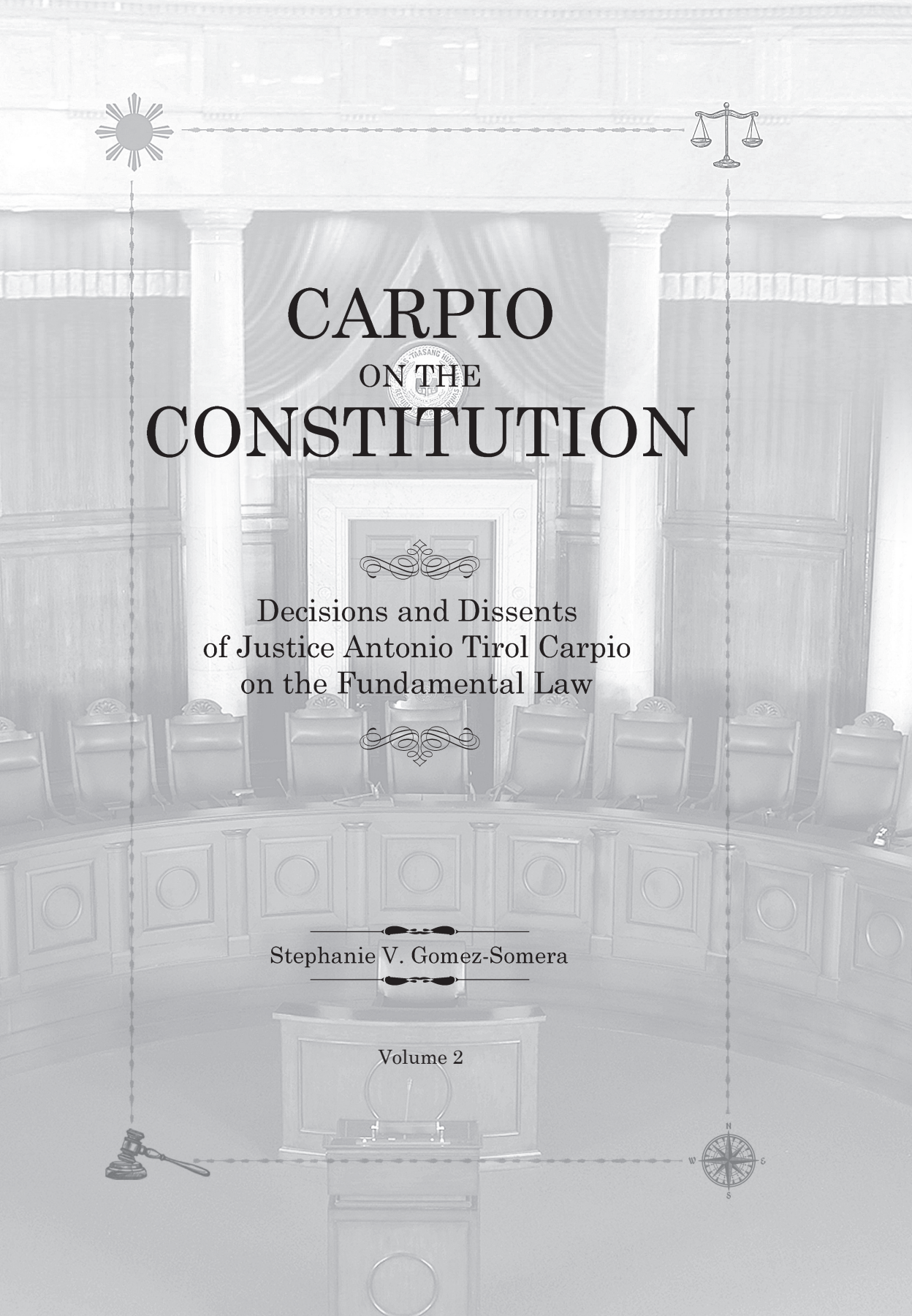
CARPIO
ON THE
CONSTITUTION

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

Stephanie V. Gomez-Somera



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Volume 2

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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.

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

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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 *Certiorari* 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

ARTICLE VIII

JUDICIAL DEPARTMENT

Section 1. The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.

Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not 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.

Role of the Supreme Court

In **LAMBINO v. COMMISSION ON ELECTIONS,** G.R. No. 174153, October 25, 2006,[1] a consolidated petition[2] against a resolution of the COMELEC denying due course to the initiative petition to amend the fundamental law, Justice Carpio, speaking for the Court *en banc*, asserted his view on the role of the Supreme Court:

> **"This Court cannot betray its primordial duty to defend and protect the Constitution. The Constitution, which embodies the people's sovereign will, is the bible of this Court. This Court exists to defend and protect the Constitution. To allow this constitutionally infirm initiative, propelled by deceptively gathered signatures, to alter basic principles in the Constitution is to allow a desecration of the Constitution. To allow such alteration and desecration is to lose this Court's *raison d'etre*."**

Then in **STRATEGIC ALLIANCE DEVELOPMENT CORPORATION v. RADSTOCK SECURITIES LIMITED**, G.R. No. 178158, December 4, 2009, 622 Phil. 431,[3] Justice Carpio penned a categorical opinion on the **role of the Supreme Court**. In ruling

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1 See discussion under Art. XVII.
2 Consolidated with Binay v. COMELEC, G.R. No. 174299.
3 See discussion under Art. VI, Sec. 29.

that certain acts of the Board of the Philippine National Construction Corporation (PNCC) constituted evident bad faith and gross inexcusable negligence, amounting to fraud, and that the compromise agreement between PNCC and Radstock was contrary to the Constitution, existing laws and public policy, Justice Carpio, speaking for the Court *en banc*, asserted:

> During the oral arguments, counsels for Radstock and PNCC admitted that the Compromise Agreement violates the Constitution and existing laws. However, they rely on this Court to approve the Compromise Agreement to shield their clients from possible criminal acts arising from violation of the Constitution and existing laws. In their view, once this Court approves the Compromise Agreement, their clients are home free from prosecution, and can enjoy the P6.185 billion loot. The following exchanges during the oral arguments reveal this view:
>
> > ASSOCIATE JUSTICE CARPIO: If there is no agreement, they better remit all of that to the National Government. They cannot just hold that. They are holding that [in] trust, as you said, ... you agree, for the National Government.
> > DEAN AGABIN: Yes, that's why, they are asking the Honorable Court to approve the compromise agreement.
> > ASSOCIATE JUSTICE CARPIO: We cannot approve that if the power to authorize the expenditure [belongs] to Congress. How can we usurp ... the power of Congress to authorize that expenditure[?] It's only Congress that can authorize the expenditure of funds from the general funds.
> > DEAN AGABIN: But, Your Honor, if the Honorable Court would approve of this compromise agreement, I believe that this would be binding on Congress.
> > ASSOCIATE JUSTICE CARPIO: Ignore the Constitutional provision that money shall be paid out of the National Treasury only pursuant to an appropriation by law. You want us to ignore that[?]
> > DEAN AGABIN: Not really, Your Honor, but I suppose that Congress would have no choice, because this is a final judgment of the Honorable Court.
> > ...
> > ASSOCIATE JUSTICE CARPIO: So, if Radstock makes the assignment, it must own its rights, otherwise, it cannot assign it, correct?
> > ATTY. AGRA: Pursuant to the compromise agreement, once approved, yes, Your Honors.
> > ASSOCIATE JUSTICE CARPIO: So, you are saying that

> Radstock can own the rights to ownership of the land?
> ATTY. AGRA: Yes, Your Honors.
> ASSOCIATE JUSTICE CARPIO: Yes?
> ATTY. AGRA: The premise, Your Honor, you mentioned a while ago was, if this Court approves said compromise (interrupted).

> This Court is not, and should never be, a rubber stamp for litigants hankering to pocket public funds for their selfish private gain. **This Court is the ultimate guardian of the public interest, the last bulwark against those who seek to plunder the public coffers. This Court cannot, and must never, bring itself down to the level of legitimizer of violations of the Constitution, existing laws or public policy.**

Judicial Review

MONTESCLAROS v. COMMISSION ON ELECTIONS, G.R. No. 152295, July 09, 2002, 433 Phil. 620, was a petition for *certiorari*, prohibition and *mandamus* with prayer for a temporary restraining order or preliminary injunction, which Justice Carpio, on behalf of the Court *en banc*, dismissed for "utter lack of merit":

> In sum, petitioners have no personal and substantial interest in maintaining this suit. This petition presents no actual justiciable controversy. Petitioners do not cite any provision of law that is alleged to be unconstitutional. Lastly, we find no grave abuse of discretion on the part of public respondents.

The petition in **Montesclaros**, filed as a taxpayer's and class suit, sought to prevent the postponement of the Sangguniang Kabataan elections based on the claim that the petitioners, who were all 20 years old, were "in danger of being disqualified to vote and be voted for in the SK elections should the SK elections be postponed to a later date."[4] The petition also sought to prevent the reduction of the age requirement for membership in the SK. Consequently, Justice Carpio had occasion to discuss the **power of judicial review**:

> On February 20, 2002, Alfredo L. Benipayo (Chairman Benipayo), then COMELEC Chairman, wrote identical letters to the Speaker of the House and the Senate President about the status of pending bills on the SK and Barangay elections. In his letters,

[4] Under the Local Government Code of 1991 (RA No. 7160), membership in the SK is limited to youths at least 15 but not more than 21 years old.

the COMELEC Chairman intimated that it was "operationally very difficult" to hold both elections simultaneously in May 2002. Instead, the COMELEC Chairman expressed support for the bill of Senator Franklin Drilon that proposed to hold the Barangay elections in May 2002 and postpone the SK elections to November 2002…

On March 6, 2002, the Senate and the House of Representatives passed their respective bills postponing the SK elections. On March 11, 2002, the Bicameral Conference Committee (Bicameral Committee) of the Senate and the House came out with a Report recommending approval of the reconciled bill consolidating Senate Bill No. 2050 and House Bill No. 4456. The Bicameral Committee's consolidated bill reset the SK and Barangay elections to July 15, 2002 and lowered the membership age in the SK to at least 15 but not more than 18 years of age.

On March 11, 2002, petitioners filed the instant petition.

On March 11, 2002, the Senate approved the Bicameral Committee's consolidated bill and on March 13, 2002, the House of Representatives approved the same. The President signed the approved bill into law on March 19, 2002.[5]

The Issues

Petitioners raise the following grounds in support of their petition:

> I. Respondents acted whimsically, illegally and unconstitutionally thus constituted (sic) with grave abuse of discretion, amounting to lack or excess of jurisdiction when they intended to postpone the SK elections.
> II. Respondents acted whimsically, illegally and unconstitutionally thus constituted (sic) with grave abuse of discretion, amounting to lack or excess of jurisdiction when

[5] The Court took judicial notice of the following events that transpired since petitioners filed the petition:
1. The May 6, 2002 SK elections and May 13, 2002 Barangay elections were not held as scheduled.
2. Congress enacted RA No. 9164 which provides that voters and candidates for the SK elections must be "at least 15 but less than 18 years of age on the day of the election." RA No. 9164 also provides that there shall be a synchronized SK and Barangay elections on July 15, 2002.
3. The COMELEC promulgated Resolution No. 4846, the rules and regulations for the conduct of the July 15, 2002 synchronized SK and Barangay elections.

they intended to discriminate, disenfranchise, single out and dismember the SK members who are 18 but not less (sic) than 21 years old composed of about 7 million youth.

III. Respondents acted whimsically, illegally and unconstitutionally thus constituted (sic) with grave abuse of discretion, amounting to lack or excess of jurisdiction when they willfully failed to fund the SK election purportedly to postpone the same in order to implement their illegal scheme and machination in spite of the fact that there are available funds for the purpose.

IV. The incumbent SK officers wanted to perpetually sit on their respective offices contrary to the envision (sic) of the creation of the SK organization, hence, in violation of law and constitution.

The Court's Ruling

The petition is bereft of merit. …

The Court's power of judicial review may be exercised in constitutional cases only if all the following requisites are complied with, namely: (1) the existence of an actual and appropriate case or controversy; (2) a personal and substantial interest of the party raising the constitutional question; (3) the exercise of judicial review is pleaded at the earliest opportunity; and (4) the constitutional question is the *lis mota* of the case.[6]

In the instant case, there is no actual controversy requiring the exercise of the power of judicial review. While seeking to prevent a postponement of the May 6, 2002 SK elections, petitioners are nevertheless amenable to a resetting of the SK elections to any date not later than July 15, 2002. RA No. 9164 has reset the SK elections to July 15, 2002, a date acceptable to petitioners. With respect to the date of the SK elections, there is therefore no actual controversy requiring judicial intervention.

Petitioners' prayer to prevent Congress from enacting into law a proposed bill lowering the membership age in the SK does not present an actual justiciable controversy. A proposed bill is not subject to judicial review because it is not a law. A proposed bill creates no right and imposes no duty legally enforceable by the Court. A proposed bill, having no legal effect, violates no constitutional right or duty. The Court has no power to declare

[6] Integrated Bar of the Philippines v. Zamora, 338 SCRA 81 (2000).

a proposed bill constitutional or unconstitutional because that would be in the nature of rendering an advisory opinion on a proposed act of Congress. The power of judicial review cannot be exercised *in vacuo*[7] (as provided in) (t)he second paragraph of Section 1, Article VIII of the Constitution…

Thus, there can be no justiciable controversy involving the constitutionality of a proposed bill. The Court can exercise its power of judicial review only after a law is enacted, not before.

Under the separation of powers, the Court cannot restrain Congress from passing any law, or from setting into motion the legislative mill according to its internal rules. Thus, the following acts of Congress in the exercise of its legislative powers are not subject to judicial restraint: the filing of bills by members of Congress, the approval of bills by each chamber of Congress, the reconciliation by the Bicameral Committee of approved bills, and the eventual approval into law of the reconciled bills by each chamber of Congress. Absent a clear violation of specific constitutional limitations or of constitutional rights of private parties, the Court cannot exercise its power of judicial review over the internal processes or procedures of Congress.[8]

The Court has also no power to dictate to Congress the object or subject of bills that Congress should enact into law. The judicial power to review the constitutionality of laws does not include the power to prescribe to Congress what laws to enact. The Court has no power to compel Congress by *mandamus* to enact a law allowing petitioners, regardless of their age, to vote and be voted for in the July 15, 2002 SK elections. To do so would destroy the delicate system of checks and balances finely crafted by the Constitution for the three co-equal, coordinate and independent branches of government.

Under RA No. 9164, Congress merely restored the age requirement in PD No. 684, the original charter of the SK, which fixed the maximum age for membership in the SK to youths less than 18 years old. Petitioners do not have a vested right to the permanence of the age requirement under Section 424 of the Local Government Code of 1991. Every law passed by Congress

[7] Allied Broadcasting Center, Inc. v. Republic, 190 SCRA 782 (1990).

[8] Santiago v. Guingona, 298 SCRA 756 (1998); See also Arroyo v. De Venecia, 277 SCRA 268 (1997); Tolentino v. Secretary of Finance, 249 SCRA 628 (1995).

is always subject to amendment or repeal by Congress. The Court cannot restrain Congress from amending or repealing laws, for the power to make laws includes the power to change the laws.[9]

The Court cannot also direct the COMELEC to allow over-aged voters to vote or be voted for in an election that is limited under RA No. 9164 to youths at least 15 but less than 18 years old. A law is needed to allow all those who have turned more than 21 years old on or after May 6, 2002 to participate in the July 15, 2002 SK elections. Youths from 18 to 21 years old as of May 6, 2002 are also no longer SK members, and cannot participate in the July 15, 2002 SK elections. Congress will have to decide whether to enact an amendatory law. Petitioners' remedy is legislation, not judicial intervention.

Petitioners have no personal and substantial interest in maintaining this suit. A party must show that he has been, or is about to be denied some personal right or privilege to which he is lawfully entitled.[10] A party must also show that he has a real interest in the suit. By "real interest" is meant a present substantial interest, as distinguished from a mere expectancy or future, contingent, subordinate, or inconsequential interest.[11]

In the instant case, petitioners seek to enforce a right originally conferred by law on those who were at least 15 but not more than 21 years old. Now, with the passage of RA No. 9164, this right is limited to those who on the date of the SK elections are at least 15 but less than 18 years old. The new law restricts membership in the SK to this specific age group. Not falling within this classification, petitioners have ceased to be members of the SK and are no longer qualified to participate in the July 15, 2002 SK elections. Plainly, petitioners no longer have a personal and substantial interest in the SK elections.

This petition does not raise any constitutional issue. At the time petitioners filed this petition, RA No. 9164, which reset the SK elections and reduced the age requirement for SK membership, was not yet enacted into law. After the passage of RA No. 9164, petitioners failed to assail any provision in RA No. 9164 that could be unconstitutional. To grant petitioners' prayer to be allowed to vote and be voted for in the July 15, 2002 SK elections

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9 Isagani A. Cruz, Philippine Political Law 152 (1998).
10 Bayan (Bagong Alyansang Makabayan) v. Zamora, 342 SCRA 449 (2000).
11 Caruncho III v. Commission on Elections, 315 SCRA 693 (1999).

> necessitates assailing the constitutionality of RA No. 9164. This, petitioners have not done. The Court will not strike down a law unless its constitutionality is properly raised in an appropriate action and adequately argued.[12]

The consolidated petitions[13] in **PHILIPPINE CONSTITUTION ASSOCIATION (PHILCONSA) v. PHILIPPINE GOVERNMENT (GPH)**, G.R. No. 218406, November 29, 2016, which challenged the constitutionality and validity of the Comprehensive Agreement on the Bangsamoro (CAB) and the Framework Agreement on the Bangsamoro (FAB), were dismissed by Justice Carpio, for the Court *en banc*, on the ground of prematurity, citing **Section 1 of this Article VIII**:

> Essentially, the petitions commonly seek to declare the CAB and the FAB unconstitutional for being similar to the void MOA-AD, which was struck down by the Court for violating, among others, the constitutional provisions on constitutional amendments.
>
> **The Facts**
>
> On 15 September 1993, President Fidel V. Ramos issued EO No. 125[14] creating the Office of the Presidential Adviser on the Peace Process and calling for a "comprehensive, integrated and holistic peace process with Muslim rebels" in Mindanao. On 28 February 2001, President Gloria Macapagal-Arroyo issued EO No. 3[15] which amended EO No. 125 to reaffirm the government's commitment to achieve just and lasting peace in the Philippines through a comprehensive peace process.
>
> Pursuant to EO No. 3, the Government Peace Negotiating Panel (GPNP) held negotiations with the MILF, an armed, revolutionary Muslim separatist group based in Mindanao seeking separation of the Muslim people from the central government. The negotiations eventually led to the preparation of the Memorandum of Agreement on Ancestral Domain (MOA-AD) on 27 July 2008. However, on 14 October 2008, in the case of *Province of North Cotabato v. Government of the Republic of*

[12] See Reyes v. Court of Appeals, 320 SCRA 486 (1999).

[13] Consolidated with Tanggulang Demokrasya, Inc. v. GPH, G.R. No. 218761; Aquino v. GPH, G.R. No. 204355; Paras v. Ferrer, G.R. No. 218407; Pamatong v. GPH, G.R. No. 204354.

[14] Defining The Approach And Administrative Structure For Government's Comprehensive Peace Efforts.

[15] Defining Policy And Administrative Structure For Government's Comprehensive Peace Efforts.

the Philippines Peace Panel on Ancestral Domain,[16] the Court declared the MOA-AD unconstitutional.

During the administration of President Benigno S. Aquino III, the government resumed peace negotiations with the MILF. Marvic M.V.F. Leonen headed the GPNP and became the government's chief peace negotiator with the MILF in July 2010.

On 15 October 2012, a preliminary peace agreement called the FAB was signed between the government and the MILF. The FAB called for the creation of an autonomous political entity named Bangsamoro, replacing the ARMM.

After further negotiations, the following Annexes and Addendum to the FAB were also signed in Kuala Lumpur, Malaysia:

a) Annex on Transitional Arrangements and Modalities;
b) Annex on Revenue Generation and Wealth Sharing;
c) Annex on Power Sharing;
d) Annex on Normalization; and
e) On the Bangsamoro Waters and Zones of Joint Cooperation Addendum to the Annex on Revenue Generation and Wealth Sharing and the Annex on Power Sharing.

The Annexes and Addendum discussed the following:

a) The Annex on Transitional Arrangements and Modalities, signed on 27 February 2013, established the transitional process for the establishment of the Bangsamoro and detailed the creation of the Bangsamoro Transition Commission, the Bangsamoro Basic Law and the Bangsamoro Transition Authority.
b) The Annex on Revenue Generation and Wealth Sharing, signed on 13 July 2013, enumerated the creation of sources of revenues for the Bangsamoro government and its power to levy taxes, fees and charges.
c) The Annex on Power Sharing, signed on 8 December 2013, discussed intergovernmental relations of the central government, the Bangsamoro government and the constituent units under the Bangsamoro.
d) The Annex on Normalization, signed on 25 January 2014, outlined the laying down of weapons of MILF members and their transition to civilian life.
e) The Addendum on the Bangsamoro Waters and Zones

[16] 589 Phil. 387 (2008).

> of Joint Cooperation, signed on 25 January 2014, detailed the scope of waters under the territorial jurisdiction of the Bangsamoro (12 nautical miles from the coast) and Zones of Joint Cooperation in the Sulu Sea and the Moro Gulf.

On 7 December 2012, Miriam Coronel-Ferrer succeeded Marvic M.V.F. Leonen as GPNP Chairperson.

On 17 December 2012, President Benigno S. Aquino III issued EO No. 120,[17] constituting the Bangsamoro Transition Commission, tasked, among others, to (1) draft the proposed Bangsamoro Basic Law with provisions consistent with the FAB, and (2) recommend to Congress or the people proposed amendments to the 1987 Philippine Constitution. Under Section 5 of the same EO, the Bangsamoro Transition Commission shall cease to operate upon the enactment by Congress of the Bangsamoro Basic Law.

On 27 March 2014, the Philippine Government, represented by GPNP Chairperson Miriam Coronel- Ferrer, signed the CAB, which was an integration of the FAB, the Annexes and the other agreements previously executed by the government and the MILF.

On 10 September 2014, a draft of the Bangsamoro Basic Law, referred to as House Bill (HB) No. 4994, was presented by President Aquino to the 16th Congress. On 27 May 2015, in Committee Report No. 747, the Ad Hoc Committee on the Basic Bangsamoro Law of the House of Representatives substituted said bill and passed another version known as House Bill No. 5811. In the Senate, a revised version of the Bangsamoro Basic Law, known as the Basic Law for the Bangsamoro Autonomous Region or Senate Bill No. 2894, was presented on 10 August 2015. However, on 6 June 2016, the 16th Congress adjourned without passing the proposed Bangsamoro Basic Law.

Meanwhile, several petitions were filed with this Court assailing the constitutionality of the CAB, including the FAB, and its Annexes. G.R. Nos. 204354 and 204355, which were both filed in 2012, were consolidated pursuant to a Resolution dated 11 December 2012. Likewise, in a Resolution dated 23 June 2015, G.R. Nos. 218406 and 218407 were consolidated. In a Resolution dated 12 January 2016, the Court granted the consolidation

[17] Constituting The Transition Commission And For Other Purposes.

of G.R. No. 218761 with G.R. Nos. 218406 and 218407. In a Resolution dated 22 November 2016, all five petitions were consolidated.

On 7 November 2016, President Rodrigo Roa Duterte issued EO No. 08[18] expanding the membership and functions of the Bangsamoro Transition Commission. EO No. 08 expands the number of members of the Bangsamoro Transition Commission from 15 to 21. Section 3 of EO No. 120, as amended by EO No. 08, provides for the functions of the Bangsamoro Transition Commission, which include drafting proposals for a Bangsamoro Basic Law, to be submitted to the Office of the President for submission to Congress, and recommending to Congress or the people proposed amendments to the 1987 Philippine Constitution.

The Issue

The threshold issue in this case is whether the CAB, including the FAB, is constitutional.

The Court's Ruling

We dismiss the petitions.

Not ripe for adjudication due to non-enactment of the Bangsamoro Basic Law.

Section 1, Article VIII of the Constitution spells out what judicial power is…

Pursuant to this constitutional provision, it is clear that the Court's judicial review power is limited to actual cases or controversies. The Court generally declines to issue advisory opinions or to resolve hypothetical or feigned problems, or mere academic questions. The limitation of the power of judicial review to actual cases and controversies assures that the courts will not intrude into areas specifically confined to the other branches of government.[19]

[18] Amending Further Executive Order No. 120 (s. 2012), as Amended by Executive Order No. 187 (s. 2015), on the Bangsamoro Transition Commission And For Other Purposes.

[19] Province of North Cotabato v. Government of the Republic of the Philippines Peace Panel on Ancestral Domain, 589 Phil. 387 (2008).

An actual case or controversy involves a conflict of legal rights, an assertion of opposite legal claims, susceptible of judicial resolution as distinguished from a hypothetical or abstract difference or dispute.[20] There must be a contrast of legal rights that can be interpreted and enforced on the basis of existing law and jurisprudence.[21] The Court can decide the constitutionality of an act, either by the Executive or Legislative, only when an actual case between opposing parties is submitted for judicial determination.[22]

Closely linked to the requirement of an actual case or controversy is the requirement of ripeness. A question is ripe for adjudication when the act being challenged has had a direct adverse effect on the individual or entity challenging it.[23] For a case to be considered ripe for adjudication, it is a prerequisite that an act had then been accomplished or performed by either branch of government before a court may interfere, and the petitioner must allege the existence of an immediate or threatened injury to himself as a result of the challenged action.[24] Petitioner must show that he has sustained or is immediately in danger of sustaining some direct injury as a result of the act complained of.[25]

In *Province of North Cotabato v. GRP (MOA-AD case)*,[26] which involved the Memorandum of Agreement on the Ancestral Domain Aspect of the GRP-MILF Tripoli Agreement on Peace of 2001, the Court faced the same issue of ripeness. There, the Court explained the limits of the power of judicial review and the prerequisites for the judicial determination of a case.

In the *MOA-AD* case, the Court rejected the argument of the Solicitor General that there was no justiciable controversy that was ripe for adjudication. The Court disagreed with the Solicitor General's contention that the initialed but "unsigned MOA-AD is simply a list of consensus points subject to further

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[20] Philippine Amusement and Gaming Corporation v. Thunderbird Pilipinas Hotels and Resorts, Inc., 730 Phil. 543, 562 (2014).

[21] Ibid.

[22] Id., citing Didipio Earth Savers' Multi-Purpose Association, Inc. v. Gozun, 520 Phil. 457 (2006).

[23] Guingona v. Court of Appeals, 354 Phil. 415, 427 (1998).

[24] Imbong v. Ochoa, Jr., G.R. Nos. 204819, 204934, 204957, 204988, 205003, 205043, 205138, 205478, 205491, 205720, 206355, 207111, 207172, 207563, April 8, 2014, 721 SCRA 146, 280.

[25] Ibid.

[26] 589 Phil. 387 (2008).

negotiations and legislative enactments as well as constitutional processes aimed at attaining a final peaceful agreement. ... [T]he MOA-AD remains to be a proposal that does not automatically create legally demandable rights and obligations until the list of operative acts required have been duly complied with." The Court ruled that "[w]hen an act of a branch of government is seriously alleged to have infringed the Constitution, it becomes not only the right but in fact the duty of the judiciary to settle the dispute." Moreover, in the *MOA-AD* case, the Executive was about to sign the initialed MOA-AD with the MILF in Kuala Lumpur, Malaysia in the presence of representatives of foreign states. Only the prompt issuance by this Court of a temporary restraining order stopped the signing, averting the implications that such signing would have caused.

In the present case, however, the Court agrees with the Solicitor General that there is no actual case or controversy requiring a full-blown resolution of the principal issue presented by petitioners.

Unlike the unconstitutional MOA-AD, the CAB, including the FAB, mandates the enactment of the Bangsamoro Basic Law in order for such peace agreements to be implemented. In the *MOA-AD* case, there was nothing in the MOA-AD which required the passage of any statute to implement the provisions of the MOA-AD, which in essence would have resulted in dramatically dismembering the Philippines by placing the provinces and areas covered by the MOA-AD under the control and jurisdiction of a Bangsamoro Juridical Entity.

The MOA-AD as an agreement did not provide for the enactment of subsequent legislation to implement its provisions. In fact, its provisions were immediately implementable after its signing warranting the timely intervention by this Court to rule on its constitutionality.

Further, under the MOA-AD, the Executive branch assumed the mandatory obligation to amend the Constitution to conform to the MOA-AD. The Executive branch guaranteed to the MILF that the Constitution would be drastically overhauled to conform to the MOA-AD. In effect, the Executive branch usurped the sole discretionary power of Congress to propose amendments to the Constitution as well as the exclusive power of the sovereign

people to approve or disapprove such proposed amendments.[27] Thus, this Court struck down the MOA-AD as unconstitutional since such ultra vires commitment by the Executive branch constituted grave abuse of discretion amounting to lack or excess of jurisdiction.

In the present case, there is no such guarantee when the CAB and the FAB were signed. The government gives no commitment, express or implied, that the Constitution will be amended or that a law will be passed comprising all the provisions indicated in the CAB and the FAB. Thus, contrary to the imagined fear of petitioners, the CAB and the FAB are not mere reincarnations or disguises of the infirm MOA-AD.

The CAB and the FAB require the enactment of the Bangsamoro Basic Law for their implementation. It is a fundamental constitutional principle that Congress has full discretion to enact the kind of Bangsamoro Basic Law that Congress, in its wisdom, deems necessary and proper to promote peace and development in Muslim areas in Mindanao. Congress is expected to seriously consider the CAB and the FAB but Congress is not bound by the CAB and the FAB. Congress is separate, independent, and co-equal of the Executive branch that alone entered into the CAB and the FAB. The Executive branch cannot compel Congress to adopt the CAB and the FAB. Neither can Congress dictate on Congress the contents of the Bangsamoro Basic Law, or the proposed amendments to the Constitution that Congress should submit to the people for ratification.

The CAB and the FAB cannot be implemented without the passage of the Bangsamoro Basic Law. The CAB and the FAB remain peace agreements whose provisions cannot be enforced and given any legal effect unless the Bangsamoro Basic Law is duly passed by Congress and subsequently ratified in accordance with the Constitution. The CAB and the FAB are preparatory documents that can "trigger a series of acts" that may lead to the exercise by Congress of its power to enact an organic act for an autonomous region under Section 18, Article X of the Constitution. The CAB and the FAB do not purport to preempt this Congressional power.

Provision I(C) of the Annex on Transitional Arrangements and

[27] Separate concurring opinion, Carpio, J., Province of North Cotabato v. GRP, 589 Phil. 387 (2008), at 585, 589, 603, discussed under Art. II.

Modalities provides that "[t]he proposed Basic Law shall be submitted to the Office of the President" and that "[t]he President shall submit the proposed Basic Law to Congress as a legislative proposal. The bill for the proposed Basic Law shall be certified as urgent by the President." The CAB, as the consolidation of the peace agreements between the government and the MILF, requires the drafting of the Bangsamoro Basic Law, its submission to the Office of the President and the President's submission of a draft Bangsamoro Basic Law to Congress as a legislative proposal. It is a fundamental premise of the CAB that a law and a ratification process are required for its "actual implementation."

Significantly, President Rodrigo Roa Duterte issued EO No. 08 expanding the membership and functions of the Bangsamoro Transition Commission. EO No. 08 increases the number of members of the Bangsamoro Transition Commission from 15 to 21. Section 3 of EO No. 120, as amended by EO No. 08, provides for the functions of the Bangsamoro Transition Commission, which include drafting proposals for a Bangsamoro Basic Law, to be submitted to the Office of the President for submission to Congress, and recommending to Congress proposed amendments to the Constitution for submission to the people for ratification.

The functions of the Bangsamoro Transition Commission, which explicitly include the drafting of proposals for a Bangsamoro Basic Law, as required under the CAB and the FAB, highlight the fact that the CAB and the FAB are mere preliminary framework agreements which will guide the Bangsamoro Transition Commission in the formulation of the proposed Bangsamoro Basic Law for submission to Congress, which may adopt such proposed law in whole or in part, amend or revise the same, or even reject it outright.

During the Aquino administration, the Bangsamoro Transition Commission submitted its proposed Bangsamoro Basic Law to former President Benigno S. Aquino III, who submitted the same to the 16th Congress, which however failed to enact the same before its adjournment. Thus, the bill proposing the Bangsamoro Basic Law has to be refiled with the present Congress. With the signing of EO No. 08 by President Duterte, the expanded Bangsamoro Transition Commission shall redraft the proposed Bangsamoro Basic Law to be submitted to the President who is expected to certify it to the present Congress as an urgent bill. Congress, in turn, may or may not accept the proposed

Bangsamoro Basic Law as it is worded. There is therefore no guarantee that Congress will enact the Bangsamoro Basic Law. Congress has the sole discretion whether or not to pass the Bangsamoro Basic Law, as proposed by the Bangsamoro Transition Commission.

It is not the CAB or the FAB that will establish the Bangsamoro but the Bangsamoro Basic Law enacted by Congress and ratified in a plebiscite in accordance with the Constitution. Congress must still enact a Bangsamoro Basic Law. The requirement of a Bangsamoro Basic Law under the CAB and the FAB ensures that the pitfalls under the invalid MOA-AD will be avoided.

Even if there were today an existing bill on the Bangsamoro Basic Law, it would still not be subject to judicial review. The Court held in **Montesclaros v. COMELEC**[28] that it has no power to declare a proposed bill constitutional or unconstitutional because that would be in the nature of rendering an advisory opinion on a proposed act of Congress. The power of judicial review cannot be exercised *in vacuo*. As the Court in **Montesclaros** noted, invoking Section 1, Article VIII of the Constitution, there can be no justiciable controversy involving the constitutionality of a proposed bill. **The power of judicial review comes into play only after the passage of a bill, and not before.** Unless enacted into law, any proposed Bangsamoro Basic Law pending in Congress is not subject to judicial review.

Clearly, any question on the constitutionality of the CAB and the FAB, without the implementing Bangsamoro Basic Law, is premature and not ripe for adjudication. Until a Bangsamoro Basic Law is passed by Congress, it is clear that there is no actual case or controversy that requires the Court to exercise its power of judicial review over a co-equal branch of government.

Extraordinary Power of *Certiorari*

KNIGHTS OF RIZAL v. DMCI HOMES, INC., G.R. No. 213948, April 25, 2017, was a petition for injunction, which the Court *en banc* treated as one for *mandamus*, with applications for temporary restraining order, writ of preliminary injunction, and others, filed by the KOR to stop the construction of DMCI's condominium development project, the Torre de Manila:

[28] 433 Phil. 620, 634 (2002), penned by Justice Carpio and excerpted above.

The Facts

On 1 September 2011, DMCI Project Developers, Inc. (DMCI-PDI) acquired a 7,716.60-square meter lot in the City of Manila, located near Taft Avenue, Ermita, beside the former Manila Jai-Alai Building and Adamson University. The lot was earmarked for the construction of DMCI-PDI's Torre de Manila condominium project.

On 2 April 2012, DMCI-PDI secured its Barangay Clearance to start the construction of its project. It then obtained a Zoning Permit from the City of Manila's City Planning and Development Office (CPDO) on 19 June 2012.

Then, on 5 July 2012, the City of Manila's Office of the Building Official granted DMCI-PDI a Building Permit, allowing it to build a "Forty-Nine (49) Storey w/ Basement & 2 penthouse Level Res'l./Condominium" on the property.

On 24 July 2012, the City Council of Manila issued Resolution No. 121 enjoining the Office of the Building Official to temporarily suspend the Building Permit of DMCI-PDI, citing among others, that "the Torre de Manila Condominium, based on their development plans, upon completion, will rise up high above the back of the national monument, to clearly dwarf the statue of our hero, and with such towering heights, would certainly ruin the line of sight of the Rizal Shrine from the frontal Roxas Boulevard vantage point[.]"

Building Official Melvin Q. Balagot then sought the opinion of the City of Manila's City Legal Officer on whether he is bound to comply with Resolution No. 121. In his letter dated 12 September 2012, City Legal Officer Renato G. Dela Cruz stated that there is "no legal justification for the temporary suspension of the Building Permit issued in favor of [DMCI-PDI]" since the construction "lies outside the Luneta Park" and is "simply too far to be a repulsive distraction or have an objectionable effect on the artistic and historical significance" of the Rizal Monument. He also pointed out that "there is no showing that the [area of] subject property has been officially declared as an anthropological or archeological area. Neither has it been categorically designated by the National Historical Institute as a heritage zone, a cultural property, a historical landmark or even a national treasure."

Subsequently, both the City of Manila and DMCI-PDI sought the

opinion of the National Historical Commission of the Philippines (NHCP) on the matter. In the letter dated 6 November 2012 from NHCP Chairperson Dr. Maria Serena I. Diokno addressed to DMCI-PDI and the letter dated 7 November 2012 from NHCP Executive Director III Ludovico D. Badoy addressed to then Manila Mayor Alfredo S. Lim, the NHCP maintained that the Torre de Manila project site is outside the boundaries of the Rizal Park and well to the rear of the Rizal Monument, and thus, cannot possibly obstruct the frontal view of the National Monument.

On 26 November 2013, following an online petition against the Torre de Manila project that garnered about 7,800 signatures, the City Council of Manila issued Resolution No. 146, reiterating its directive in Resolution No. 121 enjoining the City of Manila's building officials to temporarily suspend DMCI-PDI's Building Permit.

In a letter to Mayor Joseph Ejercito Estrada dated 18 December 2013, DMCI-PDI President Alfredo R. Austria sought clarification on the controversy surrounding its Zoning Permit. He stated that since the CPDO granted its Zoning Permit, DMCI-PDI continued with the application for the Building Permit, which was granted, and did not deem it necessary to go through the process of appealing to the local zoning board. He then expressed DMCI-PDI's willingness to comply with the process if the City of Manila deemed it necessary.

On 23 December 2013, the Manila Zoning Board of Adjustments and Appeals (MZBAA) issued Zoning Board Resolution No. 06, Series of 2013, recommending the approval of DMCI-PDI's application for variance. The MZBAA noted that the Torre de Manila project "exceeds the prescribed maximum Percentage of Land Occupancy (PLO) and exceeds the prescribed Floor Area Ratio (FAR) as stipulated in Article V, Section 17 of City Ordinance No. 8119[.]" However, the MZBAA still recommended the approval of the variance subject to the five conditions set under the same resolution.

After some clarification sought by DMCI-PDI, the MZBAA issued Zoning Board Resolution No. 06-A, Series of 2013, on 8 January 2014, amending condition I in the earlier resolution.

On 16 January 2014, the City Council of Manila issued Resolution No. 5, Series of 2014, adopting Zoning Board Resolution Nos.

06 and 06-A. The City Council resolution states that "the City Council of Manila find[s] no cogent reason to deny and/or reverse the aforesaid recommendation of the [MZBAA] and hereby ratif[ies] and confirm[s] all previously issued permits, licenses and approvals issued by the City [Council] of Manila for Torre de Manila[.]"

Arguments of the KOR

On 12 September 2014, the KOR, a "civic, patriotic, cultural, nonpartisan, non-sectarian and non-profit organization" created under Republic Act No. 646, filed a Petition for Injunction seeking a temporary restraining order, and later a permanent injunction, against the construction of DMCI-PDI's Torre de Manila condominium project. The KOR argues that the subject matter of the present suit is one of "transcendental importance, paramount public interest, of overarching significance to society, or with far-reaching implication" involving the desecration of the Rizal Monument.

The KOR asserts that the completed Torre de Manila structure will "[stick] out like a sore thumb, [dwarf] all surrounding buildings within a radius of two kilometer/s" and "forever ruin the sightline of the Rizal Monument in Luneta Park; Torre de Manila building would loom at the back and overshadow the entire monument, whether up close or viewed from a distance."

Further, the KOR argues that the Rizal Monument, as a National Treasure, is entitled to "full protection of the law" and the national government must abate the act or activity that endangers the nation's cultural heritage "even against the wishes of the local government hosting it."

Next, the KOR contends that the project is a nuisance *per se* because "[t]he despoliation of the sight view of the Rizal Monument is a situation that 'annoys or offends the senses' of every Filipino who honors the memory of the National Hero Jose Rizal. It is a present, continuing, worsening and aggravating status or condition. Hence, the PROJECT is a nuisance *per se*. It deserves to be abated summarily, even without need of judicial proceeding."

The KOR also claims that the Torre de Manila project violates the NHCP's Guidelines on Monuments Honoring National Heroes, Illustrious Filipinos and Other Personages, which state

that historic monuments should assert a visual "dominance" over its surroundings, as well as the country's commitment under the International Charter for the Conservation and Restoration of Monuments and Sites, otherwise known as the Venice Charter.

Lastly, the KOR claims that the DMCI-PDI's construction was commenced and continues in bad faith, and is in violation of the City of Manila's zoning ordinance.

Arguments of DMCI-PDI

In its Comment, MCI-PDI argues that the KOR's petition should be dismissed, on the following grounds:

I. This honorable court has no jurisdiction over this action.
II. KOR has no legal right or interest to file or prosecute this action.
III. Torre de manila is not a nuisance *per se*.
IV. DMCI-PDI acted in good faith in constructing Torre de Manila; and
V. KOR is not entitled to a temporary restraining order and/or a writ of preliminary injunction.

First, DMCI-PDI asserts that the Court has no original jurisdiction over actions for injunction. Even assuming that the Court has concurrent jurisdiction, DMCI-PDI maintains that the petition should still have been filed with the Regional Trial Court under the doctrine of hierarchy of courts and because the petition involves questions of fact.

DMCI-PDI also contends that the KOR's petition is in actuality an opposition or appeal from the exemption granted by the City of Manila's MZBAA, a matter which is also not within the jurisdiction of the Court. DMCI-PDI claims that the proper forum should be the MZBAA, and should the KOR fail there, it should appeal the same to the Housing and Land Use Regulatory Board (HLURB).

DMCI-PDI further argues that since the Rizal Monument has been declared a National Treasure, the power to issue a cease and desist order is lodged with the "appropriate cultural agency" under Section 25 of Republic Act No. 10066 or the National Cultural Heritage Act of 2009. Moreover, DMCI-PDI asserts that the KOR availed of the wrong remedy since an action for injunction is not the proper remedy for abatement of a nuisance.

Second, DMCI-PDI maintains that the KOR has no standing to

institute this proceeding because it is not a real party in interest in this case. The purposes of the KOR as a public corporation do not include the preservation of the Rizal Monument as a cultural or historical heritage site. The KOR has also not shown that it suffered an actual or threatened injury as a result of the alleged illegal conduct of the City of Manila. If there is any injury to the KOR at all, the same was caused by the private conduct of a private entity and not the City of Manila.

Third, DMCI-PDI argues that the Torre de Manila is not a nuisance *per se*. DMCI-PDI reiterates that it obtained all the necessary permits, licenses, clearances, and certificates for its construction. It also refutes the KOR's claim that the Torre de Manila would dwarf all other structures around it, considering that there are other tall buildings even closer to the Rizal Monument itself, namely, the Eton Baypark Tower at the corner of Roxas Boulevard and T.M. Kalaw Street (29 storeys; 235 meters from the Rizal Monument) and Sunview Palace at the corner of M.H. Del Pilar and T.M. Kalaw Streets (42 storeys; 250 meters from the Rizal Monument).

Fourth, DMCI-PDI next argues that it did not act in bad faith when it started construction of its Torre de Manila project. Bad faith cannot be attributed to it since it was within the "lawful exercise of [its] rights." The KOR failed to present any proof that DMCI-PDI did not follow the proper procedure and zoning restrictions of the City of Manila. Aside from obtaining all the necessary permits from the appropriate government agencies, DMCI-PDI also sought clarification on its right to build on its site from the Office of the City Legal Officer of Manila, the Manila CPDO, and the NHCP. Moreover, even if the KOR proffered such proof, the Court would be in no position to declare DMCI-PDI's acts as illegal since the Court is not a trier of facts.

Finally, DMCI-PDI opposes the KOR's application for a Temporary Restraining Order (TRO) and writ of preliminary injunction. DMCI-PDI asserts that the KOR has failed to establish "a clear and unmistakable right to enjoin the construction of Torre de Manila, much less request its demolition." DMCI-PDI further argues that it "has complied with all the legal requirements for the construction of Torre de Manila ... [and] has violated no right of KOR that must be protected. Further, KOR stands to suffer no damage because of its lack of direct pecuniary interest in this petition. To grant the KOR's application for injunctive relief would constitute an unjust taking of property without due

process of law."

Arguments of the City of Manila

In its Comment, the City of Manila argues that the writ of *mandamus* cannot issue "considering that no property or substantive rights whatsoever in favor of [the KOR] is being affected or ... entitled to judicial protection[.]"

The City of Manila also asserts that the "issuance and revocation of a Building Permit undoubtedly fall under the category of a discretionary act or duty performed by the proper officer in light of his meticulous appraisal and evaluation of the pertinent supporting documents of the application in accordance with the rules laid out under the National Building Code [and] Presidential Decree No. 1096," while the remedy of *mandamus* is available only to compel the performance of a ministerial duty.

Further, the City of Manila maintains that the construction of the Torre de Manila did not violate any existing law, since the "edifice [is] well behind (some 789 meters away) the line of sight of the Rizal Monument." It adds that the City of Manila's "prevailing Land Use and Zoning Ordinance [Ordinance No. 8119] ... allows an adjustment in Floor Area Ratios thru the [MZBAA] subject to further final approval of the City Council." The City Council adopted the MZBAA's favorable recommendation in its Resolution No. 5, ratifying all the licenses and permits issued to DMCI-PDI for its Torre de Manila project.

In its Position Paper dated 15 July 2015, the City of Manila admitted that the Zoning Permit issued to DMCI-PDI was "in breach of certain provisions of City Ordinance No. 8119." It maintained, however, that the deficiency is "procedural in nature and pertains mostly to the failure of [DMCI-PDI] to comply with the stipulations that allow an excess in the [FAR] provisions." Further, the City of Manila argued that the MZBAA, when it recommended the allowance of the project's variance, imposed certain conditions upon the Torre de Manila project in order to mitigate the possible adverse effects of an excess FAR.

The Issue

The issues raised by the parties can be summed up into one main point: Can the Court issue a writ of *mandamus* against the officials of the City of Manila to stop the construction of DMCI-

PDI's Torre de Manila project?

Justice Carpio, for the Court *en banc*, dismissed the **Knights of Rizal** petition for lack of merit as there was no law prohibiting the construction of the Torre de Manila, and discussed the **extraordinary *certiorari* power of review under Section 1 of this Article VIII**:

> In *Manila Electric Company v. Public Service Commission*,[29] the Court held that "what is not expressly or impliedly prohibited by law may be done, except when the act is contrary to morals, customs and public order." This principle is fundamental in a democratic society, to protect the weak against the strong, the minority against the majority, and the individual citizen against the government. **In essence, this principle, which is the foundation of a civilized society under the rule of law, prescribes that the freedom to act can be curtailed only through law. Without this principle, the rights, freedoms, and civil liberties of citizens can be arbitrarily and whimsically trampled upon by the shifting passions of those who can shout the loudest, or those who can gather the biggest crowd or the most number of Internet trolls.** In other instances,[30] the Court has allowed or upheld actions that were not expressly prohibited by statutes when it determined that these acts were not contrary to morals, customs, and public order, or that upholding the same would lead to a more equitable solution to the controversy. However, it is the law itself - Articles 1306 and 1409(1) of the Civil Code - which prescribes that acts not contrary to morals, good customs, public order, or public policy are allowed if also not contrary to law.
>
> In this case, there is no allegation or proof that the Torre de Manila project is "contrary to morals, customs, and public order" or that it brings harm, danger, or hazard to the community. On the contrary, the City of Manila has determined that DMCI-PDI complied with the standards set under the pertinent laws and local ordinances to construct its Torre de Manila project.
>
> There is one fact that is crystal clear in this case. There is no law prohibiting the construction of the Torre de Manila due to its effect on the background "view, vista, sightline, or setting" of the Rizal Monument.

[29] 60 Phil. 658, 661 (1934).

[30] See In the Matter of the Adoption of Stephanie Nathy Astroga Garcia, 494 Phil. 515 (2005); Summerville General Merchandising Co. v. Court of Appeals, 552 Phil. 668 (2007).

Zoning, as well as land use, in the City of Manila is governed by Ordinance No. 8119. The ordinance provides for standards and guidelines to regulate development projects of historic sites and facilities within the City of Manila.

…

It is clear that the standards laid down in Section 47 of Ordinance No. 8119 only serve as guides, as it expressly states that "the following shall guide the development of historic sites and facilities." A guide simply sets a direction or gives an instruction to be followed by property owners and developers in order to conserve and enhance a property's heritage values.

…

Section 47 of Ordinance No. 8119 specifically regulates the "development of historic sites and facilities." Section 48 regulates "large commercial signage and/or pylon." There is nothing in Sections 47 and 48 of Ordinance No. 8119 that disallows the construction of a building outside the boundaries of a historic site or facility, where such building may affect the background of a historic site. In this case, the Torre de Manila stands 870 meters outside and to the rear of the Rizal Monument and "cannot possibly obstruct the front view of the [Rizal] Monument." Likewise, the Torre de Manila is not in an area that has been declared as an "anthropological or archeological area" or in an area designated as a heritage zone, cultural property, historical landmark, or a national treasure by the NHCP.

…

***Mandamus* does not lie against the City of Manila.**

The Constitution states that "[n]o person shall be deprived of life, liberty or property without due process of law ..."[31] It is a fundamental principle that no property shall be taken away from an individual without due process, whether substantive or procedural. The dispossession of property, or in this case the stoppage of the construction of a building in one's own property, would violate substantive due process.

The Rules on Civil Procedure are clear that *mandamus* only issues when there is a clear legal duty imposed upon the office or the officer sought to be compelled to perform an act, and

[31] Const., Art. III, Sec. 1.

when the party seeking *mandamus* has a clear legal right to the performance of such act.

In the present case, nowhere is it found in Ordinance No. 8119 or in any law, ordinance, or rule for that matter, that the construction of a building outside the Rizal Park is prohibited if the building is within the background sightline or view of the Rizal Monument. Thus, there is no legal duty on the part of the City of Manila "to consider," in the words of the Dissenting Opinion, "the standards set under Ordinance No. 8119" in relation to the applications of DMCI-PDI for the Torre de Manila since under the ordinance these standards can never be applied outside the boundaries of Rizal Park. While the Rizal Park has been declared a National Historical Site, the area where Torre de Manila is being built is a privately-owned property that is "not part of the Rizal Park that has been declared as a National Heritage Site in 1995," and the Torre de Manila area is in fact "well-beyond" the Rizal Park, according to NHCP Chairperson Dr. Maria Serena I. Diokno. Neither has the area of the Torre de Manila been designated as a "heritage zone, a cultural property, a historical landmark or even a national treasure."

Also, to declare that the City of Manila failed to consider the standards under Ordinance No. 8119 would involve making a finding of fact. A finding of fact requires notice, hearing, and the submission of evidence to ascertain compliance with the law or regulation. In such a case, it is the Regional Trial Court which has the jurisdiction to hear the case, receive evidence, make a proper finding of fact, and determine whether the Torre de Manila project properly complied with the standards set by the ordinance. In *Meralco v. Public Service Commission*,[32] we held that it is the cardinal right of a party in trials and administrative proceedings to be heard, which includes the right of the party interested or affected to present his own case and submit evidence in support thereof and to have such evidence presented considered by the proper court or tribunal.

To compel the City of Manila to consider the standards under Ordinance No. 8119 to the Torre de Manila project will be an empty exercise since these standards cannot apply outside of the Rizal Park - and the Torre de Manila is outside the Rizal Park. *Mandamus* will lie only if the officials of the City of Manila have a ministerial duty to consider these standards to buildings

[32] 120 Phil. 321, 337 (1964).

outside of the Rizal Park. There can be no such ministerial duty because these standards are not applicable to buildings outside of the Rizal Park.

The KOR also invokes this Court's exercise of its **extraordinary *certiorari* power of review under Section 1, Article VIII of the Constitution.** However, this Court can only exercise its extraordinary *certiorari* power if the City of Manila, in issuing the required permits and licenses, gravely abused its discretion amounting to lack or excess of jurisdiction. Tellingly, neither the majority nor minority opinion in this case has found that the City of Manila committed grave abuse of discretion in issuing the permits and licenses to DMCI-PDI. Thus, there is no justification at all for this Court to exercise its extraordinary *certiorari* power.

Moreover, the exercise of **this Court's extraordinary *certiorari* power is limited to actual cases and controversies that necessarily involve a violation of the Constitution or the determination of the constitutionality or validity of a governmental act or issuance. Specific violation of a statute that does not raise the issue of constitutionality or validity of the statute cannot, as a rule, be the subject of the Court's direct exercise of its expanded *certiorari* power.** Thus, the KOR's recourse lies with other judicial remedies or proceedings allowed under the Rules of Court.

In *Association of Medical Clinics for Overseas Workers, Inc. v. GCC Approved Medical Centers Association, Inc.*,[33] we held that in cases where the question of constitutionality of a governmental action is raised, the judicial power that the courts exercise is likewise identified as the power of judicial review - the power to review the constitutionality of the actions of other branches of government. As a rule, as required by the hierarchy of courts principle, these cases are filed with the lowest court with jurisdiction over the subject matter. The judicial review that the courts undertake requires:

> 1) there be an actual case or controversy calling for the exercise of judicial power;
> 2) the person challenging the act must have "standing" to challenge; he must have a personal and substantial interest in the case such that he has sustained, or will sustain, direct injury as a result of its enforcement;

[33] G.R. No. 207132, December 6, 2016.

3) the question of constitutionality must be raised at the earliest possible opportunity; and
4) the issue of constitutionality must be the very *lis mota* of the case.

The lower court's decision under the constitutional scheme reaches the Supreme Court through the appeal process, through a petition for review on *certiorari* under Rule 45 of the Rules of Court.

In the present case, the KOR elevated this case immediately to this Court in an original petition for injunction which we later on treated as one for *mandamus* under Rule 65. There is, however, no clear legal duty on the City of Manila to consider the provisions of Ordinance No. 8119 for applications for permits to build outside the protected areas of the Rizal Park. Even if there were such legal duty, the determination of whether the City of Manila failed to abide by this legal duty would involve factual matters which have not been admitted or established in this case. Establishing factual matters is not within the realm of this Court. Findings of fact are the province of the trial courts.

There is no standard in Ordinance No. 8119 for defining or determining the background sightline that is supposed to be protected or that is part of the "physical integrity" of the Rizal Monument. How far should a building like the Torre de Manila be from the Rizal Monument - one, two, three, four, or five kilometers? Even the Solicitor General, during the Oral Arguments, conceded that the ordinance does not prescribe how sightline is determined, neither is there any way to measure by metes and bounds whether construction that is not part of the historic monument itself or is outside the protected area can be said to violate the Rizal Monument's physical integrity, except only to say "when you stand in front of the Rizal Monument, there can be no doubt that your view is marred and impaired." This kind of a standard has no parameters and can include a sightline or a construction as far as the human eyes can see when standing in front of the Rizal Monument. Obviously, this Court cannot apply such a subjective and non-uniform standard that adversely affects property rights several kilometers away from a historical site or facility.

The Dissenting Opinion[34] claims that "the City, by reason of a mistaken or erroneous construction of its own Ordinance, had failed to consider its duties under [Ordinance No. 8119] when it issued permits in DMCI-PDI's favor." However, MZBAA Zoning Board Resolution Nos. 06 and 06-A easily dispel this claim. According to the resolutions, the City of Manila, through the MZBAA, acted on DMCI-PDI's application for variance under the powers and standards set forth in Ordinance No. 8119.

Without further proof that the MZBAA acted whimsically, capriciously, or arbitrarily in issuing said resolution, the Court should respect MZBAA's exercise of discretion. The Court cannot "substitute its judgment for that of said officials who are in a better position to consider and weigh the same in the light of the authority specifically vested in them by law."[35] Since the Court has "no supervisory power over the proceedings and actions of the administrative departments of the government," it "should not generally interfere with purely administrative and discretionary functions."[36] The power of the Court in *mandamus* petitions does not extend "to direct the exercise of judgment or discretion in a particular way or the retraction or reversal of an action already taken in the exercise of either."[37]

Still, the Dissenting Opinion insists on directing the re-evaluation by the City of Manila, through the CPDO, of the permits previously issued in favor of the Torre de Manila project to determine compliance with the standards under Ordinance No. 8119. It also declares that the circumstances in this case warrant the *pro hac vice* conversion of the proceedings in the issuance of the permits into a "contested case" necessitating notice and hearing with all the parties involved.

Pro hac vice means a specific decision does not constitute a precedent because the decision is for the specific case only, not to be followed in other cases. A *pro hac vice* decision violates statutory law - Article 8 of the Civil Code - which states that "judicial decisions applying or interpreting the laws or the Constitution shall form part of the legal system of the Philippines." The decision of the Court in this case cannot be *pro hac vice* because by mandate of the law every decision of the Court forms part of the legal system of the Philippines. If

[34] Dissenting opinion, Jardeleza, J.
[35] Lianga Bay Logging Co., Inc. v. Enage, 236 Phil. 84, 95 (1987).
[36] Board of Medical Education v. Alfonso, 257 Phil. 311, 321 (1989).
[37] Angchangco, Jr. v. Ombudsman, 335 Phil. 766, 771-772 (1997).

another case comes up with the same facts as the present case, that case must be decided in the same way as this case to comply with the constitutional mandate of equal protection of the law. Thus, a *pro hac vice* decision also violates the equal protection clause of the Constitution.

It is the policy of the courts not to interfere with the discretionary executive acts of the executive branch unless there is a clear showing of grave abuse of discretion amounting to lack or excess of jurisdiction. *Mandamus* does not lie against the legislative and executive branches or their members acting in the exercise of their official discretionary functions. This emanates from the respect accorded by the judiciary to said branches as co-equal entities under the principle of separation of powers.

In *De Castro v. Salas*,[38] we held that no rule of law is better established than the one that provides that *mandamus* will not issue to control the discretion of an officer or a court when honestly exercised and when such power and authority is not abused.

In exceptional cases, the Court has granted a prayer for *mandamus* to compel action in matters involving judgment and discretion, only "to act, but not to act one way or the other,"[39] and only in cases where there has been a clear showing of grave abuse of discretion, manifest injustice, or palpable excess of authority.[40]

In this case, there can be no determination by this Court that the City of Manila had been negligent or remiss in its duty under Ordinance No. 8119 considering that this determination will involve questions of fact. DMCI-PDI had been issued the proper permits and had secured all approvals and licenses months before the actual construction began. Even the KOR could not point to any law that respondent City of Manila had violated and could only point to declarations of policies by the NHCP and the Venice Charter which do not constitute clear legal bases for the issuance of a writ of *mandamus*.

The Venice Charter is merely a codification of guiding principles

[38] 34 Phil. 818, 823 (1916).

[39] M.A. Jimenez Enterprises, Inc. v. Ombudsman, 665 Phil. 523, 540-541 (2011), citing Albay Accredited Constructors Association, Inc. v. Desierto, 516 Phil. 308, 326 (2006).

[40] Angchangco, Jr. v. Ombudsman, 335 Phil. 766, 771-772 (1997); Kant Kwong v. PCGG, 240 Phil. 219, 230 (1987).

for the preservation and restoration of ancient monuments, sites, and buildings. It brings together principles in the field of historical conservation and restoration that have been developed, agreed upon, and laid down by experts over the years. Each country, however, remains "responsible for applying the plan within the framework of its own culture and traditions."

The Venice Charter is not a treaty and therefore does not become enforceable as law. The Philippines is not legally bound to follow its directive, as in fact, these are not directives but mere guidelines a set of the best practices and techniques that have been proven over the years to be the most effective in preserving and restoring historical monuments, sites and buildings.

The City of Manila concedes that DMCI-PDI's Zoning Permit was granted without going through the process under Ordinance No. 8119. However, the same was properly rectified when, faced with mounting opposition, DMCI-PDI itself sought clarification from the City of Manila and immediately began complying with the procedure for applying for a variance. The MZBAA did subsequently recommend the approval of the variance and the City Council of Manila approved the same, ratifying the licenses and permits already given to DMCI-PDI. Such ratification was well within the right of the City Council of Manila. The City Council of Manila could have denied the application had it seen any reason to do so. Again, the ratification is a function of the City Council of Manila, an exercise of its discretion and well within the authority granted it by law and the City's own Ordinance No. 8119.

The main purpose of zoning is the protection of public safety, health, convenience, and welfare. There is no indication that the Torre de Manila project brings any harm, danger, or hazard to the people in the surrounding areas except that the building allegedly poses an unsightly view on the taking of photos or the visual appreciation of the Rizal Monument by locals and tourists. In fact, the Court must take the approval of the MZBAA, and its subsequent ratification by the City Council of Manila, as the duly authorized exercise of discretion by the city officials. Great care must be taken that the Court does not unduly tread upon the local government's performance of its duties. It is not for this Court to dictate upon the other branches of the government how their discretion must be exercised so long as these branches do not commit grave abuse of discretion amounting to lack or excess of jurisdiction.

Likewise, any violation of Ordinance No. 8119 must be determined in the propel case and before the proper forum. It is not within the power of this Court in this case to make such determination. Without such determination, this Court cannot simply declare that the City of Manila had failed to consider its duties under Ordinance No. 8119 when it issued the permits in DMCI-PDI's favor without making a finding of fact how the City of Manila failed "to consider" its duties with respect to areas outside the boundaries of the Rizal Park. In the first place, this Court has no jurisdiction to make findings of fact in an original action like this before this Court. Moreover, the City of Manila could not legally apply standards to sites outside the area covered by the ordinance that prescribed the standards. With this, taken in light of the lack of finding that there was grave abuse of discretion on the part of the City of Manila, there is no basis to issue the writ of *mandamus* against the City of Manila.

During the Oral Arguments, it was established that the granting of a variance is neither uncommon nor irregular. On the contrary, current practice has made granting of a variance the rule rather than the exception:

> JUSTICE CARPIO: Let's go to Ordinance 8119. For residential condominium that stand alone, in other words not part of a commercial complex or an industrial complex ...
> ATTY. FLAMINIANO: Yes, Your Honor.
> JUSTICE CARPIO: The [Floor Area Ratio (FAR)] is uniform for the entire City of Manila, the FAR 4, correct?
> ATTY. FLAMINIANO: I believe so, Your Honor, it's FAR 4.
> JUSTICE CARPIO: So it's FAR 4 for all residential condominium complex or industrial projects.
> ATTY. FLAMINIANO: There might be, the FAR might be different when it comes to condominiums in commercial areas, Your Honor.
> JUSTICE CARPIO: Yes, I'm talking of stand-alone ...
> ATTY. FLAMINIANO: Yes, Your Honor.
> JUSTICE CARPIO: ... residential condominiums ...
> ATTY. FLAMINIANO: Uniform at FAR 4, Your Honor.
> JUSTICE CARPIO: And the percentage of land occupancy is always 60 percent.
> ATTY. FLAMINIANO: 60 percent, correct, Your Honor.
> JUSTICE CARPIO: Okay ... how many square meters is this Torre de Manila? ...
> ATTY. FLAMINIANO: The land area, Your Honor, it's almost 5,000 ... 5,556.

JUSTICE CARPIO: So, it's almost half a hectare.
ATTY. FLAMINIANO: Yes, Your Honor.
JUSTICE CARPIO: And at FAR 4, it can only build up to 18 storeys, I mean at FAR 4, is that correct?
ATTY. FLAMINIANO: If the 60 percent of the lot ...
JUSTICE CARPIO: Yes, but that is a rule.
ATTY. FLAMINIANO: That is a rule, that's the rule, Your Honor.
JUSTICE CARPIO: 60 percent of ...
ATTY. FLAMINIANO: Of the land area.
JUSTICE CARPIO: ... buildable, the rest not buildable.
ATTY. FLAMINIANO: Yes, Your Honor.
JUSTICE CARPIO: Okay, so if you look around here in the City of Manila anywhere you go, you look at stand-alone residential condominium buildings ...
ATTY. FLAMINIANO: There's a lot of them, Your Honor.
JUSTICE CARPIO: It's always not FAR 4, it's more than FAR 4.
ATTY. FLAMINIANO: Yes, Your Honor.
JUSTICE CARPIO: And the buildable area is to the edge of the property ... it's not 60 percent, correct?
ATTY. FLAMINIANO: Yes, Your Honor.
JUSTICE CARPIO: So, if you look at all the ... residential buildings in the last ten years, they [have] all variances. They did not follow the original FAR 4 or the 60 percent (of land occupancy). Every residential building that stand alone was a variance.
ATTY. FLAMINIANO: That's correct, Your Honor.
JUSTICE CARPIO: So the rule really in the City of Manila is variance, and the exception which is never followed is FAR 4.
ATTY. FLAMINIANO: FAR 4, it appears to be that way, Your Honor.
...
JUSTICE CARPIO: Every developer will have to get a variance because it doesn't make sense to follow FAR 4 because the land is so expensive and if you can build only two storeys on a 1,000-square meter lot, you will surely lose money, correct?
ATTY. FLAMINIANO: Exactly, Your Honor.

Thus, the MZBAA's grant of the variance cannot be used as a basis to grant the *mandamus* petition absent any clear finding that said act amounted to "grave abuse of discretion, manifest injustice, or palpable excess of authority."

The KOR is Estopped from Questioning the Torre de Manila Construction.

The KOR is now estopped from questioning the construction of the Torre de Manila project. The KOR itself came up with the idea to build a structure right behind the Rizal Monument that would dwarf the Rizal Monument.

In the mid-1950s, the Jose Rizal National Centennial Commission (JRNCC) formulated a plan to build an Educational Center within the Rizal Park. In July 1955, the KOR proposed the inclusion of a national theater on the site of the Educational Center. The JRNCC adopted the proposal. The following year, a law - Republic Act No. 1427[41] - authorized the establishment of the Jose Rizal National Cultural Shrine consisting of a national theater, a national museum, and a national library on a single site.

To be built on the open space right behind the 12.7 meter high Rizal Monument were: the KOR's proposed national theater, standing 29.25 meters high and 286 meters in distance from the Rizal Monument; the national library, standing 25.6 meters high and 180 meters in distance from the Rizal Monument, with its rear along San Luis Street (now T.M. Kalaw Street); and facing it, the national museum, at 19.5 meters high and 190 meters in distance from the Rizal Monument, with its back along P. Burgos Street.

However, several sectors voiced their objections to the construction for various reasons. Among them, the need to preserve the open space of the park, the high cost of construction, the desecration of the park's hallowed grounds, and the fact that the proposed cultural center including the 29.25 meter high national theater proposed by the KOR would dwarf the 12.7 meter high Rizal Monument. The JRNCC revised the plan and only the National Library - which still stands today - was built.

According to the NHCP, the KOR even proposed to build a Rizal Center on the park as recently as 2013. The proposal was disapproved by the NHCP and the Department of Tourism.

[41] An Act Appropriating Funds To Carry Out The Purposes Of Jose Rizal National Centennial Commission Created By Executive Order No. Fifty-Two, Dated August Ten, Nineteen Hundred And Fifty-Four (1956).

Surely, as noble as the KOR's intentions were, its proposed center would have dwarfed the Rizal Monument with its size and proximity.

In contrast, the Torre de Manila is located well outside the Rizal Park, and to the rear of the Rizal Monument - approximately 870 meters from the Rizal Monument and 30 meters from the edge of Rizal Park.

It is a basic principle that "one who seeks equity and justice must come to court with clean hands."[42] In *Jenosa v. Delariarte*,[43] the Court reiterated that he who seeks equity must do equity, and he who comes into equity must come with clean hands. This "signifies that a litigant may be denied relief by a court of equity on the ground that his conduct has been inequitable, unfair and dishonest, or fraudulent, or deceitful as to the controversy in issue." Thus, the KOR, having earlier proposed a national theater a mere 286 meters in distance from the back of the Rizal Monument that would have dwarfed the Rizal Monument, comes to this Court with unclean hands. It is now precluded from "seeking any equitable refuge"[44] from the Court. The KOR's petition should be dismissed on this ground alone.

Torre de Manila is Not a Nuisance *Per Se*.

In its petition, the KOR claims that the Torre de Manila is a nuisance *per se* that deserves to be summarily abated even without judicial proceedings. However, during the Oral Arguments, counsel for the KOR argued that the KOR now believes that the Torre de Manila is a nuisance *per accidens* and not a nuisance *per se*.

Article 694 of the Civil Code defines a nuisance as any act, omission, establishment, business, condition of property, or anything else which: (1) injures or endangers the health or safety of others; (2) annoys or offends the senses; (3) shocks, defies or disregards decency or morality; (4) obstructs or interferes with the free passage of any public highway or street, or any body of water; or (5) hinders or impairs the use of property.

The Court recognizes two kinds of nuisances. The first, nuisance

[42] Bank of the Philippine Islands v. Fernandez, G.R. No. 173134, September 2, 2015, 768 SCRA 563, 582, citing Roque v. Lapuz, 185 Phil. 525 (1980).
[43] 644 Phil. 565 (2010).
[44] Beumer v. Amores, 700 Phil. 90, 98 (2012).

per se, is one "recognized as a nuisance under any and all circumstances, because it constitutes a direct menace to public health or safety, and, for that reason, may be abated summarily under the undefined law of necessity."[45] The second, nuisance *per accidens*, is that which "depends upon certain conditions and circumstances, and its existence being a question of fact, it cannot be abated without due hearing thereon in a tribunal authorized to decide whether such a thing in law constitutes a nuisance."

It can easily be gleaned that the Torre de Manila is not a nuisance *per se*. The Torre de Manila project cannot be considered as a "direct menace to public health or safety." Not only is a condominium project commonplace in the City of Manila, DMCI-PDI has, according to the proper government agencies, complied with health and safety standards set by law. DMCI-PDI has been granted the following permits and clearances prior to starting the project: (1) Height Clearance Permit from the Civil Aviation Authority of the Philippines; (2) Development Permit from the HLURB; (3) Zoning Certification from the HLURB; (4) Certificate of Environmental Compliance Commitment from the Environment Management Bureau of the Department of Environment and Natural Resources; (5) Barangay Clearance; (6) Zoning Permit; (7) Building Permit; (8) and Electrical and Mechanical Permit.

Later, DMCI-PDI also obtained the right to build under a variance recommended by the MZBAA and granted by the City Council of Manila. Thus, there can be no doubt that the Torre de Manila project is not a nuisance *per se*.

On the other hand, the KOR now claims that the Torre de Manila is a nuisance *per accidens*.

By definition, a nuisance *per accidens* is determined based on its surrounding conditions and circumstances. These conditions and circumstances must be well established, not merely alleged. The Court cannot simply accept these conditions and circumstances as established facts as the KOR would have us do in this case. The KOR itself concedes that the question of whether the Torre de Manila is a nuisance *per accidens* is a question of fact.

[45] Aquino v. Municipality of Malay, Aklan, G.R. No. 211356, September 29, 2014, 737 SCRA 145, 163; Salao v. Santos, 67 Phil. 547, 550 (1939).

The authority to decide when a nuisance exists is an authority to find facts, to estimate their force, and to apply rules of law to the case thus made.[46] This Court is no such authority. It is not a trier of facts. It cannot simply take the allegations in the petition and accept these as facts, more so in this case where these allegations are contested by the respondents.

The task to receive and evaluate evidence is lodged with the trial courts. The question, then, of whether the Torre de Manila project is a nuisance *per accidens* must be settled after due proceedings brought before the proper Regional Trial Court. The KOR cannot circumvent the process in the guise of protecting national culture and heritage.

The TRO must be lifted.

Injunctive reliefs are meant to preserve substantive rights and prevent further injury[47] until final adjudication on the merits of the case. In the present case, since the legal rights of the KOR are not well-defined, clear, and certain, the petition for *mandamus* must be dismissed and the TRO lifted.

The general rule is that courts will not disturb the findings of administrative agencies when they are supported by substantial evidence. In this case, DMCI-PDI already acquired vested rights in the various permits, licenses, or even variances it had applied for in order to build a 49-storey building which is, and had been, allowed by the City of Manila's zoning ordinance.

As we have time and again held, courts generally hesitate to review discretionary decisions or actions of administrative agencies in the absence of proof that such decisions or actions were arrived at with grave abuse of discretion amounting to lack or excess of jurisdiction.

In *JRS Business Corp. v. Montesa*,[48] we held that *mandamus* is the proper remedy if it could be shown that there was neglect on the part of a tribunal in the performance of an act which the law specifically enjoins as a duty, or there was an unlawful exclusion of a party from the use and enjoyment of a right to which he is clearly entitled. Only specific legal rights may be enforced by

[46] Iloilo Ice and Cold Storage Co. v. Municipal Council of Iloilo, 24 Phil. 471, 475 (1913).
[47] See Garcia, Jr. v. Court of Appeals, 604 Phil. 677 (2009).
[48] 131 Phil. 719, 725 (1968).

mandamus if they are clear and certain. If the legal rights of the petitioner are not well-defined, definite, clear, and certain,[49] the petition must be dismissed. Stated otherwise, the writ never issues in doubtful cases. It neither confers powers nor imposes duties. It is simply a command to exercise a power already possessed and to perform a duty already imposed.[50]

In sum, bearing in mind the Court does not intervene in discretionary acts of the executive department in the absence of grave abuse of discretion,[51] and considering that *mandamus* may only be issued to enforce a clear and certain legal right,[52] the present special civil action for *mandamus* must be dismissed and the TRO issued earlier must be lifted.

Section 2. The Congress shall have the power to define, prescribe, and apportion the jurisdiction of the various courts but may not deprive the Supreme Court of its jurisdiction over cases enumerated in Section 5 hereof.

No law shall be passed reorganizing the Judiciary when it undermines the security of tenure of its Members.

Section 3. The Judiciary shall enjoy fiscal autonomy. Appropriations for the Judiciary may not be reduced by the legislature below the amount appropriated for the previous year and, after approval, shall be automatically and regularly released.

Section 4. (1) The Supreme Court shall be composed of a Chief Justice and fourteen Associate Justices. It may sit *en banc* or in its discretion, in division of three, five, or seven Members. Any vacancy shall be filled within ninety days from the occurrence thereof.

(2) All cases involving the constitutionality of a treaty, international or executive agreement, or law, which shall be heard by the Supreme Court *en banc*, and all other cases which under the Rules of Court are required to be heard *en banc*, including those involving the constitutionality, application,

[49] Zamora v. Wright, 53 Phil. 613, 629 (1929).
[50] Sanson v. Barrios, 63 Phil. 198, 201 (1936).
[51] Case v. Board of Health, 24 Phil. 250, 277 (1913).
[52] Pascua v. Tuason, 108 Phil. 69, 73 (1960), citing Zamora v. Wright, 53 Phil. 613 (1929); Sanson v. Barrios, 63 Phil. 198 (1936); Pabico v. Jaranilla, 60 Phil. 247 (1934).

or operation of presidential decrees, proclamations, orders, instructions, ordinances, and other regulations, shall be decided with the concurrence of a majority of the Members who actually took part in the deliberations on the issues in the case and voted thereon.

(3) Cases or matters heard by a division shall be decided or resolved with the concurrence of a majority of the Members who actually took part in the deliberations on the issues in the case and voted thereon, and in no case without the concurrence of at least three of such Members. When the required number is not obtained, the case shall be decided *en banc*: Provided, that no doctrine or principle of law laid down by the court in a decision rendered *en banc* or in division may be modified or reversed except by the court sitting *en banc*.

Since 2006, Justice Carpio was the Chair of the Second Division of the Supreme Court, and since 2009, the Chair of the Senate Electoral Tribunal, until his retirement from the Supreme Court in 2019.

Since 2009, he was the Acting Chief Justice numerous times, including serving as such in moments of crisis for the Court - in 2011, with the impeachment of then Chief Justice Renato C. Corona, and in 2018, with the ouster by *quo warranto* of then Chief Justice Maria Lourdes P.A. Sereno.

Section 5. The Supreme Court shall have the following powers:

(1) Exercise original jurisdiction over cases affecting ambassadors, other public ministers and consuls, and over petitions for *certiorari*, prohibition, *mandamus*, *quo warranto*, and *habeas corpus*.

