral part of the appointment process ignores the reason for the limitation of the President's power to appoint, which is to prevent the outgoing President from continuing to rule the country indirectly after the end of his term. The 1986 Constitutional Commission installed a definite cut-off date as an objective and unbiased marker against which this once-in-every-six-years prohibition should be measured.

The dissent's assertion that appointment should be viewed in its narrow sense (and is not a process) only during the prohibited period is selective and time-based, and ignores well-settled jurisprudence. For purposes of complying with the time limit imposed by the appointment ban, the dissent's position cuts short the appointment process to the signing of the appointment paper and its transmittal, excluding the receipt of the appointment paper and acceptance of the appointment by the appointee.

The President exercises only one kind of appointing power. There is no need to differentiate the exercise of the President's appointing power outside, just before, or during the appointment ban. The Constitution allows the President to exercise the power of appointment during the period not covered by the appointment ban, and disallows (subject to an exception) the President from exercising the power of appointment during the period covered by the appointment ban. The concurrence of all steps in the appointment process is admittedly required for appointments outside the appointment ban. There is no justification whatsoever to remove acceptance as a requirement in the appointment process for appointments just before the start of the appointment ban, or during the appointment ban in appointments falling within the exception. The existence of the appointment ban makes no difference in the power of the President to appoint; it is still the same power to appoint. In fact, considering the purpose of the appointment ban, the concurrence of all steps in the appointment process must be strictly applied on appointments made just before or during the appointment ban.

In attempting to extricate itself from the obvious consequences of its selective application, the dissent glaringly contradicts itself:

Thus, an acceptance is still necessary in order for the appointee to validly assume his post and discharge the functions of his new office, and thus make the appointment effective. There can never be an instance where the appointment of an incumbent will automatically result in his resignation from his present post and his subsequent assumption of his new position; or where the President can simply remove an incumbent from his current office by appointing him to another one. I stress that acceptance through oath or any positive act is still indispensable before any assumption of office may occur.

The dissent proposes that this Court ignore well-settled jurisprudence during the appointment ban, but apply the same jurisprudence outside of the appointment ban.

[T]he well-settled rule in our jurisprudence, that an appointment is a process that begins with the selection by the appointing power and ends with acceptance of the appointment by the appointee, stands. As early as the 1949 case of *Lacson v. Romero*, this Court laid down the rule that acceptance by the appointee is the last act needed to make an appointment complete. The Court reiterated this rule in the 1989 case of *Javier v. Reyes*. In the 1996 case of *Garces v. Court of Appeals*, this Court emphasized that acceptance by the appointee is indispensable to complete an appointment. The 1999 case of *Bermudez v. Executive Secretary*, cited in the *ponencia*, affirms this standing rule in our jurisdiction, to wit:

The appointment is deemed complete once the last act required of the appointing authority has been complied with and its acceptance thereafter by the appointee in order to render it effective.³⁴

The dissent's assertion creates a singular exception to the well-settled doctrine that appointment is a process that begins with the signing of the appointment paper, followed by the transmittal and receipt of the appointment paper, and becomes complete with the acceptance of the appointment. The dissent makes the singular exception that during the constitutionally mandated ban on appointments, acceptance is not necessary to complete

³⁴ Separate concurring opinion, Carpio, J. in Re: Seniority Among the Four (4) Most Recent Appointments to the Position of Associate Justices of the Court of Appeals, 646 Phil. 1, 17 (2010), citing *Lacson v. Romero*, 84 Phil. 740 (1949); *Javier v. Reyes*, 252 Phil. 369 (1989); *Garces v. Court of Appeals*, 328 Phil. 403 (1996); and *Bermudez v. Executive Secretary Torres*, 370 Phil. 769 (1999).

the appointment. The dissent gives no reason why this Court should make such singular exception, which is contrary to the express provision of the Constitution prohibiting the President from making appointments during the ban. The dissent's singular exception will allow the President, during the ban on appointments, to remove from office incumbents without cause by simply appointing them to another office and transmitting the appointment papers the day before the ban begins, appointments that the incumbents cannot refuse because their acceptance is not required during the ban. Adoption by this Court of the dissent's singular exception will certainly wreak havoc on the civil service.

The following elements should always concur in the making of a valid (which should be understood as both complete and effective) appointment: (1) authority to appoint and evidence of the exercise of the authority; (2) transmittal of the appointment paper and evidence of the transmittal; (3) a vacant position at the time of appointment; and (4) receipt of the appointment paper and acceptance of the appointment by the appointee who possesses all the qualifications and none of the disqualifications.

The concurrence of all these elements should always apply, regardless of when the appointment is made, whether outside, just before, or during the appointment ban. These steps in the appointment process should always concur and operate as a single process. There is no valid appointment if the process lacks even one step. And, unlike the dissent's proposal, there is no need to further distinguish between an effective and an ineffective appointment when an appointment is valid.

Appointing Authority

The President's exercise of his power to appoint officials is provided for in the Constitution and laws.³⁵ Discretion is an integral part in the exercise of the power of appointment.³⁶

Considering that appointment calls for a selection, the appointing power necessarily exercises a discretion. According

³⁵ See Administrative Code of 1987, Book III, Title I, Chap. 5, Sec. 16.

³⁶ See *Bermudez v. Executive Secretary Torres*, 370 Phil. 769 (1999).

to Woodbury, J., “the choice of a person to fill an office constitutes the essence of his appointment,” and Mr. Justice Malcolm adds that an “[a]ppointment to office is intrinsically an executive act involving the exercise of discretion.” In *Pamantasan ng Lungsod ng Maynila v. Intermediate Appellate Court* we held:

The power to appoint is, in essence, discretionary. The appointing power has the right of choice which he may exercise freely according to his judgment, deciding for himself who is best qualified among those who have the necessary qualifications and eligibilities. It is a prerogative of the appointing power ...

Indeed, the power of choice is the heart of the power to appoint. Appointment involves an exercise of discretion of whom to appoint; it is not a ministerial act of issuing appointment papers to the appointee. In other words, the choice of the appointee is a fundamental component of the appointing power.

Hence, when Congress clothes the President with the power to appoint an officer, it (Congress) cannot at the same time limit the choice of the President to only one candidate. Once the power of appointment is conferred on the President, such conferment necessarily carries the discretion of whom to appoint. Even on the pretext of prescribing the qualifications of the officer, Congress may not abuse such power as to divest the appointing authority, directly or indirectly, of his discretion to pick his own choice. Consequently, when the qualifications prescribed by Congress can only be met by one individual, such enactment effectively eliminates the discretion of the appointing power to choose and constitutes an irregular restriction on the power of appointment.³⁷

Transmittal

It is not enough that the President signs the appointment paper. There should be evidence that the President intended the appointment paper to be issued. It could happen that an appointment paper may be dated and signed by the President months before the appointment ban, but never left his locked drawer for the entirety of his term. Release of the appointment paper through the MRO is an unequivocal act that signifies the President’s intent of its issuance.

³⁷ Flores v. Drilon, G.R. No. 104732, June 22, 1993, 223 SCRA 568, 579-580.

The MRO was created by Memorandum Order No. 1, Series of 1958, Governing the Organization and Functions of the Executive Office and General Matters of Procedure Therein. Initially called the Records Division, the MRO functioned as an administrative unit of the Executive Office. Memorandum Order No. 1 assigned the following functions:

- a. Receive, record and screen all incoming correspondence, telegrams, documents and papers, and
 - (1) Forward those of a personal and unofficial nature to the President's Private Office; and
 - (2) Distribute those requiring action within the Office or requiring staff work prior to presentation to the President to the appropriate units within the Office.
- b. Follow up on correspondence forwarded to entities outside the Office to assure that prompt replies are made and copies thereof furnished the Office.
- c. Dispatch outgoing correspondence and telegrams.
- d. Have custody of records of the Office, except personal papers of the President, and keep them in such condition as to meet the documentary and reference requirements of the Office.
- e. Keep and maintain a filing and records system for acts, memoranda, orders, circulars, correspondence and other documents affecting the Office for ready reference and use.
- f. Issue certified true copies of documents on file in the Division in accordance with prevailing standard operating procedure.
- g. Keep a separate record of communications or documents of confidential nature.
- h. Have custody of the Great Seal of the Republic of the Philippines.
- i. Prepare and submit to the approving authority, periodic disposition schedules of non-current records which have no historical, legal and/or claim value.
- j. With the approval of the Executive Secretary, assist other offices in the installation or improvement of their records management system; and
- k. Give instructions or deliver lectures and conduct practical training to in-service trainees from other offices and to students from educational institutions on records management.

The Records Division was elevated to an Office in 1975, with the addition of the following functions:

1. Maintain and control vital documents and essential records to support the functions of the OP in its day to day activities;
2. Monitor the flow of communications from their time of receipt up to their dispatch;
3. Service the documentary, information and reference requirements of top management and action officers of the OP, and the reference and research needs of other government agencies and the general public;
4. Ensure the proper storage, maintenance, protection and preservation of vital and presidential documents, and the prompt disposal of obsolete and valueless records;
5. Effect the prompt publication/dissemination of laws, presidential issuances and classified documents;
6. Provide computerized integrated records management support services for easy reference and retrieval of data and information; and
7. To be able to represent the OP and OP officials in response to Subpoena Duces Tecum and Testificandum served by courts and other investigating bodies.

For purposes of verification of the appointment paper's existence and authenticity, the appointment paper must bear the security marks (i.e., handwritten signature of the President, bar code, etc.) and must be accompanied by a transmittal letter from the MRO.

The testimony of Mr. Marianito Dimaandal, Director IV of the MRO, underscores the purpose of the release of papers through his office.

Q: What are the functions of the MRO?

A: The MRO is mandated under Memorandum Order No. 1, series of 1958 to (1) receive, record, and screen all incoming correspondence, telegrams, documents, and papers; (2) follow up on correspondence forwarded to entities outside the Office of the President (OP) to assure that prompt replies are made and copies thereof furnished the OP; (3) timely dispatch all outgoing documents and correspondence; (4) have custody of records of the OP, except personal papers of the President, and keep them in such condition as to meet the documentary and reference requirements of the Office; (5) keep and maintain a filing and records system for Acts, Memoranda, Orders, Circulars, correspondence, and other pertinent documents for ready reference and use; (6) issue certified copies of documents on file as requested and in accordance with prevailing standard operating procedures; (7) maintain

and control vital documents and essential records to support the OP in its day-to-day activities; (8) monitor the flow of communications from the time of receipt up to their dispatch; and (9) other related functions.

...

Q: As you previously mentioned, the MRO is the custodian of all documents emanating from Malacañang pursuant to its mandate under Memorandum Order No. 1, Series of 1958. Is the MRO required to follow a specific procedure in dispatching outgoing documents?

A: Yes.

Q: Is this procedure observed for the release of an appointment paper signed by the President?

A: Yes. It is observed for the release of the original copy of the appointment paper signed by the President.

Q: Can you briefly illustrate the procedure for the release of the original copy of the appointment paper signed by the President?

A: After an appointment paper is signed by the President, the Office of the Executive Secretary (OES) forwards the appointment paper bearing the stamp mark, barcode, and hologram of the Office of the President, together with a transmittal letter, to the MRO for official release. Within the same day, the MRO sends the original copy of the appointment paper together with the transmittal letter and a delivery receipt which contains appropriate spaces for the name of the addressee, the date released, and the date received by the addressee. Only a photocopy of the appointment is retained for the MRO's official file.

Q: What is the basis for the process you just discussed?

A: The Service Guide of the MRO.

...

Q: What is the legal basis for the issuance of the MRO Service Guide, if any?

A: The MRO Service Guide was issued pursuant to Memorandum Circular No. 35, Series of 2003 and Memorandum Circular No. 133, Series of 2007.

...

Q: Do you exercise any discretion in the release of documents forwarded to the MRO for transmittal to various offices?

A: No. We are mandated to immediately release all documents and correspondence forwarded to us for transmittal.

Q: If a document is forwarded by the OES to the MRO today, when is it officially released by the MRO to the department or agency concerned?

A: The document is released within the day by the MRO if the addressee is within Metro Manila. For example, in the case of the appointment paper of Dindo Venturanza, the OES forwarded to the MRO on March 12, 2010 his original appointment paper dated February 23, 2010 and the transmittal letter dated March 9, 2010 prepared by the OES. The MRO released his appointment paper on the same day or on March 12, 2010, and was also received by the DOJ on March 12, 2010 as shown by the delivery receipt.

Q: What is the effect if a document is released by an office or department within Malacañan without going through the MRO?

A: If a document does not pass through the MRO contrary to established procedure, the MRO cannot issue a certified true copy of the same because as far as the MRO is concerned, it does not exist in our official records, hence, not an official document from the Malacañang. There is no way of verifying the document's existence and authenticity unless the document is on file with the MRO even if the person who claims to have in his possession a genuine document furnished to him personally by the President. As a matter of fact, it is only the MRO which is authorized to issue certified true copies of documents emanating from Malacañan being the official custodian and central repository of said documents. Not even the OES can issue a certified true copy of documents prepared by them.

Q: Why do you say that, Mr. Witness?

A: Because the MRO is the so-called "gatekeeper" of the Malacañang Palace. All incoming and outgoing documents and correspondence must pass through the MRO. As the official custodian, the MRO is in charge of the official release of documents.

Q: What if an appointment paper was faxed by the Office of the Executive Secretary to the appointee, is that considered an official release by the MRO?

A: No. It is still the MRO which will furnish the original copy of the appointment paper to the appointee. That appointment paper is, at best, only an "advanced copy."

Q: Assuming the MRO has already received the original appointment paper signed by the President together with the transmittal letter prepared by the OES, you said that the MRO is bound to transmit these documents immediately, that is, on the same day?

A: Yes.

Q: Were there instances when the President, after the original

appointment paper has already been forwarded to the MRO, recalls the appointment and directs the MRO not to transmit the documents?

A: Yes, there were such instances.

Q: How about if the document was already transmitted by the MRO, was there any instance when it was directed to recall the appointment and retrieve the documents already transmitted?

A: Yes, but only in a few instances. Sometimes, when the MRO messenger is already in transit or while he is already in the agency or office concerned, we get a call to hold the delivery.

Q: You previously outlined the procedure governing the transmittal of original copies of appointment papers to the agency or office concerned. Would you know if this procedure was followed by previous administrations?

A: Yes. Since I started working in the MRO in 1976, the procedure has been followed. However, it was unusually disregarded when the appointments numbering more than 800 were made by then President Arroyo in March 2010. The MRO did not even know about some of these appointments and we were surprised when we learned about them in the newspapers.

Q: You mentioned that then President Arroyo appointed more than 800 persons in the month of March alone. How were you able to determine this number?

A: My staff counted all the appointments made by then President Arroyo within the period starting January 2009 until June 2010.

Q: What did you notice, if any, about these appointments?

A: There was a steep rise in the number of appointments made by then President Arroyo in the month of March 2010 compared to the other months.

Q: Do you have any evidence to show this steep rise?

A: Yes. I prepared a Certification showing these statistics and the graphical representation thereof.

Q: If those documents will be shown to you, will you be able to recognize them?

A: Yes.

Q: I am showing you a Certification containing the number of presidential appointees per month since January 2009 until June 2010, and a graphical representation thereof. Can you go over these documents and tell us the relation of these documents to the ones you previously mentioned?

A: These are [sic] the Certification with the table of statistics I prepared after we counted the appointments, as well as the

graph thereof.

...

Q: Out of the more than 800 appointees made in March 2010, how many appointment papers and transmittal letters were released through the MRO?

A: Only 133 appointment papers were released through the MRO.

Q: In some of these transmittal letters and appointment papers which were not released through the MRO but apparently through the OES, there were portions on the stamp of the OES which supposedly indicated the date and time it was actually received by the agency or office concerned but were curiously left blank, is this regular or irregular?

A: It is highly irregular.

Q: Why do you say so?

A: Usually, if the document released by the MRO, the delivery receipt attached to the transmittal letter is filled out completely because the dates when the original appointment papers were actually received are very material. It is a standard operating procedure for the MRO personnel to ask the person receiving the documents to write his/her name, his signature, and the date and time when he/she received it.

Q: So, insofar as these transmittal letters and appointment papers apparently released by the OES are concerned, what is the actual date when the agency or the appointee concerned received it?

A: I cannot answer. There is no way of knowing when they were actually received because the date and time were deliberately or inadvertently left blank.

Q: Can we say that the date appearing on the face of the transmittal letters or the appointment papers is the actual date when it was released by the OES?

A: We cannot say that for sure. That is why it is very unusual that the person who received these documents did not indicate the date and time when it was received because these details are very important.

The MRO's exercise of its mandate does not prohibit the President or the Executive Secretary from giving the appointment paper directly to the appointee. However, a problem may arise if an appointment paper is not coursed through the MRO and the appointment paper is lost or the appointment is questioned. The appointee would then have to prove that the appointment paper was directly given to him.

Dimaandal's counsel made this manifestation about petitioners' appointment papers and their transmittal:

Your Honors, we respectfully request for the following markings to be made:

1. A) The Transmittal Letter pertinent to the appointment of petitioner DINDO VENTURANZA dated March 9, 2010 as Exhibit "2-F" for the respondents;

B) The delivery receipt attached in front of the letter bearing the date March 12, 2010 as Exhibit "2-F-1";

C) The Appointment Paper of DINDO VENTURANZA dated February 23, 2010 as Exhibit "2- G" for the respondents;

2. A) The Transmittal Letter pertinent to the appointment of CHELOY E. VELICARIA- GARAFIL turned over to the MRO on May 13, 2010 consisting of seven (7) pages as Exhibits "2-H," "2-H-1," "2-H-2," "2-H-3," "2-H-4," "2-H-5," and "2-H-6" respectively for the respondents;

i. The portion with the name "CHELOY E. VELICARIA-GARAFIL" as "State Solicitor II, Office of the Solicitor General" located on the first page of the letter as Exhibit "2-H- 7;"

ii. The portion rubber stamped by the Office of the Executive Secretary located at the back of the last page of the letter showing receipt by the DOJ with blank spaces for the date and time when it was actually received as Exhibit "2-H-8;"

B) The Appointment Paper of CHELOY E. VELICARIA-GARAFIL dated March 5, 2010 as Exhibit "2-I" for the respondents;

...

4. A) The Transmittal Letter pertinent to the appointment of EDDIE U. TAMONDONG dated 8 March 2010 but turned over to the MRO only on May 6, 2010 consisting of two (2) pages as Exhibits "2-L" and "2-L-1" respectively for the respondents;

(a) The portion with the name "EDDIE U. TAMONDONG" as "Member, representing the Private Sector, Board of Directors" as Exhibit "2-L-2";

(b) The portion rubber stamped by the Office of the Executive Secretary located at the back of the last page of the letter showing receipt by Ma. Carissa O. Coscuella with blank spaces for the date and time when it was actually received as Exhibit "2-L-3";

...

8. A) The Transmittal Letter pertinent to the appointments

of ... FRANCISCA BESTOYONG-ROSQUITA dated March 8, 2010 but turned over to the MRO on May 13, 2010 as Exhibit "2-T" for the respondents;

...

(c) The portion with the name "FRANCISCA BESTOYONG-ROSQUITA" as "Commissioner, Representing Region I and the Cordilleras" as Exhibit "2-T-3;"

(d) The portion rubber stamped by the Office of the Executive Secretary at the back thereof showing receipt by Masli A. Quilaman of NCIP-QC on March 15, 2010 as Exhibit "2- T-4;"

...

D) The Appointment Paper of FRANCISCA BESTOYONG-ROSQUITA dated March 5, 2010 as Exhibit "2-W" for the respondents;

9. A) The Transmittal Letter pertinent to the appointment of IRMA A. VILLANUEVA as Administrator for Visayas, Board of Administrators, Cooperative Development Authority, Department of Finance dated March 8, 2010 as Exhibit "2-X" for the respondents;

(a) The portion rubber stamped by the Office of the Executive Secretary at the back thereof showing receipt by DOF with blank spaces for the date and time when it was actually received as Exhibit "2-X-1;"

B) The Appointment Paper of IRMA A. VILLANUEVA dated March 3, 2010 as Exhibit "2-Y" for the respondents.

The testimony of Ellenita G. Gatbunton, Division Chief of File Maintenance and Retrieval Division of the MRO, supports Dimaandal's counsel's manifestation that the transmittal of petitioners' appointment papers is questionable.

Q: In the case of Cheloy E. Velicaria-Garafil, who was appointed as State Solicitor II of the Office of the Solicitor General, was her appointment paper released through the MRO?

A: No. Her appointment paper dated March 5, 2010, with its corresponding transmittal letter, was merely turned over to the MRO on May 13, 2010. The transmittal letter that was turned over to the MRO was already stamped "released" by the Office of the Executive Secretary, but the date and time as to when it was actually received were unusually left blank.

Q: What is your basis?

A: The transmittal letter and appointment paper turned over to the MRO. ...

Q: In the case of Eddie U. Tamondong, who was appointed as

member of the Board of Directors of Subic Bay Metropolitan Authority, was her [sic] appointment paper released through the MRO?

A: No. His appointment paper dated March 1, 2010, with its corresponding transmittal letter, was merely turned over to the MRO on May 6, 2010. The transmittal letter that was turned over to the MRO was already stamped “released” by the Office of the Executive Secretary, but the date and time as to when it was actually received were unusually left blank.

Q: What is your basis?

A: The transmittal letter and appointment paper turned over to the MRO. ...

Q: In the case of Francisca Bestoyong-Resquita who was appointed as Commissioner of the National Commission on Indigenous Peoples, representing Region 1 and the Cordilleras, was her appointment paper released thru the MRO?

A: No. Her appointment paper dated March 5, 2010, with its corresponding transmittal letter, was merely turned over to the MRO on May 13, 2010. The transmittal letter that was turned over to the MRO was already stamped “released” by the Office of the Executive Secretary and received on March 15, 2010.

Q: What is your basis?

A: The transmittal letter and appointment paper turned over to the MRO. ...

Q: In the case of Irma A. Villanueva who was appointed as Administrator for Visayas of the Cooperative Development Authority, was her appointment paper released thru the MRO?

A: No. Her appointment paper dated March 3, 2010, with its corresponding transmittal letter, was merely turned over to the MRO on May 4, 2010. The transmittal letter that was turned over to the MRO was already stamped “released” by the Office of the Executive Secretary, but the date and time as to when it was actually received were unusually left blank.

Q: What is your basis?

A: The transmittal letter and appointment paper turned over to the MRO.

The possession of the original appointment paper is not indispensable to authorize an appointee to assume office. If it were indispensable, then a loss of the original appointment paper, which could be brought about by negligence, accident, fraud, fire

or theft, corresponds to a loss of the office.³⁸ However, in case of loss of the original appointment paper, the appointment must be evidenced by a certified true copy issued by the proper office, in this case the MRO.

Vacant Position

An appointment can be made only to a vacant office. An appointment cannot be made to an occupied office. The incumbent must first be legally removed, or his appointment validly terminated, before one could be validly installed to succeed him.³⁹

To illustrate: in *Lacson v. Romero*,⁴⁰ Antonio Lacson (Lacson) occupied the post of provincial fiscal of Negros Oriental. He was later nominated and confirmed as provincial fiscal of Tarlac. The President nominated and the Commission on Appointments confirmed Honorio Romero (Romero) as provincial fiscal of Negros Oriental as Lacson's replacement. Romero took his oath of office, but Lacson neither accepted the appointment nor assumed office as provincial fiscal of Tarlac. This Court ruled that Lacson remained as provincial fiscal of Negros Oriental, having declined the appointment as provincial fiscal of Tarlac. There was no vacancy to which Romero could be legally appointed; hence, Romero's appointment as provincial fiscal of Negros Oriental vice Lacson was invalid.

The appointment to a government post like that of provincial fiscal to be complete involves several steps. *First*, comes the nomination by the President. Then to make that nomination valid and permanent, the Commission on Appointments of the Legislature has to confirm said nomination. The last step is the acceptance thereof by the appointee by his assumption of office. The first two steps, nomination and confirmation, constitute a mere offer of a post. They are acts of the Executive and Legislative departments of the Government. But the last necessary step to make the appointment complete and effective rests solely with the appointee himself. He may or he may not accept the appointment or nomination. As held in the case of *Borromeo v. Mariano*, 41 Phil. 327, "there is no power in this country which can compel a man to accept

³⁸ See *Marbury v. Madison*, 5 U.S. 137 (1803).

³⁹ See *Garces v. Court of Appeals*, 328 Phil. 403 (1996).

⁴⁰ 84 Phil. 740 (1949).

an office.” Consequently, since Lacson has declined to accept his appointment as provincial fiscal of Tarlac and no one can compel him to do so, then he continues as provincial fiscal of Negros Oriental and no vacancy in said office was created, unless Lacson had been lawfully removed as such fiscal of Negros Oriental.

Paragraph (b), Section 1 of EO 2 considered as midnight appointments those appointments to offices that will only be vacant on or after 11 March 2010 even though the appointments are made prior to 11 March 2010. EO 2 remained faithful to **the intent of Section 15, Article VII of the 1987 Constitution: the outgoing President is prevented from continuing to rule the country indirectly after the end of his term.**

Acceptance by the Qualified Appointee

Acceptance is indispensable to complete an appointment. Assuming office and taking the oath amount to acceptance of the appointment.⁴¹ An oath of office is a qualifying requirement for a public office, a prerequisite to the full investiture of the office.⁴²

*Javier v. Reyes*⁴³ is instructive in showing how acceptance is indispensable to complete an appointment. On 7 November 1967, petitioner Isidro M. Javier (Javier) was appointed by then Mayor Victorino B. Aldaba as the Chief of Police of Malolos, Bulacan. The Municipal Council confirmed and approved Javier’s appointment on the same date. Javier took his oath of office on 8 November 1967, and subsequently discharged the rights, prerogatives, and duties of the office. On 3 January 1968, while the approval of Javier’s appointment was pending with the CSC, respondent Purificacion C. Reyes (Reyes), as the new mayor of Malolos, sent to the CSC a letter to recall Javier’s appointment. Reyes also designated Police Lt. Romualdo F. Clemente as Officer-in-Charge of the police department. The CSC approved Javier’s appointment as permanent on 2 May 1968, and even directed Reyes to reinstate Javier. Reyes, on the other hand, pointed to the appointment of Bayani Bernardo as Chief of Police of Malolos, Bulacan on 4 September 1967. This Court ruled that Javier’s appointment prevailed over that of Bernardo. It cannot

⁴¹ See *Javier v. Reyes*, 252 Phil. 369 (1989). See also *Mitra v. Subido*, 128 Phil. 128 (1967).

⁴² *Chavez v. Ronidel*, 607 Phil. 76 (2009), citing *Mendoza v. Laxina, Sr.*, 453 Phil. 1013, 1026-1027 (2003); *Lecaroz v. Sandiganbayan*, 364 Phil. 890, 904 (1999).

⁴³ 252 Phil. 369 (1989).

be said that Bernardo accepted his appointment because he never assumed office or took his oath.

Excluding the act of acceptance from the appointment process leads us to the very evil which we seek to avoid (i.e., antedating of appointments). Excluding the act of acceptance will only provide more occasions to honor the Constitutional provision in the breach. The inclusion of acceptance by the appointee as an integral part of the entire appointment process prevents the abuse of the Presidential power to appoint. It is relatively easy to antedate appointment papers and make it appear that they were issued prior to the appointment ban, but it is more difficult to simulate the entire appointment process up until acceptance by the appointee.

Petitioners have failed to show compliance with all four elements of a valid appointment. They cannot prove with certainty that their appointment papers were transmitted before the appointment ban took effect. On the other hand, petitioners admit that they took their oaths of office during the appointment ban.

Petitioners have failed to raise any valid ground for the Court to declare EO 2, or any part of it, unconstitutional. Consequently, EO 2 remains valid and constitutional.

Section 16. The President shall nominate and, with the consent of the Commission on Appointments, appoint the heads of the executive departments, ambassadors, other public ministers and consuls, or officers of the armed forces from the rank of colonel or naval captain, and other officers whose appointments are vested in him in this Constitution. He shall also appoint all other officers of the Government whose appointments are not otherwise provided for by law, and those whom he may be authorized by law to appoint. The Congress may, by law, vest the appointment of other officers lower in rank in the President alone, in the courts, or in the heads of departments, agencies, commissions, or boards.

The President shall have the power to make appointments during the recess of the Congress, whether voluntary or compulsory, but such appointments shall be effective only until disapproved by the Commission on Appointments or until the next adjournment of the Congress.

Power to Appoint

In **RUFINO v. ENDRIGA**, G.R. No. 139554, July 21, 2006, 528 Phil. 473, *quo warranto* proceedings⁴⁴ involving two sets of Board of Trustees of the Cultural Center of the Philippines, both claiming the legal right to hold office, Justice Carpio, speaking for the Court *en banc*, resolved the case based on the unconstitutionality of PD 15, specifically on the manner of filling vacancies in the Board:

We declare unconstitutional Section 6(b) and (c) of Presidential Decree No. 15, as amended, insofar as it authorizes the remaining trustees to fill by election vacancies in the Board of Trustees of the Cultural Center of the Philippines.

The antecedent facts of **Rufino** were as follows:

On 25 June 1966, then President Ferdinand E. Marcos issued Executive Order No. 30 (EO 30) creating the Cultural Center of the Philippines as a trust governed by a Board of Trustees of seven members to preserve and promote Philippine culture. The original founding trustees, who were all appointed by President Marcos, were Imelda Romualdez-Marcos, Juan Ponce-Enrile, Andres Soriano, Jr., Antonio Madrigal, Father Horacio Dela Costa, S.J., I.P. Soliongco, and Ernesto Rufino.

On 5 October 1972, or soon after the declaration of Martial Law, President Marcos issued PD 15,⁴⁵ the CCP's charter, which converted the CCP under EO 30 into a non-municipal public corporation free from the "pressure or influence of politics." PD 15 increased the members of CCP's Board from seven to nine trustees. Later, Executive Order No. 1058, issued on 10 October 1985, increased further the trustees to 11.

After the People Power Revolution in 1986, then President Corazon C. Aquino asked for the courtesy resignations of the then incumbent CCP trustees and appointed new trustees to the Board. Eventually, during the term of President Fidel V. Ramos, the CCP Board included Endriga, Lagdameo, Sison, Potenciano, Fernandez, Lenora A. Cabili, and Manuel T. Mañosa (the Endriga group).

⁴⁴ Consolidated with *Endriga v. Rufino*, G.R. No. 139565, but in view of the ruling in the earlier case, the Court deemed it "unnecessary to rule on" this later case.

⁴⁵ Later amended by PD Nos. 179, 1444, 1815, 1825, and EO No. 1058 dated 10 October 1985.

On 22 December 1998, then President Joseph E. Estrada appointed seven new trustees to the CCP Board for a term of four years to replace the Endriga group as well as two other incumbent trustees. The seven new trustees (the Rufino group) were:

1. Armita B. Rufino	- President, vice Baltazar N. Endriga
2. Zenaida R. Tantoco	- Member, vice Doreen Fernandez
3. Federico Pascual	- Member, vice Lenora A. Cabili
4. Rafael Buenaventura	- Member, vice Manuel T. Mañosa
5. Lorenzo Calma	- Member, vice Ma. Paz D. Lagdameo
6. Rafael Simpao, Jr.	- Member, vice Patricia C. Sison
7. Freddie Garcia	- Member, vice Irma Ponce-Enrile Potenciano

Except for Tantoco, the Rufino group took their respective oaths of office and assumed the performance of their duties in early January 1999.

On 6 January 1999, the Endriga group filed a petition for *quo warranto* before this Court questioning President Estrada's appointment of seven new members to the CCP Board. The Endriga group alleged that under Section 6(b) of PD 15, vacancies in the CCP Board "shall be filled by election by a vote of a majority of the trustees held at the next regular meeting ..." In case "only one trustee survive[s], the vacancies shall be filled by the surviving trustee acting in consultation with the ranking officers of the [CCP]." The Endriga group claimed that it is only when the CCP Board is entirely vacant may the President of the Philippines fill such vacancies, acting in consultation with the ranking officers of the CCP.

The Endriga group asserted that when former President Estrada appointed the Rufino group, only one seat was vacant due to the expiration of Mañosa's term. The CCP Board then had 10 incumbent trustees, namely, Endriga, Lagdameo, Sison, Potenciano, Fernandez, together with Cabili, Father Bernardo

P. Perez (Fr. Perez), Eduardo De los Angeles (De los Angeles), Ma. Cecilia Lazaro (Lazaro), and Gloria M. Angara (Angara). President Estrada retained Fr. Perez, De los Angeles, Lazaro, and Angara as trustees.

Endriga's term was to expire on 26 July 1999, while the terms of Lagdameo, Sison, Potenciano, and Fernandez were to expire on 6 February 1999. The Endriga group maintained that under the CCP Charter, the trustees' fixed four-year term could only be terminated "by reason of resignation, incapacity, death, or other cause." Presidential action was neither necessary nor justified since the CCP Board then still had 10 incumbent trustees who had the statutory power to fill by election any vacancy in the Board.

The Endriga group refused to accept that the CCP was under the supervision and control of the President. The Endriga group cited Section 3 of PD 15, which states that the CCP "shall enjoy autonomy of policy and operation ..."

The Court referred the Endriga group's petition to the Court of Appeals "for appropriate action" in observance of the hierarchy of courts.

On 14 May 1999, the Court of Appeals rendered the Decision under review granting the *quo warranto* petition. The Court of Appeals declared the Endriga group lawfully entitled to hold office as CCP trustees. On the other hand, the appellate court's Decision ousted the Rufino group from the CCP Board.

In their motion for reconsideration, the Rufino group asserted that the law could only delegate to the CCP Board the power to appoint officers lower in rank than the trustees of the Board. The law may not validly confer on the CCP trustees the authority to appoint or elect their fellow trustees, for the latter would be officers of equal rank and not of lower rank. Section 6(b) of PD 15 authorizing the CCP trustees to elect their fellow trustees should be declared unconstitutional being repugnant to Section 16, Article VII of the 1987 Constitution allowing the appointment only of "officers lower in rank" than the appointing power.

On 3 August 1999, the Court of Appeals denied the Rufino group's motion for reconsideration. The Court of Appeals also denied the Endriga group's motion for immediate execution of the 14 May 1999 Decision.

Hence, the instant consolidated petitions...

The Ruling of the Court of Appeals

The Court of Appeals held that Section 6(b) of PD 15 providing for the manner of filling vacancies in the CCP Board is clear, plain, and free from ambiguity. Section 6(b) of PD 15 mandates the remaining trustees to fill by election vacancies in the CCP Board. Only when the Board is entirely vacant, which is not the situation in the present case, may the President exercise his power to appoint.

The Court of Appeals stated that the legislative history of PD 15 shows a clear intent “to insulate the position of trustee from the pressure or influence of politics by abandoning appointment by the President of the Philippines as the mode of filling” vacancies in the CCP Board. The Court of Appeals held that until Section 6(b) of PD 15 is declared unconstitutional in a proper case, it remains the law. The Court of Appeals also clarified that PD 15 vests on the CCP Chairperson the power to appoint all officers, staff, and personnel of the CCP, subject to confirmation by the Board.

The Court of Appeals denied the Rufino group’s motion for reconsideration for failure to raise new issues except the argument that Section 6(b) of PD 15 is unconstitutional. The Court of Appeals declined to rule on the constitutionality of Section 6(b) of PD 15 since the Rufino group raised this issue for the first time in the motion for reconsideration. The Court of Appeals also held, “Nor may the President’s constitutional and/or statutory power of supervision and control over government corporations restrict or modify the application of the CCP Charter.”

The Court of Appeals, moreover, denied the Endriga group’s motion for immediate execution of judgment on the ground that the reasons submitted to justify execution pending appeal were not persuasive.

The Issues

In G.R. No. 139554, the Rufino group, through the Solicitor General, contends that the Court of Appeals committed reversible error:

I ... in holding that it was “not actuated” to pass upon the constitutionality of Section 6(b) of PD 15 inasmuch as the

issue was raised for the first time in [Rufino et al.'s] motion for reconsideration;

II ... in not holding that Section 6(b) of PD 15 is unconstitutional considering that:

A. ... [it] is an invalid delegation of the President's appointing power under the Constitution;

B. ... [it] effectively deprives the President of his constitutional power of control and supervision over the CCP;

III ... in declaring the provisions of PD 15 as clear and complete and in failing to apply the executive/administrative construction ... which has been consistently recognized and accepted since 1972;

IV ... in finding that [Endriga et al.] have a clear legal right to be the incumbent trustees and officers of the CCP considering that:

A. Endriga et al. are estopped from instituting the *quo warranto* action since they recognized and benefited from the administrative construction regarding the filling of vacancies in the CCP Board of Trustees ...;

B. ... [Endriga et al.'s] terms did not legally commence as [they] were not validly elected under PD 15;

C. assuming that [Endriga et al.] were validly elected, they lost their right to retain their offices because their terms as trustees expired on 31 December 1998;

d. [Endriga et al.] assumed positions in conflict ... with their offices in the CCP and were thus not entitled to retain the same;

V... in not dismissing the *quo warranto* petition for being moot ...;

VI ... in holding that [Rufino et al.'s] prayer [that the] disputed offices [be declared] entirely as vacant is bereft of basis and amounts to "an admission of their lack of right to the office they claim."

... The petition in G.R. No. 139554 has merit.

The battle for CCP's leadership between the Rufino and Endriga groups dealt a blow to the country's artistic and cultural activities. The highly publicized leadership row over the CCP created discord among management, artists, scholars, employees, and even the public because of the public interest at stake.

Subsequently, the assumption to office of a new President in 2001 seemingly restored normalcy to the CCP leadership. After then Vice-President Gloria Macapagal-Arroyo assumed the

Presidency on 20 January 2001, the Rufino group tendered their respective resignations on 24-29 January 2001 as trustees of the CCP Board. On 12 July 2001, President Macapagal-Arroyo appointed 11 trustees to the CCP Board with the corresponding positions set opposite their names:

1. Baltazar N. Endriga	- Chairman
2. Nestor O. Jardin	- President
3. Ma. Paz D. Lagdameo	- Member
4. Teresita O. Luz	- Member
5. Irma P.E. Potenciano	- Member
6. Eduardo D. De los Angeles	- Member
7. Patricia C. Sison	- Member
8. Benjamin H. Cervantes	Member
9. Sonia M. Roco	Member
10. Ruperto S. Nicdao, Jr.	Member
11. Lina F. Litton	Member

In its special meeting on 13 July 2001, the CCP Board elected these 11 newly-appointed trustees to the same positions and as trustees of the CCP Board. In the same meeting, the Board also elected the Chairman and President.

On 21 December 2001, the Solicitor General submitted to this Court a manifestation stating that the “election of the trustees was made without prejudice to the resolution of the constitutional issues before this Honorable Court in G.R. Nos. 139554 and 139565, ...”

In **Rufino**, Justice Carpio first resolved the issue of mootness - the Rufino group contended that the Endriga group’s *quo warranto* suit should have been dismissed for being moot, arguing that when the Endriga group’s terms subsequently expired, there was no actual controversy for the Court to decide:

For the Court to exercise its power of adjudication, there must be an actual case or controversy, one that involves a conflict of legal rights, an assertion of opposite legal claims susceptible of judicial resolution.⁴⁶ The case must not be moot or based on

⁴⁶ *Joya v. Presidential Commission on Good Government*, G.R. No. 96541, 24 August 1993, 225 SCRA 568.

extra-legal or other similar considerations not cognizable by courts of justice.⁴⁷ A case becomes moot when its purpose has become stale.⁴⁸

The purpose of the *quo warranto* petition was to oust the Rufino group from the CCP Board and to declare the Endriga group as the rightful trustees of the CCP Board. It may appear that supervening events have rendered this case moot with the resignation of the Rufino group as well as the expiration of the terms of the Endriga group based on their appointments by then President Ramos. A “new” set of CCP trustees had been appointed by President Macapagal-Arroyo and subsequently elected by the CCP Board.

However, there are times when the controversy is of such character that to prevent its recurrence, and to assure respect for constitutional limitations, this Court must pass on the merits of a case. This is one such case.

The issues raised here are no longer just determinative of the respective rights of the contending parties. The issues pertaining to circumstances personal to the Endriga group may have become stale. These issues are (1) whether the Endriga group is estopped from bringing the *quo warranto* for they themselves were appointed by the incumbent President; (2) whether they were validly elected by the remaining CCP trustees; (3) whether their terms expired on 31 December 1998 as specified in their appointment papers; and (4) whether they are entitled to immediate execution of judgment.

However, the constitutional question that gave rise to these issues will continue to spawn the same controversy in the future, unless the threshold constitutional question is resolved - the validity of Section 6(b) and (c) of PD 15 on the manner of filling vacancies in the CCP Board. While the issues may be set aside in the meantime, they are certain to recur every four years, especially when a new President assumes office, generating the same controversy all over again. Thus, the issues raised here are capable of repetition, yet evading review if compromises are resorted every time the same controversy erupts and the constitutionality of Section 6(b) and (c) of PD 15 is not resolved.

⁴⁷ Ibid.

⁴⁸ Ibid.

The Court cannot refrain from passing upon the constitutionality of Section 6(b)⁴⁹ and (c)⁵⁰ of PD 15 if only to prevent a repeat of this regrettable controversy and to protect the CCP from being periodically wracked by internecine politics. Every President who assumes office naturally wants to appoint his or her own trustees to the CCP Board. A frontal clash will thus periodically arise between the President's constitutional power to appoint under Section 16, Article VII of the 1987 Constitution and the CCP trustees' power to elect their fellow trustees under Section 6(b) and (c) of PD 15.

This Court may, in the exercise of its sound discretion, brush aside procedural barriers⁵¹ and take cognizance of constitutional issues due to their paramount importance. It is the Court's duty to apply the 1987 Constitution in accordance with what it says and not in accordance with how the Legislature or the Executive would want it interpreted.⁵² This Court has the final word on what the law means.⁵³ The Court must assure respect for the constitutional limitations embodied in the 1987 Constitution.

The Court, thru Justice Carpio, then proceeded to discuss Section 6(b) and (c) of PD 15, which were "at the heart of the controversy" in **Rufino**, and then discussed the **power to appoint** as contained in this **Section 16, Article VII**:

⁴⁹ Sec. 6(b), Board of Trustees. - The governing powers and authority of the corporation shall be vested in, and exercised by, a Board of eleven (11) Trustees who shall serve without compensation...

(b) Vacancies in the Board of Trustees due to termination of term, resignation, incapacity, death or other cause as may be provided in the By-laws, shall be filled by election by a vote of a majority of the trustees held at the next regular meeting following occurrence of such vacancy. The elected trustee shall then hold office for a complete term of four years unless sooner terminated by reason of resignation, incapacity, death or other cause. Should only one trustee survive, the vacancies shall be filled by the surviving trustee acting in consultation with the ranking officers of the Center. Such officers shall be designated in the Center's Code of By-Laws. Should for any reason the Board be left entirely vacant, the same shall be filled by the President of the Philippines acting in consultation with the aforementioned ranking officers of the Center.

⁵⁰ Sec. 6(c) No person may serve as trustee who is not a resident of the Philippines, of good moral standing in the community and at least 25 years of age: Provided, That there shall always be a majority of the trustees who are citizens of the Philippines. Trustees may not be reelected for more than two (2) consecutive terms.

⁵¹ The requisites before courts will assume jurisdiction over a constitutional question are (1) there must be an actual case or controversy involving a conflict of rights susceptible of judicial determination; (2) the constitutional question must be raised by a proper party; (3) the constitutional question must be raised at the earliest opportunity; and (4) the resolution of the constitutional question must be necessary to the resolution of the case. (*Board of Optometry v. Hon. Colet*, 328 Phil. 1187 [1996]).

⁵² *Calderon v. Carale*, G.R. No. 91636, April 23, 1992, 208 SCRA 254.

⁵³ *Endencia v. David*, 93 Phil. 696 (1953).

The source of the President's power to appoint, as well as the Legislature's authority to delegate the power to appoint, is found in Section 16, Article VII of the 1987 Constitution...

The power to appoint is the prerogative of the President, except in those instances when the Constitution provides otherwise. Usurpation of this fundamentally Executive power by the Legislative and Judicial branches violates the system of separation of powers that inheres in our democratic republican government.⁵⁴

Under Section 16, Article VII of the 1987 Constitution, the President appoints three groups of officers. The first group refers to the heads of the Executive departments, ambassadors, other public ministers and consuls, officers of the armed forces from the rank of colonel or naval captain, and other officers whose appointments are vested in the President by the Constitution. The second group refers to those whom the President may be authorized by law to appoint. The third group refers to all other officers of the Government whose appointments are not otherwise provided by law.

Under the same Section 16, there is a fourth group of lower-ranked officers whose appointments Congress may by law vest in the heads of departments, agencies, commissions, or boards. The present case involves the interpretation of Section 16, Article VII of the 1987 Constitution with respect to the appointment of this fourth group of officers.⁵⁵

The President appoints the first group of officers with the consent of the Commission on Appointments. The President appoints the second and third groups of officers without the consent of the Commission on Appointments. The President appoints the third group of officers if the law is silent on who is the appointing power, or if the law authorizing the head of a department, agency, commission, or board to appoint is declared unconstitutional. Thus, if Section 6(b) and (c) of PD 15 is found unconstitutional, the President shall appoint the trustees of the CCP Board because the trustees fall under the third group of officers.

⁵⁴ See *Santos v. Macaraig*, G.R. No. 94070, April 10, 1992, 208 SCRA 74.

⁵⁵ There is a fifth group of officers whose appointments are vested by the Constitution in the Supreme Court and the Constitutional Commissions (Const., Art. VIII, Sec. 5[6] and Art. IX-A, Sec. 4).

The Scope of the Appointment Power of the Heads of Departments, Agencies, Commissions, or Boards

The original text of Section 16, Article VII of the 1987 Constitution, as written in Resolution No. 517⁵⁶ of the Constitutional Commission, is almost a verbatim copy of the one found in the 1935 Constitution. Constitutional Commissioner Father Joaquin Bernas, S.J., explains the evolution of this provision and its import, thus:

The last sentence of the first paragraph of Section 16 ... is a relic from the 1935 and 1973 Constitutions, ...

Under the 1935 Constitution, the provision was: “but the Congress may by law vest the appointment of inferior officers in the President alone, in the courts, or in the heads of departments.” As already seen, it meant that, while the general rule was that all presidential appointments needed confirmation by the Commission on Appointments, Congress could relax this rule by vesting the power to appoint “inferior officers” in “the President alone, in the courts, or in the heads of departments.” It also meant that while, generally, appointing authority belongs to the President, Congress could let others share in such authority. And the word “inferior” was understood to mean not petty or unimportant but lower in rank than those to whom appointing authority could be given. Under the 1973 Constitution, according to which the power of the President to appoint was not limited by any other body, the provision read: “However, the Batasang Pambansa may by law vest in members of the Cabinet, courts, heads of agencies, commissions, and boards the power to appoint inferior officers in their respective offices.” No mention was made of the President. The premise was that the power to appoint belonged to the President; but the Batasan could diffuse this authority by allowing it to be shared by officers other than the President.

The 1987 provision also has the evident intent of allowing Congress to give to officers other than the President the

⁵⁶ It reads: The President shall nominate and, with the consent of a Commission on Appointments, shall appoint the heads of the executive departments and bureaus, ambassadors, other public ministers and consuls, or officers of the armed forces from the rank of colonel or naval captain and all other officers of the Government whose appointments are not herein otherwise provided for by law, and those whom he may be authorized by law to appoint. The Congress may by law vest the appointment of inferior officers in the President alone, in the courts, or in the heads of departments.

authority to appoint. To that extent therefore reference to the President is pointless. And by using the word “alone,” copying the tenor of the 1935 provision, it implies, it is submitted, that the general rule in the 1935 Constitution of requiring confirmation by the Commission on Appointments had not been changed. Thereby the picture has been blurred. This confused text, however, should be attributed to oversight. Reference to the President must be ignored and the whole sentence must be read merely as authority for Congress to vest appointing power in courts, in heads of departments, agencies, commissions, or boards after the manner of the 1973 text.

Incidentally, the 1987 text, in order to eschew any pejorative connotation, avoids the phrase “inferior officers” and translates it instead into “officers lower in rank,” that is, lower in rank than the courts or the heads of departments, agencies, commissions, or boards.⁵⁷

The framers of the 1987 Constitution clearly intended that Congress could by law vest the appointment of lower-ranked officers in the heads of departments, agencies, commissions, or boards.

The deliberations⁵⁸ of the 1986 Constitutional Commission explain this intent beyond any doubt.⁵⁹

The framers of the 1987 Constitution changed the qualifying word “inferior” to the less disparaging phrase “lower in rank” purely for style. However, the clear intent remained that these inferior or lower in rank officers are the subordinates of the heads of departments, agencies, commissions, or boards who are vested by law with the power to appoint. The express language of the Constitution and the clear intent of its framers point to only one conclusion - the officers whom the heads of departments, agencies, commissions, or boards may appoint must be of lower rank than those vested by law with the power to appoint.

Congress May Vest the Authority to Appoint Only in the Heads of the Named Offices

⁵⁷ 2 Joaquin G. Bernas, *The Constitution Of The Republic Of The Philippines*, A Commentary 194-195 (1988).

⁵⁸ See II Record, Constitutional Commission 522-523 [31 July 1986].

⁵⁹ For the role of the deliberations of the Constitutional Commission in determining the framers' intent, see *Development Bank of the Philippines v. COA*, 424 Phil. 411 (2002).

Further, Section 16, Article VII of the 1987 Constitution authorizes Congress to vest “in the heads of departments, agencies, commissions, or boards” the power to appoint lower-ranked officers...

In a department in the Executive branch, the head is the Secretary. The law may not authorize the Undersecretary, acting as such Undersecretary, to appoint lower-ranked officers in the Executive department. In an agency, the power is vested in the head of the agency for it would be preposterous to vest it in the agency itself. In a commission, the head is the chairperson of the commission. In a board, the head is also the chairperson of the board. In the last three situations, the law may not also authorize officers other than the heads of the agency, commission, or board to appoint lower-ranked officers.

The grant of the power to appoint to the heads of agencies, commissions, or boards is a matter of legislative grace. Congress has the discretion to grant to, or withhold from, the heads of agencies, commissions, or boards the power to appoint lower-ranked officers. If it so grants, Congress may impose certain conditions for the exercise of such legislative delegation, like requiring the recommendation of subordinate officers or the concurrence of the other members of the commission or board.

This is in contrast to the President’s power to appoint which is a self-executing power vested by the Constitution itself and thus not subject to legislative limitations or conditions.⁶⁰ The power to appoint conferred directly by the Constitution on the Supreme Court *en banc*⁶¹ and on the Constitutional Commissions⁶² is also self-executing and not subject to legislative limitations or conditions.

The Constitution authorizes Congress to vest the power to appoint lower-ranked officers specifically in the “heads” of the specified offices, and in no other person. The word “heads” refers to the chairpersons of the commissions or boards and not to their members, for several reasons.

First, a plain reading of the last sentence of the first paragraph of Section 16, Article VII of the 1987 Constitution shows that

⁶⁰ Bermudez v. Executive Secretary Torres, 370 Phil. 769 (1999).

⁶¹ Const., Art. VIII, Sec. 5(6).

⁶² Const., Art. IX-A, Sec. 4.

the word “heads” refers to all the offices succeeding that term, namely, the departments, agencies, commissions, or boards. This plain reading is consistent with other related provisions of the Constitution.

Second, agencies, like departments, have no collegial governing bodies but have only chief executives or heads of agencies. Thus, the word “heads” applies to agencies. Any other interpretation is untenable.

Third, all commissions or boards have chief executives who are their heads. Since the Constitution speaks of “heads” of offices, and all commissions or boards have chief executives or heads, the word “heads” could only refer to the chief executives or heads of the commissions or boards.

Fourth, the counterpart provisions of Section 16, Article VII of the 1987 Constitution in the 1935 and 1973 Constitutions uniformly refer to “heads” of offices. The 1935 Constitution limited the grant of the appointment power only to “heads of departments.”⁶³ The 1973 Constitution expanded such grant to other officers, namely, “members of the Cabinet, ... courts, heads of agencies, commissions, and boards ...”⁶⁴

If the 1973 Constitution intended to extend the grant to members of commissions or boards, it could have followed the same language used for “members of the Cabinet” so as to state “members of commissions or boards.” Alternatively, the 1973 Constitution could have placed the words commissions and boards after the word “courts” so as to state “members of the Cabinet, ... courts, commissions and boards.” Instead, the 1973 Constitution used “heads of agencies, commissions, and boards.”

Fifth, the 1935, 1973, and 1987 Constitutions make a clear distinction whenever granting the power to appoint lower-ranked officers to members of a collegial body or to the head of that collegial body. Thus, the 1935 Constitution speaks of vesting the power to appoint “in the courts, or in the heads of departments.” Similarly, the 1973 Constitution speaks of “members of the Cabinet, courts, heads of agencies, commissions, and boards.”

Also, the 1987 Constitution speaks of vesting the power to

⁶³ Const. (1935), Art. VII, Sec. 10(3).

⁶⁴ Const. (1973), Art. VII, Sec. 10.

appoint “in the courts, or in the heads of departments, agencies, commissions, or boards.” This is consistent with Section 5(6), Article VIII of the 1987 Constitution which states that the “Supreme Court shall ... [a]ppoint all officials and employees of the Judiciary in accordance with the Civil Service Law,” making the Supreme Court *en banc* the appointing power. In sharp contrast, when the 1987 Constitution speaks of the power to appoint lower-ranked officers in the Executive branch, it vests the power “in the heads of departments, agencies, commissions, or boards.”

In addition, the 1987 Constitution expressly provides that in the case of the constitutional commissions, the power to appoint lower-ranked officers is vested in the commission as a body. Thus, Section 4, Article IX-A of the 1987 Constitution provides, “The Constitutional Commissions shall appoint their officials and employees in accordance with law.”

Sixth, the last clause of the pertinent sentence in Section 16, Article VII of the 1987 Constitution is an enumeration of offices whose heads may be vested by law with the power to appoint lower-ranked officers. This is clear from the framers’ deliberations of the 1987 Constitution, thus:

THE PRESIDENT: Commissioner Davide is recognized.

MR. DAVIDE: On page 8, line 3, change the period (.) after “departments” to a comma (,) and add Agencies, Commissions, or Boards. This is just to complete the enumeration in the 1935 Constitution from which this additional clause was taken.

THE PRESIDENT: Does the Committee accept?

...

MR. SUMULONG: We accept the amendment.

MR. ROMULO: The Committee has accepted the amendment, Madam President.

THE PRESIDENT: Is there any objection to the addition of the words “Agencies, Commissions, or Boards” on line 3, page 8? (Silence) The Chair hears none; the amendment is approved.⁶⁵

As an enumeration of offices, what applies to the first office in the enumeration also applies to the succeeding offices mentioned in the enumeration. Since the words “in the heads of” refer to

⁶⁵ II Record, Constitutional Commission 523 (31 July 1986).

“departments,” the same words “in the heads of” also refer to the other offices listed in the enumeration, namely, “agencies, commissions, or boards.”

The Chairperson of the CCP Board is the Head of CCP

The head of the CCP is the Chairperson of its Board. PD 15 and its various amendments constitute the Chairperson of the Board as the head of CCP. Thus, Section 8 of PD 15 provides:

Appointment of Personnel. - The Chairman, with the confirmation of the Board, shall have the power to appoint all officers, staff and personnel of the Center with such compensation as may be fixed by the Board, who shall be residents of the Philippines. The Center may elect membership in the Government Service Insurance System and if it so elects, its officers and employees who qualify shall have the same rights and privileges as well as obligations as those enjoyed or borne by persons in the government service. Officials and employees of the Center shall be exempt from the coverage of the Civil Service Law and Rules.

Section 3 of the Revised Rules and Regulations of the CCP recognizes that the head of the CCP is the Chairman of its Board when it provides:

Chairman of the Board. - The Board of Trustees shall elect a Chairman who must be one of its members, and who shall be the presiding officer of the Board of Trustees, with power among others, to appoint, within the compensation fixed by the Board, and subject to confirmation of the Board, remove, discipline all officers and personnel of the Center, and to do such other acts and exercise such other powers as may be determined by the Board of Trustees. The Chairman shall perform his duties and exercise his powers as such until such time as the Board of Trustees, by a majority vote, shall elect another Chairman. The Chairman shall be concurrently President, unless the Board otherwise elects another President.

Thus, the Chairman of the CCP Board is the “head” of the CCP who may be vested by law, under Section 16, Article VII of the 1987 Constitution, with the power to appoint lower-ranked officers of the CCP.

Under PD 15, the CCP is a public corporation governed by a Board of Trustees. Section 6 of PD 15, as amended, states:

Board of Trustees. - The governing powers and authority of the corporation shall be vested in, and exercised by, a Board of eleven (11) Trustees who shall serve without compensation.

The CCP, being governed by a board, is not an agency but a board for purposes of Section 16, Article VII of the 1987 Constitution.

Section 6(b) and (c) of PD 15 Repugnant to Section 16, Article VII of the 1987 Constitution

Section 6(b) and (c) of PD 15 is thus irreconcilably inconsistent with Section 16, Article VII of the 1987 Constitution. Section 6(b) and (c) of PD 15 empowers the remaining trustees of the CCP Board to fill vacancies in the CCP Board, allowing them to elect their fellow trustees. On the other hand, Section 16, Article VII of the 1987 Constitution allows heads of departments, agencies, commissions, or boards to appoint only “officers lower in rank” than such “heads of departments, agencies, commissions, or boards.” This excludes a situation where the appointing officer appoints an officer equal in rank as him. Thus, insofar as it authorizes the trustees of the CCP Board to elect their co-trustees, Section 6(b) and (c) of PD 15 is unconstitutional because it violates Section 16, Article VII of the 1987 Constitution.

It does not matter that Section 6(b) of PD 15 empowers the remaining trustees to “elect” and not “appoint” their fellow trustees for the effect is the same, which is to fill vacancies in the CCP Board. A statute cannot circumvent the constitutional limitations on the power to appoint by filling vacancies in a public office through election by the co-workers in that office. Such manner of filling vacancies in a public office has no constitutional basis.

Further, Section 6(b) and (c) of PD 15 makes the CCP trustees the independent appointing power of their fellow trustees. The creation of an independent appointing power inherently conflicts with the President’s power to appoint. This inherent conflict has spawned recurring controversies in the appointment of CCP trustees every time a new President assumes office.

In the present case, the incumbent President appointed the Endriga group as trustees, while the remaining CCP trustees elected the

same Endriga group to the same positions. This has been the *modus vivendi* in filling vacancies in the CCP Board, allowing the President to appoint and the CCP Board to elect the trustees. In effect, there are two appointing powers over the same set of officers in the Executive branch. Each appointing power insists on exercising its own power, even if the two powers are irreconcilable. The Court must put an end to this recurring anomaly.

PIMENTEL v. ERMITA, G.R. No. 164978, October 13, 2005, 509 Phil. 567, was a petition for *certiorari* and prohibition with a prayer for the issuance of a writ of preliminary injunction to declare unconstitutional the appointments issued by then President Gloria Macapagal-Arroyo through Executive Secretary Eduardo R. Ermita to Florencio B. Abad, Avelino J. Cruz, Jr., Michael T. Defensor, Joseph H. Durano, Raul M. Gonzalez, Alberto G. Romulo, Rene C. Villa, and Arthur C. Yap as acting secretaries of their respective departments. In dismissing the petition for the Court *en banc*, Justice Carpio further explained the **power to appoint** as contained in **Section 16 of this Article VII**:

Antecedent Facts

The Senate and the House of Representatives (Congress) commenced their regular session on 26 July 2004. The Commission on Appointments, composed of Senators and Representatives, was constituted on 25 August 2004.

Meanwhile, President Arroyo issued appointments to respondents as acting secretaries of their respective departments...

The appointment papers are uniformly worded as follows:

Sir:

Pursuant to the provisions of existing laws, you are hereby appointed Acting Secretary, Department Of (appropriate department) vice (name of person replaced).

By virtue hereof, you may qualify and enter upon the performance of the duties and functions of the office, furnishing this Office and the Civil Service Commission with copies of your Oath of Office.

(signed) Gloria Arroyo

Respondents took their oath of office and assumed duties as acting secretaries.

On 8 September 2004, Aquilino Q. Pimentel, Jr. (Senator

Pimentel), Edgardo J. Angara (Senator Angara), Juan Ponce Enrile (Senator Enrile), Luisa P. Ejercito-Estrada (Senator Ejercito-Estrada), Jinggoy E. Estrada (Senator Estrada), Panfilo M. Lacson (Senator Lacson), Alfredo S. Lim (Senator Lim), Jamby A.S. Madrigal (Senator Madrigal), and Sergio R. Osmeña, III (Senator Osmeña) (petitioners) filed the present petition as Senators of the Republic of the Philippines.

Congress adjourned on 22 September 2004. On 23 September 2004, President Arroyo issued *ad interim* appointments to respondents as secretaries of the departments to which they were previously appointed in an acting capacity. The appointment papers are uniformly worded as follows:

Sir:

Pursuant to the provisions of existing laws, you are hereby appointed Secretary [*Ad Interim*], Department Of (appropriate department).

By virtue hereof, you may qualify and enter upon the performance of the duties and functions of the office, furnishing this Office and the Civil Service Commission with copies of your oath of office.

(signed) Gloria Arroyo

Issue

The petition questions the constitutionality of President Arroyo's appointment of respondents as acting secretaries without the consent of the Commission on Appointments while Congress is in session.

The Court's Ruling

The petition has no merit.

Preliminary Matters

On the Mootness of the Petition

The Solicitor General argues that the petition is moot because President Arroyo had extended to respondents *ad interim* appointments on 23 September 2004 immediately after the recess of Congress.

As a rule, the writ of prohibition will not lie to enjoin acts already

done.⁶⁶ However, as an exception to the rule on mootness, courts will decide a question otherwise moot if it is capable of repetition yet evading review.⁶⁷

In the present case, the mootness of the petition does not bar its resolution. The question of the constitutionality of the President's appointment of department secretaries in an acting capacity while Congress is in session will arise in every such appointment.

On the Nature of the Power to Appoint

The power to appoint is essentially executive in nature, and the legislature may not interfere with the exercise of this executive power except in those instances when the Constitution expressly allows it to interfere.⁶⁸ Limitations on the executive power to appoint are construed strictly against the legislature.⁶⁹ The scope of the legislature's interference in the executive's power to appoint is limited to the power to prescribe the qualifications to an appointive office. Congress cannot appoint a person to an office in the guise of prescribing qualifications to that office. Neither may Congress impose on the President the duty to appoint any particular person to an office.⁷⁰...

On Petitioners' Standing

The Solicitor General states that the present petition is a *quo warranto* proceeding because, with the exception of Secretary Ermita, petitioners effectively seek to oust respondents for unlawfully exercising the powers of department secretaries. The Solicitor General further states that petitioners may not claim standing as Senators because no power of the Commission on Appointments has been "infringed upon or violated by the President. ... If at all, the Commission on Appointments as a body (rather than individual members of the Congress) may

⁶⁶ Tolentino v. Commission on Elections, G.R. No. 148334, January 21, 2004, 420 SCRA 438 citing Gil v. Benipayo, G.R. No. 148179, June 26, 2001 (minute resolution).