(2) Review, revise, reverse, modify, or affirm on appeal or *certiorari*, as the law or the Rules of Court may provide, final judgments and orders of lower courts in:

(a) All cases in which the constitutionality or validity of any treaty, international or executive agreement, law, presidential decree, proclamation, order, instruction, ordinance, or regulation is in question.

(b) All cases involving the legality of any tax, impost, assessment,

or toll, or any penalty imposed in relation thereto.

(c) All cases in which the jurisdiction of any lower court is in issue.

(d) All criminal cases in which the penalty imposed is *reclusion perpetua* or higher.

(e) All cases in which only an error or question of law is involved.

(3) Assign temporarily judges of lower courts to other stations as public interest may require. Such temporary assignment shall not exceed six months without the consent of the judge concerned.

(4) Order a change of venue or place of trial to avoid a miscarriage of justice.

(5) Promulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts, the admission to the practice of law, the integrated bar, and legal assistance to the underprivileged. Such rules shall provide a simplified and inexpensive procedure for the speedy disposition of cases, shall be uniform for all courts of the same grade, and shall not diminish, increase, or modify substantive rights. Rules of procedure of special courts and quasi-judicial bodies shall remain effective unless disapproved by the Supreme Court.

(6) Appoint all officials and employees of the Judiciary in accordance with the Civil Service Law.

Original Jurisdiction

CHAVEZ v. PUBLIC ESTATES AUTHORITY, G.R. No. 133250, July 9, 2002,[53] 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 the then on-going renegotiations with Amari Coastal Bay and Development Corporation to reclaim portions of Manila Bay. In resolving the procedural issues, Justice Carpio, speaking for the Court *en banc*, characterized the case

[53] See discussion under Arts. II Sec. 28, III Sec. 7, XI Sec. 1, and XII Sec. 2 and 3.

as one of "transcendental importance" and had occasion to discuss the **original jurisdiction** of the Supreme Court as set out in **Section 5, paragraph 1 of this Article VIII**:

> PEA and AMARI claim petitioner ignored the judicial hierarchy by seeking relief directly from the Court. The principle of hierarchy of courts applies generally to cases involving factual questions. As it is not a trier of facts, the Court cannot entertain cases involving factual issues. The instant case, however, raises constitutional issues of transcendental importance to the public.[54] The Court can resolve this case without determining any factual issue related to the case. Also, **the instant case is a petition for *mandamus*** which falls under the **original jurisdiction of the Court under Section 5, Article VIII of the Constitution**. We resolve to exercise primary jurisdiction over the instant case.
>
> **Whether the petition merits dismissal for non-exhaustion of administrative remedies.**
>
> PEA faults petitioner for seeking judicial intervention in compelling PEA to disclose publicly certain information without first asking PEA the needed information. PEA claims petitioners direct resort to the Court violates the principle of exhaustion of administrative remedies. It also violates the rule that *mandamus* may issue only if there is no other plain, speedy and adequate remedy in the ordinary course of law.
>
> PEA distinguishes the instant case from *Tañada v. Tuvera*[55] where the Court granted the petition for *mandamus* even if the petitioners there did not initially demand from the Office of the President the publication of the presidential decrees. PEA points out that in *Tañada*, the Executive Department had an affirmative statutory duty under Article 2 of the Civil Code[56] and Section 1 of Commonwealth Act No. 638[57] to publish the presidential decrees. There was, therefore, no need for the petitioners in *Tañada* to make an initial demand from the Office of the President. In the

[54] Chavez v. PCGG, 299 SCRA 744 (1998).

[55] 136 SCRA 27 (1985).

[56] Art. 2 of the Civil Code (prior to its amendment by EO No. 200) provided as follows: Laws shall take effect after fifteen days following the completion of their publication in the Official Gazette, unless it is provided otherwise, ...

[57] Sec. 1 of CA No. 638 provides as follows: There shall be published in the Official Gazette all important legislative acts and resolutions of the Congress of the Philippines; all executive and administrative orders and proclamations, except such as have no general applicability; ...

instant case, PEA claims it has no affirmative statutory duty to disclose publicly information about its renegotiation of the JVA. Thus, PEA asserts that the Court must apply the principle of exhaustion of administrative remedies to the instant case in view of the failure of petitioner here to demand initially from PEA the needed information.

The original JVA sought to dispose to AMARI public lands held by PEA, a government corporation. Under Section 79 of the Government Auditing Code,[58] the disposition of government lands to private parties requires public bidding. PEA was under a positive legal duty to disclose to the public the terms and conditions for the sale of its lands. The law obligated PEA to make this public disclosure even without demand from petitioner or from anyone. PEA failed to make this public disclosure because the original JVA, like the Amended JVA, was the result of a negotiated contract, not of a public bidding. Considering that PEA had an affirmative statutory duty to make the public disclosure, and was even in breach of this legal duty, petitioner had the right to seek direct judicial intervention.

Moreover, and this alone is determinative of this issue, the principle of exhaustion of administrative remedies does not apply when the issue involved is a purely legal or constitutional question.[59] The principal issue in the instant case is the capacity of AMARI to acquire lands held by PEA in view of the constitutional ban prohibiting the alienation of lands of the public domain to private corporations. We rule that the principle of exhaustion of administrative remedies does not apply in the instant case.

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[58] Sec. 79 of the Government Auditing Codes provides as follows: When government property has become unserviceable for any cause, or is no longer needed, it shall, upon application of the officer accountable therefor, be inspected by the head of the agency or his duly authorized representative in the presence of the auditor concerned and, if found to be valueless or unsaleable, it may be destroyed in their presence. If found to be valuable, it may be sold at public auction to the highest bidder under the supervision of the proper committee on award or similar body in the presence of the auditor concerned or other authorized representative of the Commission, after advertising by printed notice in the Official Gazette, or for not less than three consecutive days in any newspaper of general circulation, or where the value of the property does not warrant the expense of publication, by notices posted for a like period in at least three public places in the locality where the property is to be sold. In the event that the public auction fails, the property may be sold at a private sale at such price as may be fixed by the same committee or body concerned and approved by the Commission.

[59] Paat v. Court of Appeals, 266 SCRA 167 (1997); Quisumbing v. Judge Gumban, 193 SCRA 520 (1991); Valmonte v. Belmonte, Jr., 170 SCRA 256 (1989).

Whether petitioner has *locus standi* to bring this suit

PEA argues that petitioner has no standing to institute *mandamus* proceedings to enforce his constitutional right to information without a showing that PEA refused to perform an affirmative duty imposed on PEA by the Constitution. PEA also claims that petitioner has not shown that he will suffer any concrete injury because of the signing or implementation of the Amended JVA. Thus, there is no actual controversy requiring the exercise of the power of judicial review.

The petitioner has standing to bring this taxpayers suit because the petition seeks to compel PEA to comply with its constitutional duties. There are two constitutional issues involved here. *First* is the right of citizens to information on matters of public concern. *Second* is the application of a constitutional provision intended to insure the equitable distribution of alienable lands of the public domain among Filipino citizens. The thrust of the first issue is to compel PEA to disclose publicly information on the sale of government lands worth billions of pesos, information which the Constitution and statutory law mandate PEA to disclose. The thrust of the second issue is to prevent PEA from alienating hundreds of hectares of alienable lands of the public domain in violation of the Constitution, compelling PEA to comply with a constitutional duty to the nation.

Moreover, the petition raises matters of transcendental importance to the public. In *Chavez v. PCGG,*[60] the Court upheld the right of a citizen to bring a taxpayers suit on matters of transcendental importance to the public, thus -

> Besides, petitioner emphasizes, the matter of recovering the ill-gotten wealth of the Marcoses is an issue of transcendental importance to the public. He asserts that ordinary taxpayers have a right to initiate and prosecute actions questioning the validity of acts or orders of government agencies or instrumentalities, if the issues raised are of paramount public interest, and if they immediately affect the social, economic and moral well-being of the people.
> Moreover, the mere fact that he is a citizen satisfies the requirement of personal interest, when the proceeding involves the assertion of a public right, such as in this

[60] 299 SCRA 744 (1998).

case. He invokes several decisions of this Court which have set aside the procedural matter of *locus standi*, when the subject of the case involved public interest.

...

In *Tañada v. Tuvera*, the Court asserted that when the issue concerns a public right and the object of *mandamus* is to obtain the enforcement of a public duty, the people are regarded as the real parties in interest; and because it is sufficient that petitioner is a citizen and as such is interested in the execution of the laws, he need not show that he has any legal or special interest in the result of the action. In the aforesaid case, the petitioners sought to enforce their right to be informed on matters of public concern, a right then recognized in Section 6, Article IV of the 1973 Constitution, in connection with the rule that laws in order to be valid and enforceable must be published in the Official Gazette or otherwise effectively promulgated. In ruling for the petitioners' legal standing, the Court declared that the right they sought to be enforced is a public right recognized by no less than the fundamental law of the land. *Legaspi v. Civil Service Commission*, while reiterating *Tañada*, further declared that when a *mandamus* proceeding involves the assertion of a public right, the requirement of personal interest is satisfied by the mere fact that petitioner is a citizen and, therefore, part of the general 'public' which possesses the right.

Further, in *Albano v. Reyes*, we said that while expenditure of public funds may not have been involved under the questioned contract for the development, management and operation of the Manila International Container Terminal, public interest [was] definitely involved considering the important role [of the subject contract] … in the economic development of the country and the magnitude of the financial consideration involved. We concluded that, as a consequence, the disclosure provision in the Constitution would constitute sufficient authority for upholding the petitioner's standing.

Similarly, the instant petition is anchored on the right of the people to information and access to official records, documents and papers a right guaranteed under Section 7, Article III of the 1987 Constitution. Petitioner, a former solicitor general, is a Filipino citizen. Because of the satisfaction of the two basic requisites laid down by decisional law to sustain petitioner's legal standing, i.e. (1) the enforcement of a public right (2) espoused by a Filipino

citizen, we rule that the petition at bar should be allowed.

We rule that since the instant petition, brought by a citizen, involves the enforcement of constitutional rights - to information[61] and to the equitable diffusion of natural resources[62] -matters of transcendental public importance, the petitioner has the requisite *locus standi*.

Rule-Making Power

CRUZ-AGANA v. SANTIAGO-LAGMAN, G.R. No. 139018, April 11, 2005, 495 Phil. 188, was a petition for *certiorari* that sought to reverse an order of the Regional Trial Court, which recalled its previous order dismissing B. Serrano Enterprises, Inc.'s counterclaim. The relevant facts were as follows:

On 18 March 1996, petitioner filed a Complaint for annulment of title with prayer for preliminary mandatory injunction against respondent. Petitioner claims that as the sole heir of one Teodorico Cruz, she is the sole owner of a lot covered by Transfer Certificate of Title No. T-3907. Petitioner further claims that the lot was fraudulently sold to Eugenio Lopez, Jr. who later on transferred the lot to respondent. The case was raffled to the Regional Trial Court, Branch 77, Malolos, Bulacan presided by Judge Aurora Santiago-Lagman and docketed as Civil Case No. 210-M-96.

Respondent seasonably filed its Answer with compulsory counterclaim. Petitioner moved to dismiss respondent's counterclaim for lack of a certificate of non-forum shopping.

In an Order dated 11 March 1999, the trial court denied petitioner's motion to dismiss respondent's counterclaim. The trial court reasoned that respondent's counterclaim is compulsory and therefore excluded from the coverage of Section 5, Rule 7 of the Rules of Court. Petitioner moved that the trial court reconsider its Order invoking the mandatory nature of a certificate of non-forum shopping under Supreme Court Administrative Circular No. 04-94.[63] On 25 May 1999,

[61] See discussion under Art. III.

[62] See discussion under Art. XII.

[63] Paragraphs 1 and 2 of Supreme Court Administrative Circular No. 04-94 provide:
1. The plaintiff, petitioner, applicant or principal party seeking relief in the complaint, petition, application or other initiatory pleading shall certify under oath in such original pleading, or in a sworn certification annexed thereto and simultaneously filed therewith, to the truth of the following facts and undertakings: (a) he has not theretofore

> the trial court reversed its 11 March 1999 Order and dismissed respondent's counterclaim for lack of a certificate of non-forum shopping.
>
> Respondent seasonably filed a motion for reconsideration arguing that Administrative Circular No. 04- 94 does not apply to compulsory counterclaims following the ruling in *Santo Tomas University Hospital v. Surla*.[64] On 4 June 1999, the trial court again reversed itself and recalled its Order dismissing respondent's counterclaim.

The sole issue for determination in **Cruz-Agana** was whether the trial court committed grave abuse of discretion in refusing to dismiss respondent's counterclaim. In denying the petition and affirming the order of the trial court, Justice Carpio, on behalf of the First Division, briefly explained the Court's **rule-making** power under **paragraph 5 of this Section 5, Article VIII**:

> The issue presented is not novel. This Court has squarely settled this issue in *Santo Tomas University Hospital v. Surla*.[65] Writing for the Court, Justice Jose C. Vitug began his *ponencia* thus:
>
> > Can a compulsory counterclaim pleaded in an Answer be dismissed on the ground of a failure to accompany it with a

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commenced any other action or proceeding involving the same issues in the Supreme Court, the Court of Appeals, or any other tribunal or agency; (b) to the best of his knowledge, no such action or proceedings is pending in the Supreme Court, the Court of Appeals, or any other tribunal or agency; (c) if there is any such action or proceeding which is either pending or may have been terminated, he must state the status thereof; and (d) if he should thereafter learn that a similar action or proceeding has been filed or is pending before the Supreme Court, the Court of Appeals or any other tribunal or agency, he undertakes to report that fact within five (5) days therefrom to the court or agency wherein the original pleading and sworn certification contemplated herein have been filed.

The complaint and other initiatory pleadings referred to and subject of this Circular are the original civil complaint, counterclaim, cross-claim, third (fourth, etc.) party complaint, or complaint-in-intervention, petition, or application wherein a party asserts his claim for relief.

2. Any violation of this Circular shall be a cause for the dismissal of the complaint, petition, application or other initiatory pleading, upon motion and after hearing. However, any clearly willful and deliberate forum shopping by any party and his counsel through the filing of multiple complaints or other initiatory pleadings to obtain favorable action shall be a ground for summary dismissal thereof and shall constitute direct contempt of court. Furthermore, the submission of a false certification or non-compliance with the undertakings therein, as provided in Paragraph 1 hereof, shall constitute indirect contempt of court, without prejudice to disciplinary proceedings against the counsel and the filing of a criminal action against the guilty party.

[64] 355 Phil. 804 (1998).

[65] Ibid.

> certificate of non-forum shopping? This question is the core issue presented for resolution in the instant petition.

Santo Tomas clarified the scope of Administrative Circular No. 04-94 with respect to counterclaims. The Court pointed out that this circular is intended primarily to cover "an initiatory pleading or an incipient application of a party asserting a claim for relief." The distinction between a compulsory and a permissive counterclaim is vital in the application of the circular. The Court explained:

> It should not be too difficult, the foregoing rationale of the circular aptly taken, to sustain the view that the circular in question has not, in fact, been contemplated to include a kind of claim which, by its very nature as being auxiliary to the proceedings in the suit and as deriving its substantive and jurisdictional support therefrom, can only be appropriately pleaded in the answer and not remain outstanding for independent resolution except by the court where the main case pends. Prescinding from the foregoing, the proviso in the second paragraph of Section 5, Rule 8 of the 1997 Rules of Civil Procedure, i.e., that the violation of the anti-forum shopping rule "shall not be curable by mere amendment ... but shall be cause for the dismissal of the case without prejudice," being predicated on the applicability of the need for a certification against forum-shopping, obviously does not include a claim which cannot be independently set up.

The Court reiterated this ruling in *Ponciano v. Judge Parentela, Jr.*[66]

Administrative Circular No. 04-94 does not apply to compulsory counterclaims. The circular applies to initiatory and similar pleadings. A compulsory counterclaim set up in the answer is not an "initiatory" or similar pleading. The initiatory pleading is the plaintiff's complaint. A respondent has no choice but to raise a compulsory counterclaim the moment the plaintiff files the complaint. Otherwise, respondent waives the compulsory counterclaim.[67] In short, the compulsory counterclaim is a reaction or response, mandatory upon pain of waiver, to an initiatory pleading which is the complaint.

Petitioner argues, however, that the Court's rulings in

[66] 387 Phil. 621 (2000).
[67] 1997 Rules of Civil Procedure, Rule 9, Sec. 2.

Santo Tomas and *Ponciano* are "contrary to the mandate of Administrative Circular No. 04-94" and other procedural laws. Petitioner is mistaken.

The Constitution expressly bestows on this Court the power to promulgate rules concerning the pleading, practice and procedure in all courts. Procedural matters are within the sole jurisdiction of this Court to prescribe. Administrative Circular No. 04-94 is an issuance of this Court. It covers a matter of procedure. Administrative Circular No. 04-94 is not an enactment of the Legislature. **This Court has the exclusive jurisdiction to interpret, amend or revise the rules it promulgates, as long as the rules do not diminish, increase, or modify substantive rights.**

This is precisely the purpose of *Santo Tomas* as far as Administrative Circular No. 04-94 is concerned.

Petitioner's counsel fails or simply refuses to accept the distinction between a permissive counterclaim and a compulsory counterclaim. This distinction was the basis for the ruling in *Santo Tomas* and *Ponciano*. The sole issue for resolution in the present case is whether respondent's counterclaim is compulsory or permissive. If it is a permissive counterclaim, the lack of a certificate of non-forum shopping is fatal. If it is a compulsory counterclaim, the lack of a certificate of non-forum shopping is immaterial.

A compulsory counterclaim is any claim for money or other relief, which a defending party may have against an opposing party, which at the time of suit arises out of, or is necessarily connected with, the same transaction or occurrence that is the subject matter of plaintiff's complaint. It is compulsory in the sense that it is within the jurisdiction of the court, does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction, and will be barred in the future if not set up in the answer to the complaint in the same case. Any other counterclaim is permissive.

Respondent's counterclaim as set up in its answer states:

> 3. That because of the unwarranted, baseless, and unjustified acts of the plaintiff, herein defendant has suffered and continue to suffer actual damages in the sum of at least P400,000,000.00 which the law, equity, and justice require

> that to be paid by the plaintiff and further to reimburse the attorney's fees of P2,000,000.00;
>
> It is clear that the counterclaim set up by respondent arises from the filing of plaintiff's complaint. The counterclaim is so intertwined with the main case that it is incapable of proceeding independently. The counterclaim will require a re-litigation of the same evidence if the counterclaim is allowed to proceed in a separate action. Even petitioner recognizes that respondent's counterclaim is compulsory. A compulsory counterclaim does not require a certificate of non-forum shopping because a compulsory counterclaim is not an initiatory pleading.

Then again in **BAGUIO MARKET VENDORS MULTI-PURPOSE COOPERATIVE (BAMARVEMPCO) v. CABATO-CORTES**, G.R. No. 165922, February 26, 2010, 627 Phil. 543, Justice Carpio, speaking for the Second Division, delved into the history of the **rule-making power** as contained in **paragraph 5 of this Section 5, Article VIII:**

> **The Facts**
>
> Petitioner Baguio Market Vendors Multi-Purpose Cooperative (petitioner) is a credit cooperative organized under Republic Act No. 6938 (RA 6938), or the Cooperative Code of the Philippines.
>
> Article 62(6) of RA 6938 exempts cooperatives:
>
> > from the payment of all court and sheriff's fees payable to the Philippine Government for and in connection with all actions brought under this Code, or where such action is brought by the Cooperative Development Authority before the court, to enforce the payment of obligations contracted in favor of the cooperative.
>
> In 2004, petitioner, as mortgagee, filed with the Clerk of Court of the Regional Trial Court of Baguio City (trial court) a petition to extrajudicially foreclose a mortgage under Act 3135, as amended.[68]
>
> Under Section 7(c) of Rule 141, as amended, petitions for extrajudicial foreclosure are subject to legal fees based on the value of the mortgagee's claim. Invoking Article 62(6) of RA

[68] An Act To Regulate The Sale Of Property Under Special Powers Inserted In Or Annexed To Real- Estate Mortgages.

6938, petitioner sought exemption from payment of the fees.

The Ruling of the Trial Court

In an Order dated 30 August 2004, Judge Iluminada Cabato-Cortes (respondent), Executive Judge of the trial court, denied the request for exemption, citing Section 22 of Rule 141 of the Rules of Court, as amended, exempting from the Rule's coverage only the "Republic of the Philippines, its agencies and instrumentalities" and certain suits of local government units.[69]

Petitioner sought reconsideration but respondent denied its motion in the Order dated 6 October 2004. This time, respondent reasoned that petitioner's reliance on Article 62(6) of RA 6938 is misplaced because the fees collected under Rule 141 are not "fees payable to the Philippine Government" as they do not accrue to the National Treasury but to a special fund[70] under the Court's control.

Hence, this petition.

Petitioner maintains that the case calls for nothing more than a simple application of Article 62(6) of RA 6938.

The Office of the Solicitor General (OSG), in its Manifestation (in lieu of Comment), joins causes with petitioner. The OSG submits that as the substantive rule, Article 62(6) of RA 6938 prevails over Section 22 of Rule 141, a judicial rule of procedure. The OSG also takes issue with respondent's finding that the legal fees collected under Rule 141 are not "fees payable to the Philippine Government" as the judiciary forms part of the Philippine government, as defined under the Revised Administrative Code.[71]

Although not a party to this suit, we required the Court's Office of the Chief Attorney (OCAT) to comment on the petition, involving as it does, issues relating to the **Court's power to promulgate judicial rules.** In its compliance, the OCAT recommends the

[69] Sec. 22 provides: Government exempt. - The Republic of the Philippines, its agencies and instrumentalities are exempt from paying the legal fees provided in the Rule. Local governments and government-owned or controlled corporations with or without independent charters are not exempt from paying such fees.
However, all court actions, criminal or civil instituted at the instance of the provincial, city or municipal treasurer or assessor under Sec. 280 of the Local Government Code of 1991 shall be exempt from the payment of court and sheriff's fees.

[70] The Judiciary Development Fund, created under Presidential Decree No. 1949.

[71] Executive Order No. 292.

denial of the petition, opining that Section 22, Rule 141, as amended, prevails over Article 62(6) of RA 6938 because (1) the power to impose judicial fees is eminently judicial and (2) the 1987 Constitution insulated the Court's rule-making powers from Congress' interference by omitting in the 1987 Constitution the provision in the 1973 Constitution allowing Congress to alter judicial rules. The OCAT called attention to the Court's previous denial of a request by a cooperative group for the issuance of "guidelines" to implement cooperatives' fees exemption under Article 62(6) of RA 6938.[72] Lastly, the OCAT recommends the amendment of Section 22, Rule 141 to make explicit the non-exemption of cooperatives from the payment of legal fees.

The Issue

The question is whether petitioner's application for extrajudicial foreclosure is exempt from legal fees under Article 62(6) of RA 6938.

The Ruling of the Court

We hold that Article 62(6) of RA 6938 does not apply to petitioner's foreclosure proceeding.

Petitions for Extrajudicial Foreclosure Outside of the Ambit of Article 62(6) of RA 6938

The scope of the legal fees exemption Article 62(6) of RA 6938 grants to cooperatives is limited to two types of actions, namely: (1) actions brought under RA 6938; and (2) actions brought by the Cooperative Development Authority to enforce the payment of obligations contracted in favor of cooperatives. By simple deduction, it is immediately apparent that Article 62(6) of RA 6938 is no authority for petitioner to claim exemption from the payment of legal fees in this proceeding because first, the fees imposable on petitioner do not pertain to an action brought under RA 6938 but to a petition for extrajudicial foreclosure of mortgage under Act 3135. Second, petitioner is not the Cooperative Development Authority which can claim exemption only in actions to enforce payments of obligations on behalf of cooperatives.

The Power of the Legislature *vis a vis* the

[72] A.M. No. 92-9-408-O, October 6, 1992, Re: Request of the Philippine Federation of Credit Cooperatives, Inc. (Min. Res.).

Power of the Supreme Court to Enact Judicial Rules

Our holding above suffices to dispose of this petition.[73] However, the Court *en banc* has recently ruled in *Re: Petition for Recognition of the Exemption of the Government Service Insurance System (GSIS) from Payment of Legal Fees*[74] on the issue of legislative exemptions from court fees. We take the opportunity to reiterate our *en banc* ruling in *GSIS*.

Until the 1987 Constitution took effect, our two previous constitutions textualized a power sharing scheme between the legislature and this Court in the enactment of judicial rules. Thus, both the 1935 and the 1973 Constitutions vested on the Supreme Court the "power to promulgate rules concerning pleading, practice, and procedure in all courts, and the admission to the practice of law." However, these constitutions also granted to the legislature the concurrent power to "repeal, alter or supplement" such rules.[75]

The 1987 Constitution textually altered the power-sharing scheme under the previous charters by deleting in Section 5(5) of Article VIII Congress' subsidiary and corrective power.[76] This glaring and fundamental omission led the Court to observe in *Echegaray v. Secretary of Justice*[77] that this Court's power to promulgate judicial rules "is no longer shared by this Court with Congress":

> The 1987 Constitution molded an even stronger and more independent judiciary. Among others, it enhanced the rule making power of this Court [under] Section 5(5), Article VIII ...
> The rule making power of this Court was expanded. This

[73] The dispositive portion of the ruling stated - Wherefore, we deny the petition. We affirm the Orders dated 30 August 2004 and 6 October 2004 of the Executive Judge of the Regional Trial Court of Baguio City. Let a copy of this Decision be furnished the Office of the Court Administrator for circulation to all courts.

[74] A.M. No. 08-2-01-0, February 11, 2010 (Res.).

[75] The 1935 Constitution provides: The Congress shall have the power to repeal, alter or supplement the rules concerning pleading, practice, and procedure, and the admission to the practice of law in the Philippines. (Art. VIII, Sec. 13). Similarly, the 1973 Constitution provides: The Supreme Court shall have the following powers: ... (5) Promulgate rules concerning pleading, practice, and procedure in all courts, the admission to the practice of law, and the integration of the bar, which, however, may be repealed, altered or supplemented by the Batasang Pambansa. (Art. X, Sec. 5(5)).

[76] In Re Cunanan, 94 Phil. 534 (1954).

[77] 361 Phil. 73, 88 (1999).

> Court for the first time was given the power to promulgate rules concerning the protection and enforcement of constitutional rights. The Court was also granted for the first time the power to disapprove rules of procedure of special courts and quasi-judicial bodies. But most importantly, the 1987 Constitution took away the power of Congress to repeal, alter, or supplement rules concerning pleading, practice and procedure. In fine, the power to promulgate rules of pleading, practice and procedure is no longer shared by this Court with Congress, more so with the Executive. ...

Any lingering doubt on the import of the textual evolution of Section 5(5) should be put to rest with our recent *en banc* ruling denying a request by the Government Service Insurance System (GSIS) for exemption from payment of legal fees based on Section 39 of its Charter, Republic Act No. 8291, exempting GSIS from "all taxes, assessments, fees, charges or dues of all kinds."[78]

Reaffirming *Echegaray's* construction of Section 5(5), the Court described its exclusive power to promulgate rules on pleading, practice and procedure as "one of the safeguards of this Court's institutional independence":

> [T]he payment of legal fees is a vital component of the rules promulgated by this Court concerning pleading, practice and procedure, it cannot be validly annulled, changed or modified by Congress. As one of the safeguards of this Court's institutional independence, the power to promulgate rules of pleading, practice and procedure is now the Court's exclusive domain.[79] ...

Judicial Privilege

During the 2012 impeachment proceedings against then Chief Justice Renato C. Corona, the prosecution panel manifested that it would present about 100 witnesses and almost a thousand documents, to be secured from both private and public offices. The list of proposed witnesses included Justices of the Supreme Court, and Court officials and employees who were to testify on various matters, including those internal to the Court. Consequently, letters that asked for the examination of records, and the issuance of certified true copies of the *rollos*, and the agenda and minutes of deliberations on certain matters,

[78] A.M. No. 08-2-01-0, February 11, 2010 (Res.).
[79] Id. at 13-14.

were sent to the Court. In a *per curiam* resolution promulgated on February 14, 2012, the Court, in **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**, ruled that members of the Court and Court officials and employees may not be compelled to testify on matters that are part of the internal deliberations and actions of the Court in the exercise of their adjudicatory functions and duties, and that certain privileged documents or communications arising from these internal deliberations and actions are not subject to disclosure. The Court noted that the principle of comity or inter-departmental courtesy demanded that the highest officials of each department be exempt from the compulsory processes of the other departments, and that these privileges belong to the Supreme Court as an institution, not to any justice or judge in his or her individual capacity. Justice Carpio **concurred** with the Resolution of 14 February 2012, but, subject to "certain important clarifications and reservations:"

> **Judicial Privilege, or the right of the Judiciary to confidentiality of certain information, is implied** from Judicial Power. Similarly, Executive Privilege, or the right of the Executive to confidentiality of certain information, is implied from Executive Power. This Court has explained the rationale for Judicial Privilege, Executive Privilege, as well as Legislative Privilege, as follows:
>
> > [I]nformation … like internal deliberations of the Supreme Court and other collegiate courts, or executive sessions of either house of Congress, 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**. …[80]
>
> However, there are clear limits to Judicial Privilege, as there are clear limits to Executive and Legislative Privilege. One overriding limitation on Judicial Privilege is that it can be invoked **only**

[80] Chavez v. Public Estates Authority, 433 Phil. 506, 534 (2002), penned by Justice Carpio and discussed previously, and again subsequently.

if the information arose from the performance of official adjudicatory functions of Members of the Judiciary. As succinctly stated in the Resolution, Judicial Privilege refers only to **matters that are part of the internal deliberations and actions of the Court in the exercise of their adjudicatory functions and duties** of Justices. The Resolution further states that the matter must refer to **the performance of their official functions of adjudication** of Justices.

Thus, information relating to the commission of crimes or misconduct, or violations of the Code of Judicial Conduct, or any violation of a law or regulation for that matter, is not confidential because the commission of crimes or misconduct is not part of the official functions or duties of Justices. Moreover, information that are outside the adjudicatory functions of Justices, such as financial, budgetary, personnel and similar administrative matters relating to the operations of the Judiciary, are not confidential. The adjudicatory functions of Justices refer to their power to decide cases in the exercise of Judicial Power, as distinguished from the power to make decisions in the exercise of administrative functions.

Judicial Privilege is merely implied from Judicial Power. Thus, another limitation on Judicial Privilege is the need to carefully weigh and calibrate its exercise when it clashes with express constitutional rights and principles, such as freedom of expression, freedom of the press, the right of the people to information on matters of public concern, and the State policy of full disclosure of all transactions involving public interest. While these express constitutional rights and principles do not negate Judicial Privilege, the Judiciary cannot invoke Judicial Privilege to claim confidentiality beyond what is essential and necessary to preserve the exercise of Judicial Power.

Thus, information of no, or *de minimis,* value to the preservation of Judicial Power, such as the date and time of receipt by the Clerk of Court of the Dissenting Opinion of a Justice, cannot be deemed confidential. By no stretch of the imagination can release of such information impair even slightly the exercise of Judicial Power. Such information is obviously not part of the internal deliberations and actions of the Court. On the other hand, such information is an official record and falls under the peoples constitutional right to access to official records, and to documents, and papers pertaining to official … decisions. This is one instance when an express constitutional right must prevail

over the invocation of Judicial Privilege.

Section 6. The Supreme Court shall have administrative supervision over all courts and the personnel thereof.

In **CIVIL SERVICE COMMISSION v. ANDAL**, G.R. No. 185749, December 16, 2009, 623 Phil. 280, a petition for review on *certiorari* filed by the CSC, which sought to set aside a decision and resolution of the Court of Appeals that had set aside the CSC's decision and resolutions, Justice Carpio, speaking for the Court *en banc*, delimited the issue to this:

> The CSC's authority and power to hear and decide administrative disciplinary cases are not in dispute. **The question is whether the CSC's disciplinary jurisdiction extends to court personnel in view of Section 6, Article VIII…**

Justice Carpio concluded in **Andal** that, by virtue of the power granted to the Supreme Court under this constitutional provision, it is "only the Supreme Court that can oversee the judges' and court personnel's administrative compliance with all laws, rules and regulations." Consequently, the petition was denied and the decision and resolution of the Court of Appeals were affirmed. However, the CSC was ordered to refer the case of Herminigildo L. Andal to the Office of the Court Administrator, for the filing of the appropriate administrative case against him.

The Facts

Herminigildo L. Andal (respondent) holds the position of Security Guard II in the Sandiganbayan. On 24 January 2000, he filed an application to take the Career Service Professional Examination- Computer Assisted Test (CSPE-CAT) and was admitted to take the examination. The examination results showed that respondent passed the examination with a rating of 81.03%.

On 25 January 2000, Arlene S. Vito (Vito), claiming to have been authorized by respondent to secure the results of the examination, presented a handwritten authorization allegedly signed by respondent. Upon verification and comparison of the pictures attached to the Picture Seat Plan and the identification card of respondent which Vito presented, there appeared a dissimilarity in the facial features. Bella A. Mitra, then Officer-

in-Charge of the Examination, Placement and Services Division (EPSD) of the Civil Service Commission-National Capital Region (CSC-NCR), issued a Memorandum on the alleged "impersonation" of respondent and the matter was referred to the Legal Affairs Division to conduct a fact-finding investigation. On 29 November 2000, the CSC-NCR formally charged respondent with dishonesty.

A formal investigation of the case was scheduled on 4 June 2001, 21 November 2001, 5 February 2002, and 10 July 2002. Notices were sent to respondent's last known address as indicated in his Application Form but respondent failed to appear on the scheduled hearings. Respondent was deemed to have waived his right to appear at the formal investigation and the case proceeded *ex parte*.

On 5 August 2005, the CSC-NCR rendered judgment finding respondent guilty of dishonesty and imposing upon him the penalty of dismissal from the service.

Aggrieved, respondent appealed to the CSC which issued Resolution No. 062255 dated 20 December 2006, the dispositive portion of which reads:

> WHEREFORE, the appeal of Herminigildo L. Andal is hereby DISMISSED. Accordingly, the Decision dated May 25, 2005 of the Civil Service Commission National Capital Region (CSC-NCR), Quezon City, finding him guilty of Dishonesty and imposing upon him the penalty of dismissal from the service with accessory penalties of disqualification from re-entering government service, forfeiture of retirement benefits, and bar from taking any civil service examination, pursuant to Section 57 of the Uniformed Rules, is AFFIRMED.

Respondent moved for a reconsideration of the CSC judgment but the motion was denied in the CSC Resolution No. 071493 dated 1 August 2007.

Respondent elevated the case to the Court of Appeals on a petition for review under Rule 43. On 22 September 2008, the Court of Appeals rendered judgment in favor of respondent, the dispositive portion of which reads:

> WHEREFORE, premises considered, the assailed Decision dated 25 May 2005, Resolution No. 062255 dated 20 December

> 2006, and Resolution No. 071493 dated 01 August 2007 in Admin. Case No. 00-12-027 are SET ASIDE and respondent Civil Service Commission is enjoined from implementing the same. Respondent Civil Service Commission is hereby ORDERED to immediately refer said administrative case for Dishonesty against petitioner Herminigildo L. Andal to the Office of the Court Administrator, Supreme Court, for appropriate action.

The CSC filed a motion for reconsideration which the Court of Appeals denied in its Resolution dated 2 December 2008.

Hence, the present petition.

The Issue

The issue in this case is whether or not the Civil Service Commission has disciplinary jurisdiction to try and decide administrative cases against court personnel.

Ruling of the Court of Appeals

The Court of Appeals ruled that the CSC encroached upon the Supreme Court's power of administrative supervision over court personnel. In reversing the CSC resolutions, the Court of Appeals cited Section 6, Article VIII of the 1987 Constitution which provides that the Supreme Court shall have administrative supervision over all courts and the personnel thereof. The Court of Appeals further stated that what the CSC should have done was to refer the administrative case for dishonesty against respondent to the Office of the Court Administrator for appropriate action instead of resolving the case.

The Court's Ruling

In taking cognizance of the administrative case for dishonesty against respondent, the CSC invoked Section 28, Rule XIV of the Omnibus Civil Service Rules and Regulations which provides that the CSC "shall have original disciplinary jurisdiction over all its officials and employees and over all cases involving civil service examination anomalies or irregularities." The CSC further contends that administrative cases of dishonesty in connection with duties and responsibilities under Section 47, Chapter 7, Subtitle A, Title I, Book V of the Revised Administrative Code are different from cases of dishonesty in connection with

cheating incidents in Civil Service examinations administered by the CSC. In the latter case, the CSC assumes jurisdiction as an integral part of its duty, authority and power to administer the civil service system and protect its integrity, citing the case of *Civil Service Commission v. Albao*.[81]

The CSC argues that one of the powers of the CSC is the administration of the civil service examinations. The CSC made a careful study and comparison of the facial features of the person appearing on the photographs attached to the Application Form and the Personal Data Sheet (PDS), and the photograph attached to the Picture Seat Plan. Resemblance of the pictures purporting to be respondent's was clearly wanting. The signatures appearing on the face of the documents also revealed discrepancies in the structure, strokes, form and general appearance.
We agree with the Court of Appeals and accordingly, deny the present petition.

The Court recognizes the CSC's administrative jurisdiction over the civil service. Section 3, Article IX-B of the Constitution declares the CSC as the central personnel agency of the Government …

Section 12, Title 1 (A), Book V of Executive Order No. 292 (EO 292) likewise enumerates the powers and functions of the CSC, one of which is its quasi-judicial function under paragraph 11, which states:

> Sec. 12. Powers and Functions - The Commission shall have the following powers and functions:
> ...
> (11) Hear and decide administrative cases instituted by or brought before it directly or on appeal, including contested appointments, and review decisions and actions of its offices and of the agencies attached to it ...

And, Section 47, Title 1 (A), Book V of EO 292 provides for the CSC's disciplinary jurisdiction, as follows:

> Sec. 47. Disciplinary Jurisdiction. - (1) The Commission shall decide upon appeal all administrative disciplinary cases involving the imposition of a penalty of suspension for more than thirty days, or fine in an amount exceeding thirty days'

[81] G.R. No. 155784, October 13, 2005, 472 SCRA 548.

> salary, demotion in rank or salary or transfer, removal or dismissal from office. A complaint may be filed directly with the Commission by a private citizen against a government official or employee in which case it may hear and decide the case or it may deputize any department or agency or official or group of officials to conduct the investigation. The results of the investigation shall be submitted to the Commission with recommendation as to the penalty to be imposed or other action to be taken. ...

The *Albao* case cited by the CSC is not in point as Albao was not a court employee but a contractual employee of the Office of the Vice President. The *Albao* case merely affirmed the authority of the CSC to take cognizance of any irregularity or anomaly connected with the civil service examinations.

One case in point is *Bartolata v. Julaton*[82] wherein a letter-complaint was sent to the CSC Regional Office in Davao City denouncing the acts of Felicia Julaton (Julaton), Clerk of Court, and Juanita Tapic (Tapic), Court Interpreter II, both of the Municipal Trial Court in Cities, Davao City, Branch 3. The CSC Regional Office in Davao City discovered that a certain Julaton submitted her application to take the Civil Service Professional Examination in 1989 but the picture on the application form and on the Picture Seat Plan did not resemble the picture appearing on the appointment of Julaton. The signature of Julaton affixed to the examination documents did not match the signature on her PDS. The case was referred to the Office of the Court Administrator which recommended that Julaton and Tapic be held liable as charged. This Court dismissed Julaton from the service, with forfeiture of all retirement benefits while Tapic, who had resigned, was fined P25,000 and his retirement benefits were ordered forfeited.

Likewise, in *Civil Service Commission v. Sta. Ana*,[83] the CSC formally charged Zenaida Sta. Ana (Sta. Ana), Court Stenographer I of the Municipal Circuit Trial Court of Quezon-Licab, Nueva Ecija with dishonesty, grave misconduct, and conduct prejudicial to the best interest of the service for misrepresenting that she took and passed the CSPE-CAT when in truth and in fact, someone else took the examinations for her. The CSC found that the picture and signature in Sta. Ana's PDS were different from those appearing

[82] A.M. No. P-02-1638, July 6, 2006, 494 SCRA 433.
[83] 450 Phil. 59 (2003).

in her application form and in the Picture Seat Plan. Upon the recommendation of the Office of the Court Administrator, this Court found Sta. Ana guilty of dishonesty and dismissed her from the service with forfeiture of retirement benefits.

In the *Julaton* and *Sta. Ana* cases, the CSC recognized the disciplinary jurisdiction of the Supreme Court over court personnel. This is consonant with Section 6, Article VIII of the 1987 Constitution vesting in the Supreme Court administrative supervision over all courts and the personnel thereof…

By virtue of this power, it is only the Supreme Court that can oversee the judges' and court personnel's administrative compliance with all laws, rules and regulations. No other branch of government may intrude into this power, without running afoul of the doctrine of separation of powers. This we have ruled in *Maceda v. Vasquez*[84] and have reiterated in the case of *Ampong v. Civil Service Commission*.[85] In *Ampong*, we also emphasized that in case of violation of the Civil Service Law by a court personnel, the standard procedure is for the CSC to bring its complaint against a judicial employee before the Office of the Court Administrator of the Supreme Court.

The CSC contends that respondent is now estopped from assailing the jurisdiction of the CSC when he voluntarily submitted himself to the CSC-NCR and was accorded due process, citing the *Ampong* case.

We disagree.

In *Ampong*, petitioner in that case admitted her guilt. She voluntarily went to the CSC regional office, admitted to the charges leveled against her and waived her right to the assistance of counsel. She was given ample opportunity to present her side and adduce evidence in her defense before the CSC. She filed her answer to the charges against her and even moved for a reconsideration of the adverse ruling of the CSC. In short, Ampong did not question the authority of the CSC and, in fact, actively participated in the proceedings before it.

In the present case, while respondent may have filed his Answer

[84] G.R. No. 102781, April 22, 1993, 221 SCRA 464.
[85] G.R. No. 167916, August 26, 2008, 563 SCRA 293.

to the formal charge of dishonesty after having been directed to do so, he denied having taken the civil service examination and did not even appear at the formal investigation conducted by the CSC-NCR. He appealed to the CSC after the adverse decision of the CSC-NCR was rendered but raised the issue of lack of jurisdiction over his person. He argued that as an employee in the Judiciary, "the jurisdiction to hear disciplinary action against him vests with the Sandiganbayan or the Supreme Court." It cannot therefore be said that he was estopped from assailing the jurisdiction of the CSC.

This notwithstanding, we reiterate that we will not and cannot tolerate dishonesty for the judiciary expects the highest standard of integrity from all its employees. The conduct and behavior of everyone connected with an office charged with the dispensation of justice is circumscribed with a heavy burden or responsibility. The Court will not hesitate to rid its ranks of undesirables.

Section 7. (1) No person shall be appointed Member of the Supreme Court or any lower collegiate court unless he is a natural-born citizen of the Philippines. A Member of the Supreme Court must be at least forty years of age, and must have been for fifteen years or more, a judge of a lower court or engaged in the practice of law in the Philippines.

(2) The Congress shall prescribe the qualifications of judges of lower courts, but no person may be appointed judge thereof unless he is a citizen of the Philippines and a member of the Philippine Bar.

(3) A Member of the Judiciary must be a person of proven competence, integrity, probity, and independence.

Justice Carpio was sworn in as a member of the Supreme Court on his 52nd birthday, and exemplified the **qualifications** required by this **Section 7, Article VIII**.

Born in Davao City on October 26, 1949 to Sol Tirol Carpio and Bernardo D. Carpio, Antonio Tirol Carpio attended the Ateneo de Davao University for his primary and secondary education. He earned his undergraduate degree in Economics in 1970 from the Ateneo de Manila University, and obtained his law degree in 1975

from the College of Law of the University of the Philippines, where he graduated valedictorian and *cum laude*. In his student days, he was Editor-in-Chief of The Guidon, the school paper of the Ateneo de Manila University, Managing Editor of the Philippine Collegian, the school paper of the University of the Philippines, and Chairman of the Editorial Board of the Philippine Law Journal of the College of Law of the University of the Philippines. His scholastic record earned him membership in the honor societies of *Phi Kappa Phi*, *Pi Gamma Mu*, and the Order of the Purple Feather.[86]

He placed sixth in the Bar Examinations of 1975 and went into private practice, eventually founding his own firm, Carpio Villaraza and Cruz, in 1980. As a practicing lawyer, he was a member of the Technology Transfer Board of the Department of Industry from 1978 to 1979, and served as Special Representative of the Department of Trade for textile negotiations from 1980 to 1981. He was a Professorial Lecturer in commercial and tax law of the University of the Philippines College of Law from 1983 to 1992. He was a director of the Philippine Bar Association and the Intellectual Property Association of the Philippines, and was elected President of the Integrated Bar of the Philippines, Pasay-Makati Chapter for the 1985 to 1986 term. He chaired the Board of Editors of the Intellectual Property Journal, and was the Executive Editor of the Journal of the Integrated Bar of the Philippines.[87]

In 1992, he was appointed Chief Presidential Legal Counsel, with cabinet rank, by then President Fidel V. Ramos, and worked for major reforms in the telecommunications, shipping, civil aviation, and insurance industries. He was also appointed as a member of the Board of Regents of the University of the Philippines from 1993 to 1998. For his "distinguished and exemplary service" to the Republic, in 1998 he was awarded the Presidential Medal of Merit by then President Fidel V. Ramos.[88]

He received the Outstanding Achievement Award in Law from the Ateneo de Manila Alumni Association in 1991. In 2002, Justice Carpio was the recipient of the Distinguished Alumnus Award of the Ateneo de Davao Alumni Association. In 2009, he was conferred a Doctorate of Laws, *honoris causa*, by the Ateneo de Davao University. In 2015, he was named the Distinguished Alumnus in Public International Law by the University of the Philippines Alumni Association and in 2017, he

[86] Curriculum Vitae of Justice Antonio Tirol Carpio prepared by the staff of the Office of the Senior Associate Justice, Supreme Court of the Philippines.

[87] Additional information from http://sc.judiciary.gov.ph/aboutsc/justices/j-carpio.php, last accessed on January 18, 2019.

[88] Ibid.

was one of the Most Distinguished Alumni awardees of the University of the Philippines Alumni Association.[89]

Section 8. (1) A Judicial and Bar Council is hereby created under the supervision of the Supreme Court composed of the Chief Justice as *ex officio* Chairman, the Secretary of Justice, and a representative of the Congress as *ex officio* Members, a representative of the Integrated Bar, a professor of law, a retired Member of the Supreme Court, and a representative of the private sector.

(2) The regular members of the Council shall be appointed by the President for a term of four years with the consent of the Commission on Appointments. Of the Members first appointed, the representative of the Integrated Bar shall serve for four years, the professor of law for three years, the retired Justice for two years, and the representative of the private sector for one year.

(3) The Clerk of the Supreme Court shall be the Secretary *ex officio* of the Council and shall keep a record of its proceedings.

(4) The regular Members of the Council shall receive such emoluments as may be determined by the Supreme Court. The Supreme Court shall provide in its annual budget the appropriations for the Council.

(5) The Council shall have the principal function of recommending appointees to the judiciary. It may exercise such other functions and duties as the Supreme Court may assign to it.

When asked which one constitutional provision in **Article VIII on the Judicial Department** required amendment, Justice Carpio responded, "**Section 8 on the Judicial and Bar Council**." In his opinion the most important amendment would be to give JBC members "only one term without reappointment, preferably for seven years, similar to the term of the members of the constitutional commissions." In his view, the four-year term provided in Section 8(2), with no limit on reappointment, "encouraged" JBC members seeking reappointment to become "sympathetic to the candidates" for

[89] Ibid.

appointment to the judiciary "of the President and Members of the Commission on Appointments." For Justice Carpio, "a fixed single term would strengthen the independence of the JBC."[90]

Section 9. The Members of the Supreme Court and judges of lower courts shall be appointed by the President from a list of at least three nominees prepared by the Judicial and Bar Council for every vacancy. Such appointments need no confirmation.

For the lower courts, the President shall issue the appointment within ninety days from the submission of the list.

Then President Gloria Macapagal Arroyo appointed Antonio Tirol Carpio as a Justice of the Supreme Court in 2001, her first appointment to the high court.

Section 10. The salary of the Chief Justice and of the Associate Justices of the Supreme Court, and of judges of lower courts shall be fixed by law. During their continuance in office, their salary shall not be decreased.

Section 11. The Members of the Supreme Court and judges of the lower court shall hold office during good behavior until they reach the age of seventy years or become incapacitated to discharge the duties of their office. The Supreme Court *en banc* shall have the power to discipline judges of lower courts, or order their dismissal by a vote of majority of the Members who actually took part in the deliberations on the issues in the case and voted in thereon.

Justice Carpio retired from the Supreme Court as its Senior Associate Justice on October 26, 2019, his 70th birthday, after having served on the bench for 18 years.

Section 12. The Members of the Supreme Court and of other courts established by law shall not be designated to any agency performing quasi-judicial or administrative function.

[90] Interview with Justice Antonio Tirol Carpio, Senior Associate Justice, Supreme Court, January 18, 2019.

Section 13. The conclusions of the Supreme Court in any case submitted to it for decision *en banc* or in division shall be reached in consultation before the case is assigned to a Member for the writing of the opinion of the Court. A certification to this effect signed by the Chief Justice shall be issued and a copy thereof attached to the record of the case and served upon the parties. Any Member who took no part, or dissented, or abstained from a decision or resolution must state the reason therefor. The same requirements shall be observed by all lower collegiate court.

Justice Carpio explained the circumstances that give rise to an extended **dissenting opinion** - First, a justice's draft *ponencia*, or written opinion, may have lost in the voting, with the original dissenting opinion winning. In such a case, the justice converts what was originally the *ponencia* into an extended dissent. Second, a justice who dissents to a draft *ponencia* may want to thoroughly explain the issues and position taken. In such a case, the extended dissent is offered for possible adoption in a future similar case where the dissenting opinion may eventually prevail.[91]

The value of dissent was fully explained by Justice Carpio in his **separate opinion** in **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.** In a *per curiam* resolution promulgated on February 14, 2012, the Court ruled, *inter alia*, that certain privileged documents or communications arising from internal deliberations and actions of the Court, were not subject to disclosure, and that these privileges belong to the Supreme Court as an institution, not to any justice or judge in his or her individual capacity. Justice Carpio **concurred** with the Resolution of 14 February 2012, subject to "certain important clarifications and reservations:"

> The Constitution **(in Section 13, Article VIII) mandates that a Justice who dissents must explain his dissent. …**
>
> The framers of the 1987 Constitution used the word **must** to

[91] Interview with Justice Antonio Tirol Carpio, Senior Associate Justice, Supreme Court, January 18, 2019.

emphasize that the duty to explain ones dissent is **mandatory**. The framers considered a violation of this express duty a culpable violation of the Constitution.[92]

Without this constitutional command to state the reasons for his dissent, a Justice still has a right to explain his dissent under the constitutional right of a citizen to freedom of expression. With this constitutional command, a Justice has not only a right, but also a **duty, to explain his dissent. Under a Justices freedom of expression, he may or may not explain his dissent. Under his constitutional duty to state the reason for his dissent, he has no choice but to explain his dissent.**

Thus, the majority can never suppress the dissent of any Justice because to write a dissent is not only a constitutional right but also a constitutional duty. If the majority suppress a dissent, then they commit a culpable violation of the Constitution. This express constitutional right and duty to explain ones dissent should be given utmost deference *vis-a-vis* Judicial Privilege which is merely implied from Judicial Power.[93] **When a Justice explains his dissent, he may even include in his dissent internal deliberations if such internal deliberations are material in complying with his constitutional duty to state the reasons for his dissent**. Assuming that the dissent of a Justice breaches Judicial Privilege, any sanction for such breach can only be made through impeachment by Congress, which has the sole power to discipline impeachable officers. Any other rule means that the majority can terrorize the minority into acquiescence by threatening to sanction them for their dissents.

A Justice who dissents can explain his position only in his dissent and nowhere else. He cannot go to media to expound on his dissent. He can articulate, and state his reasons, only in his dissent. Thus, a Justice who dissents often strives to put into his dissent all the arguments he could possibly marshal, hoping that his arguments could one day in the future carry more weight with the wisdom of hindsight. Indeed, in both American and Philippine jurisprudence, many dissents eventually emerged as the majority rule, and some dissents were even enacted into law by the legislature. This is another reason for giving dissents as much leeway as possible.

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92 I Records, Constitutional Commission 501 (14 July 1986).

93 See discussion under Art. VIII, Sec. 5.

Section 14. No decision shall be rendered by any court without expressing therein clearly and distinctly the facts and the law on which it is based.

No petition for review or motion for reconsideration of a decision of the court shall be refused due course or denied without stating the legal basis therefor.

In **SPOUSES CONSING v. COURT OF APPEALS**, G.R. No. 143584, March 10, 2004, 469 Phil. 148, a petition for review of a decision of the Court of Appeals, Justice Carpio, for the First Division, briefly discussed this **Section 14, Article VIII**. Originating as a sum of money claim filed by Sugar Producers Cooperative Marketing Association against Antonio and Soledad Consing, the trial court ruled in favor of SPMCA in a two-page decision. Dissatisfied with the decision of the trial court, the Consings appealed to the Court of Appeals, which affirmed the decision of the trial court, and subsequently denied their motion for reconsideration:

> Antonio and Soledad draw our attention to the two-page decision of the trial court penned by Judge Cicero U. Querubin ... While Judge Querubin mentioned his factual findings, the legal basis of his ruling is not set out in the decision. Judge Querubin failed to meet faithfully the requirement demanded by the Constitution from the courts in rendering their decisions (pursuant to) Section 14, Article VIII of the Constitution …
>
> **The court must inform the parties to a case of the legal basis for the court's decision so that if a party appeals, it can point out to the appellate court the points of law to which it disagrees.**[94] **Every judge should know the constitutional mandate and the rationale behind it. Judge Querubin should have known the exacting standard imposed on courts by Section 14, Article VIII of the Constitution and should not have sacrificed the constitutional standard for brevity's sake.**
>
> The failure of the trial court decision to measure up to the standard set by the Constitution is too gross to ignore as it is in stark contrast to the Court of Appeals' decision. The Court of Appeals' decision, while also brief, being only three pages long, laid down the factual and legal reasons why Antonio and

[94] People v. Bugarin, 339 Phil. 570 (1997).

> Soledad are the ones liable to SPCMA, and not PNB. The Court of Appeals' discussion of the merits of this case enabled the parties to pinpoint the proper issues that we now review.

Section 15. (1) All cases or matters filed after the effectivity of this Constitution must be decided or resolved within twenty-four months from date of submission for the Supreme Court, and, unless reduced by the Supreme Court, twelve months for all lower collegiate courts, and three months for all other lower courts.

(2) A case or matter shall be deemed submitted for decision or resolution upon the filing of the last pleading, brief, or memorandum required by the Rules of Court or by the court itself.

(3) Upon the expiration of the corresponding period, a certification to this effect signed by the Chief Justice or the presiding judge shall forthwith be issued and a copy thereof attached to the record of the case or matter, and served upon the parties. The certification shall state why a decision or resolution has not been rendered or issued within said period.

(4) Despite the expiration of the applicable mandatory period, the court, without prejudice to such responsibility as may have been incurred in consequence thereof, shall decide or resolve the case or matter submitted thereto for determination, without further delay.

In his 18 years in the Supreme Court, Justice Carpio penned over 800 decisions, and left no backlog in his docket. For this reason his decisions on the **constitutional mandate contained in this Section 15, Article VIII** were all the more compelling. Speaking for the Second Division of the Court in A.M. No. MTJ-16-1869, July 27, 2016, **BANCIL v. REYES**, Justice Carpio reiterated[95] the **mandatory nature of the periods** provided under this constitutional provision:

> The Constitution expressly provides that all lower courts should decide or resolve cases or matters within three months from the date of submission. Accordingly, Section 5, Canon 6 of the New

[95] See A.M. No. MTJ-11-1790 (Formerly A.M. No. 11-7-86-MTC), December 11, 2013, Office of the Court Administrator v. Lopez, 723 Phil. 256, also penned by Justice Carpio.

Code of Judicial Conduct[96] provides:

> Sec. 5. Judges shall perform all judicial duties, including the delivery of reserved decisions, efficiently, fairly, and with reasonable promptness…

Accordingly, this Court has laid down certain guidelines to ensure the compliance with this mandate. More particularly, Supreme Court Administrative Circular No. 13-87[97] provides:

> 3. Judges shall observe scrupulously the periods prescribed by Article VIII, Section 15 of the Constitution for the adjudication and resolution of all cases or matters submitted in their courts. Thus, all cases or matters must be decided or resolved within twelve months from date of submission by all lower collegiate courts while all other lower courts are given a period of three months to do so…

Supreme Court Administrative Circular No. 1-88[98] further states:

> 6.1 All Presiding Judges must endeavor to act promptly on all motions and interlocutory matters pending before their courts.

Time and again, we have stressed the importance of reasonable promptness in relation to the administration of justice as justice delayed is justice denied. Undue delay in the disposition of cases and motions erodes the faith and confidence of the people in the judiciary and unnecessarily blemishes its stature.[99] This is more so the case with trial judges who serve as the frontline officials of the judiciary expected to act all times with efficiency and probity.[100]

We have held:

> As a frontline official of the Judiciary, a trial judge should at all times act with efficiency and probity. He is duty-bound not only to be faithful to the law, but also to maintain professional competence. The pursuit of excellence ought always to be his

[96] A.M. No. 03-05-01-SC, June 1, 2004.
[97] Dated July 1, 1987.
[98] Dated January 28, 1988.
[99] Magtibay v. Judge Indar, 695 Phil. 617 (2012).
[100] Angelia v. Judge Grageda, 656 Phil. 570 (2011).

> guiding principle. Such dedication is the least that he can do to sustain the trust and confidence that the public have reposed in him and the institution he represents.
> The Court cannot overstress its policy on prompt disposition or resolution of cases. Delay in the disposition of cases is a major culprit in the erosion of public faith and confidence in the judicial system, as judges have the sworn duty to administer justice without undue delay. Thus, judges have been constantly reminded to strictly adhere to the rule on the speedy disposition of cases and observe the periods prescribed by the Constitution for deciding cases, which is three months from the filing of the last pleading, brief or memorandum for lower courts. To further impress upon judges such mandate, the Court has issued guidelines (Administrative Circular No. 3-99 dated January 15, 1999) that would insure the speedy disposition of cases and has therein reminded judges to scrupulously observe the periods prescribed in the Constitution.[101]

This being said, the Court, in view of the voluminous case load of some trial court judges, generally allows for a reasonable extension of time to decide cases and the pending incidents thereof. The judge merely has to request for such extension if he, for good reasons, is unable to comply with the prescribed three-month period.[102]

We have also been consistent in holding that the delay of a judge of a lower court in resolving motions and incidents within the reglementary period as prescribed by the Constitution is not excusable and constitutes gross inefficiency.[103] In this case, Judge Reyes failed to act, within the prescribed period, on the case and the motions filed by both Bancil and Krieger. Necessarily, an administrative sanction is in order.

Under Section 9, Rule 140 of the Revised Rules of Court, undue delay in rendering a decision or order is considered a less serious offense which is punishable by:

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[101] Re: Failure of Former Judge Antonio A. Carbonell to Decide Cases Submitted for Decision and to Resolve Pending Motions in the Regional Trial Court, Branch 27, San Fernando, La Union, 713 Phil. 594, 597-598 (2013). Citations omitted.
[102] Office of the Court Administrator v. Judge Reyes, 566 Phil. 325 (2008); Office of the Court Administrator v. Judge Javellana, 481 Phil. 315, 327 (2004).
[103] Angelia v. Judge Grageda, 656 Phil. 570 (2011), citing Prosecutor Visbal v. Judge Buban, 443 Phil. 705, 708 (2003).

> 1. Suspension from office without salary and other benefits for not less than one (1) nor more than three (3) months; or
> 2. A fine of more than P10,000.00 but not exceeding P20,000.00.[104]
>
> In imposing the proper penalty, we note that Judge Reyes readily admitted the fact of delay with a prayer for understanding and a fervent plea of good faith. He further stated that this incident will serve as a wake-up call for him to be always fully alert in rendering decisions or orders on time. Based on his candid admissions, we find that a penalty of fine is proper.

Section 16. The Supreme Court shall, within thirty days from the opening of each regular session of the Congress, submit to the President and the Congress an annual report on the operations and activities of the Judiciary.

A review of the committees Justice Carpio chaired or co-chaired[105] since his appointment in 2001 reveal, to a certain extent, the **operations and activities** of the Judiciary:

2002	Committee on Mass Housing Committee on Halls of Justice
2003	Library and Printing Committee
2004-05	Committee on Library, Records Management, Legal Research and Printing Committee on Halls of Justice
2006	Committee on Computerization and Library
2008-10	Committee on Strengthening the Institutional Capacity of the Judiciary
2008	Judicial Reform Handbook of the Asia Pacific Judicial Reform Forum
2008	Oversight Committee on Halls of Justice
2012	Committee on the Revision of the Rules of Court Oversight Committee on Halls of Justice
2015	*En Banc* Raffle Committee

[104] Sec. 11, Rule 140, Revised Rules of Court.
[105] Information provided by the staff of the Office of the Senior Associate Justice of the Supreme Court.

His work as chair of the committees on library, printing, records management, and legal research led to the launch of the E-Library on November 19, 2004. The speedy development of the E-Library was unprecedented as it was launched after six months from conceptualization, and one year ahead of the target date. The E-Library was the first online digital law library of legal information not only in the Philippines but also throughout Asia, incorporating the decisions of the Supreme Court, Court of Appeals, Sandiganbayan, and Court of Tax Appeals, and eventually, international agreements under the jurisdiction of the Department of Foreign Affairs. Access to the E-Library was made available not only to justices, judges and court attorneys, but also to law schools and lawyers who requested access.

While Justice Carpio was chair of the committee on computerization, the E-Payment System was launched, which allowed the Judiciary to electronically assess and collect legal fees to ensure correct assessment and maximum efficiency. An advocate of open source systems, Justice Carpio introduced its use in the Supreme Court, to maximize the Court's allocation of resources for computerization of the courts.

Justice Carpio, as Chairperson of the Supreme Court's Committee on Computerization and Library, presses the switch to formally commence the Nationwide Launching of the E-Library for law schools with then Chief Justice Artemio V. Panganiban. 20 February 2006, Arellano University, Manila.

Justice Carpio leads the inauguration of the ePayment system for trial courts at the Makati City Hall, with then Makati City Mayor Jejomar Binay (second from left) and then Chief Justice Artemio V. Panganiban (third from left). 21 April 2006.

Justice Carpio and Associate Justice Presbitero Velasco take their oath as Chairperson and Member of the Senate Electoral Tribunal (SET), respectively, before Senator Edgardo J. Angara. Looking on are (from left) SET Secretary Atty. Irene R. Guevara, Senators Manuel M. Lapid and Richard J. Gordon. 3 December 2009, Hyatt Hotel, Manila. The SET is the sole judge of all contests relating to the election, returns, and qualifications of its Members. It is composed of nine Members, three of whom are Justices of the Supreme Court designated by the Chief Justice. The senior Justice in the SET is its Chairman.

Justice Carpio attends the *en banc* session during the Court's summer sessions in Baguio City. With him are (from left) Justices Arturo D. Brion and Antonio Eduardo B. Nachura, then Chief Justice Reynato S. Puno and Justice Jose C. Mendoza (partly hidden). April 2010, Supreme Court, Baguio City. The Supreme Court may sit *en banc* or in division.

Acting Chief Justice Carpio, together with (from left) Associate Justices Maria Lourdes P. A. Sereno, Teresita J. Leonardo-De Castro, Mariano C. Del Castillo, and Jose Portugal Perez, leads the inauguration of the Chief Justice Jose Abad Santos Hall of Justice at the City Hall Compound, Pulong Maragul, in Angeles City. Looking on is Court Administrator Jose Midas P. Marquez. 5 July 2012, Angeles City, Pampanga. Although the Judiciary enjoys fiscal autonomy, the Supreme Court, within thirty days from the opening of each regular session of the Congress, submits to the President and the Congress an annual report on its operations and activities.

Acting Chief Justice Carpio, representing the judicial power vested in one Supreme Court, sits beside Vice President Ma. Leonor Robredo, during the State of the Nation Address of President Rodrigo R. Duterte. 23 July 2018. House of Representatives, Plenary Hall, Batasang Pambansa, Quezon City.

Justice Carpio administers the oath of office to Chief Justice Teresita Leonardo-De Castro. Witnessing the event are Associate Justices Mariano C. Del Castillo, Diosdado M. Peralta, Lucas P. Bersamin, Marvic Mario Victor F. Leonen, Noel G. Tijam, and Jose C. Reyes, Jr. 28 August 2018, Supreme Court *En Banc* Session Hall, Manila.

Acting Chief Justice Carpio presides over oral arguments on petitions questioning the country's withdrawal from the International Criminal Court. 9 October 2018, Supreme Court *En Banc* Session Hall, Manila. All cases involving the constitutionality of a treaty, international or executive agreement, or law, are heard by the Supreme Court *en banc*.

Justice Carpio administers the oath of office to Chief Justice Lucas P. Bersamin. Beside the Chief Justice is Mrs. Aurora B. Bersamin. 28 November 2018, Supreme Court *En Banc* Session Hall, Manila.

Justice Carpio conducts a lecture on the West Philippine Sea dispute as a Special Course on International Criminal Law and Security of the Philippine Judicial Academy (PHILJA). 21 January 2016. PHILJA Training Center, Tagaytay City. The PHILJA, created by law under Republic Act No. 8557, is a separate but component unit of the Supreme Court that operates under its administration, supervision and control.

The Supreme Court en banc with Justice Carpio as Acting Chief Justice. Front (l-r): Associate Justices Diosdado M. Peralta, Presbitero J. Velasco, Jr., Acting Chief Justice Carpio, Associate Justices Teresita J. Leonardo-De Castro, and Lucas P. Bersamin.
Back (l-r): Associate Justices Andres B. Reyes, Jr., Samuel R. Martires, Francis H. Jardeleza, Estela M. Perlas-Bernabe, Mariano C. Del Castillo, Marvic Mario Victor F. Leonen, Alfredo Benjamin S. Caguioa, Noel G. Tijam, and Alexander G. Gesmundo. 31 July 2018, Dignitaries Lounge, Supreme Court, Manila. The Supreme Court is composed of a Chief Justice and fourteen Associate Justices.

Justice Carpio, Chairman of the Second Division and of the Senate Electoral Tribunal, with his Supreme Court staff. 26 June 2019, Dignitaries Lounge, Supreme Court, Manila. Seated from left: Angelita C. Lauchengco, Atty. Anna Teresita A. Marcelo, Atty. Nelda Ethel P. Torio, Atty. Janice May R. Erni-Manongdo, Atty. Rosalinda E. Beltran-Kawada, Atty. Maria Teresa B. Sibulo, Atty. Eleanor S. Francisco-Anunciacion, Atty. Maria Luz A. Cabegin, Atty. Maria Kristina R. Santos-Bagaporo, Atty. Sarah Liliana Z. Sarmiento.
Standing from left: Danilo A. Espejon, Marcelino A. Matias, Emiliano Allan L. Coscolluela, Ruth R. Loma, Oscar G. Laude, Rowena M. Diaz, Emiliano Allan N. Coscolluela, Jr., Natalie Marilyn O. Calumpong, Roberto A. Samson, Atty. Christina R. Fernandez, Atty. Marinela Ilas-Panganiban, Atty. Marlon Iñigo T. Tronqued, Maria Richie T. Guansing, Roger E. Bagaoisan, Ma. Teresa L. Erbito, Rhonan S. Lamano, Mirasol B. Sia, Ronnie C. Dela Cruz, Joan G. Altamia, Armando G. Uypala, Rolf C. Guillen, Mark V. Loma.

ARTICLE IX

CONSTITUTIONAL COMMISSIONS

A. COMMON PROVISIONS

Section 1. The Constitutional Commissions, which shall be independent, are the Civil Service Commission, the Commission on Elections, and the Commission on Audit.

In his **concurring** opinion in **GONZALES v. OFFICE OF THE PRESIDENT OF THE PHILIPPINES**, G.R. No. 196231, September 4, 2012, 694 Phil. 52,[1] Justice Carpio explained:

> Our Constitution does not impart a fixed and rigid **concept of independence** among the offices that it creates. While it declares certain bodies as "independent", we cannot assume that the independence of the Ombudsman is the same as the independence of the Judiciary. Neither is the **independence of the Constitutional Commissions** the same as that of the National Economic and Development Authority, the Bangko Sentral ng Pilipinas or the Commission on Human Rights.[2] This Court cannot make a "one size fits all" concept of independence because the Constitution itself differentiates the degree of independence of these bodies.
> …
>
> … **The constitutional principle of independence does not obviate the possibility of a check from another body. After all, one of the constitutive principles of our constitutional structure is the system of checks and balances - a check that is not within a body, but outside of it. This is how our democracy operates - on the basis of distrust.**[3]
> …

[1] Consolidated with Barreras-Sulit v. Ochoa, G.R. No. 196232. See discussion under Arts. XI, Sec. 5, XII, Secs. 9 and 20, and XIII, Sec. 17.

[2] These are the bodies that the 1987 Constitution considers as "independent." See Const., Arts. IX-A, Sec. 1, XI, Sec. 5, XII, Secs. 9 and 20, XIII, Sec. 17.

[3] See J. Ely, Democracy And Distrust: A Theory Of Judicial Review (2002).

> **When the 1987 Constitution speaks of "independent" bodies, it does not mean complete insulation from other offices.** The text, history and structure of the Constitution contemplate checks and balances that result in the expansion, contraction or concurrence of powers, a coordinate functioning among different bodies of government that is not limited to the executive, legislative and judicial branches, but includes the "independent" constitutional bodies. The very structure of our government belies the claim that "independent" bodies necessarily have exclusive authority to discipline its officers.
> …
>
> … The Constitution clearly intended different degrees of independence among the "independent" bodies that it created. … **For the others, like the Civil Service Commission, the Commission on Audit and the Commission on Elections, legislative power is decidedly more limited,**[4] **with express guarantees like fiscal autonomy**[5] **and rule-making power on pleadings and practice.**[6]
> …
>
> … The fact that different constitutional bodies are treated differently under the Constitution shows that independence is a broadly delineated norm. With this level of generality, the constitutional meaning of independence is only that of independent decision-making that is free from partisanship and political pressures. …

Furthermore, the **independence of the Constitutional Commissions**, was, for Justice Carpio, subject to an overriding limitation - "the clear intent of the framers of the Constitution." The case of **MATIBAG v. BENIPAYO,** G.R. No. 149036, April 2, 2002,[7] illustrated this limitation:

> While the Constitution mandates that the COMELEC "shall be independent", this provision should be harmonized with the President's power to extend *ad interim* appointments. To hold that the independence of the COMELEC requires the Commission on Appointments to first confirm *ad interim* appointees before the appointees can assume office will negate the President's power to make *ad interim* appointments. This is contrary to the rule

[4] See Const., Art. IX-A, Sec. 3, 4 and 8.
[5] Const., Art. IX-A, Sec. 5.
[6] Const., Art. IX-A, Sec. 6.
[7] See discussion under Art. VII, Sec. 16.

on statutory construction to give meaning and effect to every provision of the law. It will also run counter to **the clear intent of the framers of the Constitution**.

Section 2. No member of a Constitutional Commission shall, during his tenure, hold any other office or employment. Neither shall he engage in the practice of any profession or in the active management or control of any business which, in any way, may be affected by the functions of his office, nor shall he be financially interested, directly or indirectly, in any contract with, or in any franchise or privilege granted by the Government, any of its subdivisions, agencies, or instrumentalities, including government-owned or controlled corporations or their subsidiaries.

Section 3. The salary of the Chairman and the Commissioners shall be fixed by law and shall not be decreased during their tenure.

Section 4. The Constitutional Commissions shall appoint their officials and employees in accordance with law.

Section 5. The Commission shall enjoy fiscal autonomy. Their approved annual appropriations shall be automatically and regularly released.

Section 6. Each Commission *en banc* may promulgate its own rules concerning pleadings and practice before it or before any of its offices. Such rules, however, shall not diminish, increase, or modify substantive rights.

Section 7. Each Commission shall decide by a majority vote of all its Members, any case or matter brought before it within sixty days from the date of its submission for decision or resolution. A case or matter is deemed submitted for decision or resolution upon the filing of the last pleading, brief, or memorandum required by the rules of the Commission or by the Commission itself. Unless otherwise provided by this Constitution or by law, any decision, order, or ruling of each Commission may be brought to the Supreme Court on *certiorari* by the aggrieved party within thirty days from receipt of a copy thereof.

In **DEVELOPMENT BANK OF THE PHILIPPINES v.**

COMMISSION ON AUDIT, G.R. No. 144516, February 11, 2004, 467 Phil. 62, a special civil action for *certiorari*, DBP sought to set aside the COA decision and resolution that disallowed in audit the dividends distributed under its Special Loan Program to the members of the DBP Gratuity Plan. The Court *en banc* affirmed the COA decision and resolution,[8] but on the preliminary issue of standing of DBP, which was raised by the Office of the Solicitor General, Justice Carpio briefly explained **Section 7 of this Article IX-A**, in relation to Section 2, Article IX-D:

> As DBP correctly argued, the COA *en banc* implicitly recognized DBP's standing when it ruled on DBP's request for reconsideration from AOM No. 93-2 and motion for reconsideration from the Decision of 6 October 1998. The supposed lack of standing of the DBP was not even an issue in the COA Decision or in the Resolution of 1 August 2000.
>
> The OSG nevertheless contends that the DBP cannot question the decisions of the COA *en banc* since DBP is a government instrumentality. Citing Section 2, Article IX-D of the Constitution, the OSG argued that:
>
> > Petitioner may ask the lifting of the disallowance by COA, since COA had not yet made a definitive and final ruling on the matter in issue. But after COA denied with finality the motion for reconsideration of petitioner, petitioner, being a government instrumentality, should accept COA's ruling and leave the matter of questioning COA's decision with the concerned investor-members.
>
> These arguments do not persuade us.
>
> **Section 2, Article IX-D of the Constitution does not bar government instrumentalities from questioning decisions of the COA. Government agencies and government-owned and controlled corporations have long resorted to petitions for *certiorari* to question rulings of the COA.**[9] **These government entities filed their petitions with this**

[8] Affirmed with Modification. The income of the Gratuity Plan Fund, held in trust for the benefit of DBP employees eligible to retire under RA 1616, should not be recorded in the books of account of DBP as the income of the latter.

[9] For instance, in Philippine International Trading Corporation v. COA, 368 Phil. 478 (1999); National Center For Mental Health Management v. COA, G.R. No. 114864, 6 December 1996, 265 SCRA 390; Philippine Ports Authority v. COA, G.R. No. 100773, 16 October 1992, 214 SCRA 653.

Court pursuant to Section 7, Article IX of the Constitution, which mandates that aggrieved parties may bring decisions of the COA to the Court on *certiorari*. Likewise, the Government Auditing Code expressly provides that a government agency aggrieved by a COA decision, order or ruling may raise the controversy to the Supreme Court on *certiorari* "in the manner provided by law and the Rules of Court."[10] Rule 64 of the Rules of Court now embodies this procedure, to wit:

> Sec. 2. Mode of review. - A judgment or final order or resolution of the Commission on Elections and the Commission on Audit may be brought by the aggrieved party to the Supreme Court on *certiorari* under Rule 65, except as hereinafter provided.

The novel theory advanced by the OSG would necessarily require persons not parties to the present case - the DBP employees who are members of the Plan or the trustees of the Fund - to avail of *certiorari* under Rule 65. The petition for *certiorari* under Rule 65, however, is not available to any person who feels injured by the decision of a tribunal, board or officer exercising judicial or quasi- judicial functions. The "person aggrieved" under Section 1 of Rule 65 who can avail of the special civil action of *certiorari* pertains only to one who was a party in the proceedings before the court *a quo*,[11] or in this case, before the COA. To hold otherwise would open the courts to numerous and endless litigations.[12] Since DBP was the sole party in the proceedings before the COA, DBP is the proper party to avail of the remedy of *certiorari*.