⁶⁷ Tolentino v. Commission on Elections, G.R. No. 148334, January 21, 2004, 420 SCRA 438 citing Chief Supt. Acop v. Secretary Guingona, Jr., 433 Phil. 62 (2002); Viola v. Hon. Alunan III, 343 Phil. 184 (1997); Alunan III v. Mirasol, 342 Phil. 467 (1997).

⁶⁸ See Joaquin G. Bernas, *The 1987 Constitution Of The Republic Of The Philippines: A Commentary* 768 (1996).

⁶⁹ See Sarmiento III v. Mison, No. L-79974, 17 December 1987, 156 SCRA 549.

⁷⁰ See Manalang v. Quitoriano, 94 Phil. 903 (1954); Flores v. Drilon, G.R. No. 104732, June 22, 1993, 223 SCRA 568.

possess standing in this case.”

Petitioners, on the other hand, state that the Court can exercise its *certiorari* jurisdiction over unconstitutional acts of the President. Petitioners further contend that they possess standing because President Arroyo’s appointment of department secretaries in an acting capacity while Congress is in session impairs the powers of Congress. Petitioners cite *Sanlakas v. Executive Secretary*⁷¹ as basis, thus:

To the extent that the powers of Congress are impaired, so is the power of each member thereof, since his office confers a right to participate in the exercise of the powers of that institution.

An act of the Executive which injures the institution of Congress causes a derivative but nonetheless substantial injury, which can be questioned by a member of Congress. In such a case, any member of Congress can have a resort to the courts.

Considering the independence of the Commission on Appointments from Congress, it is error for petitioners to claim standing in the present case as members of Congress. President Arroyo’s issuance of acting appointments while Congress is in session impair no power of Congress. Among the petitioners, only the following are members of the Commission on Appointments of the 13th Congress: Senator Enrile as Minority Floor Leader, Senator Lacson as Assistant Minority Floor Leader, and Senator Angara, Senator Ejercito-Estrada, and Senator Osmeña as members.

Thus, on the impairment of the prerogatives of members of the Commission on Appointments, only Senators Enrile, Lacson, Angara, Ejercito-Estrada, and Osmeña have standing in the present petition. This is in contrast to Senators Pimentel, Estrada, Lim, and Madrigal, who, though vigilant in protecting their perceived prerogatives as members of Congress, possess no standing in the present petition.

The Constitutionality of President Arroyo’s Issuance of Appointments to Respondents as Acting Secretaries

⁷¹ G.R. No. 159085, February 3, 2004, 421 SCRA 656 citing Philippine Constitution Association v. Enriquez, G.R. No. 113105, August 19, 1994, 235 SCRA 506.

Petitioners contend that President Arroyo should not have appointed respondents as acting secretaries because “in case of a vacancy in the Office of a Secretary, it is only an Undersecretary who can be designated as Acting Secretary.” Petitioners base their argument on Section 10, Chapter 2, Book IV of Executive Order No. 292 (EO 292), which enumerates the powers and duties of the undersecretary. Paragraph 5 of Section 10 reads:

Sec. 10. Powers and Duties of the Undersecretary. - The Undersecretary shall:

...

(5) Temporarily discharge the duties of the Secretary in the latter's absence or inability to discharge his duties for any cause or in case of vacancy of the said office, unless otherwise provided by law. Where there are more than one Undersecretary, the Secretary shall allocate the foregoing powers and duties among them. The President shall likewise make the temporary designation of Acting Secretary from among them; and ...

Petitioners further assert that “while Congress is in session, there can be no appointments, whether regular or acting, to a vacant position of an office needing confirmation by the Commission on Appointments, without first having obtained its consent.”

In sharp contrast, respondents maintain that the President can issue appointments in an acting capacity to department secretaries without the consent of the Commission on Appointments even while Congress is in session. Respondents point to Section 16, Article VII of the 1987 Constitution...

Respondents also rely on EO 292, which devotes a chapter to the President's power of appointment. Sections 16 and 17, Chapter 5, Title I, Book III of EO 292 read:

Sec. 16. Power of Appointment. - The President shall exercise the power to appoint such officials as provided for in the Constitution and laws.

Sec. 17. Power to Issue Temporary Designation. - (1) The President may temporarily designate an officer already in the government service or any other competent person to perform the functions of an office in the executive branch, appointment to which is vested in him by law, when: (a) the officer regularly appointed to the office is unable to perform his duties by reason of illness, absence or any other cause; or (b) there exists a vacancy[.]

- (2) The person designated shall receive the compensation attached to the position, unless he is already in the government service in which case he shall receive only such additional compensation as, with his existing salary, shall not exceed the salary authorized by law for the position filled. The compensation hereby authorized shall be paid out of the funds appropriated for the office or agency concerned.
- (3) In no case shall a temporary designation exceed one (1) year.

Petitioners and respondents maintain two diametrically opposed lines of thought. Petitioners assert that the President cannot issue appointments in an acting capacity to department secretaries while Congress is in session because the law does not give the President such power. In contrast, respondents insist that the President can issue such appointments because no law prohibits such appointments.

The essence of an appointment in an acting capacity is its temporary nature. It is a stop-gap measure intended to fill an office for a limited time until the appointment of a permanent occupant to the office.⁷² In case of vacancy in an office occupied by an alter ego of the President, such as the office of a department secretary, the President must necessarily appoint an alter ego of her choice as acting secretary before the permanent appointee of her choice could assume office.

Congress, through a law, cannot impose on the President the obligation to appoint automatically the undersecretary as her temporary alter ego. An alter ego, whether temporary or permanent, holds a position of great trust and confidence. Congress, in the guise of prescribing qualifications to an office, cannot impose on the President who her alter ego should be.

The office of a department secretary may become vacant while Congress is in session. Since a department secretary is the alter ego of the President, the acting appointee to the office must necessarily have the President's confidence. Thus, by the very nature of the office of a department secretary, the President must appoint in an acting capacity a person of her choice even while Congress is in session. That person may or may not be the permanent appointee, but practical reasons may make it

⁷² See *Marohomsar v. Alonto, Jr.*, G.R. No. 93711, February 25, 1991, 194 SCRA 390.

expedient that the acting appointee will also be the permanent appointee.

The law expressly allows the President to make such acting appointment. Section 17, Chapter 5, Title I, Book III of EO 292 states that “[t]he President may temporarily designate an officer already in the government service or any other competent person to perform the functions of an office in the executive branch.” Thus, the President may even appoint in an acting capacity a person not yet in the government service, as long as the President deems that person competent.

Petitioners assert that Section 17 does not apply to appointments vested in the President by the Constitution, because it only applies to appointments vested in the President by law. Petitioners forget that Congress is not the only source of law. “Law” refers to the Constitution, statutes or acts of Congress, municipal ordinances, implementing rules issued pursuant to law, and judicial decisions.⁷³

Finally, petitioners claim that the issuance of appointments in an acting capacity is susceptible to abuse. Petitioners fail to consider that acting appointments cannot exceed one year as expressly provided in Section 17(3), Chapter 5, Title I, Book III of EO 292. The law has incorporated this safeguard to prevent abuses, like the use of acting appointments as a way to circumvent confirmation by the Commission on Appointments. In distinguishing *ad interim* appointments from appointments in an acting capacity, a noted textbook writer on constitutional law has observed:

Ad-interim appointments must be distinguished from appointments in an acting capacity. Both of them are effective upon acceptance. But *ad-interim* appointments are extended only during a recess of Congress, whereas acting appointments may be extended any time there is a vacancy. Moreover *ad-interim* appointments are submitted to the Commission on Appointments for confirmation or rejection; acting appointments are not submitted to the Commission on Appointments. Acting appointments are a way of temporarily filling important offices but, if abused, they can also be a way of circumventing the need for confirmation by the Commission

⁷³ Civil Code, Art. 8. See *National Amnesty Commission v. Commission on Audit*, G.R. No. 156982, 8 September 2004, 437 SCRA 655.

on Appointments.⁷⁴

However, we find no abuse in the present case. The absence of abuse is readily apparent from President Arroyo's issuance of *ad interim* appointments to respondents immediately upon the recess of Congress, way before the lapse of one year.

Ad Interim Appointments

Although the nature of ***ad interim appointments*** was briefly discussed in **Pimentel**, it is the case of **MATIBAG v. BENIPAYO**, G.R. No. 149036, April 2, 2002, a petition for prohibition with prayer for the issuance of a writ of preliminary injunction and a temporary restraining order, that fully explained it. Ma. J. Angelina G. Matibag questioned the constitutionality of the appointment and the right to hold office of Alfredo L. Benipayo as Chairman of the Commission on Elections, and Resurreccion Z. Borra and Florentino A. Tuason, Jr. as COMELEC Commissioners. Petitioner also questioned the legality of the appointment of Velma J. Cinco as Director IV of the COMELEC's Education and Information Department (EID). Petitioner argued that Benipayo had no authority to remove her as Director IV of the EID and reassign her to the Law Department; that only the COMELEC, acting as a collegial body, can authorize such reassignment; and that a reassignment without her consent amounted to removal from office without due process and was therefore illegal. But Justice Carpio, speaking on behalf of the Court *en banc*, ruled that such "posturing will hold water" only if Benipayo did not possess "color of title to the office of Chairman of the COMELEC:"

The real issue then turns on whether or not Benipayo is the lawful Chairman of the COMELEC. Even if petitioner is only an Acting Director of the EID, her reassignment is without legal basis if Benipayo is not the lawful COMELEC Chairman, an office created by the Constitution.

On the other hand, if Benipayo is the lawful COMELEC Chairman because he assumed office in accordance with the Constitution, then petitioner's reassignment is legal and she has no cause to complain provided the reassignment is in accordance with the Civil Service Law.

The Court ruled that Benipayo is the *de jure* COMELEC Chairman,

⁷⁴ Joaquin G. Bernas, *The 1987 Constitution Of The Republic Of The Philippines: A Commentary* 772 (1996).

and consequently has full authority to exercise all the powers of that office for so long as his *ad interim* appointment remains effective pursuant to the second paragraph of this constitutional provision. The facts of **Matibag** were stated in the *en banc* Decision:

On February 2, 1999, the COMELEC *en banc* appointed petitioner as “Acting Director IV” of the EID. On February 15, 2000, then Chairperson Harriet O. Demetriou renewed the appointment of petitioner as Director IV of EID in a “Temporary” capacity. On February 15, 2001, Commissioner Rufino S.B. Javier renewed again the appointment of petitioner to the same position in a “Temporary” capacity.

On March 22, 2001, President Gloria Macapagal Arroyo appointed, *ad interim*, Benipayo as COMELEC Chairman, and Borra and Tuason as COMELEC Commissioners, each for a term of seven years and all expiring on February 2, 2008. Benipayo took his oath of office and assumed the position of COMELEC Chairman. Borra and Tuason likewise took their oaths of office and assumed their positions as COMELEC Commissioners. The Office of the President submitted to the Commission on Appointments on May 22, 2001 the *ad interim* appointments of Benipayo, Borra and Tuason for confirmation. However, the Commission on Appointments did not act on said appointments.

On June 1, 2001, President Arroyo renewed the *ad interim* appointments of Benipayo, Borra and Tuason to the same positions and for the same term of seven years, expiring on February 2, 2008. They took their oaths of office for a second time. The Office of the President transmitted on June 5, 2001 their appointments to the Commission on Appointments for confirmation.

Congress adjourned before the Commission on Appointments could act on their appointments. Thus, on June 8, 2001, President Macapagal Arroyo renewed again the *ad interim* appointments of Benipayo, Borra and Tuason to the same positions. The Office of the President submitted their appointments for confirmation to the Commission on Appointments. They took their oaths of office anew.

In his capacity as COMELEC Chairman, Benipayo issued a Memorandum dated April 11, 2001 addressed to petitioner as Director IV of the EID and to Cinco as Director III also of the EID, designating Cinco Officer-in-Charge of the EID and

reassigning petitioner to the Law Department. COMELEC EID Commissioner-in-Charge Mehol K. Sadain objected to petitioner's reassignment in a Memorandum dated April 14, 2001 addressed to the COMELEC *en banc*. Specifically, Commissioner Sadain questioned Benipayo's failure to consult the Commissioner-in-Charge of the EID in the reassignment of petitioner.

On April 16, 2001, petitioner requested Benipayo to reconsider her relief as Director IV of the EID and her reassignment to the Law Department. Petitioner cited Civil Service Commission Memorandum Circular No. 7 dated April 10, 2001, reminding heads of government offices that "transfer and detail of employees are prohibited during the election period beginning January 2 until June 13, 2001." Benipayo denied her request for reconsideration on April 18, 2001, citing COMELEC Resolution No. 3300 dated November 6, 2000, which states in part:

NOW, THEREFORE, the Commission on Elections by virtue of the powers conferred upon it by the Constitution, the Omnibus Election Code and other election laws, as an exception to the foregoing prohibitions, has RESOLVED, as it is hereby RESOLVED, to appoint, hire new employees or fill new positions and transfer or reassign its personnel, when necessary in the effective performance of its mandated functions during the prohibited period, provided that the changes in the assignment of its field personnel within the thirty-day period before election day shall be effected after due notice and hearing.

Petitioner appealed the denial of her request for reconsideration to the COMELEC *en banc* in a Memorandum dated April 23, 2001. Petitioner also filed an administrative and criminal complaint with the Law Department against Benipayo, alleging that her reassignment violated Section 261 (h) of the Omnibus Election Code, COMELEC Resolution No. 3258, Civil Service Memorandum Circular No. 07, s. 001, and other pertinent administrative and civil service laws, rules and regulations.

During the pendency of her complaint before the Law Department, petitioner filed the instant petition questioning the appointment and the right to remain in office of Benipayo, Borra and Tuason, as Chairman and Commissioners of the COMELEC, respectively. Petitioner claims that the *ad interim* appointments of Benipayo, Borra and Tuason violate the constitutional provisions on the independence of the COMELEC, as well as on the

prohibitions on temporary appointments and reappointments of its Chairman and members. Petitioner also assails as illegal her removal as Director IV of the EID and her reassignment to the Law Department. Simultaneously, petitioner challenges the designation of Cinco as Officer-in-Charge of the EID. Petitioner, moreover, questions the legality of the disbursements made by COMELEC Finance Services Department Officer-in-Charge Gideon C. De Guzman to Benipayo, Borra and Tuason by way of salaries and other emoluments.

In the meantime, on September 6, 2001, President Macapagal Arroyo renewed once again the *ad interim* appointments of Benipayo as COMELEC Chairman and Borra and Tuason as Commissioners, respectively, for a term of seven years expiring on February 2, 2008. They all took their oaths of office anew.

Justice Carpio identified five issues for resolution in **Matibag**:

1. Whether or not the instant petition satisfies all the requirements before this Court may exercise its power of judicial review in constitutional cases;
2. Whether or not the assumption of office by Benipayo, Borra and Tuason on the basis of the *ad interim* appointments issued by the President amounts to a temporary appointment prohibited by Section 1 (2), Article IX-C of the Constitution;
3. Assuming that the first *ad interim* appointments and the first assumption of office by Benipayo, Borra and Tuason are legal, whether or not the renewal of their *ad interim* appointments and subsequent assumption of office to the same positions violate the prohibition on reappointment under Section 1 (2), Article IX-C of the Constitution;
4. Whether or not Benipayo's removal of petitioner from her position as Director IV of the EID and her reassignment to the Law Department is illegal and without authority, having been done without the approval of the COMELEC as a collegial body;
5. Whether or not the Officer-in-Charge of the COMELEC's Finance Services Department, in continuing to make disbursements in favor of Benipayo, Borra, Tuason and Cinco, is acting in excess of jurisdiction.

Justice Carpio's discussion of the first three issues of **Matibag** fully

delineated the nature of *ad interim* appointments:

Propriety of Judicial Review

Respondents assert that the petition fails to satisfy all the four requisites before this Court may exercise its power of judicial review in constitutional cases. Out of respect for the acts of the Executive department, which is co-equal with this Court, respondents urge this Court to refrain from reviewing the constitutionality of the *ad interim* appointments issued by the President to Benipayo, Borra and Tuason unless all the four requisites are present. These are: (1) the existence of an actual and appropriate controversy; (2) a personal and substantial interest of the party raising the constitutional issue; (3) the exercise of the judicial review is pleaded at the earliest opportunity; and (4) the constitutional issue is the *lis mota* of the case.⁷⁵ Respondents argue that the second, third and fourth requisites are absent in this case. Respondents maintain that petitioner does not have a personal and substantial interest in the case because she has not sustained a direct injury as a result of the *ad interim* appointments of Benipayo, Borra and Tuason and their assumption of office. Respondents point out that petitioner does not claim to be lawfully entitled to any of the positions assumed by Benipayo, Borra or Tuason. Neither does petitioner claim to be directly injured by the appointments of these three respondents.

Respondents also contend that petitioner failed to question the constitutionality of the *ad interim* appointments at the earliest opportunity. Petitioner filed the petition only on August 3, 2001 despite the fact that the *ad interim* appointments of Benipayo, Borra and Tuason were issued as early as March 22, 2001. Moreover, the petition was filed after the third time that these three respondents were issued *ad interim* appointments.

Respondents insist that the real issue in this case is the legality of petitioner's reassignment from the EID to the Law Department. Consequently, the constitutionality of the *ad interim* appointments is not the *lis mota* of this case.

We are not persuaded.

⁷⁵ Integrated Bar of the Philippines v. Hon. Ronaldo B. Zamora, 338 SCRA 81 (2000); Philippine Constitutional Association v. Enriquez, 235 SCRA 506 (1994); Luz Farms v. Secretary of the Department of Agrarian Reform, 192 SCRA 51 (1990).

Benipayo reassigned petitioner from the EID, where she was Acting Director, to the Law Department, where she was placed on detail service. Respondents claim that the reassignment was “pursuant to ... Benipayo’s authority as Chairman of the Commission on Elections, and as the Commission’s Chief Executive Officer.” Evidently, respondents anchor the legality of petitioner’s reassignment on Benipayo’s authority as Chairman of the COMELEC. The real issue then turns on whether or not Benipayo is the lawful Chairman of the COMELEC. Even if petitioner is only an Acting Director of the EID, her reassignment is without legal basis if Benipayo is not the lawful COMELEC Chairman, an office created by the Constitution.

On the other hand, if Benipayo is the lawful COMELEC Chairman because he assumed office in accordance with the Constitution, then petitioner’s reassignment is legal and she has no cause to complain provided the reassignment is in accordance with the Civil Service Law. Clearly, petitioner has a personal and material stake in the resolution of the constitutionality of Benipayo’s assumption of office. Petitioner’s personal and substantial injury, if Benipayo is not the lawful COMELEC Chairman, clothes her with the requisite *locus standi* to raise the constitutional issue in this petition.

Respondents harp on petitioner’s belated act of questioning the constitutionality of the *ad interim* appointments of Benipayo, Borra and Tuason. Petitioner filed the instant petition only on August 3, 2001, when the first *ad interim* appointments were issued as early as March 22, 2001. However, it is not the date of filing of the petition that determines whether the constitutional issue was raised at the earliest opportunity. The earliest opportunity to raise a constitutional issue is to raise it in the pleadings before a competent court that can resolve the same, such that, “if it is not raised in the pleadings, it cannot be considered at the trial, and, if not considered at the trial, it cannot be considered on appeal.”⁷⁶ Petitioner questioned the constitutionality of the *ad interim* appointments of Benipayo, Borra and Tuason when she filed her petition before this Court, which is the earliest opportunity for pleading the constitutional issue before a competent body. Furthermore, this Court may determine, in the exercise of sound discretion, the time when

⁷⁶ Joaquin G. Bernas, *The 1987 Constitution Of The Republic Of The Philippines: A Commentary* 858 (1996), citing *People v. Vera*, 65 Phil. 56 (1937).

a constitutional issue may be passed upon.⁷⁷ There is no doubt petitioner raised the constitutional issue on time.

Moreover, the legality of petitioner's reassignment hinges on the constitutionality of Benipayo's *ad interim* appointment and assumption of office. Unless the constitutionality of Benipayo's *ad interim* appointment and assumption of office is resolved, the legality of petitioner's reassignment from the EID to the Law Department cannot be determined. Clearly, the *lis mota* of this case is the very constitutional issue raised by petitioner.

In any event, the issue raised by petitioner is of paramount importance to the public. The legality of the directives and decisions made by the COMELEC in the conduct of the May 14, 2001 national elections may be put in doubt if the constitutional issue raised by petitioner is left unresolved. In keeping with this Court's duty to determine whether other agencies of government have remained within the limits of the Constitution and have not abused the discretion given them, this Court may even brush aside technicalities of procedure and resolve any constitutional issue raised.⁷⁸ Here the petitioner has complied with all the requisite technicalities. Moreover, public interest requires the resolution of the constitutional issue raised by petitioner.

The Nature of an *Ad Interim* Appointment

Petitioner argues that an *ad interim* appointment to the COMELEC is a temporary appointment that is prohibited by Section 1 (2), Article IX-C of the Constitution, which provides as follows:

The Chairman and the Commissioners shall be appointed by the President with the consent of the Commission on Appointments for a term of seven years without reappointment. Of those first appointed, three Members shall hold office for seven years, two Members for five years, and the last Members for three years, without reappointment. Appointment to any vacancy shall be only for the unexpired term of the predecessor. In no case shall any Member be appointed or designated in a temporary or acting capacity.

⁷⁷ *Id.*, citing Sotto v. Commission on Elections, 76 Phil. 516 (1946).

⁷⁸ *Ople v. Torres*, 293 SCRA 141 (1998); *Telecommunications and Broadcast Attorneys of the Philippines, Inc. v. Commission on Elections*, 289 SCRA 337 (1998); *Osmeña v. Commission on Elections*, 199 SCRA 750 (1991).

Petitioner posits the view that an *ad interim* appointment can be withdrawn or revoked by the President at her pleasure, and can even be disapproved or simply by-passed by the Commission on Appointments. For this reason, petitioner claims that an *ad interim* appointment is temporary in character and consequently prohibited by the last sentence of Section 1 (2), Article IX-C of the Constitution.

Based on petitioner's theory, there can be no *ad interim* appointment to the COMELEC or to the other two constitutional commissions, namely the Civil Service Commission and the Commission on Audit. The last sentence of Section 1 (2), Article IX-C of the Constitution is also found in Article IX-B and Article IX-D providing for the creation of the Civil Service Commission and the Commission on Audit, respectively. Petitioner interprets the last sentence of Section 1 (2) of Article IX-C to mean that the *ad interim* appointee cannot assume office until his appointment is confirmed by the Commission on Appointments for only then does his appointment become permanent and no longer temporary in character.

The rationale behind petitioner's theory is that only an appointee who is confirmed by the Commission on Appointments can guarantee the independence of the COMELEC. A confirmed appointee is beyond the influence of the President or members of the Commission on Appointments since his appointment can no longer be recalled or disapproved. Prior to his confirmation, the appointee is at the mercy of both the appointing and confirming powers since his appointment can be terminated at any time for any cause. In the words of petitioner, a Sword of Damocles hangs over the head of every appointee whose confirmation is pending with the Commission on Appointments.

We find petitioner's argument without merit.

An *ad interim* appointment is a permanent appointment because it takes effect immediately and can no longer be withdrawn by the President once the appointee has qualified into office. The fact that it is subject to confirmation by the Commission on Appointments does not alter its permanent character. The Constitution itself makes an *ad interim* appointment permanent in character by making it effective until disapproved by the Commission on Appointments or until the next adjournment of Congress. The second paragraph of Section 16, Article VII of the Constitution provides as (much) ...

Thus, the *ad interim* appointment remains effective until such disapproval or next adjournment, signifying that it can no longer be withdrawn or revoked by the President. The fear that the President can withdraw or revoke at any time and for any reason an *ad interim* appointment is utterly without basis.

More than half a century ago, this Court had already ruled that an *ad interim* appointment is permanent in character. In *Summers v. Ozaeta*,⁷⁹ decided on October 25, 1948, we held that:

... an *ad interim* appointment is one made in pursuance of paragraph (4), Section 10, Article VII of the Constitution, which provides that the 'President shall have the power to make appointments during the recess of the Congress, but such appointments shall be effective only until disapproval by the Commission on Appointments or until the next adjournment of the Congress.' It is an appointment permanent in nature, and the circumstance that it is subject to confirmation by the Commission on Appointments does not alter its permanent character. An *ad interim* appointment is disapproved certainly for a reason other than that its provisional period has expired. Said appointment is of course distinguishable from an 'acting' appointment which is merely temporary, good until another permanent appointment is issued.

The Constitution imposes no condition on the effectivity of an *ad interim* appointment, and thus an *ad interim* appointment takes effect immediately. The appointee can at once assume office and exercise, as a *de jure* officer, all the powers pertaining to the office. In *Pacete v. Secretary of the Commission on Appointments*,⁸⁰ this Court elaborated on the nature of an *ad interim* appointment as follows:

A distinction is thus made between the exercise of such presidential prerogative requiring confirmation by the Commission on Appointments when Congress is in session and when it is in recess. In the former, the President nominates, and only upon the consent of the Commission on Appointments may the person thus named assume office. It is not so with reference to *ad interim* appointments. It takes effect at once. The individual chosen may thus qualify and

⁷⁹ 81 Phil. 754 (1948).

⁸⁰ 40 SCRA 58 (1971).

perform his function without loss of time. His title to such office is complete. In the language of the Constitution, the appointment is effective ‘until disapproval by the Commission on Appointments or until the next adjournment of the Congress.’

Petitioner cites Black’s Law Dictionary which defines the term “*ad interim*” to mean “in the meantime” or “for the time being.” Hence, petitioner argues that an *ad interim* appointment is undoubtedly temporary in character. This argument is not new and was answered by this Court in *Pamantasan ng Lungsod ng Maynila v. Intermediate Appellate Court*,⁸¹ where we explained that:

... From the arguments, it is easy to see why the petitioner should experience difficulty in understanding the situation. Private respondent had been extended several ‘ad interim’ appointments which petitioner mistakenly understands as appointments temporary in nature. Perhaps, it is the literal translation of the word ‘ad interim’ which creates such belief. The term is defined by Black to mean “in the meantime” or “for the time being”. Thus, an officer *ad interim* is one appointed to fill a vacancy, or to discharge the duties of the office during the absence or temporary incapacity of its regular incumbent (Black’s Law Dictionary, Revised Fourth Edition, 1978). But such is not the meaning nor the use intended in the context of Philippine law. In referring to Dr. Esteban’s appointments, the term is not descriptive of the nature of the appointments given to him. Rather, it is used to denote the manner in which said appointments were made, that is, done by the President of the Pamantasan in the meantime, while the Board of Regents, which is originally vested by the University Charter with the power of appointment, is unable to act. ...

Thus, the term “*ad interim* appointment”, as used in letters of appointment signed by the President, means a permanent appointment made by the President in the meantime that Congress is in recess. It does not mean a temporary appointment that can be withdrawn or revoked at any time. The term, although not found in the text of the Constitution, has acquired a definite legal meaning under Philippine jurisprudence. The Court had again occasion to explain the nature of an *ad interim* appointment in the more recent case of *Marohombsar v.*

⁸¹ 140 SCRA 22 (1985).

Court of Appeals,⁸² where the Court stated:

We have already mentioned that an *ad interim* appointment is not descriptive of the nature of the appointment, that is, it is not indicative of whether the appointment is temporary or in an acting capacity, rather it denotes the manner in which the appointment was made. In the instant case, the appointment extended to private respondent by then MSU President Alonto, Jr. was issued without condition nor limitation as to tenure. The permanent status of private respondent's appointment as Executive Assistant II was recognized and attested to by the Civil Service Commission Regional Office No. 12. Petitioner's submission that private respondent's *ad interim* appointment is synonymous with a temporary appointment which could be validly terminated at any time is clearly untenable. *Ad interim* appointments are permanent but their terms are only until the Board disapproves them.

An *ad interim* appointee who has qualified and assumed office becomes at that moment a government employee and therefore part of the civil service. He enjoys the constitutional protection that "[n]o officer or employee in the civil service shall be removed or suspended except for cause provided by law."⁸³ Thus, an *ad interim* appointment becomes complete and irrevocable once the appointee has qualified into office. The withdrawal or revocation of an *ad interim* appointment is possible only if it is communicated to the appointee before the moment he qualifies, and any withdrawal or revocation thereafter is tantamount to removal from office.⁸⁴ Once an appointee has qualified, he acquires a legal right to the office which is protected not only by statute but also by the Constitution. He can only be removed for cause, after notice and hearing, consistent with the requirements of due process.

An *ad interim* appointment can be terminated for two causes specified in the Constitution. The first cause is the disapproval of his *ad interim* appointment by the Commission on Appointments. The second cause is the adjournment of Congress without the Commission on Appointments acting on his appointment. These two causes are resolutive conditions expressly imposed by the Constitution on all *ad interim* appointments. These resolutive

⁸² 326 SCRA 62 (2000).

⁸³ Const., Art. IX-B, Sec. 2(3).

⁸⁴ See concurring opinion, Bengzon, J., *Erana v. Vergel de Dios*, 85 Phil. 17 (1949).

conditions constitute, in effect, a Sword of Damocles over the heads of *ad interim* appointees. No one, however, can complain because it is the Constitution itself that places the Sword of Damocles over the heads of the *ad interim* appointees.

... The original draft of Section 16, Article VII of the Constitution - on the nomination of officers subject to confirmation by the Commission on Appointments - did not provide for *ad interim* appointments. The original intention of the framers of the Constitution was to do away with *ad interim* appointments because the plan was for Congress to remain in session throughout the year except for a brief 30-day compulsory recess. However, because of the need to avoid disruptions in essential government services, the framers of the Constitution thought it wise to reinstate the provisions of the 1935 Constitution on *ad interim* appointments. The following discussion during the deliberations of the Constitutional Commission elucidates this:

FR. BERNAS: ... our compulsory recess now is only 30 days. So under such circumstances, is it necessary to provide for *ad interim* appointments? Perhaps there should be a little discussion on that.

...

MS. AQUINO: My concern is that unless this problem is addressed, this might present problems in terms of anticipating interruption of government business, considering that we are not certain of the length of involuntary recess or adjournment of the Congress. We are certain, however, of the involuntary adjournment of the Congress which is 30 days, but we cannot leave to conjecture the matter of involuntary recess.

FR. BERNAS: That is correct, but we are trying to look for a formula. I wonder if the Commissioner has a formula ...

...

MR. BENGZON: Madam President, apropos of the matter raised by Commissioner Aquino and after conferring with the Committee, Commissioner Aquino and I propose the following amendment as the last paragraph of Section 16, the wordings of which are in the 1935 Constitution: The president shall have the power to make appointments during the recess of Congress whether it be voluntary or compulsory but such appointments shall be effective only until disapproval by the commission on appointments or until the next adjournment of the congress.

This is otherwise called the *ad interim* appointments.

...

THE PRESIDENT: Is there any objection to the proposed amendment of Commissioners Aquino and Bengzon, adding a paragraph to the last paragraph of Section 16? (Silence) The Chair hears none; the amendment is approved.⁸⁵

Clearly, the reinstatement in the present Constitution of the *ad interim* appointing power of the President was for the purpose of avoiding interruptions in vital government services that otherwise would result from prolonged vacancies in government offices, including the three constitutional commissions. In his concurring opinion in *Guevara v. Inocentes*,⁸⁶ decided under the 1935 Constitution, Justice Roberto Concepcion, Jr. explained the rationale behind *ad interim* appointments in this manner:

Now, why is the lifetime of *ad interim* appointments so limited? Because, if they expired before the session of Congress, the evil sought to be avoided - interruption in the discharge of essential functions - may take place. Because the same evil would result if the appointments ceased to be effective during the session of Congress and before its adjournment. Upon the other hand, once Congress has adjourned, the evil aforementioned may easily be conjured by the issuance of other *ad interim* appointments or reappointments.

Indeed, the timely application of the last sentence of Section 16, Article VII of the Constitution barely avoided the interruption of essential government services in the May 2001 national elections. Following the decision of this Court in *Gaminde v. Commission on Appointments*,⁸⁷ promulgated on December 13, 2000, the terms of office of constitutional officers first appointed under the Constitution would have to be counted starting February 2, 1987, the date of ratification of the Constitution, regardless of the date of their actual appointment. By this reckoning, the terms of office of three Commissioners of the COMELEC, including the Chairman, would end on February 2, 2001.⁸⁸

Then COMELEC Chairperson Harriet O. Demetriou was appointed only on January 11, 2000 to serve, pursuant to her appointment papers, until February 15, 2002, the original

⁸⁵ II Record, Constitutional Commission 521-524 (1986).

⁸⁶ 16 SCRA 379 (1966).

⁸⁷ 347 SCRA 655 (2000).

⁸⁸ Const., Art. IX-C, Sec. 1(2).

expiry date of the term of her predecessor, Justice Bernardo P. Pardo, who was elevated to this Court. The original expiry date of the term of Commissioner Teresita Dy-Liacco Flores was also February 15, 2002, while that of Commissioner Julio F. Desamito was November 3, 2001. The original expiry dates of the terms of office of Chairperson Demetriou and Commissioners Flores and Desamito were therefore supposed to fall after the May 2001 elections. Suddenly and unexpectedly, because of the *Gaminde* ruling, there were three vacancies in the seven-person COMELEC, with national elections looming less than three and one-half months away. To their credit, Chairperson Demetriou and Commissioner Flores vacated their offices on February 2, 2001 and did not question any more before this Court the applicability of the *Gaminde* ruling to their own situation.

In a Manifestation dated December 28, 2000 filed with this Court in the *Gaminde* case, Chairperson Demetriou stated that she was vacating her office on February 2, 2001, as she believed any delay in choosing her successor might create a “constitutional crisis” in view of the proximity of the May 2001 national elections. Commissioner Desamito chose to file a petition for intervention in the *Gaminde* case but this Court denied the intervention. Thus, Commissioner Desamito also vacated his office on February 2, 2001.

During an election year, Congress normally goes on voluntary recess between February and June considering that many of the members of the House of Representatives and the Senate run for re-election. In 2001, the Eleventh Congress adjourned from January 9, 2001 to June 3, 2001. Concededly, there was no more time for Benipayo, Borra and Tuason, who were originally extended *ad interim* appointments only on March 22, 2001, to be confirmed by the Commission on Appointments before the May 14, 2001 elections.

If Benipayo, Borra and Tuason were not extended *ad interim* appointments to fill up the three vacancies in the COMELEC, there would only have been one division functioning in the COMELEC instead of two during the May 2001 elections. Considering that the Constitution requires that “all ... election cases shall be heard and decided in division”,⁸⁹ the remaining one division would have been swamped with election cases. Moreover, since under the Constitution motions for reconsideration “shall

⁸⁹ Const., Art. IX-C, Sec. 3.

be decided by the Commission *en banc*”, the mere absence of one of the four remaining members would have prevented a quorum, a less than ideal situation considering that the Commissioners are expected to travel around the country before, during and after the elections. There was a great probability that disruptions in the conduct of the May 2001 elections could occur because of the three vacancies in the COMELEC. The successful conduct of the May 2001 national elections, right after the tumultuous EDSA II and EDSA III events, was certainly essential in safeguarding and strengthening our democracy.

Evidently, the exercise by the President in the instant case of her constitutional power to make *ad interim* appointments prevented the occurrence of the very evil sought to be avoided by the second paragraph of Section 16, Article VII of the Constitution. This power to make *ad interim* appointments is lodged in the President to be exercised by her in her sound judgment. Under the second paragraph of Section 16, Article VII of the Constitution, the President can choose either of two modes in appointing officials who are subject to confirmation by the Commission on Appointments. First, while Congress is in session, the President may nominate the prospective appointee, and pending consent of the Commission on Appointments, the nominee cannot qualify and assume office. Second, during the recess of Congress, the President may extend an *ad interim* appointment which allows the appointee to immediately qualify and assume office.

Whether the President chooses to nominate the prospective appointee or extend an *ad interim* appointment is a matter within the prerogative of the President because the Constitution grants her that power. This Court cannot inquire into the propriety of the choice made by the President in the exercise of her constitutional power, absent grave abuse of discretion amounting to lack or excess of jurisdiction on her part, which has not been shown in the instant case.

The issuance by Presidents of *ad interim* appointments to the COMELEC is a long-standing practice. Former President Corazon Aquino issued an *ad interim* appointment to Commissioner Alfredo E. Abueg. Former President Fidel V. Ramos extended *ad interim* appointments to Commissioners Julio F. Desamito, Japal M. Guiani, Graduacion A. Reyes-Claravall and Manolo F. Gorospe. Former President Joseph Estrada also extended *ad interim* appointments to Commissioners Abdul Gani M. Marohombsar, Luzviminda Tancangco, Mehol K. Sadain and

Ralph C. Lantion.

The President's power to extend *ad interim* appointments may indeed briefly put the appointee at the mercy of both the appointing and confirming powers. This situation, however, is only for a short period - from the time of issuance of the *ad interim* appointment until the Commission on Appointments gives or withholds its consent. The Constitution itself sanctions this situation, as a trade-off against the evil of disruptions in vital government services. This is also part of the check-and-balance under the separation of powers, as a trade-off against the evil of granting the President absolute and sole power to appoint. The Constitution has wisely subjected the President's appointing power to the checking power of the legislature...

The Constitutionality of Renewals of Appointments

Petitioner also argues that assuming the first *ad interim* appointments and the first assumption of office by Benipayo, Borra and Tuason are constitutional, the renewal of their *ad interim* appointments and their subsequent assumption of office to the same positions violate the prohibition on reappointment under Section 1 (2), Article IX-C of the Constitution, which provides as follows:

The Chairman and the Commissioners shall be appointed by the President with the consent of the Commission on Appointments for a term of seven years without reappointment. Of those first appointed, three Members shall hold office for seven years, two Members for five years, and the last members for three years, without reappointment. ...

Petitioner theorizes that once an *ad interim* appointee is bypassed by the Commission on Appointments, his *ad interim* appointment can no longer be renewed because this will violate Section 1 (2), Article IX-C of the Constitution which prohibits reappointments. Petitioner asserts that this is particularly true to permanent appointees who have assumed office, which is the situation of Benipayo, Borra and Tuason if their *ad interim* appointments are deemed permanent in character.

There is no dispute that an *ad interim* appointee disapproved by the Commission on Appointments can no longer be extended a new appointment. The disapproval is a final decision of the

Commission on Appointments in the exercise of its checking power on the appointing authority of the President. The disapproval is a decision on the merits, being a refusal by the Commission on Appointments to give its consent after deliberating on the qualifications of the appointee. Since the Constitution does not provide for any appeal from such decision, the disapproval is final and binding on the appointee as well as on the appointing power. In this instance, the President can no longer renew the appointment not because of the constitutional prohibition on reappointment, but because of a final decision by the Commission on Appointments to withhold its consent to the appointment.

An *ad interim* appointment that is by-passed because of lack of time or failure of the Commission on Appointments to organize is another matter. A by-passed appointment is one that has not been finally acted upon on the merits by the Commission on Appointments at the close of the session of Congress. There is no final decision by the Commission on Appointments to give or withhold its consent to the appointment as required by the Constitution. Absent such decision, the President is free to renew the *ad interim* appointment of a by-passed appointee. This is recognized in Section 17 of the Rules of the Commission on Appointments, which provides as follows:

Sec. 17. Unacted Nominations or Appointments Returned to the President. Nominations or appointments submitted by the President of the Philippines which are not finally acted upon at the close of the session of Congress shall be returned to the President and, unless new nominations or appointments are made, shall not again be considered by the Commission.

Hence, under the Rules of the Commission on Appointments, a by-passed appointment can be considered again if the President renews the appointment.

It is well settled in this jurisdiction that the President can renew the *ad interim* appointments of by-passed appointees. Justice Roberto Concepcion, Jr. lucidly explained in his concurring opinion in *Guevara v. Inocentes* why by-passed *ad interim* appointees could be extended new appointments, thus:

In short, an *ad interim* appointment ceases to be effective upon disapproval by the Commission, because the incumbent cannot continue holding office over the positive objection of

the Commission. It ceases, also, upon “the next adjournment of the Congress”, simply because the President may then issue new appointments - not because of implied disapproval of the Commission deduced from its inaction during the session of Congress, for, under the Constitution, the Commission may affect adversely the interim appointments only by action, never by omission. If the adjournment of Congress were an implied disapproval of *ad interim* appointments made prior thereto, then the President could no longer appoint those so by-passed by the Commission. But, the fact is that the President may reappoint them, thus clearly indicating that the reason for said termination of the *ad interim* appointments is not the disapproval thereof allegedly inferred from said omission of the Commission, but the circumstance that upon said adjournment of the Congress, the President is free to make *ad interim* appointments or reappointments.

Guevara was decided under the 1935 Constitution from where the second paragraph of Section 16, Article VII of the present Constitution on *ad interim* appointments was lifted *verbatim*.⁹⁰ The jurisprudence under the 1935 Constitution governing *ad interim* appointments by the President is doubtless applicable to the present Constitution. The established practice under the present Constitution is that the President can renew the appointments of by-passed *ad interim* appointees. This is a continuation of the well-recognized practice under the 1935 Constitution, interrupted only by the 1973 Constitution which did not provide for a Commission on Appointments but vested sole appointing power in the President.

The prohibition on reappointment in Section 1 (2), Article IX-C of the Constitution applies neither to disapproved nor by-passed *ad interim* appointments. A disapproved *ad interim* appointment cannot be revived by another *ad interim* appointment because the disapproval is final under Section 16, Article VII of the Constitution, and not because a reappointment is prohibited under Section 1 (2), Article IX-C of the Constitution. A by-passed *ad interim* appointment can be revived by a new *ad interim* appointment because there is no final disapproval under Section 16, Article VII of the Constitution, and such new appointment will not result in the appointee serving beyond the fixed term of seven years.

⁹⁰ See Const. (1935), Art. VII, Sec. 10 (4).

... However, an *ad interim* appointment that has lapsed by inaction of the Commission on Appointments does not constitute a term of office. The period from the time the *ad interim* appointment is made to the time it lapses is neither a fixed term nor an unexpired term. To hold otherwise would mean that the President by his unilateral action could start and complete the running of a term of office in the COMELEC without the consent of the Commission on Appointments. This interpretation renders inutile the confirming power of the Commission on Appointments. ...

Section 17. The President shall have control of all the executive departments, bureaus, and offices. He shall ensure that the laws be faithfully executed.

In the *en banc* decision in **NATIONAL ELECTRIFICATION ADMINISTRATION v. COMMISSION ON AUDIT**, G. R. No. 143481, February 15, 2002, 427 Phil. 464,⁹¹ a petition for *certiorari*, with prayer for preliminary injunction and temporary restraining order, to reverse and set aside a decision of the COA that disallowed the payment of accelerated increases to NEA officials and employees, Justice Carpio briefly explained the presidential **power of control** over the executive branch:

(U)nder our system of government all executive departments, bureaus and offices are under the control of the President of the Philippines.

This precept is embodied in Article VII, Section 17 of the Constitution...

The presidential power of control over the executive branch of government extends to all executive employees from Cabinet Secretary to the lowliest clerk.⁹² The constitutional vesture of this power in the President is self-executing and does not require statutory implementation, nor may its exercise be limited, much less withdrawn, by the legislature.⁹³

Executive officials who are subordinate to the President

⁹¹ See discussion under Art. IX-D, Sec. 2.

⁹² 2 Joaquin G. Bernas, *The Constitution, A Commentary* 203-204 (2nd Ed., 1988).

⁹³ *De Leon v. Carpio*, 178 SCRA 457 (1989).

should not trifle with the President's constitutional power of control over the executive branch. There is only one Chief Executive who directs and controls the entire executive branch⁹⁴, and all other executive officials must implement in good faith his directives and orders. This is necessary to provide order, efficiency and coherence in carrying out the plans, policies and programs of the executive branch.

The presidential **power of control** over the executive branch was discussed more exhaustively in **RUFINO v. ENDRIGA**, G.R. No. 139554, July 21, 2006, 528 Phil. 473.⁹⁵ Justice Carpio, speaking for the Court *en banc*, declared Section 6(b) and (c) of Presidential Decree No. 15, as amended, unconstitutional, insofar as these sections authorized the remaining trustees to fill vacancies in the Board of Trustees of the Cultural Center of the Philippines by election:

There is another constitutional impediment to the implementation of Section 6(b) and (c) of PD 15. Under our system of government, all Executive departments, bureaus, and offices are under the control of the President of the Philippines (citing) Section 17, Article VII of the 1987 Constitution...

The presidential power of control over the Executive branch of government extends to all executive employees from the Department Secretary to the lowliest clerk.⁹⁶ This constitutional power of the President is self-executing and does not require any implementing law. Congress cannot limit or curtail the President's power of control over the Executive branch.⁹⁷

The 1987 Constitution has established three branches of government - the Executive, Legislative and Judicial. In addition, there are the independent constitutional bodies - like the Commission on Elections, Commission on Audit, Civil Service Commission, and the Ombudsman. Then there are the hybrid or quasi-judicial agencies,⁹⁸ exercising jurisdiction in specialized areas, that are under the Executive branch for administrative supervision purposes, but whose decisions are reviewable by

⁹⁴ Villena v. Secretary of the Interior, 67 Phil. 451 (1939).

⁹⁵ See discussion under Art. VII, Sec. 16.

⁹⁶ National Electrification Administration v. COA, 427 Phil. 464 (2002).

⁹⁷ *Ibid.*

⁹⁸ Department of Agrarian Reform Adjudication Board (DARAB) v. Lubrica, G.R. No. 159145, April 29, 2005, 457 SCRA 800; San Miguel Corporation v. Secretary of Labor, No. L-39195, May 16, 1975, 64 SCRA 56.

the courts. Lastly, there are the local government units, which under the Constitution enjoy local autonomy⁹⁹ subject only to limitations Congress may impose by law.¹⁰⁰ Local government units are subject to general supervision by the President.¹⁰¹

Every government office, entity, or agency must fall under the Executive, Legislative, or Judicial branches, or must belong to one of the independent constitutional bodies, or must be a quasi-judicial body or local government unit. Otherwise, such government office, entity, or agency has no legal and constitutional basis for its existence.

The CCP does not fall under the Legislative or Judicial branches of government. The CCP is also not one of the independent constitutional bodies. Neither is the CCP a quasi-judicial body nor a local government unit. Thus, the CCP must fall under the Executive branch. Under the Revised Administrative Code of 1987, any agency “not placed by law or order creating them under any specific department” falls “under the Office of the President.”¹⁰²

Since the President exercises control over “all the executive departments, bureaus, and offices,” the President necessarily exercises control over the CCP which is an office in the Executive branch. In mandating that the President “shall have control of all executive ... offices,” Section 17, Article VII of the 1987 Constitution does not exempt any executive office - one performing executive functions outside of the independent constitutional bodies - from the President’s power of control. There is no dispute that the CCP performs executive, and not legislative, judicial, or quasi-judicial functions.

The President’s power of control applies to the acts or decisions of all officers in the Executive branch. This is true whether such officers are appointed by the President or by heads of departments, agencies, commissions, or boards. The power of control means the power to revise or reverse the acts or decisions of a subordinate officer involving the exercise of discretion.¹⁰³

⁹⁹ Const., Art. X, Sec. 2.

¹⁰⁰ Id., Sec. 3 and 5.

¹⁰¹ Id., Sec. 4.

¹⁰² Administrative Code, Book III, Title II, Chapter 8, Sec. 23.

¹⁰³ *Mondano v. Silvosa*, 97 Phil. 143 (1955); Administrative Code of 1987, Book IV, Chapter 7, Sec. 38, paragraph 1, provides: Supervision and Control. - Supervision and control shall include authority to act directly whenever a specific function is entrusted

In short, the President sits at the apex of the Executive branch, and exercises “control of all the executive departments, bureaus, and offices.” There can be no instance under the Constitution where an officer of the Executive branch is outside the control of the President. The Executive branch is unitary since there is only one President vested with executive power exercising control over the entire Executive branch.¹⁰⁴ Any office in the Executive branch that is not under the control of the President is a lost command whose existence is without any legal or constitutional basis.

The Legislature cannot validly enact a law that puts a government office in the Executive branch outside the control of the President in the guise of insulating that office from politics or making it independent. If the office is part of the Executive branch, it must remain subject to the control of the President. Otherwise, the Legislature can deprive the President of his constitutional power of control over “all the executive ... offices.” If the Legislature can do this with the Executive branch, then the Legislature can also deal a similar blow to the Judicial branch by enacting a law putting decisions of certain lower courts beyond the review power of the Supreme Court. This will destroy the system of checks and balances finely structured in the 1987 Constitution among the Executive, Legislative, and Judicial branches.

Of course, the President’s power of control does not extend to quasi-judicial bodies whose proceedings and decisions are judicial in nature and subject to judicial review, even as such quasi-judicial bodies may be under the administrative supervision of the President. It also does not extend to local government units, which are merely under the general supervision of the President.

Section 6(b) and (c) of PD 15, which authorizes the trustees of the CCP Board to fill vacancies in the Board, runs afoul with the President’s power of control under Section 17, Article VII of the 1987 Constitution. The intent of Section 6(b) and (c) of PD 15 is to insulate the CCP from political influence and pressure,

by law or regulation to a subordinate; direct the performance of duty; restrain the commission of acts; review, approve, reverse or modify acts and decisions of subordinate officials or units; determine priorities in the execution of plans and programs; and prescribe standards, guidelines, plans and programs. Unless a different meaning is explicitly provided in the specific law governing the relationship of particular agencies, the word “control” shall encompass supervision and control as defined in this paragraph.

¹⁰⁴ Const., Art. VII, Sec. 1; *Villena v. Secretary of the Interior*, 67 Phil. 451 (1939).

specifically from the President. Section 6(b) and (c) of PD 15 makes the CCP a self-perpetuating entity, virtually outside the control of the President. Such a public office or board cannot legally exist under the 1987 Constitution.

Section 3 of PD 15, as amended, states that the CCP “shall enjoy autonomy of policy and operation ...” This provision does not free the CCP from the President’s control, for if it does, then it would be unconstitutional. This provision may give the CCP Board a free hand in initiating and formulating policies and undertaking activities, but ultimately these policies and activities are all subject to the President’s power of control.

The CCP is part of the Executive branch. No law can cut off the President’s control over the CCP in the guise of insulating the CCP from the President’s influence. By stating that the “President shall have control of all the executive ... offices,” the 1987 Constitution empowers the President not only to influence but even to control all offices in the Executive branch, including the CCP. Control is far greater than, and subsumes, influence.

In **KILUSANG MAYO UNO v. NATIONAL ECONOMIC DEVELOPMENT AUTHORITY**,¹⁰⁵ G.R. No. 167798, April 19, 2006, 521 Phil. 732, the presidential **power of control** was further explained by Justice Carpio for the Court *en banc*. In dismissing the consolidated petitions¹⁰⁶ for *certiorari*, prohibition, and *mandamus*, and upholding the constitutionality of Executive Order No. 420, Justice Carpio explained:

On the Alleged Usurpation of Legislative Power

(Section 2 of...) EO 420 applies only to government entities that issue ID cards as part of their functions under existing laws. These government entities have already been issuing ID cards even prior to EO 420. Examples of these government entities are the GSIS, SSS, Philhealth, Mayor’s Office, LTO, PRC, and similar government entities.

Section 1 of EO 420 directs these government entities to “adopt a unified multi-purpose ID system.” Thus, all government entities that issue IDs as part of their functions under existing laws are required to adopt a uniform data collection and format for their

¹⁰⁵ See discussion under Art. III, Secs. 1, 2, 3.

¹⁰⁶ Consolidated with *Bayan Muna v. Ermita*, G.R. No. 167930.

IDs. Section 1 of EO 420 enumerates the purposes of the uniform data collection and format...

In short, the purposes of the uniform ID data collection and ID format are to reduce costs, achieve efficiency and reliability, insure compatibility, and provide convenience to the people served by government entities.

Section 3 of EO 420 limits the data to be collected and recorded under the uniform ID system to only 14 specific items...

These limited and specific data are the usual data required for personal identification by government entities, and even by the private sector. Anyone who applies for or renews a driver's license provides to the LTO all these 14 specific data.

At present, government entities like LTO require considerably more data from applicants for identification purposes. EO 420 will reduce the data required to be collected and recorded in the ID databases of the government entities. Government entities cannot collect or record data, for identification purposes, other than the 14 specific data.

Various laws allow several government entities to collect and record data for their ID systems, either expressly or impliedly by the nature of the functions of these government entities. Under their existing ID systems, some government entities collect and record more data than what EO 420 allows. At present, the data collected and recorded by government entities are disparate, and the IDs they issue are dissimilar.

In the case of the Supreme Court, the IDs that the Court issues to all its employees, including the Justices, contain 15 specific data, namely: (1) Name; (2) Picture; (3) Position; (4) Office Code Number; (5) ID Number; (6) Height; (7) Weight; (8) Complexion; (9) Color of Hair; (10) Blood Type; (11) Right Thumbmark; (12) Tax Identification Number; (13) GSIS Policy Number; (14) Name and Address of Person to be Notified in Case of Emergency; and (15) Signature. If we consider that the picture in the ID can generally also show the sex of the employee, the Court's ID actually contains 16 data.

In contrast, the uniform ID format under Section 3 of EO 420 requires only "the first five items listed" in Section 3, plus the fingerprint, agency number and the common reference number,

or only eight specific data. Thus, at present, the Supreme Court's ID contains far more data than the proposed uniform ID for government entities under EO 420. The nature of the data contained in the Supreme Court ID is also far more financially sensitive, specifically the Tax Identification Number.

Making the data collection and recording of government entities unified, and making their ID formats uniform, will admittedly achieve substantial benefits. These benefits are savings in terms of procurement of equipment and supplies, compatibility in systems as to hardware and software, ease of verification and thus increased reliability of data, and the user-friendliness of a single ID format for all government entities.

There is no dispute that government entities can individually limit the collection and recording of their data to the 14 specific items in Section 3 of EO 420. There is also no dispute that these government entities can individually adopt the ID format as specified in Section 3 of EO 420. Such an act is certainly within the authority of the heads or governing boards of the government entities that are already authorized under existing laws to issue IDs.

A unified ID system for all these government entities can be achieved in either of two ways. First, the heads of these existing government entities can enter into a memorandum of agreement making their systems uniform. If the government entities can individually adopt a format for their own ID pursuant to their regular functions under existing laws, they can also adopt by mutual agreement a uniform ID format, especially if the uniform format will result in substantial savings, greater efficiency, and optimum compatibility. This is purely an administrative matter, and does not involve the exercise of legislative power.

Second, the President may by executive or administrative order direct the government entities under the Executive department to adopt a uniform ID data collection and format (pursuant to) Section 17, Article VII of the 1987 Constitution...

Certainly, under this constitutional power of control the President can direct all government entities, in the exercise of their functions under existing laws, to adopt a uniform ID data collection and ID format to achieve savings, efficiency, reliability, compatibility, and convenience to the public. **The President's constitutional power of control is self-executing and does not need any implementing legislation.**

Of course, the President's power of control is limited to the Executive branch of government and does not extend to the Judiciary or to the independent constitutional commissions. Thus, EO 420 does not apply to the Judiciary, or to the COMELEC which under existing laws is also authorized to issue voter's ID cards. This only shows that EO 420 does not establish a national ID system because legislation is needed to establish a single ID system that is compulsory for all branches of government.

The Constitution also mandates the President to ensure that the laws are faithfully executed. There are several laws mandating government entities to reduce costs, increase efficiency, and in general, improve public services. The adoption of a uniform ID data collection and format under EO 420 is designed to reduce costs, increase efficiency, and in general, improve public services. Thus, in issuing EO 420, the President is simply performing the constitutional duty to ensure that the laws are faithfully executed.

Clearly, EO 420 is well within the constitutional power of the President to promulgate. The President has not usurped legislative power in issuing EO 420. EO 420 is an exercise of Executive power - the President's constitutional power of control over the Executive department. EO 420 is also compliance by the President of the constitutional duty to ensure that the laws are faithfully executed.

Legislative power is the authority to make laws and to alter or repeal them. In issuing EO 420, the President did not make, alter or repeal any law but merely implemented and executed existing laws. EO 420 reduces costs, as well as insures efficiency, reliability, compatibility and user-friendliness in the implementation of current ID systems of government entities under existing laws. Thus, EO 420 is simply an executive issuance and not an act of legislation.

The act of issuing ID cards and collecting the necessary personal data for imprinting on the ID card does not require legislation. Private employers routinely issue ID cards to their employees. Private and public schools also routinely issue ID cards to their students. Even private clubs and associations issue ID cards to their members. The purpose of all these ID cards is simply to insure the proper identification of a person as an employee, student, or member of a club. These ID cards, although imposed as a condition for exercising a privilege, are voluntary because

a person is not compelled to be an employee, student or member of a club.

What require legislation are three aspects of a government maintained ID card system. First, when the implementation of an ID card system requires a special appropriation because there is no existing appropriation for such purpose. Second, when the ID card system is compulsory on all branches of government, including the independent constitutional commissions, as well as compulsory on all citizens whether they have a use for the ID card or not. Third, when the ID card system requires the collection and recording of personal data beyond what is routinely or usually required for such purpose, such that the citizen's right to privacy is infringed.

In the present case, EO 420 does not require any special appropriation because the existing ID card systems of government entities covered by EO 420 have the proper appropriation or funding. EO 420 is not compulsory on all branches of government and is not compulsory on all citizens. EO 420 requires a very narrow and focused collection and recording of personal data while safeguarding the confidentiality of such data. In fact, the data collected and recorded under EO 420 are far less than the data collected and recorded under the ID systems existing prior to EO 420.

EO 420 does not establish a national ID card system. EO 420 does not compel all citizens to have an ID card. EO 420 applies only to government entities that under existing laws are already collecting data and issuing ID cards as part of their governmental functions. Every government entity that presently issues an ID card will still issue its own ID card under its own name. The only difference is that the ID card will contain only the five data specified in Section 3 of EO 420, plus the fingerprint, the agency ID number, and the common reference number which is needed for cross-verification to ensure integrity and reliability of identification.

This Court should not interfere how government entities under the Executive department should undertake cost savings, achieve efficiency in operations, insure compatibility of equipment and systems, and provide user-friendly service to the public. The collection of ID data and issuance of ID cards are day-to-day functions of many government entities under existing laws. Even the Supreme Court has its own ID system for employees of

the Court and all first and second level courts. The Court is even trying to unify its ID system with those of the appellate courts, namely the Court of Appeals, Sandiganbayan and Court of Tax Appeals.

There is nothing legislative about unifying existing ID systems of all courts within the Judiciary. The same is true for government entities under the Executive department. If government entities under the Executive department decide to unify their existing ID data collection and ID card issuance systems to achieve savings, efficiency, compatibility and convenience, such act does not involve the exercise of any legislative power. Thus, the issuance of EO 420 does not constitute usurpation of legislative power.

Then in **POWER SECTOR ASSETS AND LIABILITIES MANAGEMENT CORPORATION v. COMMISSIONER OF INTERNAL REVENUE**, G.R. No. 198146, August 8, 2017, the **power of control** of the President over the executive branch, and corollary concepts, were further explained by Justice Carpio for the Court *en banc*. The case was a petition for review that assailed a decision and resolution of the Court of Appeals, which nullified the decisions of the Secretary of Justice for lack of jurisdiction:

The Facts

Petitioner Power Sector Assets and Liabilities Management Corporation (PSALM) is a government-owned and controlled corporation created under Republic Act No. 9136 (RA 9136), also known as the Electric Power Industry Reform Act of 2001 (EPIRA). Section 50 of RA 9136 states that the principal purpose of PSALM is to manage the orderly sale, disposition, and privatization of the National Power Corporation (NPC) generation assets, real estate and other disposable assets, and Independent Power Producer (IPP) contracts with the objective of liquidating all NPC financial obligations and stranded contract costs in an optimal manner.

PSALM conducted public biddings for the privatization of the Pantabangan-Masiway Hydroelectric Power Plant (Pantabangan-Masiway Plant) and Magat Hydroelectric Power Plant (Magat Plant) on 8 September 2006 and 14 December 2006, respectively. First Gen Hydropower Corporation with its \$129 Million bid and SN Aboitiz Power Corporation with its \$530 Million bid were the winning bidders for the Pantabangan-Masiway Plant and Magat Plant, respectively.

On 28 August 2007, the NPC received a letter dated 14 August 2007 from the Bureau of Internal Revenue (BIR) demanding immediate payment of P3,813,080,472 deficiency value-added tax (VAT) for the sale of the Pantabangan-Masiway Plant and Magat Plant. The NPC indorsed BIR's demand letter to PSALM.

On 30 August 2007, the BIR, NPC, and PSALM executed a Memorandum of Agreement (MOA), wherein they agreed that:

A) NPC/PSALM shall remit under protest to the BIR the amount of PhP 3,813,080,472.00, representing basic VAT as shown in the BIR letter dated August 14, 2007, upon execution of this Memorandum of Agreement (MOA).

B) This remittance shall be without prejudice to the outcome of the resolution of the Issues before the appropriate courts or body.

C) NPC/PSALM and BIR mutually undertake to seek final resolution of the Issues by the appropriate courts or body.

D) BIR shall waive any and all interests and surcharges on the aforesaid BIR letter, except when the case is elevated by the BIR before an appellate court.

E) Nothing contained in this MOA shall be claimed or construed to be an admission against interest as to any party or evidence of any liability or wrongdoing whatsoever nor an abandonment of any position taken by NPC/PSALM in connection with the Issues.

F) Each Party to this MOA hereto expressly represents that the authorized signatory hereto has the legal authority to bind [the] party to all the terms of this MOA.

G) Any resolution by the appropriate courts or body in favor of the BIR, other than a decision by the Supreme Court, shall not constitute as precedent and sufficient legal basis as to the taxability of NPC/PSALM's transactions pursuant to the privatization of NPC's assets as mandated by the EPIRA Law.

H) Any resolution in favor of NPC/PSALM by any appropriate court or body shall be immediately executory without necessity of notice or demand from NPC/PSALM. A ruling from the Department of Justice (DOJ) that is favorable to NPC/PSALM shall be tantamount to the filing of an application for refund (in cash)/tax credit certificate (TCC), at the option of NPC/PSALM. BIR undertakes to immediately process and approve the application, and release the tax refund/TCC within fifteen (15) working days from issuance of the DOJ ruling that is favorable to NPC/PSALM.

I) Either party has the right to appeal any adverse decision

against it before any appropriate court or body.

J) In the event of failure by the BIR to fulfill the undertaking referred to in (H) above, NPC/PSALM shall assign to DOF its right to the refund of the subject remittance, and the DOF shall offset such amount against any liability of NPC/PSALM to the National Government pursuant to the objectives of the EPIRA on the application of the privatization proceeds.

In compliance with the MOA, PSALM remitted under protest to the BIR the amount of P3,813,080,472, representing the total basic VAT due.

On 21 September 2007, PSALM filed with the Department of Justice (DOJ) a petition for the adjudication of the dispute with the BIR to resolve the issue of whether the sale of the power plants should be subject to VAT. The case was docketed as OSJ Case No. 2007-3.