The real party in interest who stands to benefit or suffer from the judgment in the suit must prosecute or defend an action.[13] We have held that "interest" means material interest, an interest in issue that the decision will affect, as distinguished from mere interest in the question involved, or a mere incidental interest.[14]

As a party to the Agreement and a trustor of the Fund, DBP has

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[10] P.D. No. 1445, Sec. 50 states: Appeal from decisions of the Commission. - The party aggrieved by any decision, order or ruling of the Commission may within thirty days from his receipt of a copy thereof appeal on *certiorari* to the Supreme Court in the manner provided by law and the Rules of Court. When the decision, order, or ruling adversely affects the interest of any government agency, the appeal may be taken by the proper head of that agency.

[11] Tang v. Court of Appeals, 382 Phil. 277 (2000).

[12] Ibid.

[13] Rules of Court, Rule 3, Sec. 2.

[14] Ortigas & Co. Ltd. v. Court of Appeals, G.R. No. 126102, 4 December 2000, 346 SCRA 748.

> a material interest in the implementation of the Agreement, and in the operation of the Gratuity Plan and the Fund as prescribed in the Agreement. The DBP also possesses a real interest in upholding the legitimacy of the policies and programs approved by its Board of Directors for the benefit of DBP employees. This includes the SLP and its implementing rules, which the DBP Board of Directors confirmed.

The **exception to the procedural rule contained in Section 7 of this Article IX-A** was discussed in the *en banc* decision in **REPOL v. COMMISSION ON ELECTIONS**, G.R. No. 161418, April 28, 2004.[15] The case was a petition for *certiorari* that assailed a *status quo ante* order of the First Division of the COMELEC that effectively overturned the trial court's proclamation of Noel Y. Repol as the duly elected mayor of Pagsanghan, Samar:

> Repol went directly to the Supreme Court from an interlocutory order of the COMELEC First Division. **Section 7, Article IX of the 1987 Constitution prescribes the power of the Supreme Court to review decisions of the COMELEC…**
>
> We have interpreted this constitutional provision to mean final orders, rulings and decisions of **the COMELEC rendered in the exercise of its adjudicatory or quasi-judicial powers.**[16] **The decision must be a final decision or resolution of the COMELEC *en banc*.**[17] **The Supreme Court has no power to review via *certiorari* an interlocutory order or even a final resolution of a Division of the COMELEC. Failure to abide by this procedural requirement constitutes a ground for dismissal of the petition.**[18]
>
> **However, this rule is not ironclad**. In *ABS-CBN Broadcasting Corporation v. COMELEC*,[19] we stated -
>
> > This Court, however, has ruled in the past that this procedural requirement [of filing a motion for reconsideration] may be glossed over to prevent a miscarriage of justice, when the issue involves the principle of social justice or the protection of labor, when the decision or resolution sought to be set aside is a nullity, or when the need for relief is extremely urgent and

[15] See discussion under Art. IX-C, Sec. 3
[16] G.R. No. 143398, 25 October 2000, 344 SCRA 358.
[17] Ibid.
[18] Ibid.
[19] 380 Phil. 780 (2000).

certiorari is the only adequate and speedy remedy available.

The Court further pointed out in ABS-CBN that an exception was warranted under the peculiar circumstances of the case since there was hardly enough opportunity to move for a reconsideration and to obtain a swift resolution in time for the 11 May 1998 elections. The same can be said in Repol's case. We rule that direct resort to this Court through a special civil action for *certiorari* is justified under the circumstances obtaining in the present case.

Section 8. Each Commission shall perform such other functions as may be provided by law.

B. THE CIVIL SERVICE COMMISSION

Section 1. (1) The civil service shall be administered by the Civil Service Commission composed of a Chairman and two Commissioners who shall be natural-born citizens of the Philippines and, at the time of their appointment, at least thirty-five years of age, with proven capacity for public administration, and must not have been candidates for any elective position in the elections immediately preceding their appointment.

(2) 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, the Chairman shall hold office for seven years, a Commissioner for five years, and another Commissioner 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.

In **MATIBAG v. BENIPAYO,** G.R. No. 149036, April 2, 2002, 429 Phil. 554,[20] the **prohibition on reappointment, contained in Section 1(2) of this Article IX-B, and common to the three Constitutional Commissions**, was explained by Justice Carpio:

[20] See discussion under Art. VII, Sec. 16.

The framers of the present Constitution prohibited reappointments for two reasons. The first is to prevent a second appointment for those who have been previously appointed and confirmed even if they served for less than seven years. The second is to insure that the members of the three Constitutional Commissions do not serve beyond the fixed term of seven years. As reported in the Journal of the Constitutional Commission, Commissioner Vicente B. Foz, who sponsored the proposed articles on the three Constitutional Commissions, outlined the four important features of the proposed articles, to wit:

> Mr. Foz stated that the Committee had introduced basic changes in the common provision affecting the three Constitutional Commissions, and which are: 1) fiscal autonomy which provides (that) appropriations shall be automatically and regularly released to the Commission in the same manner (as) provided for the Judiciary; 2) *fixed term of office without reappointment* on a staggered basis to ensure continuity of functions and to minimize the opportunity of the President to appoint all the members during his incumbency; 3) prohibition to decrease salaries of the members of the Commissions during their term of office; and 4) appointments of members would not require confirmation.[21]

There were two important amendments subsequently made by the Constitutional Commission to these four features. First, as discussed earlier, the framers of the Constitution decided to require confirmation by the Commission on Appointments of all appointments to the Constitutional Commissions. Second, the framers decided to *strengthen* further the prohibition on serving beyond the fixed seven-year term, in the light of a former chair of the Commission on Audit remaining in office for 12 years despite his fixed term of seven years. The following exchange in the deliberations of the Constitutional Commission is instructive:

> MR. SUAREZ: These are only clarificatory questions, Madam President. May I call the sponsor's attention, first of all, to Section 2 (2) on the Civil Service Commission wherein it is stated: "In no case shall any Member be appointed in a temporary or acting capacity." I detect in the Committee's proposed resolutions a constitutional hangover, if I may use the term, from the past administration. Am I correct in concluding

[21] I Journal, Constitutional Commission 244 (1986).

> that the reason the Committee introduced this particular provision is to avoid an incident similar to the case of the Honorable Francisco Tantuico who was appointed in an acting capacity as Chairman of the Commission on Audit for about 5 years from 1975 until 1980, and then in 1980, was appointed as Chairman with a tenure of another 7 years. So, if we follow that appointment to (its) logical conclusion, he occupied that position for about 12 years in violation of the Constitution?
> MR. FOZ: It is only one of the considerations. Another is really to make sure that any member who is appointed to any of the commissions does not serve beyond 7 years.[22]

Commissioner Christian Monsod further clarified the prohibition on reappointment in this manner:

> MR. MONSOD: If the (Commissioner) will read the whole Article, she will notice that there is no reappointment of any kind and, therefore as a whole there is no way that somebody can serve for more than seven years. The purpose of the last sentence is to make sure that this does not happen by including in the appointment both temporary and acting capacities.[23]

Plainly, the prohibition on reappointment is intended to insure that there will be no reappointment of any kind. On the other hand, the prohibition on temporary or acting appointments is intended to prevent any circumvention of the prohibition on reappointment that may result in an appointee's total term of office exceeding seven years. **The evils sought to be avoided by the twin prohibitions are very specific - reappointment of any kind and exceeding one's term in office beyond the maximum period of seven years.**

Not contented with these ironclad twin prohibitions, the framers of the Constitution tightened even further the screws on those who might wish to extend their terms of office. Thus, the word "designated" was inserted to plug any loophole that might be exploited by violators of the Constitution, as shown in the following discussion in the Constitutional Commission:

> MR. DE LOS REYES: On line 32, between the words "appointed" and "in", I propose to insert the words OR DESIGNATED so that the whole sentence will read: "In no

[22] Id. p. 546.
[23] Id. p. 586.

case shall any Member be appointed OR DESIGNATED in a temporary or acting capacity."
THE PRESIDING OFFICER (Mr. Trenas): What does the Committee say?
MR. FOZ: But it changes the meaning of this sentence. The sentence reads: "In no case shall any Member be appointed in a temporary or acting capacity."
MR. DE LOS REYES: Mr. Presiding Officer, the reason for this amendment is that some lawyers make a distinction between an appointment and a designation. The Gentleman will recall that in the case of Commissioner on Audit Tantuico, I think his term exceeded the constitutional limit but the Minister of Justice opined that it did not because he was only designated during the time that he acted as Commissioner on Audit. So, in order to erase that distinction between appointment and designation, we should specifically place the word so that there will be no more ambiguity. "In no case shall any Member be appointed OR DESIGNATED in a temporary or acting capacity."
MR. FOZ: The amendment is accepted, Mr. Presiding Officer.
MR. DE LOS REYES: Thank you.
THE PRESIDING OFFICER (Mr. Trenas): Is there any objection? (Silence) The Chair hears none; the amendment is approved.[24]

Section 2. (1) The civil service embraces all branches, subdivisions, instrumentalities, and agencies of the Government, including government-owned or controlled corporations with original charters.

(2) Appointments in the civil service shall be made only according to merit and fitness to be determined, as far as practicable, and, except to positions which are policy-determining, primarily confidential, or highly technical, by competitive examination.

(3) No officer or employee of the civil service shall be removed or suspended except for cause provided by law.

(4) No officer or employee in the civil service shall engage, directly or indirectly, in any electioneering or partisan political campaign.

[24] I Record, Constitutional Commission 586-587 (1986).

(5) The right to self-organization shall not be denied to government employees.

(6) Temporary employees of the Government shall be given such protection as may be provided by law.

Again in **MATIBAG v. BENIPAYO,** G.R. No. 149036, April 2, 2002, 429 Phil. 554,[25] Justice Carpio extended the **constitutional protection in Section 2(3) of Article IX-B** to *ad interim* appointees:

> 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." 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.[26] **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.**

In **QUINTO v. COMMISSION ON ELECTIONS**, G.R. No. 189698, February 22, 2010, the Court *en banc*, granted the COMELEC's motion for reconsideration of a decision that had earlier granted the petition for *certiorari* and prohibition filed by Eleazar P. Quinto. The earlier decision, dated December 1, 2009, declared as unconstitutional the second proviso in the third paragraph of Section 13 of Republic Act No. 9369, Section 66 of the Omnibus Election Code, and Section 4(a) of COMELEC Resolution No. 8678, mainly on the ground of violation of the equal protection clause. The assailed decision effectively paved the way for public appointive officials to continue discharging the powers, prerogatives and functions of their office notwithstanding their entry into the political arena. Justice Carpio, who had dissented from the December 1, 2009 decision, **concurred** with the majority[27] and discussed this **Section 2(4), Article IX-B**:

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[25] See discussion under Art. VII, Sec. 16.

[26] See concurring opinion, Bengzon, J., Erana v. Vergel de Dios, 85 Phil. 17 (1949).

[27] Majority opinion, Puno, C.J.

The filing of a Certificate of Candidacy for an elective position is, by the very nature of the act, an electioneering or partisan political activity.

Two provisions of the Constitution, taken together, **mandate that civil service employees cannot engage in any electioneering or partisan political activity except to vote (as provided in Section 2(4), Article IX-B** and Section 5(3), Article XVI on the prohibition on members of the military) …

During the deliberations of the Constitutional Commission on these provisions of the Constitution, it was clear that the exercise of the right to vote is the only non-partisan political activity a citizen can do. All other political activities are deemed partisan. Thus, Commissioner Christian Monsod declared that, "As a matter of fact, the only non-partisan political activity one can engage in as a citizen is voting."[28]

Indisputably, any political activity except to vote is a partisan political activity. Section 79(b) of the Omnibus Election Code implements this by declaring that any act designed to elect or promote the election of a candidate is an electioneering or partisan political activity, thus:

> The term "election campaign" or "partisan political activity" refers to an act designed to promote the election or defeat of a particular candidate or candidates to a public office …"

Filing a certificate of candidacy is obviously a partisan political activity.

First, the mere filing of a Certificate of Candidacy is a definitive announcement to the world that a person will actively solicit the votes of the electorate to win an elective public office. Such an announcement is already a promotion of the candidate's election to public office. Indeed, once a person becomes an official candidate, he abandons the role of a mere passive voter in an election, and assumes the role of a political partisan, a candidate promoting his own candidacy to public office.

Second, only a candidate for a political office files a Certificate of Candidacy. A person merely exercising his or her right to vote does not. A candidate for a political office is necessarily a

[28] I Records, Constitutional Commission 543.

partisan political candidate because he or she is contesting an elective office against other political candidates. The candidate and the electorate know that there are, more often than not, other candidates vying for the same elective office, making the contest politically partisan.

Third, a candidate filing his or her Certificate of Candidacy almost always states in the Certificate of Candidacy the name of the political party to which he or she belongs. The candidate will even attach to his or her Certificate of Candidacy the certification of his or her political party that he or she is the official candidate of the political party. Such certification by a political party is obviously designed to promote the election of the candidate.

Fourth, **the constitutional ban prohibiting civil servants from engaging in partisan political activities is intended, among others, to keep the civil service non-partisan.** This constitutional ban is violated when a civil servant files his or her Certificate of Candidacy as a candidate of a political party. From the moment the civil servant files his or her Certificate of Candidacy, he or she is immediately identified as a political partisan because everyone knows he or she will prepare, and work, for the victory of his or her political party in the elections.

Fifth, **the constitutional ban prohibiting civil servants from engaging in partisan political activities is also intended to prevent civil servants from using their office, and the resources of their office, to promote their candidacies or the candidacies of other persons.** We have seen the spectacle of civil servants who, after filing their certificates of candidacies, still cling to their public office while campaigning during office hours.

Sixth, **the constitutional ban prohibiting civil servants from engaging in partisan political activities is further intended to prevent conflict of interest.** We have seen Comelec officials who, after filing their certificates of candidacies, still hold on to their public office.

Finally, filing of a Certificate of Candidacy is a partisan political act that *ipso facto* operates to consider the candidate deemed resigned from public office pursuant to paragraph 3, Section 11 of R.A. No. 8436, as amended by R.A. No. 9369, as well as Section 66 of the Omnibus Election Code, as amended.

Section 3. The Civil Service Commission, as the central personnel agency of the Government, shall establish a career service and adopt measures to promote morale, efficiency, integrity, responsiveness, progressiveness, and courtesy in the civil service. It shall strengthen the merit and rewards system, integrate all human resources development programs for all levels and ranks, and institutionalize a management climate conducive to public accountability. It shall submit to the President and the Congress an annual report on its personnel programs.

Section 4. All public officers and employees shall take an oath or affirmation to uphold and defend this Constitution.

Section 5. The Congress shall provide for the standardization of compensation of government officials and employees, including those in government-owned or controlled corporations with original charters, taking into account the nature of the responsibilities pertaining to, and the qualifications required for, their positions.

Section 6. No candidate who has lost in any election, shall within one year after such election, be appointed to any office in the Government or any government-owned or controlled corporations or in any of their subsidiaries.

Section 7. No elective official shall be eligible for appointment or designation in any capacity to any public office or position during his tenure.

Unless otherwise allowed by law or by the primary functions of his position, no appointive official shall 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.

Section 8. No elective or appointive public officer or employee shall receive additional, double, or indirect compensation, unless specifically authorized by law, nor accept without the consent of the Congress, any present, emolument, office, or title of any kind from any foreign government.

Pensions or gratuities shall not be considered as additional, double, or indirect compensation.

C. THE COMMISSION ON ELECTIONS

Section 1. (1) There shall be a Commission on Elections composed of a Chairman and six Commissioners who shall be natural-born citizens of the Philippines and, at the time of their appointment, at least thirty-five years of age, holders of a college degree, and must not have been candidates for any elective positions in the immediately preceding elections. However, a majority thereof, including the Chairman, shall be members of the Philippine Bar who have been engaged in the practice of law for at least ten years.

(2) 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.

In **MATIBAG v. BENIPAYO,** G.R. No. 149036, April 2, 2002, 429 Phil. 554,[29] Ma. J. Angelina G. Matibag argued that an *ad interim* appointment to the COMELEC was a temporary appointment that was prohibited by **Section 1(2) of this Article IX-C**, since an *ad interim* appointment can be withdrawn or revoked at the pleasure of the President, and can be disapproved or simply by-passed by the Commission on Appointments. For this reason, Matibag claimed that an *ad interim* appointment was temporary in character and consequently prohibited by the last sentence of this Section. The rationale behind Matibag's theory was that only an appointee who is confirmed by the Commission on Appointments can guarantee the independence of the COMELEC.

Justice Carpio, speaking on behalf of the Court *en banc*, clarified in **Matibag** that an *ad interim* appointment was 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 was subject to confirmation by the Commission on Appointments did not alter its permanent character. The

[29] See discussion under Art. VII, Sec. 16.

Constitution itself made 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 pursuant to the second paragraph of Section 16, Article VII.

But Justice Carpio further explained in **Matibag** that:

> While an *ad interim* appointment is permanent and irrevocable except as provided by law, an appointment or designation in a temporary or acting capacity can be withdrawn or revoked at the pleasure of the appointing power.[30] A temporary or acting appointee does not enjoy any security of tenure, no matter how briefly. This is the kind of appointment that the Constitution prohibits the President from making to the three independent Constitutional Commissions, including the COMELEC. Thus, in *Brillantes v. Yorac*,[31] this Court struck down as unconstitutional the designation by then President Corazon Aquino of Associate Commissioner Haydee Yorac as Acting Chairperson of the COMELEC. This Court ruled that:
>
> > A designation as Acting Chairman is by its very terms essentially temporary and therefore revocable at will. No cause need be established to justify its revocation. Assuming its validity, the designation of the respondent as Acting Chairman of the Commission on Elections may be withdrawn by the President of the Philippines at any time and for whatever reason she sees fit. It is doubtful if the respondent, having accepted such designation, will not be estopped from challenging its withdrawal.
> > ...
> > The Constitution provides for many safeguards to the independence of the Commission on Elections, foremost among which is the security of tenure of its members. That guarantee is not available to the respondent as Acting Chairman of the Commission on Elections by designation of the President of the Philippines.
>
> Earlier, in *Nacionalista Party v. Bautista*,[32] a case decided under the 1935 Constitution, which did not have a provision prohibiting temporary or acting appointments to the COMELEC, this Court nevertheless declared unconstitutional the designation of the

[30] Binamira v. Garrucho, 188 SCRA 154 (1990); Santiago v. COA, 199 SCRA 125 (1991); Sevilla v. Court of Appeals, 209 SCRA 637 (1992).
[31] 192 SCRA 358 (1990).
[32] 85 Phil. 101 (1949).

Solicitor General as acting member of the COMELEC. This Court ruled that the designation of an acting Commissioner would undermine the independence of the COMELEC and hence violate the Constitution. We declared then:

> It would be more in keeping with the intent, purpose and aim of the framers of the Constitution to appoint a permanent Commissioner than to designate one to act temporarily.

In the instant case, the President did in fact appoint permanent Commissioners to fill the vacancies in the COMELEC, subject only to confirmation by the Commission on Appointments. Benipayo, Borra and Tuason were extended permanent appointments during the recess of Congress. They were not appointed or designated in a temporary or acting capacity, unlike Commissioner Haydee Yorac in *Brillantes v. Yorac* and Solicitor General Felix Bautista in *Nacionalista Party v. Bautista*. The *ad interim* appointments of Benipayo, Borra and Tuason are expressly allowed by the Constitution which authorizes the President, during the recess of Congress, to make appointments that take effect immediately…

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.

This situation, however, does not compromise the independence of the COMELEC as a constitutional body. The vacancies in the COMELEC are precisely staggered to insure that the majority of its members hold confirmed appointments, and not one President will appoint all the COMELEC members. In the instant case, the Commission on Appointments had long confirmed four of the incumbent COMELEC members, comprising a majority, who could now be removed from office only by impeachment. The special constitutional safeguards that insure the independence of the COMELEC remain in place.[33] The COMELEC enjoys fiscal autonomy, appoints its own officials and employees, and promulgates its own rules on pleadings and practice. Moreover, the salaries of COMELEC members cannot be decreased during their tenure.

In fine, we rule that the ad interim appointments extended by the President to Benipayo, Borra and Tuason, as COMELEC Chairman and Commissioners, respectively, do not constitute temporary or acting appointments prohibited by Section 1 (2), Article IX-C of the Constitution.

In **Matibag**, Justice Carpio also discussed the **prohibition on reappointment under Section 1(2) of this Article IX-C** in detail:

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 the 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…

Petitioner theorizes that once an *ad interim* appointee is by-passed 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*

[33] Const., Art. IX-A, Secs. 3, 4, 5 and 6.

interim appointments are deemed permanent in character…

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.

… **There are four situations where this provision (citing Section 1 (2), Article IX-C) will apply**. The first situation is where an *ad interim* appointee to the COMELEC, after confirmation by the Commission on Appointments, serves his full seven-year term. Such person cannot be reappointed to the COMELEC, whether as a member or as a chairman, because he will then be actually serving more than seven years. The second situation is where the appointee, after confirmation, serves a part of his term and then resigns before his seven-year term of office ends. Such person cannot be reappointed, whether as a member or as a chair, to a vacancy arising from retirement because a reappointment will result in the appointee also serving more than seven years. The third situation is where the appointee is confirmed to serve the unexpired term of someone who died or resigned, and the appointee completes the unexpired term. Such person cannot be reappointed, whether as a member or chair, to a vacancy arising from retirement because a reappointment will result in the appointee also serving more than seven years. The fourth situation is where the appointee has previously served a term of less than seven years, and a vacancy arises from death or resignation. Even if it will not result in his serving more than seven years, a reappointment of such person to serve an unexpired term is also prohibited because his situation will be similar to those appointed under the second sentence of Section 1 (2), Article IX-C of the Constitution. This provision refers to the first appointees under the Constitution whose terms of office are less than seven years, but are barred from ever being reappointed under any situation. Not one of these four situations applies to the case of Benipayo, Borra or Tuason.

The framers of the Constitution made it quite clear that any person who has served any term of office as COMELEC member - whether for a full term of seven years, a truncated term of five or three years, or even for an unexpired term of any length of time - can no longer be reappointed to the COMELEC. Commissioner Foz succinctly explained this intent in this manner:

> MR. FOZ. But there is the argument made in the concurring opinion of Justice Angelo Bautista in the case of *Visarra v. Miraflor*, to the effect that the prohibition on reappointment applies only when the term or tenure is for seven years. But in cases where the appointee serves only for less than seven years, he would be entitled to reappointment. Unless we put the qualifying words "without reappointment" in the case of those appointed, then it is possible that an interpretation could be made later on their case, they can still be reappointed to serve for a total of seven years.
> Precisely, we are foreclosing that possibility by making it clear that even in the case of those first appointed under the Constitution, no reappointment can be made.[34]

In *Visarra v. Miraflor*,[35] Justice Angelo Bautista, in his concurring opinion, quoted *Nacionalista v. De Vera*[36] that a "[r] eappointment is not prohibited when a Commissioner has held office only for, say, three or six years, provided his term will not exceed nine years in all." This was the interpretation despite the express provision in the 1935 Constitution that a COMELEC member "shall hold office for a term of nine years and may not be reappointed."

To foreclose this interpretation, the phrase "without reappointment" appears twice in Section 1 (2), Article IX-C of the present Constitution. The first phrase prohibits reappointment of any person previously appointed for a term of seven years. The second phrase prohibits reappointment of any person previously appointed for a term of five or three years pursuant to the first set of appointees under the Constitution. In either case, it does not matter if the person previously appointed completes his term of office for the intention is to prohibit any reappointment of any kind.

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[34] I Record, Constitutional Commission 591 (1986).
[35] 8 SCRA 1 (1963).
[36] 85 Phil. 126 (1949).

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.

The phrase "without reappointment" applies only to one who has been appointed by the President and confirmed by the Commission on Appointments, whether or not such person completes his term of office. There must be a confirmation by the Commission on Appointments of the previous appointment before the prohibition on reappointment can apply. To hold otherwise will lead to absurdities and negate the President's power to make *ad interim* appointments.

In the great majority of cases, the Commission on Appointments usually fails to act, for lack of time, on the *ad interim* appointments first issued to appointees. If such *ad interim* appointments can no longer be renewed, the President will certainly hesitate to make *ad interim* appointments because most of her appointees will effectively be disapproved by mere inaction of the Commission on Appointments. This will nullify the constitutional power of the President to make *ad interim* appointments, a power intended to avoid disruptions in vital government services. This Court cannot subscribe to a proposition that will wreak havoc on vital government services…

The *ad interim* appointments and subsequent renewals of appointments of Benipayo, Borra and Tuason do not violate the prohibition on reappointments because there were no previous appointments that were confirmed by the Commission on Appointments. A reappointment presupposes a previous confirmed appointment. The same *ad interim* appointments and renewals of appointments will also not breach the seven-year term limit because all the appointments and renewals of appointments of Benipayo, Borra and Tuason are for a fixed term expiring on February 2, 2008. Any delay in their confirmation will not extend the expiry date of their terms of office. Consequently, there is no danger whatsoever that the renewal of the *ad interim* appointments of these three respondents will

result in any of the evils intended to be exorcised by the twin prohibitions in the Constitution. The continuing renewal of the *ad interim* appointment of these three respondents, for so long as their terms of office expire on February 2, 2008, does not violate the prohibition on reappointments in Section 1 (2), Article IX-C of the Constitution…

Section 2. The Commission on Elections shall exercise the following powers and functions:

(1) Enforce and administer all laws and regulations relative to the conduct of an election, plebiscite, initiative, referendum, and recall.

(2) Exercise exclusive original jurisdiction over all contests relating to the elections, returns, and qualifications of all elective regional, provincial, and city officials, and appellate jurisdiction over all contests involving elective municipal officials decided by trial courts of general jurisdiction, or involving elective barangay officials decided by trial courts of limited jurisdiction.

Decisions, final orders, or rulings of the Commission on election contests involving elective municipal and barangay offices shall be final, executory, and not appealable.

(3) Decide, except those involving the right to vote, all questions affecting elections, including determination of the number and location of polling places, appointment of election officials and inspectors, and registration of voters.

(4) Deputize, with the concurrence of the President, law enforcement agencies and instrumentalities of the Government, including the Armed Forces of the Philippines, for the exclusive purpose of ensuring free, orderly, honest, peaceful, and credible elections.

(5) Register, after sufficient publication, political parties, organizations, or coalitions which, in addition to other requirements, must present their platform or program of government; and accredit citizens' arms of the Commission on Elections. Religious denominations and sects shall not be registered. Those which seek to achieve their goals through violence or unlawful means, or refuse to uphold and adhere

to this Constitution, or which are supported by any foreign government shall likewise be refused registration.

Financial contributions from foreign governments and their agencies to political parties, organizations, coalitions, or candidates related to elections, constitute interference in national affairs, and, when accepted, shall be an additional ground for the cancellation of their registration with the Commission, in addition to other penalties that may be prescribed by law.

(6) File, upon a verified complaint, or on its own initiative, petitions in court for inclusion or exclusion of voters; investigate and, where appropriate, prosecute cases of violations of election laws, including acts or omissions constituting election frauds, offenses, and malpractices.

(7) Recommend to the Congress effective measures to minimize election spending, including limitation of places where propaganda materials shall be posted, and to prevent and penalize all forms of election frauds, offenses, malpractices, and nuisance candidacies.

(8) Recommend to the President the removal of any officer or employee it has deputized, or the imposition of any other disciplinary action, for violation or disregard of, or disobedience to, its directive, order, or decision.

(9) Submit to the President and the Congress, a comprehensive report on the conduct of each election, plebiscite, initiative, referendum, or recall.

The nature of the functions of the COMELEC was discussed in **SAMBARANI v. COMMISSION ON ELECTIONS,** G.R. No. 160427, September 15, 2004, 481 Phil. 661. Challenged in this petition for *certiorari*, with prayer for temporary restraining order and preliminary injunction, was the resolution of the COMELEC *en banc* that declared a failure of election, but failed to call another special election. Speaking for the Court *en banc*, Justice Carpio, in disposing of the first issue, explained:

The COMELEC's Ruling

The COMELEC agreed with petitioners that the special elections

held on 13 August 2002 in the five barangays failed. The COMELEC, however, ruled that to hold another special election in these barangays as prayed for by petitioners is untenable. The COMELEC explained that it is no longer in a position to call for another special election since Section 6 of the Omnibus Election Code provides that "special elections shall be held on a date reasonably close to the date of the election not held, but not later than thirty days after cessation of the cause of such postponement." The COMELEC noted that more than thirty days had elapsed since the failed election.

The COMELEC also pointed out that to hold another special election in these barangays will not only be tedious and cumbersome, but a waste of its precious resources. The COMELEC left to the Department of Interior and Local Government (DILG) the process of appointing the Barangay Captains and Barangay Kagawads as well as the Sangguniang Kabataan (SK) Chairmen and SK Kagawads in these barangays "in accordance with the Local Government Code of 1991 and other related laws on the matter."

The Issues

Petitioners contend that the COMELEC acted with grave abuse of discretion amounting to lack of jurisdiction in -

1. Denying the prayer to call for another special election in barangays Occidental Linuk, Pindolonan Moriatao Sarip, Talub, New Lumbacaingud (subject barangays) …

The Court's Ruling

The petition is meritorious.

Whether To Call Another Special Election

Petitioners fault the COMELEC for not holding another special election after the failed 13 August 2002 special election. Petitioners insist that the special barangay and SK elections in the subject barangays failed because EO Maulay did not use the voter's list used during the 2001 ARMM elections. Neither did Maulay segregate and exclude those voters whose Voter's Registration Records (VRRs) were not among those 500 VRRs bearing serial numbers 00097501 to 0009800 allocated and released to Tamparan. Finally, Maulay

did not delete from the certified list of candidates the name of disqualified candidate Candidato Manding. Petitioners contend that COMELEC's refusal to call another special election conflicts with established jurisprudence, specifically the ruling in *Basher v. Commission on Elections*.[37]

The Solicitor General supports the COMELEC's stance that a special election can be held only within thirty days after the cause of postponement or failure of election has ceased. The Solicitor General also maintains that the DILG has the power to appoint and fill vacancies in the concerned elective barangay and SK offices.

Section 2(1) of Article IX-C of the Constitution gives the COMELEC the broad power to "enforce and administer all laws and regulations relative to the conduct of an election, plebiscite, initiative, referendum, and recall." Indisputably, the text and intent of this constitutional provision is to give COMELEC all the necessary and incidental powers for it to achieve its primordial objective of holding free, orderly, honest, peaceful and credible elections.[38]

The functions of the COMELEC under the Constitution are essentially executive and administrative in nature. It is elementary in administrative law that "courts will not interfere in matters which are addressed to the sound discretion of government agencies entrusted with the regulation of activities coming under the special technical knowledge and training of such agencies."[39] **The authority given to COMELEC to declare a failure of elections and to call for special elections falls under its administrative function.**[40]

The marked trend in our laws has been to grant the COMELEC ample latitude so it can more effectively perform its duty in safeguarding the sanctity of our elections. But what if, as in this case, the COMELEC refuses to hold elections due to operational, logistical and financial problems? Did the COMELEC gravely abuse its discretion in refusing to conduct a second special Barangay and SK elections in the subject barangays?

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[37] 386 Phil. 954 (2000).

[38] Pangandaman v. COMELEC, 377 Phil. 297 (1999).

[39] Province of Zamboanga del Norte v. Court of Appeals, G.R. No. 109583, 11 October 2000, 342 SCRA 549.

[40] Ampatuan v. COMELEC, 426 Phil. 201 (2002).

Neither the candidates nor the voters of the affected barangays caused the failure of the special elections. The COMELEC's own acting election officer, EO Maulay, readily admitted that there were no special elections in these barangays. The COMELEC also found that the Provincial Election Supervisor of Lanao del Sur and the Regional Election Director of Region XII did not contest the fact that there were no special elections in these barangays.

An election is the embodiment of the popular will, the expression of the sovereign power of the people.[41] It involves the choice or selection of candidates to public office by popular vote.[42] 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. The fact that the elections involved in this case pertain to the lowest level of our political organization is not a justification to disenfranchise voters.

COMELEC anchored its refusal to call another special election on the last portion of Section 6 of the Omnibus Election Code (Section 6) which reads:

> Sec. 6. Failure of election. - If, on account of force majeure, violence, terrorism, fraud, or other analogous cases the election in any polling place has 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 any 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.

The Court construed Section 6 in *Pangandaman v. COMELEC*,[43]

[41] Taule v. Santos, G.R. No. 90336, 12 August 1991, 200 SCRA 512.
[42] Ibid.
[43] 377 Phil. 297 (1999).

as follows -

> In fixing the date for special elections the COMELEC should see to it that: 1.] it should not be later than thirty (30) days after the cessation of the cause of the postponement or suspension of the election or the failure to elect; and, 2.] it should be reasonably close to the date of the election not held, suspended or which resulted in the failure to elect. The first involves a question of fact. The second must be determined in the light of the peculiar circumstances of a case. Thus, the holding of elections within the next few months from the cessation of the cause of the postponement, suspension or failure to elect may still be considered "reasonably close to the date of the election not held."

The prohibition on conducting special elections after thirty days from the cessation of the cause of the failure of elections is not absolute. It is directory, not mandatory, and the COMELEC possesses residual power to conduct special elections even beyond the deadline prescribed by law. The deadline in Section 6 cannot defeat the right of suffrage of the people as guaranteed by the Constitution. The COMELEC erroneously perceived that the deadline in Section 6 is absolute. **The COMELEC has broad power or authority to fix other dates for special elections to enable the people to exercise their right of suffrage.** The COMELEC may fix other dates for the conduct of special elections when the same cannot be reasonably held within the period prescribed by law.

More in point is Section 45 of the Omnibus Election Code (Section 45) which specifically deals with the election of barangay officials. Section 45 provides:

> Sec. 45. Postponement or failure of election. - When for any serious cause such as violence, terrorism, loss or destruction of election paraphernalia or records, force majeure, and other analogous causes of such nature that the holding of a free, orderly and honest election should become impossible in any barangay, the Commission, upon a verified petition of an interested party and after due notice and hearing at which the interested parties are given equal opportunity to be heard, shall postpone the election therein for such time as it may deem necessary.
> If, on account of force majeure, violence, terrorism, fraud or other analogous causes, the election in any barangay has not been held on the date herein fixed or has been suspended

> before the hour fixed by law for the closing of the voting therein and such failure or suspension of election would affect the result of the election, the Commission, on the basis of a verified petition of an interested party, and after due notice and hearing, at which the interested parties are given equal opportunity to be heard shall call for the holding or continuation of the election within thirty days after it shall have verified and found that the cause or causes for which the election has been postponed or suspended have ceased to exist or upon petition of at least thirty percent of the registered voters in the barangay concerned.
> When the conditions in these areas warrant, upon verification by the Commission, or upon petition of at least thirty percent of the registered voters in the barangay concerned, it shall order the holding of the barangay election which was postponed or suspended.

Unlike Section 6, Section 45 does not state that special elections should be held on a date reasonably close to the date of the election not held. Instead, Section 45 states that special elections should be held within thirty days from the cessation of the causes for postponement. Logically, special elections could be held anytime, provided the date of the special elections is within thirty days from the time the cause of postponement has ceased.

Thus, in *Basher*[44] the COMELEC declared the 27 May 1997 barangay elections a failure and set special elections on 12 June 1997 which also failed. The COMELEC set another special election on 30 August 1997 which this Court declared irregular and void. On 12 April 2000, this Court ordered the COMELEC "to conduct a special election for punong barangay of Maidan, Tugaya, Lanao del Sur as soon as possible." This despite the provision in Section 2[45] of Republic Act No. 6679 (RA 6679)[46]

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[44] 386 Phil. 954 (2000).

[45] RA 6679, Sec. 2 provides: When for any serious cause such as rebellion, insurrection, violence, terrorism, loss or destruction of election paraphernalia, and any analogous causes of such nature that the holding of a free, orderly and honest election should become impossible in any barangay, the Commission on Elections *motu proprio* or upon sworn petition of ten (10) registered voters of a barangay, after summary proceedings of the existence of such grounds, shall suspend or postpone the election therein to a date reasonably close to the date of the election that is not held or is suspended or postponed, or which resulted in a failure to elect, but not later than thirty (30) days after the cessation of the cause for such suspension or postponement of the election or failure to elect, and in all cases not later than ninety (90) days from the date of all the original election.

[46] An Act To Amend Republic Act No. 6653 To Postpone The Barangay Elections To March 28, 1989, Prescribing Additional Rules Governing The Conduct Of Barangay Elections And For Other Purposes.

> stating that the special barangay election should be held "in all cases not later than ninety (90) days from the date of all the original election."
>
> Had the COMELEC resolved to hold special elections in its Resolution dated 8 October 2003, it would not be as pressed for time as it is now. The operational, logistical and financial problems which COMELEC claims it will encounter with the holding of a second special election can be solved with proper planning, coordination and cooperation among its personnel and other deputized agencies of the government. A special election will require extraordinary efforts, but it is not impossible. In applying election laws, it would be better to err in favor of popular sovereignty than to be right in complex but little understood legalisms.[47] In any event, this Court had already held that special elections under Section 6 would entail minimal costs because it covers only the precincts in the affected barangays.[48]
>
> In this case, the cause of postponement after the second failure of elections was COMELEC's refusal to hold a special election because of (1) its erroneous interpretation of the law, and (2) its perceived logistical, operational and financial problems. We rule that COMELEC's reasons for refusing to hold another special election are void…

Then in **MONTESCLAROS v. COMMISSION ON ELECTIONS,** G.R. No. 152295, July 9, 2002, 433 Phil. 620,[49] Justice Carpio, on behalf of the Court *en banc*, dismissed, for "utter lack of merit," the petition that sought to prevent the postponement of the Sangguniang Kabataan elections, and had occasion to discuss **Sections 2(1) and 2(7) of this Article IX-C:**

> The petition must also fail because no grave abuse of discretion attended the postponement of the SK elections. RA No. 9164 is now the law that prescribes the qualifications of candidates and voters for the SK elections. This law also fixes the date of the SK elections. Petitioners are not even assailing the constitutionality of RA No. 9164. RA No. 9164 enjoys the presumption of constitutionality and will apply to the July 15, 2002 SK elections.
>
> Petitioners have not shown that the COMELEC acted illegally

[47] Malabaguio v. COMELEC, G.R. No. 142507, 1 December 2000, 346 SCRA 699; Maruhom v. COMELEC, 387 Phil. 491 (2000).

[48] Lucero v. COMELEC, G.R. Nos. 113107 and 113509, 20 July 1994, 234 SCRA 280.

[49] See discussion under Art. VIII.

or with grave abuse of discretion in recommending to Congress the postponement of the SK elections. The very evidence relied upon by petitioners contradict their allegation of illegality. The evidence consist of the following: (1) COMELEC *en banc* Resolution No. 4763 dated February 5, 2002 that recommended the postponement of the SK elections to 2003; (2) the letter of then COMELEC Chairman Benipayo addressed to the Speaker of the House of Representatives and the President of the Senate; and (3) the Conference Committee Report consolidating Senate Bill No. 2050 and House Bill No. 4456.

The COMELEC exercised its power and duty to "enforce and administer all laws and regulations relative to the conduct of an election, plebiscite, initiative, referendum and recall" and to "recommend to Congress effective measures to minimize election spending." The COMELEC's acts enjoy the presumption of regularity in the performance of official duties.[50] These acts cannot constitute proof, as claimed by petitioners, that there "exists a connivance and conspiracy (among) respondents in contravention of the present law." As the Court held in *Pangkat Laguna v. COMELEC,*[51] the "COMELEC, as the government agency tasked with the enforcement and administration of elections laws, is entitled to the presumption of regularity of official acts with respect to the elections."

The 1987 Constitution imposes upon the COMELEC the duty of enforcing and administering all laws and regulations relative to the conduct of elections. Petitioners failed to prove that the COMELEC committed grave abuse of discretion in recommending to Congress the postponement of the May 6, 2002 SK elections. The evidence cited by petitioners even establish that the COMELEC has demonstrated an earnest effort to address the practical problems in holding the SK elections on May 6, 2002. The presumption remains that the decision of the COMELEC to recommend to Congress the postponement of the elections was made in good faith in the regular course of its official duties.

Grave abuse of discretion is such capricious and whimsical exercise of judgment that is patent and gross as to amount to an evasion of a positive duty or a virtual refusal to perform a

[50] Salcedo v. COMELEC, 312 SCRA 447 (1999).
[51] G.R. No. 148075, February 4, 2002.

> duty enjoined by law.[52] Public respondents having acted strictly pursuant to their constitutional powers and duties, we find no grave abuse of discretion in their assailed acts.
>
> Petitioners contend that the postponement of the SK elections would allow the incumbent SK officers to perpetuate themselves in power, depriving other youths of the opportunity to serve in elective SK positions. This argument deserves scant consideration. While RA No. 9164 contains a hold-over provision, incumbent SK officials can remain in office only until their successors have been elected or qualified. On July 15, 2002, when the SK elections are held, the hold-over period expires and all incumbent SK officials automatically cease to hold their SK offices and their ex-officio public offices.

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,[53] or the law on the automated election system, on several grounds,[54] one of the assailed provisions was Section 43:

> Sec. 43. Section 265 of Batas Pambansa Blg. 881 is hereby amended to read as follows:
> Sec. 265. Prosecution. - The Commission shall, through its duly authorized legal officers, have the power, concurrent with the other prosecuting arms of the government, to conduct preliminary investigation of all election offenses punishable under this Code, and to prosecute the same.

The issue raised in **BANAT Party-list** with respect to Section 43 was whether it violated **Section 2(6) of this Article IX-C**. In speaking for the Court *en banc*, Justice Carpio explained:

> **Section 43 does not violate Section 2(6), Article IX-C of the Constitution**

[52] Integrated Bar of the Philippines v. Zamora, 338 SCRA 81 (2000).

[53] 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).

[54] See discussions under Art. III, Sec. 10, Art. VI, Secs. 17 and 26, and Art. VII, Sec. 4.

Both petitioner and the COMELEC argue that the Constitution vests in the COMELEC the "exclusive power" to investigate and prosecute cases of violations of election laws. Petitioner and the COMELEC allege that Section 43 is unconstitutional because it gives the other prosecuting arms of the government concurrent power with the COMELEC to investigate and prosecute election offenses. We do not agree with petitioner and the COMELEC that the Constitution gave the COMELEC the "exclusive power" to investigate and prosecute cases of violations of election laws.

Section 2(6), Article IX-C of the Constitution vests in the COMELEC the power to "investigate and, where appropriate, prosecute cases of violations of election laws, including acts or omissions constituting election frauds, offenses, and malpractices." This was an important innovation introduced by the Constitution because this provision was not in the 1935[55] or 1973[56] Constitutions.[57] The phrase "[w]here appropriate" leaves to the legislature the power to determine the kind of election offenses that the COMELEC shall prosecute exclusively or

[55] Const. (1935), Art. X, Sec. 2 provides: The Commission on Elections 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. It shall decide, save those involving the right to vote, all administrative questions affecting elections, including the determination of the number and location of polling places, and the appointment of election inspectors and of other election officials. All law-enforcement agencies and instrumentalities of the Government, when so required by the Commission, shall act as its deputies for the purpose of insuring free, orderly, and honest election. The decisions, orders, and rulings of the Commission shall be subject to review by the Supreme Court.
No pardon, parole, or suspension of sentence for the violation of any election law may be granted without the favorable recommendation of the Commission.

[56] Const. (1973), Art. XII-C, Sec. 2 provides: The Commission on Elections shall have the following powers and functions:
(1) Enforce and administer all laws relative to the conduct of elections.
(2) Be the sole judge of all contests relating to the elections, returns, and qualifications of all Members of the Batasang Pambansa and elective provincial and city officials.
(3) Decide, save those involving the right to vote, administrative questions affecting elections, including the determination of the number and location of polling places, the appointment of election officials and inspectors, and the registration of voters.
(4) Deputize, with the consent or at the instance of the President, law enforcement agencies and instrumentalities of the Government, including the armed forces of the Philippines, for the purpose of ensuring free, orderly, and honest elections.
(5) Register and accredit political parties subject to the provisions of Sec. eight hereof.
(6) Recommend to the Batasang Pambansa effective measures to minimize election expenses and prohibit all forms of election frauds and malpractices, political opportunism, guest or nuisance candidacy, or other similar acts.
(7) Submit to the President, the Prime Minister, and the Batasang Pambansa a report on the conduct and manner of each election.
(8) Perform such other functions as may be provided by law.

[57] Record, Constitutional Commission No. 106 (12 October 1986).

concurrently with other prosecuting arms of the government.

The grant of the "exclusive power" to the COMELEC can be found in Section 265 of BP 881, which provides:

> Sec. 265. Prosecution. - The Commission shall, through its duly authorized legal officers, have the exclusive power to conduct preliminary investigation of all election offenses punishable under this Code, and to prosecute the same. The Commission may avail of the assistance of other prosecuting arms of the government: Provided, however, That in the event that the Commission fails to act on any complaint within four months from his filing, the complainant may file the complaint with the office of the fiscal or with the Ministry of Justice for proper investigation and prosecution, if warranted.

This was also an innovation introduced by BP 881. The history of election laws shows that prior to BP 881, no such "exclusive power" was ever bestowed on the COMELEC.[58]

We also note that while Section 265 of BP 881 vests in the COMELEC the "exclusive power" to conduct preliminary investigations and prosecute election offenses, it likewise authorizes the COMELEC to avail itself of the assistance of other prosecuting arms of the government. In the 1993 COMELEC Rules of Procedure, the authority of the COMELEC was subsequently qualified and explained.[59] The 1993 COMELEC Rules of Procedure provides:

> Rule 34 - Prosecution of Election Offenses
> Sec. 1. Authority of the Commission to Prosecute Election Offenses. - The Commission shall have the exclusive power to conduct preliminary investigation of all election offenses punishable under the election laws and to prosecute the same, except as may otherwise be provided by law.

It is clear that the grant of the "exclusive power" to investigate and prosecute election offenses to the COMELEC was not by virtue of the Constitution but by BP 881, a legislative enactment. If the intention of the framers of the Constitution were to give the COMELEC the "exclusive power" to investigate and prosecute

[58] RA No. 6388, also known as The Election Code of 1971… PD No. 1296, also known as The 1978 Election Code…

[59] Margarejo v. Escoses, 417 Phil. 506 (2001).

election offenses, the framers would have expressly so stated in the Constitution. They did not.

In *People v. Basilla*,[60] we acknowledged that without the assistance of provincial and city fiscals and their assistants and staff members, and of the state prosecutors of the Department of Justice, the prompt and fair investigation and prosecution of election offenses committed before or in the course of nationwide elections would simply not be possible. In *COMELEC v. Español,*[61] we also stated that enfeebled by lack of funds and the magnitude of its workload, the COMELEC did not have a sufficient number of legal officers to conduct such investigation and to prosecute such cases. The prompt investigation, prosecution, and disposition of election offenses constitute an indispensable part of the task of securing free, orderly, honest, peaceful, and credible elections.[62] Thus, given the plenary power of the legislature to amend or repeal laws, if Congress passes a law amending Section 265 of BP 881, such law does not violate the Constitution.

Section 3. The Commission on Elections may sit *en banc* or in two divisions, and shall promulgate its rules of procedure in order to expedite disposition of election cases, including pre-proclamation controversies. All such election cases shall be heard and decided in division, provided that motions for reconsideration of decisions shall be decided by the Commission *en banc*.

Justice Carpio cited this constitutional provision in **MATIBAG v. BENIPAYO,** G.R. No. 149036, April 2, 2002, 429 Phil. 554,[63] and explained its import:

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", the remaining one division would have been swamped with election cases. Moreover, since under the Constitution**

[60] G.R. Nos. 83938-40, 6 November 1989, 179 SCRA 87.
[61] 463 Phil. 240 (2003).
[62] People v. Basilla, G.R. Nos. 83938-40, 6 November 1989, 179 SCRA 87.
[63] See discussion under Art. VII, Sec. 16.

> **motions for reconsideration "shall 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.

In **BAYTAN v. COMMISSION ON ELECTIONS**, G.R. No. 153945, February 4, 2003, 444 Phil. 812, Justice Carpio discussed **Sections 2 and 3 of this Article IX-C** on behalf of the Court *en banc*. The case was a petition for *certiorari* with prayer for temporary restraining order and preliminary injunction against the Resolution of the COMELEC *en banc*, which ordered the Law Department to file criminal cases for "double registration" against petitioners:

> **The Issues**
>
> … In sum, petitioners insist they are innocent of any wrongdoing in their act of registering twice on different days in two different precincts. Petitioners argue that they did not intend to perpetrate the act prohibited, and therefore they should be exculpated. They claim honest mistake and good faith in registering twice…
>
> Petitioners theorize that their August 21, 1997 letter to the election registrar of Cavite City informing him of the lapse and asking how to rectify the same constitutes substantial compliance with the Omnibus Election Code's requirement of cancellation of prior registration. They further implore a liberal construction of the laws on election offenses since almost five years had lapsed from the date of the commission of the offense on June 15, 1997. They claim the case is about to prescribe under the Election Code.
>
> Lastly, petitioners fault the COMELEC *en banc* for assuming original jurisdiction over the case in contravention of Section 3, Article IX-C of the Constitution. Petitioners argue that this constitutional provision requires that election cases must first be heard and decided by a Division before assumption of jurisdiction by the COMELEC *en banc*.

The Court ruled in **Baytan** that the petition was "bereft of merit," but it was the ruling on the third issue - whether the COMELEC *en banc's* assumption of original jurisdiction over the case violated **Section 3 of this Article IX-C** - that was relevant:

> Petitioners rely on Section 3, Article IX-C of the 1987 Constitution…
>
> Petitioners assert that this constitutional provision serves as basis to nullify the proceedings conducted and orders issued by the COMELEC *en banc* in E.O. Case No. 97-503. Petitioners cite *Sarmiento v. COMELEC*[64] and *Zarate v. COMELEC*[65] to support their stand that the COMELEC *en banc* acted without jurisdiction or with grave abuse of discretion when it assumed original jurisdiction over the case without first referring the same to any of its divisions. In *Sarmiento* and *Zarate*, the Court similarly held that "election cases must first be heard and decided by a Division of the Commission," and that the "Commission, sitting *en banc*, does not have the authority to hear and decide the same at the first instance."
>
> In its Comment for the COMELEC, the Solicitor General points out that the rulings in *Sarmiento* and *Zarate* were clarified in *Canicosa v. COMELEC*[66] to mean that -
>
> > [I]t is only in the exercise of its adjudicatory or quasi-judicial powers that the COMELEC is mandated to hear and decide cases first by division and then, upon motion for reconsideration, by the COMELEC *en banc*. This is when it is jurisdictional.
>
> The Solicitor General contends that the conduct of a preliminary investigation before the filing of an information in court does not in any way adjudicate with finality the rights and liabilities of the parties investigated. A preliminary investigation does not make any pronouncement as to the guilt or innocence of the party involved. Hence, a preliminary investigation cannot be considered a judicial or quasi-judicial proceeding required to be heard by the Division in the first instance.
>
> On the other hand, petitioners countered that in *Cruz v. People*,[67]

[64] 212 SCRA 307 (1992).
[65] 318 SCRA 608 (1999).
[66] 282 SCRA 512 (1997).
[67] 233 SCRA 439 (1995).

the Court held that the conduct of a preliminary investigation "is a judicial or quasi-judicial proceeding since there is opportunity to be heard and for the production and weighing of evidence and a decision is rendered thereon."

Under Section 2, Article IX-C of the 1987 Constitution, the COMELEC exercises both administrative and quasi-judicial powers. The COMELEC's **administrative powers** are found in **Section 2(1), (3), (4), (5), (6), (7), (8), and (9) of Article IX-C**. The 1987 Constitution does not prescribe how the COMELEC should exercise its administrative powers, whether *en banc* or in division. The Constitution merely vests the COMELEC's administrative powers in the "Commission on Elections," while providing that the COMELEC "may sit *en banc* or in two divisions." Clearly, the COMELEC *en banc* can act directly on matters falling within its administrative powers. Indeed, this has been the practice of the COMELEC both under the 1973 and 1987 Constitutions.[68]

On the other hand, the COMELEC's **quasi-judicial powers** are found in **Section 2(2) of Article IX-C**…

The COMELEC's exercise of its quasi-judicial powers is subject to Section 3 of Article IX-C which expressly requires that all election cases, including pre-proclamation controversies, shall be decided by the COMELEC in division, and the motion for reconsideration shall be decided by the COMELEC *en banc*. It follows, as held by the Court in **Canicosa**,[69] that the COMELEC is mandated to decide cases first in division, and then upon motion for reconsideration *en banc*, only when the COMELEC exercises its quasi-judicial powers.

The COMELEC is empowered in **Section 2(6), Article IX-C** of the 1987 Constitution to "prosecute cases of violations of election laws." **The prosecution of election law violators involves the exercise of the COMELEC's administrative powers**. Thus, the COMELEC *en banc* can directly approve the recommendation of its Law Department to file the criminal information for double registration against petitioners in the instant case. There is no constitutional requirement that the filing of the criminal information be first decided by any of the

[68] COMELEC v. Silva, Jr., 286 SCRA 177 (1998); Pimentel v. COMELEC, 289 SCRA 586 (1998); COMELEC v. Noynay, 292 SCRA 254 (1998); Domalanta v. COMELEC, 334 SCRA 555 (2000).

[69] 282 SCRA 512 (1997).

divisions of the COMELEC.

In sum, the second sentence of Section 3, Article IX-C of the 1987 Constitution is not applicable in administrative cases, like the instant case where the COMELEC is determining whether probable cause exists to charge petitioners for violation of the provision of the Election Code prohibiting double registration.

Indeed, the COMELEC acted in accordance with Section 9(b), Rule 34 of the 1993 COMELEC Rules of Procedure governing the prosecution of election offenses in meeting *en banc* in the first instance and acting on the recommendation of Investigating Officer Ravanzo to file charges against petitioners. The rule reads:

> Sec. 9. Duty of the Law Department, State Prosecutor, Provincial or City Fiscal Upon Receipt of Records. - ...
> (b). In cases investigated by the lawyers or the field personnel of the Commission, the Director of the Law Department shall review and evaluate the recommendation of said legal officer, prepare a report and make a recommendation to the Commission affirming, modifying or reversing the same which shall be included in the agenda of the succeeding meeting en banc of the Commission. If the Commission approves the filing of an information against the respondent/s, the Director of the Law Department shall prepare and sign the information for immediate filing with the appropriate court.

Then in **REPOL v. COMMISSION ON ELECTIONS**, G.R. No. 161418, April 28, 2004,[70] a petition for *certiorari* that alleged that the COMELEC's First Division committed grave abuse of discretion in issuing an order that directed the parties to maintain the *status quo*, which effectively overturned the trial court's grant of execution pending appeal in Noel Y. Repol's favor, **Section 3 of this Article IX-C on the jurisdiction of the COMELEC**, and deviations therefrom, were explained further:

The Facts

Repol and private respondent Violeto Ceracas (Ceracas) were candidates for Municipal Mayor of Pagsanghan, Samar in the 14 May 2001 elections. On 16 May 2001, Ceracas was proclaimed as

[70] See discussion under Art. IX-A, Sec. 7.

the duly elected mayor with 66 votes more than Repol.

On 23 May 2001, Repol filed an election protest before the Regional Trial Court of Tarangnan, Samar, Branch 40 (trial court), docketed as Election Case No. T-001. Claiming that fraud and other irregularities marred the elections in Precincts 3A, 5A and 71, Repol prayed for revision of the ballots in these precincts. Judge Francisco Mazo dismissed the election protest on 28 August 2001. On *certiorari*, the COMELEC First Division reversed the dismissal order of Judge Mazo in a Resolution dated 22 May 2002 "for being issued with grave abuse of discretion tantamount to lack of jurisdiction." The COMELEC First Division directed the trial court "to reinstate the subject election protest, conduct the revision of ballots from the protested precincts and render its Decision with immediate dispatch." On 18 September 2003, the COMELEC *en banc* denied Ceracas's motion to reconsider the Resolution dated 22 May 2002. The COMELEC *en banc* affirmed in toto the reinstatement of Repol's election protest. This time around, trial and revision of the ballots ensued with Judge Roberto A. Navidad presiding.

On 30 December 2003, the trial court declared Ceracas's proclamation void and proclaimed Repol the duly elected mayor of Pagsanghan, Samar. The trial court explained thus:

> After a very careful study and meticulous and painstaking appraisal of the contested ballots, the Court finds and so holds that the cheating and commission of various frauds and irregularities in these three contested precincts was massive, used many people to fill up the ballots - including the voters, connivance with those perpetrating the fraud and the members of the Board of Election Inspectors, the perpetrators of the fraud enjoyed the luxury of time to perpetrate the fraud and filling the ballots, that filling up of some of the ballots was done outside of the voting booth and it is not difficult to finally find the answers to the questions of the Protestant as to wherever and whatever happened to the 24 excess ballots it noted in precinct 3A (Barangay Canlapwas) and 21 excess ballots in precinct 5A (Brgy. Sto. Ninio).
>
> From the foregoing peculiar facts and circumstances it is clearly evident that the electoral fraud was perpetrated by the use of some ballots as shuttles [*lanzadera*], by which device, the ballots of the voters who are not skilled in the act of writing or whose fidelity to party is in doubt is illegally written out for them by others.

> It is likewise not hard to find the answers why the sisters in law of the protestee were illegally at the table of the BEI Chairman controlling the voting process and even angrily and at the top of their voices demanding that some voters be allowed to vote as illiterates even though there were no proper identifications and indications that indeed they were illiterates. Or why the Minutes of Voting in precinct 5A is not the printed one. It only means that there was something to hide.
>
> After a very careful study, meticulous and painstaking appraisal of the ballots the Court finds that the handwriting of one person in some of the ballots in one precinct are also found in the other two precincts…
>
> All these ballots should not be counted in favor of the protestee.
>
> Further, the following ballots are marked for their being written with or unnecessary decorations serving to easily identify his vote. Accordingly, they should not be counted in favor of the protestee…
>
> Clearly, the will of the electorate was fraudulently substituted by the will of the perpetrators of the fraud.
>
> All in all a total of 142 votes had been illegally counted in favor of the protestee. Deducting 66 from 142 we get a total of 76. In other words, the Protestant garnered a majority of 76 votes over that of the protestee.

In light of these findings, the trial court rendered judgment as follows:

> WHEREFORE, and in view of the foregoing, judgment is hereby rendered DECLARING as null and void the proclamation of the Protestee and instead hereby PROCLAIM AND DECLARE, NOEL Y. REPOL, the duly elected Mayor of Pagsanghan, Samar in the May 2001 elections with a majority of 77 votes.

Repol filed before the trial court a motion for execution pending appeal. On 5 January 2004, the trial court granted Repol's motion and issued a writ of execution. Meanwhile, Ceracas appealed the trial court's judgment to the COMELEC.

On 6 January 2004, Repol took his oath of office as the duly elected mayor of Pagsanghan, Samar. On the same date, Ceracas filed before the trial court an omnibus motion to reconsider, set aside and quash the writ of execution.

During the pendency of Ceracas's appeal with the COMELEC and without waiting for the trial court to resolve his omnibus motion, Ceracas filed with the COMELEC a Petition for *Certiorari* (with prayer for temporary restraining order, writ of preliminary injunction and/or *status quo ante*) assailing the writ of execution, docketed as SPR No. 1-2004. On 12 January 2004, the COMELEC First Division issued the assailed Order directing the parties to maintain the *status quo ante*. The Order reads in part:

> Acting on the Petition for *Certiorari* with Prayer for the issuance of Temporary Restraining Order, Writ of Preliminary Injunction and/or *Status Quo Ante* Order filed by Petitioner Violeto Ceracas through counsel on January 8, 2004, the Commission (First Division) hereby directs respondents to file their Answer within ten (10) days from receipt hereof.
> The application for the Writ of Preliminary Injunction shall be heard on January 29, 2004 at ten o'clock in the morning at the COMELEC Session Hall, Intramuros, Manila.
> In the interest of justice and so as not to render the issues moot and academic, the COMELEC (First Division) hereby directs the parties to maintain the *STATUS QUO ANTE*, which is the condition prevailing before the issuance and implementation of the questioned Order of the court a quo dated January 5, 2004 in Election Case No. T-001, entitled, "Noel Y. Repol versus Violeto Ceracas".
> Accordingly, effective immediately, private respondent Noel Repol, is hereby ordered to
> cease and desist from assuming the duties and functions of Municipal Mayor of Pagsanghan, Western Samar until further orders from this Commission. In the meantime, petitioner Violeto Ceracas shall assume the post of Municipal Mayor of Pagsanghan, Western Samar.
> The Provincial Election Supervisor of Samar and the Provincial Director of the Philippine National Police (PNP), Catbalogan, Samar, are hereby directed to immediately implement this Order and make a return of service within five (5) days from the implementation thereof.
> The Clerk of Commission is hereby directed to serve a copy of this Order together with a copy of the Petition to each of the respondents.

At the scheduled hearing on 29 January 2004, the COMELEC First Division issued an order which reads in full:

> In today's hearing of the application for a Writ of Preliminary Injunction prayed for in the above entitled petition, Atty. Sixto S. Brillantes appeared for the petitioner, while Attys. Baltazar Y. Repol and Farah D. Repol appeared for the private respondent.
> Both parties argued on their respective legal positions.
> In view of the pendency of the petition for *certiorari* filed by private respondent with the Supreme Court questioning the *status quo ante* issued on January 12, 2004, both parties are hereby given five (5) days from today or until February 3, 2004 to file their respective memoranda on the issue of whether this Commission can resolve on the Application for a Writ of Preliminary Injunction despite the pendency of the said petition. Parties may likewise include in their memoranda authorities and arguments on the life span of a *status quo ante* Order issued by the Commission. Thereafter, with or without the said memoranda, the said issue shall be deemed submitted for resolution…

Hence, the instant petition.

The Issues

Repol raises the sole issue of -

> Whether the COMELEC is empowered under any statute, rule, or jurisprudence to issue a *status quo ante* in effect overturning the effective enforcement of the writ of execution issued by the trial court and suspending indefinitely, without prior notice and hearing, the implementation of such writ.

Repol argues that the COMELEC First Division acted with grave abuse of discretion in issuing the *status quo ante* Order which indefinitely suspended and effectively nullified the trial court's writ of execution. Repol contends that the COMELEC First Division has no authority to issue the Order after the trial court found the election in the protested precincts marred by fraud and after the trial court considered meritorious the grounds cited by Repol in his motion for execution pending appeal. According to Repol, the law, rule and jurisprudence limit the COMELEC's power to issue temporary restraining orders to a non-extendible period of 20 days from the date of issuance.

Ceracas agrees with Repol that the rules do not expressly grant to the COMELEC the power to issue *status quo ante* orders.

However, Ceracas argues that the COMELEC's power to issue temporary restraining orders and preliminary injunctions necessarily includes the power to issue *status quo ante* orders.

On the other hand, the Office of the Solicitor General (OSG) appearing on behalf of the COMELEC, prays that the Court dismiss the instant petition. The OSG asserts that Repol cannot challenge before this Court by way of a petition for *certiorari* an interlocutory order issued by a COMELEC Division without first filing a motion for reconsideration with the COMELEC *en banc*.

The petition is meritorious.

The Court's Ruling

Remedy to Assail Interlocutory Orders of the COMELEC in Division

Where the COMELEC in division allegedly committed grave abuse of discretion or acted without or in excess of jurisdiction in issuing an interlocutory order, the applicable rule is Section 5(c), Rule 3 of the 1993 COMELEC Rules of Procedure, which states-

> Sec. 5. Quorum; Votes Required …
> (c) Any motion to reconsider a decision, resolution, order or ruling of a Division shall be resolved by the Commission *en banc* except motions on interlocutory orders of the division, which shall be resolved by the division which issued the order.

The 12 January 2004 Order did not dispose of the case completely as there is something more to be done. Interlocutory orders merely rule on an incidental issue and do not terminate or finally dispose of the case as they leave something to be done before it is finally decided on the merits.[71]

Since the COMELEC First Division issued the interlocutory Order of 12 January 2004, the same COMELEC First Division should resolve Repol's motion for reconsideration of the Order. The remedy of the aggrieved party is neither to file a motion for reconsideration for certification to the COMELEC *en banc* nor to elevate the issue to this Court via a petition for *certiorari* under Rule 65 of the Rules of Civil Procedure.

[71] Nepomuceno v. Salazar, G.R. No. 37165, 15 May 1989, 173 SCRA 366.

Section 5, Rule 19 of the 1993 COMELEC Rules of Procedure governs motions for reconsideration of decisions of a COMELEC Division, as follows:

> Sec. 5. How Motion for Reconsideration Disposed of. - Upon the filing of a motion to reconsider a decision, resolution, order or ruling of a Division, the Clerk of Court concerned shall, within twenty-four (24) hours from the filing thereof, notify the presiding Commissioner. The latter shall within two (2) days thereafter certify the case to the Commission *en banc*.

In *Gementiza v. Commission on Elections*,[72] the Court explained the import of this rule in this wise:

> Under the above-quoted rule, the acts of a Division that are subject of a motion for reconsideration must have a character of finality before the same can be elevated to the COMELEC *en banc*. The elementary rule is that an order is final in nature if it completely disposes of the entire case. But if there is something more to be done in the case after its issuance, that order is interlocutory.

Only final orders of the COMELEC in Division may be raised before the COMELEC *en banc*. **Section 3, Article IX-C of the 1987 Constitution mandates that only motions for reconsideration of final decisions shall be decided by the COMELEC *en banc*…**

Under this constitutional provision, the COMELEC *en banc* shall decide motions for reconsideration only of "decisions" of a Division, meaning those acts having a final character.[73] Clearly, the assailed *status quo ante* Order, being interlocutory, should first be resolved by the COMELEC First Division via a motion for reconsideration.

Furthermore, the present controversy does not fall under any of the instances over which the COMELEC *en banc* can take cognizance of the case. Section 2, Rule 3 of the 1993 COMELEC Rules of Procedure provides:

> Sec. 2. The Commission *en banc*. - The Commission shall sit *en banc* in cases hereinafter specifically provided, or in pre-

[72] G.R. No. 140884, 6 March 2001, 353 SCRA 724.
[73] Ibid.

> proclamation cases upon a vote of a majority of the members of the Commission, or in all other cases where a division is not authorized to act, or where, upon a unanimous vote of all the Members of a Division, an interlocutory matter or issue relative to an action or proceeding before it is decided to be referred to the Commission *en banc*.

The present case is not one of the cases specifically provided under the COMELEC Rules of Procedure in which the COMELEC may sit *en banc*. Neither is this case one where a division is not authorized to act nor a case where the members of the First Division unanimously voted to refer the issue to the COMELEC *en banc*. Thus, the COMELEC *en banc* is not even the proper forum where Repol may bring the assailed interlocutory order for resolution.

We held in *Ambil, Jr. v. Commission on Elections*[74] that -

> Under the existing Constitutional scheme, a party to an election case within the jurisdiction of the COMELEC in division cannot dispense with the filing of a motion for reconsideration of a decision, resolution or final order of the Division of the Commission on Elections because the case would not reach the COMELEC *en banc* without such motion for reconsideration having been filed ...

However, speaking for the Court *en banc*, Justice Carpio explained that **direct resort to the Court through a special civil action for *certiorari* was justified under the circumstances obtaining in Repol**. The Court applied the exception to the procedural requirement, which is "not ironclad" and "may be glossed over to prevent a miscarriage of justice … or when the need for relief is extremely urgent and *certiorari* is the only adequate and speedy remedy available." The Court then proceeded to determine the validity of the *status quo ante* order:

> The main issue to be resolved in this petition is whether the COMELEC First Division acted with grave abuse of discretion amounting to lack or excess of jurisdiction in issuing the *status quo ante* Order which effectively overturned the trial court's grant of execution pending appeal in Repol's favor. **This issue is not mooted even if the next elections are just a few weeks away. The holding of periodic elections is a basic**

[74] G.R. No. 143398, 25 October 2000, 344 SCRA 358.

feature of our democratic government.[75] **To set aside the resolution of the issue now will only postpone a task that could well crop up again in future elections.**[76]

We rule in the affirmative.

First … A cursory reading of the Order dated 12 January 2004 or the so-called *status quo ante* Order reveals that it was actually a temporary restraining order. It ordered Repol to cease and desist from assuming the position of municipal mayor of Pagsanghan, Samar and directed Ceracas to assume the post in the meantime. The *status quo ante* Order had a life span of more than 20 days since the directive was qualified by the phrase "until further orders from this Commission." This violates the rule that a temporary restraining order has an effective period of only 20 days and automatically expires upon the COMELEC's denial of the preliminary injunction. Thus, the *status quo ante* Order automatically ceased to have any effect after 1 February 2004 since the COMELEC First Division did not issue a writ of preliminary injunction.

While the hearing on Ceracas's application for a writ of preliminary injunction was held on 29 January 2004, the COMELEC First Division failed to resolve the application. Instead, it issued an Order directing the parties to file their memoranda until 3 February 2004 on their respective positions "on the life span of *status quo ante* orders and whether a writ of preliminary injunction should be granted in the case." Clearly, the COMELEC First Division's indecision on the matter not only worked injustice to Repol but also failed to dispel the uncertainty beclouding the real choice of the electorate for municipal mayor.

Second. The decision of the trial court in Election Case No. T-001 was rendered on 30 December 2003, or after almost one year of trial and revision of the questioned ballots. It found Repol as the candidate with the plurality of votes. The grant of execution pending appeal was well within the discretionary powers of the trial court.[77] In the recent case of *Edgar Y. Santos v. Commission on Elections (First Division) and Pedro Q. Panulaya*,[78] we ruled:

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[75] ABS-CBN Broadcasting Corporation v. COMELEC, 380 Phil. 780 (2000).
[76] Ibid.
[77] Navarosa v. COMELEC, G.R. No. 157975, 18 September 2003; Fermo v. COMELEC, 384 Phil. 584 (2000).
[78] G.R. No. 155618, 26 March 2003.

> Between the determination by the trial court of who of the candidates won the elections and the finding of the Board of Canvassers as to whom to proclaim, it is the court's decision that should prevail. This was sufficiently explained in the case of *Ramas v. COMELEC* in this wise:
>
> > All that was required for a valid exercise of the discretion to allow execution pending appeal was that the immediate execution should be based "upon good reasons to be stated in a special order." The rationale why such execution is allowed in election cases is, as stated in *Gahol v. Riodique*, "to give as much recognition to the worth of a trial judge's decision as that which is initially ascribed by the law to the proclamation by the board of canvassers." Thus:
> >
> > Why should the proclamation by the board of canvassers suffice as basis of the right to assume office, subject to future contingencies attendant to a protest, and not the decision of a court of justice? Indeed, when it is considered that the board of canvassers is composed of persons who are less technically prepared to make an accurate appreciation of the ballots, apart from their being more apt to yield to extraneous considerations, and that the board must act summarily, practically racing against time, while, on the other hand, the judge has the benefit of all the evidence the parties can offer and of admittedly better technical preparation and background, apart from his being allowed ample time for conscientious study and mature deliberation before rendering judgment, one cannot but perceive the wisdom of allowing the immediate execution of decisions in election cases adverse to the protestees, notwithstanding the perfection and pendency of appeals therefrom, as long as there are, in the sound discretion of the court, good reasons therefor.
> >
> > To deprive trial courts of their discretion to grant execution pending appeal would, in the words of *Tobon Uy v. COMELEC*, bring back the ghost of the "grab-the-proclamation-prolong the protest" techniques so often resorted to by devious politicians in the past in their efforts to perpetuate their hold to an elective office. This would, as a consequence, lay to waste the will of the electorate.
>
> Applying *Santos* to this petition, we hold that the COMELEC First Division committed grave abuse of discretion in setting aside the trial court's order granting execution pending appeal…

Finally, in **SORIANO, JR. v. COMMISSION ON ELECTIONS**,

G.R. Nos. 164496-505, April 2, 2007, 548 Phil. 639, in dismissing the petition for *certiorari* and prohibition, and denying the prayer for the issuance of a writ of preliminary injunction or temporary restraining order, Justice Carpio, for the Court *en banc*, discussed **Section 3 of this Article IX-C** and summarized the rules relating to **interlocutory orders of a COMELEC division**:

The Facts

Petitioners and private respondents were candidates for City Council for the First and Second Districts of Muntinlupa City in the 10 May 2004 elections.

After the elections, the Muntinlupa City Board of Canvassers proclaimed private respondents as the duly elected Councilors of the Muntinlupa City Council. Petitioners individually and separately filed election protest cases against private respondents, contesting the results of the elections in all the 603 precincts of the First District and the 521 precincts of the Second District of Muntinlupa City. The election protest cases for the Second District of Muntinlupa City were docketed as EPC Nos. 2004-36, 2004-37, 2004-38, 2004-39, and 2004-40 while those for the First District were docketed as EPC Nos. 2004-41, 2004-42, 2004-43, 2004-44, and 2004-45.

On 21 June 2003, the COMELEC First Division issued an Order consolidating EPC Nos. 2004-36, 2004- 37, 2004-38, 2004-39, 2004-40, 2004-41, 2004-42, 2004-43, 2004-44, and 2004-45.

On 26 June 2004, the COMELEC First Division issued two identical orders. The first order directed petitioners (protestants) Norberto Espeleta, Jeffrey Arevalo, Rodolfo Oliquino, Cecilio Marcelino, and Nathaniel Calalang to deposit P454,020 each to the COMELEC Cash Division to defray expenses under Section 8, Rule 20 of the COMELEC Rules, in the revision of 603 protested precincts in the First District of Muntinlupa City. The order also directed respondents (protestees) Raul Corro, Allan Rey Camilon,

Maria Luisa Echavez, Melchor Gaspar Teves, Allen Ampaya, and Icasiano Dela Rea to deposit P454,020 each to the COMELEC Cash Division in the revision of 603 counter-protested precincts in the First District of Muntinlupa City. The second order directed petitioners (protestants) Isidoro Soriano, Reynaldo Abas, Dante Almario, Alicia Landrito, and Alfredo Bunye IV to deposit P408,990

each to the COMELEC Cash Division in the revision of 521 protested precincts in the Second District of Muntinlupa. The order also directed respondents (protestees) Elmer Espeleta, Francis Ian Bagatsing, Marissa Rongavilla, Lucio Constantino, Mamerto Sevilla, Jr., and Mario Bulay, Jr. to deposit P408,990 each to the COMELEC Cash Division in the revision of 521 counter-protested precincts in the Second District of Muntinlupa.

On 1 July 2004, petitioners filed a motion for reconsideration of the Orders dated 26 June 2004. The COMELEC First Division denied the motion in an Order dated 30 July 2004.

On 3 August 2004, petitioners filed a petition for certiorari and prohibition with prayer for the issuance of a writ of preliminary injunction or temporary restraining order. Petitioners alleged that the Orders dated 26 June 2004 of the COMELEC First Division were issued with grave abuse of discretion amounting to lack or excess of jurisdiction. Petitioners maintain that the cash deposit of P454,020 to defray the expenses for the revision of the ballots for the First District of Muntinlupa should be paid jointly by all the protestants for the First District and that to require them to pay P454,020 each constitutes grave abuse of discretion. In the same manner, the cash deposit of P408,990 to defray the expenses for the revision of the ballots for the Second District of Muntinlupa should be paid jointly by all the protestants for the Second District and that to require them to pay P408,990 each constitutes grave abuse of discretion.

Meanwhile, on 31 May 2005, the COMELEC First Division issued another Order, dismissing the protests and counter-protests in EPC Nos. 2004-36, 2004-37, 2004-38, 2004-39, 2004-40, 2004-41, 2004-42, 2004-43, 2004-44, and 2004-45 for failure of the protestants and protestees to pay the required cash deposits.