On 13 March 2008, the DOJ ruled in favor of PSALM, thus:

In cases involving purely question[s] of law, such as in the instant case, between and among the government-owned and controlled corporation and government bureau, the issue is best settled in this Department. In the final analysis, there is but one party in interest, the Government itself in this litigation.

...

The instant petition is an original petition involving only [a] question of law on whether or not the sale of the Pantabangan-Masiway and Magat Power Plants to private entities under the mandate of the EPIRA is subject to VAT. It is to be stressed that this is not an appeal from the decision of the Commissioner of Internal Revenue involving disputed assessments, refunds of internal revenue taxes, fees or other charges, or other matters arising under the National Internal Revenue Code or other law.

...

Moreover, it must be noted that respondent already invoked this Office's jurisdiction over it by praying in respondent's Motion for Extension of Time to File Comment (On Petitioner's Petition dated 21 September 2007) and later, Omnibus Motion To Lift Order dated 22 October 2007 and To Admit Attached Comment. The Court has held that the filing of motions seeking affirmative relief, such as, to admit answer, for additional time to answer, for reconsideration of

a default judgment, and to lift order of default with motion for reconsideration, are considered voluntary submission to the jurisdiction of the court. Having sought this Office to grant extension of time to file answer or comment to the instant petition, thereby submitting to the jurisdiction of this Court [sic], respondent cannot now repudiate the very same authority it sought.

...

When petitioner was created under Section 49 of RA No. 9136, for the principal purpose to manage the orderly sale, disposition, and privatization of NPC generation assets, real estate and other disposable assets, IPP contracts with the objective of liquidating all NPC financial obligations and stranded contract costs in an optimal manner, there was, by operation of law, the transfer of ownership of NPC assets. Such transfer of ownership was not carried out in the ordinary course of transfer which must be accorded with the required elements present for a valid transfer, but in this case, in accordance with the mandate of the law, that is, EPIRA. Thus, respondent cannot assert that it was NPC who was the actual seller of the Pantabangan-Masiway and Magat Power Plants, because at the time of selling the aforesaid power plants, the owner then was already the petitioner and not the NPC. Consequently, petitioner cannot also be considered a successor-in-interest of NPC.

Since it was petitioner who sold the Pantabangan-Masiway and Magat Power Plants and not the NPC, through a competitive and public bidding to the private entities, Section 24(A) of RA No. 9337 cannot be applied to the instant case. Neither the grant of exemption and revocation of the tax exemption accorded to the NPC, be also affected to petitioner.

...

Clearly, the disposition of Pantabangan-Masiway and Magat Power Plants was not in the regular conduct or pursuit of a commercial or an economic activity, but was effected by the mandate of the EPIRA upon petitioner to direct the orderly sale, disposition, and privatization of NPC generation assets, real estate and other disposable assets, and IPP contracts, and afterward, to liquidate the outstanding obligations of the NPC.

...

Verily, to subject the sale of generation assets in accordance with a privatization plan submitted to and approved by the President, which is a one-time sale, to VAT would run counter

to the purpose of obtaining optimal proceeds since potential bidders would necessarily have to take into account such extra cost of VAT.

WHEREFORE, premises considered, the imposition by respondent Bureau of Internal Revenue of deficiency Value-Added Tax in the amount of P3,813,080,472.00 on the privatization sale of the Pantabangan-Masiway and Magat Power Plants, done in accordance with the mandate of the Electric Power Industry Reform Act of 2001, is hereby declared NULL and VOID. Respondent is directed to refund the amount of P3,813,080,472.00 remitted under protest by petitioner to respondent.

The BIR moved for reconsideration, alleging that the DOJ had no jurisdiction since the dispute involved tax laws administered by the BIR and therefore within the jurisdiction of the Court of Tax Appeals (CTA). Furthermore, the BIR stated that the sale of the subject power plants by PSALM to private entities is in the course of trade or business, as contemplated under Section 105 of the National Internal Revenue Code (NIRC) of 1997, which covers incidental transactions. Thus, the sale is subject to VAT.

On 14 January 2009, the DOJ denied BIR's Motion for Reconsideration.

On 7 April 2009, the BIR Commissioner (Commissioner of Internal Revenue) filed with the Court of Appeals a petition for *certiorari*, seeking to set aside the DOJ's decision for lack of jurisdiction. In a Resolution dated 23 April 2009, the Court of Appeals dismissed the petition for failure to attach the relevant pleadings and documents. Upon motion for reconsideration, the Court of Appeals reinstated the petition in its Resolution dated 10 July 2009.

The Ruling of the Court of Appeals

The Court of Appeals held that the petition filed by PSALM with the DOJ was really a protest against the assessment of deficiency VAT, which under Section 204 of the NIRC of 1997 is within the authority of the Commissioner of Internal Revenue (CIR) to resolve. In fact, PSALM's objective in filing the petition was to recover the P3,813,080,472 VAT which was allegedly assessed erroneously and which PSALM paid under protest to the BIR.

Quoting paragraph H of the MOA among the BIR, NPC, and

PSALM, the Court of Appeals stated that the parties in effect agreed to consider a DOJ ruling favorable to PSALM as the latter's application for refund.

Citing Section 4 of the NIRC of 1997, as amended by Section 3 of Republic Act No. 8424 (RA 8424)¹⁰⁷ and Section 7 of Republic Act No. 9282 (RA 9282),¹⁰⁸ the Court of Appeals ruled that the CIR is the proper body to resolve cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties imposed in relation thereto, or other matters arising under the NIRC or other laws administered by the BIR. The Court of Appeals stressed that jurisdiction is conferred by law or by the Constitution; the parties, such as in this case, cannot agree or stipulate on it by conferring jurisdiction in a body that has none. Jurisdiction over the person can be waived but not the jurisdiction over the subject matter which is neither subject to agreement nor conferred by consent of the parties. The Court of Appeals held that the DOJ Secretary erred in ruling that the CIR is estopped from assailing the jurisdiction of the DOJ after having agreed to submit to its jurisdiction. As a general rule, estoppel does not confer jurisdiction over a cause of action to a tribunal where none, by law, exists.

In conclusion, the Court of Appeals found that the DOJ Secretary gravely abused his discretion amounting to lack of jurisdiction when he assumed jurisdiction over OSJ Case No. 2007-3. The dispositive portion of the Court of Appeals' 27 September 2010 Decision reads:

WHEREFORE, premises considered, we hereby GRANT the petition. Accordingly: (1) the [D]ecision dated March 13, 2008, and the Decision dated January 14, 2009 both issued by the public respondent Secretary of Justice in [OSJ Case No.] 2007-3 are declared NULL and VOID for having been issued without jurisdiction. ...

PSALM moved for reconsideration, which the Court of Appeals denied in its 3 August 2011 Resolution.

¹⁰⁷ An Act Amending The National Internal Revenue Code, As Amended, And For Other Purposes.

¹⁰⁸ An Act Expanding The Jurisdiction Of The Court Of Tax Appeals (CTA), Elevating Its Rank To The Level Of A Collegiate Court With Special Jurisdiction And Enlarging Its Membership, Amending For The Purpose Certain Sections Of Republic Act No. 1125, As Amended, Otherwise Known As The Law Creating The Court Of Tax Appeals, And For Other Purposes.

Hence, this petition. ...

In finding the petition meritorious, the relevant and primary issue resolved by Justice Carpio in **PSALM** was whether the Secretary of Justice had jurisdiction over the case, which, in turn, involved the resolution of whether the sale of the Pantabangan-Masiway Plant and Magat Plant was subject to the value added tax:

We agree with the Court of Appeals that jurisdiction over the subject matter is vested by the Constitution or by law, and not by the parties to an action.¹⁰⁹ Jurisdiction cannot be conferred by consent or acquiescence of the parties¹¹⁰ or by erroneous belief of the court, quasi-judicial office or government agency that it exists.

However, contrary to the ruling of the Court of Appeals, we find that the DOJ is vested by law with jurisdiction over this case. This case involves a dispute between PSALM and NPC, which are both wholly government-owned corporations, and the BIR, a government office, over the imposition of VAT on the sale of the two power plants. There is no question that original jurisdiction is with the CIR, who issues the preliminary and the final tax assessments. However, if the government entity disputes the tax assessment, the dispute is already between the BIR (represented by the CIR) and another government entity, in this case, the petitioner PSALM. Under Presidential Decree No. 242¹¹¹ (PD 242), all disputes and claims solely between government agencies and offices, including government-owned or controlled corporations, shall be administratively settled or adjudicated by the Secretary of Justice, the Solicitor General, or the Government Corporate Counsel, depending on the issues and government agencies involved. As regards cases involving only questions of law, it is the Secretary of Justice who has jurisdiction. Sections 1, 2, and 3 of PD 242 read:

Sec. 1. Provisions of law to the contrary notwithstanding, all disputes, claims and controversies solely between or among the

¹⁰⁹ *Magno v. People*, 662 Phil. 726 (2011); *Republic of the Philippines v. Sandiganbayan*, 454 Phil. 504 (2003).

¹¹⁰ *Nippon Express (Philippines) Corporation v. Commissioner of Internal Revenue*, 706 Phil. 442 (2013); *Cojuangco, Jr. v. Republic of the Philippines*, 699 Phil. 443 (2012).

¹¹¹ *Prescribing The Procedure For Administrative Settlement Or Adjudication Of Disputes, Claims And Controversies Between Or Among Government Offices, Agencies And Instrumentalities, Including Government-Owned Or Controlled Corporations, And For Other Purposes* (1973).

departments, bureaus, offices, agencies and instrumentalities of the National Government, including constitutional offices or agencies, arising from the interpretation and application of statutes, contracts or agreements, shall henceforth be administratively settled or adjudicated as provided hereinafter: Provided, That, this shall not apply to cases already pending in court at the time of the effectivity of this decree.

Sec. 2. In all cases involving only questions of law, the same shall be submitted to and settled or adjudicated by the Secretary of Justice, as Attorney General and *ex officio* adviser of all government-owned or controlled corporations and entities, in consonance with Section 83 of the Revised Administrative Code. His ruling or determination of the question in each case shall be conclusive and binding upon all the parties concerned.

Sec. 3. Cases involving mixed questions of law and of fact or only factual issues shall be submitted to and settled or adjudicated by:

- (a) The Solicitor General, with respect to disputes or claims [or] controversies between or among the departments, bureaus, offices and other agencies of the National Government;
- (b) The Government Corporate Counsel, with respect to disputes or claims or controversies between or among the government-owned or controlled corporations or entities being served by the Office of the Government Corporate Counsel; and
- (c) The Secretary of Justice, with respect to all other disputes or claims or controversies which do not fall under the categories mentioned in paragraphs (a) and (b).

The use of the word “shall” in a statute connotes a mandatory order or an imperative obligation.¹¹² Its use rendered the provisions mandatory and not merely permissive, and unless PD 242 is declared unconstitutional, its provisions must be followed. The use of the word “shall” means that administrative settlement or adjudication of disputes and claims between government agencies and offices, including government-owned or controlled corporations, is not merely permissive but mandatory and imperative. Thus, under PD 242, it is mandatory that disputes and claims “solely” between government agencies and offices, including government-owned or controlled corporations,

¹¹² *Abakada Guro Party List v. Hon. Exec. Sec. Ermita*, 506 Phil. 1 (2005); *Enriquez v. Enriquez*, 505 Phil. 193 (2005); *Province of Batangas v. Hon. Romulo*, 473 Phil. 806 (2004).

involving only questions of law, be submitted to and settled or adjudicated by the Secretary of Justice.

The law is clear and covers “all disputes, claims and controversies solely between or among the departments, bureaus, offices, agencies and instrumentalities of the National Government, including constitutional offices or agencies arising from the interpretation and application of statutes, contracts or agreements.” When the law says “all disputes, claims and controversies solely” among government agencies, the law means all, without exception. Only those cases already pending in court at the time of the effectivity of PD 242 are not covered by the law.

The purpose of PD 242 is to provide for a speedy and efficient administrative settlement or adjudication of disputes between government offices or agencies under the Executive branch, as well as to filter cases to lessen the clogged dockets of the courts. As explained by the Court in *Philippine Veterans Investment Development Corp. (PHIVIDEC) v. Judge Velez*:¹¹³

Contrary to the opinion of the lower court, P.D. No. 242 is not unconstitutional. It does not diminish the jurisdiction of [the] courts but only prescribes an administrative procedure for the settlement of certain types of disputes between or among departments, bureaus, offices, agencies, and instrumentalities of the National Government, including government- owned or controlled corporations, so that they need not always repair to the courts for the settlement of controversies arising from the interpretation and application of statutes, contracts or agreements. The procedure is not much different, and no less desirable, than the arbitration procedures provided in Republic Act No. 876 (Arbitration Law) and in Section 26, RA 6715 (The Labor Code). It is an alternative to, or a substitute for, traditional litigation in court with the added advantage of avoiding the delays, vexations and expense of court proceedings. Or, as P.D. No. 242 itself explains, its purpose is “the elimination of needless clogging of court dockets to prevent the waste of time and energies not only of the government lawyers but also of the courts, and eliminates expenses incurred in the filing and prosecution of judicial actions.

PD 242 is only applicable to disputes, claims, and controversies

¹¹³ 276 Phil. 439 (1991).

solely between or among the departments, bureaus, offices, agencies and instrumentalities of the National Government, including government-owned or controlled corporations, and where no private party is involved. In other words, PD 242 will only apply when all the parties involved are purely government offices and government-owned or controlled corporations. Since this case is a dispute between PSALM and NPC, both government-owned and controlled corporations, and the BIR, a National Government office, PD 242 clearly applies and the Secretary of Justice has jurisdiction over this case. In fact, the MOA executed by the BIR, NPC, and PSALM explicitly provides that “[a] ruling from the Department of Justice (DOJ) that is favorable to NPC/PSALM shall be tantamount to the filing of an application for refund (in cash)/tax credit certificate (TCC), at the option of NPC/PSALM.” Such provision indicates that the BIR and petitioner PSALM and the NPC acknowledged that the Secretary of Justice indeed has jurisdiction to resolve their dispute.

This case is different from the case of *Philippine National Oil Company v. Court of Appeals*, (*PNOC v. CA*)¹¹⁴ which involves not only the BIR (a government bureau) and the PNOC and PNB (both government-owned or controlled corporations), but also respondent Tirso Savellano, a private citizen. Clearly, PD 242 is not applicable to the case of *PNOC v. CA*. Even the *ponencia* in *PNOC v. CA* stated that the dispute in that case is not covered by PD 242, thus:

Even if, for the sake of argument, that P.D. No. 242 should prevail over Rep. Act No. 1125, the present dispute would still not be covered by P.D. No. 242. Section 1 of P.D. No. 242 explicitly provides that only disputes, claims and controversies solely between or among departments, bureaus, offices, agencies, and instrumentalities of the National Government, including constitutional offices or agencies, as well as government-owned and controlled corporations, shall be administratively settled or adjudicated. While the BIR is obviously a government bureau, and both PNOC and PNB are government-owned and controlled corporations, respondent Savellano is a private citizen. His standing in the controversy could not be lightly brushed aside. It was private respondent Savellano who gave the BIR the information that resulted in the investigation of PNOC and PNB; who requested the BIR Commissioner to reconsider the compromise agreement in

¹¹⁴ 496 Phil. 506 (2005).

question; and who initiated the CTA Case No. 4249 by filing a Petition for Review.

In contrast, since this case is a dispute solely between PSALM and NPC, both government-owned and controlled corporations, and the BIR, a National Government office, PD 242 clearly applies and the Secretary of Justice has jurisdiction over this case.

It is only proper that intra-governmental disputes be settled administratively since the opposing government offices, agencies and instrumentalities are all under the President's executive control and supervision (... as provided in) Section 17, Article VII of the Constitution ... In *Carpio v. Executive Secretary*,¹¹⁵ the Court expounded on the President's control over all the executive departments, bureaus and offices, thus:

This presidential power of control over the executive branch of government extends over all executive officers from Cabinet Secretary to the lowliest clerk and has been held by us, in the landmark case of *Mondano v. Silvosa*, to mean "the power of [the President] to alter or modify or nullify or set aside what a subordinate officer had done in the performance of his duties and to substitute the judgment of the former with that of the latter." It is said to be at the very "heart of the meaning of Chief Executive."

Equally well accepted, as a corollary rule to the control powers of the President, is the "Doctrine of Qualified Political Agency." As the President cannot be expected to exercise his control powers all at the same time and in person, he will have to delegate some of them to his Cabinet members.

Under this doctrine, which recognizes the establishment of a single executive, "all executive and administrative organizations are adjuncts of the Executive Department, the heads of the various executive departments are assistants and agents of the Chief Executive, and, except in cases where the Chief Executive is required by the Constitution or law to act in person on the exigencies of the situation demand that he act personally, the multifarious executive and administrative functions of the Chief Executive are performed by and through the executive departments, and the acts of the Secretaries of such departments, performed and promulgated in the regular

¹¹⁵ 283 Phil. 196 (1992).

course of business, are, unless disapproved or reprobated by the Chief Executive presumptively the acts of the Chief Executive.”

Thus, and in short, “the President’s power of control is directly exercised by him over the members of the Cabinet who, in turn, and by his authority, control the bureaus and other offices under their respective jurisdictions in the executive department.”

This power of control vested by the Constitution in the President cannot be diminished by law. As held in **Rufino v. Endriga**,¹¹⁶ Congress cannot by law deprive the President of his power of control, thus:

The Legislature cannot validly enact a law that puts a government office in the Executive branch outside the control of the President in the guise of insulating that office from politics or making it independent. If the office is part of the Executive branch, it must remain subject to the control of the President. Otherwise, the Legislature can deprive the President of his constitutional power of control over “all the executive ... offices.” If the Legislature can do this with the Executive branch, then the Legislature can also deal a similar blow to the Judicial branch by enacting a law putting decisions of certain lower courts beyond the review power of the Supreme Court. This will destroy the system of checks and balances finely structured in the 1987 Constitution among the Executive, Legislative, and Judicial branches.

Clearly, the President’s constitutional power of control over all the executive departments, bureaus and offices cannot be curtailed or diminished by law. “Since the Constitution has given the President the power of control, with all its awesome implications, it is the Constitution alone which can curtail such power.”¹¹⁷ This constitutional power of control of the President cannot be diminished by the CTA. **Thus, if two executive offices or agencies cannot agree, it is only proper and logical that the President, as the sole Executive who under the Constitution has control over both offices or agencies in dispute, should resolve the dispute instead of the courts. The judiciary should not intrude in this**

¹¹⁶ 528 Phil. 473 (2006), penned by Justice Carpio and excerpted above.

¹¹⁷ Joaquin G. Bernas, *The 1987 Constitution Of The Republic Of The Philippines: A Commentary* 859 (2003).

executive function of determining which is correct between the opposing government offices or agencies, which are both under the sole control of the President. Under his constitutional power of control, the President decides the dispute between the two executive offices. The judiciary cannot substitute its decision over that of the President. Only after the President has decided or settled the dispute can the courts' jurisdiction be invoked. Until such time, the judiciary should not interfere since the issue is not yet ripe for judicial adjudication. Otherwise, the judiciary would infringe on the President's exercise of his constitutional power of control over all the executive departments, bureaus, and offices.

Furthermore, under the doctrine of exhaustion of administrative remedies, it is mandated that where a remedy before an administrative body is provided by statute, relief must be sought by exhausting this remedy prior to bringing an action in court in order to give the administrative body every opportunity to decide a matter that comes within its jurisdiction.¹¹⁸ A litigant cannot go to court without first pursuing his administrative remedies; otherwise, his action is premature and his case is not ripe for judicial determination.¹¹⁹ PD 242 (now Chapter 14, Book IV of Executive Order No. 292), provides for such administrative remedy. Thus, only after the President has decided the dispute between government offices and agencies can the losing party resort to the courts, if it so desires. Otherwise, a resort to the courts would be premature for failure to exhaust administrative remedies. Non-observance of the doctrine of exhaustion of administrative remedies would result in lack of cause of action,¹²⁰ which is one of the grounds for the dismissal of a complaint.

The rationale of the doctrine of exhaustion of administrative remedies was aptly explained by the Court in *Universal Robina Corp. (Corn Division) v. Laguna Lake Development Authority*:¹²¹

The doctrine of exhaustion of administrative remedies is a cornerstone of our judicial system. The thrust of the rule is

¹¹⁸ *Smart Communications, Inc. v. Aldecoa*, 717 Phil. 577 (2013); *Special People, Inc. Foundation v. Canda*, 701 Phil. 365 (2013); *Addition Hills Mandaluyong Civic & Social Organization, Inc. v. Megaworld Properties & Holdings, Inc.*, 686 Phil. 76 (2012); *Laguna CATV Network, Inc. v. Hon. Maraan*, 440 Phil. 734 (2002).

¹¹⁹ *Gov. Joson III v. Court of Appeals*, 517 Phil. 555 (2006).

¹²⁰ *Ejera v. Merto*, 725 Phil. 180 (2014).

¹²¹ 664 Phil. 754 (2011).

that courts must allow administrative agencies to carry out their functions and discharge their responsibilities within the specialized areas of their respective competence. The rationale for this doctrine is obvious. It entails lesser expenses and provides for the speedier resolution of the controversies. Comity and convenience also impel courts of justice to shy away from a dispute until the system of administrative redress has been completed.

In requiring parties to exhaust administrative remedies before pursuing action in a court, the doctrine prevents overworked courts from considering issues when remedies are available through administrative channels.¹²² Furthermore, the doctrine endorses a more economical and less formal means of resolving disputes,¹²³ and promotes efficiency since disputes and claims are generally resolved more quickly and economically through administrative proceedings rather than through court litigations.¹²⁴

The Court of Appeals ruled that under the 1997 NIRC, the dispute between the parties is within the authority of the CIR to resolve. Section 4 of the 1997 NIRC reads:

Sec. 4. Power of the Commissioner to Interpret Tax Laws and to Decide Tax Cases.- The power to interpret the provisions of this Code and other tax laws shall be under the exclusive and original jurisdiction of the Commissioner, subject to review by the Secretary of Finance.

The power to decide disputed assessments, refunds in internal revenue taxes, fees or other charges, penalties imposed in relation thereto, or other matters arising under this Code or other laws or portions thereof administered by the Bureau of Internal Revenue is vested in the Commissioner, subject to the exclusive appellate jurisdiction of the Court of Tax Appeals.

The first paragraph of Section 4 of the 1997 NIRC provides that the power of the CIR to interpret the NIRC provisions and other tax laws is subject to review by the Secretary of Finance, who is the alter ego of the President. Thus, the constitutional power of control of the President over all the executive departments, bureaus, and offices (referencing Section 17, Article VII) is still

¹²² *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378, 110 S. Ct. 688, 107 L. Ed. 2D 796 (1990).

¹²³ *Rojo v. Kliger*, 52 Cal. 3D 65, 276 Cal Rptr. 130, 801 P.2d 373 (1990).

¹²⁴ *Woodford v. Ngo*, 126 S. Ct. 2378, 165 L. Ed. 2D 368 (2006).

preserved. **The President's power of control, which cannot be limited or withdrawn by Congress, means the power of the President to alter, modify, nullify, or set aside the judgment or action of a subordinate in the performance of his duties.**¹²⁵

The second paragraph of Section 4 of the 1997 NIRC, providing for the exclusive appellate jurisdiction of the CTA as regards the CIR's decisions on matters involving disputed assessments, refunds in internal revenue taxes, fees or other charges, penalties imposed in relation thereto, or other matters arising under NIRC, is in conflict with PD 242. Under PD 242, all disputes and claims solely between government agencies and offices, including government-owned or controlled corporations, shall be administratively settled or adjudicated by the Secretary of Justice, the Solicitor General, or the Government Corporate Counsel, depending on the issues and government agencies involved.

To harmonize Section 4 of the 1997 NIRC with PD 242, the following interpretation should be adopted: (1) As regards private entities and the BIR, the power to decide disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or other matters arising under the NIRC or other laws administered by the BIR is vested in the CIR subject to the exclusive appellate jurisdiction of the CTA, in accordance with Section 4 of the NIRC; and (2) Where the disputing parties are all public entities (covers disputes between the BIR and other government entities), the case shall be governed by PD 242.

Furthermore, it should be noted that the 1997 NIRC is a general law governing the imposition of national internal revenue taxes, fees, and charges.¹²⁶ On the other hand, PD 242 is a special law that applies only to disputes involving solely government offices, agencies, or instrumentalities. The difference between a special law and a general law was clarified in *Vinzons-Chato v. Fortune Tobacco Corporation*:¹²⁷

A general statute is one which embraces a class of subjects or places and does not omit any subject or place naturally belonging to such class. A special statute, as the term is generally understood, is one which relates to particular persons or things

¹²⁵ *Orosa v. Roa*, 527 Phil. 347 (2006).

¹²⁶ *Commissioner of Internal Revenue v. Philippine Airlines, Inc.*, 609 Phil. 695 (2009).

¹²⁷ 552 Phil. 101 (2007).

of a class or to a particular portion or section of the state only.

A general law and a special law on the same subject are statutes in *pari materia* and should, accordingly, be read together and harmonized, if possible, with a view to giving effect to both. The rule is that where there are two acts, one of which is special and particular and the other general which, if standing alone, would include the same matter and thus conflict with the special act, the special law must prevail since it evinces the legislative intent more clearly than that of a general statute and must not be taken as intended to affect the more particular and specific provisions of the earlier act, unless it is absolutely necessary so to construe it in order to give its words any meaning at all.

The circumstance that the special law is passed before or after the general act does not change the principle. Where the special law is later, it will be regarded as an exception to, or a qualification of, the prior general act; and where the general act is later, the special statute will be construed as remaining an exception to its terms, unless repealed expressly or by necessary implication.

Thus, even if the 1997 NIRC, a general statute, is a later act, PD 242, which is a special law, will still prevail and is treated as an exception to the terms of the 1997 NIRC with regard solely to intra-governmental disputes. PD 242 is a special law while the 1997 NIRC is a general law, insofar as disputes solely between or among government agencies are concerned. Necessarily, such disputes must be resolved under PD 242 and not under the NIRC, precisely because PD 242 specifically mandates the settlement of such disputes in accordance with PD 242. PD 242 is a valid law prescribing the procedure for administrative settlement or adjudication of disputes among government offices, agencies, and instrumentalities under the executive control and supervision of the President.¹²⁸

Even the BIR, through its authorized representative, then OIC Commissioner of Internal Revenue Lilian B. Hefti, acknowledged in the MOA executed by the BIR, NPC, and PSALM, that the Secretary of Justice has jurisdiction to resolve its dispute with petitioner PSALM and the NPC. This is clear from the provision in the MOA (citing paragraph H, quoted earlier)...

¹²⁸ Philippine Veterans Investment Development Corp. (PHIVIDEC) v. Judge Velez, 276 Phil. 439 (1991).

PD 242 is now embodied in Chapter 14, Book IV of Executive Order No. 292 (EO 292), otherwise known as the Administrative Code of 1987, which took effect on 24 November 1989.¹²⁹ The pertinent provisions read:

Chapter 14 - Controversies Among Government Offices and Corporations

Sec. 66. How Settled. - All disputes, claims and controversies, solely between or among the departments, bureaus, offices, agencies and instrumentalities of the National Government, including government-owned or controlled corporations, such as those arising from the interpretation and application of statutes, contracts or agreements, shall be administratively settled or adjudicated in the manner provided in this Chapter. This Chapter shall, however, not apply to disputes involving the Congress, the Supreme Court, the Constitutional Commissions, and local governments.

Sec. 67. Disputes Involving Questions of Law. - All cases involving only questions of law shall be submitted to and settled or adjudicated by the Secretary of Justice as Attorney-General of the National Government and as ex officio legal adviser of all government-owned or controlled corporations. His ruling or decision thereon shall be conclusive and binding on all the parties concerned.

Sec. 68. Disputes Involving Questions of Fact and Law. - Cases involving mixed questions of law and of fact or only factual issues shall be submitted to and settled or adjudicated by:

(1) The Solicitor General, if the dispute, claim or controversy involves only departments, bureaus, offices and other agencies of the National Government as well as government-owned or controlled corporations or entities of whom he is the principal law officer or general counsel; and

(2) The Secretary of Justice, in all other cases not falling under paragraph (1).

Sec. 69. Arbitration. - The determination of factual issues may be referred to an arbitration panel composed of one representative each of the parties involved and presided over by a representative of the Secretary of Justice or the Solicitor General, as the case may be.

Sec. 70. Appeals. - The decision of the Secretary of Justice as well as that of the Solicitor General, when approved by

¹²⁹ *Pandi v. Court of Appeals*, 430 Phil. 239 (2002). Republic Act No. 6682 amended the effectivity clause of EO 292, directing that “[t]his Code shall take effect two years after its publication in the Official Gazette.”

the Secretary of Justice, shall be final and binding upon the parties involved. Appeals may, however, be taken to the President where the amount of the claim or the value of the property exceeds one million pesos. The decision of the President shall be final.

Sec. 71. Rules and Regulations. - The Secretary of Justice shall promulgate the rules and regulations necessary to carry out the provisions of this Chapter.

Since the amount involved in this case is more than one million pesos, the DOJ Secretary's decision may be appealed to the Office of the President in accordance with Section 70, Chapter 14, Book IV of EO 292 and Section 5 of PD 242. If the appeal to the Office of the President is denied, the aggrieved party can still appeal to the Court of Appeals under Section 1, Rule 43 of the 1997 Rules of Civil Procedure.¹³⁰ However, in order not to further delay the disposition of this case, the Court resolves to decide the substantive issue¹³¹ raised in the petition.¹³²

Section 18. The President shall be the Commander-in-Chief of all armed forces of the Philippines and whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion or rebellion. In case of invasion or rebellion, when the public safety requires it, he may, for a period not exceeding sixty days, suspend the privilege of the writ of *habeas corpus* or place the Philippines or any part thereof under martial law. Within forty-eight hours from the proclamation of martial law or the suspension of the privilege of the writ of *habeas corpus*, the President shall submit a report in person or in writing to the Congress. The Congress, voting jointly, by a vote of at least a majority of all its Members in regular or special session, may revoke such proclamation or suspension, which revocation shall not be set

¹³⁰ Appeals From The Court Of Tax Appeals And Quasi-Judicial Agencies To The Court Of Appeals

¹³¹ The Court proceeded to determine whether the sale of the power plants is subject to VAT and concluded that the sale of the power plants cannot be considered an incidental transaction made in the course of NPC's or PSALM's business, and is therefore not subject to VAT. The Court reinstated the decisions of the Secretary of Justice that the deficiency VAT remitted by PSALM under protest should be refunded to PSALM. However, to give effect to Section 70, Chapter 14, Book IV of the Administrative Code of 1987 on appeals from decisions of the Secretary of Justice, the BIR was given an opportunity to appeal the decisions of the Secretary of Justice to the Office of the President within 10 days from finality of the decision of the Court.

¹³² *Traveño v. Bobongon Banana Growers Multi-Purpose Cooperative*, 614 Phil. 222 (2009).

aside by the President. Upon the initiative of the President, the Congress may, in the same manner, extend such proclamation or suspension for a period to be determined by the Congress, if the invasion or rebellion shall persist and public safety requires it.

The Congress, if not in session, shall, within twenty-four hours following such proclamation or suspension, convene in accordance with its rules without need of a call.

The Supreme Court may review, in an appropriate proceeding filed by any citizen, the sufficiency of the factual basis of the proclamation of martial law or the suspension of the privilege of the writ or the extension thereof, and must promulgate its decision thereon within thirty days from its filing.

A state of martial law does not suspend the operation of the Constitution, nor supplant the functioning of the civil courts or legislative assemblies, nor authorize the conferment of jurisdiction on military courts and agencies over civilians where civil courts are able to function, nor automatically suspend the privilege of the writ.