The Orders of the COMELEC First Division

The Order dated 26 June 2004 of the COMELEC First Division for EPC Nos. 2004-36, 2004-37, 2004- 38, 2004-39, and 2004-40 states:

> Considering the issues in this case were joined upon the filing of the answers with the counter-protests by the Protestees, and that the initial hearing in the instant case has already been made on 21 June 2004, the Commission, First Division, pursuant to the powers of the Commission prescribed under

Section 6, Rule 20 of the Comelec Rules of Procedure, resolved as it hereby resolves to:

a) DIRECT Protestant ISIDRO SORIANO to deposit before the Cash Division, Commission on Elections, the amount of FOUR HUNDRED EIGHT THOUSAND NINE HUNDRED NINETY PESOS (P408,990.00) within five (5) days from receipt of this Order to defray the expenses under Sec. 8, Rule 20 of the Comelec Rules, in the revision of FIVE HUNDRED TWENTY ONE (521) protested precincts in the [Second] District of Muntinlupa City and other incidental expenses such as supplies and the compensation/honoraria of the revision committees;

b) DIRECT Protestant REYNALDO ABAS to deposit before the Cash Division, Commission on Elections, the amount of FOUR HUNDRED EIGHT THOUSAND NINE HUNDRED NINETY PESOS (P408,990.00) within five (5) days from receipt of this Order to defray the expenses under Sec. 8, Rule 20 of the Comelec Rules, in the revision of FIVE HUNDRED TWENTY ONE (521) protested precincts in the [Second] District of Muntinlupa City and other incidental expenses such as supplies and the compensation/honoraria of the revision committees;

c) DIRECT Protestant DANTE S. ALMARIO to deposit before the Cash Division, Commission on Elections, the amount of FOUR HUNDRED EIGHT THOUSAND NINE HUNDRED NINETY PESOS (P408,990.00) within five (5) days from receipt of this Order to defray the expenses under Sec. 8, Rule 20 of the Comelec Rules, in the revision of FIVE HUNDRED TWENTY ONE (521) protested precincts in the [Second] District of Muntinlupa City and other incidental expenses such as supplies and the compensation/honoraria of the revision committees;

d) DIRECT Protestant ALICIA G. LANDRITO to deposit before the Cash Division, Commission on Elections, the amount of FOUR HUNDRED EIGHT THOUSAND NINE HUNDRED NINETY PESOS (P408,990.00) within five (5) days from receipt of this Order to defray the expenses under Sec. 8, Rule 20 of the Comelec Rules, in the revision of FIVE HUNDRED TWENTY ONE (521) protested precincts in the [Second] District of Muntinlupa City and other incidental expenses such as supplies and the compensation/honoraria of the revision committees;

e) DIRECT Protestant ALFREDO G. BUNYE [IV] to deposit before the Cash Division, Commission on Elections, the amount of FOUR HUNDRED EIGHT THOUSAND

> NINE HUNDRED NINETY PESOS (P408,990.00) within five (5) days from receipt of this Order to defray the expenses under Sec. 8, Rule 20 of the Comelec Rules, in the revision of FIVE HUNDRED TWENTY ONE (521) protested precincts in the [Second] District of Muntinlupa City and other incidental expenses such as supplies and the compensation/honoraria of the revision committees;
>
> f) DIRECT Protestees ELMER ESPELETA, FRANCIS IAN T. BAGATSING, MARISSA C. RONGAVILLA, LUCIO B. CONSTANTINO, MAMERTO T. SEVILLA, JR., and MARIO E. BUYAL, JR., to each deposit before the Cash Division, Commission on Elections, the amount of FOUR HUNDRED EIGHT THOUSAND NINE HUNDRED NINETY PESOS (P408,990.00) within five (5) days from receipt of this Order to defray the expenses under Sec. 8, Rule 20 of the Comelec Rules, in the revision of FIVE HUNDRED TWENTY ONE (521) counter-protested precincts in the Second District of Muntinlupa City and other incidental expenses such as supplies and the compensation/honoraria of the revision committees also within five (5) days from receipt of this Order;
>
> Failure of the protestants and the protestees to comply with this order within the period stated shall be a ground for the dismissal of their respective protest and counter-protest.
>
> ...

Similarly, the Order dated 26 June 2004 of the COMELEC First Division for EPC Nos. 2004-41, 2004- 42, 2004-43, 2004-44, and 2004-45 states:

> Considering the issues in this case were joined upon the filing of the answers with the counter-protests by the Protestees, and that the initial hearing in the instant case has already been made on 21 June 2004, the Commission, First Division, pursuant to the powers of the Commission prescribed under Section 6, Rule 20 of the Comelec Rules of Procedure, resolved as it hereby resolves to:
>
> h) DIRECT Protestant NORBERTO ESPELETA to deposit before the Cash Division, Commission on Elections, the amount of FOUR HUNDRED FIFTY FOUR THOUSAND TWENTY PESOS (P454,020.00) within five (5) days from receipt of this Order to defray the expenses under Sec. 8, Rule 20 of the Comelec Rules, in the revision of SIX HUNDRED THREE (603) protested precincts in the FIRST District of Muntinlupa City and other incidental

expenses such as supplies and the compensation/honoraria of the revision committees;

i) DIRECT Protestant JEFFREY L. AREVALO to deposit before the Cash Division, Commission on Elections, the amount of FOUR HUNDRED FIFTY FOUR THOUSAND TWENTY PESOS (P454,020.00) within five (5) days from receipt of this Order to defray the expenses under Sec. 8, Rule 20 of the Comelec Rules, in the revision of SIX HUNDRED THREE (603) protested precincts in the FIRST District of Muntinlupa City and other incidental expenses such as supplies and the compensation/honoraria of the revision committees;

j) DIRECT Protestant RODOLFO I. OLIQUINO to deposit before the Cash Division, Commission on Elections, the amount of FOUR HUNDRED FIFTY FOUR THOUSAND TWENTY PESOS (P454,020.00) within five (5) days from receipt of this Order to defray the expenses under Sec. 8, Rule 20 of the Comelec Rules, in the revision of SIX HUNDRED THREE (603) protested precincts in the FIRST District of Muntinlupa City and other incidental expenses such as supplies and the compensation/honoraria of the revision committees;

k) DIRECT Protestant CECILIO E. MARCELINO to deposit before the Cash Division, Commission on Elections, the amount of FOUR HUNDRED FIFTY FOUR THOUSAND TWENTY PESOS (P454,020.00) within five (5) days from receipt of this Order to defray the expenses under Sec. 8, Rule 20 of the Comelec Rules, in the revision of SIX HUNDRED THREE (603) protested precincts in the FIRST District of Muntinlupa City and other incidental expenses such as supplies and the compensation/honoraria of the revision committees;

l) DIRECT Protestant NATHANIEL S. CALALANG to deposit before the Cash Division, Commission on Elections, the amount of FOUR HUNDRED FIFTY FOUR THOUSAND TWENTY PESOS (P454,020.00) within five (5) days from receipt of this Order to defray the expenses under Sec. 8, Rule 20 of the Comelec Rules, in the revision of SIX HUNDRED THREE (603) protested precincts in the FIRST District of Muntinlupa City and other incidental expenses such as supplies and the compensation/honoraria of the revision committees;

m) DIRECT Protestees RAUL R. CORRO, ALLAN REY A. CAMILON, MARIA LUISA B. ECHAVEZ, MELCHOR GASPAR R. TEVES, ALLEN F. AMPAYA,

> and ICASIANO M. DELA REA to each deposit before the Cash division, Commission on Elections, the amount of FOUR HUNDRED FIFTY FOUR THOUSAND TWENTY PESOS (P454,020.00) within five (5) days from receipt of this Order to defray the expenses under Sec. 8, Rule 20 of the Comelec Rules, in the revision of SIX HUNDRED THREE (603) counter-protested precincts in the FIRST District of Muntinlupa City and other incidental expenses such as supplies and the compensation/honoraria of the revision committees;
>
> Failure of the protestants and the protestees to comply with this order within the period stated shall be a ground for the dismissal of their respective protest and counter-protest.
>
> ...

In denying petitioners' partial motion for reconsideration, the COMELEC First Division held that Rule 40 of the COMELEC Rules of Procedure explicitly states that filing fees shall be paid for each interest. According to the COMELEC First Division, the requirement of payment per interest also applies to all other fees including cash deposit per ballot box.

The Issues

The issues raised are:

1. Whether a writ of certiorari will lie in this case; and

2. Whether the COMELEC First Division committed grave abuse of discretion amounting to lack or excess of jurisdiction in issuing the Orders dated 26 June 2004.

The Court's Ruling

The petition has no merit.

Respondents contend that petitioners should have filed first with the COMELEC *en banc* a motion for reconsideration of the assailed Orders of the COMELEC First Division before filing the petition for certiorari. Citing Section 3, Article IX-C of the Constitution, respondents allege that the COMELEC *en banc* has the sole authority to resolve motions for reconsideration of decisions or rulings of a COMELEC Division. Respondents assert that only decisions, orders, or rulings of the COMELEC *en banc* may be brought to this Court on certiorari.

…

In accordance with this constitutional provision (**Section 3, Article IX-C**), the COMELEC Rules of Procedure provides:

> Rule 19 - Motions for Reconsideration
>
> Sec. 1. Grounds of Motion for Reconsideration. - A motion for reconsideration may be filed on the grounds that the evidence is insufficient to justify the decision, order or ruling; or that the said decision, order or ruling is contrary to law.
>
> Sec. 2. Period for Filing Motions for Reconsideration. - A motion to reconsider a decision, resolution, order, or ruling of a Division shall be filed within five (5) days from the promulgation thereof. Such motion, if not pro-forma, suspends the execution for implementation of the decision, resolution, order and ruling.
>
> ...
>
> Sec. 5. How Motion for Reconsideration Disposed of. - Upon the filing of a motion to reconsider a decision, resolution, order or ruling of a Division, the Clerk of Court concerned shall, within twenty-four (24) hours from the filing thereof, notify the Presiding Commissioner. The latter shall within two (2) days thereafter certify the case to the Commission *en banc*.
>
> Sec. 6. Duty of Clerk of Court of Commission to Calendar Motion for Resolution. - The Clerk of Court concerned shall calendar the motion for reconsideration for the resolution of the Commission *en banc* within ten (10) days from certification thereof.)

However, for interlocutory orders, the COMELEC Rules of Procedure provides:

> Rule 3 - How the Commission Transacts Business
>
> Sec. 1. How Business is Transacted. - In the exercise of its Constitutional or statutory powers, functions, and duties, the Commission may sit *en banc* or in two Divisions.
>
> Sec. 2. The Commission *En Banc*. - The Commission shall sit *en banc* in cases hereinafter specifically provided, or in pre-proclamation cases upon a vote of a majority of the members of the Commission, or in all other cases where a division is not authorized to act, or where, upon a unanimous vote of all the Members of a Division, an interlocutory matter or issue relative to an action or proceeding before it is decided to be referred to the Commission *en banc*.

> Sec. 3. The Commission Sitting in Divisions. - The Commission shall sit in two (2) Divisions to hear and decide protests or petitions in ordinary actions, special actions, special cases, provisional remedies, contempt, and special proceedings except in accreditation of citizens' arms of the Commission.
> ...
> Sec. 5. Quorum; Votes Required. - ...
> (c) Any motion to reconsider a decision, resolution, order or ruling of a Division shall be resolved by the Commission *en banc* except motions on interlocutory orders of the division which shall be resolved by the division which issued the order.

Thus, the rule is that a motion to reconsider a decision, resolution, order, or ruling of a COMELEC Division shall be elevated to the COMELEC *en banc*. However, a motion to reconsider an interlocutory order of a COMELEC Division shall be resolved by the division which issued the interlocutory order, except when all the members of the division decide to refer the matter to the COMELEC *en banc*.

Let us examine the cases regarding interlocutory orders of a COMELEC Division. In the 1993 case of *Bulaong v. Comelec, First Division*,[79] the issue was whether the First Division of the COMELEC committed grave abuse of discretion when it refused to refer the motion for reconsideration to the COMELEC *en banc*. In *Bulaong*, the COMELEC Division denied the motion for reconsideration of an interlocutory order and subsequently denied the motion to elevate the matter to the COMELEC *en banc*. The Court held that a COMELEC Division is not mandated to refer all pending motions for reconsideration to the COMELEC *en banc*, thus:

> We vote to dismiss the instant petition. It is not mandatory on the part of a division of the COMELEC to refer all pending motions for reconsideration to the COMELEC *en banc*.
> Admittedly, the order regarding the revision of ballots is an interlocutory order because it still requires a party to perform certain acts leading to the final adjudication of a case. The order in the case at bar is for the Provincial Election Supervisor of Camarines Sur to transfer the ballot boxes from Camarines Sur to Manila for a recount and revision of ballots, for the purpose of determining who won the gubernatorial race in Camarines Sur.

[79] G.R. No. 107987, 31 March 1993, 220 SCRA 745.

> Being an interlocutory matter, the question now before us is whether or not the First Division of the COMELEC committed grave abuse of discretion in refusing to refer petitioner's motion for reconsideration to the COMELEC *en banc*. It is our opinion that the COMELEC did not commit grave abuse of discretion. For said motion to be considered en banc, it requires the unanimous vote of the members of the division as mandated by Section 2 of Rule 3 of the COMELEC Rules. In the case at bar, there was an absence of such vote. Instead of withholding its decision on such interlocutory matter, the First Division of the COMELEC decided to exercise its power under Section 6 of Rule 20 of the COMELEC Rules which states:
>
> > When the allegation in a protest or counter-protest so warrant, or whenever in the opinion of the Commission or Division the interest of justice so demands, it shall immediately order the ballot boxes containing ballots and their keys, list of voters with voting records, book of voters and other documents used in the election to be brought before the Commission, and shall order the revision of the ballots. ...
>
> The revision of ballots shall be made in the Office of the Clerk of Court concerned or at such places as the Commission or Division shall designate, and shall be completed within three (3) months from the date of the order, unless otherwise directed by the Commission."

The ruling in *Bulaong* was reiterated in the 1997 case of *Kho v. Comelec*.[80] In *Kho*, it was alleged that the COMELEC First Division committed grave abuse of discretion in issuing an interlocutory order admitting an answer with counter-protest which was filed beyond the reglementary period. Kho moved to reconsider the interlocutory order, which the COMELEC First Division denied. Kho then filed a motion to elevate the case to the COMELEC *en banc*, which the COMELEC First Division likewise denied. The Court held that the interlocutory order was clearly void for having been issued without jurisdiction. On the procedural issue, the Court held that the COMELEC First Division was correct in refusing to refer the case to the COMELEC *en banc* because what was involved was merely an interlocutory order of the division which should be resolved by the division itself. The Court held:

[80] 344 Phil. 878 (1997).

As to the issue of whether or not the case should be referred to the COMELEC *en banc*, this Court finds the respondent COMELEC First Division correct when it held in its order dated February 28, 1996 that no final decision, resolution or order has yet been made which will necessitate the elevation of the case and its records to the Commission *en banc*. No less than the Constitution requires that the election cases must be heard and decided first in division and any motion for reconsideration of decisions shall be decided by the Commission *en banc*. Apparently, the orders dated July 26, 1995, November 15 1995 and February 28, 1996 and the other orders relating to the admission of the answer with counter-protest are issuances of a commission in division and are all interlocutory orders because they merely rule upon an incidental issue regarding the admission of Espinosa's answer with counter- protest and do not terminate or finally dispose of the case as they leave something to be done before it is finally decided on the merits. In such a situation, the rule is clear that the authority to resolve incidental matters of the case pending in a division, like the questioned interlocutory orders, falls on the division itself, and not on the Commission *en banc*. Section 5 (c), Rule 3 of the COMELEC Rules of procedure explicitly provides for this:

> Sec. 5. Quorum; Votes Required. ...
>
> (c) Any motion to reconsider a decision, resolution, order or ruling of a Division shall be resolved by the Commission en banc except motions on interlocutory orders of the division which shall be resolved by the division which issued the order.

Furthermore, a look at section 2, Rule 3 of the COMELEC Rules of Procedure confirms that the subject case does not fall on any of the instances over which the Commission *en banc* can take cognizance of. It reads as follows:

> Sec. 2. The Commission *En Banc*. - The Commission shall sit *en banc* in cases hereinafter specifically provided, or in pre-proclamation cases upon a vote of a majority of the members of a commission, or in all other cases where a division is not authorized to act, or where, upon a unanimous vote of all the members of a Division, an interlocutory matter or issue relative an action or proceeding before it is decided to be referred to the commission *en banc*.

In the instant case, it does not appear that the subject controversy is one of the cases specifically provided under the COMELEC Rules of Procedure in which the Commission may sit *en banc*. Neither is it shown that the present controversy a

> case where a division is not authorized to act nor a situation wherein the members of the First Division unanimously voted to refer the subject case to the Commission *en banc*. Clearly, the Commission *en banc*, under the circumstances shown above, cannot be the proper forum which the matter concerning the assailed interlocutory orders can be referred to.
> In a situation such as this where the Commission in division committed grave abuse of discretion or acted without or in excess of jurisdiction in issuing interlocutory orders relative to an action pending before it and the controversy did not fall under any of the instances mentioned in section 2, Rule 3 of the COMELEC Rules of Procedure, the remedy of the aggrieved party is not to refer the controversy to the commission *en banc* as this is not permissible under its present rules but to elevate it to this Court via a petition for certiorari under Rule 65 of the Rules of Court.
> Nevertheless, the resolution of this second issue is not decisive in the disposition of the instant case. What we considered here is the fact that the respondent COMELEC First Division committed grave abuse of discretion tantamount to lack of jurisdiction in admitting the belatedly filed answer with counter-protest of private respondent Espinosa.

However, in the succeeding 2000 case of *Ambil, Jr. v. Comelec*,[81] the Court dismissed the petition for prematurity. In *Ambil*, a petition for certiorari was filed with this Court questioning the interlocutory order of a COMELEC Division setting the date for the promulgation of a resolution. In *Ambil*, the petitioner did not move to reconsider the interlocutory order but instead filed directly with this Court a petition for *certiorari*. The Court held:

> In a long line of cases, this Court has held consistently that "before a party is allowed to seek the intervention of the court, it is a pre-condition that he should have availed of all the means of administrative processes afforded him. Hence, if a remedy within the administrative machinery can still be resorted to by giving the administrative officer concerned every opportunity to decide on a matter that comes within his jurisdiction, then such remedy should be exhausted first before the court's judicial power can be sought. The premature invocation of court's intervention is fatal to one's cause of action."

[81] 398 Phil. 257 (2000).

In both the cases of *Bulaong* and *Kho*, the petitioners filed with the COMELEC Division a motion to reconsider the interlocutory orders. In *Ambil*, the petitioner did not file a motion to reconsider the interlocutory order of the COMELEC Division but instead filed directly with this Court a petition for *certiorari*. The different circumstances in the three cases explain the variance in the rulings of the Court.

In the 2004 case of **Repol v. Commission on Elections**,[82] the Court cited *Ambil* and held that this Court has no power to review via *certiorari* an interlocutory order or even a final resolution of a division of the COMELEC. However, the Court held that an exception to this rule applies where the commission of grave abuse of discretion is apparent on its face. In **Repol**, what was assailed was a *status quo ante* Order without any time limit, and more than 20 days had lapsed since its issuance without the COMELEC First Division issuing a writ of preliminary injunction. The Court held that the *status quo ante* Order of the COMELEC First Division was actually a temporary restraining order because it ordered Repol to cease and desist from assuming the position of municipal mayor of Pagsanghan, Samar and directed Ceracas to assume the post in the meantime. Since the *status quo ante* Order, which was qualified by the phrase "until further orders from this Commission," had a lifespan of more than 20 days, this Order clearly violates the rule that a temporary restraining order has an effective period of only 20 days and automatically expires upon the COMELEC's denial of preliminary injunction. The Court held:

> Only final orders of the COMELEC in Division may be raised before the COMELEC *en banc*. Section 3, Article IX-C of the 1987 Constitution mandates that only motions for reconsideration of final decisions shall be decided by the COMELEC *en banc*…
> Under this constitutional provision, the COMELEC *en banc* shall decide motions for reconsideration only of "decisions" of a Division, meaning those acts having a final character. Clearly, the assailed *status quo ante* Order, being interlocutory, should first be resolved by the COMELEC First Division via a motion for reconsideration. …
> Furthermore, the present controversy does not fall under any of the instances over which the COMELEC *en banc* can take

[82] G.R. No. 161418, 28 April 2004, 428 SCRA 321, penned by Justice Carpio and excerpted above.

cognizance of the case. …
Repol went directly to the Supreme Court from an interlocutory order of the COMELEC First Division. …
We have interpreted this constitutional provision (Section 7, Article IX of the 1987 Constitution) to mean final orders, rulings and decisions of the COMELEC rendered in the exercise of its adjudicatory or quasi-judicial powers. The decision must be a final decision or resolution of the COMELEC *en banc*. The Supreme Court has no power to review via certiorari an interlocutory order or even a final resolution of a Division of the COMELEC. Failure to abide by this procedural requirement constitutes a ground for dismissal of the petition.
However, this rule is not ironclad. In *ABS-CBN Broadcasting Corporation v. COMELEC*, we stated -

> This Court, however, has ruled in the past that this procedural requirement [of filing a motion for reconsideration] may be glossed over to prevent a miscarriage of justice, when the issue involves the principle of social justice or the protection of labor, when the decision or resolution sought to be set aside is a nullity, or when the need for relief is extremely urgent and certiorari is the only adequate and speedy remedy available.

The Court further pointed out in *ABS-CBN* that an exception was warranted under the peculiar circumstances of the case since there was hardly enough opportunity to move for a reconsideration and to obtain a swift resolution in time for the 11 May 1998 elections. The same can be said in Repol's case. We rule that direct resort to this Court through a special civil action for certiorari is justified under the circumstances obtaining in the present case.[83]

The most recent case involving interlocutory orders of a COMELEC Division is the 2007 case of *Rosal v. Commission on Elections*.[84] In *Rosal*, the Court allowed the petition for *certiorari* assailing the interlocutory orders rendered by a COMELEC Division. It should be emphasized that the *Rosal* case is unusual because while the petition for *certiorari* questioning the interlocutory order of a COMELEC Division was pending before this Court, the main case which was meanwhile decided by the COMELEC *en banc* was likewise elevated to this Court. Thus, we have a situation where the petition for *certiorari* questioning

[83] See discussion above.
[84] G.R. Nos. 168253 & 172741, 16 March 2007.

the interlocutory orders of the COMELEC Division and the petition for *certiorari* and prohibition assailing the Resolution of the COMELEC *en banc* on the main case were consolidated. The issues raised in the petition for *certiorari* were also raised in the main case and therefore there was actually no need to resolve the petition assailing the interlocutory orders.

The general rule is that a decision or an order of a COMELEC Division cannot be elevated directly to this Court through a special civil action for *certiorari*. Furthermore, a motion to reconsider a decision, resolution, order, or ruling of a COMELEC Division shall be elevated to the COMELEC *en banc*. However, a motion to reconsider an interlocutory order of a COMELEC Division shall be resolved by the division which issued the interlocutory order, except when all the members of the division decide to refer the matter to the COMELEC *en banc*.

Thus, in general, interlocutory orders of a COMELEC Division are not appealable, nor can they be proper subject of a petition for *certiorari*. To rule otherwise would not only delay the disposition of cases but would also unnecessarily clog the Court docket and unduly burden the Court. This does not mean that the aggrieved party is without recourse if a COMELEC Division denies the motion for reconsideration. The aggrieved party can still assign as error the interlocutory order if in the course of the proceedings he decides to appeal the main case to the COMELEC *en banc*. The exception enunciated in *Kho* and Repol is when the interlocutory order of a COMELEC Division is a patent nullity because of absence of jurisdiction to issue the interlocutory order, as where a COMELEC Division issued a temporary restraining order without a time limit, which is the Repol case, or where a COMELEC Division admitted an answer with counter-protest which was filed beyond the reglementary period, which is the *Kho* case.

This Court has already ruled in *Reyes v. RTC of Oriental Mindoro*,[85] that "it is the decision, order or ruling of the COMELEC *en banc* that, in accordance with Section 7, Art. IX-A of the Constitution, may be brought to the Supreme Court

[85] 313 Phil. 727, 734 (1995).

on *certiorari*." The exception provided in *Kho* and **Repol** is unavailing in this case because unlike in *Kho* and **Repol**, the assailed interlocutory orders of the COMELEC First Division in this case are not a patent nullity. The assailed orders in this case involve the interpretation of the COMELEC Rules of Procedure. Neither will the *Rosal* case apply because in that case the petition for *certiorari* questioning the interlocutory orders of the COMELEC Second Division and the petition for certiorari and prohibition assailing the Resolution of the COMELEC *en banc* on the main case were already consolidated.

The Court also notes that the COMELEC First Division has already issued an Order dated 31 May 2005 dismissing the protests and counter-protests in EPC Nos. 2004-36, 2004-37, 2004-38, 2004-39, 2004- 40, 2004-41, 2004-42, 2004-43, 2004-44, and 2004-45 for failure of the protestants and protestees to pay the required cash deposits. Thus, we have this peculiar situation where the interlocutory order of the COMELEC First Division is pending before this Court but the main case has already been dismissed by the COMELEC First Division. This situation is precisely what we are trying to avoid by insisting on strict compliance of the rule that an interlocutory order cannot by itself be the subject of an appeal or a petition for *certiorari*.

Section 4. The Commission may, during the election period, supervise or regulate the enjoyment or utilization of all franchises or permits for the operation of transportation and other public utilities, media of communication or information, all grants, special privileges, or concessions granted by the Government or any subdivision, agency, or instrumentality thereof, including any government-owned or controlled corporation or its subsidiary. Such supervision or regulation shall aim to ensure equal opportunity, time, and space, and the right to reply, including reasonable, equal rates therefor, for public information campaigns and forums among candidates in connection with the objective of holding free, orderly, honest, peaceful, and credible elections.

Section 5. No pardon, amnesty, parole, or suspension of sentence for violation of election laws, rules, and regulations shall be granted by the President without the favorable recommendation of the Commission.

Section 6. A free and open party system shall be allowed to

evolve according to the free choice of the people, subject to the provisions of this Article.

Section 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.

Section 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.

Section 9. Unless otherwise fixed by the Commission in special cases, the election period shall commence ninety days before the day of election and shall end thirty days thereafter.

Section 10. *Bona fide* candidates for any public office shall be free from any form of harassment and discrimination.

Section 11. Funds certified by the Commission as necessary to defray the expenses for holding regular and special elections, plebiscites, initiatives, referenda, and recalls, shall be provided in the regular or special appropriations and, once approved, shall be released automatically upon certification by the Chairman of the Commission

D. THE COMMISSION ON AUDIT

Section 1. (1) There shall be a Commission on Audit composed of a Chairman and two Commissioners, who shall be natural-born citizens of the Philippines and, at the time of their appointment, at least thirty-five years of age, Certified Public Accountants with not less than ten years of auditing experience, or members of the Philippine Bar who have been engaged in the practice of law for at least ten years, and must not have been candidates for any elective position in the elections immediately preceding their appointment. At no time shall all Members of the Commission belong to the same profession.

(2) 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, the Chairman shall hold office for seven years, one Commissioner for five years, and the other Commissioner for three years, without reappointment. Appointment to any vacancy shall be only for the unexpired portion of the term of the predecessor. In no case shall any Member be appointed or designated in a temporary or acting capacity.

As previously discussed, in **MATIBAG v. BENIPAYO,** G.R. No. 149036, April 2, 2002, Justice Carpio explained the **prohibition on reappointment** found in **Section 1(2) of Article IX-D**:

> The framers of the present Constitution prohibited reappointments for two reasons. The first is to prevent a second appointment for those who have been previously appointed and confirmed even if they served for less than seven years. The second is to insure that the members of the three Constitutional Commissions do not serve beyond the fixed term of seven years.
>
> … the framers decided to strengthen further the prohibition on serving beyond the fixed seven-year term, in the light of a former chair of the Commission on Audit remaining in office for 12 years despite his fixed term of seven years…
>
> Plainly, the prohibition on reappointment is intended to insure that there will be no reappointment of any kind. On the other hand, the prohibition on temporary or acting appointments is intended to prevent any circumvention of the prohibition on reappointment that may result in an appointee's total term of office exceeding seven years. The evils sought to be avoided by the twin prohibitions are very specific - reappointment of any kind and exceeding one's term in office beyond the maximum period of seven years.
>
> Not contented with these ironclad twin prohibitions, the framers of the Constitution tightened even further the screws on those who might wish to extend their terms of office. Thus, the word "designated" was inserted to plug any loophole that might be exploited by violators of the Constitution…

Section 2. (1) The Commission on Audit shall have the power, authority, and duty to examine, audit, and settle all accounts pertaining to the revenue and receipts of, and expenditures

or uses of funds and property, owned or held in trust by, or pertaining to, the Government, or any of its subdivisions, agencies, or instrumentalities, including government-owned or controlled corporations with original charters, and on a post-audit basis:
(a) constitutional bodies, commissions and offices that have been granted fiscal autonomy under this Constitution;
(b) autonomous state colleges and universities;
(c) other government-owned or controlled corporations and their subsidiaries; and
(d) such non-governmental entities receiving subsidy or equity, directly or indirectly, from or through the Government, which are required by law or the granting institution to submit to such audit as a condition of subsidy or equity. However, where the internal control system of the audited agencies is inadequate, the Commission may adopt such measures, including temporary or special pre-audit, as are necessary and appropriate to correct the deficiencies. It shall keep the general accounts of the Government and, for such period as may be provided by law, preserve the vouchers and other supporting papers pertaining thereto.

(2) The Commission shall have exclusive authority, subject to the limitations in this Article, to define the scope of its audit and examination, establish the techniques and methods required therefor, and promulgate accounting and auditing rules and regulations, including those for the prevention and disallowance of irregular, unnecessary, excessive, extravagant, or unconscionable expenditures or uses of government funds and properties.

DEVELOPMENT BANK OF THE PHILIPPINES v. COMMISSION ON AUDIT, G.R. No. 88435, January 16, 2002, 424 Phil. 411, was a petition for review on *certiorari* of the letter-decision of the Chairman of the COA and the letter-decision of the COA *en banc*, prohibiting the DBP from hiring a private external auditor. Speaking for the Court *en banc*, on a question of first impression, Justice Carpio explained that the **constitutional power of the COA to examine and audit** the DBP is not exclusive and does not preclude a concurrent audit of the DBP by a private external auditor:

The Antecedent Facts

In 1986, the Philippine government, under the administration

of then President Corazon C. Aquino, obtained from the World Bank an Economic Recovery Loan (ERL) in the amount of US$310 million. The ERL was intended to support the recovery of the Philippine economy, at that time suffering severely from the financial crisis that hit the country during the latter part of the Marcos regime.

As a condition for granting the loan, the World Bank required the Philippine government to rehabilitate the DBP which was then saddled with huge non-performing loans. Accordingly, the government committed to rehabilitate the DBP to make it a viable and self-sustaining financial institution in recognition of its developmental role in the economy. The DBP was expected to continue "providing principally medium and long-term financing to projects with risks higher than the private sector may be willing to accept under reasonable terms." The government's commitment was embodied in the Policy Statement for the Development Bank of the Philippines which stated in part:

> 4. Furthermore, like all financial institutions under Central Bank supervision, DBP will now be required to have a private external audit, and its Board of Directors will now be opened to adequate private sector representation. It is hoped that with these commitments, DBP can avoid the difficulties of the past and can function as a competitive and viable financial institution within the Philippine financial system.

On November 28, 1986, the Monetary Board adopted Resolution No. 1079 amending the Central Bank's Manual of Regulations for Banks and other Financial Intermediaries, in line with the government's commitment to the World Bank to require a private external auditor for DBP…

On December 12, 1986, pursuant to Central Bank Circular No. 1124 and the government's commitment to the World Bank, DBP Chairman Jesus Estanislao wrote the COA seeking approval of the DBP's engagement of a private external auditor in addition to the COA.

On January 2, 1987, to formalize its request for the ERL, the Philippine government sent the World Bank a letter assuring the World Bank that pursuant to Central Bank Circular No. 1124, "all Banks, including government banks, shall be fully audited by external independent auditors ... in addition to that provided by the Commission on Audit." The letter was signed

by the Central Bank Governor and the Ministers of Finance, Trade and Industry, and Economic Planning of the Philippine government.

On January 8, 1987, the Philippine government and World Bank negotiating panels reached final agreement on the private audit of the DBP, as follows:

> 13. With respect to the draft Policy Statement, it was agreed that Sections 4, 7 and 11 would be amended as follows:
> ...
> (iii) Section 11 should in line with the letter of Development Policy, confirm that the external independent audits would commence with a balance sheet audit as of December 31, 1986 and a full financial audit, including income statements, starting with the period July 1 to December 31, 1986. A copy of COA's letter (referred to in par. 1, a draft of which is attached as Annex VIII) regarding DBP's appointment of a private external auditor will be sent to the Bank before the distribution of the loan documents to the Bank's Board, along with a copy of the scope of audit as approved by COA and satisfactory to the Bank.
> With regard to the scope of the audit to be undertaken by the private external auditors, the terms of reference which will be issued to the selected auditors should be generally consistent with the attached model terms of reference for financial audits (Annex IX). These general terms of reference were discussed during negotiations and form a part of the World Bank's guidelines for financial information on financial institutions.

On January 20, 1987, then COA Chairman Teofisto Guingona, Jr. replied to the December 12, 1986 letter of the DBP Chairman. The COA Chairman's reply stated that:

> ... the Commission on Audit (COA) will interpose no objection to your engagement of a private external auditor as required by the Economic Recovery Program Loan Agreements of 1987 provided that the terms for said audit are first reviewed and approved by the Commission.

The following day, the COA Chairman also informed the Consultant of the Central Bank that the COA interposed no objection to the proposed scope of audit services to be undertaken by the private external auditors to be engaged by the DBP.

On February 18, 1987, the Board of Directors of the DBP approved the hiring of Joaquin Cunanan & Co. as the DBP's private external auditor for calendar year 1986 as required by Central Bank Circular No. 1124 and the World Bank. The DBP Board of Directors placed a ceiling on the amount of reimbursable out-of-pocket expenses that could be charged by the private auditor.

On February 23, 1987, the World Bank President, in his Report to the Bank's Executive Directors on the Philippine government's application for the ERL, certified that the Philippine government was complying with the requirement of a private external auditor. The World Bank President's certification stated that:

> 74. Accounting and Auditing. All banks both government and private are now subject to accounting and auditing standards as established by the Central Bank. To ensure full public accountability, the Monetary Board now requires that all government banks be subject to annual audits by independent private auditing firms, in addition to those normally undertaken by the Government's Commission on Audit. DBP and PNB have already selected private auditors, and audited accounts for 1986 and 1987 will be a requirement for the releases of the second and third tranches, respectively, of the ERL.

However, a change in the leadership of the COA suddenly reversed the course of events. On April 27, 1987, the new COA Chairman, Eufemio Domingo, wrote the Central Bank Governor protesting the Central Bank's issuance of Circular No. 1124 which allegedly encroached upon the COA's constitutional and statutory power to audit government agencies. The COA Chairman's letter informed the Governor that:

> This Commission hereby registers its strong objection to that portion of the CBP Circular No. 1124 which requires government banks to engage private auditors in addition to that conducted by the Commission on Audit, and urges the immediate amendment thereof. It is the position of this Commission that the said requirement: (a) infringes on Article IX-D of the Philippine Constitution; (b) violates Section 26 and 32 of the Government Auditing Code of the Philippines; (c) exposes the financial programs and strategies of the Philippine Government to high security risks; (d) allows the unnecessary and unconscionable expenditure of government funds; and (e) encourages unethical encroachment among professionals.

On May 13, 1987, after learning that the DBP had signed a contract with a private auditing firm for calendar year 1986, the new COA Chairman wrote the DBP Chairman that the COA resident auditors were under instructions to disallow any payment to the private auditor whose services were unconstitutional, illegal and unnecessary.

On July 1, 1987, the DBP Chairman sent to the COA Chairman a copy of the DBP's contract with Joaquin Cunanan & Co., signed four months earlier on March 5, 1987. The DBP Chairman's covering handwritten note sought the COA's concurrence to the contract.

During the pendency of the DBP Chairman's note-request for concurrence, the DBP paid the billings of the private auditor in the total amount of P487,321.14 despite the objection of the COA. On October 30, 1987, the COA Chairman issued a Memorandum disallowing the payments, and holding the following persons personally liable for such payment:

> SVP Fajardo who approved the voucher for payment; VP Santiago who certified that the expenditure was authorized, necessary and lawful; SM Terrel, Catuncan and Rebueno who signed the checks; and the head of office who signed the contract and who is immediately and primarily responsible for the funds of the Bank.

On January 19, 1988, the DBP Chairman wrote the COA Chairman seeking reconsideration of the COA Chairman's Memorandum. However, the DBP received no response until August 29, 1988 when the COA Chairman issued a letter-decision denying petitioner's July 1, 1987 note-request for concurrence. The letter-decision, one of the two COA decisions assailed in this petition, declared in part as follows:

> (a) In the letter to the Central Bank Governor ... this Commission clearly stated its non-negotiable stand on the issue in the following terms:
>
> > ... the very essence of the Commission on Audit as an independent constitutional commission in the total scheme of Government, is its singular function to '[E]xamine, audit, and settle ... all accounts pertaining to ... the Government, or any of its subdivisions, ... including government-owned or controlled corporations.' To allow private firms to interfere in this governmental audit domain would be to

derogate the Constitutional supremacy of State audit as the Government's guardian of the people's treasury, and as the prime advocate of economy in the use of government resources.

...

(c) In the letter to the Secretary of Finance dated January 28, 1988 ... this Commission maintains:

1. 'COA is in no way prepared to permit 'use of private auditors' except insofar as the law allows, which is 'to deputize and retain in the name of the Commission such certified public accountants and other licensed professionals not in the public service as it may deem necessary to assist government auditors in undertaking specialized audit engagements' (Sec. 31, PD No 1445). Outside of this, the Commission does not consider the matter of hiring private auditing firms a negotiable matter, and this we want to emphasize to avoid future embarrassment to the Government. The Commission on Audit is a constitutionally-created independent and separate body, and neither Congress nor the Executive Department has the power to detract from its mandated duties, functions, and powers.

2. 'Since the proceeds of the proposed loan accrue to the Republic of the Philippines as borrower, it follows that its accounting and audit must comply with the laws of this country. To specify in the Loan Agreement that the loan account, once released to the Government, shall be 'audited by independent auditors acceptable to the Bank' is not only to entirely by- pass this Commission but to ignore as well the Constitution and the laws of this country which vests in this Commission the 'power, authority, and duty to examine, audit, and settle all accounts pertaining to the revenue and receipts of, and expenditures or uses of funds and property ... pertaining to the Government.' (Sec. 2, Art. IX-D, Phil. Const.).

'Such brazen disregard of the fundamental law of this country cannot be countenanced by this Commission.'

In view of all the foregoing, you are hereby advised:

1. To desist from proceeding with the audit of Joaquin Cunanan & Co. of the Bank's financial statements for the year ending December 31, 1987.

2. To refrain from making any payments out of the funds of the Development Bank of the Philippines, in the event that such audit services have already been rendered, attention being invited to the following provisions of the Government

> Auditing Code of the Philippines:
> 'Sec. 108. General liability for unlawful expenditures - Expenditures of government funds or uses of government property in violation of law or regulations shall be a personal liability of the official or employee found to be directly responsible therefore.'
> 3. To restitute, within thirty (30) days from receipt hereof, the total amount of P513,549.24 under CV Nos. 9136, 5014, 6201 and 4082 for professional services rendered in the audit of the 1986 financial operations of the Bank. Pursuant to the aforequoted provisions of law, such unlawful expenditure is the personal liability of the official directly responsible therefore.
> Please be guided accordingly.

On September 26, 1988, the DBP Chairman appealed the letter-decision to the COA *en banc*. On May 20, 1989, the COA *en banc*, in a letter-decision, denied the DBP's appeal. This letter-decision, now also assailed by the DBP, held that:

> Upon a circumspect evaluation of the grounds upon which your instant request is predicated, this Commission finds the same to be devoid of merit. As hereunder demonstrated, the justifications offered do not inspire rational belief in the mind of this Commission.
> First, it bears stress that CB Circular No. 1124, series of 1986, which has earlier been shown to be constitutionally and legally infirm, cannot by any means possess any binding and conclusive effect upon this Commission and, hence, may not be properly invoked in support of the instant appeal.
> Secondly, it was not the International Bank for Reconstruction and Development which required the audit of government banks by private auditing firm, but the Central Bank itself.
> Thirdly, insofar as this Commission is concerned, PD 2029 is an anachronism of sorts if viewed in the light of the present Constitution recognizing this Commission as the supreme and exclusive audit institution of the government. This is necessarily implicit from the bare language of Section 2(1), Article IX-D thereof which, despite the absence of the qualifying adjective "exclusive" that anyway would be a surplusage, ought to be reasonably construed as vesting in this Commission the "power, authority, and duty" to audit all government accounts to the exclusion of any other person or entity, whether in the public or the private sector. *Expressio unius est exclusio alterius*. A contrary interpretation, such

as that being pressed upon this Commission, would reduce this constitutional ordinance to an absurdity (*reductio ad absurdum*) as it thereby would give rise to the rather confusing spectacle, as it were, of a government agency or corporation being audited not only by this Commission but also and in addition thereto by one or two or several private accounting firms - certainly a situation never intended by the framers of the Constitution.

Lastly, while this Commission has not lost sight of the letter of then COA Chairman Guingona, Jr. to the DBP Chairman, dated January 20, 1987, it has opted to be guided and influenced by the more persuasive and controlling COA Circular No. 860254 dated March 24, 1986, which in categorical and precise terms ordained that:

> Accordingly, by way of reassertion and reaffirmation of its primary audit jurisdiction, as herein above defined, the Commission on Audit hereby issues the following directives:
>
> 1. Any ongoing audit of a government-owned and/or controlled corporation or any of its subsidiaries or corporate offsprings being conducted by a private auditor or accounting firm shall cease and terminate on April 15, 1986. Henceforth, from and after said date, the audit of said corporate entity shall be undertaken solely and exclusively by the Commission on Audit. ...

Premises considered, it is regretted that your instant request for reconsideration has to be, as it is hereby, denied.

Hence, on June 14, 1989 the DBP filed this petition for review with prayer for a temporary restraining order, assailing the two COA letter-decisions for being contrary to the Constitution and existing laws. On June 15, 1989 this Court issued a temporary restraining order directing the COA to cease and desist from enforcing its challenged letter-decisions. The Office of the Solicitor General, in a Manifestation dated October 18, 1989, declined to appear on behalf of the COA on the ground that the Solicitor General was "taking a position adverse to that of the COA." Consequently, a private counsel on pro bono basis represented the COA.

The Issues

The DBP's petition raises the following issues:

1. Does the Constitution vest in the COA the sole and

exclusive power to examine and audit government banks so as to prohibit concurrent audit by private external auditors under any circumstance?…
3. If there is no legal impediment to the hiring by government banks of a private auditor, was the hiring by the DBP of a private auditor in the case at bar necessary, and were the fees paid by DBP to the private auditor reasonable, under the circumstances?

The Court's Ruling

The DBP's petition is meritorious.

Power of COA to Audit under the Constitution

The resolution of the primordial issue of whether or not the COA has the sole and exclusive power to examine and audit government banks involves an interpretation of Section 2, Article IX-D of the 1987 Constitution…

The COA vigorously asserts that under the first paragraph of Section 2, the COA enjoys the sole and exclusive power to examine and audit all government agencies, including the DBP. The COA contends this is similar to its sole and exclusive authority, under the second paragraph of the same Section, to define the scope of its audit, promulgate auditing rules and regulations, including rules on the disallowance of unnecessary expenditures of government agencies. The bare language of Section 2, however, shows that the COA's power under the first paragraph is not declared exclusive, while its authority under the second paragraph is expressly declared "exclusive." There is a significant reason for this marked difference in language.

During the deliberations of the Constitutional Commission, Commissioner Serafin Guingona proposed the addition of the word "exclusive" in the first paragraph of Section 2, thereby granting the COA the sole and exclusive power to examine and audit all government agencies. However, the Constitutional Commission rejected the addition of the word "exclusive" in the first paragraph of Section 2 and Guingona was forced to withdraw his proposal. Commissioner Christian Monsod explained the rejection in this manner:

MR. MONSOD. Earlier Commissioner Guingona, in withdrawing his amendment to add "Exclusive" made a

> statement about the preponderant right of COA.
> For the record, we would like to clarify the reason for not including the word. First, we do not want an Article that would constitute a disincentive or an obstacle to private investment. There are government institutions with private investments in them, and some of these investors - Filipinos, as well as in some cases, foreigners - require the presence of private auditing firms, not exclusively, but concurrently. So this does not take away the power of the Commission on Audit. Second, there are certain instances where private auditing may be required, like the listing in the stock exchange. In other words, we do not want this provision to be an unnecessary obstacle to privatization of these companies or attraction of investments.[86]

Shortly thereafter, Commissioner Guingona attempted to resurrect his amendment by proposing the following provision:

> Private auditing firms may not examine or audit accounts pertaining to the revenue and receipts of, and expenditures or uses of funds and property owned or held in trust by or pertaining to the Government or any of its subdivisions, agencies or instrumentalities.[87]

Guingona argued that a private audit in addition to the COA audit would be a useless duplication and an unnecessary expense on the part of government.

The Constitutional Commission also rejected this proposed provision, after Commissioner Monsod made the following explanation:

> MR. MONSOD. ... But it is also a fact that even government agencies, instrumentalities and subdivisions sometimes borrow money from abroad. And if we are at all going to preclude the possibility of any concurrent auditing, if that is required, and insist that it is only exclusively the government which can audit, we may be unnecessarily tying their hands without really accomplishing much more than what we want. As long as the COA is there, and the COA's power cannot be eliminated by law, by decree or anything of that sort, then the government funds are protected.

[86] V Record, Constitutional Commission 607.
[87] Id. p. 614.

> As far as the question of fees is concerned, this is always negotiable. Besides, if one talks about auditing fees, these are governed by certain regulations within the auditing profession, beyond which auditing firms cannot go. Furthermore, the government can always refuse to pay unconscionable fees. So, that matter really is not that relevant. But I think what we want to insist on is that there should be some flexibility so that a procedural requirement does not impede a substantive transaction as long as COA is there.[88]

The rejection of Guingona's second proposal put an end to all efforts to grant the COA the sole and exclusive power to examine and audit government agencies.

In sharp contrast, the Constitutional Commission placed the word "exclusive" to qualify the authority of the COA under the second paragraph of the same Section 2. The word "exclusive" did not appear in the counterpart provisions of Section 2 in the 1935 and 1973 Constitutions.

There is no dispute that the COA's authority under the second paragraph of Section 2 is exclusive as the language of the Constitution admits of no other meaning. Thus, the COA has the exclusive authority to decide on disallowances of unnecessary government expenditures. Other government agencies and their officials, as well as private auditors engaged by them, cannot in any way intrude into this exclusive function of the COA.

The qualifying word "exclusive" in the second paragraph of Section 2 cannot be applied to the first paragraph which is another sub-section of Section 2. A qualifying word is intended to refer only to the phrase to which it is immediately associated, and not to a phrase distantly located in another paragraph or sub-section.[89] Thus, the first paragraph of Section 2 must be read the way it appears, without the word "exclusive", signifying that non-COA auditors can also examine and audit government agencies. Besides, the framers of the Constitution intentionally omitted the word "exclusive" in the first paragraph of Section 2 precisely to allow concurrent audit by private external auditors.

The clear and unmistakable conclusion from a reading of the entire Section 2 is that the COA's power to examine

[88] Ibid.

[89] Felipe v. De la Cruz, 99 Phil. 940 (1956); Tirona v. Cudiamat, 14 SCRA 264 (1965).

and audit is non-exclusive. On the other hand, the COA's authority to define the scope of its audit, promulgate auditing rules and regulations, and disallow unnecessary expenditures is exclusive.

Moreover, as the constitutionally mandated auditor of all government agencies, the COA's findings and conclusions necessarily prevail over those of private auditors, at least insofar as government agencies and officials are concerned. The superiority or preponderance of the COA audit over private audit can be gleaned from the records of the Constitutional Commission, as follows:

> MR. GUINGONA. Madam President, after consultation with the honorable members of the Committee, I have amended my proposed amendment by deleting the word EXCLUSIVE because I was made to understand that the Commission on Audit will still have the preponderant power and authority to examine, audit and settle.[90]

The findings and conclusions of the private auditor may guide private investors or creditors who require such private audit. Government agencies and officials, however, remain bound by the findings and conclusions of the COA, whether the matter falls under the first or second paragraph of Section 2, unless of course such findings and conclusions are modified or reversed by the courts…

Manifestly, the express language of the Constitution, and the clear intent of its framers, point to only one indubitable conclusion - the COA does not have the exclusive power to examine and audit government agencies. The framers of the Constitution were fully aware of the need to allow independent private audit of certain government agencies in addition to the COA audit, as when there is a private investment in a government-controlled corporation, or when a government corporation is privatized or publicly listed, or as in the case at bar when the government borrows money from abroad.

In these instances the government enters the marketplace and competes with the rest of the world in attracting investments or loans. To succeed, the government must abide with the reasonable business practices of the marketplace. Otherwise

[90] V Record, Constitutional Commission 605.

no investor or creditor will do business with the government, frustrating government efforts to attract investments or secure loans that may be critical to stimulate moribund industries or resuscitate a badly shattered national economy as in the case at bar. By design the Constitution is flexible enough to meet these exigencies. Any attempt to nullify this flexibility in the instances mentioned, or in similar instances, will be ultra vires, in the absence of a statute limiting or removing such flexibility.

The deliberations of the Constitutional Commission reveal eloquently the intent of Section 2, Article IX- D of the Constitution. As this Court has ruled repeatedly, the intent of the law is the controlling factor in the interpretation of the law.[91] If a law needs interpretation, the most dominant influence is the intent of the law.[92] The intent of the law is that which is expressed in the words of the law, which should be discovered within its four corners aided, if necessary, by its legislative history.[93] In the case of Section 2, Article IX-D of the Constitution, the intent of the framers of the Constitution is evident from the bare language of Section 2 itself. The deliberations of the Constitutional Commission confirm expressly and even elucidate further this intent beyond any doubt whatsoever.

…

Necessity of Private Auditor and Reasonableness of the Fees

The remaining issue to be resolved is whether or not the DBP's hiring of a private auditor was necessary and the fees it paid reasonable under the circumstances. The hiring by the DBP of a private auditor was a condition imposed by the World Bank for the grant to the Philippine government in early 1987 of a US$310 million Economic Recovery Loan, at a time when the government desperately needed funds to revive a badly battered economy. One of the salient objectives of the US$310 million loan was the rehabilitation of the DBP which was then burdened with enormous bad loans. The rehabilitation of the DBP was important in the overall recovery of the national economy.

On February 23, 1986, the World Bank President reported to the

[91] People v. Purisima, 86 SCRA 542 (1978); Yellow Taxi & Pasay Transport Workers' Union v. Manila Yellow Taxi Cab. Co., 80 Phil. 833 (1948); Ledesma v. Pictain, 79 Phil. 95 (1947); Torres v. Limjap, 56 Phil 141 (1931).

[92] De Jesus v. City of Manila, 29 Phil. 73 (1914).

[93] Manila Lodge No. 761 v. Court of Appeals, 73 SCRA 162 (1976).

Bank's Executive Directors that the privately audited accounts of the DBP for 1986 and 1987 "will be a requirement for the releases of the second and third tranches, respectively, of the ERL" (Emphasis supplied). Moreover, the Agreed Minutes of Negotiations on the Philippine Economic Recovery Program signed by the Philippine government and World Bank negotiating panels on January 8, 1987, required that "a copy of COA's letter ... regarding DBP's appointment of a private external auditor will be sent to the (World) Bank before the distribution of the loan documents to the Bank's Board, along with a copy of the scope of audit as approved by COA and satisfactory to the Bank".

As a creditor, the World Bank needed the private audit for its own information to monitor the progress of the DBP's rehabilitation. This is apparent from the said Agreed Minutes which provided that the "general terms of reference (for the hiring of private external audit) were discussed during the negotiations and form part of the World Bank's guidelines for financial information on financial institutions".

The hiring of a private auditor being an express condition for the grant of the US$310 million Economic Recovery Loan, a major objective of which was the DBP's rehabilitation, the same was a necessary corporate act on the part of the DBP. The national government, represented by the Central Bank Governor, as well as the Ministers of Finance, Trade, and Economic Planning, had already committed to the hiring by all government banks of private auditors in addition to the COA. For the DBP to refuse to hire a private auditor would have aborted the vital loan and derailed the national economic recovery, resulting in grave consequences to the entire nation. The hiring of a private auditor was not only necessary based on the government's loan covenant with the World Bank, it was also necessary because it was mandated by Central Bank Circular No. 1124 under pain of administrative and penal sanctions.

The last matter to determine is the reasonableness of the fees charged by Joaquin C. Cunanan & Co., the private auditor hired by the DBP. The COA describes the private auditor's fees as an "excessive, extravagant or unconscionable expenditure" of government funds. For the audit of the DBP's financial statements in 1986, the private auditor billed the DBP the amount of P487,321.14. In 1987, the private auditor billed the DBP the amount of P529,947.00. In comparison, the COA billed the DBP an audit fee of P27,015,963.00 in 1988, and P15,421,662.00 in

> 1989. Even granting that the COA's scope of audit services was broader, still it could not be said that the private auditor's fees are excessive, extravagant or unconscionable compared to the COA's billings.
>
> The hiring of a private auditor by the DBP being a condition of the US$310 million World Bank loan to the Philippine government, the fees of such private auditor are in reality part of the government's cost of borrowing from the World Bank. The audit report of the private auditor is primarily intended for the World Bank's information on the financial status of the DBP whose rehabilitation was one of the objectives of the loan. An annual private audit fee of about half a million pesos added to the interest on a US$310 million loan would hardly make the cost of borrowing excessive, extravagant or unconscionable. Besides, the condition imposed by a lender, whose money is at risk, requiring the borrower or its majority-owned subsidiaries to submit to audit by an independent public accountant, is a reasonable and normal business practice.

Then in **NATIONAL ELECTRIFICATION ADMINISTRATION v. COMMISSION ON AUDIT**, G. R. No. 143481, February 15, 2002, 427 Phil. 464, a petition for *certiorari,* with prayer for preliminary injunction and temporary restraining order, to reverse and set aside the COA's decision that disallowed the payment of accelerated increases to NEA officials and employees, NEA argued that the COA did not have the authority to inquire into NEA's advance release of salary increases, considering that the COA's power was limited to a determination of whether or not there is a law appropriating funds for that purpose. Justice Carpio, speaking for the Court *en banc*, explained why this was erroneous:

> To support this theory, NEA cites *Guevara v. Gimenez*,[94] wherein the Supreme Court allegedly outlined the scope of authority of the Commission as follows:
>
> > Under the Constitution, the authority of the Auditor General in connection with the expenditures of the government is limited to the auditing of expenditures of fund or property pertaining to, or held in trust by, the government or the provinces or municipalities thereof. ... Such function is limited to a determination of whether there is a law appropriating funds for a given purpose.

[94] 6 SCRA 813 (1962).

The ruling in *Guevara* has already been overturned by the Court in *Caltex Philippines, Inc. v. Commission on Audit*,[95] as follows:

> The ruling on this particular point, quoted by petitioner from the cases of *Guevara v. Gimenez* and *Ramos v. Aquino*, are no longer controlling as the two (2) were decided in the light of the 1935 Constitution.
> ... As observed by one of the Commissioners of the 1986 Constitutional Commission, Fr. Joaquin G. Bernas:
>
> > It should be noted, however, that whereas under Article XI, Section 2, of the 1935 Constitution the Auditor General could not correct 'irregular, unnecessary, excessive or extravagant' expenditures of public funds but could only 'bring [the matter] to the attention of the proper administrative officer,' under the 1987 Constitution, as also under the 1973 Constitution, the Commission on Audit can 'promulgate accounting and auditing rules and regulations including those for the prevention and disallowance of irregular, unnecessary, excessive, extravagant, or unconscionable expenditures or uses of government funds and properties.' Hence, since the Commission on Audit must ultimately be responsible for the enforcement of these rules and regulations, the failure to comply with these regulations can be a ground for disapproving the payment of a proposed expenditure.
>
> Indeed, the powers of the Commission as provided in the 1987 Constitution are broader and more extensive (as provided in Section 2, Article IX-D)…
>
> The Constitution and existing laws[96] mandate the Commission to audit all government agencies, including government-owned or controlled corporations. The Constitution specifically vests in the Commission the authority to determine whether government entities comply with laws and regulations in the disbursement of government funds and to disallow illegal or irregular disbursements of government funds.

Again in **PARREÑO v. COMMISSION ON AUDIT**, G.R. No. 162224, June 07, 2007, 551 Phil. 368,[97] an *en banc* decision, which dismissed a petition for *certiorari* that assailed a decision and

[95] 208 SCRA 726 (1992).
[96] Including the Government Auditing Code of the Philippines, specifically Sec. 26 thereof…
[97] See discussion under Art. III, Sec. 1.

resolution of the COA, Justice Carpio discussed the scope of **COA's jurisdiction**:

> **The Ruling of the Commission on Audit**
>
> In its 9 January 2003 Decision, the COA denied petitioner's claim for lack of jurisdiction. The COA ruled:
>
> > It becomes immediately noticeable that the resolution of the issue at hand hinges upon the validity of Section 27 of P.D. No. 1638, as amended. Pursuant to the mandate of the Constitution, whenever a dispute involves the validity of laws, "the courts, as guardians of the Constitution, have the inherent authority to determine whether a statute enacted by the legislature transcends the limit imposed by the fundamental law. Where the statute violates the Constitution, it is not only the right but the duty of the judiciary to declare such act as unconstitutional and void." (*Tatad v. Secretary of Department of Energy*, 281 SCRA 330) That being so, prudence dictates that this Commission defer to the authority and jurisdiction of the judiciary to rule in the first instance upon the constitutionality of the provision in question.
> > Premises considered, the request is denied for lack of jurisdiction to adjudicate the same. Claimant is advised to file his claim with the proper court of original jurisdiction.
>
> Petitioner filed a motion for reconsideration. Petitioner alleged that the COA has the power and authority to incidentally rule on the constitutionality of Section 27 of PD 1638, as amended. Petitioner alleged that a direct recourse to the court would be dismissed for failure to exhaust administrative remedies. Petitioner further alleged that since his monthly pension involves government funds, the reason for the termination of the pension is subject to COA's authority and jurisdiction.
>
> In its 13 January 2004 Resolution, the COA denied the motion. The COA ruled that the doctrine of exhaustion of administrative remedies does not apply if the administrative body has, in the first place, no jurisdiction over the case. The COA further ruled that even if it assumed jurisdiction over the claim, petitioner's entitlement to the retirement benefits he was previously receiving must necessarily cease upon the loss of his Filipino citizenship in accordance with Section 27 of PD 1638, as amended.

Hence, the petition before this Court.

The Issues

Petitioner raises the following issues:

… 2. Whether the COA has jurisdiction to rule on the constitutionality of Section 27 of PD 1638, as amended...

The Ruling of this Court

The petition has no merit.

Jurisdiction of the COA

Petitioner filed his money claim before the COA. A money claim is "a demand for payment of a sum of money, reimbursement or compensation arising from law or contract due from or owing to a government agency."[98] Under Commonwealth Act No. 327,[99] as amended by Presidential Decree No. 1445,[100] money claims against the government shall be filed before the COA.[101]

Section 2(1), Article IX-D of the 1987 Constitution prescribes the powers of the COA…

The jurisdiction of the COA over money claims against the government does not include the power to rule on the constitutionality or validity of laws. The 1987 Constitution vests the power of judicial review or the power to declare unconstitutional a law, treaty, international or executive agreement, presidential decree, order, instruction, ordinance, or regulation in this Court and in all Regional Trial Courts.[102] Petitioner's money claim essentially involved the constitutionality of Section 27 of PD 1638, as amended. Hence, the COA did not commit grave abuse of discretion in dismissing petitioner's money claim.

Petitioner submits that the COA has the authority to order the restoration of his pension even without ruling on the constitutionality of Section 27 of PD 1638, as amended. The COA

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[98] 1997 Revised Rules of Procedure of the Commission on Audit Rule I, Sec. 4(o).

[99] An Act Fixing The Time Within Which The Auditor General Shall Render His Decisions And Prescribing The Manner Of Appeal Therefrom (1938).

[100] Ordaining And Instituting A Government Auditing Code Of The Philippines (1978).

[101] See Department of Agriculture v. NLRC, G.R. No. 104269, 11 November 1993, 227 SCRA 693; Carabao, Inc. v. Agricultural Productivity Commission, 146 Phil. 236 (1970).

[102] Spouses Mirasol v. Court of Appeals, 403 Phil. 760 (2001).

actually ruled on the matter in its 13 January 2004 Resolution, thus:

> Furthermore, assuming arguendo that this Commission assumed jurisdiction over the instant case, claimant's entitlement to the retirement benefits he was previously receiving must necessarily be severed or stopped upon the loss of his Filipino citizenship as prescribed in Section 27, P.D. No. 1638, as amended by P.D. No. 1650.

The COA effectively denied petitioner's claim because of the loss of his Filipino citizenship…

Finally, in **TECHNICAL EDUCATION AND SKILLS DEVELOPMENT AUTHORITY v. COMMISSION ON AUDIT**, G.R. No. 204869, March 11, 2014, 729 Phil. 60,[103] a petition for *certiorari* to annul the decision of the COA that disallowed payments of Extraordinary and Miscellaneous Expenses (EME) by the TESDA to its officials, Justice Carpio, for the Court *en banc*, reiterated the scope of the **COA's jurisdiction under Section 2(2) of this Article IX-D**:

> **The Constitution vests COA, as guardian of public funds, with enough latitude to determine, prevent and disallow irregular, unnecessary, excessive, extravagant or unconscionable expenditures of government funds. The COA is generally accorded complete discretion in the exercise of its constitutional duty and the Court generally sustains its decisions in recognition of its expertise in the laws it is entrusted to enforce.**[104]
>
> **Only when COA acts without or in excess of jurisdiction, or with grave abuse of discretion amounting to lack or excess of jurisdiction, may the Court grant a petition assailing COA's actions. There is grave abuse of discretion when there is an evasion of a positive duty or a virtual refusal to perform a duty enjoined by law or to act in contemplation of law as when the judgment rendered is not based on law and evidence but on caprice, whim and despotism.**[105]

[103] See discussion under Art. VI, Sec. 29(1).
[104] Nazareth v. Villar, G.R. No. 188635, 29 January 2013, 689 SCRA 385; Yap v. COA, G.R. No. 158562, 23 April 2010, 619 SCRA 154; Sanchez v. COA, 575 Phil. 428 (2008).
[105] Yap v. COA, G.R. No. 158562, 23 April 2010, 619 SCRA 154, citing Ferrer v. Office of the Ombudsman, 583 Phil. 50 (2008).

> We do not find any grave abuse of discretion when COA disallowed the disbursement of EME to TESDA officials for being excessive and unauthorized by law, specifically the 2004-2007 GAAs …
> The GAA provisions are clear that the EME shall not exceed the amounts fixed in the GAA. The GAA provisions are also clear that only the officials named in the GAA, the officers of equivalent rank as may be authorized by the DBM, and the offices under them are entitled to claim EME not exceeding the amount provided in the GAA.
>
> The COA faithfully implemented the GAA provisions. COA Circular No. 2012-001 states that the amount fixed under the GAA for the National Government offices and officials shall be the ceiling in the disbursement of EME. COA Circular No. 89-300, prescribing the guidelines in the disbursement of EME, likewise states that the amount fixed by the GAA shall be the basis for the control in the disbursement of these funds.

Section 3. No law shall be passed exempting any entity of the Government or its subsidiaries in any guise whatever, or any investment of public funds, from the jurisdiction of the Commission on Audit.

In **DEVELOPMENT BANK OF THE PHILIPPINES v. COMMISSION ON AUDIT**, G.R. No. 88435, January 16, 2002, 424 Phil. 411, discussed above,[106] Justice Carpio explained the importance of **Section 3 of this Article IX-D:**

> **The power of the COA to examine and audit government agencies, while non-exclusive, cannot be taken away from the COA. Section 3, Article IX-D of the Constitution mandates (it)…**
>
> The mere fact that private auditors may audit government agencies does not divest the COA of its power to examine and audit the same government agencies. The COA is neither by-passed nor ignored since even with a private audit the COA will still conduct its usual examination and audit, and its findings and conclusions will still bind government agencies and their officials. A concurrent private audit poses no danger whatsoever of public funds or assets escaping the usual scrutiny of a COA

[106] See discussion under Art. IX-D, Sec. 2.

audit …

The DBP also relies on Section 8 of PD No. 2029[107] as its statutory basis for hiring a private auditor. This Section states in part as follows:

> The audit of government corporations by the Commission on Audit shall not preclude government corporations from engaging the services of private auditing firms: Provided, however, that even if the services of the latter are availed of, the audit report of the Commission on Audit shall serve as the report for purposes of compliance with audit requirements as required of government corporations under applicable law.

Section 8 of PD No. 2029, however, also provides that the "policy of withdrawal of resident auditors shall be fully implemented ..." Section 2 of the same decree also excludes from the term "government-owned or controlled corporation" two classes of corporations. The first are originally private corporations the majority of the shares of stock of which are acquired by government financial institutions through foreclosure or *dacion en pago*. The second are subsidiary corporations of government corporations, which subsidiaries are organized exclusively to own, manage or lease physical assets acquired by government financial institutions through foreclosure or *dacion en pago*. Claiming that PD No. 2029 operates to exempt certain government-owned corporations from the COA's jurisdiction in violation of Section 3, Article IX-D of the Constitution, the COA is questioning the constitutionality of PD No. 2029.

There is, however, no compelling need to pass upon the constitutionality of PD No. 2029 because the Constitution and existing banking laws allow such hiring. The issues raised in this case can be resolved adequately without resolving the constitutionality of PD No. 2029. This Court will leave the issue of the constitutionality of PD No. 2029 to be settled in another case where its resolution is an absolute necessity.[108]

In **FELICIANO v. COMMISSION ON AUDIT,** G.R. No. 147402, January 14, 2004, 464 Phil. 439, a petition for *certiorari* to annul the

[107] Defining Government-Owned Or Controlled Corporations And Identifying Their Role In National Development.
[108] Alger v. Court of Appeals, 135 SCRA 37 (1985).

COA's resolution and its decision denying a motion for reconsideration, Justice Carpio, speaking for the Court *en banc*, ruled that the second sentence of Section 20 of Presidential Decree No. 198 was void for being inconsistent with **Sections 2(1) and 3, Article IX-D - the constitutional provisions that provide for the audit jurisdiction**[109] of the COA:

> **Antecedent Facts**
>
> A Special Audit Team from COA Regional Office No. VIII audited the accounts of LMWD.[110] Subsequently, LMWD received a letter from COA dated 19 July 1999 requesting payment of auditing fees. As General Manager of LMWD, petitioner sent a reply dated 12 October 1999 informing COA's Regional Director that the water district could not pay the auditing fees. Petitioner cited as basis for his action Sections 6 and 20 of Presidential Decree 198 (PD 198)[111], as well as Section 18 of Republic Act No. 6758 (RA 6758). The Regional Director referred petitioner's reply to the COA Chairman on 18 October 1999.
>
> On 19 October 1999, petitioner wrote COA through the Regional Director asking for refund of all auditing fees LMWD previously paid to COA.
>
> On 16 March 2000, petitioner received COA Chairman Celso D. Gangan's Resolution dated 3 January 2000 denying his requests. Petitioner filed a motion for reconsideration on 31 March 2000, which COA denied on 30 January 2001.
>
> On 13 March 2001, petitioner filed this instant petition. Attached to the petition were resolutions of the Visayas Association of Water Districts (VAWD) and the Philippine Association of Water Districts (PAWD) supporting the petition.
>
> **The Ruling of the Commission on Audit**
>
> The COA ruled that this Court has already settled COA's audit jurisdiction over local water districts in *Davao City Water District v. Civil Service Commission and Commission on Audit,*[112] as follows:

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[109] See also De Jesus v. COA, G.R. No. 149154, June 10, 2003, 451 Phil. 812, an *en banc* decision penned by Justice Carpio.

[110] Leyte Metropolitan Water District.

[111] As amended by PD Nos. 768 and 1479.

[112] G.R. Nos. 95237-38, 13 September 1991, 201 SCRA 593.

> The above-quoted provision [referring to Section 3(b) PD 198] definitely sets to naught petitioner's contention that they are private corporations. It is clear therefrom that the power to appoint the members who will comprise the members of the Board of Directors belong to the local executives of the local subdivision unit where such districts are located. In contrast, the members of the Board of Directors or the trustees of a private corporation are elected from among members or stockholders thereof. It would not be amiss at this point to emphasize that a private corporation is created for the private purpose, benefit, aim and end of its members or stockholders. Necessarily, said members or stockholders should be given a free hand to choose who will compose the governing body of their corporation. But this is not the case here and this clearly indicates that petitioners are not private corporations.

The COA also denied petitioner's request for COA to stop charging auditing fees as well as petitioner's request for COA to refund all auditing fees already paid.

The Issues

Petitioner contends that COA committed grave abuse of discretion amounting to lack or excess of jurisdiction by auditing LMWD and requiring it to pay auditing fees. Petitioner raises the following issues for resolution:

> 1. Whether a Local Water District (LWD) created under PD 198, as amended, is a government-owned or controlled corporation subject to the audit jurisdiction of COA[113];
> 2. Whether Section 20 of PD 198, as amended, prohibits COA's certified public accountants from auditing local water districts; and
> 3. Whether Section 18 of RA 6758 prohibits the COA from charging government-owned and controlled corporations auditing fees.

The Ruling of the Court

The petition lacks merit.

The Constitution and existing laws[114] mandate COA to audit

[113] See also discussion under Art. XII, Sec. 16.
[114] Government Auditing Code Of The Philippines, Sec. 26.

all government agencies, including government-owned and controlled corporations (GOCCs) with original charters. An LWD is a GOCC with an original charter. Section 2(1), Article IX-D of the Constitution provides for COA's audit jurisdiction…

The COA's audit jurisdiction extends not only to government "agencies or instrumentalities," but also to "government-owned and controlled corporations with original charters" as well as "other government-owned or controlled corporations" without original charters.
…

Petitioner also contends that LWDs are private corporations because Section 6 of PD 198[115] declares that LWDs "shall be considered quasi-public" in nature. Petitioner's rationale is that only private corporations may be deemed "quasi-public" and not public corporations. Put differently, petitioner rationalizes that a public corporation cannot be deemed "quasi-public" because such corporation is already public. Petitioner concludes that the term "quasi-public" can only apply to private corporations. Petitioner's argument is inconsequential.

Petitioner forgets that the constitutional criterion on the exercise of COA's audit jurisdiction depends on the government's ownership or control of a corporation. The nature of the corporation, whether it is private, quasi-public, or public is immaterial.

The Constitution vests in the COA audit jurisdiction over "government-owned and controlled corporations with original charters," as well as "government-owned or controlled corporations" without original charters. GOCCs with original charters are subject to COA pre-audit, while GOCCs without original charters are subject to COA post-audit. GOCCs without original charters refer to corporations created under the Corporation Code but are owned or controlled by the government. **The nature or purpose of the corporation is not material in determining COA's audit jurisdiction. Neither is the manner of creation of a corporation, whether under a general or special law.**

The determining factor of COA's audit jurisdiction is government ownership or control of the corporation. In *Philippine Veterans Bank Employees Union-NUBE v. Philippine*

[115] As amended by PD 1479.

Veterans Bank,[116] the Court even ruled that the criterion of ownership and control is more important than the issue of original charter, thus:

> This point is important because the Constitution provides in its Article IX-B, Section 2(1) that "the Civil Service embraces all branches, subdivisions, instrumentalities, and agencies of the Government, including government-owned or controlled corporations with original charters." As the Bank is not owned or controlled by the Government although it does have an original charter in the form of RA No. 3518, it clearly does not fall under the Civil Service and should be regarded as an ordinary commercial corporation. Section 28 of the said law so provides. The consequence is that the relations of the Bank with its employees should be governed by the labor laws, under which in fact they have already been paid some of their claims.

Certainly, the government owns and controls LWDs. The government organizes LWDs in accordance with a specific law, PD 198. There is no private party involved as co-owner in the creation of an LWD. Just prior to the creation of LWDs, the national or local government owns and controls all their assets. The government controls LWDs because under PD 198 the municipal or city mayor, or the provincial governor, appoints all the board directors of an LWD for a fixed term of six years.[117] The board directors of LWDs are not co-owners of the LWDs. LWDs have no private stockholders or members. The board directors and other personnel of LWDs are government employees subject to civil service laws[118] and anti-graft laws.[119]

While Section 8 of PD 198 states that "[N]o public official shall serve as director" of an LWD, it only means that the appointees to the board of directors of LWDs shall come from the private sector. Once such private sector representatives assume office as directors, they become public officials governed by the civil service law and anti-graft laws. Otherwise, Section 8 of PD 198 would contravene Section 2(1), Article IX-B of the Constitution declaring that the civil service includes "government-owned or controlled corporations with original charters."

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[116] G.R. No. 67125, 24 August 1990, 189 SCRA 14.

[117] See PD 198, Sec. 3 (b).

[118] Baguio Water District v. Trajano, 212 Phil. 674 (1984); Davao City Water District v. CSC, G.R. No. 95237-38, 13 September 1991, 201 SCRA 593.

[119] Morales v. People, G.R. No. 144047, 26 July 2002, 385 SCRA 259.

If LWDs are neither GOCCs with original charters nor GOCCs without original charters, then they would fall under the term "agencies or instrumentalities" of the government and thus still subject to COA's audit jurisdiction. However, the stark and undeniable fact is that the government owns LWDs.

Section 45[120] of PD 198 recognizes government ownership of LWDs when Section 45 states that the board of directors may dissolve an LWD only on the condition that "another public entity has acquired the assets of the district and has assumed all obligations and liabilities attached thereto." The implication is clear that an LWD is a public and not a private entity.

Petitioner does not allege that some entity other than the government owns or controls LWDs. Instead, petitioner advances the theory that the "Water District's owner is the District itself."

Assuming for the sake of argument that an LWD is "self-owned," as petitioner describes an LWD, the government in any event controls all LWDs. First, government officials appoint all LWD directors to a fixed term of office. Second, any per diem of LWD directors in excess of P50 is subject to the approval of the Local Water Utilities Administration, and directors can receive no other compensation for their services to the LWD.[121] Third, the Local Water Utilities Administration can require LWDs to merge or consolidate their facilities or operations.[122] This element of government control subjects LWDs to COA's audit jurisdiction.

Petitioner argues that upon the enactment of PD 198, LWDs became private entities through the transfer of ownership of water facilities from local government units to their respective water districts as mandated by PD 198. Petitioner is grasping at straws. Privatization involves the transfer of government assets to a private entity. Petitioner concedes that the owner of the assets transferred under Section 6 (c) of PD 198 is no other than the LWD itself. The transfer of assets mandated by PD 198 is a transfer of the water systems facilities "managed, operated by or under the control of such city, municipality or province to such (water) district."[123] In short, the transfer is from one government entity to another government entity. PD 198 is bereft of any indication that the transfer is to privatize the operation and

[120] As amended by PD 768.
[121] PD 198, Sec. 13.
[122] PD 198, Sec. 43.
[123] PD 198, Sec. 6(c), as amended by PD 768.

control of water systems.

Finally, petitioner claims that even on the assumption that the government owns and controls LWDs, Section 20 of PD 198 prevents COA from auditing LWDs.[124] Section 20 of PD 198 provides:

> Sec. 20. System of Business Administration. - The Board shall, as soon as practicable, prescribe and define by resolution a system of business administration and accounting for the district, which shall be patterned upon and conform to the standards established by the Administration. Auditing shall be performed by a certified public accountant not in the government service. The Administration may, however, conduct annual audits of the fiscal operations of the district to be performed by an auditor retained by the Administration. Expenses incurred in connection therewith shall be borne equally by the water district concerned and the Administration.

Petitioner argues that PD 198 expressly prohibits COA auditors, or any government auditor for that matter, from auditing LWDs. Petitioner asserts that this is the import of the second sentence of Section 20 of PD 198 when it states that "[A]uditing shall be performed by a certified public accountant not in the government service."

PD 198 cannot prevail over the Constitution. No amount of clever legislation can exclude GOCCs like LWDs from COA's audit jurisdiction. Section 3, Article IX-C of the Constitution outlaws any scheme or devise to escape COA's audit jurisdiction…

The framers of the Constitution added Section 3, Article IX-D of the Constitution precisely to annul provisions of Presidential Decrees, like that of Section 20 of PD 198, that exempt GOCCs from COA audit. The following exchange in the deliberations of the Constitutional Commission elucidates this intent of the framers:

> MR. OPLE: I propose to add a new section on line 9, page 2 of the amended committee report which reads: no law shall be passed exempting any entity of the government or

[124] As amended by PD Nos. 768 and 1479.

its subsidiary in any guise whatever, or any investments of public funds, from the jurisdiction of the Commission on Audit.

May I explain my reasons on record.

We know that a number of entities of the government took advantage of the absence of a legislature in the past to obtain presidential decrees exempting themselves from the jurisdiction of the Commission on Audit, one notable example of which is the Philippine National Oil Company which is really an empty shell. It is a holding corporation by itself, and strictly on its own account. Its funds were not very impressive in quantity but underneath that shell there were billions of pesos in a multiplicity of companies. The PNOC - the empty shell - under a presidential decree was covered by the jurisdiction of the Commission on Audit, but the billions of pesos invested in different corporations underneath it were exempted from the coverage of the Commission on Audit.

Another example is the United Coconut Planters Bank. The Commission on Audit has determined that the coconut levy is a form of taxation; and that, therefore, these funds attributed to the shares of 1,400,000 coconut farmers are, in effect, public funds. And that was, I think, the basis of the PCGG in undertaking that last major sequestration of up to 94 percent of all the shares in the United Coconut Planters Bank. The charter of the UCPB,

through a presidential decree, exempted it from the jurisdiction of the Commission on Audit, it being a private organization.

So these are the fetuses of future abuse that we are slaying right here with this additional section.

May I repeat the amendment, Madam President: No law shall be passed exempting any entity of the government or its subsidiary in any guise whatever, or any investments of public funds, from the jurisdiction of the Commission on Audit.

THE PRESIDENT: May we know the position of the Committee on the proposed amendment of Commissioner Ople?

MR. JAMIR: If the honorable Commissioner will change the number of the section to 4, we will accept the amendment.

MR. OPLE: Gladly, Madam President. Thank you.

MR. DE CASTRO: Madam President, point of inquiry on the new amendment.

THE PRESIDENT: Commissioner de Castro is recognized.

MR. DE CASTRO: Thank you. May I just ask a few questions

> of Commissioner Ople.
> Is that not included in Section 2(1) where it states: "(c) government-owned or controlled corporations and their subsidiaries"? So that if these government-owned and controlled corporations and their subsidiaries are subjected to the audit of the COA, any law exempting certain government corporations or subsidiaries will be already unconstitutional. So I believe, Madam President, that the proposed amendment is unnecessary.
> MR. MONSOD: Madam President, since this has been accepted, we would like to reply to the point raised by Commissioner de Castro.
> THE PRESIDENT: Commissioner Monsod will please proceed.
> MR. MONSOD: I think the Commissioner is trying to avoid the situation that happened in the past, because the same provision was in the 1973 Constitution and yet somehow a law or a decree was passed where certain institutions were exempted from audit. We are just reaffirming, emphasizing, the role of the Commission on Audit so that this problem will never arise in the future.[125]

There is an irreconcilable conflict between the second sentence of Section 20 of PD 198 prohibiting COA auditors from auditing LWDs and Sections 2(1) and 3, Article IX-D of the Constitution vesting in COA the power to audit all GOCCs. We rule that the second sentence of Section 20 of PD 198 is unconstitutional since it violates Sections 2(1) and 3, Article IX-D of the Constitution.

On the Legality of COA's Practice of Charging Auditing Fees

Petitioner claims that the auditing fees COA charges LWDs for audit services violate the prohibition in Section 18 of RA 6758,[126] which states:

> Sec. 18. Additional Compensation of Commission on Audit Personnel and of other Agencies. - In order to preserve the independence and integrity of the Commission on Audit (COA), its officials and employees are prohibited from receiving salaries, honoraria, bonuses, allowances or other emoluments from any government entity, local government

[125] I Record, Constitutional Commission 606-607.
[126] Compensation And Position Classification Act Of 1989.

> unit, government-owned or controlled corporations, and government financial institutions, except those compensation paid directly by COA out of its appropriations and contributions.
> Government entities, including government-owned or controlled corporations including financial institutions and local government units are hereby prohibited from assessing or billing other government entities, including government-owned or controlled corporations including financial institutions or local government units for services rendered by its officials and employees as part of their regular functions for purposes of paying additional compensation to said officials and employees.

Claiming that Section 18 is "absolute and leaves no doubt," petitioner asks COA to discontinue its practice of charging auditing fees to LWDs since such practice allegedly violates the law.

Petitioner's claim has no basis.

Section 18 of RA 6758 prohibits COA personnel from receiving any kind of compensation from any government entity except "compensation paid directly by COA out of its appropriations and contributions." Thus, RA 6758 itself recognizes an exception to the statutory ban on COA personnel receiving compensation from GOCCs. In *Tejada v. Domingo*,[127] the Court declared:

> There can be no question that Section 18 of Republic Act No. 6758 is designed to strengthen further the policy ... to preserve the independence and integrity of the COA, by explicitly prohibiting: (1) COA officials and employees from receiving salaries, honoraria, bonuses, allowances or other emoluments from any government entity, local government unit, GOCCs and government financial institutions, except such compensation paid directly by the COA out of its appropriations and contributions, and (2) government entities, including GOCCs, government financial institutions and local government units from assessing or billing other government entities, GOCCs, government financial institutions or local government units for services rendered by the latter's officials and employees as part of their regular functions for purposes of paying additional compensation to

[127] G.R. No. 91860, 13 January 1992, 205 SCRA 138.

> said officials and employees …
> The first aspect of the strategy is directed to the COA itself, while the second aspect is addressed directly against the GOCCs and government financial institutions. Under the first, COA personnel assigned to auditing units of GOCCs or government financial institutions can receive only such salaries, allowances or fringe benefits paid directly by the COA out of its appropriations and contributions. The contributions referred to are the cost of audit services earlier mentioned which cannot include the extra emoluments or benefits now claimed by petitioners. The COA is further barred from assessing or billing GOCCs and government financial institutions for services rendered by its personnel as part of their regular audit functions for purposes of paying additional compensation to such personnel. ...

In *Tejada*, the Court explained the meaning of the word "contributions" in Section 18 of RA 6758, which allows COA to charge GOCCs the cost of its audit services:

> ... the contributions from the GOCCs are limited to the cost of audit services which are based on the actual cost of the audit function in the corporation concerned plus a reasonable rate to cover overhead expenses. The actual audit cost shall include personnel services, maintenance and other operating expenses, depreciation on capital and equipment and out-of-pocket expenses. In respect to the allowances and fringe benefits granted by the GOCCs to the COA personnel assigned to the former's auditing units, the same shall be directly defrayed by COA from its own appropriations ...

COA may charge GOCCs "actual audit cost" but GOCCs must pay the same directly to COA and not to COA auditors. Petitioner has not alleged that COA charges LWDs auditing fees in excess of COA's "actual audit cost." Neither has petitioner alleged that the auditing fees are paid by LWDs directly to individual COA auditors. Thus, petitioner's contention must fail.

Section 4. The Commission shall submit to the President and the Congress, within the time fixed by law, an annual report covering the financial condition and operation of the Government, its subdivisions, agencies, and instrumentalities, including government-owned or controlled corporations, and non-governmental entities subject to its audit, and

recommend measures necessary to improve their effectiveness and efficiency. It shall submit such other reports as may be required by law.

ARTICLE X

LOCAL GOVERNMENT

GENERAL PROVISIONS

Section 1. The territorial and political subdivisions of the Republic of the Philippines are the provinces, cities, municipalities, and barangays. There shall be autonomous regions in Muslim Mindanao and the Cordilleras as hereinafter provided.

Section 2. The territorial and political subdivisions shall enjoy local autonomy.

Section 3. The Congress shall enact a local government code which shall provide for a more responsive and accountable local government structure instituted through a system of decentralization with effective mechanisms of recall, initiative, and referendum, allocate among the different local government units their powers, responsibilities, and resources, and provide for the qualifications, election, appointment and removal, term, salaries, powers and functions and duties of local officials, and all other matters relating to the organization and operation of the local units.

Section 4. The President of the Philippines shall exercise general supervision over local governments. Provinces with respect to component cities and municipalities, and cities and municipalities with respect to component barangays, shall ensure that the acts of their component units are within the scope of their prescribed powers and functions.

PROVINCE OF NEGROS OCCIDENTAL v. COMMISSION ON AUDIT, G.R. No. 182574, September 28, 2010, 646 Phil. 50, was a petition for *certiorari* that assailed decisions of the COA that disallowed premium payments for the hospitalization and health care insurance benefits of officials and employees of the Province of Negros Occidental. In granting the petition, and reversing the decisions of the COA,

Justice Carpio, on behalf of the Court *en banc*, explained this **power of general supervision** *vis a vis* other constitutional provisions:

The Facts

On 21 December 1994, the Sangguniang Panlalawigan of Negros Occidental passed Resolution No. 720-A allocating P4,000,000 of its retained earnings for the hospitalization and health care insurance benefits of 1,949 officials and employees of the province. After a public bidding, the Committee on Awards granted the insurance coverage to Philam Care Health System Incorporated (Philam Care).

Petitioner Province of Negros Occidental, represented by its then Governor Rafael L. Coscolluela, and Philam Care entered into a Group Health Care Agreement involving a total payment of P3,760,000 representing the insurance premiums of its officials and employees. The total premium amount was paid on 25 January 1996.

On 23 January 1997, after a post-audit investigation, the Provincial Auditor issued Notice of Suspension No. 97-001-101 suspending the premium payment because of lack of approval from the Office of the President (OP) as provided under Administrative Order No. 103[1] (AO 103) dated 14 January 1994. The Provincial Auditor explained that the premium payment for health care benefits violated Republic Act No. 6758 (RA 6758),[2] otherwise known as the Salary Standardization Law. Petitioner complied with the directive post-facto and sent a letter-request dated 12 January 1999 to the OP. In a Memorandum dated 26 January 1999, then President Joseph E. Estrada directed the COA to lift the suspension but only in the amount of P100,000. The Provincial Auditor ignored the directive of the President and instead issued Notice of Disallowance No. 99-005-101(96) dated 10 September 1999 stating similar grounds as mentioned in Notice of Suspension No. 97-001-101.

Petitioner appealed the disallowance to the COA. In a Decision dated 14 July 2006, the COA affirmed the Provincial Auditor's Notice of Disallowance dated 10 September 1999. The COA

[1] Authorizing The Grant Of CY-1993 Productivity Incentive Benefits To Government Personnel And Prohibiting Payments Of Similar Benefits In Future Years Unless Duly Authorized By The President.

[2] An Act Prescribing A Revised Compensation And Position Classification System In The Government And For Other Purposes (1989).

ruled that under AO 103, no government entity, including a local government unit, is exempt from securing prior approval from the President granting additional benefits to its personnel. This is in conformity with the policy of standardization of compensation laid down in RA 6758. The COA added that Section 468(a)(1)(viii) of Republic Act No. 7160 (RA 7160) or the Local Government Code of 1991 relied upon by petitioner does not stand on its own but has to be harmonized with Section 12 of RA 6758.

Further, the COA stated that the insurance benefits from Philam Care, a private insurance company, was a duplication of the benefits provided to employees under the Medicare program which is mandated by law. Being merely a creation of a local legislative body, the provincial health care program should not contravene but instead be consistent with national laws enacted by Congress from where local legislative bodies draw their authority.

The COA held the following persons liable: (1) all the 1,949 officials and employees of the province who benefited from the hospitalization and health care insurance benefits with regard to their proportionate shares; (2) former Governor Rafael L. Coscolluela, being the person who signed the contract on behalf of petitioner as well as the person who approved the disbursement voucher; and (3) the Sangguniang Panlalawigan members who passed Resolution No. 720-A. The COA did not hold Philam Care and Provincial Accountant Merly P. Fortu liable for the disallowed disbursement. The COA explained that it was unjust to require Philam Care to refund the amount received for services it had duly rendered since insurance law prohibits the refund of premiums after risks had already attached to the policy contract. As for the Provincial Accountant, the COA declared that the Sangguniang Panlalawigan resolution was sufficient basis for the accountant to sign the disbursement voucher since there were adequate funds available for the purpose. However, being one of the officials who benefited from the subject disallowance, the inclusion of the accountant's name in the persons liable was proper with regard to her proportionate share of the premium.

The dispositive portion of the COA's 14 July 2006 decision states:

> WHEREFORE, premises considered, and finding no substantial ground or cogent reason to disturb the subject disallowance, the instant appeal is hereby denied for lack of merit. Accordingly, Notice of Disallowance No. 99-005-101(96)

> dated 10 September 1999 in the total amount of P3,760,000.00 representing the hospitalization and insurance benefits of the officials and employees of the Province of Negros Occidental is hereby AFFIRMED and the refund thereof is hereby ordered. The Cluster Director, Cluster IV-Visayas, COA Regional Office No. VII, Cebu City shall ensure the proper implementation of this decision.

Petitioner filed a Motion for Reconsideration dated 23 October 2006 which the COA denied in a Resolution dated 30 January 2008.

Hence, the instant petition.

The Issue

The main issue is whether COA committed grave abuse of discretion in affirming the disallowance of P3,760,000 for premium paid for the hospitalization and health care insurance benefits granted by the Province of Negros Occidental to its 1,949 officials and employees.

The Court's Ruling

Petitioner insists that the payment of the insurance premium for the health benefits of its officers and employees was not unlawful and improper since it was paid from an allocation of its retained earnings pursuant to a valid appropriation ordinance. Petitioner states that such enactment was a clear exercise of its express powers under the principle of local fiscal autonomy which includes the power of Local Government Units (LGUs) to allocate their resources in accordance with their own priorities. Petitioner adds that while it is true that LGUs are only agents of the national government and local autonomy simply means decentralization, it is equally true that an LGU has fiscal control over its own revenues derived solely from its own tax base.

Respondents, on the other hand, maintain that although LGUs are afforded local fiscal autonomy, LGUs are still bound by RA 6758 and their actions are subject to the scrutiny of the Department of Budget and Management (DBM) and applicable auditing rules and regulations enforced by the COA. Respondents add that the grant of additional compensation, like the hospitalization and health care insurance benefits in the present case, must have prior Presidential approval to conform with the state policy on

salary standardization for government workers.

AO 103 took effect on 14 January 1994 or eleven months before the Sangguniang Panlalawigan of the Province of Negros Occidental passed Resolution No. 720-A. The main purpose of AO 103 is to prevent discontentment, dissatisfaction and demoralization among government personnel, national or local, who do not receive, or who receive less, productivity incentive benefits or other forms of allowances or benefits. This is clear in the Whereas Clauses of AO 103 which state:

> WHEREAS, the faithful implementation of statutes, including the Administrative Code of 1987 and all laws governing all forms of additional compensation and personnel benefits is a Constitutional prerogative vested in the President of the Philippines under Section 17, Article VII of the 1987 Constitution;
> WHEREAS, the Constitutional prerogative includes the determination of the rates, the timing and schedule of payment, and final authority to commit limited resources of government for the payment of personal incentives, cash awards, productivity bonus, and other forms of additional compensation and fringe benefits;
> WHEREAS, the unilateral and uncoordinated grant of productivity incentive benefits in the past gave rise to discontentment, dissatisfaction and demoralization among government personnel who have received less or have not received at all such benefits;
> NOW, THEREFORE, I, FIDEL V. RAMOS, President of the Republic of the Philippines, by virtue of the powers vested in me by law and in order to forestall further demoralization of government personnel do hereby direct: ...

Sections 1 and 2 of AO 103 state:

> Sec. 1. All agencies of the National Government including government-owned and/or - controlled corporations and government financial institutions, and local government units, are hereby authorized to grant productivity incentive benefit in the maximum amount of TWO THOUSAND PESOS (P2,000.00) each to their permanent and full-time temporary and casual employees, including contractual personnel with employment in the nature of a regular employee, who have rendered at least one (1) year of service in the Government as of December 31, 1993.

> Sec. 2. All heads of government offices/agencies, including government owned and/or controlled corporations, as well as their respective governing boards are hereby enjoined and prohibited from authorizing/granting Productivity Incentive Benefits or any and all forms of allowances/benefits without prior approval and authorization via Administrative Order by the Office of the President. Henceforth, anyone found violating any of the mandates in this Order, including all officials/agency found to have taken part thereof, shall be accordingly and severely dealt with in accordance with the applicable provisions of existing administrative and penal laws.
>
> Consequently, all administrative authorizations to grant any form of allowances/benefits and all forms of additional compensation usually paid outside of the prescribed basic salary under RA 6758, the Salary Standardization Law, that are inconsistent with the legislated policy on the matter or are not covered by any legislative action are hereby revoked.

It is clear from Section 1 of AO 103 that the President authorized all agencies of the national government as well as LGUs to grant the maximum amount of P2,000 productivity incentive benefit to each employee who has rendered at least one year of service as of 31 December 1993. In Section 2, the President enjoined all heads of government offices and agencies from granting productivity incentive benefits or any and all similar forms of allowances and benefits without the President's prior approval.

In the present case, petitioner, through an approved Sangguniang Panlalawigan resolution, granted and released the disbursement for the hospitalization and health care insurance benefits of the province's officials and employees without any prior approval from the President. The COA disallowed the premium payment for such benefits since petitioner disregarded AO 103 and RA 6758.

We disagree with the COA. From a close reading of the provisions of AO 103, petitioner did not violate the rule of prior approval from the President since Section 2 states that the prohibition applies only to "government offices/agencies, including government-owned and/or controlled corporations, as well as their respective governing boards." Nowhere is it indicated in Section 2 that the prohibition also applies to LGUs. The requirement then of prior approval from the President under AO 103 is applicable only to departments, bureaus, offices and government-owned and

controlled corporations under the Executive branch. In other words, AO 103 must be observed by government offices under the President's control as mandated by Section 17, Article VII of the Constitution…

Being an LGU, petitioner is merely under the President's general supervision pursuant to Section 4, Article X of the Constitution…

The President's power of general supervision means the power of a superior officer to see to it that subordinates perform their functions according to law.[3] **This is distinguished from the President's power of control which is the power to alter or modify or set aside what a subordinate officer had done in the performance of his duties and to substitute the judgment of the President over that of the subordinate officer.**[4] **The power of control gives the President the power to revise or reverse the acts or decisions of a subordinate officer involving the exercise of discretion.**[5]

Since LGUs are subject only to the power of general supervision of the President, the President's authority is limited to seeing to it that rules are followed and laws are faithfully executed. The President may only point out that rules have not been followed but the President cannot lay down the rules, neither does he have the discretion to modify or replace the rules. Thus, the grant of additional compensation like hospitalization and health care insurance benefits in the present case does not need the approval of the President to be valid.

Also, while it is true that LGUs are still bound by RA 6758, the COA did not clearly establish that the medical care benefits given by the government at the time under Presidential Decree No. 1519[6] were sufficient to cover the needs of government employees especially those employed by LGUs.

Petitioner correctly relied on the Civil Service Commission's

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[3] De Villa v. City of Bacolod, G.R. No. 80744, 20 September 1990, 189 SCRA 736.

[4] Bito-Onon v. Judge Yap Fernandez, 403 Phil. 693 (2001).

[5] Rufino v. Endriga, G.R. No. 139554, 21 July 2006, 496 SCRA 13, citing Mondano v. Silvosa, 97 Phil. 143 (1955).

[6] Revised Philippine Medical Care Act (1978). This Act revised RA No. 6111 or The Philippine Medical Care Act Of 1969 which took effect on 4 August 1969.

(CSC) Memorandum Circular No. 33 (CSC MC No. 33), series of 1997, issued on 22 December 1997 which provided the policy framework for working conditions at the workplace. In this circular, the CSC pursuant to CSC Resolution No. 97- 4684 dated 18 December 1997 took note of the inadequate policy on basic health and safety conditions of work experienced by government personnel. Thus, under CSC MC No. 33, all government offices including LGUs were directed to provide a health program for government employees which included hospitalization services and annual mental, medical-physical examinations.

Later, CSC MC No. 33 was further reiterated in Administrative Order No. 402[7] (AO 402) which took effect on 2 June 1998. Sections 1, 2, and 4 of AO 402 state:

> Sec. 1. Establishment of the Annual Medical Check-up Program. - An annual medical
> check-up for government of officials and employees is hereby authorized to be established starting this year, in the meantime that this benefit is not yet integrated under the National Health Insurance Program being administered by the Philippine Health Insurance Corporation (PHIC).
> Sec. 2. Coverage. - ... Local Government Units are also encouraged to establish a similar program for their personnel.
> Sec. 4. Funding. - ... Local Government Units, which may establish a similar medical program for their personnel, shall utilize local funds for the purpose.

The CSC, through CSC MC No. 33, as well as the President, through AO 402, recognized the deficiency of the state of health care and medical services implemented at the time. Republic Act No. 7875 or the National Health Insurance Act of 1995 instituting a National Health Insurance Program (NHIP) for all Filipinos was only approved on 14 February 1995 or about two months after petitioner's Sangguniang Panlalawigan passed Resolution No. 720-A. Even with the establishment of the NHIP, AO 402 was still issued three years later addressing a primary concern that basic health services under the NHIP either are still inadequate or have not reached geographic areas like that of petitioner.

Thus, consistent with the **state policy of local autonomy as guaranteed by the 1987 Constitution, under Section 25,**

[7] Establishment Of A Medical Check-Up Program For Government Personnel.

> **Article II and Section 2, Article X,** and the Local Government Code of 1991, we declare that the grant and release of the hospitalization and health care insurance benefits given to petitioner's officials and employees were validly enacted through an ordinance passed by petitioner's Sangguniang Panlalawigan.
>
> In sum, since petitioner's grant and release of the questioned disbursement without the President's approval did not violate the President's directive in AO 103, the COA then gravely abused its discretion in applying AO 103 to disallow the premium payment for the hospitalization and health care insurance benefits of petitioner's officials and employees.

Section 5. Each local government unit shall have the power to create its own sources of revenues and to levy taxes, fees and charges subject to such guidelines and limitations as the Congress may provide, consistent with the basic policy of local autonomy. Such taxes, fees, and charges shall accrue exclusively to the local governments.

In **MANILA INTERNATIONAL AIRPORT AUTHORITY v. COURT OF APPEALS,** G.R. No. 155650, July 20, 2006, 528 Phil. 181, a petition for review that assailed resolutions of the Court of Appeals, the Court *en banc* granted the petition and declared the Airport Lands and Buildings of the Manila International Airport Authority exempt from the real estate tax imposed by the City of Parañaque, voided all real estate tax assessments, including the final notices of real estate tax delinquencies issued thereon (except for the portions that the Manila International Airport Authority had leased to private parties), and voided the assailed auction sale thereof and all its effects. Speaking for the Court, Justice Carpio identified the issue and presented the Court's conclusions:

> This petition raises the threshold issue of whether the Airport Lands and Buildings of MIAA are exempt from real estate tax under existing laws. If so exempt, then the real estate tax assessments issued by the City of Parañaque, and all proceedings taken pursuant to such assessments, are void. In such event, the other issues raised in this petition become moot…
>
> We rule that MIAA's Airport Lands and Buildings are exempt from real estate tax imposed by local governments…

> First, MIAA is not a government-owned or controlled corporation but an instrumentality of the National Government and thus exempt from local taxation. Second, the real properties of MIAA are owned by the Republic of the Philippines and thus exempt from real estate tax…
>
> Under Section 2(10) and (13) of the Introductory Provisions of the Administrative Code, which governs the legal relation and status of government units, agencies and offices within the entire government machinery, MIAA is a government instrumentality and not a government-owned or controlled corporation. Under Section 133(o) of the Local Government Code, MIAA as a government instrumentality is not a taxable person because it is not subject to "[t]axes, fees or charges of any kind" by local governments. The only exception is when MIAA leases its real property to a "taxable person" as provided in Section 234(a) of the Local Government Code, in which case the specific real property leased becomes subject to real estate tax. Thus, only portions of the Airport Lands and Buildings leased to taxable persons like private parties are subject to real estate tax by the City of Parañaque.
>
> Under Article 420 of the Civil Code, the Airport Lands and Buildings of MIAA, being devoted to public use, are properties of public dominion and thus owned by the State or the Republic of the Philippines. Article 420 specifically mentions "ports ... constructed by the State," which includes public airports and seaports, as properties of public dominion and owned by the Republic. As properties of public dominion owned by the Republic, there is no doubt whatsoever that the Airport Lands and Buildings are expressly exempt from real estate tax under Section 234(a) of the Local Government Code. This Court has also repeatedly ruled that properties of public dominion are not subject to execution or foreclosure sale.

In discussing the rationale for the conclusions in **MIAA**, Justice Carpio agreed that a government-owned or controlled corporation was not exempt from real estate tax, but that MIAA was not a government-owned or controlled corporation. A government-owned or controlled corporation must be "organized as a stock or non-stock corporation," and MIAA was not organized as a stock or non-stock corporation - MIAA was not a stock corporation because it had no capital stock divided into shares, and MIAA was also not a non-stock corporation because it had no members. Justice Carpio then asked and answered the question - what then is the legal status of MIAA within the National Government

- and consequently discussed **Section 5 of Article X**:

> MIAA is a government instrumentality vested with corporate powers to perform efficiently its governmental functions. MIAA is like any other government instrumentality, the only difference is that MIAA is vested with corporate powers…
>
> A government instrumentality like MIAA falls under Section 133(o) of the Local Government Code, which states:
>
> > Sec. 133. Common Limitations on the Taxing Powers of Local Government Units. - Unless otherwise provided herein, the exercise of the taxing powers of provinces, cities, municipalities, and barangays shall not extend to the levy of the following:
> > ...
> > (o) Taxes, fees or charges of any kind on the National Government, its agencies and instrumentalities and local government units.
>
> Section 133(o) recognizes the basic principle that local governments cannot tax the national government, which historically merely delegated to local governments the power to tax. **While the 1987 Constitution now includes taxation as one of the powers of local governments, local governments may only exercise such power "subject to such guidelines and limitations as the Congress may provide."**
>
> When local governments invoke the power to tax on national government instrumentalities, such power is construed strictly against local governments. The rule is that a tax is never presumed and there must be clear language in the law imposing the tax. Any doubt whether a person, article or activity is taxable is resolved against taxation. This rule applies with greater force when local governments seek to tax national government instrumentalities.
>
> Another rule is that a tax exemption is strictly construed against the taxpayer claiming the exemption. However, when Congress grants an exemption to a national government instrumentality from local taxation, such exemption is construed liberally in favor of the national government instrumentality. As this Court declared in *Maceda v. Macaraig, Jr.*:
>
> > The reason for the rule does not apply in the case of exemptions

> running to the benefit of the government itself or its agencies. In such case the practical effect of an exemption is merely to reduce the amount of money that has to be handled by government in the course of its operations. For these reasons, provisions granting exemptions to government agencies may be construed liberally, in favor of non-tax liability of such agencies.[8]

There is, moreover, no point in national and local governments taxing each other, unless a sound and compelling policy requires such transfer of public funds from one government pocket to another.

There is also no reason for local governments to tax national government instrumentalities for rendering essential public services to inhabitants of local governments. The only exception is when the legislature clearly intended to tax government instrumentalities for the delivery of essential public services for sound and compelling policy considerations. There must be express language in the law empowering local governments to tax national government instrumentalities. Any doubt whether such power exists is resolved against local governments.

Thus, Section 133 of the Local Government Code states that "unless otherwise provided" in the Code, local governments cannot tax national government instrumentalities. As this Court held in *Basco v. Philippine Amusements and Gaming Corporation*:

> The states have no power by taxation or otherwise, to retard, impede, burden or in any manner control the operation of constitutional laws enacted by Congress to carry into execution the powers vested in the federal government. (*McCulloch v. Maryland*, 4 Wheat 316, 4 L Ed. 579)
> This doctrine emanates from the "supremacy" of the National Government over local governments.
> "Justice Holmes, speaking for the Supreme Court, made reference to the entire absence of power on the part of the States to touch, in that way (taxation) at least, the instrumentalities of the United States (*Johnson v. Maryland*, 254 US 51) and it can be agreed that no state or political subdivision can regulate a federal instrumentality in such a way as to prevent

[8] 274 Phil. 1060, 1100 (1991) quoting C. Dallas Sands, 3 Statutes and Statutory Construction 207.

> it from consummating its federal responsibilities, or even to seriously burden it in the accomplishment of them." (Antieau, Modern Constitutional Law, Vol. 2, p. 140…)
> Otherwise, mere creatures of the State can defeat National policies thru extermination of what local authorities may perceive to be undesirable activities or enterprise using the power to tax as "a tool for regulation" (*U.S. v. Sanchez*, 340 US 42).
> The power to tax which was called by Justice Marshall as the "power to destroy" (*McCulloch v. Maryland*, supra) cannot be allowed to defeat an instrumentality or creation of the very entity which has the inherent power to wield it.[9]

SMART COMMUNICATIONS, INC. v. MUNICIPALITY OF MALVAR, BATANGAS, G.R. No. 204429, February 18, 2014, 727 Phil. 430, was a petition for review that challenged the decisions and resolution of the Court of Tax Appeals *en banc* that affirmed the decision and resolution of its first division, which in turn affirmed the decision and order of the Regional Trial Court. Speaking for the Court *en banc*, Justice Carpio discussed the **revenue-making powers of local government units provided in Section 5 of this Article X**:

> **The Facts**
>
> Petitioner Smart Communications, Inc. (Smart) is a domestic corporation engaged in the business of providing telecommunications services to the general public while respondent Municipality of Malvar, Batangas (Municipality) is a local government unit created by law.
>
> In the course of its business, Smart constructed a telecommunications tower within the territorial jurisdiction of the Municipality. The construction of the tower was for the purpose of receiving and transmitting cellular communications within the covered area.
>
> On 30 July 2003, the Municipality passed Ordinance No. 18, series of 2003, entitled "An Ordinance Regulating the Establishment of Special Projects."
>
> On 24 August 2004, Smart received from the Permit and Licensing Division of the Office of the Mayor of the Municipality an assessment letter with a schedule of payment for the total

[9] 274 Phil. 323, 339-340 (1991).

amount of P389,950.00 for Smart's telecommunications tower. …

Due to the alleged arrears in the payment of the assessment, the Municipality also caused the posting of a closure notice on the telecommunications tower.

On 9 September 2004, Smart filed a protest, claiming lack of due process in the issuance of the assessment and closure notice. In the same protest, Smart challenged the validity of Ordinance No. 18 on which the assessment was based.

In a letter dated 28 September 2004, the Municipality denied Smart's protest.

On 17 November 2004, Smart filed with Regional Trial Court of Tanauan City, Batangas, Branch 6, an "Appeal/Petition" assailing the validity of Ordinance No. 18. The case was docketed as SP Civil Case No. 04-11-1920.

On 2 December 2008, the trial court rendered a Decision partly granting Smart's Appeal/Petition. The trial court confined its resolution of the case to the validity of the assessment, and did not rule on the legality of Ordinance No. 18. The trial court held that the assessment covering the period from 2001 to July 2003 was void since Ordinance No. 18 was approved only on 30 July 2003. However, the trial court declared valid the assessment starting 1 October 2003, citing Article 4 of the Civil Code of the Philippines, in relation to the provisions of Ordinance No. 18 and Section 166 of Republic Act No. 7160 or the Local Government Code of 1991 (LGC). The dispositive portion of the trial court's Decision reads:

> WHEREFORE, in light of the foregoing, the Petition is partly GRANTED. The assessment dated August 24, 2004 against petitioner is hereby declared null and void insofar as the assessment made from year 2001 to July 2003 and respondent is hereby prohibited from assessing and collecting, from petitioner, fees during the said period and the Municipal Government of Malvar, Batangas is directed to assess Smart Communications, Inc. only for the period starting October 1, 2003.
> No costs.
> SO ORDERED.

The trial court denied the motion for reconsideration in its Order of 21 May 2009.

On 8 July 2009, Smart filed a petition for review with the CTA First Division, docketed as CTA AC No. 58.

On 17 December 2010, the CTA First Division denied the petition for review. The dispositive portion of the decision reads:

> WHEREFORE, the Petition for Review is hereby DENIED, for lack of merit. Accordingly, the assailed Decision dated December 2, 2008 and the Order dated May 21, 2009 of Branch 6 of the Regional Trial Court of Tanauan City, Batangas in SP. Civil Case No. 04-11-1920 entitled "Smart Communications, Inc. v. Municipality of Malvar, Batangas" are AFFIRMED.
> SO ORDERED.

On 7 April 2011, the CTA First Division issued a Resolution denying the motion for reconsideration.

Smart filed a petition for review with the CTA *en banc*, which affirmed the CTA First Division's decision and resolution. The dispositive portion of the CTA *en banc*'s 26 June 2012 decision reads:

> WHEREFORE, premises considered, the present Petition for Review is hereby DISMISSED for lack of merit.
> Accordingly, the assailed Decision dated December 17, 2010 and Resolution dated April 7, 2011 are hereby AFFIRMED.
> SO ORDERED.

The CTA *en banc* denied the motion for reconsideration. Hence, this petition.

The Ruling of the CTA *En Banc*

The CTA *en banc* dismissed the petition on the ground of lack of jurisdiction. The CTA *en banc* declared that it is a court of special jurisdiction and as such, it can take cognizance only of such matters as are clearly within its jurisdiction. Citing Section 7(a), paragraph 3, of Republic Act No. 9282, the CTA *en banc* held that the CTA has exclusive appellate jurisdiction to review on appeal, decisions, orders or resolutions of the Regional Trial Courts in local tax cases originally resolved by them in the

exercise of their original or appellate jurisdiction. However, the same provision does not confer on the CTA jurisdiction to resolve cases where the constitutionality of a law or rule is challenged.

The Issues

The petition raises the following arguments:

> 1. The [CTA *en banc* Decision and Resolution] should be reversed and set aside for being contrary to law and jurisprudence considering that the CTA *en banc* should have exercised its jurisdiction and declared the Ordinance as illegal.
> 2. The [CTA *en banc* Decision and Resolution] should be reversed and set aside for being contrary to law and jurisprudence considering that the doctrine of exhaustion of administrative remedies does not apply in [this case].
> 3. The [CTA *en banc* Decision and Resolution] should be reversed and set aside for being contrary to law and jurisprudence considering that the respondent has no authority to
> impose the so-called "fees" on the basis of the void ordinance.

The Ruling of the Court

The Court denies the petition.

On Whether the CTA has Jurisdiction over the Present Case

Smart contends that the CTA erred in dismissing the case for lack of jurisdiction. Smart maintains that the CTA has jurisdiction over the present case considering the "unique" factual circumstances involved.

The CTA refuses to take cognizance of this case since it challenges the constitutionality of Ordinance No. 18, which is outside the province of the CTA.

Jurisdiction is conferred by law. Republic Act No. 1125, as amended by Republic Act No. 9282, created the Court of Tax Appeals. Section 7, paragraph (a), sub-paragraph (3) of the law vests the CTA with the exclusive appellate jurisdiction over "decisions, orders or resolutions of the Regional Trial Courts in local tax cases originally decided or resolved by them in the

exercise of their original or appellate jurisdiction."

The question now is whether the trial court resolved a local tax case in order to fall within the ambit of the CTA's appellate jurisdiction. This question, in turn, depends ultimately on whether the fees imposed under Ordinance No. 18 are in fact taxes.

Smart argues that the "fees" in Ordinance No. 18 are actually taxes since they are not regulatory, but revenue-raising. Citing *Philippine Airlines, Inc. v. Edu*,[10] Smart contends that the designation of "fees" in Ordinance No. 18 is not controlling.

The Court finds that the fees imposed under Ordinance No. 18 are not taxes.

…
Consistent with this constitutional mandate (citing Section 5, Article X), the LGC grants the taxing powers to each local government unit. Specifically, Section 142 of the LGC grants municipalities the power to levy taxes, fees, and charges not otherwise levied by provinces. Section 143 of the LGC provides for the scale of taxes on business that may be imposed by municipalities while Section 147 of the same law provides for the fees and charges that may be imposed by municipalities on business and occupation.

The LGC defines the term "charges" as referring to pecuniary liability, as rents or fees against persons or property, while the term "fee" means "a charge fixed by law or ordinance for the regulation or inspection of a business or activity."

In this case, the Municipality issued Ordinance No. 18, which is entitled "An Ordinance Regulating the Establishment of Special Projects," to regulate the "placing, stringing, attaching, installing, repair and construction of all gas mains, electric, telegraph and telephone wires, conduits, meters and other apparatus, and provide for the correction, condemnation or removal of the same when found to be dangerous, defective or otherwise hazardous to the welfare of the inhabitant[s]." It was also envisioned to address the foreseen "environmental depredation" to be brought about by these "special projects" to the Municipality. Pursuant

[10] 247 Phil. 283 (1988).

to these objectives, the Municipality imposed fees on various structures, which included telecommunications towers.

As clearly stated in its whereas clauses, the primary purpose of Ordinance No. 18 is to regulate the "placing, stringing, attaching, installing, repair and construction of all gas mains, electric, telegraph and telephone wires, conduits, meters and other apparatus" listed therein, which included Smart's telecommunications tower. Clearly, the purpose of the assailed Ordinance is to regulate the enumerated activities particularly related to the construction and maintenance of various structures. The fees in Ordinance No. 18 are not impositions on the building or structure itself; rather, they are impositions on the activity subject of government regulation, such as the installation and construction of the structures.[11]

Since the main purpose of Ordinance No. 18 is to regulate certain construction activities of the identified special projects, which included "cell sites" or telecommunications towers, the fees imposed in Ordinance No. 18 are primarily regulatory in nature, and not primarily revenue-raising. While the fees may contribute to the revenues of the Municipality, this effect is merely incidental. Thus, the fees imposed in Ordinance No. 18 are not taxes.

In *Progressive Development Corporation v. Quezon City*,[12] the Court declared that "if the generating of revenue is the primary purpose and regulation is merely incidental, the imposition is a tax; but if regulation is the primary purpose, the fact that incidentally revenue is also obtained does not make the imposition a tax."

In *Victorias Milling Co., Inc. v. Municipality of Victorias*,[13] the Court reiterated that the purpose and effect of the imposition determine whether it is a tax or a fee, and that the lack of any standards for such imposition gives the presumption that the same is a tax.

> We accordingly say that the designation given by the municipal authorities does not decide whether the imposition is properly a license tax or a license fee. The determining

[11] See Angeles University Foundation v. City of Angeles, G.R. No. 189999, 27 June 2012, 675 SCRA 359, 373.
[12] 254 Phil. 635, 643 (1989). See also City of Iloilo v. Villanueva, 105 Phil. 337 (1959).
[13] 134 Phil. 180, 189-190 (1968).

> factors are the purpose and effect of the imposition as may be apparent from the provisions of the ordinance. Thus, "[w]hen no police inspection, supervision, or regulation is provided, nor any standard set for the applicant to establish, or that he agrees to attain or maintain, but any and all persons engaged in the business designated, without qualification or hindrance, may come, and a license on payment of the stipulated sum will issue, to do business, subject to no prescribed rule of conduct and under no guardian eye, but according to the unrestrained judgment or fancy of the applicant and licensee, the presumption is strong that the power of taxation, and not the police power, is being exercised."

Contrary to Smart's contention, Ordinance No. 18 expressly provides for the standards which Smart must satisfy prior to the issuance of the specified permits, clearly indicating that the fees are regulatory in nature. These requirements are as follows:

> Sec. 5. Requirements and Procedures in Securing Preliminary Development Permit. The following documents shall be submitted to the SB Secretary in triplicate:
> a) zoning clearance
> b) Vicinity Map
> c) Site Plan
> d) Evidence of ownership
> e) Certificate true copy of NTC Provisional Authority in case of Cellsites, telephone or telegraph line, ERB in case of gasoline station, power plant, and other concerned national agencies
> f) Conversion order from DAR is located within agricultural zone
> g) Radiation Protection Evaluation.
> h) Written consent from subdivision association or the residence of the area concerned if the special projects is located within the residential zone.
> i) Barangay Council Resolution endorsing the special projects.
> Sec. 6. Requirement for Final Development Permit - Upon the expiration of 180 days and the proponents of special projects shall apply for final [development permit] and they are require[d] to submit the following:
> a) evaluation from the committee where the Vice Mayor refers the special project
> b) Certification that all local fees have been paid.

Considering that the fees in Ordinance No. 18 are not in the nature of local taxes, and Smart is questioning the

constitutionality of the ordinance, the CTA correctly dismissed the petition for lack of jurisdiction. Likewise, Section 187 of the LGC, which outlines the procedure for questioning the constitutionality of a tax ordinance, is inapplicable, rendering unnecessary the resolution of the issue on non-exhaustion of administrative remedies.

On Whether the Imposition of the Fees in Ordinance No. 18 is *Ultra Vires*

Smart argues that the Municipality exceeded its power to impose taxes and fees as provided in Book II, Title One, Chapter 2, Article II of the LGC. Smart maintains that the mayor's permit fees in Ordinance No. 18 (equivalent to 1% of the project cost) are not among those expressly enumerated in the LGC.

As discussed, the fees in Ordinance No.18 are not taxes. Logically, the imposition does not appear in the enumeration of taxes under Section 143 of the LGC.

Moreover, even if the fees do not appear in Section 143 or any other provision in the LGC, the Municipality is empowered to impose taxes, fees and charges, not specifically enumerated in the LGC or taxed under the Tax Code or other applicable law. Section 186 of the LGC, granting local government units wide latitude in imposing fees, expressly provides:

> Sec. 186. Power To Levy Other Taxes, Fees or Charges. - Local government units may exercise the power to levy taxes, fees or charges on any base or subject not otherwise specifically enumerated herein or taxed under the provisions of the National Internal Revenue Code, as amended, or other applicable laws: Provided, That the taxes, fees, or charges shall not be unjust, excessive, oppressive, confiscatory or contrary to declared national policy: Provided, further, That the ordinance levying such taxes, fees or charges shall not be enacted without any prior public hearing conducted for the purpose.

Smart further argues that the Municipality is encroaching on the regulatory powers of the National Telecommunications Commission (NTC). Smart cites Section 5(g) of Republic Act No. 7925 which provides that the National Telecommunications Commission (NTC), in the exercise of its regulatory powers, shall impose such fees and charges as may be necessary to cover

reasonable costs and expenses for the regulation and supervision of the operations of telecommunications entities. Thus, Smart alleges that the regulation of telecommunications entities and all aspects of its operations is specifically lodged by law on the NTC.

To repeat, Ordinance No. 18 aims to regulate the "placing, stringing, attaching, installing, repair and construction of all gas mains, electric, telegraph and telephone wires, conduits, meters and other apparatus" within the Municipality. The fees are not imposed to regulate the administrative, technical, financial, or marketing operations of telecommunications entities, such as Smart's; rather, to regulate the installation and maintenance of physical structures - Smart's cell sites or telecommunications tower. The regulation of the installation and maintenance of such physical structures is an exercise of the police power of the Municipality. Clearly, the Municipality does not encroach on NTC's regulatory powers.

The Court likewise rejects Smart's contention that the power to fix the fees for the issuance of development permits and locational clearances is exercised by the Housing and Land Use Regulatory Board (HLURB). Suffice it to state that the HLURB itself recognizes the local government units' power to collect fees related to land use and development. Significantly, the HLURB issued locational guidelines governing telecommunications infrastructure. Guideline No. VI relates to the collection of locational clearance fees either by the HLURB or the concerned local government unit, to wit:

> VI. Fees
> The Housing and Land Use Regulatory Board in the performance of its functions shall collect the locational clearance fee based on the revised schedule of fees under the special use project as per Resolution No. 622, series of 1998 or by the concerned LGUs subject to EO 72.

On Whether Ordinance No. 18 is Valid and Constitutional

Smart contends that Ordinance No. 18 violates Sections 130(b)(3) and 186 of the LGC since the fees are unjust, excessive, oppressive and confiscatory. Aside from this bare allegation, Smart did not present any evidence substantiating its claims.

In *Victorias Milling Co., Inc. v. Municipality of Victorias*,[14] the Court rejected the argument that the fees imposed by respondent therein are excessive for lack of evidence supporting such claim, to wit:

> An ordinance carries with it the presumption of validity. The question of reasonableness though is open to judicial inquiry. Much should be left thus to the discretion of municipal authorities. Courts will go slow in writing off an ordinance as unreasonable unless the amount is so excessive as to be prohibitive, arbitrary, unreasonable, oppressive, or confiscatory. A rule which has gained acceptance is that factors relevant to such an inquiry are the municipal conditions as a whole and the nature of the business made subject to imposition.
> Plaintiff, has however not sufficiently proven that, taking these factors together, the license taxes are unreasonable. The presumption of validity subsists. For, plaintiff has limited itself to insisting that the amounts levied exceed the cost of regulation and the municipality has adequate funds for the alleged purposes as evidenced by the municipality's cash surplus for the fiscal year ending 1956.

On the constitutionality issue, Smart merely pleaded for the declaration of unconstitutionality of Ordinance No. 18 in the Prayer of the Petition, without any argument or evidence to support its plea. Nowhere in the body of the Petition was this issue specifically raised and discussed. Significantly, Smart failed to cite any constitutional provision allegedly violated by respondent when it issued Ordinance No. 18.

Settled is the rule that every law, in this case an ordinance, is presumed valid. To strike down a law as unconstitutional, Smart has the burden to prove a clear and unequivocal breach of the Constitution, which Smart miserably failed to do. In *Lawyers Against Monopoly and Poverty (LAMP) v. Secretary of Budget and Management*,[15] the Court held, thus:

> To justify the nullification of the law or its implementation, there must be a clear and unequivocal, not a doubtful, breach of the Constitution. In case of doubt in the sufficiency

[14] 134 Phil. 180, 194 (1968).
[15] G.R. No. 164987, 24 April 2012, 670 SCRA 373, 386-387.

> of proof establishing unconstitutionality, the Court must sustain legislation because "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." This presumption of constitutionality can be overcome only by the clearest showing that there was indeed an infraction of the Constitution, and only when such a conclusion is reached by the required majority may the Court pronounce, in the discharge of the duty it cannot escape, that the challenged act must be struck down.

Section 6. Local government units shall have a just share, as determined by law, in the national taxes which shall be automatically released to them.

Section 7. Local governments shall be entitled to an equitable share in the proceeds of the utilization and development of the national wealth within their respective areas, in the manner provided by law, including sharing the same with the inhabitants by way of direct benefits.

Section 8. The term of office of elective local officials, except barangay officials, which shall be determined by law, shall be three years and no such official 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.

On August 14, 2002, the COMELEC *en banc* promulgated a resolution which gave due course to a recall resolution filed by then incumbent barangay officials of Puerto Princesa, Palawan, against then Mayor Victorino Dennis M. Socrates. The recall elections were eventually set for September 24, 2002, with Edward M. Hagedorn as candidate for mayor. Several petitions were filed, anchored on the ground of disqualification of Hagedorn from running for "a fourth consecutive term" as mayor, all of which were ultimately denied by the COMELEC, resulting in the affirmation of the resolution declaring Hagedorn qualified to run in the recall election. Petitions for *certiorari* seeking the reversal of the COMELEC resolutions were filed with the Supreme Court, and were consolidated with **SOCRATES v. COMMISSION ON**

ELECTIONS, G.R. No. 154512, November 12, 2002, 440 Phil. 106.[16] In dismissing the petitions (and lifting the temporary restraining order enjoining the proclamation of the winning candidate for mayor in the recall election), Justice Carpio, speaking for the Court *en banc*, had occasion to discuss **Section 8 of this Article X**:

> **Hagedorn's Qualification to Run for Mayor in the Recall Election of September 24, 2002.**
>
> The three-term limit rule for elective local officials is found in Section 8, Article X of the Constitution… This three-term limit rule is reiterated in Section 43 (b) of RA No. 7160, otherwise known as the Local Government Code, which provides:
>
> > Sec. 43. Term of Office. - (a) ...
> > (b) No local elective official shall serve for more than three (3) consecutive terms in the same position. Voluntary renunciation of the office for any length of time shall not be considered as an interruption in the continuity of service for the full term for which the elective official was elected.
>
> **These constitutional and statutory provisions have two parts. The first part provides that an elective local official cannot serve for more than three consecutive terms. The clear intent is that only consecutive terms count in determining the three-term limit rule. The second part states that voluntary renunciation of office for any length of time does not interrupt the continuity of service. The clear intent is that involuntary severance from office for any length of time interrupts continuity of service and prevents the service before and after the interruption from being joined together to form a continuous service or consecutive terms.**
>
> After three consecutive terms, an elective local official cannot seek immediate reelection for a fourth term. The prohibited election refers to the next regular election for the same office following the end of the third consecutive term. Any subsequent election, like a recall election, is no longer covered by the prohibition for two reasons. First, a subsequent election like a recall election is no longer an immediate reelection after three consecutive terms. Second, the intervening period constitutes an

[16] Consolidated with Sandoval v. COMELEC, G.R. No. 154683, November 12, 2002, which was mooted, and Adovo v. COMELEC, G.R. Nos. 155083-84, November 12, 2002.

involuntary interruption in the continuity of service.

When the framers of the Constitution debated on the term limit of elective local officials, the question asked was whether there would be no further election after three terms, or whether there would be "no immediate reelection" after three terms. This is clear from the following deliberations of the Constitutional Commission:

> THE PRESIDENT: The Acting Floor Leader is recognized.
> MR. ROMULO: We are now ready to discuss the two issues, as indicated on the blackboard, and these are Alternative No. I where there is no further election after a total of three terms and Alternative No. 2 where there is no immediate reelection after three successive terms.[17]

The Journal of the Constitutional Commission reports the following manifestation on the term of elective local officials:

> MANIFESTATION OF MR. ROMULO
> Upon resumption of session, Mr. Romulo manifested that the Body would proceed to the consideration of two issues on the term of Representatives and local officials, namely: 1) Alternative No. 1 (no further reelection after a total of three terms), and 2) Alternative No. 2 (no immediate reelection after three successive terms).[18]

The framers of the Constitution used the same "no immediate reelection" question in voting for the term limits of Senators and Representatives of the House. Clearly, what the Constitution prohibits is an immediate reelection for a fourth term following three consecutive terms. The Constitution, however, does not prohibit a subsequent reelection for a fourth term as long as the reelection is not immediately after the end of the third consecutive term. A recall election mid-way in the term following the third consecutive term is a subsequent election but not an immediate reelection after the third term.

Neither does the Constitution prohibit one barred from seeking immediate reelection to run in any other subsequent election involving the same term of office. What the Constitution prohibits is a consecutive fourth term. The debates in the Constitutional

[17] II Record, Constitutional Commission 236.
[18] I Journal, Constitutional Commission 420.

Commission evidently show that the prohibited election referred to by the framers of the Constitution is the immediate reelection after the third term, not any other subsequent election.

If the prohibition on elective local officials is applied to any election within the three-year full term following the three-term limit, then Senators should also be prohibited from running in any election within the six-year full term following their two-term limit. The constitutional provision on the term limit of Senators is worded exactly like the term limit of elective local officials…[19]

In the debates on the term limit of Senators, the following exchange in the Constitutional Convention is instructive:

> GASCON: I would like to ask a question with regard to the issue after the second term. We will allow the Senator to rest for a period of time before he can run again?
> DAVIDE: That is correct.
> GASCON: And the question that we left behind before - if the Gentleman will remember - was: How long will that period of rest be? Will it be one election which is three years or one term which is six years?
> DAVIDE: If the Gentleman will remember, Commissioner Rodrigo expressed the view that during the election following the expiration of the first 12 years, whether such election will be on the third or on the sixth year thereafter, this particular member of the Senate can run. So, it is not really a period of hibernation for six years. That was the Committee's stand.
> GASCON: So, effectively, the period of rest would be three years at the least.[20]

The framers of the Constitution thus clarified that a Senator can run after only three years[21] following his completion of two terms. The framers expressly acknowledged that the prohibited election refers only to the immediate reelection, and not to any subsequent election, during the six-year period following the two term limit. The framers of the Constitution did not intend "the period of rest" of an elective official who has reached his term limit to be the full extent of the succeeding term.

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[19] See Art. VI, Sec. 4(2).
[20] II Record, Constitutional Commission 590.
[21] Joaquin G. Bernas, The Intent Of The 1986 Constitution Writers, 341 (1995).

In the case of Hagedorn, his candidacy in the recall election on September 24, 2002 is not an immediate reelection after his third consecutive term which ended on June 30, 2001. The immediate reelection that the Constitution barred Hagedorn from seeking referred to the regular elections in 2001. Hagedorn did not seek reelection in the 2001 elections.

Hagedorn was elected for three consecutive terms in the 1992, 1995 and 1998 elections and served in full his three consecutive terms as mayor of Puerto Princesa. Under the Constitution and the Local Government Code, Hagedorn could no longer run for mayor in the 2001 elections. The Constitution and the Local Government Code disqualified Hagedorn, who had reached the maximum three-term limit, from running for a fourth consecutive term as mayor. Thus, Hagedorn did not run for mayor in the 2001 elections. Socrates ran and won as mayor of Puerto Princesa in the 2001 elections. After Hagedorn ceased to be mayor on June 30, 2001, he became a private citizen until the recall election of September 24, 2002 when he won by 3,018 votes over his closest opponent, Socrates.

From June 30, 2001 until the recall election on September 24, 2002, the mayor of Puerto Princesa was Socrates. During the same period, Hagedorn was simply a private citizen. This period is clearly an interruption in the continuity of Hagedorn's service as mayor, not because of his voluntary renunciation, but because of a legal prohibition. Hagedorn's three consecutive terms ended on June 30, 2001. Hagedorn's new recall term from September 24, 2002 to June 30, 2004 is not a seamless continuation of his previous three consecutive terms as mayor. One cannot stitch together Hagedorn's previous three-terms with his new recall term to make the recall term a fourth consecutive term because factually it is not. An involuntary interruption occurred from June 30, 2001 to September 24, 2002 which broke the continuity or consecutive character of Hagedorn's service as mayor.

In *Lonzanida v. COMELEC*,[22] the Court had occasion to explain interruption of continuity of service in this manner:

> ... The second sentence of the constitutional provision under scrutiny states, "Voluntary renunciation of office for any length of time shall not be considered as an interruption in the continuity of service for the full term for which he was

[22] 311 SCRA 602 (1999).

> elected." The clear intent of the framers of the constitution to bar any attempt to circumvent the three-term limit by a voluntary renunciation of office and at the same time respect the people's choice and grant their elected official full service of a term is evident in this provision. Voluntary renunciation of a term does not cancel the renounced term in the computation of the three-term limit; conversely, involuntary severance from office for any length of time short of the full term provided by law amounts to an interruption of continuity of service. ...

In Hagedorn's case, the nearly 15-month period he was out of office, although short of a full term of three years, constituted an interruption in the continuity of his service as mayor. The Constitution does not require the interruption or hiatus to be a full term of three years. The clear intent is that interruption "for any length of time," as long as the cause is involuntary, is sufficient to break an elective local official's continuity of service.

In the recent case of *Adormeo v. COMELEC*,[23] a unanimous Court reiterated the rule that an interruption consisting of a portion of a term of office breaks the continuity of service of an elective local official. In *Adormeo*, Ramon Y. Talaga, Jr. had served two consecutive full terms as mayor of Lucena City. In his third bid for election as mayor in 1998, Talaga lost to Bernard G. Tagarao. However, in the recall election of May 12, 2000, Talaga won and served the unexpired term of Tagarao from May 12, 2000 to June 30, 2001. When Talaga ran again for mayor in the 2001 elections, Raymundo Adormeo, the other candidate for mayor, petitioned for Talaga's disqualification on the ground that Talaga had already served three consecutive terms as mayor.

Thus, the issue in *Adormeo* was whether Talaga's recall term was a continuation of his previous two terms so that he was deemed to have already served three consecutive terms as mayor. The Court ruled that Talaga was qualified to run in the 2001 elections, stating that the period from June 30, 1998 to May 12, 2000 when Talaga was out of office interrupted the continuity of his service as mayor. Talaga's recall term as mayor was not consecutive to his previous two terms because of this interruption, there having been a break of almost two years during which time Tagarao was the mayor.

[23] G.R. No. 147927, February 4, 2002.

We held in *Adormeo* that the period an elective local official is out of office interrupts the continuity of his service and prevents his recall term from being stitched together as a seamless continuation of his previous two consecutive terms. In the instant case, we likewise hold that the nearly 15 months Hagedorn was out of office interrupted his continuity of service and prevents his recall term from being stitched together as a seamless continuation of his previous three consecutive terms. The only difference between *Adormeo* and the instant case is the time of the interruption. In *Adormeo*, the interruption occurred after the first two consecutive terms. In the instant case, the interruption happened after the first three consecutive terms. In both cases, the respondents were seeking election for a fourth term.

In *Adormeo*, the recall term of Talaga began only from the date he assumed office after winning the recall election. Talaga's recall term did not retroact to include the tenure in office of his predecessor. If Talaga's recall term was made to so retroact, then he would have been disqualified to run in the 2001 elections because he would already have served three consecutive terms prior to the 2001 elections. One who wins and serves a recall term does not serve the full term of his predecessor but only the unexpired term. The period of time prior to the recall term, when another elective official holds office, constitutes an interruption in continuity of service. Clearly, *Adormeo* established the rule that the winner in the recall election cannot be charged or credited with the full term of three years for purposes of counting the consecutiveness of an elective official's terms in office.

In the same manner, Hagedorn's recall term does not retroact to include the tenure in office of Socrates. Hagedorn can only be disqualified to run in the September 24, 2002 recall election if the recall term is made to retroact to June 30, 2001, for only then can the recall term constitute a fourth consecutive term. But to consider Hagedorn's recall term as a full term of three years, retroacting to June 30, 2001, despite the fact that he won his recall term only last September 24, 2002, is to ignore reality. This Court cannot declare as consecutive or successive terms of office which historically and factually are not.

Worse, to make Hagedorn's recall term retroact to June 30, 2001 creates a legal fiction that unduly curtails the freedom of the people to choose their leaders through popular elections. The concept of term limits is in derogation of the sovereign will of the people to elect the leaders of their own choosing. Term limits

must be construed strictly to give the fullest possible effect to the sovereign will of the people. As this Court aptly stated in *Borja, Jr. v. COMELEC*:

> Thus, a consideration of the historical background of Art. X, §8 of the Constitution reveals that the members of the Constitutional Commission were as much concerned with preserving the freedom of choice of the people as they were with preventing the monopolization of political power. Indeed, they rejected a proposal put forth by Commissioner Edmundo F. Garcia that after serving three consecutive terms or nine years there should be no further reelection for local and legislative officials. Instead, they adopted the alternative proposal of Commissioner Christian Monsod that such officials be simply barred from running for the same position in the succeeding election following the expiration of the third consecutive term. Monsod warned against 'prescreening candidates [from] whom the people will choose' as a result of the proposed absolute disqualification, considering that the draft constitution contained provisions "recognizing people's power."[24]

A necessary consequence of the interruption of continuity of service is the start of a new term following the interruption. An official elected in recall election serves the unexpired term of the recalled official. This unexpired term is in itself one term for purposes of counting the three-term limit. This is clear from the following discussion in the Constitutional Commission:

> SUAREZ: For example, a special election is called for a Senator, and the Senator newly elected would have to serve the unexpired portion of the term. Would that mean that serving the unexpired portion of the term is already considered one term? So, half a term, which is actually the correct statement, plus one term would disqualify the Senator concerned from running? Is that the meaning of this provision on disqualification, Madam President?
> DAVIDE: Yes, because we speak of 'term,' and if there is a special election, he will serve only for the unexpired portion of that particular term plus one more term for the Senator and two more terms for the Members of the Lower House.[25]

[24] 295 SCRA 157 (1998).
[25] II Record, Constitutional Commission 592.

Although the discussion referred to special elections for Senators and Representatives of the House, the same principle applies to a recall election of local officials. Otherwise, an elective local official who serves a recall term can serve for more than nine consecutive years comprising of the recall term plus the regular three full terms. A local official who serves a recall term should know that the recall term is in itself one term although less than three years. This is the inherent limitation he takes by running and winning in the recall election.

In summary, we hold that Hagedorn is qualified to run in the September 24, 2002 recall election for mayor of Puerto Princesa because:

1. Hagedorn is not running for immediate reelection following his three consecutive terms as mayor which ended on June 30, 2001;

2. Hagedorn's continuity of service as mayor was involuntarily interrupted from June 30, 2001 to September 24, 2002 during which time he was a private citizen;

3. Hagedorn's recall term from September 24, 2002 to June 30, 2004 cannot be made to retroact to June 30, 2001 to make a fourth consecutive term because factually the recall term is not a fourth consecutive term; and

4. Term limits should be construed strictly to give the fullest possible effect to the right of the electorate to choose their leaders.

DIZON v. COMELEC, G.R. No. 182088, January 30, 2009, 597 Phil. 571, was a petition for *certiorari* and prohibition that sought the reversal of the resolution of the COMELEC's Second Division, which dismissed the petition to disqualify or cancel Marino P. Morales' certificate of candidacy, as well as the resolution of the COMELEC *en banc*, which denied Roberto L. Dizon's motion for reconsideration:

The COMELEC Second Division stated the facts as follows:

> Roberto L. Dizon, hereinafter referred to as petitioner, is a resident and taxpayer of the Municipality of Mabalacat, Pampanga. Marino P. Morales, hereinafter referred to as respondent, is the incumbent Mayor of the Municipality of Mabalacat, Pampanga.

Petitioner alleges respondent was proclaimed as the municipal mayor of Mabalacat, Pampanga during the 1995, 1998, 2001 and 2004 elections and has fully served the same. Respondent filed his Certificate of Candidacy on March 28, 2007 again for the same position and same municipality.

Petitioner argues that respondent is no longer eligible and qualified to run for the same position for the May 14, 2007 elections under Section 43 of the Local Government Code of 1991. Under the said provision, no local elective official is allowed to serve for more than three (3) consecutive terms for the same position.

Respondent, on the other hand, asserts that he is still eligible and qualified to run as Mayor of the Municipality of Mabalacat, Pampanga because he was not elected for the said position in the 1998 elections. He avers that the Commission *en banc* in SPA Case No. A- 04-058, entitled Atty. Venancio Q. Rivera III and Normandick P. De Guzman v. Mayor Marino P. Morales, affirmed the decision of the Regional Trial Court of Angeles City declaring Anthony D. Dee as the duly elected Mayor of Mabalacat, Pampanga in the 1998 elections.

Respondent alleges that his term should be reckoned from 2001 or when he was proclaimed as Mayor of Mabalacat, Pampanga. Respondent further asserts that his election in 2004 is only for his second term. Hence, the three term rule provided under the Local Government Code is not applicable to him.

Respondent further argues that the grounds stated in the instant petition are not covered under Section 78 of the Omnibus Election Code. Respondent further contend [sic] that even if it is covered under the aforementioned provision, the instant petition failed to allege any material misrepresentation in the respondent's Certificate of Candidacy.

The Ruling of the COMELEC Second Division

In its Resolution dated 27 July 2007, the COMELEC Second Division took judicial notice of this Court's ruling in the consolidated cases of *Atty. Venancio Q. Rivera III v. COMELEC and Marino "Boking" Morales* in G.R. No. 167591 and *Anthony Dee v. COMELEC and Marino "Boking" Morales* in G.R. No. 170577 (*Rivera* case) promulgated on 9 May 2007. The pertinent portions of the COMELEC Second Division's ruling read as follows:

Respondent was elected as mayor of Mabalacat from July 1,

> 1995 to June 30, 1998. There was no interruption of his second term from 1998 to 2001. He was able to exercise the powers and enjoy the position of a mayor as "caretaker of the office" or a "de facto officer" until June 30, 2001 notwithstanding the Decision of the RTC in an electoral protest case. He was again elected as mayor from July 1, 2001 to June 30, 2003 [sic].
> It is worthy to emphasize that the Supreme Court ruled that respondent has violated the three-term limit under Section 43 of the Local Government Code. Respondent was considered not a candidate in the 2004 Synchronized National and Local Elections. Hence, his failure to qualify for the 2004 elections is a gap and allows him to run again for the same position in the May 14, 2007 National and Local Elections.
> WHEREFORE, premises considered, the Commission RESOLVED, as it hereby RESOLVES to DENY the instant Petition to Cancel the Certificate of Candidacy and/or Petition for the Disqualification of Marino P. Morales for lack of merit.

Dizon filed a motion for reconsideration before the COMELEC *en banc*.

The Ruling of the COMELEC *En Banc*

The COMELEC *en banc* affirmed the resolution of the COMELEC Second Division.

The pertinent portions of the COMELEC *en banc*'s Resolution read as follows:

> Respondent's certificate of candidacy for the May 2004 Synchronized National and Local Elections was cancelled pursuant to the above-mentioned Supreme Court decision which was promulgated on May 9, 2007. As a result, respondent was not only disqualified but was also not considered a candidate in the May 2004 elections.
> Another factor which is worth mentioning is the fact that respondent has relinquished the disputed position on May 16, 2007. The vice-mayor elect then took his oath and has assumed office as mayor of Mabalacat on May 17, 2007 until the term ended on June 30, 2007. For failure to serve for the full term, such involuntary interruption in his term of office should be considered a gap which renders the three-term limit inapplicable.
> The three-term limit does not apply whenever there is an involuntary break. The Constitution does not require that the

interruption or hiatus to be a full term of three years. What the law requires is for an interruption, break or a rest period from a candidate's term of office "for any length of time." The Supreme Court in the case of *Latasa v. COMELEC* ruled:

> Indeed, the law contemplates a rest period during which the local elective official steps down from office and ceases to exercise power or authority over the inhabitants of the territorial jurisdiction of a particular local government unit.

In sum, the three-term limit is not applicable in the instant case for lack of the two conditions: 1) respondent was not the duly-elected mayor of Mabalacat for the July 1, 2004 to June 30, 2007 term primordially because he was not even considered a candidate thereat; and 2) respondent has failed to serve the entire duration of the term of office because he has already relinquished the disputed office on May 16, 2007 which is more than a month prior to the end of his supposed term.

…

WHEREFORE, premises considered, the Commission RESOLVED, as it hereby RESOLVES, to DENY the instant Motion for Reconsideration for LACK OF MERIT. The Resolution of the Commission Second Division is hereby AFFIRMED.

SO ORDERED.

The Issues

Dizon submits that the factual findings made in the *Rivera* case should still be applied in the present case because Morales had, except for one month and 14 days, served the full term of 2004-2007. Morales' assumption of the mayoralty position on 1 July 2007 makes the 2007-2010 term Morales' fifth term in office. Dizon raises the following grounds before this Court:

1. The COMELEC gravely abused its discretion amounting to lack or excess of its jurisdiction when it ruled that respondent Morales did not violate the three-year term limit when he ran and won as mayor of Mabalacat, Pampanga during the May 14, 2007 election.
2. The COMELEC gravely abused its discretion amounting to lack or excess of jurisdiction when it ruled that due to this Honorable Court's ruling in the aforesaid consolidated cases, respondent Morales' fourth term is considered a gap in the latter's service when he filed his certificate of candidacy for the 2007 elections.

> 3. The COMELEC gravely abused its discretion when it ruled that the fourth term of Morales was interrupted when he "relinquished" his position for one month and 14 days prior to the May 14, 2007 election.

The petition has no merit.

The Ruling of the Court

The present case covers a situation wherein we have previously ruled that Morales had been elected to the same office and had served three consecutive terms, and wherein we disqualified and removed Morales during his fourth term. Dizon claims that Morales is currently serving his fifth term as mayor. Is the 2007-2010 term really Morales' fifth term?

The Effect of our Ruling in the Rivera Case

In our decision promulgated on 9 May 2007, this Court unseated Morales during his fourth term. We cancelled his Certificate of Candidacy dated 30 December 2003. This cancellation disqualified Morales from being a candidate in the May 2004 elections. The votes cast for Morales were considered stray votes. The dispositive portion in the *Rivera* case reads:

> WHEREFORE, the petition in G.R. No. 167591 is GRANTED. Respondent Morales' Certificate of Candidacy dated December 30, 2003 is cancelled. In view of the vacancy in the Office of the Mayor of Mabalacat, Pampanga, the vice-mayor elect of the said municipality in the May 10, 2004 Synchronized National and Local Elections is hereby declared mayor and shall serve as such for the remaining duration of the term July 1, 2004 to June 30, 2007. The petition in G.R. No. 170577 is DISMISSED for being moot.
> This Decision is immediately executory. …[26]

Justice Carpio, speaking for the Court *en banc* in **Dizon**, again cited and explained **Section 8 of this Article X:**

> Section 43(b) of the Local Government Code restated Article X, Section 8 of the 1987 Constitution as follows:
>
> > No local elective official shall serve for more than three

[26] Rivera III v. COMELEC, G.R. No. 167591, 9 May 2007, 523 SCRA 41, 59.

(3) consecutive terms in the same position. Voluntary renunciation of the office for any length of time shall not be considered as an interruption in the continuity of service for the full term for which the elective official concerned was elected.

For purposes of determining the resulting disqualification brought about by the three-term limit, it is not enough that an individual has served three consecutive terms in an elective local office, he must also have been elected to the same position for the same number of times.[27] **There should be a concurrence of two conditions for the application of the disqualification: (1) that the official concerned has been elected for three consecutive terms in the same local government post and (2) that he has fully served three consecutive terms.**[28]

In the *Rivera* case, we found that Morales was elected as mayor of Mabalacat for four consecutive terms: 1 July 1995 to 30 June 1998, 1 July 1998 to 30 June 2001, 1 July 2001 to 30 June 2004, and 1 July 2004 to 30 June 2007. We disqualified Morales from his candidacy in the May 2004 elections because of the three-term limit. Although the trial court previously ruled that Morales' proclamation for the 1998-2001 term was void, there was no interruption of the continuity of Morales' service with respect to the 1998-2001 term because the trial court's ruling was promulgated only on 4 July 2001, or after the expiry of the 1998-2001 term.

Our ruling in the *Rivera* case served as Morales' involuntary severance from office with respect to the 2004-2007 term. Involuntary severance from office for any length of time short of the full term provided by law amounts to an interruption of continuity of service.[29] Our decision in the *Rivera* case was promulgated on 9 May 2007 and was effective immediately. The next day, Morales notified the vice mayor's office of our decision. The vice mayor assumed the office of the mayor from 17 May 2007 up to 30 June 2007. The assumption by the vice mayor of the office of the mayor, no matter how short it may seem to Dizon, interrupted Morales' continuity of service. Thus, Morales did not hold office for the full term of 1 July 2004 to 30 June 2007.

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[27] See Borja, Jr. v. COMELEC, 356 Phil. 467 (1998).
[28] Lonzanida v. COMELEC, 370 Phil. 625 (1999).
[29] Id. at 638.

2007-2010: Morales' Fifth Term?

Dizon claims that the 2007-2010 term is Morales' fifth term in office. Dizon asserts that even after receipt of our decision on 10 May 2007, Morales "waited for the election to be held on 14 May 2007 to ensure his victory for a fifth term."

We concede that Morales occupied the position of mayor of Mabalacat for the following periods: 1 July 1995 to 30 June 1998, 1 July 1998 to 30 June 2001, 1 July 2001 to 30 June 2004, and 1 July 2004 to 16 May 2007. However, because of his disqualification, Morales was not the duly elected mayor for the 2004-2007 term. Neither did Morales hold the position of mayor of Mabalacat for the full term. Morales cannot be deemed to have served the full term of 2004-2007 because he was ordered to vacate his post before the expiration of the term. Morales' occupancy of the position of mayor of Mabalacat from 1 July 2004 to 16 May 2007 cannot be counted as a term for purposes of computing the three-term limit. Indeed, the period from 17 May 2007 to 30 June 2007 served as a gap for purposes of the three-term limit rule. Thus, the present 1 July 2007 to 30 June 2010 term is effectively Morales' first term for purposes of the three-term limit rule.

Dizon alleges that Morales "was able to serve his fourth term as mayor through lengthy litigations. ... In other words, he was violating the rule on three-term limit with impunity by the sheer length of litigation and profit from it even more by raising the technicalities arising therefrom." To this, we quote our ruling in *Lonzanida v. COMELEC*:

> The respondents harp on the delay in resolving the election protest between petitioner and his then opponent Alvez which took roughly about three years and resultantly extended the petitioner's incumbency in an office to which he was not lawfully elected. We note that such delay cannot be imputed to the petitioner. There is no specific allegation nor proof that the delay was due to any political maneuvering on his part to prolong his stay in office. Moreover, protestant Alvez, was not without legal recourse to move for the early resolution of the election protest while it was pending before the regional trial court or to file a motion for the execution of the regional trial court's decision declaring the position of mayor vacant and ordering the vice-mayor to assume office while the appeal was pending with the COMELEC. Such delay which is not here

> shown to have been intentionally sought by the petitioner to prolong his stay in office cannot serve as basis to bar his right to be elected and to serve his chosen local government post in the succeeding mayoral election.[30]

Finally, in **HALILI v. COMMISSION ON ELECTIONS**, G.R. No. 231643, January 15, 2019, Justice Carpio, on behalf of the Court *en banc*, affirmed the resolutions of the COMELEC (First Division and *en banc*) that were sought to be nullified and set aside by the consolidated petitions[31] for *certiorari* and prohibition, and again discussed **Section 8, Article X**:

> **The Facts**
>
> Petitioner Marino P. Morales (Morales) was elected and served as Mayor of the Municipality of Mabalacat, Pampanga from 1 July 2007 to 30 June 2010. He was elected again as mayor during the 2010 elections. On 15 May 2012, or during Morales' second term, Congress passed Republic Act No. (RA) 10164,[32] converting the Municipality of Mabalacat into a component city. Thereafter, a plebiscite was held. In the 2013 elections, Morales ran again and was elected as mayor of the new Mabalacat City. On 8 December 2015, Morales filed his Certificate of Candidacy (COC) for the 2016 elections for the position of mayor of Mabalacat City, as substitute candidate for Wilfredo Feliciano of *Aksyon Demokratiko* Party.
>
> On 4 January 2016, respondent Pyra Lucas (Lucas), also a candidate for the position of mayor of Mabalacat City, filed a Petition for Cancellation of the COC and/or Disqualification of Morales for the Mayoral Position of Mabalacat City, docketed as SPA No. 16-001 (DC), before the COMELEC. Lucas alleged that Morales was disqualified to run for mayor, since he was elected and had served three consecutive terms prior to the 2016 elections. Lucas also alleged that the conversion of the Municipality of Mabalacat into Mabalacat City did not interrupt Morales' service for the full term for which he was elected.
>
> On 25 January 2016, Morales filed his Verified Answer alleging that Lucas' petition should be summarily dismissed for lack of certification against forum shopping, for being filed out of

[30] Id. at 638-639.

[31] Consolidated with Morales v. Lucas**,** G.R. No. 231657.

[32] An Act Converting The Municipality Of Mabalacat In The Province Of Pampanga Into A Component City To Be Known As Mabalacat City.

time, and for lack of jurisdiction and/or cause of action. Morales claimed that his candidacy did not violate the three-term limit rule, because the conversion of the Municipality of Mabalacat into Mabalacat City interrupted his term. According to him, his term as mayor of Mabalacat City is not a continuation of his term as mayor of the Municipality of Mabalacat.

On 10 May 2016, following the canvass of all election returns, the City Board of Canvassers of Mabalacat City proclaimed Morales as elected city mayor, and petitioner Christian C. Halili (Halili) as elected city vice mayor.