The suspension of the privilege of the writ shall apply only to persons judicially charged for rebellion or offenses inherent in or directly connected with invasion.

During the suspension of the privilege of the writ, any person thus arrested or detained shall be judicially charged within three days, otherwise he shall be released.

On May 23, 2017, President Rodrigo Roa Duterte issued Proclamation No. 216 declaring a state of martial law and suspending the privilege of the writ of *habeas corpus* in the whole of Mindanao, for a period not exceeding 60 days. Consolidated petitions¹³³ were filed with the Court in **LAGMAN v. MEDIALDEA**, G.R. No. 231658, July 4, 2017, 812 Phil. 179,¹³⁴ for the review of the sufficiency of the factual basis of the proclamation of martial law and suspension of the privilege of the writ of *habeas corpus* under **Section 18(3) of this Article**, thereby challenging the constitutionality of Proclamation No. 216. The Court *en*

¹³³ Consolidated with *Cullamat v. Duterte*, G.R. No. 231771 and *Mohamad v. Medialdea*, G.R. No. 231774.

¹³⁴ See discussion under Art. VI, Sec. 23 and Art. XII, Sec. 17.

banc found sufficient factual bases for the issuance of Proclamation No. 216 and declared the same constitutional. Justice Carpio **dissented**, and voted to partially grant the petitions, declare Proclamation No. 216 unconstitutional as to geographic areas of Mindanao outside of Marawi City, and constitutional only within Marawi City. In his **dissent** to the December 5, 2017 Resolution of the Court *en banc*, Justice Carpio provided a brief history of this constitutional provision on **martial law**:

By way of background, the concept of martial law was first introduced into the organic law of the Philippines through the Philippine Autonomy Act of 1916 or the Jones Law.¹³⁵ Under the law, the Governor-General of the Philippine Islands may place the Islands or any part thereof under martial law in case of rebellion or imminent danger thereof and public safety requires it:

Sec. 21. ... [The Governor-General of the Philippine Islands] shall be responsible for the faithful execution of the laws of the Philippine Islands and of the United States operative within the Philippine Islands, and whenever it becomes necessary he may call upon the commanders of the military and naval forces of the United States in the Islands, or summon the *posse comitatus*, or call out the militia or other locally created armed forces, to prevent or suppress lawless violence, invasion, insurrection, or rebellion; and he may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privileges of the writ of *habeas corpus*, or place the Islands, or any part thereof, under martial law: Provided, That whenever the Governor-General shall exercise this authority, he shall at once notify the President of the United States thereof, together with the attending facts and circumstances, and the President shall have power to modify or vacate the action of the Governor-General.

With the passage of the Tydings-McDuffie Act or the Philippine Independence Act, the 1935 Constitution was subsequently enacted. Section 10(2), Article VII of the 1935 Constitution, as amended, provided for the power of the President to place the country or any part thereof under martial law in case of rebellion or imminent danger thereof and public safety requires it:

¹³⁵ See concurring and dissenting opinion, Leonen, J., *Padilla v. Congress of the Philippines*, G.R. Nos. 231671 and 231694, 25 July 2017.

ARTICLE VII

Executive Department

Sec. 10. ... (2) The President shall be commander-in-chief of all armed forces of the Philippines, and, whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion, insurrection, or rebellion. In case of invasion, insurrection, or rebellion or imminent danger thereof, when the public safety requires it, he may suspend the privilege of the writ of *habeas corpus*, or place the Philippines or any part thereof under Martial Law.

The text of paragraph 2, Section 10, Article VII of the 1935 Constitution was reproduced in Section 9, Article VII of the 1973 Constitution:

ARTICLE VII

The President and Vice-President

Sec. 9. The President shall be commander-in-chief of all armed forces of the Philippines and, whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion, insurrection, or rebellion. In case of invasion, insurrection, or rebellion, or imminent danger thereof, when the public safety requires it, he may suspend the privilege of the writ of *habeas corpus*, or place the Philippines or any part thereof under martial law.

...

Indeed, the Jones Law, the 1935 Constitution, and the 1973 Constitution seemed to have conferred to the President the absolute prerogative to determine the territorial scope of martial law because of the phrase “the Philippines or any part thereof.” **However, this seeming absolute discretion must also be interpreted in relation to the legal reality then that the “imminent danger” of rebellion was a valid ground to declare martial law. In other words, the three organic laws expressly empowered the President to place the entire country under martial law, even if the rebellion was limited to a particular locality, because of the “imminent danger” that it would spread or spill over outside the place of actual rebellion.**

This no longer holds true under the 1987 Constitution. With the intentional removal of “imminent danger” as a ground to declare martial law, the President cannot proclaim martial law or suspend the privilege of the

writ because of a possibility of a “spill-over of hostilities” outside the place of actual rebellion.

To validate the President’s action of declaring martial law outside of Marawi City on the basis of a “spill-over of hostilities” would unlawfully reinstate “imminent danger,” a ground not present in the 1987 Constitution, as a ground to declare martial law or suspend the privilege of the writ. To reiterate, the President must be confined strictly to the existence of the two elements under Section 18, Article VII of the 1987 Constitution of actual rebellion or invasion and the satisfaction of the public safety requirement for the declaration of martial law and the suspension of the privilege of the writ in any part of the Philippines. The two elements under the Constitution are only present in Marawi City and are absent in geographic areas of Mindanao outside of Marawi City.

According to Atty. Marlon Iñigo T. Tronqued, Court Attorney VI, Supreme Court, the **dissents** of Justice Carpio in **Lagman** were based on his being “an originalist, inspiring strict adherence to the provisions of the Constitution. Justice Carpio urged the Court to review the sufficiency of the factual basis to declare martial law and suspend the privilege of the writ in the whole of Mindanao with uncompromising objectivity, strictly applying the requirements laid down in the Constitution, and firmly following the Constitution’s letter and intent.”¹³⁶

The Antecedent Facts

...

On the night of 23 May 2017, President Rodrigo Roa Duterte (President Duterte) issued Proclamation No. 216, declaring a state of martial law and suspending the privilege of the writ in the whole of Mindanao. The full text of Proclamation No. 216, signed by President Duterte and attested by Executive Secretary Salvador C. Medialdea reads:

PROCLAMATION NO. 216
DECLARING A STATE OF MARTIAL LAW AND
SUSPENDING THE PRIVILEGE OF THE WRIT OF
HABEAS CORPUS IN THE WHOLE OF MINDANAO
WHEREAS, Proclamation No. 55, series of 2016, was issued
on 04 September 2016 declaring a state of national emergency

¹³⁶ Response of Atty. Marlon Iñigo T. Tronqued, January 30, 2019.

on account of lawless violence in Mindanao;

WHEREAS, Section 18 Article VII of the Constitution provides that "... In case of invasion or rebellion, when the public safety requires it, he (the President) may, for a period not exceeding sixty days, suspend the privilege of the writ of *habeas corpus* or place the Philippines or any part thereof under martial law ...";

WHEREAS, Article 134 of the Revised Penal Code, as amended by R.A. No. 6968, provides that "the crime of rebellion or insurrection is committed by rising and taking arms against the Government for the purpose of removing from the allegiance to said Government or its laws, the territory of the Republic of the Philippines or any part thereof, of any body of land, naval or other armed forces, or depriving the Chief Executive or the Legislature, wholly or partially, of any of their powers or prerogatives";

WHEREAS, part of the reasons for the issuance of Proclamation No. 55 was the series of violent acts committed by the Maute terrorist group such as the attack on the military outpost in Butig, Lanao del Sur in February 2016, killing and wounding several soldiers, and the mass jailbreak in Marawi City in August 2016, freeing their arrested comrades and other detainees;

WHEREAS, today, 23 May 2017, the same Maute terrorist group has taken over a hospital in Marawi City, Lanao del Sur, established several checkpoints within the City, burned down certain government and private facilities and inflicted casualties on the part of Government forces, and started flying the flag of the Islamic State of Iraq and Syria (ISIS) in several areas, thereby openly attempting to remove from the allegiance to the Philippine Government this part of Mindanao and deprive the Chief Executive of his powers and prerogatives to enforce the laws of the land and to maintain public order and safety in Mindanao, constituting the crime of rebellion; and

WHEREAS, this recent attack shows the capability of the Maute group and other rebel groups to sow terror, and cause death and damage to property not only in Lanao del Sur but also in other parts of Mindanao.

NOW, THEREFORE, I, RODRIGO ROA DUTERTE, President of the Republic of the Philippines by virtue of the powers vested in me by the Constitution and by law, do hereby proclaim as follows:

Sec. 1. There is hereby declared a state of martial law in the Mindanao group of islands for a period not exceeding sixty

days, effective as of the date hereof.

Sec. 2. The privilege of the writ of *habeas corpus* shall likewise be suspended in the aforesaid area for the duration of the state of martial law.

DONE, in the Russian Federation, this 23rd day of May in the year of our Lord[,] Two Thousand and Seventeen.

On 25 May 2017, President Duterte submitted his Report to Congress in accordance with Section 18, Article VII of the 1987 Constitution... In his Report, President Duterte presented the following justifications for imposing martial law and suspending the privilege of the writ in the whole of Mindanao:

Pursuant to Section 18, Article VII of the 1987 Constitution, I am submitting hereunder the Report relative to Proclamation No. 216 dated 23 May 2017 entitled, “Declaring a State of Martial Law and Suspending the Privilege of the Writ of *Habeas Corpus* in the Whole of Mindanao,” after finding that lawless armed groups have taken up arms and committed public uprising against the duly constituted government and against the people of Mindanao, for the purpose of removing Mindanao - starting with the City of Marawi, Lanao del Sur - from its allegiance to the Government and its laws and depriving the Chief Executive of his powers and prerogatives to enforce the laws of the land and to maintain public order and safety in Mindanao, to the great damage, prejudice, and detriment of the people therein and the nation as a whole. The text of Proclamation No. 216 reads:

...

Mindanao has been the hotbed of violent extremism and a brewing rebellion for decades. In more recent years, we have witnessed the perpetration of numerous acts of violence challenging the authority of the duly constituted authorities, i.e., the Zamboanga siege, the Davao bombing, the Mamasapano carnage, and the bombings in Cotabato, Sultan Kudarat, Sulu, and Basilan, among others. Two armed groups have figured prominently in all these, namely, the Abu Sayyaf Group (ASG) and the ISIS-backed Maute Group. On 23 May 2017, a government operation to capture Isnilon Hapilon, senior leader of the ASG, and Maute Group operational leaders, Abdullah and Omarkhayam Maute, was confronted with armed resistance which escalated into open hostility against the government. Through these groups’ armed siege and acts of violence directed towards civilians and government authorities, institutions and establishments,

they were able to take control of major social, economic, and political foundations of Marawi City which led to its paralysis. This sudden taking of control was intended to lay the groundwork for the eventual establishment of a DAESH¹³⁷ wilayat or province in Mindanao.

Based on verified intelligence reports, the Maute Group, as of the end of 2016, consisted of around two hundred sixty-three (263) members, fully armed and prepared to wage combat in furtherance of its aims. The group chiefly operates in the province of Lanao del Sur, but has extensive networks and linkages with foreign and local armed groups such as the Jemaah Islamiyah, Mujahidin Indonesia Timur and the ASG. It adheres to the ideals being espoused by DAESH, as evidenced by, among others, its publication of a video footage declaring its allegiance to the DAESH. Reports abound that foreign-based terrorist groups, the ISIS (Islamic State of Iraq and Syria) in particular, as well as illegal drug money, provide financial and logistical support to the Maute Group. The events commencing on 23 May 2017 put on public display the groups' clear intention to establish an Islamic State and their capability to deprive the duly constituted authorities - the President, foremost - of their powers and prerogatives.

- At 1400H members of the Maute Group and ASG, along with their sympathizers, commenced their attack on various facilities - government and privately owned - in the City of Marawi.
- At 1600H around fifty (50) armed criminals assaulted Marawi City Jail being managed by the Bureau of Jail Management and Penology (BJMP).
- The Maute Group forcibly entered the jail facilities, destroyed its main gate, and assaulted on-duty personnel. BJMP personnel were disarmed, tied, and/or locked inside the cells.
- The group took cellphones, personnel-issued firearms, and vehicles (i.e., two [2] prisoner vans and private vehicles).
- By 1630H, the supply of power into Marawi City had been interrupted, and sporadic gunfights were heard and felt everywhere. By evening, the power outage had spread citywide. (As of 24 May 2017, Marawi City's electric supply was still cut off, plunging the city into total black-out.)
- From 1800 to 1900H, the same members of the Maute

¹³⁷ Acronym of the group's full Arabic name, *al-Dawla al-Islamiya fi al-Iraq wa al-Sham*, translated as "Islamic State in Iraq and Syria."

Group ambushed and burned the Marawi Police Station. A patrol car of the Police Station was also taken.

- A member of the Provincial Drug Enforcement Unit was killed during the takeover of the Marawi City Jail. The Maute Group facilitated the escape of at least sixty-eight (68) inmates of the City Jail.

- The BJMP directed its personnel at the Marawi City and other affected areas to evacuate.

- By evening of 23 May 2017, at least three (3) bridges in Lanao del Sur, namely, Lilod, Bangulo, and Sauiaran, fell under the control of these groups. They threatened to bomb the bridges to pre-empt military reinforcement.

- As of 2222H, persons connected with the Maute group had occupied several areas in Marawi City, including Naga Street, Bangolo Street, Mapandi, and Camp Keithly, as well as the following barangays: Basak Malutlot, Mapandi, Saduc, Lilod Maday, Bangon, Saber, Bubong, Marantao, Caloocan, Banggolo, Barionaga, and Abubakar.

- These lawless armed groups had likewise set up road blockades and checkpoints at the Iligan City-Marawi City junction.

- Later in the evening, the Maute Group burned Dansalan College Foundation, Cathedral of Maria Auxiliadora, the nun's quarters in the church, and the Shia Masjid Moncado Colony. Hostages were taken from the church.

- About five (5) faculty members of Dansalan College Foundation had been reportedly killed by the lawless groups.

- Other educational institutions were also burned, namely, Senator Ninoy Aquino College Foundation and the Marawi Central Elementary Pilot School.

- The Maute Group also attacked Amai Pakpak Hospital and hoisted the DAESH flag there, among other several locations. As of 0600H of 24 May 2017, members of the Maute Group were seen guarding the entry gates of the Amai Pakpak Hospital. They held hostage the employees of the Hospital and took over the Phil-Health office located thereat.

- The groups likewise laid siege to another hospital, Filipino-Libyan Friendship Hospital, which they later set ablaze.

- Lawless armed groups likewise ransacked the Landbank of the Philippines and commandeered one its armored vehicles.

- Latest information indicated that about seventy-five

percent (75%) of Marawi City has been infiltrated by lawless armed groups composed of members of the Maute Group and the ASG. As of the time of this Report, eleven (11) members of the Armed Forces and the Philippine National Police have been killed in action, while thirty-five (35) others have been seriously wounded.

- There are reports that these lawless armed groups are searching for Christian communities in Marawi City to execute Christians. They are also preventing Maranaos from leaving their homes and forcing young male Muslims to join their groups.

- Based on various verified intelligence reports from the AFP and the PNP, there exists a strategic mass action of lawless armed groups in Marawi City, seizing public and private facilities, perpetrating killings of government personnel, and committing armed uprising against and open defiance of the government.

These activities constitute not simply a display of force, but a clear attempt to establish the groups' seat of power in Marawi City for their planned establishment of a DAESH wilayat or province covering the entire Mindanao.

The cutting of vital lines for transportation and power; the recruitment of young Muslims to further expand their ranks and strengthen their force; the armed consolidation of their members throughout Marawi City; the decimation of a segment of the city population who resist; and the brazen display of DAESH flags constitute a clear, pronounced, and unmistakable intent to remove Marawi City, and eventually the rest of Mindanao, from its allegiance to the Government. There exists no doubt that lawless armed groups are attempting to deprive the President of his power, authority, and prerogatives within Marawi City as a precedent to spreading their control over the entire Mindanao, in an attempt to undermine his control over executive departments, bureaus, and offices in said area; defeat his mandate to ensure that all laws are faithfully executed; and remove his supervisory powers over local governments.

Law enforcement and other government agencies now face pronounced difficulty sending their reports to the Chief Executive due to the city-wide power outages. Personnel from the BJMP have been prevented from performing their functions. Through the attack and occupation of several hospitals, medical services in Marawi City have been adversely affected. The bridge and road blockades set up by the groups effectively deprive the government of its ability

to deliver basic services to its citizens. Troop reinforcements have been hampered, preventing the government from restoring peace and order in the area. Movement by both civilians and government personnel to and from the city is likewise hindered.

The taking up of arms by lawless armed groups in the area, with support being provided by foreign-based terrorists and illegal drug money, and their blatant acts of defiance which embolden other armed groups in Mindanao, have resulted in the deterioration of public order and safety in Marawi City; they have likewise compromised the security of the entire island of Mindanao.

The groups' occupation of Marawi City fulfills a strategic objective because of its terrain and the easy access it provides to other parts of Mindanao. Lawless armed groups have historically used provinces adjoining Marawi City as escape routes, supply lines, and backdoor passages.

Considering the network and alliance-building activities among terrorist groups, local criminals, and lawless armed men, the siege of Marawi City is a vital cog in attaining their long-standing goal: absolute control over the entirety of Mindanao. These circumstances demand swift and decisive action to ensure the safety and security of the Filipino people and preserve our national integrity

While the government is presently conducting legitimate operations to address the on-going rebellion, if not the seeds of invasion, public safety necessitates the continued implementation of martial law and the suspension of the privilege of the writ of *habeas corpus* in the whole of Mindanao until such time that the rebellion is completely quelled.

These petitions impugn the constitutionality of Proclamation No. 216.

The Issue

The threshold issue before the Court is whether there is sufficient factual basis for the issuance of Proclamation No. 216 based on the stringent requirements set forth in Section 18, Article VII of the 1987 Constitution.

Discussion

Before proceeding to the substantive issues, I shall first discuss

the procedural issues in this case.

The “appropriate proceeding” under paragraph 3, Section 18, Article VII of the 1987 Constitution is a *sui generis* petition not falling under any of the actions or proceedings under the Rules of Court.¹³⁸

According to the OSG, Section 18, Article VII of the 1987 Constitution must be construed in conjunction with the power of judicial review, and the original jurisdiction in petitions for *certiorari*, of the Court as defined under Sections 1 and 5, respectively, of Article VIII of the 1987 Constitution. For this reason, the OSG concludes that the “appropriate proceeding” referred to in Section 18, Article VII of the 1987 Constitution is a special civil action for *certiorari* under Rule 65 of the Rules of Court.

I disagree.

Based on ... (paragraph 3, Section 18, Article VII), the “appropriate proceeding” referred to is a *sui generis* petition not falling under any of the actions or proceedings in the Rules of Court for the following three reasons.

First, any citizen can be a petitioner. As discussed in the deliberations of the Constitutional Commission, the “citizen” who can challenge the declaration of martial law need not be a taxpayer,¹³⁹ or a resident of the locality where martial law is declared, or even directly or personally prejudiced by the declaration. This was deliberately designed to arrest, without further delay, the grave effects of an illegal declaration of martial law or suspension of the privilege of the writ wherever it may be imposed, and to provide immediate relief to the entire nation.

Second, the Court is vested by the 1987 Constitution with the power to determine the “sufficiency of the factual basis” of the declaration of martial law or suspension of the privilege of the writ. Indeed, the Court is expressly authorized and tasked under

¹³⁸ This is also the ruling of the majority of the Court on this issue - “In fine, the phrase ‘in an appropriate proceeding’ appearing on the third paragraph of Section 18, Article VII refers to any action initiated by a citizen for the purpose of questioning the sufficiency of the factual basis of the exercise of the Chief Executive’s emergency powers, as in these cases. It could be denominated as a complaint, a petition, or a matter to be resolved by the Court.”

¹³⁹ II Record, Constitutional Commission 392 (July 29, 1986).

paragraph 3, Section 18, Article VII of the 1987 Constitution to be a trier of facts in the review petition. Moreover, the standard of “sufficiency of factual basis” is a unique standard applicable only to a review of the constitutionality of the declaration of martial law or suspension of the privilege of the writ.

Third, the Court must decide the case within 30 days from the date of filing of the petition. In contrast, all other cases brought to the Court shall be resolved within 24 months, which period shall be reckoned from the date of submission for resolution rather than the date of filing.

Contrary to the position of the OSG, the proceeding under paragraph 3, Section 18, Article VII of the 1987 Constitution cannot possibly refer to a petition for *certiorari*. Section 1, Rule 65 of the Rules of Court defines a petition for *certiorari* in this wise:

Sec. 1. Petition for *certiorari*. - When any tribunal, board or officer exercising judicial or quasi-judicial functions has acted without or in excess of its or his jurisdiction, or with grave abuse of discretion amounting to lack or excess of jurisdiction, and there is no appeal, or any plain, speedy, and adequate remedy in the ordinary course of law, a person aggrieved thereby may file a verified petition in the proper court, alleging the facts with certainty and praying that judgment be rendered annulling or modifying the proceedings of such tribunal, board or officer, and granting such incidental reliefs as law and justice may require.

What is assailed in a petition for *certiorari* under Rule 65 of the Rules of Court are acts of government officials or tribunals exercising judicial or quasi-judicial functions. In contrast, what is assailed in a proceeding under paragraph 3, Section 18, Article VII of the 1987 Constitution is an executive act of the President not involving judicial or quasi-judicial functions.

More importantly, *certiorari* is an extraordinary remedy designed for the correction of errors of jurisdiction.¹⁴⁰ What is at issue in the present petitions, however, is not the jurisdiction of the President to declare martial law or suspend the privilege of the writ for the 1987 Constitution expressly grants him these powers. Rather, what is at issue is the sufficiency of his

¹⁴⁰ Julie’s Franchise Corp. v. Ruiz, 614 Phil. 108, 117 (2009), citing Soriano v. Ombudsman, 610 Phil. 75 (2009) & Castro v. People, 581 Phil. 639 (2008).

factual basis when he exercised these powers. Simply put, the petition under paragraph 3, Section 18, Article VII of the 1987 Constitution does not involve jurisdictional but factual issues.

Under paragraph 2, Section 1, Article VIII of the Constitution, the Court exercises its expanded *certiorari* jurisdiction to review acts constituting “grave abuse of discretion amounting to lack or excess of jurisdiction” by any branch or instrumentality of Government. However, this expanded *certiorari* power is not applicable to the declaration of martial law or suspension of the privilege of the writ. Grave abuse of discretion generally refers to “capricious or whimsical exercise of judgment that is equivalent to lack or absence of jurisdiction.”¹⁴¹ The abuse of discretion must be so patent and so gross as to amount to an evasion of a positive duty or a virtual refusal to perform a duty enjoined by law, as where the power is exercised in an arbitrary and despotic manner by reason of passion and hostility.¹⁴²

However, paragraph 3, Section 18, Article VII of the 1987 Constitution uses the phrase “sufficiency of the factual basis,” which means that the declaration must not only have factual basis, but the factual basis must also be sufficient. This rules out the “grave abuse of discretion amounting to lack or excess of jurisdiction” standard as the latter requires absence of factual basis. Under the “sufficiency of the factual basis” standard, there may be factual basis, but the same may not be sufficient to justify the imposition of martial law or the suspension of the privilege of the writ. Under the “grave abuse of discretion” standard, there must be no factual basis whatsoever, which is clearly not the letter and intent of paragraph 3, Section 18, Article VII of the 1987 Constitution prescribing the review of the declaration of martial law or suspension of the privilege of the writ. Thus, the “sufficiency of the factual basis” standard, which applies exclusively to the review of the imposition of martial law or suspension of the privilege of the writ, is separate and distinct from the “grave abuse of discretion” standard.

The cases cited by the OSG are also not in point.

Integrated Bar of the Philippines (IBP) v. Zamora,¹⁴³ which employed arbitrariness as the standard of review, involved the

¹⁴¹ De Vera v. De Vera, 602 Phil. 886, 877 (2009).

¹⁴² Ibid.

¹⁴³ 392 Phil. 618 (2000).

calling out power of the President, which is not subject to the “sufficiency of the factual basis” standard. As the Court explained in *IBP*, the “sufficiency of the factual basis” standard is applicable only to the declaration of martial law or the suspension of the privilege of the writ:

... Congress may revoke such proclamation or suspension and the Court may review the sufficiency of the factual basis thereof. However, there is no such equivalent provision dealing with the revocation or review of the President’s action to call out the armed forces. The distinction places the calling out power in a different category from the power to declare martial law and the power to suspend the privilege of the writ of *habeas corpus*, otherwise, the framers of the Constitution would have simply lumped together the three powers and provided for their revocation and review without any qualification. ...

Neither is the case of *Lansang v. Garcia*¹⁴⁴ applicable because it was decided under the 1935 Constitution, which had no provision similar to the “sufficiency of the factual basis” standard under the 1987 Constitution. Section 11 (2), Article VII of the 1935 Constitution reads:

Sec. 11. (1) ...

(2) The President shall be commander-in-chief of all armed forces of the Philippines, and, whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion, insurrection, or rebellion, or imminent danger thereof, when the public safety requires it, he may suspend the privileges of the writ of *habeas corpus*, or place the Philippines or any part thereof under martial law.

Nowhere in the 1935 Constitution did it state that any citizen could ask the Court to review the “sufficiency of the factual basis” of the President’s suspension of the privilege of the writ. In *Lansang*, the Court used its ordinary *certiorari* power to review the constitutionality of the suspension of the privilege of the writ as the 1935 Constitution neither contained the expanded *certiorari* power of the Court nor the “sufficiency of the factual basis” standard now found in the 1987 Constitution. This is not the situation in the present case. Applying the ordinary *certiorari* power the Court used in *Lansang* to the present petitions is to

¹⁴⁴ 149 Phil. 547 (1971).

erase from the 1987 Constitution the “sufficiency of the factual basis” standard expressly written in paragraph 3, Section 18, Article VII of the 1987 Constitution, a standard specifically applicable to the review of the imposition of martial law or the suspension of the privilege of the writ. Applying the ordinary *certiorari* review power in *Lansang* to the present petitions is to drastically revise paragraph 3, Section 18, Article VII of the 1987 Constitution, an act obviously beyond the power of the Court to do.

The burden of proof to show the sufficiency of the factual basis of the declaration of martial law is on the government.

As to who bears the burden of proof, the OSG argues that petitioners must show proof of the sufficiency of the factual basis, being the parties who allege. Moreover, the OSG argues that the presumption of regularity accorded to acts of the President likewise puts the burden of proof on petitioners.

I disagree.

Being a *sui generis* petition intended as a checking mechanism against the abusive imposition of martial law or suspension of the privilege of the writ, the proceeding under paragraph 3, Section 18, Article VII of the 1987 Constitution places the burden of proof on the Government. It is the Government that must justify the resort to extraordinary powers that are subject to the extraordinary review mechanisms under the Constitution. This is only logical because it is the Government that is in possession of facts and intelligence reports justifying the declaration of martial law or suspension of the privilege of the writ. Ordinary citizens are not expected to be in possession of such facts and reports. Hence, to place the burden of proof on petitioners pursuant to the doctrine of “be who alleges must prove” is to make this Constitutional checking mechanism a futile and empty exercise. The Court cannot interpret or apply a provision of the Constitution as to make the provision inutile or meaningless. This is especially true to a constitutional provision designed to check the abusive use of emergency powers that could lead to the curtailment of the cherished Bill of Rights of the people.

The Court, in reviewing the sufficiency of the factual basis of the declaration of martial law or suspension of the privilege

of the writ, can rely on evidence from the Government such as the Proclamation and Report issued by the President himself, General Orders and Implementing Orders issued pursuant to the Proclamation, the Comment of the Solicitor General in defense of the Proclamation, and briefings made by defense and military officials before the Court.

Similarly, in *Lansang*, the Court relied on the pleadings, oral arguments and memoranda of respondents in ruling that the suspension of the privilege of the writ was justified. Other documents relied on were the Letter of the President to the Secretary of National Defense, Communications of the Chief Constabulary to all units of his command, a memorandum of the Department of National Defense, and other intelligence findings, all of which were in the possession of the Government.

The Court cannot simply trust blindly the President when he declares martial law or suspends the privilege of the writ. While the 1987 Constitution vests the totality of executive power in one person only, the same Constitution also specifically empowers the Court to “review” the “sufficiency of the factual basis” of the President’s declaration of martial law or suspension of the privilege of the writ if it is subsequently questioned by any citizen. To “review” the “sufficiency of the factual basis” for the declaration of martial law or suspension of the privilege of the writ means: (1) to make a finding of fact that there is or there is no actual rebellion or invasion, and if there is, (2) to determine whether public safety requires the declaration of martial law or suspension of the privilege of the writ to suppress the rebellion or invasion.

Applying these two elements, the Court’s review power is to determine whether there are sufficient facts establishing rebellion and requiring, for the protection of public safety, the imposition of martial law or the suspension of the privilege of the writ. The Court is tasked by the 1987 Constitution to review an executive act of the President, an act that involves discretion because the President has the prerogative to decide how to deal with the rebellion- whether only to call out the armed forces to suppress the rebellion, or to declare martial law- with or without the suspension of the privilege of the writ. If the President decides only to call out the armed forces, the review power of the Court under the “sufficiency of the factual basis” standard does not apply because this standard, as paragraph 3, Section 18, Article VII of the 1987 Constitution itself states, applies only in case martial law is imposed or the privilege of the writ is suspended.

However, the expanded *certiorari* review power of the Court under the “grave abuse of discretion” standard will apply in the exercise of the President’s calling out power to suppress rebellion. This standard requires total absence of factual basis of rebellion for the Court to invalidate the President’s exercise of the calling out power.

Thus, for the constitutional exercise by the President of his power to impose martial law or suspend the privilege of the writ, a more stringent review by the Court is required by the 1987 Constitution as embodied in the “sufficiency of the factual basis” standard. For the constitutional exercise of the calling out power by the President, a less stringent review by the Court is required by the 1987 Constitution as embodied in the “grave abuse of discretion” standard under the expanded *certiorari* power of the Court.

That the intent of the 1987 Constitution is exactly what its letter says is explained in the deliberations of the Constitutional Commission, to wit:

FR. BERNAS: ... When he (the President) judges that it is necessary to impose martial law or suspend the privilege of the writ of *habeas corpus*, his judgment is subject to review. We are making it subject to review by the Supreme Court and subject to concurrence by the National Assembly. ...¹⁴⁵

Justices of the Court took an oath to preserve and defend the Constitution. Their oath of office does not state that they must trust the President when he declares martial law or suspends the privilege of the writ. On the contrary, paragraph 3, Section 18, Article VII of the 1987 Constitution expressly authorizes and specifically tasks the Court to review the judgment of the President as one of the two checking mechanisms on the President’s power to declare martial law or suspend the privilege of the writ. The 1987 Constitution would not have entrusted this specific review power to the Court if it intended the Justices to simply trust the judgment or wisdom of the President. Such obeisance to the President by the Court is an abject abdication of a solemn duty imposed by the Constitution.

¹⁴⁵ II Record, Constitutional Commission 409 (July 29, 1986).

Similarly, the power of the Court to review under paragraph 3, Section 18, Article VII of the 1987 Constitution is separate and independent of any action taken by Congress. In case of conflict, the decision of the Court, being the ultimate arbiter of constitutional issues, prevails over the decision of Congress.

The quantum of evidence required is probable cause.¹⁴⁶

While the 1987 Constitution expressly provides strict safeguards against any potential abuse of the President's emergency powers, the 1987 Constitution does not compel the President to examine or produce such amount of proof as to unduly burden and effectively incapacitate him from exercising such powers.

The President need not gather proof beyond reasonable doubt, the highest quantum of evidence, which is the standard required for convicting an accused charged with a criminal offense under Section 2, Rule 133 of the Rules of Court. To require the President to establish the existence of rebellion or invasion with such amount of proof before declaring martial law or suspending the privilege of the writ constitutes an excessive restriction on "the President's power to act as to practically tie (his) hands and disable (him) from effectively protecting the nation against threats to public safety."¹⁴⁷

The standard of clear and convincing evidence, which is employed in either criminal or civil cases, is also not required for a lawful declaration of martial law or suspension of the privilege of the writ. This amount of proof likewise unduly restrains the President in exercising his emergency powers, as it requires proof greater than preponderance of evidence although not beyond reasonable doubt.¹⁴⁸

Not even preponderance of evidence under Section 1, Rule 133 of the Rules of Court, which is the degree of proof necessary in civil cases, is demanded for a lawful declaration of martial law or suspension of the privilege of the writ. Preponderance of evidence is evidence which is more convincing to the court as worthy of

¹⁴⁶ See dissenting opinion, Carpio, J., *Fortun v. Macapagal-Arroyo*, 684 Phil. 526, 595-598 (2012).

¹⁴⁷ *Fortun v. Macapagal-Arroyo*, 684 Phil. 526, 596 (2012), quoting from the Brief of Amicus Curiae Father Joaquin G. Bernas, S.J.

¹⁴⁸ *Manalo v. Roldan-Confesor*, 290 Phil 311, 323 (1992).

belief than that which is offered in opposition thereto.¹⁴⁹ This quantum of evidence likewise curtails the President's emergency powers because he has to weigh the superiority of the evidence on hand, from at least two opposing sides, before he can act and impose martial law or suspend the privilege of the writ.

Similarly, substantial evidence constitutes an unnecessary restriction on the President's use of his emergency powers. Substantial evidence is the amount of proof required in administrative or quasi-judicial cases, or that amount of relevant evidence that a reasonable mind might accept as adequate to justify a conclusion.

Probable cause of the existence of either rebellion or invasion suffices and satisfies the standard of proof for a valid declaration of martial law or suspension of the privilege of the writ.

Probable cause is the same amount of proof required for the filing of a criminal information by the prosecutor and for the issuance of an arrest warrant by a judge. Probable cause has been defined as a "set of facts and circumstances as would lead a reasonably discreet and prudent man to believe that the offense charged in the Information or any offense included therein has been committed by the person sought to be arrested."¹⁵⁰ In *Viudez II v. Court of Appeals*,¹⁵¹ the Court explained:

... In determining probable cause, the average man weighs the facts and circumstances without resorting to the calibrations of the rules of evidence of which he has no technical knowledge. He relies on common sense. A finding of probable cause needs only to rest on evidence showing that, more likely than not, a crime has been committed and that it was committed by the accused. ...

The requirement of probable cause is consistent with Section 18, Article VII of the 1987 Constitution. It is only upon the existence of probable cause that a person can be "judicially charged" under the last two paragraphs of Section 18, Article VII of the 1987 Constitution ...

The standard of "reasonable belief" advanced by the OSG is

¹⁴⁹ *Raymundo v. Lunaria*, 590 Phil 546, 553 (2008).

¹⁵⁰ *Santos v. Orda, Jr.*, 634 Phil 452, 461 (2010).

¹⁵¹ 606 Phil. 337 (2009).

essentially the same as probable cause. The Court has held in several cases that probable cause does not mean “actual and positive cause” nor does it import absolute certainty. Rather, probable cause is merely based on opinion and reasonable belief that the act or omission complained of constitutes the offense charged.¹⁵² The facts and circumstances surrounding the case must be such as to excite reasonable belief in the mind of the person charging.¹⁵³

Probable cause, basically premised on common sense, is the most reasonable, most practical, and most expedient standard by which the President can fully ascertain the existence or non-existence of rebellion necessary for a declaration of martial law or suspension of the privilege of the writ. Lacking probable cause of the existence of rebellion, a declaration of martial law or suspension of the privilege of the writ is without any basis and thus, unconstitutional.

However, the sufficiency of the factual basis of martial law must be determined at the time of its proclamation. Immediately preceding or contemporaneous events must establish probable cause for the existence of the factual basis. Subsequent events that immediately take place, however, can be considered to confirm the existence of the factual basis.

Having addressed the procedural aspects of this case, I shall now proceed to the substantive issues raised by the parties.

Under the 1987 Constitution, the declaration of martial law or suspension of the privilege of the writ requires the concurrence of two elements: (1) the existence of actual rebellion or invasion; and (2) public safety requires the declaration.

The power of the President to declare martial law or to suspend the privilege of the writ is anchored on Section 18, Article VII of the 1987 Constitution...

In exercising his Commander-in-Chief power to declare martial law or suspend the privilege of the writ, the 1987 Constitution requires that the President establish the following: (1) the

¹⁵² Aguilar v. Department of Justice, 717 Phil 789, 800 (2013).

¹⁵³ People v. Court of Appeals, 361 Phil. 401, 410-413 (1999).

existence of actual rebellion or invasion; and (2) public safety requires the declaration of martial law or suspension of the privilege of the writ to suppress the rebellion or invasion. Needless to say, the absence of either element will not authorize the President, who is sworn to defend the Constitution, from exercising his Commander-in-Chief power to declare martial law or suspend the privilege of the writ.

The term “rebellion” in Section 18, Article VII of the 1987 Constitution refers to the crime of rebellion as defined by the Revised Penal Code. In fact, when President Duterte issued Proclamation No. 216, he expressly cited the definition of rebellion under the Revised Penal Code.

Article 134 of the Revised Penal Code, as amended by Republic Act No. 6968,¹⁵⁴ defines the crime of rebellion:

Art. 134. Rebellion or insurrection; How committed. - The crime of rebellion or insurrection is committed. By rising publicly and taking arms against the Government for the purpose of removing from the allegiance to said Government or its laws, the territory of the Philippine Islands or any part thereof, of any body of land, naval or other armed forces, depriving the Chief Executive or the Legislature, wholly or partially, of any of their powers or prerogatives.

Based on its statutory definition, the crime of rebellion has the following elements: (1) there is a (a) public uprising and (b) taking arms against the Government; and (2) the purpose of the uprising is either (a) to remove from the allegiance to the Government or its laws: (1) the territory of the Philippines or any part thereof; or (2) any body of land, naval, or other armed forces; or (b) to deprive the Chief Executive or Congress, wholly or partially, of any of their powers and prerogatives.¹⁵⁵

To clarify, mass or crowd action is not a requisite for rebellion. Nowhere in the Revised Penal Code does it say that rebellion can be committed only by mass action, or that masses or multitudes of people are a requirement to constitute the crime of rebellion. Therefore, a single armed fighter could on his own commit the

¹⁵⁴ An Act Punishing The Crime Of *Coup D'etat* By Amending Articles 134, 135 And 136 Of Chapter One, Title Three Of Act Numbered Thirty-Eight Hundred And Fifteen, Otherwise Known As The Revised Penal Code, And For Other Purposes.

¹⁵⁵ *Ladlad v. Velasco*, 551 Phil. 313, 329 (2007).

crime of rebellion.

Moreover, imminent danger or threat of rebellion or invasion is not sufficient. The 1987 Constitution requires the existence of actual rebellion or actual invasion. “Imminent danger” as a ground to declare martial law or suspend the privilege of the writ, which was present in both the 1935 and 1973 Constitutions, was intentionally removed in the 1987 Constitution. By the intentional deletion of the words “imminent danger” in the 1987 Constitution, the President can no longer use imminent danger of rebellion or invasion as a ground to declare martial law or suspend the privilege of the writ. Thus, the President cannot proclaim martial law or suspend the privilege of the writ absent an actual rebellion or actual invasion. This is the clear, indisputable letter and intent of the 1987 Constitution.

However, the existence of actual rebellion or invasion alone would not justify the declaration of martial law or suspension of the privilege of the writ. Another requisite must be satisfied, that is, public safety requires the declaration of martial law or suspension of the privilege of the writ to suppress rebellion or invasion. The 1987 Constitution mandates that the President must establish that the gravity of the rebellion or invasion is such that public safety requires the imposition of martial law or suspension of the privilege of the writ to suppress the rebellion or invasion. If a single armed fighter takes up arms against the Government for the purpose of removing a part of the Philippines from allegiance to the Government, public safety would not justify the President’s imposition of martial law or suspension of the privilege of the writ. Although a single armed fighter can commit rebellion, public safety is certainly not endangered to require the imposition of martial law or suspension of the privilege of the writ in suppressing such rebellion.

In sum, the twin requirements of actual rebellion or actual invasion, and public safety, must both be complied with before the President, acting as Commander-in-Chief, is authorized by the 1987 Constitution to impose martial law or suspend the privilege of the writ in any part, or in the entirety, of the Philippines.

Consequently, in exercising its constitutional duty to “review” the “sufficiency of the factual basis” for the declaration of martial law or suspension of the privilege of the writ, the Court has a two-fold duty: (1) to make a finding of fact that there is or there

is no actual rebellion or invasion, and if there is, (2) to determine whether public safety requires the declaration of martial law or suspension of the privilege of the writ to suppress the rebellion or invasion. If there is actual rebellion or invasion, and the declaration of martial law or suspension of the privilege of the writ is necessary to suppress the rebellion or invasion, then the Court must validate the declaration as constitutional. On the other hand, if there is no actual rebellion or invasion, or even if there is, but the declaration of martial law or suspension of the privilege of the writ is not necessary to suppress the rebellion or invasion, then the Court must strike down the proclamation for being unconstitutional.

This is the specific review power that the framers of the 1987 Constitution and the people who ratified the 1987 Constitution expressly tasked the Court as a checking mechanism to any abusive use by the President of his Commander-in-Chief power to declare martial law or suspend the privilege of the writ. Needless to say, the Court has no option but to perform its solemn constitutional duty in the present petitions.

Probable cause exists that there is actual rebellion and that public safety requires the declaration of martial law and suspension of the privilege of the writ in Marawi City, but not elsewhere.

Applying the evidentiary threshold required in a proceeding challenging the sufficiency of the factual basis of a declaration of martial law and suspension of the privilege of the writ. I find that probable cause exists that there is actual rebellion in Marawi City and that public safety requires the declaration of martial law and suspension of the privilege of the writ in Marawi City to suppress the rebellion.

The armed and public uprising in Marawi City by 400 to 500 Maute-Hapilon armed fighters, with the announced intention to impose Shariah Law in Marawi City and make it an Islamic State, is concrete and indisputable evidence of actual rebellion. The OSG cites *People v. Geronimo*,¹⁵⁶ *People v. Lovedioro*,¹⁵⁷ and *Ladlad* ... in support of its position that rebellion is a crime of

¹⁵⁶ 100 Phil. 90 (1956).

¹⁵⁷ 320 Phil. 481 (1995).

masses and multitudes. However, the Maute-Hapilon armed fighters in Marawi City, numbering no more than 500, do not constitute masses or multitudes. Neither do they command masses or multitudes of followers in Marawi City. Nevertheless, rebellion may be committed even by a single armed fighter who publicly takes up arms against the government to remove a certain territory from allegiance to the Government. Rebellion is not necessarily a crime of masses or multitudes.

Proclamation No. 216 likewise enumerates the belligerent acts of the Maute-Hapilon armed fighters within Marawi City on 23 May 2017. ...

Without question, the widespread killing of both government forces and innocent civilians, coupled with the destruction of government and private facilities, thereby depriving the whole population in Marawi City of basic necessities and services, endangered the public safety in the whole of Marawi City. Hence, with the concurrence of an actual rebellion and requirement of public safety, the President lawfully exercised his Commander-in-Chief powers to declare martial law and suspend the privilege of the writ in Marawi City.

However, the same does not apply to the rest of Mindanao. Proclamation No. 216 and the President's Report to Congress do not contain any evidence whatsoever of actual rebellion outside of Marawi City. In fact, the Proclamation itself states that the Maute-Hapilon armed fighters in Marawi City intended to remove "this part of Mindanao," referring to Marawi City, from Philippine sovereignty. The Proclamation itself admits that only "this part of Mindanao" is the subject of separation from Philippine sovereignty by the rebels. The President's Report did not mention any other city, province or territory in Mindanao, other than Marawi City, that had a similar public uprising by a rebel group, an element of actual rebellion. Thus, the President's Report concludes that "based on various verified intelligence reports from the AFP and the PNP, there exists a strategic mass action of lawless armed groups in Marawi City."

The President's Report expressly states that the Maute-Hapilon armed fighters were waging rebellion first in Marawi City as a prelude or "precedent" to waging rebellion in the rest of Mindanao. This is a clear admission that the rebellion was only in Marawi City and had yet to spread to the rest of Mindanao. ...

Neither did the OSG present any evidence of a Maute-Hapilon-led rebellion in Camiguin Province, Dinagat Province, Bukidnon Province, the Misamis, Agusan, Davao, Zamboanga, Pagadian, Cotabato, Surigao, General Santos, and the other islands and parts of Mindanao.

Likewise, in an interview, the Maute-Hapilon group's spokesperson, Abu Hafs, himself announced publicly over a radio station in Marawi City that the rebels intended to implement Shariah Law in "Marawi City." Other areas of Mindanao, outside of Marawi City, were not mentioned. Abu Hafs said that the Maute-Hapilon group wanted the people of Marawi to sacrifice lives and property for "the total implementation of Shariah Law." It is clear from the interview that other areas of Mindanao outside of Marawi City would not be subjected to the imposition of Shariah Law. Clearly, the scope of the actual rebellion is only in Marawi City.

Proclamation No. 216 also attempts to justify the declaration of martial law and suspension of the privilege of the writ in the whole of Mindanao by citing the capability of the Maute-Hapilon group and other rebel groups to sow terror, and cause death and damage to property, not only in Marawi City but also in other parts of Mindanao. Of the same tenor, the President's Report considers the siege of Marawi City as a precedent or starting point to the spread of control by the Maute-Hapilon group over the entire Mindanao.

This clearly violates the 1987 Constitution.

Capability to rebel, absent an actual rebellion or invasion, is not a ground to declare martial law or suspend the privilege of the writ under the 1987 Constitution. Respondents cannot rely on the Maute-Hapilon group's intention to establish an Islamic State in the whole of Mindanao or even on its capability to deprive duly constituted authorities of their powers as a justification to the imposition of martial law or suspension of the writ in the other areas of Mindanao where there is in fact no actual rebellion. The fear that the rebellion in Marawi City will spread to other areas in Mindanao is a mere danger or threat and may not even amount to an imminent danger or threat. In any event, to allow martial law outside Marawi City on the basis of an imminent danger or threat would unlawfully reinstate the ground of "imminent danger" of rebellion or invasion, a ground that was intentionally removed from the 1987 Constitution. Allowing a

state of martial law or suspension of the privilege of the writ in the rest of Mindanao where there is no actual rebellion is a gross violation of the clear letter and intent of the 1987 Constitution as gleaned from the following deliberations of the Constitutional Commission:

MR. DELOSREYES. As I see it now, the Committee envisions actual rebellion and no longer imminent rebellion. Does the Committee mean that there should be actual shooting or actual attack on the legislature or Malacañang, for example? Let us take for example a contemporary event - this Manila Hotel incident; everybody knows what happened. Would the committee consider that an actual act of rebellion?

MR. REGALADO. If we consider the definition of rebellion under Articles 134 and 135 of the Revised Penal Code, that presupposes an actual assemblage of men in an armed public uprising for the purposes mentioned in Article 134 and by the means employed in Article 135. ...¹⁵⁸

The argument that martial law is justified in the whole of Mindanao since the rebels in Marawi City could easily flee or escape to other areas of Mindanao is also wrong.

When the Court ruled in *People v. Geronimo* and *People v. Lovedioro* that rebellion “cannot be confined *a priori* within predetermined bounds,” the Court was referring to the crimes that may or may not be absorbed in rebellion depending on the absence or presence of political motive for the commission of the crimes attending the commission of rebellion. In other words, the reference to non-confinement to “predetermined bounds” does not refer to geographical boundaries, but to the scope of the attending crimes and circumstances. The Court in *Lovedioro* explained:

The gravamen of the crime of rebellion is an armed public uprising against the government. By its very nature, rebellion is essentially a crime of masses or multitudes involving crowd action, which cannot be confined *a priori* within predetermined bounds. One aspect noteworthy in the commission of rebellion is that other acts committed in its pursuance are, by law, absorbed in the crime itself because they acquire a political character. This peculiarity was underscored in the case of *People v. Hernandez*, thus:

¹⁵⁸ II Record, Constitutional Commission 412 (July 29, 1986).

In short, political crimes are those directly aimed against the political order, as well as such common crimes as may be committed to achieve a political purpose. The decisive factor is the intent or motive. If a crime usually regarded as common, like homicide, is perpetrated for the purpose of removing from the allegiance to the Government the territory of the Philippine Islands or any part thereof, then it becomes stripped of its “common” complexion, inasmuch as, being part and parcel of the crime of rebellion, the former acquires the political character of the latter.

Divested of its common complexion therefore, any ordinary act, however grave, assumes a different color by being absorbed in the crime of rebellion, which carries a lighter penalty than the crime of murder. In deciding if the crime committed is rebellion, not murder, it becomes imperative for our courts to ascertain whether or not the act was done in furtherance of a political end. The political motive of the act should be conclusively demonstrated.

To repeat, *Lovedioro* never declared that rebellion cannot be confined to geographical boundaries.

Lovedioro referred to the many crimes that are absorbed in rebellion when it stated that that “rebellion ... cannot be confined *a priori* within predetermined bounds.”

The rebels who escape Marawi City may be issued a warrant of arrest anywhere within the Philippines without the need to declare martial law or suspend the privilege of the writ outside of Marawi City. The rebels may even be arrested by a civilian pursuant to the provision on warrantless arrests under the Rules of Court. To allow martial law in the whole of Mindanao on the sole basis of securing the arrest of rebels who escape Marawi City would not only violate the 1987 Constitution, but also render useless the provisions of the Revised Penal Code and the Rules of Court. The act of the rebels in fleeing or escaping to other territories outside of the place of rebellion will certainly not constitute armed public uprising for the purpose of removing from allegiance to the Philippines the territory where the rebels flee or escape to.

Moreover, sporadic bombings in other areas of Mindanao outside of Marawi City, in the absence of an armed public uprising against the Government and sans an intent to remove from allegiance to the Government the areas where the bombings

take place, cannot constitute actual rebellion. Such bombings constitute terrorism, but certainly not rebellion as understood in the 1987 Constitution and as defined in the Revised Penal Code. Otherwise, a few bombings in Metro Manila, even without any armed public uprising in Metro Manila, would justify the imposition of martial law in Metro Manila.

Proclamation No. 216, having been issued by the President in the absence of an actual rebellion outside of Marawi City, was issued without sufficient factual basis, contrary to the express requirement under Section 18, Article VII of the 1987 Constitution, with respect to areas outside of Marawi City.¹⁵⁹

Consequences of a proclamation of a state of martial law.

Counsel for petitioners and the OSG share the view that martial law under the 1987 Constitution does not significantly give the President additional powers.

Indeed, there are only incremental accretions of power that automatically attach under a state of martial law. The significant additional powers that the President can exercise under a state of martial law require laws to be enacted by Congress.

First, a state of martial law facilitates the speedy apprehension of suspected rebels, and when the privilege of the writ is likewise suspended, allows a longer detention of suspected rebels under arrest before they are judicially charged.

Under Philippine law, rebellion is a continuing crime. In *Umil v. Ramos*,¹⁶⁰ the Court explained that rebellion constitutes a direct assault against the State for which reason it is considered a

¹⁵⁹ See dissenting opinion, Carpio, J.: Just hours after the Decision in the present petitions was announced on 4 July 2017, President Duterte told media that he declared a Mindanao-wide martial law to prevent a ‘spillover’:

Alam mo, iyong Central Mindanao if you look at the map is in Central Mindanao kaya nga central, sa gitna. You have the two Lanaos, he said. When you declare martial law, you have to use your coconut, the grey matter between your ears. It’s easy to escape because there is no division in terms of land. You can go anywhere, there can be a spillover, he added.

This one confirms that there is no actual rebellion outside of Marawi City. However, the President feared a ‘spillover’ to other areas of Mindanao because ‘it is easy to escape’ from Marawi City ‘because there is no division in terms of land.’

¹⁶⁰ 265 Phil. 325 (1990).

continuing crime, to wit:

However, Rolando Dural was arrested for being a member of the New People's Army (NPA), an outlawed subversive organization. Subversion, being a continuing offense, the arrest of Rolando Dural without warrant is justified as it can be said that he was committing an offense when arrested. The crimes of rebellion, subversion, conspiracy or proposal to commit such crimes, and crimes or offenses committed in furtherance thereof or in connection therewith constitute direct assaults against the State and are in the nature of continuing crimes. ...

Considering that rebellion is a continuing crime in our jurisdiction, any suspected rebel can be the subject of a warrantless arrest within Philippine territory wherever he or she goes. Under the Rules of Criminal Procedure, any person who has committed, is actually committing, or is attempting to commit an offense in the presence of the arresting officer can be arrested without warrant; or if it be an offense which had just been committed, that the police officer making the arrest has personal knowledge of facts or circumstances that the person to be arrested has committed it. Once there is a rebellion, any rebel is deemed to be continuously committing the crime of rebellion wherever he or she may be in the Philippines, even if the rebel has hidden his or her firearm to avoid arrest. In short, with or without a state of martial law, a suspected rebel of a known rebellion such as the present communist CPP-NPA rebellion, can be arrested anywhere in the Philippines, with or without a warrant. Trial courts can take judicial notice of the ongoing communist rebellion in the country.

The difference lies, however, when there is actual rebellion by a new rebel group in a specific locality. The rebels can still be arrested anywhere. However, in a state of martial law, trial courts can take judicial notice of the rebellion for the purpose of applying the continuing crime doctrine under *Umil v. Ramos*. In contrast, without a declaration of martial law, the prosecution will have to prove the fact of rebellion to justify the arrest on the ground of continuing rebellion; trial courts cannot take judicial notice of the new rebellion for the purpose of automatically applying the continuing rebellion doctrine.

Another difference is the period of detention. In a state of martial law where the privilege of the writ is suspended, those arrested of rebellion must be judicially charged within three days from arrest. In other words, they can be lawfully detained for three

days without need to file an Information before the court. In contrast, absent a declaration of martial law, the rebel arrested must be charged judicially within 36 hours as prescribed under Article 125 of the Revised Penal Code. Without martial law, the suspected rebel, absent any criminal charge, can only be lawfully detained for 36 hours.

Second, with the declaration of martial law or suspension of the privilege of the writ, the right to privacy of communication and the freedom to travel can be legitimately restricted on the ground of public safety, provided there is a law enacted by Congress specifically authorizing such restriction.

Under Section 18, Article VII of the 1987 Constitution, “[a] state of martial law does not suspend the operation of the Constitution,” including Article III on the Bill of Rights. However, these rights are not absolute and their continued enjoyment is subject to certain limitations, as may be prescribed by law. Among these are the right to privacy of communication and the freedom to travel, both of which can be restricted through a law when public safety requires it (as provided in) Article III, or the Bill of Rights, of the 1987 Constitution ...

The existence of the twin requirements for the imposition of martial law actual rebellion or invasion and the need to protect public safety may lead to a valid restriction on the privacy of communication and correspondence as well as on the freedom to travel, provided there is an existing law specifically authorizing such restrictions.

Republic Act No. 4200, otherwise known as the Anti-Wiretapping Act, allows any peace officer, upon court authorization in cases involving rebellion, “to tap any wire or cable, or by using any other device or arrangement, to secretly overhear, intercept, or record such communication or spoken word by using a device commonly known as a dictaphone or dictagraph or walkie-talkie or tape recorder, or however otherwise described.” Similarly, Republic Act No. 10173, or the Data Privacy Act of 2012, sanctions the “collection, recording, ... [and] use” of one’s personal information, even without the consent of the data subject, whenever “necessary in order to respond to national emergency, to comply with the requirements of public order and safety, or to fulfill functions of public authority which necessarily includes the processing of personal data for the fulfillment of

(the National Privacy Commission's) mandate." Further, Section 4 of Republic Act No. 8239, or the Philippine Passport Act of 1996, authorizes the Secretary of Foreign Affairs to cancel the passport of a citizen for cause after due hearing in the interest of national security or public safety.

Third, with the declaration of martial law, Congress may by law delegate to the President emergency powers such as the takeover of privately-owned public utilities or businesses affected with public interest.

Section 23, Article VI of the 1987 Constitution authorizes Congress to delegate by law powers to the President in times of "national emergency"....¹⁶¹

Fourth, under paragraph 2, Section 18, Article VII of the Constitution, a state of martial law may "authorize the conferment of jurisdiction on military courts and agencies over civilians where civil courts are not able to function." However, this also needs a law to be enacted by Congress since a state of martial law does not suspend the operation of the 1987 Constitution and it is Congress that is empowered by law "to define, prescribe, and apportion the jurisdiction of various courts." To date, no statute confers jurisdiction on military courts and agencies over civilians where civil courts are unable to function.

On the contrary, Republic Act No. 7055¹⁶² even strengthened civilian supremacy over the military by returning to the civil courts the jurisdiction over certain offenses involving members of the Armed Forces of the Philippines, other persons subject to military law, and the members of the Philippine National Police, repealing for the purpose certain presidential decrees promulgated during the Marcos dictatorship.

In short, the 1987 Constitution does not automatically vest significant additional powers to the President under a state of martial law or suspension of the privilege of the writ. However, a declaration of martial law or suspension

¹⁶¹ See discussion under Art. VI, Sec. 23, and Art. XII, Sec. 17.

¹⁶² An Act Strengthening Civilian Supremacy Over The Military Returning To The Civil Courts The Jurisdiction Over Certain Offenses Involving Members Of The Armed Forces Of The Philippines, Other Persons Subject To Military Law, And The Members Of The Philippine National Police, Repealing For The Purpose Certain Presidential Decrees, effective June 20, 1991.

of the privilege of the writ has a built-in trigger mechanism for the applicability of other constitutional provisions that may lawfully restrict the enjoyment of constitutional rights, provided there are existing laws specifically authorizing such restrictions.

In the opinion of Atty. Sarah Liliana Z. Sarmiento, Court Attorney VI, Supreme Court, Justice Carpio's **dissents in Lagman** clearly exemplified his belief "that the Constitution is the ultimate protector of the Filipino people, and that the Constitution and all its protections, prohibitions and provisions were explicitly enacted to protect the Filipino people from abusive authority and unlimited power."¹⁶³ Justice Carpio's "Final Word" in **Lagman** was eloquent proof:

Immediately after issuing Proclamation No. 216, President Duterte announced to the entire nation and to the world that his martial law "will not be any different from what Marcos did." The Court must take this public and official statement seriously for this is no trivial matter. When President Ferdinand Marcos declared martial law in 1972 under the 1935 Constitution, he abolished Congress, shut down media, imprisoned leaders of the political opposition, packed the Supreme Court with his law school classmates and loyalists, and ruled by decree thereby making himself a dictator for over 13 years until the people ousted him from power in 1986.

The review power of the Court, as well as of the Legislature, on the President's exercise of his Commander-in-Chief powers was precisely written in the 1987 Constitution as a checking mechanism to prevent a recurrence of the martial law of Marcos. The 1987 Constitution further mandates that a state of martial law does not suspend the operation of the Constitution. It is apparent that President Duterte does not understand, or refuses to understand, this fundamental principle that forms part of the bedrock of our democracy under the 1987 Constitution, despite his having taken a solemn oath of office to "preserve and defend the (1987) Constitution."

The Court cannot simply gloss over this Presidential mindset that has been publicly broadcasted to the nation and to the world. **Any sign of acquiescence by the Court to this Presidential mindset could be fatal to the survival of the 1987 Constitution and our democracy. The Court cannot**

¹⁶³ Response of Atty. Sarah Z. Sarmiento, January 31, 2019.

play with the fire of martial law which could turn into ashes the very Constitution that members of the Court are sworn to preserve and defend, a tragic event that once befell the Court in 1972 and brought the Court to its lowest point in its history. The Court must never allow the 1972 debacle to be ever repeated again. With this wisdom from hindsight, the Court must now stand firm and apply the clear letter and intent of the 1987 Constitution without fear or favor, for the nation and history demand no less from every member of the Court.

The decision of the Court in the present petitions has far reaching ramifications on the future of our civil liberties and our democratic society under the rule of law. For in deciding the present petitions, the Court prescribes the fundamental rules governing the exercise of the Commander-in-Chief powers under the 1987 Constitution not only for the incumbent President but also for all future Presidents. The Court should not mercilessly inflict on the Filipino people the constant fear of a recurrence of the nightmarish martial law of Marcos.

Then in **LAGMAN v. PIMENTEL**, G.R. No. 235935, February 06, 2018, consolidated petitions¹⁶⁴ assailed the constitutionality of, this time, the **extension of martial law and suspension of the privilege of the writ of *habeas corpus*** in the entire Mindanao for one year from January 1 to December 31, 2018. The Court *en banc* found sufficient factual bases for the issuance of Joint Resolution No. 4, dated December 13, 2017, of the Senate and House of Representatives and declared the extension constitutional. Justice Carpio maintained his **dissent** and voted to grant the petitions and declare Joint Resolution No. 4 unconstitutional for failure to comply with this **Section 18, Article VII**:

Preliminarily, I shall address petitioners' invocation of *Ex Parte Milligan*¹⁶⁵ as basis to define martial law as "the assumption of jurisdiction by the military over the civilian population ..." Petitioners view martial law "in the context of a theater of war, wherein the government civilian functions such as the civil courts and other civil services cannot function ..."

¹⁶⁴ Consolidated with *Cullamat v. Duterte*, G.R. No. 236061, *Rosales v. Duterte*, G.R. No. 236145, and *Monsod v. Pimentel*, G.R. No. 236155.

¹⁶⁵ 711 U.S. 4 Wall. 2 (1866).

I disagree.

Decided by the United States (US) Supreme Court in 1866, *Ex Parte Milligan* involved Lambden P. Milligan who was charged with acts of disloyalty and faced trial before a military commission in Indiana during the civil war. He was found guilty on all charges and sentenced to death by hanging. He then sought release through *habeas corpus* from a federal court. While trials of civilians by presidentially created military commissions were invalidated, the US Supreme Court recognized martial law as a necessary substitute for the civil authority in the theater of active military operations, thus:

It follows from what has been said on this subject that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theat[er] of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society, and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration, for, if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war.¹⁶⁶

This pronouncement of the US Supreme Court has no application in this jurisdiction because *Ex Parte Milligan* conflicts with the Philippine Constitution... (citing paragraph 4, Section 18, Article VII)...

To repeat, a state of martial law does not suspend the operation of the Constitution. Contrary to the theory of petitioners, the clause “nor supplant the functioning of the civil courts or legislative assemblies” already precludes the “existence of a vacuum in civilian authority in a theater of war.” Not even the phrase “conferment of jurisdiction on military courts and agencies over civilians where civil courts are able to function” can serve as basis for the military to immediately acquire jurisdiction. Under Section 2, Article VIII of the Constitution, “Congress shall have

¹⁶⁶ *Ex Parte Milligan*, 711 U.S. 4 Wall. 2, 127 (1866).

the power to define, prescribe, and apportion the jurisdiction of various courts.” Applied to military courts, this means that Congress needs to enact a law vesting military courts with jurisdiction. In other words, a state of martial law does *not ipso facto* confer jurisdiction on military courts over civilians. Rather, the conferment comes from Congress through a separate law.