On 20 May 2016, respondent Crisostomo Garbo (Garbo), another candidate for the position of mayor of Mabalacat City, filed a Motion for Leave To Intervene and To Admit Attached Petition-in-Intervention alleging that he was interested in the outcome of the case, since he obtained the second highest number of votes and he should be proclaimed as mayor of Mabalacat City should Morales' COC be cancelled.

On 28 June 2016, Halili also filed a Verified Motion for Leave to Intervene (as Respondent) and Admit Attached Answer-in-Intervention alleging that, as incumbent vice mayor of Mabalacat City, he should be proclaimed as mayor of Mabalacat City should Morales' COC be cancelled pursuant to the rule on succession under Section 44 of RA 7160, or the Local Government Code.

On 16 December 2016, Morales filed an Opposition to Garbo's Petition-in-Intervention and a Comment to Halili's Answer-in-Intervention before the COMELEC, alleging that both pleadings are premature.

The Ruling of the COMELEC

In a Resolution dated 3 August 2016, the COMELEC First Division granted the petition, cancelled Morales' COC, and ordered the proclamation of the qualified mayoralty candidate with the next higher number of votes. The dispositive portion states:

> WHEREFORE, the Petition is GRANTED. Accordingly, the Certificate of Candidacy of MARINO P. MORALES is hereby CANCELLED. All votes cast in his favor are declared stray. The City Board of Canvassers of Mabalacat, Pampanga is hereby ORDERED to RECONVENE, ANNUL the

> proclamation of MARINO P. MORALES, PROCLAIM the qualified candidate with the next highest number of votes, and EFFECT the necessary corrections in the Certificate of Canvass and Proclamation. …

The COMELEC First Division ruled that Lucas' petition was a petition for cancellation of COC under Section 78 of the Omnibus Election Code (OEC), and it was timely filed. The COMELEC First Division likewise held that Morales committed a material misrepresentation in his COC in stating that he is eligible to run as mayor of Mabalacat City, when in fact he is not eligible, because he violated the three-term limit rule after having served for the same local government post for three consecutive terms prior to the 2016 elections.

On 27 January 2017, the COMELEC *en banc* granted the motions for leave to intervene filed by Garbo and Halili.

In a Resolution dated 26 May 2017, the COMELEC *en banc* denied the motion for reconsideration filed by Morales for lack of merit, and affirmed the Resolution dated 3 August 2016 of the COMELEC First Division. The COMELEC *en banc* declared that Garbo, being the qualified mayoralty candidate with the highest number of votes, should be proclaimed.

On 1 June 2017, Lucas filed a Motion for Execution, and a subsequent Manifestation alleging the finality of the COMELEC *en banc* Resolution dated 26 May 2017. Thereafter, Morales filed an Opposition to the Motion for Execution.

On 2 June 2017, Halili filed a Petition for Certiorari and Prohibition With Application for Temporary Restraining Order and/or *Status Quo Ante* Order before us, docketed as G.R. No. 231643.

On 5 June 2017, Morales filed a Petition for Certiorari and Prohibition with Urgent Prayer for Issuance of Temporary Restraining Order and/or *Status Quo Ante* Order and/or Writ of Preliminary Injunction with Motion for Special Raffle before us, docketed as G.R. No. 231657.

On 8 June 2017, the COMELEC *en banc* issued a Writ of Execution: (1) ordering Morales to cease and desist from performing the functions of mayor of Mabalacat City, Pampanga; (2) directing, after due notice to the parties, the Special City

Board of Canvassers of Mabalacat City, Pampanga to convene on 27 June 2017, 3:00 p.m., at the COMELEC Session Hall, 8th Floor, Palacio del Gobernador Building, Intramuros, Manila and to proclaim Garbo, who garnered the highest number of votes of Seventeen Thousand Seven Hundred Ten (17,710) votes, as the duly elected mayor of Mabalacat City, Pampanga; and (3) directing the Special City Board of Canvassers of Mabalacat City, Pampanga to furnish a copy of the Certificate of Proclamation to the Department of Interior and Local Government, Secretary of the Sangguniang Panlungsod of Mabalacat City and affected parties.

…

The Issues

In G.R. No. 231643, Halili raised the following issues:

> A. Whether or not the Honorable Commission on Elections committed grave abuse of discretion amounting to lack or excess of jurisdiction in considering the application of *Aratea vs. Comelec* case as basis in declaring that "the Petitioner-Intervenor [Crisostomo Garbo] being the qualified mayoral candidate with the highest number of votes should be proclaimed?"
> B. Whether or not the Honorable Commission on Elections committed grave abuse of discretion amounting to lack or excess of jurisdiction in not declaring a permanent vacancy in the office of the Mayor of Mabalacat City pursuant to Section 4, R.A. 716[0] [Local Government Code of 1991] after it cancelled the COC of Marino P. Morales?
> C. Whether or not the Honorable Commission on Elections committed grave abuse of discretion amounting to lack or excess of jurisdiction in ordering the reconvening of the 2016 Elections City Board of Canvassers of Mabalacat City to proclaim the qualified candidate with the next highest number of votes?

In G.R. No. 231657, Morales raised the following issues:

> a. Whether public respondent committed grave abuse of discretion amounting to lack or excess of jurisdiction in arbitrarily treating the VERY VAGUE Lucas Petition as a Petition to Deny Due Course despite the fact that there is NOT a single statement or allegation in said Petition that petitioner committed "deliberate material misrepresentation";

a.1. Whether public respondent should have DISMISSED the Lucas Petition OUTRIGHT for being defective because it is a Petition for Disqualification invoking a ground proper for a Petition to Deny Due Course, in violation of Section 1, Rule 25, COMELEC Resolution No. 9523;

b. Assuming *arguendo* that the Lucas Petition can be treated as a Petition to Deny Due Course, whether public respondent committed grave abuse of discretion amounting to lack or excess of jurisdiction when it failed to DISMISS OUTRIGHT the Lucas Petition for being filed out of time and for failure of private respondent to attach to said Petition a Certificat[ion] of Non-Forum Shopping, as required by the Rules;

c. Assuming *arguendo* that the Lucas Petition can be treated as a Petition to Deny Due Course, whether public respondent committed grave abuse of discretion amounting to lack or excess of jurisdiction when it did NOT dismiss the Lucas Petition despite the fact that there is no prior "authoritative ruling" yet on petitioner's eligibility by any competent court or tribunal, following the doctrine laid down by this Court in the case of *Poe vs. Comelec.* In a word, whether or not petitioner violated the three-term limit rule when he ran for Mayor of the newly created Mabalacat City in the May 9, 2016 elections;

d. Assuming *arguendo* that the Lucas Petition can be treated as a Petition to Deny Due Course, whether public respondent committed grave abuse of discretion amounting to lack or excess of jurisdiction when [it] refused to dismiss the Lucas Petition on the basis of its Resolution in the Castro Petition with practically the same issues herein, which had already attained finality pending resolution of the Lucas Petition;

e. Whether public respondent committed grave abuse of discretion amounting to lack or excess of jurisdiction when it refused to dismiss the Lucas Petition despite the fact that it had already lost jurisdiction over the case since the petitioner had already been proclaimed and assumed office, similar or analogous to the ruling of this Court in various cases that "after the proclamation of the winning candidate, disputes as to his COC become moot (and are taken out of COMELEC's jurisdiction) and the proper remedy is to file a *quo warranto* proceeding questioning the candidate's eligibility"; and

f. Public respondent committed grave abuse of discretion amounting to lack or excess of jurisdiction in ruling that the second placer in the subject contest should replace petitioner.

The Ruling of the Court

The primordial issue to be resolved is whether or not the COMELEC gravely abused its discretion amounting to lack or excess of jurisdiction: (1) in finding that Morales committed a false material representation in his COC when he declared that he was eligible to run as mayor of Mabalacat City for the 2016 elections despite his violation of the three-term limit rule; and (2) in proclaiming Garbo as the duly elected mayor of Mabalacat City for being the qualified candidate with the highest number of votes.

We do not find merit in both petitions.

The three-term limit rule is embodied in Section 8, Article X of the 1987 Constitution …

It is restated in Section 43 of the Local Government Code, thus:

> Section 43. Term of Office.- (a) …
> b) No local elective official shall serve for more than three (3) consecutive terms in the same position. Voluntary renunciation of the office for any length of time shall not be considered as an interruption in the continuity of service for the full term for which the elective official concerned was elected. …

The intention behind the three-term limit rule is not only to abrogate the "monopolization of political power" and prevent elected officials from breeding "proprietary interest in their position" but also to "enhance the people's freedom of choice."[33] **There are two conditions which must concur for the application of the disqualification of a candidate based on violation of the three-term limit rule: (1) that the official concerned has been elected for three consecutive terms in the same local government post, and (2) that he has fully served three consecutive terms.**[34]

In the present case, Morales admits that he has been elected and has served as mayor of Mabalacat, Pampanga for three consecutive terms: (1) 2007-2010; (2) 2010-2013; and (3) 2013-

[33] Abundo, Sr. v. COMELEC, 701 Phil. 135 (2013), citing Borja, Jr. v. COMELEC, 356 Phil. 467 (1998).
[34] Albania v. COMELEC, G.R. No. 226792, 6 June 2017, 826 SCRA 191, 208, citing Lonzanida v. COMELEC, 370 Phil. 625 (1999).

2016. However, Morales insists that his second term as mayor of the Municipality of Mabalacat was interrupted by the conversion of the municipality into a component city. Morales claims that Mabalacat City is an entirely different political unit from the Municipality of Mabalacat, having an increased territory, income and population.

We are not convinced.

We have already ruled upon the same issue in the case of *Latasa v. COMELEC (Latasa),*[35] where we held that the conversion of a municipality into a city does not constitute an interruption of the incumbent official's continuity of service. We held that to be considered as interruption of service, the "law contemplates a rest period during which the local elective official steps down from office and ceases to exercise power or authority over the inhabitants of the territorial jurisdiction of a particular local government unit."[36]

In *Latasa,* petitioner was elected and served as mayor of the Municipality of Digos, Davao del Sur for terms 1992-1995, 1995-1998, and 1998-2001. During petitioner's third term, Digos was converted into a component city. When Latasa filed his COC for the 2001 elections, we held that petitioner was disqualified to run as mayor of Digos City for violation of the three-term limit rule, with the following explanation:

> … Section 2 of the Charter of the City of Digos provides:
>
> Section 2. The City of Digos.- The Municipality of Digos shall be converted into a component city to be known as the City of Digos, hereinafter referred to as the City, which shall comprise the present territory of the Municipality of Digos, Davao del Sur Province. The territorial jurisdiction of the City shall be within the present metes and bounds of the Municipality of Digos. …
>
> Moreover, Section 53 of the said Charter further states:
>
> Section 53. Officials of the City of Digos. - The present elective officials of the Municipality of Digos shall continue to exercise their powers and functions until such a time that a new election is held and the duly-elected officials shall have already qualified and assumed their offices. …
>
> As seen in the aforementioned provisions, this Court notes

[35] 463 Phil. 296 (2003).
[36] Id. at 312.

> that the delineation of the metes and bounds of the City of Digos did not change even by an inch the land area previously covered by the Municipality of Digos. This Court also notes that the elective officials of the Municipality of Digos continued to exercise their powers and functions until elections were held for the new city officials.
>
> True, the new city acquired a new corporate existence separate and distinct from that of the municipal ty. This does not mean, however, that for the purpose of applying the subject Constitutional provision, the office of the municipal mayor would ow be construed as a different local government post as that of the office of the city mayor. As stated earlier, the territorial jurisdiction of the City of Digos is the same as that of the municipality. Consequently, the inhabitants of the municipality are the same as those in the city. These inhabitants are the same group of voters who elected petitioner Latasa to be their municipal mayor for three consecutive terms. These are also the same inhabitants over whom he held power and authority as their chief executive for nine years.
>
> …
>
> In the present case, petitioner, upon ratification of the law converting the municipality to a city, continued to hold office as chief executive of the same territorial jurisdiction. There were changes in the political and economic rights of Digos as local government unit, but no substantial change occurred as to petitioner's authority as chief executive over the inhabitants of Digos.[37]

Similarly, in *Laceda, Sr. v. Limena, (Laceda),*[38] we held that the merger and conversion of the municipalities of Sorsogon and Bacon into Sorsogon City did not interrupt petitioner's term as Punong Barangay for three consecutive terms, to wit:

> … [W]hile it is true that under Rep. Act No. 8806 the municipalities of Sorsogon and Bacon were merged and converted into a city thereby abolishing the former and creating Sorsogon City as a new political unit, it cannot be said that for the purpose of applying the prohibition in Section 2 of Rep. Act No. 9164, the office of Punong Barangay of Barangay Panlayaan, Municipality of Sorsogon, would now be construed as a different local government post as that

[37] Id. at 308-310.
[38] 592 Phil. 335 (2008).

> of the office of Punong Barangay of Barangay Panlayaan, Sorsogon City. The territorial jurisdiction of Barangay Panlayaan, Sorsogon City, is the same as before the conversion. Consequently, the inhabitants of the barangay are the same. They are the same group of voters who elected Laceda to be their Punong Barangay for three consecutive terms and over whom Laceda held power and authority as their Punong Barangay. Moreover, Rep. Act No. 8806 did not interrupt Laceda's term.[39]

In the present case, RA 10164, or An Act Converting the Municipality of Mabalacat in the Province of Pampanga into a Component City to be Known as Mabalacat City, provides that:

> …
> Sec. 2. Mabalacat City. - The Municipality of Mabalacat shall be converted into a component city to be known as Mabalacat City, hereinafter referred to as the City. The territorial jurisdiction of the City shall be within the present metes and bounds of the Municipality of Mabalacat, Province of Pampanga.
> The foregoing provision shall be without prejudice to the resolution by the appropriate agency or forum of any boundary dispute or case involving questions of territorial jurisdiction between Mabalacat City and the adjoining local government units.
> …
> Sec. 52. Officials of Mabalacat City. - The present elective officials of the Municipality of Mabalacat shall continue to exercise their powers and functions until such time that a new election is held and the duly-elected officials shall have already qualified and assumed their offices. Appointive officials and employees of the municipality shall likewise continue exercising their duties and functions and they shall be automatically absorbed by the city government of Mabalacat City.

When the law is clear and free from any doubt or ambiguity, there is no room for construction or interpretation, but only application. *Verba legis non est recedendum,* or from the words of a statute there should be no departure. Thus, contrary to Morales' arguments, the territorial jurisdiction of Mabalacat City is the same as that of the Municipality of Mabalacat. Also,

[39] Id. at 340.

the elective officials of the Municipality of Mabalacat continued to exercise their powers and functions until elections were held for the new city officials.

Applying our ruling in *Latasa,* the provisions of RA 10164 mean that the delineation of the metes and bounds of Mabalacat City did not change even by an inch the land area previously covered by the Municipality of Mabalacat. **Consequently, the inhabitants are the same group of voters who elected Morales to be their mayor for three consecutive terms, and over whom he held power and authority as their mayor. Accordingly, Morales never ceased from acting and discharging his duties and responsibilities as chief executive of Mabalacat, despite the conversion of the Municipality of Mabalacat into Mabalacat City.**

In insisting that Mabalacat City is an entirely different political unit as that of the Municipality of Mabalacat due to an alleged increased territory, income and population, Morales cites the second paragraph of Section 2, RA 10164 and presents a Political Boundary Map before us.

We find that Morales failed to substantiate his claim that Mabalacat City is an entirely different political unit as that of the Municipality of Mabalacat. In his Memorandum, Morales states that: "the Political Boundary Map just offered as EXHIBIT B never made it to be released officially by the Bureau of Land Management of the DENR and is being used only in this case as a reference tool to designate the original and specific intent of Congress when it passed into law RA 10164, the Charter of Mabalacat City. Though the political boundary map is complete for its intended purpose, respondent acknowledges that it never got officially released because of circumstances beyond anyone's control. The notable stumbling blocks against the release of this Political Boundary Map are the already on-going litigations among various claimants and the protestations of conflicting claims by would be stakeholders with the new added areas."

Thus, Morales admits that there are on-going litigations, and there is no resolution by an appropriate agency on any boundary dispute, as required by the second paragraph of Section 2, RA 10164. The Political Boundary Map is merely offered to show the intent of Congress in passing RA 10164, when in fact, resort to intention is unnecessary when the law is clear. Accordingly, there is no factual or legal authority for Morales' claim that the

territorial jurisdiction of Mabalacat City is different from that of the Municipality of Mabalacat.

Still, Morales insists that his declarations in his COC are material representations of his honest to goodness belief that he was eligible to run.

In *Aratea v. Commission on Elections (Aratea),*[40] we found that Lonzanida misrepresented his eligibility because he knew fully well that he had been elected, and had served, as mayor of San Antonio, Zambales for more than three consecutive terms, yet, he still certified that he was eligible to run for mayor for the next succeeding term. We held that such misrepresentation constitutes false material representation as to his qualification or eligibility for the office. We explained that:

> In a certificate of candidacy, the candidate is asked to certify under oath his or her eligibility, and thus qualification, to the office he [or she] seeks election. Even though the certificate of candidacy does not specifically ask the candidate for the number of terms elected and served in an elective position, such fact is material in determining a candidate's eligibility, and thus qualification for the office. Election to and service of the same local elective position for three consecutive terms renders a candidate ineligible from running for the same position in the succeeding elections.[41]

In the present case, Morales' alleged lack of knowledge or notice of ineligibility is negated by the previous cases involving the three-term limit rule and his eligibility to run, specifically *Rivera III v. Commission on Elections (Rivera)*[42] and **Dizon v. Commission on Elections (Dizon)**.[43]

In *Rivera,* Morales, the present petitioner, was elected mayor of the Municipality of Mabalacat, Pampanga for the following consecutive terms: 1995-1998, 1998-2001, and 2001-2004. In the 2004 elections, Morales ran again as mayor of the same town and was proclaimed elective mayor for the term commencing 1 July 2004 to 30 June 2007. A petition for *quo warranto* was later filed against Morales alleging that he was ineligible to run for a "fourth" term, having served as mayor for three consecutive

[40] 696 Phil. 700 (2012).
[41] Id. at 738.
[42] 551 Phil. 37 (2007).
[43] 597 Phil. 571 (2009), also penned by Justice Carpio and excerpted above.

terms. Morales answered that his supposed 1998-2001 term could not be considered against him, because although he was proclaimed the elected mayor and discharged the duties of mayor from 1998 to 2001, his proclamation was later nullified by the Regional Trial Court of Angeles City (RTC) and his closest rival was proclaimed the duly elected mayor.

The Court found that Morales exceeded the three-term limit rule, because he was mayor for the entire period from 1998 to 2001, notwithstanding the decision of the RTC. The Court ruled that the fact of being belatedly ousted, which was after the expiry of his term, could not constitute an interruption in Morales' service of the full term, and Morales could not be considered as a mere "caretaker of the office" or "*de facto* officer" for purposes of applying the three-term limit rule. We held that "Section 8, Article X of the Constitution is violated and its purpose defeated when an official serves in the same position for three consecutive terms. Whether as 'caretaker' or *'de facto'* officer, he exercises the powers and enjoys the prerequisites of the office which enables him 'to stay on indefinitely.'"[44]

In **Dizon**, Morales was a respondent in a disqualification proceeding when he ran again as a mayoralty candidate during the 2007 elections. This time, the Court ruled in his favor and held that for purposes of the 2007 elections, the three-term limit rule was no longer a disqualifying factor against Morales …

Accordingly, we find that Morales misrepresented his eligibility because he knew full well that he had been elected, and had served, as mayor of Mabalacat, Pampanga for three consecutive terms; yet, he still certified that he was eligible to run for mayor for the next succeeding term.

Morales, however, claims that the COMELEC *en banc* should take judicial notice of the COMELEC Second Division Resolution, which dismissed Noelito Castro's Petition to Deny Due Course to or Cancel the COC and to Disqualify Morales for the Second Time as a Mayoralty Candidate of Mabalacat City filed on 10 December 2015 (Castro's Petition), since it involves the same issue as the present petitions.

We do not find merit in such argument.

[44] 551 Phil. 37, 58 (2007).

In the said Resolution dated 14 September 2016, the COMELEC Second Division dismissed Castro's Petition due to the following procedural reasons: (1) the petition lacked verification required by both provisions of the OEC and the COMELEC Rules of Procedure; (2) Morales was not served with a copy of the petition; and (3) Castro failed to comply with Resolution No. 9576 requiring submission of soft copies of pleadings in MS Word and annexes in PDF format. The COMELEC Second Division further ruled that the petition was "dismissible" because the records of the case were bereft of any prior authoritative ruling that Morales already served as mayor of Mabalacat City for three consecutive terms, pursuant to *Poe-Llamanzares v. Commission on Elections (Poe).*[45] Considering that no motion for reconsideration was filed, the COMELEC Second Division Resolution became final on 22 December 2016, and the COMELEC *en banc* has nothing to decide on Castro's Petition. Election cases shall be heard and decided in division, provided that motions for reconsideration of decisions shall be decided by the COMELEC *en banc.*[46]

On the other hand, we find that in arguing that the COMELEC *en banc* should consider the COMELEC Second Division Resolution on Castro's Petition because the "Castro Case is very similar to the instant Petition in that both are petitions to deny due course and/or to cancel the Certificate of Candidacy (COC) of respondent for alleged violation of the three-term limit rule [and] … both Petitions arise from the same set of facts and both availed of the same relief from this commission (Petition to Deny Due Course)," Morales essentially admits that Lucas' petition is properly filed under Section 78 of the OEC, contrary to his argument that Lucas' petition is vague and wrongly construed by the COMELEC as a petition to deny due course.

In *Albania v. Commission on Elections,*[47] we held that the COMELEC has the authority to examine the allegations of every pleading filed, obviously aware that its averments, rather than its title/caption, are the proper gauges in determining the true nature of the cases filed before it. Thus, the COMELEC aptly found that Lucas' petition contains the essential allegations of a "Section 78" petition, namely: (1) the candidate made a representation in his COC; (2) the representation pertains to a material matter which would affect the substantive rights of

[45] 782 Phil. 292 (2016).
[46] Const., Art. IX, Sec. 3.
[47] G.R. No. 226792, 6 June 2017, 826 SCRA 191.

the candidate; and (3) the candidate made a false representation with the intention to deceive the electorate as to his qualification for public office or deliberately attempted to mislead, misinform, or hide a fact which would otherwise render him ineligible.[48]

Contrary to Morales' argument that since he had been proclaimed and had assumed office as mayor in 2016, disputes as to his COC became moot and the proper remedy is to file a *quo warranto* proceeding questioning his eligibility, we held in *Velasco v. Commission on Elections*[49] that the COMELEC's jurisdiction to deny due course to and cancel a COC continues, to wit:

> … If the disqualification or COC cancellation/denial case is not resolved before election day, the proceedings shall continue even after the election and the proclamation of the winner. In the meanwhile, the candidate may be voted for and be proclaimed if he or she wins, but the COMELEC's jurisdiction to deny due course and cancel his or her COC continues. This rule applies even if the candidate facing disqualification is voted for and receives the highest number of votes, and even if the candidate is proclaimed and has taken his oath of office. The only exception to this rule is in the case of congressional or senatorial candidates with unresolved disqualification or COC denial/cancellation cases after the elections. Pursuant to Section 17 of Article VI of the Constitution, the COMELEC *ipso jure* loses jurisdiction over these unfinished cases in favor of the respective Senate or the House of Representatives electoral tribunals after the candidates take their oath of office.[50]

Moreover, we held in *Fermin v. Commission on Elections*[51] that the Court has already likened a proceeding under Section 78 to a *quo warranto* proceeding under Section 253 of the OEC since they both deal with the eligibility or qualification of a candidate, with the distinction mainly in the fact that a "Section 78" petition is filed before proclamation, while a petition for *quo warranto* is filed after proclamation of the wining candidate.

Thus, Section 78 of the OEC states:

> Sec. 78. Petition to deny due course to or cancel a certificate of

[48] Fermin v. COMELEC, 595 Phil., 449, 465 (2008).
[49] 595 Phil. 1172 (2008).
[50] Id. at 1193.
[51] Supra.

> candidacy. - A verified petition seeking to deny due course or to cancel a certificate of candidacy may be filed by the person exclusively on the ground that any material representation contained therein as required under Section 74 hereof is false. The petition may be filed at any time not later than twenty-five days from the time of the filing of the certificate of candidacy and shall be decided, after due notice and hearing, not later than fifteen days before the election.

Under Section 78, a petition to deny due course to or to cancel a COC must be filed within 25 days from the time of filing of the COC. Morales filed his COC on 8 December 2015. Thus, Lucas had until 2 January 2016 to file the petition under Section 78, but since 2 January 2016 fell on a Saturday, Lucas had until the next working day or 4 January 2016 to file the petition. We, thus, find that Lucas timely filed her petition on 4 January 2016 under Section 78 of the OEC. Furthermore, contrary to Morales' insistence, the COMELEC Rules of Procedure do not require that a certification of non-forum shopping be attached to the petition. At any rate, we held that the COMELEC's rules of procedure on certifications of non-forum shopping should be liberally construed, and COMELEC's interpretation of such rules in accordance with its constitutional mandate should carry great weight.[52]

We likewise find no merit in Morales' argument that a prior authoritative ruling is necessary pursuant to *Poe*.

We held in *Francisco v. Commission on Elections*[53] that the COMELEC can be the proper body to make the pronouncement against which the truth or falsity of a material representation in a COC can be measured. The COMELEC, as an adjunct to its adjudicatory power, may investigate facts or ascertain the existence of facts, hold hearings, weigh evidence, and draw conclusions from them as basis for their official action.

We upheld our ruling in *Aratea* that no prior judgment recognizing a candidate's service for three consecutive terms was necessary to effect the cancellation of his COC.

At any rate, we also held in *Poe* that self-evident facts of unquestioned or unquestionable veracity and judicial confessions

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[52] Panlilio v. COMELEC, 610 Phil. 551 (2009).
[53] G.R. No. 230249, 24 April 2018.

are bases equivalent to prior decisions against which the falsity of representation can be determined.[54] Since Morales admits having been elected and having served for three consecutive terms, his admission already served as basis against which the falsity of his representation can be determined.

Knowing fully well that he had been elected and had fully served three consecutive terms for the same local government post, Morales' representation in his COC that he was eligible to run as mayor constitutes false material representation as to his qualification or eligibility for the office, which is a ground for a petition to deny due course to or cancel a COC. Accordingly, we find that Morales' COC is void *ab initio,* and he was never a candidate at all, and all votes for him were considered stray votes.

As we held in *Aratea,* a violation of the three-term limit rule is an ineligibility affecting the qualification of a candidate to elective office and the misrepresentation of such is a ground to grant the petition to deny due course to or cancel a COC.[55] A person whose COC had been denied due course and/or cancelled under Section 78 is deemed to have not been a candidate at all, because his COC is considered void *ab initio* and thus, cannot give rise to a valid candidacy and necessarily to valid votes.[56] In *Jalosjos, Jr. v. Commission on Elections,*[57] we explained that:

> Decisions of this Court holding that the second-placer cannot be proclaimed winner if the first-placer is disqualified or declared ineligible should be limited to situations where the certificate of candidacy of the first-placer was valid at the time of filing but subsequently had to be cancelled because of a violation of law that took place, or a legal impediment that took effect, after the filing of the certificate of candidacy. If the certificate of candidacy is void *ab initio,* then legally the person who filed such void certificate of candidacy was never a candidate in the elections at any time. All votes for such non-candidate are stray votes and should not be counted. Thus, such non-candidate can never be a first-placer in the elections. If a certificate of candidacy void *ab initio* is cancelled on the day, or before the day, of the

[54] 782 Phil. 292 (2016).
[55] 696 Phil. 700 (2012).
[56] Ty-Delgado v. House of Representatives Electoral Tribunal, 779 Phil. 268 (2016), citing Aratea v. COMELEC, supra.
[57] 696 Phil. 601 (2012).

> election, prevailing jurisprudence holds that all votes for that candidate are stray votes. If a certificate of candidacy void *ab initio* is cancelled one day or more after the elections, all votes for such candidate should also be stray votes because the certificate of candidacy is void from the very beginning. This is the more equitable and logical approach on the effect of the cancellation of a certificate of candidacy that is void *ab initio.* Otherwise, a certificate of candidacy void *ab initio* can operate to defeat one or more valid certificates of candidacy for the same position.[58]

The rule on succession under Section 44 of RA 7160,[59] as espoused by Halili, would not apply if the permanent vacancy was caused by one whose COC was void *ab initio.* In case of vacancies caused by those with *void ab initio* COCs, the person legally entitled to the vacant position would be the candidate who garnered the next highest number of votes among those eligible.[60] In this case, it is Garbo who is legally entitled to the position of mayor, having garnered the highest number of votes among the eligible candidates. Thus, the COMELEC correctly proclaimed Garbo as mayor of Mabalacat City.

Where a material COC misrepresentation under oath is made, thereby violating both our election and criminal laws, we are faced as well with an assault on the will of the people of the Philippines as expressed in our laws.[61] In a choice between provisions on material qualifications of elected officials, on the one hand, and the will of the electorate in any given locality, on the other, we believe and so hold that we cannot choose the will of the electorate.[62]

Section 9. Legislative bodies of local governments shall have

[58] Id. at 633-634.

[59] RA 7160, Section 44. Permanent Vacancies in the Offices of the Governor, Vice-Governor, Mayor, and Vice-Mayor. - (a) If a permanent vacancy occurs in the office of the governor or mayor, the vice-governor or vice-mayor concerned shall become the governor or mayor. If a permanent vacancy occurs in the offices of the governor, vice-governor, mayor, or vice-mayor, the highest ranking sanggunian member or, in case of his permanent inability, the second highest ranking sanggunian member, shall become the governor, vice-governor, mayor or vice-mayor, as the case may be. Subsequent vacancies in the said office shall be filled automatically by the other sanggunian members according to their ranking as defined herein. …

[60] Chua v. COMELEC, 783 Phil. 876, 900 (2016), citing Maquiling v. COMELEC, 709 Phil. 408 (2013).

[61] Velasco v. COMELEC, 595 Phil. 1172,1196 (2008).

[62] Ibid.

sectoral representation as may be prescribed by law.

Section 10. No province, city, municipality, or barangay may be created, divided, merged, abolished, or its boundary substantially altered, except in accordance with the criteria established in the local government code and subject to approval by a majority of the votes cast in a plebiscite in the political units directly affected.

In **LEAGUE OF CITIES OF THE PHILIPPINES v. COMMISSION ON ELECTIONS,** G.R. No. 176951, consolidated petitions[63] for prohibition, were filed that assailed the Cityhood Laws.[64] Justice Carpio's *ponencia* dated November 18, 2008, for the Court *en banc*, declared the Cityhood Laws unconstitutional for violating Section 6 and **Section 10 of this Article X,** and the equal protection clause. In what Justice Carpio described as "repeated flip-flopping," the Court *en banc* reversed itself and declared the Cityhood Laws constitutional on December 21, 2009; the Court reversed itself again and declared the Cityhood Laws unconstitutional on August 24, 2010; then in yet another reversal, the Court *en banc* declared the Cityhood Laws as constitutional on February 15, 2011. In a resolution dated April 12, 2011, the Court *en banc* denied the motion for reconsideration of the petitioners, and on June 28, 2011, the Court *en banc* denied the "second" motion for reconsideration of the petitioners. The antecedent facts were presented in Justice Carpio's November 18, 2008 *ponencia*:

> **The Facts**
>
> During the 11th Congress, Congress enacted into law 33 bills converting 33 municipalities into cities. However, Congress did not act on bills converting 24 other municipalities into cities.
>
> During the 12th Congress, Congress enacted into law Republic Act No. 9009 (RA 9009),[65] which took effect on 30 June 2001.

[63] Consolidated with G.R. No. 177499 and G.R. No. 178056.

[64] 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 (Carcar, Cebu), and 9491 (Naga, Cebu).

[65] An Act Amending Section 450 Of Republic Act No. 7160, Otherwise Known As The Local Government Code Of 1991, By Increasing The Average Annual Income Requirement For A Municipality Or Cluster Of Barangays To Be Converted Into A Component City.

RA 9009 amended Section 450 of the Local Government Code by increasing the annual income requirement for conversion of a municipality into a city from P20 million to P100 million. The rationale for the amendment was to restrain, in the words of Senator Aquilino Pimentel, "the mad rush" of municipalities to convert into cities solely to secure a larger share in the Internal Revenue Allotment despite the fact that they are incapable of fiscal independence.

After the effectivity of RA 9009, the House of Representatives of the 12th Congress adopted Joint Resolution No. 29,[66] which sought to exempt from the P100 million income requirement in RA 9009 the 24 municipalities whose cityhood bills were not approved in the 11th Congress. However, the 12th Congress ended without the Senate approving Joint Resolution No. 29.

During the 13th Congress, the House of Representatives re-adopted Joint Resolution No. 29 as Joint Resolution No. 1 and forwarded it to the Senate for approval. However, the Senate again failed to approve the Joint Resolution. Following the advice of Senator Aquilino Pimentel, 16 municipalities filed, through their respective sponsors, individual cityhood bills. The 16 cityhood bills contained a common provision exempting all the 16 municipalities from the P100 million income requirement in RA 9009.

On 22 December 2006, the House of Representatives approved the cityhood bills. The Senate also approved the cityhood bills in February 2007, except that of Naga, Cebu which was passed on 7 June 2007. The cityhood bills lapsed into law (Cityhood Laws) on various dates from March to July 2007 without the President's signature.[67]

The Cityhood Laws direct the COMELEC to hold plebiscites to determine whether the voters in each respondent municipality approve of the conversion of their municipality into a city.

Petitioners filed the present petitions to declare the Cityhood Laws unconstitutional for violation of Section 10, Article X of the Constitution, as well as for violation of the equal protection clause.[68] Petitioners also lament that the wholesale conversion of

[66] Entitled Joint Resolution To Exempt Certain Municipalities Embodied In Bills Filed In Congress Before June 30, 2001 From The Coverage Of RA No. 9009.
[67] Const., Art. VI, Sec. 27(1).
[68] Const., Art. III, Sec. 1.

> municipalities into cities will reduce the share of existing cities in the Internal Revenue Allotment because more cities will share the same amount of internal revenue set aside for all cities under Section 285 of the Local Government Code.

In his **dissenting opinion** to the February 15, 2011 **League of Cities** decision, Justice Carpio reiterated the arguments he raised in his original *ponencia*, citing **Section 10 of this Article X**:

> The crux of the controversy is whether the 16 Cityhood Laws are constitutional.
>
> As I have consistently opined, which opinion is concurred in by the majority members of this Court in the reinstated Decision of 18 November 2008 and in the assailed Resolution of 24 August 2010, the 16 Cityhood Laws are unconstitutional.
>
> First, the 16 Cityhood Laws violate Section 10, Article X of the 1987 Constitution. …
>
> **The Constitution is clear. The creation of local government units must follow the criteria established in the Local Government Code and not in any other law. There is only one Local Government Code. The Constitution requires Congress to stipulate in the Local Government Code all the criteria necessary for the creation of a city, including the conversion of a municipality into a city. Congress cannot write such criteria in any other law, like the Cityhood Laws.**
>
> RA 9009 amended Section 450 of the Local Government Code to increase the income requirement from ₱20 million to ₱100 million for the creation of a city. This took effect on 30 June 2001. Hence, from that moment the Local Government Code required that any municipality desiring to become a city must satisfy the ₱100 million income requirement. Section 450 of the Local Government Code, as amended by RA 9009, does not contain any exemption from this income requirement.
>
> In enacting RA 9009, Congress did not grant any exemption to respondent municipalities, even though their cityhood bills were pending in Congress when Congress passed RA 9009. The Cityhood Laws, all enacted *after* the effectivity of RA 9009, explicitly exempt respondent municipalities from the increased income requirement in Section 450 of the Local Government

> Code, as amended by RA 9009. Such exemption clearly violates Section 10, Article X of the Constitution and is thus patently unconstitutional. To be valid, such exemption must be written in the Local Government Code and not in any other law, including the Cityhood Laws.
>
> I repeat, Section 10, Article X of the Constitution expressly provides that "no ... city shall be created ... except in accordance with the criteria established in the local government code." This provision can only be interpreted in one way, that is, all the criteria for the creation of cities must be embodied exclusively in the Local Government Code. In this case, the Cityhood Laws, which are unmistakably laws other than the Local Government Code, provided an exemption from the increased income requirement for the creation of cities under Section 450 of the Local Government Code, as amended by RA 9009. Clearly, the Cityhood Laws contravene the letter and intent of Section 10, Article X of the Constitution.

Then in his **dissenting opinion** to the April 12, 2011 **League of Cities** resolution, again citing **Section 10 of this Article X**, Justice Carpio was more emphatic:

> **The Cityhood Laws are laws other than the Local Government Code.**
>
> In sustaining the constitutionality of the 16 Cityhood Laws, the majority[69] ruled in the Resolution of 15 February 2011 that "in effect, the Cityhood Laws amended RA No. 9009 through the exemption clauses found therein. Since the Cityhood Laws explicitly exempted the concerned municipalities from the amendatory RA No. 9009, such Cityhood Laws are, therefore, also amendments to the LGC itself." In the Resolution denying petitioner's motion for reconsideration, the majority stated that "RA 9009, and, by necessity, the LGC, were amended, ... by way of the express exemptions embodied in the exemption clauses."
>
> This is egregious error.
>
> Nowhere in the plain language of the Cityhood Laws can this interpretation be discerned. Neither the title nor the body of the Cityhood Laws sustains such conclusion. Simply put, there is absolutely nothing in the Cityhood Laws to support the majority

[69] Majority resolution, Bersamin, J.

decision that the Cityhood Laws further amended the Local Government Code, which exclusively embodies the essential requirements for the creation of cities, including the conversion of a municipality into a city.

An "amendment" refers to a change or modification to a previously adopted law.[70] An amendatory law merely modifies a specific provision or provisions of a previously adopted law.[71] Indisputably, an amendatory law becomes an integral part of the law it seeks to amend.

On the contrary, each Cityhood Law contains a uniformly worded Separability Clause which expressly states:

> Separability Clause. - If, for any reason or reasons, any part or provision of this Charter shall be held unconstitutional, invalid or inconsistent with the Local Government Code of 1991, the other parts or provisions hereof which are not affected thereby shall continue to be in full force and effect. Moreover, in cases where this Charter is silent or unclear, the pertinent provisions of the Local Government Code shall govern, if so provided therein.

Each Cityhood Law states that if any of its provisions is "inconsistent with the Local Government Code," the other consistent provisions "shall continue to be in full force and effect." The clear and inescapable implication is that any provision in each Cityhood Law that is "inconsistent with the Local Government Code" has no force and effect - in short, void and ineffective. Each Cityhood Law expressly and unequivocally acknowledges the superiority of the Local Government Code, and that in case of conflict, the Local Government Code shall prevail over the Cityhood Law. Clearly, the Cityhood Laws do not amend the Local Government Code, and the Legislature never intended the Cityhood Laws to amend the Local Government Code. The clear intent and express language of the Cityhood Laws is for these laws to conform to the Local Government Code and not the other way around.

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[70] See Commissioner of Customs v. Court of Tax Appeals, G.R. Nos. 48886-88, 21 July 1993, where the Court stated that "The change in phraseology by amendment of a provision of law indicates a legislative intent to change the meaning of the provision from that it originally had."

[71] See Ruben E. Agpalo, Statutory Construction 278-279 (Second Edition, 1990), citing David v. Dancel, G.R. No. 21485, 25 July 1966, 17 SCRA 696 (1966).

To repeat, every Cityhood Law unmistakably provides that any provision in the Cityhood Law that is inconsistent with the Local Government Code is void. It follows that the Cityhood Laws cannot be construed to authorize the creation of cities that have not met the prevailing ₱100 million income requirement prescribed without exception in the Local Government Code.

Moreover, Congress, in providing in the Separability Clause that the Local Government Code shall prevail over the Cityhood Laws, treats the Cityhood Laws as separate and distinct from the Local Government Code. In other words, the Cityhood Laws *do not form integral parts* of the Local Government Code but are separate and distinct laws. There is therefore no question that the Cityhood Laws are laws *other* than the Local Government Code. As such, the Cityhood Laws cannot stipulate an exception from the requirements for the creation of cities, prescribed in the Local Government Code, without running afoul of the explicit mandate of Section 10, Article X of the 1987 Constitution…

The Constitution is clear. The creation of local government units must follow the criteria established in the Local Government Code itself and not in any other law. There is only one Local Government Code. To avoid discrimination and ensure uniformity and equality, the Constitution expressly requires Congress to stipulate in the Local Government Code itself all the criteria necessary for the creation of a city, including the conversion of a municipality into a city. Congress cannot write such criteria in any other law, like the Cityhood Laws.

The increased income requirement of ₱100 million is neither arbitrary nor difficult to comply.

The majority resolution of 15 February 2011 states that "the imposition of the ₱100 million average annual income requirement for the creation of component cities was arbitrarily made." The majority resolution further declares: "... there was no evidence or empirical data, such as inflation rates, to support the choice of this amount. The imposition of a very high income requirement of ₱100 million, increased from ₱20 million, was simply to make it extremely difficult for municipalities to become component cities."

This is glaring error.

In stating that there is no evidence to support the increased income requirement, the majority is requiring the Legislature, the sole law-making body under the Constitution, to provide evidence justifying the economic rationale, like inflation rates, for the increase in income requirement. The Legislature, in enacting RA No. 9009, is not required by the Constitution to show the courts data like inflation figures to support the increased income requirement. Besides, even assuming the inflation rate is zero, this Court cannot invalidate the increase in income requirement on such ground. A zero inflation rate does not bar the Legislature from increasing the income requirement to convert a municipality into a city, or increasing taxes or tax rates, or increasing capital requirements for businesses. This Court should not venture into areas of analyses obviously beyond its competence.

As long as the increased income requirement is not impossible to comply, such increase is a policy determination involving the wisdom of the law, which exclusively lies within the province of the Legislature. When the Legislature enacts laws increasing taxes, tax rates, or capital requirements for businesses, the Court cannot refuse to apply such laws on the ground that there is no economic justification for such increases. Economic, political or social justifications for the enactment of laws go into the wisdom of the law, outside the purview of judicial review. This Court cannot refuse to apply the law unless the law violates a specific provision of the Constitution. There is plainly nothing unconstitutional in increasing the income requirement from ₱20 million to ₱100 million because such increase does not violate any express or implied provision of the Constitution.

The majority declares that the ₱100 million income requirement under RA No. 9009 was imposed "simply to make it extremely difficult for the municipalities to become component cities." In short, the majority is saying that the Legislature, out of sheer whim or spite at municipalities, increased the income requirement from ₱20 million to ₱100 million. Thus, the majority applied the ₱20 million income requirement under the repealed law, not the ₱100 million income requirement under the prevailing law. Yet, the majority does not state that the ₱100 million income requirement is unconstitutional. The majority simply refuses to apply the prevailing law, choosing instead to apply a repealed law. There is neither law nor logic in the majority decision.

The majority's conclusion that the Legislature increased the income requirement from ₱20 million to ₱100 million "simply to make it difficult for the municipalities to become component cities" is not only unfair to the Legislature, it is also grossly erroneous. Contrary to the majority's baseless conclusion, the increased income requirement of ₱100 million is not at all difficult to comply. …

Further disproving the majority's erroneous conclusion, an additional twenty-one (21) municipalities have satisfied the ₱100 million income requirement for the creation of cities. …

Compliance by these municipalities with the ₱100 million income requirement underscores the fact that the ₱100 million income requirement is not difficult to comply at all, contrary to the baseless and speculative conclusion in the majority decision. In short, the majority decision is based on patently and undeniably false and erroneous premises.

Indisputably, right after the enactment of RA No. 9009, Congress passed laws converting municipalities into cities using the new ₱100 million income requirement. Subsequently, Congress enacted the 16 Cityhood Laws using the old ₱20 million income requirement. Thereafter, Congress again passed laws converting additional municipalities into cities using the ₱100 million income requirement. **The 16 Cityhood Laws stick out like a sore thumb, starkly showing an obvious violation of the equal protection clause. The Cityhood Laws create distinctly privileged cities with only ₱20 million annual income, discriminating against cities with ₱100 million annual income created *before and after* the enactment of the Cityhood Laws. This kind of discrimination is precisely what Section 10, Article X of the Constitution seeks to prohibit when it commands that "no ... city ... shall be created ... except in accordance with the criteria established in the local government code."**

…

The reduction of the share in the Internal Revenue Allotment will adversely affect the cities' economic situation.

In the Resolution of 15 February 2011, the majority declared that petitioner's protest against the reduction of their just share in the Internal Revenue Allotment "all boils down to

money," criticizing petitioners for overlooking the alleged need of respondent municipalities to become channels of economic growth in the countryside.

The majority gravely loses sight of the fact that "the members of petitioner League of Cities are also in need of the same resources, and are responsible for development imperatives that need to be done for almost 40 million Filipinos, as compared to only 1.3 million Filipinos in the respondent municipalities." As pointed out by petitioner, "this is just about equal to the population of Davao City, whose residents, on a per capita basis, receive less than half of what respondent municipalities' residents would receive if they become cities. Stated otherwise, for every peso that each Davaoeño receives, his counterpart in the respondent municipality will receive more than two pesos."

In addition, the majority conveniently forgets that members of the LCP have more projects, more contractual obligations, and more employees than respondent municipalities. If their share in the Internal Revenue Allotment is unreasonably reduced, it is possible, even expected, that these cities may have to lay-off workers and abandon projects, greatly hampering, or worse paralyzing, the delivery of much needed public services in their respective territorial jurisdictions.

Obviously, petitioner's protest does not boil down to money. It boils down to equity and fairness, rational allocation of scarce resources, and above all, faithful compliance with an express mandatory provision of the Constitution. No one should put a monetary value to compliance with an express command of the Constitution. Neither should any one, least of all this Court, disregard a patent violation of the Constitution just because the issue also involves monetary recovery. To do so would expose the stability of the Constitution to the corrosive vagaries of the marketplace.

Not substantial compliance, but outright violation of the Constitution.

In his Concurring Opinion to the Resolution of 15 February 2011, Justice Roberto A. Abad stated, "These new cities have not altogether been exempted from the operation of the Local Government Code covering income requirement. They have been expressly made subject to the lower income requirement of the

old code. There remains, therefore, substantial compliance with the provision of Section 10, Article X of the Constitution."

This is gross error.

There is a wide disparity - an ₱80 million difference - in the income requirement of ₱20 million under the old Local Government Code and the ₱100 million requirement under the prevailing Local Government Code. By any reasonable yardstick known to man since the dawn of civilization, compliance with the old income requirement, which is only 20% compliance with the new income requirement under the prevailing law, cannot be deemed "substantial compliance." It is like saying that those who obtain a general average of 20% in the Bar Examinations are in "substantial compliance" with the requirement for admission to the Bar where the highest possible score is 100%.

RA No. 9009 amended the Local Government Code precisely because the criteria in the old Local Government Code were no longer sufficient. In short, RA No. 9009 repealed the old income requirement of ₱20 million, a requirement that no longer exists in our statute books. Compliance with the old income requirement is compliance with a repealed, dead, and non-existent law - a totally useless, futile, and empty act**. Worse, compliance with the old requirement is an outright violation of the Constitution which expressly commands that "no ... city ... shall be created ... except in accordance with the criteria established in the local government code." To repeat, applying what Justice Abad calls "the lower income requirement of the old code" is applying a repealed, dead, and non-existent law, which is exactly what the majority decision has done.**

The invocation here of "substantial compliance" of the Constitution reminds us of what Justice Calixto Zaldivar wrote in his dissenting opinion in *Javellana v. Executive Secretary:*[72] "It would be indulging in sophistry to maintain that the voting in the citizens assemblies amounted to a substantial compliance with the requirements prescribed in Section 1 of Article XV of the 1935 Constitution." The same can be said in this case.

A final point. There must be strict compliance with the express command of the Constitution that "no city ...

[72] G.R. No. L-36142, 31 March 1973.

> **shall be created ... except in accordance with the criteria established in the local government code." Substantial compliance is insufficient because it will discriminate against all other cities that were created before and after the enactment** of the Cityhood Laws in strict compliance with the criteria in the Local Government Code, as amended by RA No. 9009. The conversion of municipalities into new cities means an increase in the Internal Revenue Allotment of the former municipalities and a corresponding decrease in the Internal Revenue Allotment of all other existing cities. There must be strict, not only substantial, compliance with the constitutional requirement because the economic lifeline of existing cities may be seriously affected. Thus, the "invocation of "substantial compliance" with constitutional requirements is clearly misplaced in this case.

In the landmark case **SEMA v. COMMISSION ON ELECTIONS**, G.R. No. 177597, July 16, 2008,[73] Justice Carpio, for the Court *en banc*, declared Section 19, Article VI of Republic Act No. 9054 unconstitutional, insofar as it granted to the Regional Assembly of the Autonomous Region in Muslim Mindanao the power to create provinces and cities, and declared void Muslim Mindanao Autonomy Act No. 201 creating the Province of Shariff Kabunsuan, as violations of Section 5, Article VI, as well as Section 20 of Article X. In so doing, Justice Carpio briefly explained the **import of Section 10 of this Article X:**

> 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

[73] Consolidated with Marquez v. COMELEC, G.R. No. 178628. See discussions under Art. VI, Sec. 5 and Art. X, Sec. 20.

> 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.[74] 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. …[75]

Justice Carpio's **dissenting opinion** in **NAVARRO v. ERMITA**, G.R. No. 180050, April 12, 2011, distilled his views on **Section 10, Article X**. It should be recalled[76] that the Supreme Court *en banc* declared - that Article 9(2) of the Rules and Regulations Implementing the Local Government Code of 1991, which stated that the land area requirement shall not apply where the proposed province is composed of one or more islands, was valid; Republic Act No. 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:

> … Alternatively, the majority[77] theorizes that Republic Act No. 9355 (RA 9355) creating the Dinagat Islands province is valid even without Article 9(2) of the implementing rules because RA

[74] See discussion under Art. VI, Sec. 5, and Art. X, Sec. 20.
[75] Ibid.
[76] See discussion under Art. VI., Sec. 1.
[77] Majority opinion, Nachura, J.

9355 effectively amended Section 461 of the Local Government Code:

> Further, the bill that eventually became R.A. No. 9355 was filed and favorably voted upon in both Chambers of Congress. Such acts of both Chambers of Congress definitively show the clear legislative intent to incorporate into the LGC that exemption from the land area requirement, with respect to the creation of a province when it consists of one or more islands, as expressly provided only in the LGC-IRR. Thereby, and by necessity, the LGC was amended by way of the enactment of R.A. No. 9355.

The majority's theory is misleading because RA 9355 did not amend the Local Government Code to exempt all islands from the minimum land area requirement for the creation of provinces. The exception in RA 9355 does not form part of the Local Government Code. RA 9355 applies only to Dinagat Islands, not to any other local government unit aspiring to be a province, and therefore could not have amended the requirements for the creation of provinces under the Local Government Code. In short, the exception in RA 9355 is in derogation of the uniform minimum requirements for the creation of provinces found in the Local Government Code.

Is Congress constitutionally permitted to make piecemeal, implied exceptions to the Local Government Code by enacting laws non-compliant with the Code's provisions? The Constitution's mandate to codify the criteria for the creation of all local government units and its prohibition that "[n]o province, city, municipality, or barangay may be created … except in accordance with the criteria established in the local government code…" compels a negative answer. The Constitution's directive for Congress to enact a "local government code" under Section 10, Article X is aimed at achieving uniformity, within range, of the sizes, incomes and populations of local government units *vis á vis* the other units of the same level. This enables the national government to equally apportion shares from the national taxes to these local units, fostering comparatively equal local development. To keep fidelity to this constitutional policy, any exception to the minimum requirements for the creation of local government units must themselves be expressly stated in the Local Government Code, applicable to all

local government units to be created. The Constitution intended the Local Government Code to serve as statutory template guiding Congress in creating local government units. Congress is constitutionally barred from acting under the Local Government Code and at the same time undercutting the Constitution by creating piecemeal, implied exceptions to the Local Government Code's minimum requirements for the creation of local government units.

The Court enforced this principle in *Tan v. Commission on Elections*[78] in reviewing Batas Pambansa Bilang 885 (BP 885) creating the island province of Negros del Norte. Under BP 885, the proposed island province of Negros del Norte, carved from its island mother province of Negros Occidental, had a land area of around 2,856 square kilometers only, way below the minimum of 3,500 square kilometers required under Section 197 of Batas Pambansa Bilang 337 (BP 337), the precursor of the present Local Government Code. Section 197 of BP 337, just like Section 461 of the Local Government Code, contained no express exception to its minimum land area requirement for island provinces. Did this Court grant provincehood to Negros del Norte because Congress can relax the minimum land area requirement under Section 197 for island provinces, in the name of local autonomy, even though Section 197 contained no exception?

In a unanimous *en banc* ruling, the Court, speaking thru Mr. Justice Alampay, emphatically held in the negative, applied Section 197 to strike down BP 885, and treated Section 197 as the unbending statutory yardstick to measure BP 885's validity. The full Court held:

> The final nail that puts to rest whatever pretension there is to the legality of the province of Negros del Norte is the significant fact that this created province does not even satisfy the area requirement prescribed in Section 197 of the Local Government Code, as earlier discussed.
> [R]espondents insist that when Section 197 of the Local Government Code speaks of the territory of the province to be created and requires that such territory be at least 3,500 square kilometers, what is contemplated is not only the land area but also the land and water over which the said province has jurisdiction and control. It is even the submission of the

[78] G.R. No. L-73155, 11 July 1986, 142 SCRA 727.

> respondents that in this regard the marginal sea within the three-mile limit should be considered in determining the extent of the territory of the new province. Such an interpretation is strained, incorrect, and fallacious.
> The last sentence of the first paragraph of Section 197 is most revealing. As so stated therein the "territory need not be contiguous if it comprises two or more islands." The use of the word territory in this particular provision of the Local Government Code and in the very last sentence thereof, clearly reflects that "territory" as therein used, has reference only to the mass of land area and excludes the waters over which the political unit exercises control.
> …
> The distinction between "territory" and "land area" which respondents make is an artificial or strained construction of the disputed provision whereby the words of the statute are arrested from their plain and obvious meaning and made to bear an entirely different meaning to justify an absurd or unjust result. The plain meaning in the language in a statute is the safest guide to follow in construing the statute. A construction based on a forced or artificial meaning of its words and out of harmony of the statutory scheme is not to be favored …
> It would be rather preposterous to maintain that a province with a small land area but which has a long, narrow, extended coast line, (such as La Union province) can be said to have a larger territory than a land-locked province (such as Ifugao or Benguet) whose land area manifestly exceeds the province first mentioned.

In the present case, the majority has done one better over the preposterous scenario in *Tan* - it grants provincehood to an aggrupation of one island, sub-island and 47 islets none of which has a "long, narrow, extended coast line" and whose total land area is only 802.12 square kilometers, not even one-half of what the Local Government Code requires.

Allowing Congress to make piecemeal, implied exceptions to the Local Government Code's minimum requirements for the creation of local government units, first done by this Court in *League of Cities v. COMELEC*,[79] which legitimized the cityhood status of 16 municipalities with ineligible incomes, results in

[79] See dissenting opinion, Resolution dated 15 February 2011, Carpio, J., G.R. No. 176951, discussed above.

selective local development for the most arbitrary of reasons, undermining the Constitution's goal of promoting uniform local development. In *League of Cities,* 16 municipalities with incomes below the minimum requirement under Section 459 of the Local Government Code, as amended, now receive the share from the national revenue allotted for cities, higher than the share going to municipalities with comparative incomes. These 16 municipalities, now cities, are accorded this privilege only because they had pending cityhood bills in Congress when Section 459 was amended. Here, a province with a population and land area measuring less than half of the populations and land areas required of other provinces will receive the share from the national revenue allotted for provinces only because it is surrounded by water.

Section 11. The Congress may, by law, create special metropolitan political subdivisions, subject to a plebiscite as set forth in Section 10 hereof. The component cities and municipalities shall retain their basic autonomy and shall be entitled to their own local executive and legislative assemblies. The jurisdiction of the metropolitan authority that will thereby be created shall be limited to basic services requiring coordination.

Section 12. Cities that are highly urbanized, as determined by law, and component cities whose charters prohibit their voters from voting for provincial elective officials, shall be independent of the province. The voters of component cities within a province, whose charters contain no such prohibition, shall not be deprived of their right to vote for elective provincial officials.

Section 13. Local government units may group themselves, consolidate or coordinate their efforts, services, and resources for purposes commonly beneficial to them in accordance with law.

Section 14. The President shall provide for regional development councils or other similar bodies composed of local government officials, regional heads of departments and other government offices, and representatives from non-governmental organizations within the regions for purposes of administrative decentralization to strengthen the autonomy of the units therein and to accelerate the economic and social growth and development of the units in the region.

AUTONOMOUS REGIONS

Section 15. There shall be created autonomous regions in Muslim Mindanao and in the Cordilleras consisting of provinces, cities, municipalities, and geographical areas sharing common and distinctive historical and cultural heritage, economic and social structures, and other relevant characteristics within the framework of this Constitution and the national sovereignty as well as territorial integrity of the Republic of the Philippines.

Section 16. The President shall exercise general supervision over autonomous regions to ensure that laws are faithfully executed.

Section 17. All powers, functions, and responsibilities not granted by this Constitution or by law to the autonomous regions shall be vested in the National Government.

Section 18. The Congress shall enact an organic act for each autonomous region with the assistance and participation of the regional consultative commission composed of representatives appointed by the President from a list of nominees from multi-sectoral bodies. The organic act shall define the basic structure of government for the region consisting of the executive department and legislative assembly, both of which shall be elective and representative of the constituent political units. The organic acts shall likewise provide for special courts with personal, family, and property law jurisdiction consistent with the provisions of this Constitution and national laws.

The creation of the autonomous region shall be effective when approved by majority of the votes cast by the constituent units in a plebiscite called for the purpose, provided that only provinces, cities, and geographic areas voting favorably in such plebiscite shall be included in the autonomous region.

Section 19. The first Congress elected under this Constitution shall, within eighteen months from the time of organization of both Houses, pass the organic acts for the autonomous regions in Muslim Mindanao and the Cordilleras.

Section 20. Within its territorial jurisdiction and subject to the provisions of this Constitution and national laws, the organic act of autonomous regions shall provide for legislative powers

over:

(1) Administrative organization;
(2) Creation of sources of revenues;
(3) Ancestral domain and natural resources;
(4) Personal, family, and property relations;
(5) Regional urban and rural planning development;
(6) Economic, social, and tourism development;
(7) Educational policies;
(8) Preservation and development of the cultural heritage; and
(9) Such other matters as may be authorized by law for the promotion of the general welfare of the people of the region.

In **SEMA v. COMMISSION ON ELECTIONS**, G.R. No. 177597, July 16, 2008, 580 Phil. 623,[80] the Court *en banc*, speaking through Justice Carpio, declared Section 19, Article VI of Republic Act No. 9054 unconstitutional insofar as it granted to the Regional Assembly of the Autonomous Region in Muslim Mindanao the power to create provinces and cities, and declared void Muslim Mindanao Autonomy Act No. 201 creating the Province of Shariff Kabunsuan, as violations of Section 5, Article VI, as well as **Sections 15 and 20 of this Article X:**

> 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…
>
> **Nothing in Section 20, Article X of the Constitution authorizes autonomous regions, expressly or impliedly, to create or reapportion legislative districts for Congress.**
>
> On the other hand, Section 3, Article IV of RA 9054 amending the ARMM Organic Act, provides, "The Regional Assembly may exercise legislative power ... except on the following matters: ... (k) National elections. ..." Since the ARMM Regional Assembly has no legislative power to enact laws relating to national elections, it cannot create a legislative district whose representative is elected in national elections. Whenever Congress enacts a law creating a legislative district, the first representative is always elected in the "next national elections" from the effectivity of the

[80] Consolidated with Marquez v. COMELEC, G.R. No. 178628. See discussion under Art. VI, Sec. 5 and under Art. X, Sec. 10, above.

law. Indeed, the office of a legislative district representative to Congress is a national office, and its occupant, a Member of the House of Representatives, is a national official. **It would be incongruous for a regional legislative body like the ARMM Regional Assembly to create a national office when its legislative powers extend only to its regional territory. The office of a district representative is maintained by national funds and the salary of its occupant is paid out of national funds. It is a self-evident inherent limitation on the legislative powers of every local or regional legislative body that it can only create local or regional offices, respectively, and it can never create a national office.**

To allow the ARMM Regional Assembly to create a national office is to allow its legislative powers to operate outside the ARMM's territorial jurisdiction. This violates Section 20, Article X of the Constitution which expressly limits the coverage of the Regional Assembly's legislative powers "[w]ithin its territorial jurisdiction ..."
....

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."

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.... 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.

Section 21. The preservation of peace and order within the regions shall be the responsibility of the local police agencies which shall be organized, maintained, supervised, and utilized in accordance with applicable laws. The defense and security of the regions shall be the responsibility of the National Government

ARTICLE XI

ACCOUNTABILITY OF PUBLIC OFFICERS

Section 1. Public office is a public trust. Public officers and employees must, at all times, be accountable to the people, serve them with utmost responsibility, integrity, loyalty, and efficiency, act with patriotism and justice, and lead modest lives.

In **CHAVEZ v. PUBLIC ESTATES AUTHORITY**, G.R. No. 133250, July 9, 2002,[1] Justice Carpio linked this provision on **public accountability** to the people's right to information under Section 7, Article III of the Constitution and the State policy of full transparency in all transactions involving public interest in Section 28, Article II:

> "... These twin provisions are also essential to hold public officials "at all times ... accountable to the people," 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.**"

In **MONTESCLAROS v. COMMISSION ON ELECTIONS,** G.R. No. 152295, July 09, 2002, 433 Phil. 620,[2] Justice Carpio, on behalf of the Court *en banc*, dismissed, for "utter lack of merit," the petition that sought to prevent the postponement of the Sangguniang Kabataan elections based on the claim that the petitioners, who were all 20 years old, "are in danger of being disqualified to vote and be voted for in the SK elections should the SK elections be postponed to a later date:"

> The only semblance of a constitutional issue, albeit erroneous, that petitioners raise is their claim that SK membership is a "property right within the meaning of the Constitution." Since certain public offices are "reserved" for SK officers, petitioners

[1] See discussions under Art. III and Art. XII.
[2] See discussion under Art. VIII.

also claim a constitutionally protected "opportunity" to occupy these public offices. In petitioners' own words, they and others similarly situated stand to "lose their opportunity to work in the government positions reserved for SK members or officers." Under the Local Government Code of 1991, the president of the federation of SK organizations in a municipality, city or province is an ex-officio member of the municipal council, city council or provincial board, respectively.[3] The chairperson of the SK in the barangay is an ex-officio member of the Sangguniang Barangay.[4] The president of the national federation of SK organizations is an ex-officio member of the National Youth Commission, with rank of a Department Assistant Secretary.[5]

Congress exercises the power to prescribe the qualifications for SK membership. One who is no longer qualified because of an amendment in the law cannot complain of being deprived of a proprietary right to SK membership. Only those who qualify as SK members can contest, based on a statutory right, any act disqualifying them from SK membership or from voting in the SK elections. SK membership is not a property right protected by the Constitution because it is a mere statutory right conferred by law. Congress may amend at any time the law to change or even withdraw the statutory right.

A public office is not a property right. As the Constitution expressly states, a "[p]ublic office is a public trust." No one has a vested right to any public office, much less a vested right to an expectancy of holding a public office. In *Cornejo v. Gabriel*,[6] decided in 1920, the Court already ruled:

> Again, for this petition to come under the due process of law prohibition, it would be necessary to consider an office a "property." It is, however, well settled ... that a public office is not property within the sense of the constitutional guaranties of due process of law, but is a public trust or agency. ... The basic idea of the government ... is that of a popular representative government, the officers being mere agents and not rulers of the people, one where no one man or set of men has a proprietary or contractual right to an office, but where every officer accepts office pursuant to the provisions of the law and holds the office as a trust for the people he represents.

[3] Local Government Code of 1991, Sec. 438.
[4] Local Government Code of 1991, Sec. 390.
[5] RA No. 8044, Sec. 5.
[6] 41 Phil. 188 (1920).

> Petitioners, who apparently desire to hold public office, should realize from the very start that no one has a proprietary right to public office. While the law makes an SK officer an ex-officio member of a local government legislative council, the law does not confer on petitioners a proprietary right or even a proprietary expectancy to sit in local legislative councils. The constitutional principle of a public office as a public trust precludes any proprietary claim to public office. Even the State policy directing "equal access to opportunities for public service"[7] cannot bestow on petitioners a proprietary right to SK membership or a proprietary expectancy to ex-officio public offices.
>
> Moreover, while the State policy is to encourage the youth's involvement in public affairs,[8] this policy refers to those who belong to the class of people defined as the youth. Congress has the power to define who are the youth qualified to join the SK, which itself is a creation of Congress. Those who do not qualify because they are past the age group defined as the youth cannot insist on being part of the youth. In government service, once an employee reaches mandatory retirement age, he cannot invoke any property right to cling to his office. In the same manner, since petitioners are now past the maximum age for membership in the SK, they cannot invoke any property right to cling to their SK membership.

Then in A.M. No. P-13-3137, August 23, 2016, **OFFICE OF THE COURT ADMINISTRATOR v. SILONGAN,** Justice Carpio, speaking for the Court *en banc*, reiterated that:

> **No less than the Constitution mandates that all public officers and employees should serve with responsibility, integrity and efficiency, for public office is a public trust**.[9] No other office in the government service exacts a greater demand for moral righteousness and uprightness from an employee than the Judiciary.[10] Thus, this Court has often stated that the conduct of court personnel, from the presiding judge to the lowliest clerk, must always be beyond reproach and must be circumscribed with the heavy burden of responsibility as to let them be free from any suspicion that may taint the Judiciary.[11] The Court condemns any conduct, act, or omission on the part of

7 Const., Art. II, Sec. 26.
8 Const., Art. II, Sec. 13.
9 Atty. Francisco v. Galvez, 622 Phil. 25 (2009).
10 Ibid.
11 Ibid.

> all those involved in the administration of justice which would violate the norm of public accountability and diminish the faith of the people in the Judiciary.[12]

Consequently, in **Silongan,** the Court, through Justice Carpio, ruled as follows:

> The Court defines misconduct as a transgression of some established and definite rule of action, more particularly, unlawful behavior or gross negligence by a public officer.[13] As distinguished from simple misconduct, the element of corruption, clear intent to violate the law, or flagrant disregard of established rule, must be manifest in a charge of grave misconduct.[14]
>
> In the present case, both the OCA and the Investigating Justice found that Silongan and Amilil certified as true copies spurious annulment decisions issued by Judge Indar. There is no question as to their guilt as the records speak for itself. The records clearly show that the 27 cases, which were certified as true copies by Silongan, were not in the court dockets nor have they been filed before the trial court. Amilil also certified as true copies two decisions, which did not appear in the court dockets. As custodians of court records in RTC Branches 14 and 15, Silongan and Amilil should have known that there were no existing records that could have served as basis for the issuance of the certificates.
>
> A certificate is a written assurance, or official representation, that some act has or has not been done, or some event occurred, or some legal formality has been complied with.[15] To certify is to attest to the truthfulness of the document.[16] Without the records to verify the truthfulness and authenticity of a document, no certification should be issued.[17]
>
> Thus, Silongan and Amilil should not have attested to the truthfulness of the decisions issued by Judge Indar knowing that there were no records to verify its truthfulness, as the decisions were not even in the court dockets. Their acts of authenticating

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[12] Ibid.

[13] Executive Judge Rojas, Jr. v. Mina, 688 Phil. 241 (2012); Office of the Court Administrator v. Judge Cader P. Indar, 685 Phil. 272 (2012); Dela Cruz v. Malunao, 684 Phil. 493 (2012).

[14] Ibid.

[15] Atty. Alcantara-Aquino v. Dela Cruz, 725 Phil. 123 (2014); Atty. Francisco v. Galvez, 622 Phil. 25 (2009).

[16] Ibid.

[17] Ibid.

and certifying as true and correct spurious decisions issued by Judge Indar undoubtedly constitute grave misconduct as those acts manifest clear intention to violate the law or to flagrantly disregard established rule.

Their acts also amount to dishonesty, which is defined as "disposition to lie, cheat, deceive, or defraud; untrustworthiness; lack of integrity; lack of honesty, probity or integrity in principle; lack of fairness and straightforwardness; disposition to defraud, deceive or betray."[18] Their acts further amount to a breach of Canon IV of the Code of Conduct for Court Personnel which states that: "Court personnel shall at all times perform official duties properly and with diligence. They shall commit themselves exclusively to the business and responsibilities of their office during working hours."

Section 2. The President, the Vice-President, the Members of the Supreme Court, the Members of the Constitutional Commissions, and the Ombudsman may be removed from office on impeachment for, and conviction of, culpable violation of the Constitution, treason, bribery, graft and corruption, other high crimes, or betrayal of public trust. All other public officers and employees may be removed from office as provided by law, but not by impeachment.

Section 3. (1) The House of Representatives shall have the exclusive power to initiate all cases of impeachment.

(2) A verified complaint for impeachment may be filed by any Member of the House of Representatives or by any citizen upon a resolution or endorsement by any Member thereof, which shall be included in the Order of Business within ten session days, and referred to the proper Committee within three session days thereafter. The Committee, after hearing, and by a majority vote of all its Members, shall submit its report to the House within sixty session days from such referral, together with the corresponding resolution. The resolution shall be calendared for consideration by the House within ten session days from receipt thereof.

[18] Balanza v. Criste, A.M. No. P-15-3321, 21 October 2015; Executive Judge Rojas, Jr. v. Mina, supra; Office of the Court Administrator v. Judge Cader P. Indar, 685 Phil. 272 (2012).; Retired Employee v. Manubag, 652 Phil. 491 (2010); Judge Dela Cruz v. Luna, 555 Phil. 742 (2007).

(3) A vote of at least one-third of all the Members of the House shall be necessary either to affirm a favorable resolution with the Articles of Impeachment of the Committee, or override its contrary resolution. The vote of each Member shall be recorded.

(4) In case the verified complaint or resolution of impeachment is filed by at least one-third of all the Members of the House, the same shall constitute the Articles of Impeachment, and trial by the Senate shall forthwith proceed.

(5) No impeachment proceedings shall be initiated against the same official more than once within a period of one year.

(6) The Senate shall have the sole power to try and decide all cases of impeachment. When sitting for that purpose, the Senators shall be on oath or affirmation. When the President of the Philippines is on trial, the Chief Justice of the Supreme Court shall preside, but shall not vote. No person shall be convicted without the concurrence of two-thirds of all the Members of the Senate.

(7) Judgment in cases of impeachment shall not extend further than removal from office and disqualification to hold any office under the Republic of the Philippines, but the party convicted shall nevertheless be liable and subject to prosecution, trial, and punishment, according to law.

(8) The Congress shall promulgate its rules on impeachment to effectively carry out the purpose of this section.

In **REPUBLIC v. SERENO**, G.R. No. 237428, May 11, 2018, a petition for the issuance of the extraordinary writ of *quo warranto*, the appointment of Maria Lourdes P.A. Sereno as Chief Justice of the Supreme Court was voided by the Court *en banc,* and Sereno was ousted and excluded from the position. Justice Carpio **dissented** from the majority, voted to dismiss the petition and to refer the matter to Congress for possible inclusion in the then on-going **impeachment proceedings** against Sereno:

> This *quo warranto* petition, filed by the Republic of the Philippines, represented by the Office of the Solicitor General (OSG), seeks to nullify the appointment of respondent Maria Lourdes P.A. Sereno as Chief Justice of the Supreme Court, an impeachable officer under Section 2, Article XI of the

Constitution, for lack of proven integrity which is required under Section 7(3), Article VIII of the Constitution for appointment to a judicial post. Petitioner asserts that respondent's repeated failure to file her Statement of Assets, Liabilities, and Net worth (SALN)[19] as required by law shows lack of integrity.

The qualifications of members of the Supreme Court are prescribed under Sections 7(1) and 7(3), Article VIII of the Constitution …

When the position of the Chief Justice became vacant in 2012, upon the impeachment of then Chief Justice Renato C. Corona, the Judicial and Bar Council (JBC) issued an announcement for the opening of the Chief Justice position. Included in the documents required to be submitted were the SALNs of the applicant: All previous SALNs (up to 31 December 2011) for those in the government or SALN as of 31 December 2011 for those from the private sector. As an applicant for the Chief Justice position, respondent submitted to the JBC her SALNs only for the years 2009, 2010, and 2011, despite being in government service for 20 years (1986-2006) as a professor at the University of the Philippines (UP) College of Law. The Certification dated 8 December 2017 of Director Angela D. Escoto of the UP Human Resources Development Office (UP HRDO) stated that based on the 201 files of respondent under the custody of the UP HRDO, between the period of 2000 to 2009, the respondent's SALN on file is only as of 31 December 2002. Based on the records, it appears that while employed at the UP College of Law, respondent only submitted her SALNs for the years 1985, 1989, 1990, 1991, 1993, 1994, 1995, 1996, 1997, 1998, and 2002.

…

Considering that the requirement of filing a SALN within the period prescribed by law is enshrined in the Constitution,[20] **the non-filing of SALN within the prescribed period clearly constitutes a violation of an express constitutional mandate. The repeated non-filing of SALN therefore constitutes culpable violation of the Constitution and betrayal of public trust, which are grounds for impeachment under the Constitution.**

Culpable violation of the Constitution must be understood to

[19] See discussion under Art. XI, Sec. 17.
[20] See discussion under Art. XI, 17.

mean "willful and intentional violation of the Constitution and not violations committed unintentionally or involuntarily or in good faith or through an honest mistake of judgment."[21] The framers of the Constitution, particularly the Committee on Accountability of Public Officers, "accepted the view that [culpable violation of the Constitution] implied 'deliberate intent, perhaps even a certain degree of perversity for it is not easy to imagine that individuals in the category of these officials would go so far as to defy knowingly what the Constitution commands.'"[22]

Betrayal of public trust, on the other hand, refers to acts "less than criminal but must be attended by bad faith and of such gravity and seriousness as the other grounds for impeachment," as the Court held in *Gonzales III v. Office of the President of the Philippines*,[23] thus:

> Betrayal of public trust is a new ground for impeachment under the 1987 Constitution added to the existing grounds of culpable violation of the Constitution, treason, bribery, graft and corruption and other high crimes. While it was deemed broad enough to cover any violation of the oath of office, the impreciseness of its definition also created apprehension that "such an overarching standard may be too broad and may be subject to abuse and arbitrary exercise by the legislature." Indeed, the catch-all phrase betrayal of public trust that referred to "all acts not punishable by statutes as penal offenses but, nonetheless, render the officer unfit to continue in office" could be easily utilized for every conceivable misconduct or negligence in office. However, deliberating on some workable standard by which the ground could be reasonably interpreted, the Constitutional Commission recognized that human error and good faith precluded an adverse conclusion.
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> ...
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> The Constitutional Commission eventually found it reasonably acceptable for the phrase betrayal of public trust to refer to "acts which are just short of being criminal but constitute gross faithlessness against public trust, tyrannical abuse

[21] Joaquin G. Bernas, The 1987 Constitution Of The Republic Of The Philippines: A Commentary 1112 (2003 Edition), citing 2 Aruego, The Framing Of The Philippine Constitution 590 (1930); Report of the Special Committee on the Impeachment of President Quirino, IV Congressional Record, House Of Representatives 553 (1949).

[22] Joaquin G. Bernas, The Intent Of The 1986 Constitution Writers 765 (1995 Edition), citing II Record at 278.

[23] 694 Phil. 100-101 (2012).

> of power, inexcusable negligence of duty, favoritism, and gross exercise of discretionary powers." In other words, acts that should constitute betrayal of public trust as to warrant removal from office may be less than criminal but must be attended by bad faith and of such gravity and seriousness as the other grounds for impeachment.

Since the repeated failure to file the SALN constitutes culpable violation of the Constitution and betrayal of public trust, it is immaterial if the failure to file the SALN is committed before appointment to an impeachable office. However, it is up to Congress, which is the constitutional body vested with the exclusive authority to remove impeachable officers, to determine if the culpable violation of the Constitution or betrayal of public trust, committed before appointment as an impeachable officer, warrants removal from office considering the need to maintain public trust in public office. For instance, if an impeachable officer is discovered to have committed treason before his appointment, it is up to the impeachment court to determine if the continuance in office of the impeachable officer is detrimental to national security warranting removal from office.

…

Jurisdiction to Remove an Impeachable Officer

… According to the *ponente*,[24] "the language of Section 2, Article XI of the Constitution does not foreclose a *quo warranto* action against impeachable officers. ... To construe Section 2, Article XI of the Constitution as proscribing a *quo warranto* petition is to deprive the State of a remedy to correct a 'public wrong' arising from defective or void appointments."

The *ponente* posits that "while impeachment concerns actions that make the officer unfit to continue exercising his or her office, *quo warranto* involves matters that render him or her ineligible to hold the position to begin with."

This is erroneous.

Section 2, Article XI of the Constitution expressly provides the mode of removal from office of "the

[24] Majority opinion, Tijam, J.

President, the Vice-President, the Members of the Supreme Court, the Members of the Constitutional Commissions, and the Ombudsman." Removal from office of these public officers shall only be by impeachment, and not through any other mode. In *Lecaroz v. Sandiganbayan*, the Court held:

> ...[T]he above provision proscribes removal from office of the aforementioned constitutional officers by any other method; otherwise, to allow a public officer who may be removed solely by impeachment to be charged criminally while holding his office with an offense that carries the penalty of removal from office, would be violative of the clear mandate of the fundamental law.[25]

The provision mandating removal only by impeachment is "the Constitution's strongest guarantee of security of tenure. The guarantee effectively blocks the use of other legal ways of ousting an officer."[26] Thus, in *In re First Indorsement from Hon. Gonzales*,[27] the argument that a sitting member of this Court may be subjected to disbarment proceedings, which could possibly result in the sitting Justice being disbarred and thus not qualified for the position, was rejected by this Court, thus:

> ... A public officer who under the Constitution is required to be a Member of the Philippine Bar as a qualification for the office held by him and who may be removed from office only by impeachment, cannot be charged with disbarment during the incumbency of such public officer. Further, such public officer, during his incumbency, cannot be charged criminally before the Sandiganbayan or any other court with any offence which carries with it the penalty of removal from office, or any penalty service of which would amount to removal from office.

The Court explained the important underlying reason for this rule in the same case of *In re First Indorsement from Hon. Gonzales*, to wit:

> The above rule rests on the fundamental principles of judicial independence and separation of powers. The rule is important because judicial independence is important. Without the protection of this rule, Members of the Supreme Court

[25] 213 Phil. 288, 294 (1984).

[26] Joaquin G. Bernas, The 1987 Constitution Of The Republic Of The Philippines: A Commentary 1111 (2003 Edition).

[27] 243 Phil. 167, 170 (1988).

> would be vulnerable to all manners of charges which might be brought against them by unsuccessful litigants or their lawyers or by other parties who, for any number of reasons might seek to affect the exercise of judicial authority by the Court.[28]

A sitting impeachable officer can be removed from office only through impeachment by Congress. As I have stated in a Dissenting Opinion,[29] the sole disciplining authority of all impeachable officers, including members of this Court, is Congress.

> Under the Constitution, the sole disciplining authority of all impeachable officers, including Justices of this Court, is Congress. Section 3(1), Article XI of the Constitution provides that, "The House of Representatives shall have the exclusive power to initiate all cases of impeachment." Likewise, Section 3(6) of the same Article provides that, "The Senate shall have the sole power to try and decide cases of impeachment." These provisions constitute Congress as the exclusive authority to discipline all impeachable officers for any impeachable offense, including "betrayal of public trust," a "catchall phrase" to cover any misconduct involving breach of public trust by an impeachable officer.

The House impeaches, and the Senate convicts. This is the only method allowed under the Constitution to remove a member of this Court. To allow any other method is to re-write the Constitution. To permit this *quo warranto* petition to remove an incumbent member of this Court is to violate the Constitution.

The grounds for impeachment are: culpable violation of the Constitution, treason, bribery, graft and corruption, other high crimes, and betrayal of public trust.

The catch-all phrase "betrayal of public trust" covers every conceivable misconduct by an impeachable officer, whether committed while in government service before the appointment, at the time of application for the office, or after appointment to office. Any misrepresentation on material matters at the time of

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[28] Id. at 172.

[29] In the Matter of the Charges of Plagiarism. etc., against Assoc. Justice Mariano C. Del Castillo, 657 Phil. 13, 80-81 (2011).

application for office is an integrity issue subsumed under the phrase "betrayal of public trust."

As I pointed out earlier, the repeated failure to file SALNs constitutes culpable violation of the Constitution and betrayal of public trust, grounds for removing an impeachable officer. While the failure to file SALNs may also raise questions on the integrity, and thus the qualification, of an applicant for Justice of the Supreme Court, the relevant applicable violation, for purposes of removing such impeachable officer once already in office, is culpable violation of the Constitution and betrayal of public trust. Only Congress, through the impeachment process, can remove an impeachable officer on these grounds.

If a court finds that an impeachable officer has committed an impeachable act, the court should refer the matter to Congress, for Congress to exercise its exclusive mandate to remove from office impeachable officers. No court, not even this Court, can assume the exclusive mandate of Congress to remove impeachable officers from office. As I have expressed in a Dissenting Opinion:[30]

> This Court may conduct an investigation of an administrative complaint against a sitting Justice to determine if there is basis in recommending to the House of Representatives the initiation of an impeachment complaint against the sitting Justice. This Court may also conduct an investigation of an administrative complaint against a sitting Justice to determine if the complaint constitutes contempt of this Court. However, this Court has no power to decide on the guilt or innocence of a sitting Justice in the administrative complaint because such act is a usurpation of the exclusive disciplinary power of Congress over impeachable officers under the Constitution. Any decision by this Court in an administrative case clearing a sitting Justice of an impeachable offense is void for want of jurisdiction and for violation of an express provision of the Constitution.
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> Such a decision will put this Court on a collision course with Congress if subsequently an impeachment complaint for plagiarism is filed with Congress against the sitting Justice. Incidentally, an impeachment complaint has already been filed in the House of Representatives involving the same complaint subject of this administrative case. If the House of Representatives decides to take cognizance of

[30] Id. at 83-84.

> the complaint and initiates an impeachment based on the same administrative complaint that this Court had already dismissed as baseless, then this Court would have created a constitutional crisis that could only weaken the public's faith in the primacy of the Constitution.
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> Thus, this Court should treat the present *quo warranto* petition as an administrative investigation by this Court of one of its members. The resolution of this Court should be to refer its findings and recommendation against respondent to Congress.

Section 4. The present anti-graft court known as the Sandiganbayan shall continue to function and exercise its jurisdiction as now or hereafter may be provided by law.

Section 5. There is hereby created the independent Office of the Ombudsman, composed of the Ombudsman to be known as Tanodbayan, one overall Deputy and at least one Deputy each for Luzon, Visayas, and Mindanao. A separate Deputy for the military establishment may likewise be appointed.

The **independence of the Office of the Ombudsman** was explained by Justice Carpio in his concurring opinion in **GONZALES v. OFFICE OF THE PRESIDENT OF THE PHILIPPINES**, G.R. No. 196231, September 4, 2012, 694 Phil. 52, [31] a petition for *certiorari*, with application for issuance of temporary restraining order, that assailed, on jurisdictional grounds, a decision of the Office of the President dismissing Emilio A. Gonzales III, Deputy Ombudsman for the Military and Other Law Enforcement Offices, for gross neglect of duty and grave misconduct constituting betrayal of public trust. The petition primarily sought a declaration that Section 8(2) of Republic Act No. 6770, or the Ombudsman Act of 1989, which gave the President the power to dismiss a Deputy Ombudsman of the Office of the Ombudsman, was unconstitutional:

> Our Constitution does not impart a fixed and rigid concept of independence among the offices that it creates. While it declares certain bodies as "independent", we cannot assume that the **independence of the Ombudsman** is the same as the independence of the Judiciary. Neither is the independence of

[31] Consolidated with Barreras-Sulit v. Ochoa, G.R. No. 196232. See discussion under Arts. IX-A, Sec. 1, XII, Secs. 9 and 20, XIII, Sec. 17.

the Constitutional Commissions the same as that of the National Economic and Development Authority, the Bangko Sentral ng Pilipinas or the Commission on Human Rights.[32] This Court cannot make a "one size fits all" concept of independence because the Constitution itself differentiates the degree of independence of these bodies.

…

I agree with the *ponencia*[33] that Section 8(2) of the Ombudsman Act does not violate the Constitution. **The constitutional principle of independence does not obviate the possibility of a check from another body. After all, one of the constitutive principles of our constitutional structure is the system of checks and balances - a check that is not within a body, but outside of it. This is how our democracy operates - on the basis of distrust.**[34]

…

When the 1987 Constitution speaks of "independent" bodies, it does not mean complete insulation from other offices. The text, history and structure of the Constitution contemplate checks and balances that result in the expansion, contraction or concurrence of powers, a coordinate functioning among different bodies of government that is not limited to the executive, legislative and judicial branches, but includes the "independent" constitutional bodies. The very structure of our government belies the claim that "independent" bodies necessarily have exclusive authority to discipline its officers.

Not all constitutional declarations are enforceable by courts.[35] We declared some of them as not self-executing such as the Declaration of Principles and State Policies under Article II.[36] However, the independence of constitutional bodies is a judicially enforceable norm. Textually, the Constitution does not define the term "independent" and thus, the contours of this principle may not be immediately clear. The question therefore arises: to what extent can this Court enforce the independence of bodies like the Ombudsman? Can we impose a particular notion

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[32] These are the bodies that the 1987 Constitution considers as "independent." See Const., Arts. IX-A, Sec. 1, XI, Sec. 5, XII, Secs. 9 and 20, XIII, Sec. 17.

[33] Majority opinion, Perlas-Bernabe, J.

[34] See J. Ely, Democracy And Distrust: A Theory Of Judicial Review (2002).

[35] Tañada v. Angara, 338 Phil. 546 (1997); Manila Prince Hotel v. Government Service Insurance System, 335 Phil. 82 (1997); Kilosbayan, Inc. v. Morato, 316 Phil. 652 (1995).

[36] Ibid.

of independence, amidst the silence of the constitutional text, to the extent of nullifying an act of Congress?

The answer lies in the Constitution itself which circumscribes the exercise of judicial power. …

…

Any reading of the 1987 Constitution does not warrant the conclusion that all bodies declared by the Constitution as "independent" have exclusive disciplinary authority over all their respective officials and employees. Unlike the Judiciary where such exclusivity is expressly provided for in the Constitution,[37] there is no reason to read such provision in the Ombudsman where the Constitution is silent. On the contrary, the constitutional provision that non-impeachable officers and employees "may be removed from office as provided by law" removes any doubt that Congress can determine the mode of removal of non-impeachable officers and employees of "independent" bodies other than the Judiciary. An "independent" body does not have exclusive disciplinary authority over its officials and employees unless the Constitution expressly so provides, as in the case of the Judiciary.

…

… The fact that different constitutional bodies are treated differently under the Constitution shows that independence is a broadly delineated norm. With this level of generality, the constitutional meaning of independence is only that of independent decision-making that is free from partisanship and political pressures. It does not even mean fiscal autonomy unless the Constitution says so.[38] Thus, it is generally left to Congress to particularize the meaning of independence, subject only to specific constitutional limitations. Nothing in the Constitution tells us that an "independent" body necessarily has exclusive disciplinary authority over its officials and employees.

A completely "independent" body is alien to our constitutional system. There is no office that is insulated from a possible correction from another office. The executive, legislative and judicial branches of government operate through the system of checks and balances. All independent constitutional bodies

[37] Const., Art. VIII, Sec. 6 and 11.

[38] Commission on Human Rights Employees' Association (CHREA) v. Commission on Human Rights, G.R. No. 155336, 21 July 2006, 496 SCRA 226.

are subject to review by the courts. A fiscally autonomous body is subject to audit by the Commission on Audit, and Congress cannot be compelled to appropriate a bigger budget than that of the previous fiscal year.[39]

Section 8(2) of the Ombudsman Act is consistent with our system of checks and balances. The provision is a narrow form of delegation which empowers the President to remove only two officers in the Office of the Ombudsman, i.e. the Deputy Ombudsman and the Special Prosecutor. The proposition that an external disciplinary authority compromises the Ombudsman's independence fails to recognize that the Constitution expressly authorizes Congress to determine the mode of removal of all non-impeachable officers and employees. It also fails to recognize that under a system of checks and balances, an external disciplinary authority is desirable and is often the norm.

In disciplinary cases, the 1987 Constitution empowers the Ombudsman to direct the proper disciplinary authority "to take appropriate action against a public official or employee at fault, and recommend his removal, suspension, demotion, fine, censure, or prosecution, and ensure compliance therewith."[40] This is further implemented by the Ombudsman Act which provides that "[a]t its option, the Office of the Ombudsman may refer certain complaints to the proper disciplinary authority for the institution of appropriate administrative proceedings against erring public officers or employees, which shall be determined within the period prescribed in the civil service law."[41]

Cleary, the Ombudsman is not constitutionally empowered to act alone. Congress can even authorize the Department of Justice or the Office of the President to investigate cases within the jurisdiction of the Ombudsman. Similarly, the Ombudsman can investigate public officers and employees who are under the disciplinary authority of heads of other bodies or agencies.[42] The cases cited in the *ponencia*, i.e. *Hagad v. Gozo-Dadofe*[43] and *Office of the Ombudsman v. Delijero, Jr.*[44] - illustrate that concurrent jurisdiction does not impair the independence of

[39] Const., Art. VIII, Sec. 3; Art. IX-A, Sec. 5; Art. XI, Sec. 14.
[40] Const., Art. XI, Sec. 13, par. (3).
[41] R.A. No. 6770, Sec. 23(2).
[42] Administrative Code, Book V, Title I, Subtitle A, Chap. 7, Secs. 47, par. (2) and 48, par. (1).
[43] G.R. No. 108072, 12 December 1995, 251 SCRA 242.
[44] G.R. No. 172635, 20 October 2010, 634 SCRA 135.

the Ombudsman. Duplication of functions may not at all times promote efficiency, but it is not proscribed by the Constitution.

Section 6. The officials and employees of the Office of the Ombudsman, other than the Deputies, shall be appointed by the Ombudsman, according to the Civil Service Law.

Section 7. The existing Tanodbayan shall hereafter be known as the Office of the Special Prosecutor. It shall continue to function and exercise its powers as now or hereafter may be provided by law, except those conferred on the Office of the Ombudsman created under this Constitution.

Section 8. The Ombudsman and his Deputies shall be natural-born citizens of the Philippines, and at the time of their appointment, at least forty years old, of recognized probity and independence, and members of the Philippine Bar, and must not have been candidates for any elective office in the immediately preceding election. The Ombudsman must have, for ten years or more, been a judge or engaged in the practice of law in the Philippines.

During their tenure, they shall be subject to the same disqualifications and prohibitions as provided for in Section 2 of Article IX-A of this Constitution.

Section 9. The Ombudsman and his Deputies shall be appointed by the President from a list of at least six nominees prepared by the Judicial and Bar Council, and from a list of three nominees for every vacancy thereafter. Such appointments shall require no confirmation. All vacancies shall be filled within three months after they occur.

Section 10. The Ombudsman and his Deputies shall have the rank of Chairman and Members, respectively, of the Constitutional Commissions, and they shall receive the same salary which shall not be decreased during their term of office.

Section 11. The Ombudsman and his Deputies shall serve for a term of seven years without reappointment. They shall not be qualified to run for any office in the election immediately succeeding their cessation from office.

Section 12. The Ombudsman and his Deputies, as protectors of

the people, shall act promptly on complaints filed in any form or manner against public officials or employees of the Government, or any subdivision, agency or instrumentality thereof, including government-owned or controlled corporations, and shall, in appropriate cases, notify the complainants of the action taken and the result thereof.

Policy of Non-Interference

KARA-AN v. OFFICE OF THE OMBUDSMAN, G.R. No. 119990, June 21, 2004, 476 Phil. 536, was a petition for review on *certiorari* that sought to reverse the Ombudsman's resolution dismissing Remberto C. Kara-an's complaint for violation of Republic Act No. 3019, or the Anti-Graft and Corrupt Practices Act, against "the clique of six in the Board of Directors of the Al-Amanah Islamic Investment Bank of the Philippines," and the order denying petitioner's motion for reconsideration in the case *a quo*. Speaking for the First Division, Justice Carpio, "cutting through the convoluted language of petitioner's arguments," identified the "pivotal issue" as "whether the Ombudsman committed grave abuse of discretion amounting to lack or excess of jurisdiction in dismissing petitioner's complaint." Answering in the negative, Justice Carpio cited **Section 12 of this Article XI** and proceeded to explain:

> The Ombudsman has the "sole power to investigate and prosecute on its own or on complaint by any person, any act or omission of any public officer or employee, office or agency, when such act or omission appears to be illegal, unjust, improper or inefficient."[45] **The consistent policy of the Court is not to interfere with the Ombudsman's exercise of his investigatory and prosecutory powers.** We held in *Alba v. Nitorreda*[46] that:
>
> > ... this Court has consistently refrained from interfering with the exercise by the Ombudsman of his constitutionally mandated investigatory and prosecutory powers. Otherwise stated, it is beyond the ambit of this Court to review the exercise of discretion of the Ombudsman in prosecuting or dismissing a complaint filed before it. Such initiative and independence are inherent in the Ombudsman who, beholden to no one, acts as the champion of the people and preserver of the integrity of the public service.

[45] RA 6770, Sec. 15(1).
[46] 325 Phil. 229 (1996).

The Court explained the rationale underlying its **policy of non-interference** in this wise:

> ... The rule is based not only upon respect for the investigatory and prosecutory powers granted by the Constitution to the Office of the Ombudsman but upon practicality as well. Otherwise, the functions of the courts will be grievously hampered by innumerable petitions assailing the dismissal of investigatory proceedings conducted by the Office of the Ombudsman with regard to complaints filed before it, in much the same way that the courts would be extremely swamped if they would be compelled to review the exercise of discretion on the part of the fiscals or prosecuting attorneys each time they decide to file an information in court or dismiss a complaint by a private complainant.[47]

Petitioner contends that the Ombudsman's grave abuse of discretion lies in his failure to conduct the appropriate investigation in breach of constitutional, statutory and administrative mandates. Petitioner also points out that EPIB Head Arnau, in his 1st Indorsement/Letter dated 29 March 1994, named as respondents "the former chairman and incumbent board members of Islamic Bank" instead of those who processed and approved the anomalous P250,000 loan to CAMEC in 1986. Petitioner asserts that Arnau could have easily determined the directors who approved the CAMEC loan by issuing a subpoena duces tecum to Islamic Bank to produce a copy of the minutes of meeting of the Bank's Board that approved the loan.

Section 2, Rule II of Administrative Order No. 07 of the Office of the Ombudsman, otherwise known as the "Rules of Procedure of the Office of the Ombudsman,"[48] states:

> 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 officer or official for fact-finding investigation;

[47] Ocampo v. Ombudsman, G.R. Nos. 103446-47, 30 August 1993, 225 SCRA 725.

[48] Dated 10 April 1990, issued pursuant to the rule-making power of the Ombudsman under Sec. 13(8) of the 1987 Constitution and Secs. 18, 23 and 27 of The Ombudsman Act of 1989.

e) referred for administrative adjudication; or
f) subjected to a preliminary investigation.

Clearly, the Ombudsman does not have to conduct a preliminary investigation upon receipt of a complaint. The Ombudsman has discretion to determine whether a preliminary investigation is proper.[49] Should the investigating officer find the complaint devoid of merit, then he may recommend its outright dismissal.[50]

Since the Ombudsman can dismiss a complaint outright for lack of merit, it necessarily follows that he can also dismiss the complaint for lack of merit after the respondent's comment to the complaint. The Ombudsman, through Graft Investigation Officer I Roline M. Ginez-Jabalde, acted within her authority in requiring Islamic Bank's former chairman and incumbent board members to comment on petitioner's letter-complaint since the complaint mentioned Roberto F. De Ocampo and referred to "the present number and membership of the Bank's Board" as the ones responsible for the loan. The records fail to show any abuse of discretion by the Ombudsman in dismissing the complaint after this inquiry. The Ombudsman did not find prima facie evidence to proceed with the investigation simply because respondents, except for Farouk A. Carpizo, were not yet directors of the Bank's Board when the Islamic Bank approved the CAMEC loan in 1986.

Petitioner cannot also compel the Ombudsman to order the production of certain documents, if in the Ombudsman's judgment such documents are not necessary to establish probable cause against respondents. The Court cannot interfere with the Ombudsman's discretion in determining the adequacy or inadequacy of the evidence before him. The investigation is advisedly called preliminary, as it is yet to be followed by the trial proper. The occasion is not for the full and exhaustive display of the parties' evidence but for the presentation of such evidence only as may engender a well-founded belief that an offense has been committed and that the accused is probably guilty of the offense.[51]

The Court cannot likewise sustain petitioner's contention that the Ombudsman gravely abused his discretion in dismissing the

[49] Mamburao, Inc. v. Office of the Ombudsman, G.R. Nos. 139141-42, 15 November 2000, 344 SCRA 805; Knecht v. Hon. Desierto, 353 Phil. 494 (1998).
[50] Ibid.
[51] Hashim v. Boncan, 71 Phil. 216 (1941).

charge against Farouk A. Carpizo (Carpizo). The Ombudsman explained his reasons for finding that there was no sufficient ground to engender a well-founded belief that Carpizo is liable under RA 3019. True, Carpizo, who was appointed in March 1981, was already a director when the Islamic Bank approved the CAMEC loan in 1986. However, the fact that the Islamic Bank processed and approved the CAMEC loan during his incumbency as director does not automatically establish probable cause against him absent a showing that he personally participated in any irregularity in the processing and approval of the loan. As the Ombudsman stated in the assailed Order, there were subordinate officials who studied and favorably endorsed the loan to the Bank's Board for approval.

Petitioner's other arguments are anchored on the propriety of the Ombudsman's appreciation of the facts. But the Ombudsman is the proper adjudicator on aspects of this nature and the Court has adopted a policy of non-interference in the exercise of the Ombudsman's constitutionally mandated powers on this matter. Indeed, this Court is not a trier of facts, the Ombudsman is.[52]

Section 13. The Office of the Ombudsman shall have the following powers, functions, and duties:

(1) Investigate on its own, or on complaint by any person, any act or omission of any public official, employee, office or agency, when such act or omission appears to be illegal, unjust, improper, or inefficient.

(2) Direct, upon complaint or at its own instance, any public official or employee of the Government, or any subdivision, agency or instrumentality thereof, as well as of any government-owned or controlled corporation with original charter, to perform and expedite any act or duty required by law, or to stop, prevent, and correct any abuse or impropriety in the performance of duties.

(3) Direct the officer concerned to take appropriate action against a public official or employee at fault, and recommend his removal, suspension, demotion, fine, censure, or prosecution, and ensure compliance therewith.

[52] Alba v. Nitorreda, 325 Phil. 229 (1996).

(4) Direct the officer concerned, in any appropriate case, and subject to such limitations as may be provided by law, to furnish it with copies of documents relating to contracts or transactions entered into by his office involving the disbursement or use of public funds or properties, and report any irregularity to the Commission on Audit for appropriate action.

(5) Request any government agency for assistance and information necessary in the discharge of its responsibilities, and to examine, if necessary, pertinent records and documents.

(6) Publicize matters covered by its investigation when circumstances so warrant and with due prudence.

(7) Determine the causes of inefficiency, red tape, mismanagement, fraud, and corruption in the Government and make recommendations for their elimination and the observance of high standards of ethics and efficiency.

(8) Promulgate its rules of procedure and exercise such other powers or perform such functions or duties as may be provided by law.[53]

Nature and Extent of Powers

In **OFFICE OF THE OMBUDSMAN v. COURT OF APPEALS**, G.R. No. 168079, July 17, 2007, 554 Phil. 656, Justice Carpio, speaking for the Court *en banc*, categorically ruled on the nature of the powers of the Ombudsman under **Section 13 of this Article XI**. The petition for *certiorari* assailed the decision of the Court of Appeals that had set aside the decision, memorandum and order of the Office of the Ombudsman, which had dismissed Ma. Melly Jaud Magbanua from the service:

> **The Antecedent Facts**
>
> Respondent was the Local Treasury Operations Assistant of the City Treasurer's Office in Bacolod City. On 27 February 1998, the Commission on Audit (COA) conducted an examination of respondent's cash and account. The examination disclosed a shortage of P265,450. Upon demand, respondent failed to

[53] Referred to as the rule-making power, see Kara-An v. Office of the Ombudsman, G.R. No. 119990, June 21, 2004, 476 Phil. 536, penned by Justice Carpio and excerpted above.

produce the missing amount.

Respondent alleged that the shortage was due to the machinations and dishonest acts of Cash Clerk I Monina Baja (Baja). Respondent alleged that Baja, acting as Paymaster, received payroll funds for distribution to specific offices. In her liquidation report, Baja reflected twice the missing amount of P265,450 representing cash advances for 26 September 1997 under Voucher No. 6205 to the following persons:

P. Villamor, et al.	P 5,100
L. Oyanib, et al.	21,900
R. Makila, et al.	74,950
M. Abada, et al.	163,500
	P265,450

Baja was impleaded in the case before the Ombudsman Visayas. Baja denied that respondent designated her as Paymaster. She also denied that she received the payroll funds. Baja alleged that her assigned task was only to take charge of the listing of payrolls and vouchers to be included in the respective cash advances of the disbursing officers.

Respondent and Baja failed to appear during the preliminary conference conducted on 26 July 1999. Despite their non-appearance, they were given time to submit their respective Memoranda or Position Papers before the case was considered submitted for decision.

The Ruling of the Ombudsman

In a Decision dated 3 May 2000, the Ombudsman Visayas found respondent guilty of Neglect of Duty, and Baja guilty of Dishonesty, thus:

> WHEREFORE, premises considered, it is respectfully recommended that respondent MA. MELLY JAUD MAGBANUA be meted the penalty of SUSPENSION for SIX (6) MONTHS WITHOUT PAY for NEGLECT OF DUTY. For having been found guilty of DISHONESTY, respondent MONINA BAJA is meted the penalty of DISMISSAL FROM SERVICE WITH FORFEITURE OF ALL BENEFITS AND DISQUALIFICATION TO HOLD PUBLIC OFFICE.

Petitioner reviewed the Decision of the Ombudsman Visayas.

In a Memorandum dated 6 June 2000, petitioner imposed upon both respondent and Baja the penalty of dismissal from the service, thus:

> WHEREFORE, premises considered, and upon finding that respondent MA. MELLY JAUD MAGBANUA GUILTY of GROSS NEGLECT OF DUTY and for VIOLATIONS OF REASONABLE OFFICE RULES AND REGULATIONS and respondent MONINA BAJA GUILTY OF DISHONESTY, they are both meted the penalty of DISMISSAL from service pursuant to the provisions of Section 22(b) and (a), respectively, of Rule XIV of the Omnibus Rules Implementing Book V of Executive Order No. 292. The penalty prescribed under Section 22(c), a lesser offense, is deemed absorbed in a much graver offense.
> Accordingly, the herein reviewed Decision dated May 3, 2000 of GIO Corazon C. Arnado-Carrillo is hereby MODIFIED insofar as the recommended penalty of respondent MAGBANUA is concerned.

Respondent filed a motion for reconsideration. In an Order dated 28 May 2002, petitioner denied the motion.

Respondent filed a petition for *certiorari* before the Court of Appeals.

The Ruling of the Court of Appeals

The Court of Appeals found that petitioner did not commit any reversible error in finding respondent guilty of Gross Neglect of Duty. The Court of Appeals ruled that respondent was an accountable officer. On the other hand, Baja was not officially designated as Disbursing Officer or Paymaster but was merely assigned to "take charge of the listing of payrolls and vouchers to be included in the respective cash advances of disbursing officers." The Court of Appeals sustained petitioner in finding that respondent was grossly remiss in her obligations as an accountable officer when she allowed Baja to release payroll funds which formed part of her own cash advance. In addition, respondent allowed Baja to prepare the necessary disbursement and liquidation reports which respondent should have prepared herself. The Court of Appeals ruled that respondent did not even review or examine the reports prepared by Baja.

However, the Court of Appeals ruled that while petitioner's

> findings were correct, petitioner has no power to impose directly sanctions against government officials and employees who are subject of its investigation. Citing *Tapiador v. Office of the Ombudsman*,[54] the Court of Appeals ruled that petitioner's power is limited and it may only recommend, not impose, the appropriate sanctions.
>
> Petitioner challenges before this Court the ruling of the Court of Appeals.

In resolving in the affirmative the sole issue of whether the Office of the Ombudsman had the power to directly impose administrative penalties on public officials or employees, Justice Carpio explained in **Office of the Ombudsman** that the **powers of the Ombudsman are found in this Article XI**, which states in part that the Ombudsman shall "exercise such other powers or performs such functions or duties as may be provided by law." Sections 15, 21, and 25 of Republic Act No. 6770 (RA 6770), otherwise known as the Ombudsman Act of 1989, specifically provide the **other powers** of the Office:

> In ruling that the power of petitioner is only recommendatory, the Court of Appeals relied on the following statement of the Court in *Tapiador*:
>
> > Besides, assuming arguendo, that petitioner [was] administratively liable, the Ombudsman has no authority to directly dismiss the petitioner from government service, more particularly from his position in the BID. Under Section 13, subparagraph (3), of Article XI of the 1987 Constitution, the Ombudsman can only "recommend" the removal of the public official or employee found to be at fault, to the public official concerned.[55]
>
> The Court has already settled this issue. In *Ledesma v. Court of Appeals*,[56] the Court observed that the main issue in *Tapiador* was the failure of the complainant to present substantial evidence to prove the charges in the administrative case. The Court ruled that the reference in *Tapiador* to the power of the Ombudsman is at best merely an obiter dictum. The Court ruled that the statement on the Ombudsman's power was not supported by sufficient explanation and was susceptible to

[54] 429 Phil. 47 (2002).
[55] Id. at 58.
[56] G.R. No. 161629, 29 July 2005, 465 SCRA 437.

varying interpretations. The Court categorically stated that the statement in *Tapiador* cannot be cited as a doctrinal declaration of the Court. The Court recognized the authority of the Office of the Ombudsman under Article XI of the 1987 Constitution and RA 6770, thus:

> It has long been settled that the power of the Ombudsman to investigate and prosecute any illegal act or omission of any public official is not an exclusive authority but a shared or concurrent authority in respect of the offense charged. By stating therefore that the Ombudsman "recommends" the action to be taken against an erring officer or employee, the provisions in the Constitution and in RA 6770 intended that the implementation of the order be coursed through the proper officer ...

It is thus clear that the framers of our Constitution intended to create a stronger and more effective Ombudsman, independent and beyond the reach of political influences and vested with powers that are not merely persuasive in character. The Constitutional Commission left to [the] Congress to empower the Ombudsman with prosecutorial functions which it did when RA 6770 was enacted. ...[57]

More at point is the *Office of the Ombudsman v. Court of Appeals*.[58] In that case, the Office of the Ombudsman found respondents guilty of simple misconduct and meted on them the penalty of suspension for one month. The Court of Appeals affirmed the finding of the Office of the Ombudsman that respondents were guilty of simple misconduct but ruled that the Office of the Ombudsman committed grave abuse of discretion in imposing on them the penalty of suspension for one month. The Court of Appeals also cited *Tapiador* in ruling that the power of the Office of the Ombudsman is limited only to the recommendation of the penalty of removal, suspension, demotion, fine, censure, or prosecution of a public officer or employee found to be at fault.

The Court in **Office of the Ombudsman v. Court of Appeals** found the petition of the Office of the Ombudsman meritorious, ruling that in *Ledesma*, the Court already rejected the argument that the power of the Ombudsman is only advisory or

[57] Id. at 450, 452-453.
[58] G.R. No. 160675, 16 June 2006, 491 SCRA 92.

recommendatory in nature.[59] The Court ruled:

> In the present case, the Court similarly upholds the Office of the Ombudsman's power to impose the penalty of removal, suspension, demotion, fine, censure, or prosecution of a public officer or employee found to be at fault, in the exercise of its administrative disciplinary authority. The exercise of such power is well founded in the Constitution and Republic Act No. 6770. ...
> [The] provisions in Republic Act No. 6770 taken together reveal the manifest intent of the lawmakers to bestow on the Office of the Ombudsman full administrative disciplinary authority. These provisions cover the entire gamut of administrative adjudication which entails the authority to, inter alia, receive complaints, conduct investigations, hold hearings in accordance with its rules of procedure, summon witnesses and require the production of documents, place under preventive suspension public officers and employees pending an investigation, determine the appropriate penalty imposable on erring public officers or employees as warranted by the evidence, and necessarily, impose the said penalty. ...
> The legislative history of Republic Act No. 6770 thus bears out the conclusion that the Office of the Ombudsman was intended to possess full administrative disciplinary authority, including the power to impose the penalty of removal, suspension, demotion, fine, censure, or prosecution of a public officer or employee found to be at fault. The lawmakers envisioned the Office of the Ombudsman to be "an activist watchman," not merely a passive one. ...[60]

In *Estarija v. Ranada*,[61] petitioner assailed as unconstitutional his dismissal from the service by the Ombudsman. Petitioner in *Estarija* alleged that the Ombudsman did not have direct and immediate power to remove government officials, whether elective or appointive, who are not removable by impeachment. The Court upheld the constitutionality of Sections 15, 21, and 25 of RA 6770, thus affirming that the powers of the Office of the Ombudsman are not merely recommendatory. The Court ruled in *Estarija* that under RA 6770 and the 1987 Constitution, the Ombudsman has the constitutional power to directly remove from government service an erring public official, other than a

[59] See Office of the Ombudsman v. Court of Appeals, G.R. No. 167844, 22 November 2006, 507 SCRA 593, also penned by Justice Carpio for the Court *en banc*.
[60] Id. at 108, 116, 119.
[61] G.R. No. 159314, 26 June 2006, 492 SCRA 652.

member of Congress and the Judiciary.

The Court reiterated the *Ledesma* and *Estarija* rulings in *Barillo v. Gervasio*[62] and in **Office of the Ombudsman v. Court of Appeals**.[63]

While Section 15(3) of RA 6770 states that the Ombudsman has the power to "recommend ... removal, suspension, demotion ..." of government officials and employees, the same Section 15(3) also states that the Ombudsman in the alternative may "enforce its disciplinary authority as provided in Section 21" of RA 6770. The word "or" in Section 15(3) before the phrase "enforce its disciplinary authority as provided in Section 21" grants the Ombudsman this alternative power.

Section 21 of RA 6770 vests in the Ombudsman "disciplinary authority over all elective and appointive officials of the Government," except impeachable officers, members of Congress, and the Judiciary. And under Section 25 of RA 6770, the Ombudsman may impose in administrative proceedings the "penalty ranging from suspension without pay for one year to dismissal with forfeiture of benefits or a fine ranging from five thousand pesos (P5,000.00) to twice the amount malversed, illegally taken or lost, or both at the discretion of the Ombudsman ..."

Clearly, under RA 6770 the Ombudsman has the power to impose directly administrative penalties on public officials or employees. Hence, the Court of Appeals erred in ruling that petitioner has no power to impose directly administrative penalties on public officials or employees.

In A.C. No. 7478, January 11, 2017, **ALICIAS, JR. v. MACATANGAY,** Justice Carpio, speaking for the Second Division, reiterated[64] that, pursuant to **Section 13 of this Article XI**, the Integrated Bar of the Philippines has no jurisdiction over government lawyers who are charged with administrative offenses involving their official duties:

The 1987 Constitution clothes the Office of the Ombudsman with the administrative disciplinary

[62] G.R. No. 155088, 31 August 2006, 500 SCRA 561.
[63] G.R. No. 167844, 22 November 2006, 507 SCRA 593, also penned by Justice Carpio for the Court *en banc*.
[64] See Spouses Buffe v. Gonzalez, A.C. No. 8168, October 12, 2016, also penned by Justice Carpio.

> **authority to investigate and prosecute any act or omission of any government official when such act or omission appears to be illegal, unjust, improper, or inefficient**. The Office of the Ombudsman is the government agency responsible for enforcing administrative, civil, and criminal liability of government officials "in every case where the evidence warrants in order to promote efficient service by the Government to the people."[65] In *Samson v. Restrivera*,[66] the Court ruled that the jurisdiction of the Ombudsman encompasses all kinds of malfeasance, misfeasance, and non-feasance committed by any public officer or employee during his or her tenure. Consequently, acts or missions of public officials relating to the performance of their function as government officials are within the administrative disciplinary jurisdiction of the Office of the Ombudsman.[67]

Exceptions to the Policy of Non-Interference

VERGARA v. OMBUDSMAN, G.R. No. 174567, March 12, 2009, 600 Phil. 26, was a petition for *certiorari* and *mandamus*, which assailed a resolution and order of the Office of the Deputy Ombudsman for Luzon that dismissed the case filed by Severino B. Vergara and Edgardo H. Catindig against Severino J. Lajara, as Calamba City Mayor, Virginia G. Baroro, as City Treasurer, Razul Requesto as President of Pamana, Inc., and Lauro Jocson, as Vice President and Trust Officer of the Prudential Bank and Trust Company, for violation of Section 3(e) of the Anti-Graft and Corrupt Practices Act. In the *en banc* decision, Justice Carpio dismissed the petition, citing the **policy of non-interference**:

> We reiterate the rule that courts do not interfere in the Ombudsman's exercise of discretion in determining probable cause unless there are compelling reasons. The Ombudsman's finding of probable cause, or lack of it, is entitled to great respect absent a showing of grave abuse of discretion. Besides, to justify the issuance of the writ of *certiorari* on the ground of abuse of discretion, the abuse must be grave, as when the power is exercised in an arbitrary or despotic manner by reason of passion or personal hostility, and it must be so patent as to amount to an evasion of a positive duty or to a virtual refusal to perform the duty enjoined, or to act at all, in contemplation of law, as to be

[65] Sec. 13, RA No. 6770.
[66] 662 Phil. 45 (2011).
[67] Ibid.

equivalent to having acted without jurisdiction[68]…

In sum, this Court has maintained its policy of non-interference with the Ombudsman's exercise of its investigatory and prosecutory powers in the absence of grave abuse of discretion, not only out of respect for these constitutionally mandated powers but also upon considerations of practicality owing to the myriad functions of the courts.[69] Absent a clear showing of grave abuse of discretion, we uphold the findings of the Ombudsman.

However, Justice Carpio also reiterated that certain exceptions exist, although none of these exceptions were present in **Vergara**:

The mandate of the Office of the Ombudsman is expressed in Section 12, Article XI of the Constitution… Section 13, Article XI of the Constitution vests in the Office of the Ombudsman… (its) powers, functions, and duties…

Republic Act No. 6770 (RA 6770), or the Ombudsman Act of 1989, granted the Office of the Ombudsman full administrative authority. Section 13 of RA 6770 restates the mandate of the Office of the Ombudsman:

> Sec. 13. Mandate. - The Ombudsman and his Deputies, as protectors of the people, shall act promptly on complaints filed in any form or manner against officers or employees of the government, or of any subdivision, agency or instrumentality thereof, including government-owned or controlled corporations, and enforce their administrative, civil and criminal liability in every case where the evidence warrants in order to promote efficient service by the Government to the people.

Section 15(1) of RA 6770 substantially reiterates the investigatory powers of the Office of the Ombudsman:

> Sec. 15. Powers, Functions and Duties. - The Office of the Ombudsman shall have the following powers, functions and duties:

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[68] San Miguel Corporation v. Sandiganbayan, 394 Phil. 608, 636-637 (2000).

[69] Trinidad v. Office of the Ombudsman, G.R. No. 166038, 4 December 2007, 539 SCRA 415, 423.

> (1) Investigate and prosecute on its own or on complaint by any person, any act or omission of any public officer or employee, office or agency, when such act or omission appears to be illegal, unjust, improper or inefficient. It has primary jurisdiction over cases cognizable by the Sandiganbayan and, in the exercise of his primary jurisdiction, it may take over, at any stage, from any investigatory agency of government, the investigation of such cases; …

Jurisprudence explains that the Office of the Ombudsman is vested with the sole power to investigate and prosecute, *motu proprio* or on complaint of any person, any act or omission of any public officer or employee, office, or agency when such act or omission appears to be illegal, unjust, improper, or inefficient.[70] The Ombudsman's power to investigate and to prosecute is plenary and unqualified.[71]

The Ombudsman has the discretion to determine whether a criminal case, given its attendant facts and circumstances, should be filed or not. The Ombudsman may dismiss the complaint should the Ombudsman find the complaint insufficient in form or substance, or the Ombudsman may proceed with the investigation if, in the Ombudsman's view, the complaint is in due form and substance.[72] Hence, the filing or non-filing of the information is primarily lodged within the "full discretion" of the Ombudsman.[73]

This Court has consistently adopted a policy of non-interference in the exercise of the Ombudsman's constitutionally mandated powers. The Ombudsman, which is "beholden to no one, acts as the champion of the people and the preserver of the integrity of the public service."[74]

However, this Court is not precluded from reviewing the Ombudsman's action when there is grave abuse of discretion, in which case the *certiorari* jurisdiction of the Court may be exceptionally invoked pursuant to Section

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[70] Ibid.
[71] Schroeder v. Saldevar, G.R. No. 163656, 27 April 2007, 522 SCRA 624, 630.
[72] Presidential Commission on Good Government v. Desierto, G.R. No. 139296, 23 November 2007, 538 SCRA 207, 215-216.
[73] Republic v. Desierto, G.R. No. 135123, 22 January 2007, 512 SCRA 57, 63.
[74] Quiambao v. Hon. Desierto, 481 Phil. 852, 867 (2004).

1, Article VIII of the Constitution.[75] We have enumerated instances where the courts may interfere with the Ombudsman's investigatory powers:

> (a) To afford protection to the constitutional rights of the accused;
> (b) When necessary for the orderly administration of justice or to avoid oppression or multiplicity of actions;
> (c) When there is a prejudicial question which is *sub judice*;
> (d) When the acts of the officer are without or in excess of authority;
> (e) Where the prosecution is under an invalid law, ordinance or regulation;
> (f) When double jeopardy is clearly apparent;
> (g) Where the court has no jurisdiction over the offense;
> (h) Where it is a case of persecution rather than prosecution;
> (i) Where the charges are manifestly false and motivated by the lust for vengeance.[76]

These exceptions are not present in this case…

Section 14. The Office of the Ombudsman shall enjoy fiscal autonomy. Its approved annual appropriations shall be automatically and regularly released.

Section 15. The right of the State to recover properties unlawfully acquired by public officials or employees, from them or from their nominees or transferees, shall not be barred by prescription, laches, or estoppel.

Section 16. No loan, guaranty, or other form of financial accommodation for any business purpose may be granted, directly or indirectly, by any government-owned or controlled bank or financial institution to the President, the Vice-President, the Members of the Cabinet, the Congress, the Supreme Court, and the Constitutional Commissions, the Ombudsman, or to any firm or entity in which they have controlling interest, during their tenure.

Section 17. A public officer or employee shall, upon assumption

[75] Crucillo v. Office of the Ombudsman, G.R. No. 159876, 26 June 2007, 525 SCRA 636, 653.
[76] Redulla v. Sandiganbayan, G.R. No. 167973, 28 February 2007, 517 SCRA 110, 118-119.

of office and as often thereafter as may be required by law, submit a declaration under oath of his assets, liabilities, and net worth. In the case of the President, the Vice-President, the Members of the Cabinet, the Congress, the Supreme Court, the Constitutional Commissions and other constitutional offices, and officers of the armed forces with general or flag rank, the declaration shall be disclosed to the public in the manner provided by law.

The requirement of filing a **statement of assets, liabilities and net worth, or SALN**, provided in this **Section 17, Article XI**, was discussed by Justice Carpio at length in his **dissenting opinion** in **REPUBLIC v. SERENO**, G.R. No. 237428, May 11, 2018. In this *quo warranto* petition, the appointment of Maria Lourdes P.A. Serreno as Chief Justice of the Supreme Court was voided by the Court *en banc*:

> **Failure to File SALN**
>
> **No less than the Constitution mandates the filing of the SALN by all public officers and employees upon assumption of office and as often thereafter as may be required by law … (citing Section 17, Article XI)…**
>
> Republic Act No. (RA) 3019, or the Anti-Graft and Corrupt Practices Act, likewise requires the filing of the SALN by every government employee not only upon assumption of office and every year thereafter, but also upon the expiration of his term of office or upon his resignation or separation from office. Section 7 of RA 3019 provides:
>
> > Sec. 7. Statement of assets and liabilities. - Every public officer, within thirty days after assuming office, thereafter, on or before the fifteenth day of April following the close of every calendar year, as well as upon the expiration of his term of office, or upon his resignation or separation from office, shall prepare and file with the office of the corresponding Department Head, or in the case of a Head of department or Chief of an independent office, with the Office of the President, a true, detailed sworn statement of assets and liabilities, including a statement of the amounts and sources of his income, the amounts of his personal and family expenses and the amount of income taxes paid for the next preceding calendar year: Provided, That the public officers assuming office less than two months before the

> end of the calendar year, may file their first statement on or before the fifteenth day of April following the close of the said calendar year.[77]

The importance of filing a SALN for all public officials and employees is furthermore emphasized in RA 6713,[78] or the Code of Conduct and Ethical Standards for Public Officials and Employees, the latest law on the matter and which has a more detailed provision of the SALN requirement. Section 8 of RA 6713 states:

> Sec. 8. Statements and Disclosure. - Public officials and employees have an obligation to accomplish and submit declarations under oath of, and the public has the right to know, their assets, liabilities, net worth and financial and business interests including those of their spouses and of unmarried children under eighteen (18) years of age living in their households.
> (A) Statements of Assets and Liabilities and Financial Disclosure. - All public officials and employees, except those who serve in an honorary capacity, laborers and casual or temporary workers, shall file under oath their Statement of Assets, Liabilities and Net Worth and a Disclosure of Business Interests and Financial Connections and those of their spouses and unmarried children under eighteen (18) years of age living in their households.
> The two documents shall contain information on the following:
> (a) real property, its improvements, acquisition costs, assessed value and current fair market value;
> (b) personal property and acquisition cost;
> (c) all other assets such as investments, cash on hand or in banks, stocks, bonds, and the like;
> (d) liabilities, and;
> (e) all business interests and financial connections.
> The documents must be filed:
> (a) within thirty (30) days after assumption of office;
> (b) on or before April 30, of every year thereafter; and

[77] As amended by RA 3047 (approved on 17 June 1961) and PD 677 (issued on 31 March 1975).

[78] An Act Establishing A Code Of Conduct And Ethical Standards For Public Officials And Employees, To Uphold The Time-Honored Principle Of Public Office Being A Public Trust, Granting Incentives And Rewards For Exemplary Service, Enumerating Prohibited Acts And Transactions And Providing Penalties For Violations Thereof And For Other Purposes. RA 6713 was enacted on 20 February 1989 and took effect on 25 March 1989.

(c) within thirty (30) days after separation from the service.
All public officials and employees required under this section to file the aforestated documents shall also execute, within thirty (30) days from the date of their assumption of office, the necessary authority in favor of the Ombudsman to obtain from all appropriate government agencies, including the Bureau of Internal Revenue, such documents as may show their assets, liabilities, net worth, and also their business interests and financial connections in previous years, including, if possible, the year when they first assumed any office in the Government.
Husband and wife who are both public officials or employees may file the required statements jointly or separately.
The Statements of Assets, Liabilities and Net Worth and the Disclosure of Business Interests and Financial Connections shall be filed by:
(1) Constitutional and national elective officials, with the national office of the Ombudsman;
(2) Senators and Congressmen, with the Secretaries of the Senate and the House of Representatives, respectively; Justices, with the Clerk of Court of the Supreme Court; Judges, with the Court Administrator; and all national executive officials with the Office of the President.
(3) Regional and local officials and employees, with the Deputy Ombudsman in their respective regions;
(4) Officers of the armed forces from the rank of colonel or naval captain, with the Office of the President, and those below said ranks, with the Deputy Ombudsman in their respective regions; and
(5) All other public officials and employees, defined in Republic Act No. 3019, as amended, with the Civil Service Commission.
(B) Identification and disclosure of relatives. - It shall be the duty of every public official or employee to identify and disclose, to the best of his knowledge and information, his relatives in the Government in the form, manner and frequency prescribed by the Civil Service Commission.
(C) Accessibility of documents. -
(1) Any and all statements filed under this Act, shall be made available for inspection at reasonable hours.
(2) Such statements shall be made available for copying or reproduction after ten (10) working days from the time they are filed as required by law.
(3) Any person requesting a copy of a statement shall be required to pay a reasonable fee to cover the cost of

> reproduction and mailing of such statement, as well as the cost of certification.
> (4) Any statement filed under this Act shall be available to the public for a period of ten (10) years after receipt of the statement. After such period, the statement may be destroyed unless needed in an ongoing investigation.
> (D) Prohibited acts. - It shall be unlawful for any person to obtain or use any statement filed under this Act for:
> (a) any purpose contrary to morals or public policy; or
> (b) any commercial purpose other than by news and communications media for dissemination to the general public.

Likewise highlighting the significance of the SALN, Executive Order No. 292 or the Administrative Code of 1987 explicitly declares as a general principle governing government employees the filing of the SALN, thus:

> Sec. 34. Declaration of Assets, Liabilities and Net Worth. - A public officer or employee shall, upon assumption of office and as often thereafter as may be required by law, submit a declaration under oath of his assets, liabilities, and net worth.

The Rules Implementing the Code of Conduct and Ethical Standards for Public Officials and Employees (Rules), which was promulgated by the Civil Service Commission (CSC) on 27 May 1989, clarified when the SALN should be filed. Section 1(c) of Rule VII reads:

> (c) When to File
> The above documents under the Code must be filed:
> (1) within thirty (30) days after assumption of office, statements of which must be reckoned as of his first day of service;
> (2) on or before April 30 of every year thereafter, statements of which must be reckoned as of the end of the preceding year; or
> (3) within thirty (30) days after separation from the service, statements of which must be reckoned as of his last day of office.

CSC Resolution No. 06-0231[79] dated 1 February 2006 further

[79] Review And Compliance Procedure In The Filing And Submission Of The Statement Of Assets, Liabilities And Net Worth And Disclosure Of Business Interests And Financial Connections.

clarified the procedure for the filing of the SALN by amending Rule VIII of the Rules. CSC Resolution No. 06-0231 reads in part:

> I. Rule VIII is hereby amended to read, as follows:
> Rule VIII. Review and Compliance Procedure in the Filing and Submission of the Statements of Assets, Liabilities and Net Worth and Disclosure of Business Interests and Financial Connections
> Sec. 1. Filing and Submission of SALN on Time and to the Proper Official
> a. All public officials and employees, except those who serve in an official honorary capacity, without service credit or pay, temporary laborers and casual or temporary and contractual workers, shall file under oath their SALNs and Disclosure of Business Interests and Financial Connections with their respective Chief or Head of the Personnel/Administrative Division or Unit/Human Resource Management Office (HRMO), to wit:
> 1. Within thirty (30) days after assumption of office, statements of which must be reckoned as of his/her first day of service;
> 2. On or before April 30 of every year thereafter, statements of which must be reckoned as of the end of the preceding year; and
> 3. Within thirty (30) days after separation from the service, statements of which must be reckoned as of his/her last day of office.
> b. Public officials and employees under temporary status are also required to file under oath their SALNs and Disclosure of Business Interests and Financial Connections in accordance with the guidelines provided under these rules.
> c. Public officials and employees are strictly required to fill in all applicable information and/or make a true and detailed statement of their SALNs.
> Sec. 2. Duties of the Chief/Head of the Personnel/ Administrative Division or Unit/HRMO
> Upon receiving the SALN forms, the Chief/Head of the Personnel/Administrative Division or Unit/HRMO shall evaluate the same to determine whether said statements have been properly accomplished. A SALN is deemed properly accomplished when all applicable information or details required therein are provided by the filer. Items not applicable to the filer should be marked N/A (not applicable). The Chief/Head of the Personnel/Administrative Division or Unit/HRMO shall submit a list of employees in alphabetical

> order, who: a) filed their SALNs with complete data; b) filed their SALNs but with incomplete data; and c) did not file their SALNs, to the head of office, copy furnished the CSC, on or before May 15 of every month.

The requirement of filing a SALN aims to suppress any questionable accumulation of wealth which usually results from non-disclosure of such matters.[80] As held in *Office of the Ombudsman v. Racho*,[81] the rationale for requiring all public officers and employees to make a complete disclosure of their assets, liabilities and net worth is to suppress and avoid the unlawful acquisition of wealth, and is aimed at curtailing and minimizing the opportunities for official corruption in order to maintain a standard of honesty in the public service. Citing *Carabeo v. Court of Appeals*,[82] the Court elucidated:

> "Unexplained" matter normally results from "non-disclosure" or concealment of vital facts. SALN, which all public officials and employees are mandated to file, are the means to achieve the policy of accountability of all public officers and employees in the government. By the SALN, the public are able to monitor movement in the fortune of a public official; it is a valid check and balance mechanism to verify undisclosed properties and wealth.

In *Casimiro v. Rigor*,[83] the Court stated that the filing of SALN promotes transparency in the civil service and serves as an effective mechanism to verify undisclosed wealth, thus:

> The requirement of filing a SALN is enshrined in the Constitution to promote transparency in the civil service and serves as a deterrent against government officials bent on enriching themselves through unlawful means. By mandate of law, every government official or employee must make a complete disclosure of his assets, liabilities and net worth in order to avoid any issue regarding questionable accumulation of wealth. The importance of requiring the submission of a complete, truthful, and sworn SALN as a measure to defeat corruption in the bureaucracy cannot be gainsaid. Full disclosure of wealth in the SALN is necessary to particularly

[80] Daplas v. Department of Finance, G.R. No. 221153, 17 April 2017.
[81] 656 Phil. 148, 160 (2011).
[82] 622 Phil. 413, 429-430 (2009). citing Ombudsman v. Valeroso, 548 Phil. 688, 698 (2007).
[83] 749 Phil. 917, 929-930 (2014).

> minimize, if not altogether eradicate, the opportunities for official corruption, and maintain a standard of honesty in the public service. Through the SALN, the public can monitor movement in the fortune of a public official; it serves as a valid check and balance mechanism to verify undisclosed properties and wealth. The failure to file a truthful SALN reasonably puts in doubt the integrity of the officer and normally amounts to dishonesty.

Considering that the requirement of filing a SALN within the period prescribed by law is enshrined in the Constitution, the non-filing of SALN within the prescribed period clearly constitutes a violation of an express constitutional mandate. The repeated non-filing of SALN therefore constitutes culpable violation of the Constitution and betrayal of public trust, which are grounds for impeachment under the Constitution.[84]

…

Period Required to Maintain SALN Records

Under Section 8 (C) (4) of RA 6713, the SALNs shall be available to the public in the custodian's office for 10 years from filing, after which period, the SALNs may be destroyed unless needed in an ongoing investigation. Since the government custodian is required to keep the SALNs for only 10 years, government employees cannot be required to keep their SALNs for more than 10 years. Thus, applicants for government positions, in particular judicial positions, should not be required to submit SALNs more than 10 years prior to the application. Incidentally, the vacancy for the Chief Justice post in 2012 was the first and only time that the JBC required applicants to submit all the SALNs they filed while in government service prior to the application. Thereafter, the JBC only required the submission of SALNs for two years prior to the application.

Penalty and Prescription of the Offense of Failure to File SALN

RA 3019 states that as an administrative offense, the failure to file the SALN "shall be sufficient cause for removal or dismissal of a public officer, even if no criminal prosecution is instituted against him." RA 6713 provides a more specific penalty which is

[84] See discussion under Art. XI, Secs. 2 and 3.

"a fine not exceeding the equivalent of six (6) months salary or suspension not exceeding one (1) year, or removal depending on the gravity of the offense." Section 11 of RA 6713 reads:

> Sec. 11. Penalties. -
> (a) Any public official or employee, regardless of whether or not he holds office or employment in a casual, temporary, holdover, permanent or regular capacity, committing any violation of this Act shall be punished with a fine not exceeding the equivalent of six (6) months salary or suspension not exceeding one (1) year, or removal depending on the gravity of the offense after due notice and hearing by the appropriate body or agency. If the violation is punishable by a heavier penalty under another law, he shall be prosecuted under the latter statute. Violations of Sections 7, 8 or 9 of this Act shall be punishable with imprisonment not exceeding five (5) years, or a fine not exceeding five thousand pesos (P5,000), or both, and, in the discretion of the court of competent jurisdiction, disqualification to hold public office.
> (b) Any violation hereof proven in a proper administrative proceeding shall be sufficient cause for removal or dismissal of a public official or employee, even if no criminal prosecution is instituted against him.
> ...

The imposition of penalty for failure to file the SALN was clarified in CSC Resolution No. 06-0231:

> Sec. 4. Sanction for Failure to Comply/Issuance of a Show Cause Order.
> Failure of an official or employee to correct/submit his/her SALN in accordance with the procedure and within the given period pursuant to the directive in Section 3 hereof shall be a ground for disciplinary action. The Head of Office shall issue a show-cause order directing the official or employee concerned to submit his/her comment or counter-affidavit; and if the evidence so warrants, proceed with the conduct of the administrative proceedings pursuant to the Uniform Rules on Administrative Cases in Civil Service (CSC Resolution No. 99-1936 dated August 31, 1999). The offense of failure to file SALN is punishable under Rule IV, Section 52 (B) (8) thereof, with the following penalties:
>
> 1st offense Suspension for one (1) month and one (1) day to 6 months
> 2nd offense Dismissal from the service

> Sec. 5. Transmittal of All Submitted SALNs to the Concerned Agencies on or before June 30.
> The Chief/Head of the Personnel/Administrative Division or Unit/HRMO shall transmit all original copies of the SALNs received, on or before June 30 of every years, to the concerned offices, as specified below:
> ...
> Clerk of Court of the Supreme Court - Justices of the Supreme Court, Court of Appeals, Sandiganbayan and Court of Tax Appeals
> ...

On 24 January 2013, CSC Resolution No. 1300174 was promulgated amending Section 3 (first paragraph) and Section 4 of CSC Resolution No. 06-0231 to read as follows:

> Sec. 3. Ministerial Duty of the Head of Office to Issue Compliance Order.
> Within five (5) days from receipt of the aforementioned list and recommendation, it shall be the ministerial duty of the Head of Office to issue an order requiring those who have incomplete data in their SALN to correct/supply the desired information and those who did not file/submit their SALN to comply within a non-extendible period of thirty (30) days from receipt of the said Order.
> Sec. 4. Sanction for Failure to Comply/Issuance of a Show Cause Order.
> Failure of an official or employee to correct/submit his/her SALN in accordance with the procedure and within the given period pursuant to the directive in Section 3 hereof shall be a ground for disciplinary action. The Head of Office shall issue a show-cause order directing the official or employee concerned to submit his/her comment or counter-affidavit; and if the evidence so warrants, proceed with the conduct of the administrative proceedings pursuant to the Revised Rules on Administrative Cases in Civil Service (RRACCS), CSC Resolution No. 1101502 dated November 8, 2011. The offense of failure to file SALN is punishable under Section 46(D)(8) of Rule X thereof with the following penalties:
>
> First Offense - Suspension for one (1) month and one (1) day to six (6) months
>
> Second Offense - Dismissal from the service
>
> Public officials and employees who fail to comply with the thirty (30) day period required under Section 3 hereof or who submit their SALNs beyond the said period shall be

> considered as not having filed their SALNs, and shall be made liable for the offense of Failure to File SALN with a penalty of suspension of one (1) month and one (1) day to six (6) months for the first offense, and dismissal from the service for the second offense.
> Heads of agencies/offices who fail to comply with the provisions of CSC Resolution No. 06-0231 dated February 1, 2006, as amended, shall be liable for Simple Neglect of Duty, which shall be punishable by suspension of one (1) month and one (1) day to six (6) months for the first offense, and dismissal from the service for the second offense.

The offense of failure to file the SALN prescribes in 20 years, as provided under Section 11 of RA 3019.[85] However, Section 11 of RA 3019 should be read in conjunction with Section 2 of Act No. 3326[86] which specifically provides when prescription shall begin to run for offenses penalized by special laws, thus:

> Sec. 2. Prescription shall begin to run from the day of the commission of the violation of the law, and if the same be not known at that time, from the discovery thereof and the institution of judicial proceedings for its investigation and punishment.
> The prescription shall be interrupted when proceedings are instituted against the guilty person and shall begin to run again if the proceedings are dismissed for reasons not constituting jeopardy.

In the case of *PCGG v. Desierto*,[87] the Court ruled that when it is impossible for the State to have known when the offense or violation took place, the prescriptive period should be computed from the discovery of the commission thereof and not from the day of such commission. The Court held:

> The case before us is not of first impression. On all fours is

[85] Sec. 11 of RA 3019, as amended by RA 10910, states that "All offenses punishable under this Act shall prescribe in twenty years." RA 10910 lapsed into law on 21 July 2016 without the signature of the President in accordance with Section 27(1), Article VI of the Constitution. However, for offenses committed prior to 21 July 2016, the 15-year prescriptive period under the law prior to the amendment applies. (See Amar v. Odiaman, 109 Phil. 681 [1960]; Quetulio v. De la Cuesta, 130 Phil. 494 [1968]; Kiamco v. Court of Appeals, 286 Phil. 260 [1992]).

[86] An Act To Establish Periods Of Prescription For Violations Penalized By Special Laws And Municipal Ordinances, And To Provide When Prescription Shall Begin To Run.

[87] 484 Phil. 53 (2004).

Presidential Ad Hoc Fact Finding Committee on Behest Loans v. Hon. Aniano A. Desierto, et al., also involving a complaint filed with the Office of the Ombudsman for an alleged behest loan obtained by the Philippine Seeds, Inc. during the Marcos administration. We ruled therein that since the law alleged to have been violated is Section 3 of Republic Act No. 3019, the applicable rule in the computation of the prescriptive period is Section 2 of Act No. 3326, as amended, cited earlier. Under Section 2 of this Act, there are two (2) rules for determining when the period of prescription shall commence: First, on the day of the commission of the violation, if such commission is known. Second, if the commission of the violation is not known at the time, then, from discovery thereof and institution of judicial proceedings for investigation and punishment.

In this case, it was obviously impossible for the State, the aggrieved party, to have known when the questioned transactions took place. Clearly, the prescriptive period for the offense charged should be computed from the discovery of the commission thereof and not from the day of such commission.[88]

Effect of Certification by Custodian of SALN

Section 1, Rule 131 of the Rules of Court provides that the "[b]urden of proof (*onus probandi*) is the duty of a party to present evidence on the facts in issue necessary to establish his claim or defense by the amount of evidence required by law." In civil cases, the burden of proof rests upon the plaintiff, who is required to establish his case by a preponderance of evidence.[89] In administrative cases, the burden of proof lies with the complainant, who is required to prove his case by substantial evidence.[90] Once the plaintiff or complainant has established his case, by *prima facie* evidence, the burden of evidence shifts to the defendant or respondent, who, in turn, has the burden to establish his defense.[91]

Prima facie evidence is defined as:

Evidence good and sufficient on its face. Such evidence as,

[88] Id. at 60-61.

[89] Sec. 1; Republic of the Philippines v. De Borja, G.R. No. 187448, 9 January 2017; Sps. De Leon v. Bank of the Philippine Islands, 721 Phil. 839 (2013).

[90] Rules of Court, Rule 133, Sec. 5; Concerned Citizen v. Divina, 676 Phil. 166, 176 (2011), Montemayor v. Bundalian, 453 Phil. 158, 167 (2003).

[91] Sps. De Leon v. Bank of the Philippine Islands, 721 Phil. 839 (2013).

> in the judgment of the law, is sufficient to establish a given fact, or the group or chain of facts constituting the party's claim or defense, and which if not rebutted or contradicted, will remain sufficient. Evidence which, if unexplained or uncontradicted, is sufficient to sustain a judgment in favor of the issue it supports, but which may be contradicted by other evidence.[92]

In cases involving the requirement of filing the SALN, a certification duly issued by the official custodian that no SALN of a government employee is on file in the custodian's office constitutes *prima facie* proof of non-filing of the SALN. Such certification satisfies the burden of proof, and shifts the burden of evidence to the government employee to prove otherwise. The government employee must present countervailing evidence to shift back the burden of evidence. In the absence of countervailing evidence, the government employee can be held liable for non-filing of the SALN on the basis of the certification by the official custodian that no SALN is on file.

Respondent Chief Justice Sereno's Situation

Effect of Certification of UP HRDO

In the present case, the burden of proof lies with the Republic which is the party that initiated the present *quo warranto* petition. Thus, the OSG, representing the Republic, must present evidence to prove its allegation that respondent repeatedly failed to comply with the constitutional and statutory requirement of filing the SALN.

There is no dispute that respondent was a faculty member of the UP College of Law from 1986 to 2006. Being a government employee at the time, respondent was required to file the SALN annually.

The OSG claims that respondent "deliberately failed to file her SALN with her [government] employer, UP, eleven times in her twenty years as a law professor." To prove its claim, the OSG submitted a Certification from the UP HRDO which stated that "based on the 201 files of [respondent] under the custody of the Information Management Section of the [UP HRDO], it was found

[92] Wa-acon v. People, 539 Phil. 485, 494 (2006), citing H. Black, et al., Black's Law Dictionary 1190 (6th ed., 1990).

that between the period 2000-2009 the SALN submission on file is as of December 31, 2002." Further, in a Letter addressed to the OSG dated 6 March 2018, UP HRDO Director Escoto stated that only the SALNs of respondent for the years 1985, 1990, 1991, 1993, 1994, 1995, 1996, 1997, and 2002 were found in the UP HRDO records. The OSG likewise submitted a Certification from the Office of the Ombudsman Central Records Division which stated that "there is no SALN filed by MS. MARIA LOURDES A. SERENO for calendar years 1999 to 2009 except SALN ending December 1998..."

The submission by the OSG of the UP HRDO Certification and Letter and the Ombudsman Certification constitutes prima facie proof of respondent's non-filing of her SALNs for a certain number of years during her employment at the UP College of Law. In other words, the OSG successfully satisfied the burden of proof by submitting the UP HRDO and Ombudsman Certifications which constituted prima facie evidence that respondent did not file her SALNs for the years 1986, 1987, 1988, 1992, 1999, 2000, 2001, 2003, 2004, 2005, and 2006, during which respondent was employed as a UP College of Law Professor. Thus, if uncontradicted, this prima facie evidence is considered sufficient to sustain respondent's liability for non-filing of her SALNs. It is therefore incumbent upon respondent to rebut and overthrow the OSG's prima facie evidence by presenting her own evidence to the contrary. In short, the burden of evidence now shifted to respondent to disprove the OSG's evidence against her.

In her 23 July 2012 letter to the JBC, respondent stated:

> As I had noted in my Personal Data Sheet, after my resignation from government service in 2006, as a professor at the University of the Philippines, I became a full-time private practitioner. Hence, when I was nominated for the position of Associate Justice of the Supreme Court in 2010, my nomination was considered as that of a private practitioner, and not as a government employee. Thus, the requirements imposed on me in connection with the consideration of my name were those imposed on nominees from the private sector, and my earlier-terminated government service, did not control nor dominate the kind of requirements imposed on me.
>
> Considering that most of my government records in the academe are more than fifteen years old, it is reasonable to consider it infeasible to retrieve all of those files.

> In any case, the University of the Philippines has already cleared me of all academic/administrative responsibilities, money and property accountabilities and from administrative charges as of 01 June 2006. Since it is the ministerial duty of the Head of the Office to ensure that the SALNs of its personnel are properly filed and accomplished (CSC Resolution No. 060231 dated 01 February 2006 and CSC Memorandum Circular No. 10-2006 dated 17 April 2006), this clearance can be taken as an assurance that my previous government employer considered the SALN requirements to have been met. A copy of the Clearance dated 19 September 2011 issued by the University of the Philippines is hereby attached.
> ... Hence, in compliance with the documentary requirements for my candidacy as Chief Justice, I submitted only the SALNs from end of 2009 up to 31 December 2011, since I am considered to have been returned to public office and rendered government service anew from the time of my appointment as Associate Justice on 16 August 2010.
> ...

Based on this letter, respondent made it appear that she had filed her SALNs with the UP HRDO during her employment as a UP College of Law Professor but she could no longer find her personal copies of her SALNs. Respondent manifested to this Court in her Memorandum that she "religiously filed her SALNs." If indeed she had religiously filed her SALNs but her personal copies were lost, she could easily have secured a Certification from the UP HRDO that she had filed her SALNs. The requirement to submit SALNs was announced through advertisement in a newspaper by the JBC. Respondent never secured a certification from the UP HRDO as to her SALNs on file in that office. Her failure to secure such certification exposes as a misrepresentation her claim that she could not find her SALNs. For how could she find her personal copies of her SALNs when there is no record that she filed her SALNs for the years 1986, 1987, 1988, 1992, 1999, 2000, 2001, 2003, 2004, 2005, and 2006 with the UP HRDO?

Clearly, respondent failed to adduce satisfactory evidence to rebut and overthrow the OSG's prima facie evidence of her failure to file her SALNs for several years while she was teaching in the UP College of Law. Respondent conveniently alleges that she religiously filed her SALNs without presenting any evidence to prove such allegation. Suffice to state, mere allegation is

not proof.[93] This means that the OSG's prima facie evidence establishing respondent's repeated failure to file her SALNs remains uncontradicted, and thus, respondent can be held liable for her repeated non-filing of SALNs while she was employed as a UP College of Law Professor.

Effect of Respondent's Failure to File SALN within 30 days from Assuming Office

In her Memorandum, respondent manifested that the SALN she filed with the JBC when she was applying as an Associate Justice of the Supreme Court was "not [the] required SALN as it is understood in law. ... Rather, it was a measuring tool which happened to be on a SALN form, requested by the JBC to test the veracity of her declarations in her ITRs." Respondent testified during the Oral Arguments, thus:

> JUSTICE DE CASTRO: Okay. So, let's go now with the SALN that you filed which so far has been located and particularly those which you submitted to the Judicial and Bar Council. When you applied for Associate Justice of the Supreme Court, you were required to submit a Sworn Statement of Assets and Liabilities, and that was in 2010. So, you submitted a Statement of Assets and Liabilities which you signed in July 27, 2010 and you wrote a letter stating that yesterday, you wrote a letter to the JBC, yesterday, that was, your letter is dated, was dated July 28. Yesterday, you submitted your Statement of Assets and Liabilities as of 2006. You deliberately did not use the word Sworn Statement of Assets and Liabilities because what you submitted is a Statement of Assets and Liabilities for 2006 which was not signed, which was not notarized. So, you omitted the word "Sworn," you agree to that or you want to see the document?
>
> CHIEF JUSTICE SERENO: The JBC did not require from me my 2006 SALN. They requested me to give my Statement of Assets regardless of whether it's sworn or not as of the time of application. Now, the form there, the only form I used there was a downloadable form as of 2006 but if you can look at the signature portion, it is 2010. So, it is a metric tool that was used by the JBC and they explained it to me intimately that it had to do with the measurement

[93] Brodeth v. People of the Philippines, G.R. No. 197849, 29 November 2017; Dr. De Jesus v. Guerrero III, 614 Phil. 520, 529 (2009); V.V. Soliven Realty Corp. v. Ong, 490 Phil. 229, 237 (2005), citing Workers of Antique Electric Coop., Inc. v. NLRC, 388 Phil. 847 (2000).

> of the banks, deposits and the income tax return. So, that SALN is not the SALN contemplated by law but it is another measurement tool of the JBC.
> JUSTICE DE CASTRO: Will you explain why you dated, why you mentioned in that ...
> CHIEF JUSTICE SERENO: I came from the private sector, Justice De Castro, so, it is a 2010 Statement of Assets unsworn during the time of my application. It is not that specified under the ... SALN law.
> ...
> It's not the SALN required by law. I had to find a form I could easily file because I was being asked to immediately send it by fax. So, the only downloadable form was what was available in the website. I downloaded it, I filled it up, I sent it.

True, the SALN form referred to by respondent when she applied for the Associate Justice post in 2010 is not the SALN form specified by and required under the law. It has been an accepted practice of the JBC to allow applicants for judicial positions from the private sector to accomplish and submit such SALN as part of the documentary requirements. Accordingly, there was nothing irregular attending respondent's submission to the JBC of her unsworn SALN on 27 July 2010 when she was applying for the Associate Justice position.

However, when respondent was appointed as Associate Justice of the Supreme Court and assumed such position on 16 August 2010, respondent was duty-bound to submit a SALN in the prescribed form and within the period specifically required by the Constitution, law, and rules.

Again, the following are the relevant provisions on SALN filing:

Section 17, Article XI of the Constitution …
Section 7, RA 3019 …
Section 8, RA 6713 …
Administrative Code of 1987, Book 1, Chapter 9, Section 34 …
CSC Rules …

Since respondent took her oath and assumed her position as Associate Justice of the Supreme Court on 16 August 2010, she was required to file under oath her SALN within thirty (30) days after assumption of office, or until 15 September 2010, and the statements must be reckoned as of her first day of service, pursuant to the relevant provisions on SALN filing.

However, respondent failed to file a SALN containing sworn statements reckoned as of her first day of service within thirty (30) days after assuming office. While she allegedly submitted an "entry SALN" on 16 September 2010, it was unsubscribed and the statements of her assets, liabilities and net worth were reckoned as of 31 December 2009, and not as of her first day of service, or as of 16 August 2010. This is clear from the following quoted portions of respondent's testimony during the Oral Arguments, to wit:

> JUSTICE DE CASTRO: Okay, now, let's go to, so, after that you were appointed Associate Justice, after that you were appointed Associate Justice of the Supreme Court, and upon assumption within thirty (30) days, you should file a SALN as of the date of your assumption to office. As you mentioned in, as you mentioned, you resigned on June 1st, 2006. So, you were no longer, you were no longer a government official as of December 31, 2009, and this is now no longer a printed date. The date depicts zero, nine (09) after two zero (00) was handwritten, so that, when you assumed office in August of 2010, and you need to follow the law to require, which requires you to file a SALN within thirty (30) days from your assumption to duty, you filed your SALN, September 2010, okay? So, with respect to the date, that is within thirty (30) days but look at the date of your Sworn Statement of Assets and Liabilities, that is your Sworn Statement of Assets and Liabilities, that is your Sworn Statement of Assets and Liabilities as of December 31, 2009, when the law requires you to reckon your Statement of Assets and Liabilities when you assumed office? So, it should have been dated between, between August and September 2010, but no, you did not do that. You submitted a sworn declaration of Assets and Liabilities dated December 31, 2009, when you are no longer a government employee at that time? May I know your answer?
> CHIEF JUSTICE SERENO: This is the entry SALN after having taken my oath and the requirement is as of the end of the preceding year.
> JUSTICE DE CASTRO: No...
> CHIEF JUSTICE SERENO: So, it must be as of end of December 2009 even if it is 2010.
> JUSTICE DE CASTRO: No, it's, I read to you the law, I read to you the provision of law and the rules, it says there, that when you assumed office, your SALN must be reckoned as of the date of your assumption to office. So, it cannot be several months before because if it is several months before, from

December 31, 2009 up to September 2010, there could have been assets and liabilities between that period of time which cannot be found in your September 2010 SALN. There is a gap...

...

CHIEF JUSTICE SERENO: Your Honor, the law only says that it must be within thirty (30) days after assumption of office. Nowhere can I say that it must be the Statement of Assets within that month. So, it is not wrong for me to have even given government a better chance and better tools to assess whether I will be hiding any ill-gotten wealth because I'm giving the government even more information than you are proposing. Because the law only says within thirty (30) days, it doesn't say as of that date.

...