During the oral arguments, I made the same clarification on the inapplicability of *Ex Parte Milligan*, thus:

JUSTICE CARPIO: Okay. ... *Ex Parte Milligan* ... The US Constitution (does) not have that provision that in case of martial law the Bill of Rights (is) not suspended ...

ATTY. HILBAY: Correct, Your Honor.

JUSTICE CARPIO: It was the old concept of necessity.

ATTY. HILBAY: Correct, Your Honor.

JUSTICE CARPIO: Okay. So, I think, you agree with me that when (this) Court adopted the *Ex Parte Milligan* definition of martial law, it did not jibe with the present Constitution, correct?

ATTY. HILBAY: Well, in fact, Your Honor, *Milligan* is seen in the United States as a civil liberties case decided by the United States Supreme Court against the military.

JUSTICE CARPIO: ... the definition ... that martial law is the assumption of jurisdiction by the military cannot apply here because our Constitution says, martial law shall not supplant legislative assemblies. So, there is no instance where the military can exercise supervision and control over legislative assemblies, correct?

ATTY. HILBAY: Your Honor, I think the cover of phrase is where civil courts are able to function.

JUSTICE CARPIO: No, ... “Shall not nor supplant the functioning of civil courts or the legislative assemblies, nor authorize the conferment of jurisdiction on military courts over civilians where civil courts are able to function.” ... that provision “nor authorize the conferment of jurisdiction on military courts,” you’re talking of conferment of jurisdiction, which is conferred by what?

ATTY. HILBAY: By martial law, Your Honor.

JUSTICE CARPIO: No. Jurisdiction is conferred by Congress, correct? ...

JUSTICE CARPIO: Because it says here, it does not confer jurisdiction on military courts. The act of declaration of martial law - can (that) confer jurisdiction on (the) military? ... there has to be a separate law. So that this definition, 1866 definition, is not appropriate today, correct?

...

JUSTICE CARPIO: It's only appropriate in that it says you can declare martial law in a theater of war...

ATTY. HILBAY: Okay, Your Honor, I agree.

To be clear, all of the provisions of the Constitution, including the Bill of Rights, remain operative during the proclamation of martial law and the suspension of the privilege of the writ. The Constitution clearly prohibits the automatic assumption of jurisdiction by military courts during a state of martial law or when the privilege of the writ is likewise suspended.

With the liberation of Marawi City and the end of the Maute rebellion, the initial declaration of martial law and suspension of the privilege of the writ under Proclamation No. 216 can no longer be extended.

(Paragraph 1, Section 18, Article VII of the) ... Constitution provides that Congress, voting jointly, may extend the period of martial law and the suspension of the privilege of the writ "if the ... rebellion shall persist." Literally and without need of constitutional construction, the word "persist" means the continued existence of the same invasion or rebellion when martial law was initially proclaimed or the privilege of the writ was initially suspended. In the deliberations of the Constitutional Commission, the framers understood that the extension could be justified "if the invasion (or rebellion) is still going on."¹⁶⁷ The authority of Congress to extend martial law and the suspension of the privilege of the writ is, therefore, limited to the same rebellion persisting at the time of the extension. In other words, the rebellion used by Congress as justification to extend martial law and the suspension of the privilege of the writ must be the same rebellion identified in the initial proclamation of the President.

Proclamation No. 216, signed by President Rodrigo Roa Duterte (President Duterte) and attested by Executive Secretary

¹⁶⁷ The portion of the records read: MR. REGALADO: Madam President, following that is the clause 'extend the same if the invasion or rebellion shall persist and public safety requires it. That by itself suggests a period within which the suspension shall be extended, if the invasion is still going on. But there is already the cutoff of 60-day period. Do they have to meet all over again and agree to extend the same? (II Records, Constitutional Commission [31 July 1986]).

Salvador C. Medialdea on 23 May 2017, clearly identifies the “Maute group” as the rebel group who committed the crime of rebellion by “rising (publicly) and taking arms against the [g]overnment for the purpose of removing from the allegiance to said [g]overnment.” ...

Moreover, on 25 May 2017, when President Duterte submitted his Report to Congress, he identified the Maute group as the perpetrator of the crime of rebellion in Marawi City...

On 17 October 2017, President Duterte declared the liberation of Marawi City, a day after the death of Isnilon Hapilon and Omar Maute, the leaders of the Maute rebellion. In his speech to the soldiers on 17 October 2017, the President said, “Ladies and gentlemen, I hereby declare Marawi City liberated from the terrorist influence that marks the beginning of rehabilitation [of the city].”

This statement was bolstered by National Defense Secretary Delfin Lorenzana in his speech at the ASEAN Defense Ministers meeting held last October 2017. He said, “After 154 days of the siege of Marawi by the DAESH-inspired Maute-ISIS group, or after a week since the Commander-in-Chief declared liberation of Marawi, we now announce the termination of all combat operations in Marawi.”

Joint Task Force Ranao Deputy Commander Colonel Romeo Brawner clarified what “termination of combat operations” means. He said, “... [t]his means that we are terminating the assault, the offensive attack on the position of the Maute-ISIS.”

These three separate statements made by President Duterte, the National Defense Secretary and the Joint Task Force Ranao Deputy Commander, respectively, clearly confirm that actual rebellion no longer persisted in Marawi City beginning 17 October 2017.

Moreover, the government did not present any evidence of an ongoing rebellion by the Maute group in other places of Mindanao outside of Marawi City to justify the extension of Proclamation No 216. In various media appearances, representatives from the government and the army confessed that Marawi City was already contained and under control.

In one media interview, Major General Restituto Padilla, Jr.,

spokesperson for the military, said that the remaining twenty (20) to thirty (30) terrorists left in Marawi City had “no way. to get out anymore” and “there is no way for anyone to get in ... [s]o choking them to death at this point will be very key for our troops to do since the area is very much contained and very controlled.”

National Defense Secretary Lorenzana Delfin told reporters that “there were no more militants, known locally as coming from the Maute Group, providing resistance following an intense final battle ...” He continued, “All terrorists, fighting troops. All hostages have been recovered. ... In crushing thus far the most serious attempt to export violent extremism and radicalism in the Philippines and in the region, we have contributed to preventing its spread in Asia and gave our share to maintaining global peace, stability and security.”

Indeed, the authority of Congress to extend the proclamation of martial law and the suspension of the privilege of the writ must be strictly confined to the rebellion that “persists,” the same rebellion cited by President Duterte in Proclamation No. 216. Hence, the end of the Maute rebellion marked the end of the validity of Proclamation No. 216. Any extension pursuant thereto is unconstitutional since the Maute rebellion already ceased, with the death of its leader Isnilon Hapilon and the liberation of Marawi City. To uphold the extension of martial law and the suspension of the privilege of the writ when the Maute rebellion no longer persists, in Marawi City or anywhere else in Mindanao, would sanction a clear violation of Section 18, Article VII of the Constitution.

The capability of the remnants of the defeated rebel groups to sow terror, and cause death and damage to property, does not constitute an actual rebellion.

Congress also justifies the extension of the declaration of martial law and suspension of the privilege of the writ by citing the capability of the remnants of the defeated rebel groups to sow terror, and cause death and damage to property.

I disagree.

Paragraph 1, Section 18, Article VII of the Constitution vests in the President, as the Commander-in-Chief, the power to declare martial law or suspend the privilege

of the writ, provided an actual rebellion or invasion exists and public safety requires the declaration or suspension. While Congress may extend the proclamation or suspension, the Constitution expressly requires, “the invasion or rebellion shall persist and public safety requires it.” In other words, the twin requirements of actual rebellion or invasion, and public safety imposed on the initial proclamation and suspension are continuing requirements for any subsequent extension of the proclamation or suspension. As aptly put by the petitioners, “what persists must be actual.”

By issuing Joint Resolution No. 4, the House of Representatives and the Senate adopted the justification of the President in extending Proclamation No. 216. The Letter dated 8 December 2017 of President Duterte to Congress reads in pertinent part:

First, despite the death of Hapilon and the Maute brothers, the remnants of their Groups have continued to rebuild their organization through the recruitment and training of new members and fighters to carry on the rebellion. ...

More specifically, the remnants of the DAESH-inspired DIWM members and their allies, together with their protectors, supporters and sympathizers, have been monitored in their continued efforts towards radicalization/recruitment, financial and logistical build-up, as well as their consolidation/reorganization in Central Mindanao. ...

Second, the Turafie Group has likewise been monitored to be planning to conduct bombings, notably targeting the Cotabato area. ...

Third, the Bangsamoro Islamic Freedom Fighters (BIFF) continue to defy the government by perpetrating at least fifteen (15) violent incidents during the Martial Law period in Maguinadao and North Cotabato. ...

Fourth, the remnants of the Abu Sayyaf Group (ASG) in Basilan, Sulu, Tawi-Tawi, and Zamboanga Peninsula remain as a serious security concern. ...

...

... Public safety indubitably requires such further extension, not only for the sake of security and public order, but more importantly to enable the government and the people of Mindanao to pursue the bigger task of rehabilitation and the promotion of a stable socio-economic growth and development.

Respondents cannot rely on the capability of the remnants of the

defeated rebels to deprive duly constituted authorities of their powers as a justification for the extension of the state of martial law or suspension of the privilege of the writ. To emphasize, capability to rebel, absent an actual rebellion or invasion, is not a ground to extend the declaration of martial law or suspension of the privilege of the writ. To allow martial law on the basis of an imminent danger or threat would unlawfully reinstate the ground of “imminent danger” of rebellion or invasion, a ground that was intentionally removed from the 1987 Constitution. This is a gross violation of the clear letter and intent of the Constitution, as gleaned from the following deliberations of the Constitutional Commission:

Mr. de los Reyes. As I see it now, the Committee envisions actual rebellion and no longer imminent rebellion. Does the Committee mean that there should be actual shooting or actual attack on the legislature or Malacañang, for example? Let us take for example a contemporary event this Manila Hotel incident; everybody knows what happened. Would the committee consider that an actual act of rebellion?

Mr. Regalado. If we consider the definition of rebellion under Articles 134 and 135 of the Revised penal Code, that presupposes an actual assemblage of men in an armed public uprising for the purposes mentioned in Article 134 and by the means employed in Article 135. ...¹⁶⁸

The NPA rebellion, with the concurrence of public safety, requires a separate martial law declaration for a period not exceeding 60 days; it cannot justify the extension of Proclamation No. 216, the factual basis of which was solely the Maute rebellion.

To repeat, under Section 18, Article VII of the Constitution, the extension of the proclamation of martial law or suspension of the privilege of the writ requires the concurrence of the following two elements: one, the invasion or rebellion persists; and two, public safety requires the extension. Strict compliance with Section 18, Article VII of the Constitution is imperative because the provision distinguishes the initial proclamation or suspension from the subsequent extension. The former can only last for a period not exceeding 60 days, while the duration of the latter is subject to the discretion of Congress. By belatedly invoking the

¹⁶⁸ II Record, Constitutional Commission 412 (1987).

NPA rebellion as factual basis for the extension of Proclamation No. 216, the government effectively circumvented the temporal limitation set by the Constitution that the initial proclamation of martial law or suspension of the privilege of the writ can only last for 60 days. Worse, the extension set a maximum period of one year.

When the Court reviewed in *Lagman v. Medialdea*¹⁶⁹ the sufficiency of the factual basis of Proclamation No. 216, the Court ruled in the affirmative on the sole basis of the Maute rebellion...

Similarly, when the Court examined the impact of the rebellion on public safety, the Court never attributed the acts of violence to the NPA as to warrant the proclamation of martial law or suspension of the privilege of the writ in the whole of Mindanao, thus:

Invasion or rebellion alone may justify resort to the calling out power but definitely not the declaration of martial law or suspension of the privilege of the writ of *habeas corpus*. For a declaration of martial law or suspension of the privilege of the writ of *habeas corpus* to be valid, there must be a concurrence of actual rebellion or invasion and the public safety requirement. In his Report, the President noted that the acts of violence perpetrated by the ASG and the Maute Group were directed not only against government forces or establishments but likewise against civilians and their properties. In addition and in relation to the armed hostilities, bomb threats were issued; road blockades and checkpoints were set up; schools and churches were burned; civilian hostages were taken and killed; non-Muslims or Christians were targeted; young male Muslims were forced to join their group; medical services and delivery of basic services were hampered; reinforcements of government troops and civilian movement were hindered; and the security of the entire Mindanao Island was compromised. These particular scenarios convinced the President that the atrocities had already escalated to a level that risked public safety and thus impelled him to declare martial law and suspend the privilege of the writ of *habeas corpus*. In the last paragraph of his Report, the President declared:

While the government is presently conducting legitimate operations to address the on-going rebellion, if not the seeds of invasion, public safety necessitates the continued

¹⁶⁹ G.R. No. 231658, July 4, 2017.

implementation of martial law and the suspension of the privilege of the writ of *habeas corpus* in the whole of Mindanao until such time that the rebellion is completely quelled.

Based on the foregoing, we hold that the parameters for the declaration of martial law and suspension of the privilege of the writ of *habeas corpus* have been properly and fully complied with. Proclamation No. 216 has sufficient factual basis there being probable cause to believe that rebellion exists and that public safety requires the martial law declaration and the suspension of the privilege of the writ of *habeas corpus*.

Even the Court concedes that Proclamation No. 216 did not contemplate the NPA rebellion as factual basis. For one, the NPA merely “took advantage of the situation and intensified their decades-long rebellion against the government and stepped up terrorist attacks ... as well as guerilla warfare,” all of which suggests that the perceived “intensified” insurgence happened after the issuance of Proclamation No. 216. For another, when Proclamation No. 216 was issued, the government and the NPA were undergoing peace negotiations. Hence, to belatedly expand the factual basis of Proclamation No. 216 as to include the NPA rebellion will violate Section 18, Article VII of the Constitution.

The Court holds that the inclusion of the NPA rebellion as basis for the martial law extension is justified because the NPA shares with the DAESH/ISIS-inspired rebels the same purpose of overthrowing the government and inflicts the same degree of violence as in the Marawi siege.

I disagree.

Contrary to the holding of the mere identity of purpose and capacity for violence between the NPA and the DAESH/ISIS-inspired rebels cannot justify the inclusion of the NPA rebellion as factual basis for the extension of Proclamation No. 216. The Constitution limits the initial martial law declaration or suspension of the privilege of the writ to a period of 60 days. Only when this period is not enough to quell the rebellion can an extension be sought. By citing the NPA rebellion as factual basis for the extension, the government bypassed the mandatory 60-day period prescribed by the Constitution for the initial declaration of martial law and suspension of the privilege of the writ. The government can cite the NPA rebellion as a ground for the imposition of martial law and suspension of the privilege of the writ, but the initial 60-day period prescribed by the

Constitution must first be observed before the government can ask for an extension of such emergency measures.

Neither can the concurrence of Congress with the President cure the unconstitutionality of the extension. The concurrent power of the legislative and the executive to extend the proclamation or suspension is circumscribed by the clause “if the invasion or rebellion shall persist and public safety requires it.” To give effect to this clause, paragraph 3, Section 18, Article VII of the Constitution vests the Court with the power to review the sufficiency of the factual basis of the extension. In other words, mere concurrence of the two political branches is not enough. The Court is the final arbiter of the constitutionality of the extension.

Finally, in **LAGMAN v. MEDIALDEA**, G.R. No. 243522, February 19, 2019, consolidated petitions¹⁷⁰ were filed under the Court’s power to review the sufficiency of the factual basis of yet **another extension of the proclamation of martial law and the suspension of the privilege of the writ of habeas corpus under Section 18(3), of Article VII**. Challenged in these petitions was the constitutionality of Joint Resolution No. 6, dated December 12, 2018, issued by the Senate and the House of Representatives, which extended the proclamation of martial law and the suspension of the privilege of the writ in the whole of Mindanao for another period of one year from January 1, 2019 until December 31, 2019. Justice Carpio maintained his **dissent** and voted to grant the petitions on the ground that the extension of martial law and the suspension of the privilege of the writ was unconstitutional:

First, martial law under Proclamation No. 216 can no longer be extended with the end of the Maute rebellion. The very basis for the proclamation of martial law and the suspension of the privilege of the writ under Proclamation No. 216 was the Maute rebellion. Since the actual rebellion of the Maute group in Marawi City has been admittedly quelled, the extension of Proclamation No. 216 is now clearly unconstitutional. Second, the government failed to discharge the burden of proof under paragraph 3, Section 18, Article VII of the 1987 Constitution that actual rebellion by the Maute group exists in the whole Mindanao group of islands.

I reiterate that the declaration of martial law on the

¹⁷⁰ Zarate v. Congress of the Philippines, G.R. No. 243677, Monsod v. Senate of the Philippines, G.R. No. 243745, Valle v. Senate of the Philippines, G.R. No. 243797.

ground of rebellion under paragraph 3, Section 18, Article VII of the 1987 Constitution requires the existence of an actual rebellion, not an imminent danger of rebellion or threat of rebellion.

In exercising his Commander-in-Chief power to declare martial law or suspend the privilege of the writ, the President is required by the 1987 Constitution to establish the following: (1) the existence of rebellion or invasion; and (2) public safety requires the declaration of martial law or suspension of the privilege of the writ to suppress the rebellion or invasion. Needless to say, the absence of either element will not authorize the President, who is sworn to defend the Constitution, to exercise his Commander-in-Chief power to declare martial law or suspend the privilege of the writ.

Imminent danger or threat of rebellion is not sufficient. The 1987 Constitution requires the existence of actual rebellion. “Imminent danger” as a ground to declare martial law or suspend the privilege of the writ, which ground was present in both the 1935 and 1973 Constitutions, was intentionally removed in the 1987 Constitution. By the intentional deletion of the words “imminent danger” in the 1987 Constitution¹⁷¹ actual rebellion is now required and the President can no longer use imminent danger of rebellion as a ground to declare martial law or suspend the privilege of the writ. Thus, the President cannot proclaim martial law or suspend the privilege of the writ absent an actual rebellion. This is the clear, indisputable letter and intent of the 1987 Constitution.

This Court in *Lagman v. Medialdea*¹⁷² held that the term “rebellion” in Section 18, Article VII of the 1987 Constitution refers to the crime of rebellion as defined by the Revised Penal Code, to wit:

... Since the Constitution did not define the term “rebellion,” it must be understood to have the same meaning as the crime

¹⁷¹ During the deliberations of the Constitutional Commission, Fr. Bernas clarified: FR. BERNAS. Let me just say that when the Committee decided to remove that, it was for the reason that the phrase “OR IMMINENT DANGER THEREOF” could cover a multitude of sins and could be a tremendous amount of irresistible temptation. And so, to better protect the liberties of the people, we preferred to eliminate that. ... (I Records, Constitutional Commission 773 (18 July 1986).

¹⁷² G.R. No. 231658, 4 July 2017, 829 SCRA 1, 182-183.

of “rebellion” in the Revised Penal Code (RPC).

During the July 29, 1986 deliberation of the Constitutional Commission of 1986, then Commissioner Florenz D. Regalado alluded to actual rebellion as one defined under Article 134 of the RPC:

MR. DE LOS REYES. As I see it now, the Committee envisions actual rebellion and no longer inminent rebellion. Does the Committee mean that there should be actual shooting or actual attack on the legislature or Malacañang, for example? Let us take for example a contemporary event - this Manila Hotel incident, everybody knows what happened. Would the Committee consider that an actual act of rebellion?

MR. REGALADO. If we consider the definition of rebellion under Articles 134 and 135 of the Revised Penal Code, that presupposes an actual assemblage of men in an armed public uprising for the purposes mentioned in Article 134 and by the means employed under Article 135. ...

Thus, rebellion as mentioned in the Constitution could only refer to rebellion as defined under Article 134 of the RPC. To give it a different definition would not only create confusion but would also give the President wide latitude of discretion, which may be abused - a situation that the Constitution seeks to prevent.

In fact, when the President declared martial law and suspended the privilege of the writ, he expressly cited the definition of rebellion under the Revised Penal Code (in) Proclamation No. 216...

Based on its statutory definition in the Revised Penal Code, the crime of rebellion has the following elements: (1) there is a (a) public uprising and (b) taking arms against the Government; and (2) the purpose of the uprising is either (a) to remove from the allegiance to the Government or its laws: (1) the territory of the Philippines or any part thereof; or (2) any body of land, naval, or other armed forces; or (b) to deprive the Chief Executive or Congress, wholly or partially, of any of their powers and prerogatives.¹⁷³

By definition, Article 134 of the Revised Penal Code requires an actual rebellion for the crime of rebellion to exist. Since there is no longer an actual rebellion by the Maute group in Marawi City and there is no showing of an actual Maute rebellion in other

¹⁷³ *Ladlad v. Velasco*, 551 Phil. 313, 329 (2007).

parts of Mindanao, Joint Resolution No. 6, extending martial law and the suspension of the privilege of the writ, is therefore unconstitutional.

Proclamation No. 216 can no longer be extended with the liberation of Marawi City and the end of the Maute rebellion in Marawi City.

As I have stated in my previous dissenting opinions, the authority of Congress to extend the proclamation of martial law and the suspension of the privilege of the writ must be strictly confined to the actual rebellion cited by President Rodrigo Roa Duterte (President Duterte) in Proclamation No. 216. The said proclamation clearly identifies the “Maute group” as the only rebel group subject of the proclamation, which specifically mentions the Maute group as rebelling by “rising (publicly) and taking arms against the (g)overnment for the purpose of removing from the allegiance to said [g]overnment” Marawi City. ...

The identity of the rebel group used by Congress to extend martial law and suspend the privilege of the writ must be limited to the same rebel group contained in the initial proclamation of the President. This is in consonance with Section 18, Article VII of the 1987 Constitution...

The Constitution is clear that upon the initiative of the President and the joint voting of both chambers of Congress, the proclamation of martial law and the suspension of the privilege of the writ may be extended “if the ... rebellion shall persist” or, in simpler terms, if the rebellion led by the rebel group cited in the initial proclamation shall continue. In this case, the rebellion of the Maute group had undoubtedly been terminated upon the death of their leader, Isnilon Hapilon, and the liberation of Marawi City. In fact, in a statement dated 17 October 2017, President Duterte publicly declared “Marawi’s liberation and beginning of (Marawi City’s) rehabilitation.” On October 2017, National Defense Secretary Delfin Lorenzana also affirmed the “termination of all combat operations in Marawi City.” Furthermore, in the year 2018, the President and representatives of the Armed Forces of the Philippines have been consistent in their public statements that the actual rebellion in Marawi City had finally ended...

During the oral arguments on 29 January 2019, Major General Lorenzo of the Armed Forces of the Philippines also admitted that

there is no longer any armed rebellion in Marawi City, to wit:

SENIOR ASSOCIATE JUSTICE CARPIO: Is there an on-going armed rebellion in Marawi City?

MAJOR GENERAL LORENZO: Not in Marawi City, Your Honor.

Hence, the end of the armed Maute rebellion bars the extension of Proclamation No. 216 which was issued because of the Maute rebellion. Any extension pursuant to Proclamation No. 216 under Joint Resolution No. 6 is unconstitutional. To uphold the extension of martial law and the suspension of the privilege of the writ under Joint Resolution No. 6 in the absence of an actual rebellion would sanction a clear violation of Section 18, Article VII of the 1987 Constitution.

The Government failed to discharge the burden of proof that there is an on-going rebellion of the Maute group in the whole Mindanao group of islands.

The burden of proof to show the sufficiency of the factual basis of the declaration of martial law and the suspension of the privilege of the writ is on the Government. The *sui generis* proceeding under paragraph 3, Section 18, Article VII of the 1987 Constitution is intended as a checking mechanism against the abusive imposition of martial law or suspension of the privilege of the writ. **The Government bears the burden of justifying the resort to extraordinary powers that are subject to the extraordinary review mechanisms of this Court under the Constitution. This is only logical because it is the Government that is in possession of facts and intelligence reports justifying the declaration of martial law or suspension of the privilege of the writ. Indeed, the majority of the members of this Court in *Lagman v. Medialdea*¹⁷⁴ conceded that this burden rests on the Government, to wit:**

... The President's conclusion, that there was an armed public uprising, the culpable purpose of which was the removal from the allegiance of the Philippine Government a portion of its territory and the deprivation of the President from performing his powers and prerogatives, was reached after a tactical

¹⁷⁴ G.R. No. 231658, 4 July 2017, 829 SCRA 1, 192-194, citing *Fortun v. President Macapagal-Arroyo*, 684 Phil. 595-598 (2012).

consideration of the facts. In fine, the President satisfactorily discharged his burden of proof.

After all, what the President needs to satisfy is only the standard of probable cause for a valid declaration of martial law and suspension of the privilege of the writ of *habeas corpus*. As Justice Carpio decreed in his Dissent in *Fortun*:

... [T]he Constitution does not compel the President to produce such amount of proof as to unduly burden and effectively incapacitate her from exercising such powers.

Definitely, the President need not gather proof beyond reasonable doubt, which is the standard of proof required for convicting an accused charged with a criminal offense.

...

Proof beyond reasonable doubt is the highest quantum of evidence, and to require the President to establish the existence of rebellion or invasion with such amount of proof before declaring martial law or suspending the writ amounts to an excessive restriction on 'the President's power to act as to practically tie her hands and disable her from effectively protecting the nation against threats to public safety.'

Neither clear and convincing evidence, which is employed in either criminal or civil cases, is indispensable for a lawful declaration of martial law or suspension of the writ. This amount of proof likewise unduly restrains the President in exercising her emergency powers, as it requires proof greater than preponderance of evidence although not beyond reasonable doubt.

Not even preponderance of evidence, which is the degree of proof necessary in civil cases, is demanded for a lawful declaration of martial law.

...

Weighing the superiority of the evidence on hand, from at least two opposing sides, before she can act and impose martial law or suspend the writ unreasonably curtails the President's emergency powers.

Similarly, substantial evidence constitutes an unnecessary restriction on the resident's use of her emergency powers. Substantial evidence is the amount of proof required in administrative or quasi-judicial cases, or that amount of relevant evidence which a reasonable mind might accept as adequate to justify conclusion.

I am of the view that probable cause of the existence of either invasion or rebellion suffices and satisfies the standard of proof for a valid declaration of martial law and suspension of the writ.

Probable cause is the same amount of proof required for the filing of a criminal information by the prosecutor and for the issuance of an arrest warrant by a judge. Probable cause has been defined as a 'set of facts and circumstances as would lead a reasonably discreet and prudent man to believe that the offense charged in the Information or any offense included therein has been committed by the person sought to be arrested.'

In determining probable cause, the average man weighs the facts and circumstances without resorting to the calibrations of the rules of evidence of which he has no technical knowledge. He relies on common sense. A finding of probable cause needs only to rest on evidence showing that, more likely than not, a crime has been committed and that it was committed by the accused.

Probable cause demands more than suspicion; it requires less than evidence that would justify conviction.

Probable cause, basically premised on common sense, is the most reasonable, most practical, and most expedient standard by which the President can fully ascertain the existence or non-existence of rebellion, necessary for a declaration of martial law. ...

During my interpellation of the Solicitor General in the oral arguments last 29 January 2019, the Government could not confirm that the elements of the Maute group are engaged in actual rebellion in Davao City. The record states:

SENIOR ASSOCIATE JUSTICE CARPIO: Mr. Sol-Gen, is there an ongoing armed rebellion today in Davao City?

SOLICITOR GENERAL CALIDA: In certain parts, Your Honor, there is.

SENIOR ASSOCIATE JUSTICE CARPIO: Committed by whom?

SOLICITOR GENERAL CALIDA: I understand the communist groups, Your Honor.

SENIOR ASSOCIATE JUSTICE CARPIO: So the NPA?

SOLICITOR GENERAL CALIDA: NPA.

SENIOR ASSOCIATE JUSTICE CARPIO: Certainly not the MILF? Peace agreement.

SOLICITOR GENERAL CALIDA: I have not been to Davao for quite some time, Your Honor, so I don't exactly know.

SENIOR ASSOCIATE JUSTICE CARPIO: But you are aware that we have a peace agreement now with the MILF. I don't think... (interrupted)

SOLICITOR GENERAL CALIDA: MILF, yes, Your Honor.

SENIOR ASSOCIATE JUSTICE CARPIO: So the rebellion in Davao, parts of Davao, as you say, is being committed by the NPA, correct?

SOLICITOR GENERAL CALIDA: Well, if I'm not mistaken, yes, Your Honor.

SENIOR ASSOCIATE JUSTICE CARPIO: But not by the MILF, correct?

SOLICITOR GENERAL CALIDA: Not by the... or MI...

SENIOR ASSOCIATE JUSTICE CARPIO: The MILF.

SOLICITOR GENERAL CALIDA: Not to my knowledge, Your Honor.

SENIOR ASSOCIATE JUSTICE CARPIO: Well, we have a peace agreement. I don't think they have broken that. ... the [Maute/ISIS] group, they are not in Davao?

SOLICITOR GENERAL CALIDA: I'm not sure of that, Your Honor.

SENIOR ASSOCIATE JUSTICE CARPIO: But do you know ... [if] they have armed rebels there operating in Davao City?

SOLICITOR GENERAL CALIDA: That is a possibility because Davao City is a huge city and in fact... (interrupted)

SENIOR ASSOCIATE JUSTICE CARPIO: Do you have any... (interrupted)

SOLICITOR GENERAL CALIDA: ... there was... (interrupted)

SENIOR ASSOCIATE JUSTICE CARPIO: ... information that they are operating in Davao City?

SOLICITOR GENERAL CALIDA: I have no... (interrupted)

SENIOR ASSOCIATE JUSTICE CARPIO: Have they engaged in any skirmish with the military or police in Davao City?

SOLICITOR GENERAL CALIDA: I have no personal knowledge at this time but I can research, Your Honor.

SENIOR ASSOCIATE JUSTICE CARPIO: Okay, you include that in your memo. How about the BIFF, are they committing rebellion in Davao City?

SOLICITOR GENERAL CALIDA: I'm not sure, Your Honor.

SENIOR ASSOCIATE JUSTICE CARPIO: So you are only sure of the NPA?

SOLICITOR GENERAL CALIDA: For now, Yes, Your Honor, but I will ask the military, Your Honor, and the police to update me if there are incidents like what you've mentioned, Your Honor.

SENIOR ASSOCIATE JUSTICE CARPIO: So okay, but you are defending martial law throughout Mindanao but you are not sure if the Maute and the ISIS groups are operating in Davao City?

SOLICITOR GENERAL CALIDA: Well, at this time I don't have the knowledge but I will try to get feedback, Your Honor.

The Government could not even affirm the existence of an on-going armed rebellion by the Maute group in Davao City. In fact, the Government has not named any province, city or municipality in the entire Mindanao where an actual rebellion by the Maute group is on-going. Consequently, under the Constitution, there is no sufficient factual basis to extend the declaration of martial law under Proclamation No. 216 in the whole of Mindanao for another period of one (1) year.

Section 19. Except in cases of impeachment, or as otherwise provided in this Constitution, the President may grant reprieves, commutations, and pardons, and remit fines and forfeitures, after conviction by final judgment.

He shall also have the power to grant amnesty with the concurrence of a majority of all the Members of the Congress.

Section 20. The President may contract or guarantee foreign loans on behalf of the Republic of the Philippines with the prior concurrence of the Monetary Board, and subject to such limitations as may be provided by law. The Monetary Board shall, within thirty days from the end of every quarter of the calendar year, submit to the Congress a complete report of its decision on applications for loans to be contracted or guaranteed by the Government or government-owned and controlled corporations which would have the effect of increasing the foreign debt, and containing other matters as may be provided by law.

Section 21. No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate.

Section 22. The President shall submit to the Congress, within thirty days from the opening of every regular session as the basis of the general appropriations bill, a budget of expenditures and sources of financing, including receipts from existing and proposed revenue measures.

Section 23. The President shall address the Congress at the opening of its regular session. He may also appear before it at any other time.