CHIEF JUSTICE SERENO: Your Honor, my proposal is this. This is a unique reading by you of the IRR while I am reading the law itself. You know, in September, my husband and I would have already accumulated income from January 1 up to September when I filed within the reglementary period. Within that period, we cannot measure our assets and liabilities accurately because of the tax implication of those incomes that we have reviewed. That is why, in fact, the mandatory requirement for annual filing of SALNs is after computation of taxes. What I have provided the government is, in fact, a better way of assessing because anyway, from September 20 up to December 31, 2010, Justice De Castro, I filed again another SALN. So, there's even more data that government can mine to find out if I have hidden anything. The law is clear, within thirty days, it does not say, ah, it does not say as of reckoned as of what date. So, I followed what has been government regulation, it was OAS of the Supreme Court, Atty. Vidal, who said it must be as of end of December 2009.

...

CHIEF JUSTICE SERENO: August 16 ... So, I assumed office, I entered into the functions of my office, August, same day. How can I? We were preparing for the oral arguments, then following day was the Hacienda Luisita, I have to have bank certifications of all my bank records. I have to force my husband to compute our estimated tax liabilities, I have to make a run down of all the debts that are due me and have not been paid. I have to, at the same time, find out if I owe anybody anything. And then if I have to find out that valuation of all my properties, how can you do that in a matter of three

> weeks, Justice De Castro? This is the most absurd, oppressive interpretation ever. What I am offering the government is a good database from which to assess whether I'm violating the SALN law. I have end 2009, I have end 2010, government can run after me if I have any ill-gotten wealth. In the first place, the SolGen has not made any case that I have violated anything of any kind.
> ...
> JUSTICE DE CASTRO: You are not required by law to submit a SALN as of December 31, 2009, because you mentioned that from June 1, 2006 up to the time that you assumed office on August 2010, you were no longer in government. So, why is it that you have a SALN for December 31, 2009? What is that for?
> CHIEF JUSTICE SERENO: Your Honor, if there had been any problem with my SALN, Chief Justice Corona should have called my attention because he is the head of the Judiciary. Under the procedures, he should have called my attention, "mali iyong entry SALN mo, bakit masyadong maaga? Bakit December 2009? Eh, ang reading ko ng batas, kung end 2009 pwede na iyon sa entry SALN kasi iyon naman usually at iyon naman ang sinabi sa akin, end 2009. Iyon ang hiningi talaga.

The Constitution, law, and rules clearly require that the sworn entry SALN "must be reckoned as of his/her first day of service" and must be filed "within thirty (30) days after assumption of office." Evidently, respondent failed to file under oath a SALN reckoned as of her first day of service, or as of 16 August 2010, within the prescribed period of thirty (30) days after her assumption of office. In other words, respondent failed to file the required SALN upon her assumption to office, which is a clear violation of Section 17, Article XI of the Constitution. In light of her previous failure to file her SALNs for several years while she was a UP College of Law Professor, her failure to file her SALN upon assuming office in 2010 as Associate Justice of this Court constitutes culpable violation of the Constitution, a violation committed while she was already serving as an impeachable officer.

Jurisprudence on Failure to File SALN

Respondent harps on the case of *Concerned Taxpayer v. Doblada,*

Jr.[94] to justify her claim that she is not liable for non-filing of SALN since she religiously filed her SALNs while she was teaching in UP.

In *Doblada*, the Office of the Court Administrator (OCA) issued a certification that Doblada had no SALNs on file for certain years, including for 2000. Doblada claimed he filed all his SALNs through the Clerk of Court. Doblada presented a letter from the Clerk of Court certifying that the latter transmitted to the OCA Doblada's SALN for 2000. The Clerk of Court is tasked to forward all SALNs filed with his office to the OCA which is the custodian of SALNs for lower courts. The Clerk of Court merely collects for the OCA. The Court held that the OCA certification is not conclusive, and Doblada could not be held liable for non-filing of his SALNs.

In *Doblada*, the OCA certification satisfied the burden of proof that Doblada did not file his SALNs for a number of years, and thus, the burden of evidence shifted to Doblada. However, the Clerk of Court letter, a countervailing evidence submitted by Doblada, was sufficient to shift back the burden of evidence because the Clerk of Court letter cast doubt on the record keeping of the OCA insofar as Doblada's SALNs were concerned. In short, the OCA Certification did not constitute conclusive evidence that Doblada did not file his SALNs, precisely because it was discredited by the Clerk of Court letter, and thus, Doblada could not be held liable for non-filing of his SALNs.

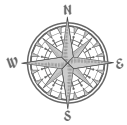
In the present case, the *Doblada* doctrine cannot apply because respondent did not file any countervailing evidence to cast doubt on the record keeping of the UP HRDO. Respondent should have presented a certification from the Secretary of the UP College of Law that she submitted all her SALNs with the College Secretary during her entire employment with the UP College of Law. The Secretary of the UP College of Law forwards to the UP HRDO whatever SALNs are submitted to the Secretary. What the UP HRDO has on file are only the 1985, 1990, 1991, 1993, 1994, 1995, 1996, 1997, and 2002 SALNs of respondent. Respondent failed to shift the burden of evidence as to her failure to file her 1986, 1987, 1988, 1992, 1999, 2000, 2001, 2003, 2004, 2005, and 2006 SALNs.

To repeat, *Doblada* is inapplicable here since respondent failed

[94] 498 Phil. 395 (2005).

to present any certification, which could attest clearly that she submitted her SALNs with the UP College of Law Secretary, who collects the SALNs and forwards the same to the UP HRDO.

Section 18. Public officers and employees owe the State and this Constitution allegiance at all times and any public officer or employee who seeks to change his citizenship or acquire the status of an immigrant of another country during his tenure shall be dealt with by law.



ARTICLE XII

NATIONAL ECONOMY AND PATRIMONY

Section 1. The goals of the national economy are a more equitable distribution of opportunities, income, and wealth; a sustained increase in the amount of goods and services produced by the nation for the benefit of the people; and an expanding productivity as the key to raising the quality of life for all, especially the underprivileged.

The State shall promote industrialization and full employment based on sound agricultural development and agrarian reform, through industries that make full and efficient use of human and natural resources, and which are competitive in both domestic and foreign markets. However, the State shall protect Filipino enterprises against unfair foreign competition and trade practices.

In the pursuit of these goals, all sectors of the economy and all regions of the country shall be given optimum opportunity to develop. Private enterprises, including corporations, cooperatives, and similar collective organizations, shall be encouraged to broaden the base of their ownership.

Section 2. All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated. The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty per centum of whose capital is owned by such citizens. Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law.

In cases of water rights for irrigation, water supply, fisheries, or industrial uses other than the development of waterpower, beneficial use may be the measure and limit of the grant.

The State shall protect the nation's marine wealth in its archipelagic waters, territorial sea, and exclusive economic zone, and reserve its use and enjoyment exclusively to Filipino citizens.

The Congress may, by law, allow small-scale utilization of natural resources by Filipino citizens, as well as cooperative fish farming, with priority to subsistence fishermen and fish workers in rivers, lakes, bays, and lagoons.

The President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the country. In such agreements, the State shall promote the development and use of local scientific and technical resources.

The President shall notify the Congress of every contract entered into in accordance with this provision, within thirty days from its execution.

Definition of "Capital"

GAMBOA v. TEVES, G.R. No. 176579, June 28, 2011, 668 Phil. 1,[1] penned by Justice Carpio for the Court *en banc*, categorically settled the definition of "capital" for purposes of complying with the nationality requirement of **paragraph 1, Section 2 of this Article XII.** It will be recalled that the case was 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:

> Despite its far-reaching implications to the national economy, this purely legal issue has remained unresolved for over 75

[1] See discussion under Art. XII, Sec. 11.

> years since the 1935 Constitution. **There is no reason for this Court to evade this ever recurring fundamental issue and delay again defining the term "capital,"** which appears not only in Section 11, Article XII of the Constitution, but also in **Section 2, Article XII on co-production and joint venture agreements for the development of our natural resources,** in Section 7, Article XII on ownership of private lands, in Section 10, Article XII on the reservation of certain investments to Filipino citizens, in Section 4(2), Article XIV on the ownership of educational institutions, and in Section 11(2), Article XVI on the ownership of advertising companies.
> …
>
> … **The term "capital"** in Section 11, Article XII of the Constitution **refers only to shares of stock entitled to vote in the election of directors,** and thus in the present case only to common shares, and not to the total outstanding capital stock comprising both common and non-voting preferred shares.
> …
>
> Section 11, Article XII of the Constitution, like other **provisions of the Constitution expressly reserving to Filipinos specific areas of investment, such as the development of natural resources and ownership of land,** educational institutions and advertising business, is self-executing. **There is no need for legislation to implement these self-executing provisions of the Constitution.**

Technical or Financial Assistance Agreements

LA BUGAL-B'LAAN TRIBAL ASSOCIATION, INC. V. RAMOS, G.R. No. 127882, December 1, 2004, 486 Phil. 754, a petition for prohibition and *mandamus*, challenged the constitutionality of Republic Act No. 7942, or the Philippine Mining Act of 1995, its Implementing Rules and Regulations (DENR Administrative Order No. 96-40), and the Financial and Technical Assistance Agreement (FTAA), executed by the government with Western Mining Corporation (Philippines), Inc. (WMCP). On January 27, 2004, the Court *en banc* promulgated its first decision which declared unconstitutional certain provisions of RA 7942 and DAO 96-40, and the entire WMCP FTAA. On a motion for reconsideration, the Court *en banc* reversed this decision and declared constitutional RA 7942 and DAO 96-40, "insofar as they relate to financial and technical assistance agreements referred to in paragraph 4 of Section 2 of Article XII," as well as the FTAA, except Sections 7.8 and 7.9 which

were invalidated "for being contrary to public policy and for being grossly disadvantageous to the government." Justice Carpio, who had voted with the majority in the first decision, wrote one of his most important and categorical **dissents**:

> Let us assume that one of the Justices of this Court is the owner of mineral resources - say gold reserves. A foreigner offers to extract the gold and pay for all development, capital and operating expenses. How much will the good Justice demand as his or her share of the gold extracted by the foreigner? If the Justice follows the Malampaya precedent, he or she will demand a 60% share of the net proceeds. If the Justice follows the manifestation of intervenor CMP and respondent WMCP before this Court, he or she will also demand a 60% share in the net proceeds. If the Justice follows the *Consolidated Mines* precedent, he or she will demand no less than 50% of the net proceeds. In either case, the 2% excise tax on the gold extracted is part of the operating expenses to be paid by the foreigner but deducted from the gross proceeds.
>
> Now, under the Regalian doctrine the State, not the Justice, owns the gold reserves. How much should the State demand from the foreigner as the State's share of the gold that is extracted? If we follow Sections 39, 80, 81, 84 and 112 of RA 7942, the State will receive only 2% excise tax as its "total share" from the gold that is extracted.
>
> **Is this fair to the State and the Filipino people, many of whom live below the poverty line? Is this what the 1987 Constitution mandates when it says that (a) the State must conserve and develop the nation's patrimony, (b) the State owns all the natural resources, (c) the State must exercise full control and supervision over the exploitation of its natural resources, and (d) FTAAs must make real contributions to the national economy and the general welfare?**
>
> **How this Court decides the present case will determine largely whether our country will remain poor, or whether we can progress as a nation.** Based on NEDA's estimates, the total mineral wealth of the nation is P47 trillion, or US$840 billion. This is 15 times more than our US$56 billion foreign debt. Can this Court in conscience agree that the State will receive only 2% of the P47 trillion mineral wealth of the nation?

> In *Miners Association*, this Court ruled that the 1987 Constitution has abandoned the old system of "license, concession or lease" and instead installed full State control and supervision over the exploitation of natural resources. No amount of dire warnings or media publicity should intimidate this Court into resurrecting the old and discredited system that has caused the denudation of almost all of the nation's virgin forests without any visible benefit to the Filipino people.
>
> **The framers of the 1987 Constitution have wisely instituted the new system to prevent a repeat of the denudation of our forestlands that did not even make any real contribution to the economic growth of the nation. This Court must do its solemn duty to uphold the intent and letter of the Constitution and, in the words of the Preamble of the 1987 Constitution, "conserve and develop our patrimony" for the benefit of the Filipino people.**
>
> This Court cannot trivialize the Filipino people's right to be the primary beneficiary of the nation's mineral resources by ruling that the phrase "among other things" is sufficient to insure that FTAAs will "make real contributions to the economic growth and general welfare of the country." This Court cannot tell the Filipino people that the phrase "among other things" is sufficient to "preserve and develop the national patrimony." This Court cannot tell the Filipino people that the phrase "among other things" means that they will receive the bulk of mining revenues.
>
> This Court cannot tell the Filipino people that Congress deliberately used the phrase "among other things" to guarantee that the Filipino people will receive their equitable share from mining revenues of foreign contractors. This Court cannot tell the Filipino people that with the phrase "among other things," this Court has protected the national interest as mandated by the 1987 Constitution.

Ultimately, in **La Bugal-B'laan**, Justice Carpio voted to declare unconstitutional Section 3 (aq), Section 39, Section 80, Section 81 (2), the proviso in Section 84, and the first proviso in Section 112 of RA 7942 for violation of **Section 2, Article XII**, and considered the implementing rules as having been issued with grave abuse of discretion amounting to lack or excess of jurisdiction. He also voted to declare unconstitutional the FTAA for violation of **Section 2, Article XII**. As explained in his compelling **dissenting** opinion:

In essence, these provisions of RA 7942 waive the State's ownership rights under the Constitution over mineral resources. These provisions also abdicate the State's constitutional duty to control and supervise fully the exploitation of mineral resources.

The Threshold Issue for Resolution

Petitioners claim that respondent Department of Environment and Natural Resources Secretary Victor O. Ramos, in issuing the rules to implement RA 7942, gravely abused his discretion amounting to lack or excess of jurisdiction. …

Petitioners also assail the validity of the Financial and Technical Assistance Agreement between the Philippine Government and WMCP (Philippines), Inc. dated 2 March 1995[3] (WMCP FTAA) for violation of Section 2, Article XII of the 1987 Constitution.

The issues that petitioners raise boil down to whether RA 7942 and the WMCP FTAA violate Section 2, Article XII of the 1987 Constitution.

The Constitutional Declaration and Mandate

… **Two basic principles flow from (Section 2, Article XII of the 1987 Constitution)… First, the Constitution vests in the State ownership of all mineral resources. Second, the Constitution mandates the State to exercise full control and supervision over the exploitation of mineral resources.**

The first principle reiterates the Regalian doctrine, which established State ownership of natural resources since the arrival of the Spaniards in the Philippines in the 16th century. The 1935, 1973 and 1987 Constitutions incorporate the Regalian doctrine.[2] The State, as owner of the nation's natural resources, exercises the attributes of ownership over its natural resources. An important attribute of ownership is the right to receive the income from any commercial exploitation of the natural resources.[3]

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[2] Chavez v. Public Estates Authority, 433 Phil. 506 (2002), penned by Justice Carpio and excerpted previously and again below.

[3] Civil Code, Art. 441.

The second principle insures that the benefits of State ownership of natural resources accrue to the Filipino people. The framers of the 1987 Constitution introduced the second principle to avoid the adverse effects of the "license, concession or lease"[4] system of exploitation under the 1935 and 1973 Constitutions. The "license, concession or lease" system enriched the private concessionaires who controlled the exploitation of natural resources. However, the "license, concession or lease" system left the Filipino people impoverished, starkly exemplified by the nation's denuded forests whose exploitation did not benefit the Filipino people.[5]

The framers of the 1987 Constitution clearly intended to abandon the "license, concession or lease" system prevailing under the 1935 and 1973 Constitutions. This exchange in the deliberations of the Constitutional Commission reveals this clear intent:

> MR. DAVIDE: Thank you, Mr. Vice-President. I would like to seek some clarifications.
> MR. VILLEGAS:Yes.
> MR. DAVIDE: Under the proposal, I notice that except for the lands of the public domain, all the other natural resources cannot be alienated and in respect to lands of the public domain, private corporations with the required ownership by Filipino citizens can only lease the same. Necessarily, insofar as other natural resources are concerned, it would only be the State which can exploit, develop, explore and utilize the same. However, the State may enter into a joint venture, co-production or production-sharing. Is that not correct?
> MR. VILLEGAS:Yes.
> MR. DAVIDE: Consequently, henceforth upon the approval of this Constitution, no timber or forest concessions, permits or authorization can be exclusively granted to any citizen of the Philippines nor to any corporation qualified to acquire lands of the public domain?
> MR. VILLEGAS:Would Commissioner Monsod like to comment on that? I think his answer is "yes."
> MR. DAVIDE: So, what will happen now to licenses or concessions earlier granted by the Philippine government to

[4] Const. (1935), Art. XIII, Sec. 1, Const. (1973), Art. XIV, Sec. 8.
[5] Miners Association of the Philippines v. Hon. Factoran, Jr., et al., 310 Phil. 113 (1995).

> private corporations or to Filipino citizens? Would they be deemed repealed?
> MR. VILLEGAS:This is not applied retroactively. They will be respected.[6]

To carry out this intent, the 1987 Constitution uses a different phraseology from that used in the 1935 and 1973 Constitutions. The previous Constitutions used the phrase "license, concession or lease" in referring to exploitation of natural resources. **The 1987 Constitution uses the phrase "co-production, joint venture or production-sharing agreements," with "full control and supervision" by the State. The change in language was a clear rejection of the old system of "license, concession or lease."**

The 1935 and 1973 Constitutions also used the words "belong to" in stating the Regalian doctrine, thus declaring that natural resources "belong to the State." The 1987 Constitution uses the word "owned," thus prescribing that natural resources are "owned" by the State. In using the word "owned," the 1987 Constitution emphasizes the attributes of ownership, among which is the right to the income of the property owned.

The State as owner of the natural resources must receive income from the exploitation of its natural resources. The payment of taxes, fees and charges, derived from the taxing or police power of the State, is not a substitute. The State is duty bound to secure for the Filipino people a fair share of the income from any exploitation of the nation's precious and exhaustible natural resources. As explained succinctly by a textbook writer:

> Under the former licensing, concession, or lease schemes, the government benefited from such activities only through fees, charges and taxes. Such benefits were very minimal compared with the enormous profits reaped by the licensees, concessionaires or lessees who had control over the particular resources over which they had been given exclusive right to exploit. Moreover, some of them disregarded the conservation of natural resources. With the new role, the State will be able to obtain a greater share in the profits. It can also actively husband our natural resources and engage in development

[6] III Records, Constitutional Commission 260.

programs that will be beneficial to the nation.[7]

Thus, the 1987 Constitution commands the State to exercise full control and supervision over the exploitation of natural resources to insure that the State receives its fair share of the income. In *Miners Association of the Philippines v. Hon. Factoran, Jr., et al.*,[8] the Court ruled that "the old system of exploration, development and utilization of natural resources through 'license, concession or lease' ... has been disallowed by Article XII, Section 2 of the 1987 Constitution." The Court explained:

> Upon the effectivity of the 1987 Constitution on February 2, 1987, the State assumed a more dynamic role in the exploration, development and utilization of the natural resources of the country. Article XII, Section 2 of the said Charter explicitly ordains that the exploration, development and utilization of natural resources shall be under the full control and supervision of the State. Consonant therewith, the exploration, development and utilization of natural resources may be undertaken by means of direct act of the State, or it may opt to enter into co-production, joint venture, or production-sharing agreements, or it may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the country.

The old system of "license, concession or lease" which merely gave the State a pittance in the form of taxes, fees and charges is now buried in history. Any attempt to resurrect it is unconstitutional and deserves outright rejection by this Court.

The Constitution prohibits the alienation of all natural resources except agricultural lands. The Constitution, however, allows the State to exploit commercially its natural resources and sell the marketable products from such exploitation. This the State may do through a co-production, joint venture or production-sharing arrangement with companies at least 60%

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[7] 2 Hector de Leon, Philippine Constitutional Law 804 (1999).

[8] 310 Phil. 113 (1995).

Filipino owned. The necessary implication is that the State, as owner of the natural resources, must receive a fair share of the income from such commercial operation. The State may receive its share of the net income in cash or in kind.

The State may also directly exploit its natural resources in either of two ways. The State may set up its own company to engage in the exploitation of natural resources. Alternatively, the State may enter into a financial or technical assistance agreement (FTAA) with private companies who act as contractors of the State. The State may seek from such contractors either financial or technical assistance, or both, depending on the State's own needs. Under an FTAA, the contractor, foreign or local, manages the contracted work or operations to the extent of its financial or technical contribution, subject to the State's control and supervision.

Except in large-scale exploitation of certain minerals, the State's contractors must be 60% Filipino owned companies. The State pays such contractors, for their technical services or financial assistance, a share of the income from the exploitation of the natural resources. The State retains the remainder of the income after paying the Filipino owned contractor.

In large-scale exploitation of minerals, petroleum and other mineral oils, the Constitution allows the State to contract with "foreign-owned corporations" under an FTAA. This is still a direct exploitation by the State but using a foreign instead of a local contractor. However, the Constitution requires that the participation of foreign contractors must make a real contribution to the national economy and the general welfare. The State pays the foreign contractor, for its technical services or financial assistance, a share of the income from the exploitation of the minerals, petroleum or other mineral oils. The State retains the rest of the income after paying the foreign contractor.

Whether the FTAA contractor is local or foreign, the State must retain its fair share of the income from the exploitation of the natural resources that it owns. To insure it retains its fair share of the income, the State must exercise full control and supervision over the exploitation of its natural resources. And whether the FTAA contractor is local or foreign, the State is directly undertaking the exploitation of its natural resources, with the FTAA contractor providing technical services or

financing to the State. Since the State is directly undertaking the exploitation, all exploration permits and similar authorizations are in the name of the Philippine Government, which then authorizes the contractor to act on its behalf.

The State exercises full control and supervision over the mining operations in the Philippines of the foreign contractor. However, the State does not exercise control and supervision over the foreign contractor itself or its board of directors. The State does not also exercise any control or supervision over the foreign contractor's mining operations in other countries, or even its non-mining operations in the Philippines. There is no conflict of power between the State and the foreign contractor's board of directors. By entering into an FTAA, the foreign contractor, through its board of directors, agrees to manage the contracted work or operations to the extent of its financial or technical contribution subject to the State's control and supervision.

No government should contract with a corporation, local or foreign, to exploit commercially the nation's natural resources without the State receiving any income as owner of the natural resources. Natural resources are non-renewable and exhaustible assets of the State. Certainly, no government in its right mind should give away for free its natural resources to private business enterprises, local or foreign, amidst widespread poverty among its people.

In sum, two basic constitutional principles govern the exploitation of natural resources in the country. First, the State owns the country's natural resources and must benefit as owner from any exploitation of its natural resources. Second, to insure that it receives its fair share as owner of the natural resources, the State must exercise full control and supervision over the exploitation of its natural resources.

We shall subject RA 7942 to constitutional scrutiny based on these two basic principles.

Waiver of Beneficial Rights from Ownership of Mineral Resources

RA 7942 contains five provisions which waive the State's right to receive income from the exploitation of its mineral resources. These provisions are Sections 39, 80, 81, 84 and 112…

Section 80 of RA 7942 limits to the excise tax the State's share in a mineral production-sharing agreement (MPSA). Section 80 expressly states that the excise tax on mineral products shall constitute the "total government share in a mineral production sharing agreement." Under Section 151(A) of the Tax Code, this excise tax on metallic and non-metallic minerals is only 2% of the market value…

Section 80 of RA 7942 does not allow the State to receive any income as owner of the mineral resources. The proviso in Section 84 of RA 7942 reiterates this when it states that "the excise tax on mineral products shall be the government share under said agreement." The State receives only an excise tax flowing from its taxing power, not from its ownership of the mineral resources. The excise tax is imposed not only on mineral products, but also on alcohol, tobacco and automobiles produced by companies that do not exploit natural resources owned by the State. The excise tax is not payment for the exploitation of the State's natural resources, but payment for the "privilege of engaging in business."[9] Clearly, under Section 80 of RA 7942, the State does not receive as owner of the mineral resources any income from the exploitation of its mineral resources.

The second paragraph of Section 81 of RA 7942 also limits the State's share in FTAAs with foreign contractors to taxes, duties and fees. Section 81 of RA 7942 provides that the State's share in FTAAs with foreign contractors -

> shall consist of, among other things, the contractor's corporate income tax, excise tax, special allowance, withholding tax due from the contractor's foreign stockholders arising from dividend or interest payments to the said foreign stockholder in case of a foreign national and all such other taxes, duties and fees as provided for under existing laws.

RA 7942 does not explain the phrase "among other things." The Solicitor General states correctly that the phrase refers to taxes. The phrase is an *ejusdem generis* phrase, and means "among other taxes, duties and fees" since the items specifically enumerated are all taxes, duties and fees. The last phrase "all such other taxes, duties and fees as provided for under existing laws" at the end of the sentence clarifies further that the phrase "among other things" refers to taxes, duties and fees.

[9] Commissioner of Internal Revenue v. Court of Appeals, 312 Phil. 337 (1995).

The second paragraph of Section 81 does not require the Government and the foreign FTAA contractor to negotiate the State's share. In contrast, the first paragraph of Section 81 expressly provides that the "share of the Government in co-production and joint-venture agreements shall be negotiated by the Government and the contractor" which is 60% Filipino owned.

In a co-production or joint venture agreement, the Government contributes other inputs or equity in addition to its mineral resources. Thus, the first paragraph of Section 81 requires the Government and the 60% Filipino owned company to negotiate the State's share. However, in an FTAA with a foreign contractor under the second paragraph of Section 81, the Government's contribution is only the mineral resources. Section 81 does not require the Government and the foreign contractor to negotiate the State's share from the net proceeds because there is no share for the State. Section 81 does not recognize the State's contribution of mineral resources as worthy of any share of the net proceeds from the mining operations.

Thus, in FTAAs with foreign contractors under RA 7942, the State's share is limited to taxes, fees and duties. The taxes include "withholding tax due from the contractor's foreign stockholders arising from dividend or interest payments." All these taxes, fees and duties are imposed pursuant to the State's taxing power. The tax on income, including dividend and interest income, is imposed on all taxpayers whether or not they are stockholders of mining companies. These taxes, fees and duties are not contractual payments to the State as owner of the mineral resources but are mandatory exactions based on the taxing power of the State.

Section 112 of RA 7942 is another provision that violates Section 2, Article XII of the 1987 Constitution. Section 112 "immediately" reverts all mineral agreements to the old and discredited "license, concession or lease" system outlawed by the 1987 Constitution. Section 112 states that "the provisions of Chapter XIV on government share in mineral production-sharing agreement ... shall immediately govern and apply to a mining lessee or contractor." The contractor, local or foreign, will now pay only the "government share in a mineral production-sharing agreement" under RA 7942. Section 80 of RA 7942, which specifically governs MPSAs, limits the "government share" solely to the excise tax on mineral products - 2% on

metallic and non-metallic minerals and 3% on indigenous petroleum.

In allowing the payment of the excise tax as the only share of the government in any mineral agreement, whether co-production, joint venture or production-sharing, Section 112 of RA 7942 reinstates the old "license, concession or lease" system where the State receives only minimal taxes, duties and fees. This clearly violates Section 2, Article XII of the Constitution and is therefore unconstitutional. Section 112 of RA 7942 is a sweeping negation of the clear letter and intent of the 1987 Constitution that the exploitation of the State's natural resources must benefit primarily the Filipino people.

Of course, Section 112 gives contractors the option not to avail of the benefit of Section 112. This is in the guise that the enactment of RA 7942 shall not impair pre-existing mining rights, as the heading of Section 112 states. It is doubtful, however, if any contractor of sound mind would refuse to receive 100% rather than only 40% of the net proceeds from the exploitation of minerals under the FTAA.

Another provision that violates Section 2, Article XII of the Constitution is Section 39 of RA 7942. Section 39 grants the foreign contractor the option to convert the FTAA into a "mineral production-sharing agreement" if the foreign contractor finds that the mineral deposits do not justify large-scale mining operations. Section 39 of RA 7942 operates to deprive the State of income from the mining operations and limits the State to the excise tax on mineral products.

Section 39 grants the foreign contractor the option to revert to the "license, concession or lease" system which the 1987 Constitution has banned. The only requirement for the exercise of the option is for the foreign contractor to divest 60% of its equity to a Philippine citizen or to a corporation 60% Filipino owned. Section 39 states, "Upon compliance with this requirement by the contractor, the Secretary shall approve the conversion and execute the mineral production-sharing agreement." The foreign contractor only needs to give "proper notice to the Secretary as provided for under the implementing rules and regulations" if the contractor finds the contract area not viable for large-scale mining. Thus, Section 39 of RA 7942 is unconstitutional.

Sections 39, 80, 81, 84 and 112 of RA 7942 operate to deprive the State of the beneficial rights arising from its ownership of mineral resources. What Section 2, Article XII of the 1987 Constitution vests in absolute ownership to the State, Sections 80, 81, 84 and 112 of RA 7942 take away and give for free to private business enterprises, including foreign-owned companies.

The legislature has discretion whether to tax a business or product. If the legislature chooses to tax a business or product, it is free to determine the rate or amount of the tax, provided it is not confiscatory.[10] The legislature has the discretion to impose merely a 2% excise tax on mineral products. Courts cannot inquire into the wisdom of the amount of such tax, no matter how meager it may be. This discretion of the legislature emanates from the State's taxing power, a power vested solely in the legislature.

However, the legislature has no power to waive for free the benefits accruing to the State from its ownership of mineral resources. Absent considerations of social justice, the legislature has no power to give away for free what forms part of the national patrimony of the State. Any surrender by the legislature of the nation's mineral resources, especially to foreign private enterprises, is repugnant to the concept of national patrimony. Mineral resources form part of the national patrimony under Article XII (National Economy and Patrimony) of the 1987 Constitution.

Under the last paragraph of Section 81, the collection of the State's so-called "share" (consisting of taxes) in FTAAs with foreign contractors is not even certain. This paragraph provides that the State's "share ... shall commence after the financial or technical assistance agreement contractor has fully recovered its pre-operating expenses, exploration, and development expenditures." There is no time limit in RA 7942 for this grace period when the collection of the State's "share" does not run.

RA 7942 itself does not require government approval for the pre-operating, exploration and development expenses of the foreign contractor. The determination of the amount of pre-operating, exploration and development expenses is left solely

[10] China Banking Corporation v. Court of Appeals, G.R. Nos. 146749 & 147938, 10 June 2003, 403 SCRA 634; City of Baguio v. De Leon, 134 Phil. 912 (1968).

to the discretion of the foreign contractor. Nothing prevents the foreign contractor from recording pre-operating, exploration and development expenses equal to the mining revenues it anticipates for the first 10 years. If that happens, the State's share is ZERO for the first 10 years.

The Government cannot tell the Filipino people when the State will start to receive its "share" (consisting of taxes) in mining revenues under the FTAA. The Executive Department cannot correct these deficiencies in RA 7942 through remedial implementing rules. The correction involves substantive legislation, not merely filling in the implementing details of the law.

Taxes, fees and duties cannot constitute payment for the State's share as owner of the mineral resources. This was the mode of payment used under the old system of "license, concession or lease" which the 1987 Constitution abrogated. Obviously, Sections 80, 81, 84 and 112 of RA 7942 constitute an ingenious attempt to resurrect the old and discredited system, which the 1987 Constitution has now outlawed. Under the 1987 Constitution, the State must receive its fair share as owner of the mineral resources, separate from taxes, fees and duties paid by taxpayers. The legislature may waive taxes, fees and duties, but it cannot waive the State's share in mining operations.

Any law waiving for free the State's right to the benefits arising from its ownership of mineral resources is unconstitutional. Such law negates Section 2, Article XII of the 1987 Constitution vesting ownership of mineral resources in the State. Such law will not contribute to "economic growth and the general welfare of the country" as required in the fourth paragraph of Section 2. Thus, in waiving the State's income from the exploitation of mineral resources, Section 80, the second paragraph of Section 81, the proviso in Section 84, and Section 112 of RA 7942 violate the Constitution and are therefore void.

Abdication of the State's Duty to Control and Supervise Fully the Exploitation of Mineral Resources

The 1987 Constitution commands the State to exercise "full control and supervision" over the exploitation of natural resources. The purpose of this mandatory directive is to insure that the State receives its fair

share in the exploitation of natural resources. The framers of the Constitution were determined to avoid the disastrous mistakes of the past. Under the old system of "license, concession or lease," the State gave full control to the concessionaires who enriched themselves while paying the State minimal taxes, fees and charges.

Under the 1987 Constitution, for a co-production, joint venture or production-sharing agreement to be valid the State must exercise full control and supervision over the mining operations. This means that the State should approve all capital and operating expenses in the exploitation of the natural resources. Approval of capital expenses determines how much capital is recoverable by the mining contractor. Approval of operating expenses determines the reasonable amounts deductible from the annual income from mining operations. Such approvals are essential because the net income from mining operations, which is the basis of the State's share, depends on the allowable amount of capital and operating expenses. There is approval of capital and operating expenses when the State approves them, or if the State disapproves them and a dispute arises, when their final allowance is subject to arbitration.

The provisions of RA 7942 on MPSAs and FTAAs do not give the State any control and supervision over mining operations. The reason is obvious. The State's so-called "share" in a mineral production-sharing agreement under Section 80 is limited solely to the excise tax on mineral products. This excise tax is based on the market value of the mineral product determined without reference to the capital or operating expenses of the mining contractor.

Likewise, the State's "share" in an FTAA under Section 81 has no relation to the capital or operating expenses of the foreign contractor. The State's "share" constitutes the same excise tax on mineral products, in addition to other direct and indirect taxes. The basis of the excise tax is the selling price of the mineral product. Hence, there is no reason for the State to approve or disapprove the capital or operating expenses of the mining contractor. Consequently, RA 7942 does not give the State any control and supervision over mining operations contrary to the express command of the Constitution. This makes Section 80, the second paragraph of Section 81, the proviso in Section 84, and Section 112 of RA 7942 unconstitutional.

RA 7942 Will Not Contribute to Economic Growth or General Welfare of the Country

The fourth paragraph of Section 2, Article XII of the 1987 Constitution requires that FTAAs with foreign contractors must make "real contributions to the economic growth and general welfare of the country." Under Section 81 of RA 7942, all the net proceeds arising from the exploitation of mineral resources accrue to the foreign contractor even if the State owns the mineral resources. The foreign contractor will naturally repatriate the entire after-tax net proceeds to its home country. Sections 94(a) and 94(b) of RA 7942 guarantee the foreign contractor the right to repatriate its after-tax net proceeds, as well as its entire capital investment, after the termination of its mining operations in the country.

Clearly, no FTAA under Section 81 will ever make any real contribution to the growth of the economy or to the general welfare of the country. The foreign contractor, after it ceases to operate in the country, can even remit to its home country the scrap value of its capital equipment. Thus, the second paragraph of Section 81 of RA 7942 is unconstitutional for failure to meet the constitutional requirement that the FTAA with a foreign contractor should make a real contribution to the national economy and general welfare.

Example of FTAA that Complies with Section 2, Article XII of the 1987 Constitution

The Solicitor General warns that declaring unconstitutional RA 7942 or its provisions will endanger the Philippine Government's contract with the foreign contractor extracting petroleum in Malampaya, Palawan. On the contrary, the FTAA with the foreign petroleum contractor meets the essential constitutional requirements since the State receives a fair share of the income from the petroleum operations. The State also exercises control and supervision over the exploitation of the petroleum. The petroleum FTAA provides enough safeguards to insure that the petroleum operations will make a real contribution to the national economy and general welfare.

The Service Contract dated 11 December 1990 between the Philippine Government as the first party, and Occidental Philippines, Inc. and Shell Exploration B.V. as the second party (Occidental-Shell FTAA), covering offshore exploitation

of petroleum in Northwest Palawan, contains the following provisions:

1. There is express recognition that the "conduct of Petroleum Operations shall be under the full control and supervision of the Office of Energy Affairs," now Department of Energy (DOE), and that the "CONTRACTOR shall undertake and execute the Petroleum Operations contemplated hereunder under the full control and supervision of the OFFICE OF ENERGY AFFAIRS;"
2. The State receives 60% of the net proceeds from the petroleum operations, while the foreign contractor receives the remaining 40%;
3. The DOE has a right to inspect and audit every year the foreign contractor's books and accounts relating to the petroleum operations, and object in writing to any expense (operating and capital expenses) within 60 days from completion of the audit, and if there is no amicable settlement, the dispute goes to arbitration;
4. The operating expenses in any year cannot exceed 70% of the gross proceeds from the sale of petroleum in the same year, and any excess may be carried over in succeeding years;
5. The Bureau of Internal Revenue (BIR) can inspect and examine all the accounts, books and records of the foreign contractor relating to the petroleum operations upon 24 hours written notice;
6. The petroleum output is sold at posted or market prices;
7. The foreign contractor pays the 32% Philippine corporate income tax on its 40% share of the net proceeds, including withholding tax on dividends or remittances of profits.

The Occidental-Shell FTAA gives the State its fair share of the income from the petroleum operations of the foreign contractor. There is no question that the State receives its rightful share, amounting to 60% of the net proceeds, in recognition of its ownership of the petroleum resources. In addition, Occidental-Shell's 40% share in the net proceeds is subject to the 32% Philippine income tax. The Occidental-Shell FTAA also gives the State, through the DOE and BIR, full control and supervision over the petroleum operations of the foreign contractor. The foreign contractor can recover only the capital and operating expenses approved by the DOE or by the arbitral panel. The Occidental-Shell FTAA also contains other safeguards to

protect the interest of the State as owner of the petroleum resources. While the foreign contractor manages the contracted work or operations to the extent of its financial or technical contribution, there are sufficient safeguards in the FTAA to insure compliance with the constitutional requirements. The terms of the Occidental-Shell FTAA are fair to the State and to Occidental-Shell.

In FTAAs with a foreign contractor, the State must receive at least 60% percent of the net proceeds from the exploitation of its mineral resources. This share is the equivalent of the constitutional requirement that at least 60% of the capital, and hence 60% of the income, of mining companies should remain in Filipino hands. Intervenor CMP and even respondent WMCP agree that the State has a 60% interest in the mining operations under an FTAA with a foreign contractor. Intervenor CMP asserts that the Philippine Government "stands in the place of the 60% Filipino-owned company."

Intervenor CMP also states that "the contractor will get 40% of the financial benefits," admitting that the State, which is the owner of the mineral resources, will retain the remaining 60% of the net proceeds.

Respondent WMCP likewise admits that the 60%-40% "sharing ratio between the Philippine Government and the Contractor is also in accordance with the 60%-40% equity requirement for Filipino-owned corporations." Respondent WMCP even adds that the 60%-40% sharing ratio is "in line with the intent behind Section 2 of Article XII that the Filipino people, as represented by the State, benefit primarily from the exploration, development, and utilization of the Philippines' natural resources." If the State has a 60% interest in the mining operations under an FTAA, then it must retain at least 60% of the net proceeds.

Otherwise, there is no sense exploiting the State's natural resources if all or a major part of the profits are remitted abroad, precluding any real contribution to the national economy or the general welfare. The constitutional requirement of full control and supervision necessarily means that the State must receive the income that corresponds to the party exercising full control, and this logically means a majority of the income.

The Occidental-Shell FTAA satisfies these constitutional requirements because the State receives 60% of the net

proceeds and exercises full control and supervision of the petroleum operations. The State's right to receive 60% of the net proceeds and its exercise of full control and supervision are the essential constitutional requirements for the validity of any FTAA. The name given to the contract is immaterial - whether a "Service Contract" or any other name - provided these two essential constitutional requirements are present. Thus, the designation of the Occidental-Shell FTAA as a "Service Contract" is inconsequential since the two essential constitutional requirements for the validity of the contract as an FTAA are present.

With the State's right to receive 60% of the net proceeds, coupled with its control and supervision, the petroleum operations in the Occidental-Shell FTAA are legally and in fact 60% owned and controlled by Filipinos. Indeed, the State is directly undertaking the petroleum exploitation with Occidental-Shell as the foreign contractor. The Occidental-Shell FTAA does not provide for the issuance of exploration permits to Occidental-Shell precisely because the State itself is directly undertaking the petroleum exploitation.

Section 3(aq) of RA 7942 allows the foreign contractor to hold the exploration permit under the FTAA. However, Section 2, Article XII of the 1987 Constitution does not allow foreign owned corporations to undertake directly mining operations. Foreign owned corporations can only act as contractors of the State under the FTAA, which is one method for the State to undertake directly the exploitation of its natural resources. The State, as the party directly undertaking the exploitation of its natural resources, must hold through the Government all exploration permits and similar authorizations. Section 3(aq) of RA 7942, in allowing foreign owned corporations to hold exploration permits, is unconstitutional.

The Occidental-Shell FTAA, involving a far riskier offshore venture than land-based mining operations, is a model for emulation if foreign contractors want to comply with the constitutional requirements. Section 112 of RA 7942, however, negates the benefits of the State from the Occidental-Shell FTAA.

Occidental-Shell can invoke Section 112 of RA 7942 and deny the State its 60% share of the net proceeds from the exploitation of petroleum. Section 112 allows the foreign contractor to pay

only the "government share in a mineral production-sharing agreement" under RA 7942. Section 80 of RA 7942 on MPSAs limits the "government share" solely to the excise tax - 2% on metallic and non-metallic mineral products and 3% on petroleum. Section 112 of RA 7942 is unconstitutional since it is contrary to Section 2, Article XII of the 1987 Constitution.

The WMCP FTAA Violates Section 2, Article XII of the 1987 Constitution

The WMCP FTAA ostensibly gives the State 60% share of the net mining revenue. In reality, this 60% share is illusory. Section 7.7 of the WMCP FTAA provides that:

> From the Commencement of Commercial Production, the Contractor shall pay a government share of sixty per centum (60%) of Net Mining Revenues, calculated in accordance with the following provisions (the Government Share). The Contractor shall be entitled to retain the balance of all revenues from the Mining Operations.

However, under Section 7.9 of the WMCP FTAA, if WMCP's foreign stockholders sell 60% of their equity to a Philippine citizen or corporation, the State loses its right to receive its 60% share of the net mining revenues under Section 7.7. Thus, Section 7.9 provides:

> The percentage of Net Mining Revenues payable to the Government pursuant to Clause 7.7 shall be reduced by 1% of Net Mining Revenues for every 1% ownership interest in the Contractor held by a Qualified Entity.

What Section 7.7 gives to the State, Section 7.9 takes away without any offsetting compensation to the State. In reality, the State has no vested right to receive any income from the exploitation of its mineral resources. What the WMCP FTAA gives to the State in Section 7.7 is merely by tolerance of WMCP's foreign stockholders, who can at any time cut off the State's entire 60% share by selling 60% of WMCP's equity to a Philippine citizen or corporation. The proceeds of such sale do not accrue to the State but belong entirely to the foreign stockholders of WMCP.

Section 2.1 of the WMCP FTAA defines a "Qualified Entity" to include a corporation 60% Filipino owned and 40% foreign

owned. WMCP's foreign stockholders can sell 60% of WMCP's equity to such corporation and the sale will still trigger the operation of Section 7.9 of the WMCP FTAA. Thus, the State will receive ZERO percent of the income but the foreign stockholders will own beneficially 64% of WMCP, consisting of their remaining 40% equity and 24% pro-rata share in the buyer-corporation. WMCP will then invoke Section 39 of RA 7942 allowing it to convert the FTAA into an MPSA, thus subjecting WMCP to pay only 2% excise tax on mineral products in lieu of sharing its mining income with the State. This violates Section 2, Article XII of the 1987 Constitution requiring that only corporations "at least sixty per centum of whose capital is owned by such citizens" can enter into co-production, joint venture or production-sharing agreements with the State.

The State, as owner of the mineral resources, must receive a fair share of the income from any commercial exploitation of its mineral resources. Mineral resources form part of the national patrimony, and so are the net proceeds from such resources. The Legislature or Executive Department cannot waive the State's right to receive a fair share of the income from such mineral resources.

The intervenor Chamber of Mines of the Philippines (CMP) admits that under an FTAA with a foreign contractor, the Philippine Government "stands in the place of the 60% Filipino owned company" and hence must retain 60% of the net proceeds. Thus, intervenor CMP concedes that:

> ... In other words, in the FTAA situation, the Government stands in the place of the 60% Filipino-owned company, and the 100% foreign-owned contractor company takes all the risks of failure to find a commercially viable large-scale ore body or oil deposit, for which the contractor will get 40% of the financial benefits.

For this reason, intervenor CMP asserts that the "contractor's stipulated share under the WMCP FTAA is limited to a maximum of 40% of the net production." Intervenor CMP further insists that "60% of its (contractor's) net returns from mining, if any, will go to the Government under the WMCP FTAA." Intervenor CMP, however, fails to consider that the Government's 60% share is illusory because under Section 7.9 of the WMCP FTAA the foreign stockholders of WMCP can

reduce at any time to ZERO percent the Government's share.

If WMCP's foreign stockholders do not immediately sell 60% of WMCP's equity to a Philippine citizen or corporation, the State in the meantime receives its 60% share. However, under Section 7.10 of the WMCP FTAA, the State shall receive its share "after the offsetting of the items referred to in Clauses 7.8 and 7.9," namely:

> 7.8. The Government Share shall be deemed to include all of the following sums:
> (a) all Government taxes, fees, levies, costs, imposts, duties and royalties including excise tax, corporate income tax, customs duty, sales tax, value added tax, occupation and regulatory fees, Government controlled price stabilization schemes, any other form of Government backed schemes, any tax on dividend payments by the Contractor or its Affiliates in respect of revenues from the Mining Operations and any tax on interest on domestic and foreign loans or other financial arrangements or accommodation, including loans extended to the Contractor by its stockholders;
> (b) any payments to local and regional government, including taxes, fees, levies, costs, imposts, duties, royalties, occupation and regulatory fees and infrastructure contributions;
> (c) any payments to landowners, surface rights holders, occupiers, indigenous people or Claim-owners;
> (d) costs and expenses of fulfilling the Contractor's obligations to contribute to national development in accordance with Clause 10.1(i)(1) and 10.1(i)(2);
> (e) an amount equivalent to whatever benefits that may be extended in the future by the Government to the Contractor or to financial or technical assistance agreement contractors in general;
> (f) all of the foregoing items which have not previously been offset against the Government Share in an earlier Fiscal year, adjusted for inflation.
> 7.9. The percentage of Net Mining Revenues payable to the Government pursuant to Clause 7.7 shall be reduced by 1% of Net Mining Revenues for every 1% ownership interest in the Contractor held by a Qualified Entity.

It makes no sense why under Section 7.8(e) money spent by the Government for the benefit of the contractor, like building roads leading to the mine site, is deductible from the State's 60% share of the Net Mining Revenues. Unless of course the

purpose is solely to reduce further the State's share regardless of any reason. In any event, the numerous deductions from the State's 60% share make one wonder if the State will ever receive anything for its ownership of the mineral resources. Even assuming the State will receive something, the foreign stockholders of WMCP can at any time take it away by selling 60% of WMCP's equity to a Philippine citizen or corporation.

In short, the State does not have any right to any share in the net income from the mining operations under the WMCP FTAA. The stipulated 60% share of the Government is illusory. The State is left to collect only the 2% excise tax as its sole share from the mining operations.

Indeed, on 23 January 2001, WMCP's foreign stockholders sold 100% of WMCP's equity to Sagittarius Mines, Inc., a domestic corporation 60% Filipino owned and 40% foreign owned. This sale automatically triggered the operation of Section 7.9 of the WMCP FTAA reducing the State's share in the Net Mining Revenues to ZERO percent without any offsetting compensation to the State. Thus, as of now, the State has no right under the WMCP FTAA to receive any share in the mining revenues of the contractor, even though the State owns the mineral resources being exploited under the WMCP FTAA.

Intervenor CMP anchors its arguments on the erroneous interpretation that the WMCP FTAA gives the State 60% of the net income of the foreign contractor. Thus, intervenor CMP states that "60% of its (WMCP's) net returns from mining, if any, will go to the Government under the WMCP FTAA." This basic error in interpretation leads intervenor CMP to erroneous conclusions of law and fact.

Like intervenor CMP, respondent WMCP also maintains that under the WMCP FTAA, the State is "guaranteed" a 60% share of the foreign contractor's Net Mining Revenues. Respondent WMCP contends, after quoting Section 7.7 of the WMCP FTAA, that:

> In other words, the State is guaranteed a sixty per centum (60%) share of the Mining Revenues, or 60% of the actual fruits of the endeavor. This is in line with the intent behind Section 2 of Article XII that the Filipino people, as represented by the State, benefit primarily from the exploration, development, and utilization of the Philippines' natural resources.

> Incidentally, this sharing ratio between the Philippine Government and the Contractor is also in accordance with the 60%-40% equity requirement for Filipino-owned corporations in Paragraph 1 of Section 2 of Article XII.

This so-called "guarantee" is a sham. Respondent WMCP gravely misleads this Court. Section 7.9 of the WMCP FTAA provides that the State's share "shall be reduced by 1% of Net Mining Revenues for every 1% ownership interest in the Contractor held by a Qualified Entity." This reduction is without any offsetting compensation to the State and constitutes a waiver of the State's share to WMCP's foreign stockholders. The Executive Department cannot give away for free, especially to foreigners, what forms part of the national patrimony. This negates the constitutionally mandated State ownership of mineral resources for the benefit of the Filipino people.

WMCP's stockholders may also invoke Section 112 of RA 7942 allowing a mining contractor to pay the State's share in accordance with Section 80 of RA 7942. WMCP will end up paying only the 2% excise tax to the Philippine Government for the exploitation of the mineral resources the State owns. In short, the old and discredited system of "license, concession or lease" will govern the WMCP FTAA.

The WMCP FTAA is also emphatic in stating that WMCP shall have exclusive right to exploit, utilize, process and dispose of all mineral products produced under the WMCP FTAA. Section 1.3 of the WMCP FTAA provides:

> The Contractor shall have the exclusive right to explore, exploit, utilise, process and dispose of all Mineral products and by-products thereof that may be derived or produced from the Contract Area but shall not, by virtue only of this Agreement, acquire any title to lands encompassed within the Contract Area.

Under the WMCP FTAA, the contractor has exclusive right to exploit, utilize and process the mineral resources to the exclusion of third parties and even the Philippine Government. Since WMCP's right is exclusive, the Government has no participation in approving the operating expenses of the foreign contractor relating to the exploitation, utilization, and processing of mineral resources. The Government will have to accept whatever operating expenses the contractor decides to

incur in exploiting, utilizing and processing mineral resources.

Under the WMCP FTAA, the contractor has exclusive right to dispose of the minerals recovered in the mining operations. This means that the contractor can sell the minerals to any buyer, local or foreign, at the price and terms the contractor chooses without any intervention from the State. There is no requirement in the WMCP FTAA that the contractor must sell the minerals at posted or market prices. The contractor has the sole right to "mortgage, charge or encumber" the "Minerals produced from the Mining Operations."

Section 8.3 of the WMCP FTAA also makes a sham of the DENR Secretary's authority to approve the foreign contractor's Work Program. Section 8.3 provides:

> If the Secretary gives a Rejection Notice the Parties shall promptly meet and endeavour to agree on amendments to the Work Program or budget. If the Secretary and the Contractor fail to agree on the proposed revision within 30 days from delivery of the Rejection Notice then the Work Programme or Budget or variation thereof proposed by the Contractor shall be deemed approved, so as not to unnecessarily delay the performance of the Agreement.

The DENR Secretary is the representative of the State which owns the mineral resources. The DENR Secretary implements the mining laws, including RA 7942. Section 8.3, however, treats the DENR Secretary like a subservient non-entity whom the contractor can overrule at will. Under Section 8.3 of the WMCP FTAA, the DENR Secretary has no authority whatsoever to disapprove the Work Program. This is not what the Constitution means by full control and supervision by the State of mining operations.

Section 10.4(i) of the WMCP FTAA compels the Philippine Government to agree to any request by the foreign contractor to amend the WMCP FTAA to satisfy the conditions of creditors of the contractor. Thus, Section 10.4(i) states:

> (i) the Government shall favourably consider any request, from Contractor for amendments of this Agreement which are necessary in order for the Contractor to successfully obtain the financing; …

This provision requires the Government to favorably consider any request from the contractor - which means that the Government must render a response favorable to the contractor. In effect, the contractor has the right to amend the WMCP FTAA even against the will of the Philippine Government just so the contractor can borrow money from banks.

True, the preceding Section 10.4(e) of the WMCP FTAA provides that "such financing arrangements will in no event reduce the Contractor's obligations or the Government's rights." However, Section 10.4(i) binds the Government to agree to any future amendment requested by the foreign contractor even if the Government does not agree with the wisdom of the amendment. This provision is contrary to the State's full control and supervision in the exploitation of mineral resources.

Clearly, under the WMCP FTAA the State has no full control and supervision over the mining operations of the contractor. Provisions in the WMCP FTAA that grant the State full control and supervision are negated by other provisions that take away such control and supervision.

The WMCP FTAA also violates the constitutional limits on the term of an FTAA. **Section 2, Article XII of the 1987 Constitution limits the term of a mineral agreement to "a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law." The original term cannot exceed 25 years, and at the end of such term, either the Government or the contracting party may decide not to renew the mineral agreement. However, both the Government and the contracting party may also decide to renew the agreement, in which case the renewal cannot exceed another 25 years. What is essential is that either party has the option to renew or not to renew the mineral agreement at the end of the original term.**

However, Section 3.3 of the WMCP FTAA binds the Philippine Government to an ironclad 50-year term. Section 3.3 compels the Government to renew the FTAA for another 25 years after the original 25-year term expires. Thus, Section 3.3 states:

> This Agreement shall be renewed by the Government for a further period of twenty-five (25) years under the same

> terms and conditions provided that the Contractor lodges a request for a renewal with the Government not less than sixty (60) days prior to the expiry of the initial term of this Agreement and provided that the Contractor is not in breach of any of the requirements of this Agreement.

Under Section 3.3, the contractor has the option to renew or not to renew the agreement. The Government has no such option and must renew the agreement once the contractor makes a request for renewal. Section 3.3 violates the constitutional limits because it binds the Government to a 50-year FTAA at the sole option of the contractor.

Arguments of the Solicitor General and the NEDA Secretary

The Solicitor General states that the "basic share" of the State in FTAAs involving large-scale exploitation of minerals, petroleum and other mineral oils -

> ... consists of all direct taxes, fees and royalties, as well as other payments made by the Contractor during the term of the FTAA. The amounts are paid to the (i) national government, (ii) local governments, and (iii) persons directly affected by the mining project. Some of the major taxes paid are as follows Section 3(g) of DAO-99-56:
> A. Payments to National Government
> Excise tax on minerals - 2% of gross output of mining operations
> Contractor's income tax - 32% of taxable income for corporation
> Customs duties and fees - rate is set by Tariff and Customs Code
> VAT on imported equipment, goods and services - 10% of value
> Royalty on minerals extracted from mineral reservations, if applicable - 5% of the actual market value of the minerals produced
> Documentary stamp tax - rate depends on the type of transaction Capital gains tax on traded stocks - 5 to 10% of the value
> Tax on interest payments on foreign loans - 15% of the interest
> Tax on foreign stockholder's dividends - 15% of the dividend
> Wharfage and port fees

Licensing fees (e.g., radio permit, firearms permit, professional fees)
B. Payments to Local Governments
Local business tax - maximum of 2% of gross sale or receipt
Real property tax - 2% of the fair market value of property based on an assessment level set by the local government
Local business tax - maximum of 2% of gross sale or receipt
Special education levy - 1% of the basis used in real property tax
Occupation tax - 50 pesos per hectare per year; 100 pesos per hectare per year if located in a mineral concession
Community tax - 10,500 pesos maximum per year
Other local taxes and fees - rate and type depends on the local government
C. Other Payments
Royalty to indigenous cultural communities, if any - not less than 1% of the gross output from mining operations
Special allowance - payment to claim owners or surface right owners

The Solicitor General argues that the phrase "among other things" in the second paragraph of Section 81 of RA 7942 means that the State "is entitled to an additional government share to be paid by the Contractor." The Solicitor General explains:

An additional government share is collected from an FTAA contractor to fulfill the intent of Section 81 of RA No. 7942, to wit:

> Sec. 81. The Government share in an FTAA shall consist of, among other things, the Contractor's corporate income tax, excise tax, special allowance, withholding tax due from the Contractor's foreign stockholders arising from dividends or interest payments to the said foreign stockholders in case of a foreign-owned corporation and all such other taxes, duties and fees as provided for in existing laws.

The phrase "among other things" indicates that the Government is entitled to an additional share to be paid by the Contractor, aside from the basic share in order to achieve the fifty- fifty sharing of net benefits from mining.
By including indirect taxes and other financial contributions in the form of fuel tax; employees' payroll and fringe benefits; various withholding taxes on royalties to land owners and claim owners, and employees' income; value added tax on local goods, equipment, supplies and services; and expenditures

> for social infrastructures in the mine site (hospitals, schools, etc.) and development of host and neighboring communities, geosciences and mining technology, the government share will be in the range of 60% or more of the total financial benefits.

The Solicitor General enumerates this "additional government share" as "indirect taxes and other financial contributions in the form of fuel tax; employees' payroll and fringe benefits; various withholding taxes on royalties to land owners and claim owners, and employees' income; value added tax on local goods, equipment, supplies and services; ..." The Solicitor General's argument merely confirms that under Section 81 of RA 7942 the State only receives taxes, duties and fees under the FTAA. The State does not receive, as owner of the mineral resources, any income from the mining operations of the contractor.

In short, the "basic share" of the State consists of direct taxes by the national and local governments. The "additional share" of the State consists of indirect taxes including even fringe benefits to employees and compensation to private surface right owners. Direct and indirect taxes, however, are impositions by the taxing authority, a burden borne by all taxpayers whether or not they exploit the State's mineral resources. Fringe benefits of employees are compensation for services rendered under an employer-employee relationship. Compensation to surface right owners is payment for the damage suffered by private landowners arising from the mining operations. All these direct and indirect taxes, as well as other expenses of the contractor, do not constitute payment for the share of the State as owner of the mineral resources.

Clearly, the so-called "share" of the State consists only of direct and indirect taxes, as well as other operating expenses not even payable to the State. The Solicitor General in effect concedes that under the second paragraph of Section 81, the State does not receive any share of the net proceeds from the mining operations of the FTAA contractor. Despite this, the Solicitor General insists that the State remains the owner of the mineral resources and exercises full control over the mining operations of the FTAA contractor. The Solicitor General has redefined the civil law concept of ownership, by giving the owner full control in the exploitation of the property he owns but denying him the fruits or income from such exploitation. The only satisfaction of the owner is that the FTAA contractor pays taxes to the Government.

However, even this psychological satisfaction is dubious. Under the third paragraph of Section 81 of RA 7942, the "collection of Government share in financial and technical assistance agreement shall commence after the financial and technical assistance agreement contractor has fully recovered its pre-operating expenses, exploration, and development expenditures, inclusive." This provision does not defer the collection of the State's "share," but prevents the accrual of the State's "share" until the contractor has fully recovered all its pre-operating, exploration and development expenditures. This provision exempts for an undefined period the contractor from all existing taxes that are part of the Government's so-called "share" under Section 81. The Solicitor General has interpreted these taxes to include "other national taxes and fees" as well as "other local taxes and fees."

Secretary Romulo L. Neri of the National Economic and Development Authority (NEDA) has warned this Court of the supposed dire repercussions to the nation's long-term economic growth if this Court declares the assailed provisions of RA 7942 unconstitutional. Under the Constitution, the NEDA is the "independent (economic) planning agency of the government." However, in this case the NEDA Secretary has joined the chorus of the foreign chambers of commerce to uphold the validity of RA 7942 as essential to entice foreign investors to exploit the nation's mineral resources.

We cannot fault the foreign chambers of commerce for driving a hard bargain to maximize the profits of foreign investors. We are, however, saddened that the NEDA Secretary is willing to give away for free to foreign investors the State's share of the income from its ownership of mineral resources. If the NEDA Secretary owns the mineral resources instead of the State, will he allow the foreign contractor to exploit his mineral resources for free, the only obligation of the foreign contractor being to pay taxes to the Government?

Secretary Neri claims that the potential tax collection from the mining industry alone is P57 billion as against the present collection of P2 billion. Secretary Neri adds that the potential tax collection from incremental activities linked to mining is another P100 billion, thus putting the total potential tax collection from mining and related industries at P157 billion. Secretary Neri also estimates the "potential mining wealth in the Philippines" at P47 trillion or US$840 billion, 15 times our

total foreign debt of US$56 billion.

If all that the State will receive from its P47 trillion potential mineral wealth is the P157 billion in direct and indirect taxes, then the State will truly receive only a pittance. The P157 billion in taxes constitute a mere .33% or a third of 1% of the total mineral wealth of P47 trillion. Even if the P157 billion is collected annually over 25 years, the original term of an FTAA, the total tax collection will amount to only P3.92 trillion, or a mere 8.35% of the total mineral wealth. The rest of the country's mineral wealth will flow out of the country if foreign contractors exploit our mineral resources under FTAAs pursuant to RA 7942.

Secretary Neri also warns that foreign investors who have acquired local cement factories in the last ten years will find their investments illegal if the Court declares unconstitutional the assailed provisions of RA 7942. Such specious arguments deserve scant consideration. Cement manufacturing is not a nationalized activity. Hence, foreigners can own 100% of cement companies in this country. When the foreign investors acquired the local cement factories, they spun off the quarry operations into separate companies 60% owned by Filipino citizens. The foreign investors knew the constitutional requirements of holding quarry permits.

Besides, the quarrying requirement of cement companies is just a simple surface mining of limestone. Such activity does not constitute large-scale exploitation of mineral resources. It definitely cannot qualify for FTAAs with foreign contractors under the fourth paragraph of Section 2, Article XII of the Constitution. Obviously, only a company at least 60% Filipino owned can engage in such mining activity.

The offshore Occidental-Shell FTAA shows that even in riskier ventures involving far more capital investments, the State can negotiate and secure at least 60% of the net proceeds from the exploitation of mineral resources. Foreign contractors like Occidental-Shell are willing to pay the State 60% of the net proceeds from petroleum operations, in addition to paying the Government the 32% corporate income tax on its 40% share of the net proceeds. Even intervenor CMP and respondent WMCP agree that the State has a 60% interest in mining operations under an FTAA. I simply cannot fathom why the NEDA Secretary is willing to accept a ZERO percent share in

the income from the exploitation of inland mineral resources.

FTAAs like the WMCP FTAA, which gives the State an illusory 60% share of the net proceeds from mining revenues, will only impoverish further the Filipino people. The nation's potential mineral wealth of P47 trillion will contribute to economic development only if the bulk of the wealth remains in the country, not if remitted abroad by foreign contractors.

Refutation of Arguments of Majority Opinion[11]

The majority opinion advances the following arguments:

1. DENR Department Administrative Order No. 56-99 (DAO 56-99) is the basis for determining the State's share in the mining income of the foreign FTAA contractor. The DENR Secretary issued DAO 56-99 pursuant to the phrase "among other things" in Section 81 of RA 7942. The majority opinion claims that the phrase "among other things" "clearly and unmistakably reveals the legislative intent to have the State collect more than just the usual taxes, duties and fees." The majority opinion anchors on the phrase "among other things" its argument that RA 7942 allows the State to collect a share in the mining income of the foreign FTAA contractor, in addition to taxes, duties and fees. Thus, on the phrase "among other things" depends whether the State and the Filipino people are entitled under RA 7942 to share in the vast mineral wealth of the nation, estimated by NEDA at P47 trillion or US$840 billion.

2. FTAAs, like the WMCP FTAA, are not subject to the term limit in Section 2, Article XII of the 1987 Constitution. In short, while co-production, joint venture and production-sharing agreements cannot exceed 25 years, renewable for another 25 years, as provided in Section 2, Article XII of the 1987 Constitution, the WMCP FTAA is not governed by the constitutional limitation. The majority opinion states that the "constitutional term limitations do not apply to FTAAs." Thus, the majority opinion upholds the validity of Section 3.3 of the WMCP FTAA providing for a 50-year term at the sole option of WMCP.

3. Section 112 of RA 7942, placing "all valid and existing"

[11] Majority opinion, Panganiban, J.

mining agreements under the fiscal regime prescribed in Section 80 of RA 7942, does not apply to FTAAs. Thus, the majority opinion states, "[W]hether Section 112 may properly apply to co-production or joint venture agreements, the fact of the matter is that it cannot be made to apply to FTAAs."

4. Foreign FTAA contractors and even foreign corporations can hold exploration permits, despite Section 2, Article XII of the 1987 Constitution reserving to Philippine citizens and to corporations 60% Filipino owned the "exploration, development and utilization of natural resources." Thus, the majority opinion states that "there is no prohibition at all against foreign or holding exploration permits."

5. The Constitution does not require that the State's share in FTAAs or other mineral agreements should be at least 60% of the net mining revenues. Thus, the majority opinion states that "the Charter did not intend to fix an iron-clad rule on the 60 percent share, applicable to all situations at all times and in all circumstances."

I respond to the arguments of the majority opinion.

DAO 99-56 as Basis for Government's Share in FTAAs

The main thrust of my separate opinion is that mineral agreements under RA 7942, whether FTAAs under Section 81 or MPSAs under Section 80, do not allow the State to receive any share from the income of mining companies. The State can collect only taxes, duties and fees from mining companies.

The majority opinion, however, points to the phrase "among other things" in the second paragraph of Section 81 as the authority of the State to collect in FTAAs a share in the mining income separate from taxes, duties and fees. The majority opinion can point to no other provision in RA 7942 allowing the State to collect any share. The majority opinion admits that limiting the State's share in any mineral agreement to taxes, duties and fees is unconstitutional. Thus, the majority opinion's case rises or falls on whether the phrase "among other things" allows the State to collect from FTAA contractors any income in addition to taxes, duties and fees.

In the case of MPSAs, the majority opinion cannot point to any

provision in RA 7942 allowing the State to collect any share in MPSAs separate from taxes, duties and fees. The language of Section 80 is so crystal clear - "the total government share in a mineral production sharing agreement shall be the excise tax on mineral products" - that there is no dispute whatsoever about it. The majority opinion merely states that the constitutionality of Section 80 is not in issue in the present case. Section 81, the constitutionality of which the majority opinion admits is in issue here, is intertwined with Sections 39, 80, 84 and 112. Resolving the constitutionality of Section 81 necessarily involves a determination of the constitutionality of Sections 39, 80, 84 and 112.

The WMCP FTAA, the constitutionality of which is certainly in issue, is governed not only by Section 81 but also by Sections 39, 80 and 112. The reason is that the WMCP FTAA is a reversible contract that gives WMCP the absolute option at any time to convert the FTAA into an MPSA. In short, the WMCP FTAA is like a single coin with two sides - one an FTAA and the other an MPSA.

The Integrated Intent, Plan and Structure of RA 7942

The clear intent of RA 7942 is to limit the State's share from mining operations to taxes, duties and fees, unless the State contributes equity in addition to the mineral resources. RA 7942 does not recognize the mere contribution of mineral resources as entitling the State to receive a share in the net mining revenues separate from taxes, duties and fees. Thus, Section 80 expressly states that the "total government share in a mineral production sharing agreement shall be the excise tax on mineral products." Section 84 reiterates this by stating that "with respect to mineral production sharing agreement, the excise tax on mineral products shall be the government share under said agreement." The only share of the State in an MPSA is the excise tax. Ironically, Sections 80 and 84 disallow the State from sharing in the production or income, even as the contract itself is called a mineral production sharing agreement.

In co-production and joint venture agreements, where the State contributes equity in addition to the mineral resources, the first paragraph of Section 81 expressly requires that "the share of the government ... shall be negotiated by the Government

and the contractor." However, in FTAAs where the State contributes only its mineral resources, the second paragraph of Section 81 states -

> The Government share in financial or technical assistance agreement shall consist of, among other things, the contractor's corporate income tax, excise tax, special allowance, withholding tax due from the contractor's foreign stockholders arising from dividend or interest payments to the said foreign stockholder in case of a foreign national and all such other taxes, duties and fees as provided for under existing laws.

All the items enumerated in the second paragraph of Section 81 as comprising the "Government share" refer to taxes, duties and fees. The phrase "all such other taxes, duties and fees as provided for under existing laws" makes this clear.

Section 112 places "all valid and existing mining" agreements "at the date of effectivity" of RA 7942 under the fiscal regime prescribed in Section 80. Section 112 expressly states that the "government share in mineral production sharing agreement ... shall immediately govern and apply to a mining lessee or contractor." Section 112 provides:

> Sec. 112. Non-impairment of Existing Mining/Quarrying Rights. - All valid and existing mining lease contracts, permits/licenses, leases pending renewal, mineral production- sharing agreements granted under Executive Order No. 279, at the date of effectivity of this Act, shall remain valid, shall not be impaired, and shall be recognized by the Government: Provided, That the provisions of Chapter XIV on government share in mineral production-sharing agreement and of Chapter XVI on incentives of this Act shall immediately govern and apply to a mining lessee or contractor unless the mining lessee or contractor indicates his intention to the secretary, in writing, not to avail of said provisions: Provided, further, That no renewal of mining lease contracts shall be made after the expiration of its term: Provided, finally, That such leases, production-sharing agreements, financial or technical assistance agreements shall comply with the applicable provisions of this Act and its implementing rules and regulations.

Thus, Section 112 requires "all" FTAAs and MPSAs, as of the date of effectivity of RA 7942, to pay only the excise tax - 2% on metallic and non-metallic minerals and 3% on petroleum - instead of the stipulated mining income sharing, if any, in their respective FTAAs or MPSAs.

This means that Section 112 applies even to the Occidental-Shell FTAA, which was executed before the enactment of RA 7942. This reduces the State's share in the Malampaya gas extraction from 60% of net proceeds to 3% of the market price of the gas as provided in Section 80 of RA 7942 in relation to Section 151 of the National Internal Revenue Code. This is disastrous to the national economy because Malampaya under the original Occidental-Shell FTAA generates annually some US$0.5 billion to the National Treasury.

Section 112 applies to all agreements executed "under Executive Order No. 279." The WMCP FTAA expressly states in its Section 1.1, "This Agreement is a Financial & Technical Assistance Agreement entered into pursuant to Executive Order No. 279." Thus, Section 112 applies to the WMCP FTAA.

Section 39 of RA 7942 grants the FTAA contractor the "option to convert" the FTAA into an MPSA "at any time during the term" of the FTAA if the contract areas are not economically viable for large-scale mining. Once the contractor reduces its foreign equity to not more than 40%, the Secretary "shall approve the conversion and execute the mineral production sharing agreement. Thus, Section 39 provides:

> Sec. 39. Option to Convert into a Mineral Agreement. - The contractor has the option to convert the financial or technical assistance agreement to a mineral agreement at any time during the term of the agreement, if the economic viability of the contract area is found to be inadequate to justify large-scale mining operations, after proper notice to the Secretary as provided for under the implementing rules and regulations: Provided, That the mineral agreement shall only be for the remaining period of the original agreement.
> In the case of a foreign contractor, it shall reduce its equity to forty percent (40%) in the corporation, partnership, association, or cooperative. Upon compliance with this requirement by the contractor, the Secretary shall approve the conversion and execute the mineral production-sharing agreement.

The only requirement in the second paragraph of Section 39 is that the FTAA contractor shall reduce its foreign equity to 40%. The second paragraph states, "Upon compliance with this requirement, the Secretary shall approve the conversion and execute the mineral production sharing agreement." The determination of the economic viability of the contract area for large-scale mining, which is left to the foreign contractor with "proper notice" only to the DENR Secretary, is not even made a condition for the conversion.

Under Section 3(aq) of RA 7942, the foreign contractor holds the exploration permit and conducts the physical exploration. The foreign contractor controls the release of the technical data on the mineral resources. The foreign contractor can easily justify the non-viability of the contract area for large-scale mining. The Philippine Government will have to depend on the foreign contractor for technical data on whether the contract area is viable for large-scale mining. Obviously, such a situation gives the foreign contractor actual control in determining whether the contract area is viable for large-scale mining.

The conversion from an FTAA into an MPSA is solely at the will of the foreign contractor because the contractor can choose at any time to sell 60% of its equity to a Philippine citizen. The price or consideration for the sale of the contractor's 60% equity does not go to the State but to the foreign stockholders of the contractor. Under Section 80 of RA 7942, once the FTAA is converted into an MPSA the only share of the State is the 2% excise tax on mineral products. Thus, under RA 7942 the FTAA contractor has the absolute option to pay the State only the 2% excise tax, despite any other stipulated consideration in the FTAA.

Clearly, Sections 3(aq), 39, 80, 81, 84 and 112 are tightly integrated under a single intent, plan and structure: unless the State contributes equity in addition to the mineral resources, the State shall receive only taxes, duties and fees. The State's contribution of mineral resources is not sufficient to entitle the State to receive any income from the mining operations separate from taxes, duties and fees.

The Meaning of the Phrase "Among Other Things"

As far as the State and the Filipino people are concerned, the most important part of an FTAA is the consideration: how much

will the State receive from the exploitation of its non-renewable and exhaustible mineral resources?

Section 81 of RA 7942 does not require the foreign FTAA contractor to pay the State any share from the mining income apart from taxes, duties and fees. The second paragraph of Section 81, just like Section 80, only allows the State to collect taxes, duties and fees as the State's share from the mining operations. The intent of RA 7942 is that the State cannot share in the income from mining operations, separate from taxes, duties and fees, based only on the mineral resources that the State contributes to the mining operations.

This is also the position of the Solicitor General - that the State's share under Section 81 refers only to direct and indirect taxes. Thus, the Solicitor General agrees that Section 81 does not allow the State to collect any share from the mining income separate from taxes, duties and fees. The majority opinion agrees that Section 81 is unconstitutional if it does not require the foreign FTAA contractor to pay the State any share of the net mining income apart from taxes, duties and fees.

However, the majority opinion says that the phrase "among other things" in Section 81 is the authority to require the FTAA contractor to pay a consideration separate from taxes, duties and fees. The majority opinion cites the phrase "among other things" as the source of power of the DENR Secretary to adopt DAO 56-99 prescribing the formulae on the State's share from mining operations separate from taxes, duties and fees.

In short, the majority opinion says that the phrase "among other things" is a delegation of legislative power to the DENR Secretary to adopt the formulae on the share of the State from mining operations. The issue now is whether the phrase "among other things" in the second paragraph of Section 81 is intended as a delegation of legislative power to the DENR Secretary. If so, the issue turns on whether it is a valid delegation of legislative power. I reproduce again the second paragraph of Section 81 for easy reference:

> The Government share in financial or technical assistance agreement shall consist of, among other things, the contractor's corporate income tax, excise tax, special allowance, withholding tax due from the contractor's foreign stockholders arising from dividend or interest payments to

> the said foreign stockholder in case of a foreign national and all such other taxes, duties and fees as provided for under existing laws.

Section 81 of RA 7942 does not delegate any legislative power to the DENR Secretary to adopt the formulae in determining the share of the State. There is absolutely no language in the second paragraph of Section 81 granting the DENR Secretary any delegated legislative power. Thus, the DENR Secretary acted without authority or jurisdiction in issuing DAO 56-99 based on a supposed delegated power in the second paragraph of Section 81. This makes DAO 56-99 void.

Even assuming, for the sake of argument, that there is language in Section 81 delegating legislative power to the DENR Secretary to adopt the formulae in DAO 56-99, such delegation is void. Section 81 has no standards by which the delegated power shall be exercised. There is no specification on the minimum or maximum share that the State must receive from mining operations under FTAAs. No parameters on the extent of the delegated power to the DENR Secretary are found in Section 81. Neither were such parameters ever discussed even remotely by Congress when it enacted RA 7942.

In sharp contrast, the first paragraph of the same Section 81, in prescribing the State's share in co-production and joint venture agreements, expressly specifies the standards in determining the State's share as follows: "(a) capital investment of the project, (b) risks involved, (c) contribution of the project to the economy, and (d) other factors that will provide for a fair and equitable sharing between the Government and the contractor." The reason for the absence of similar standards in the succeeding paragraph of Section 81 in determining the State's share in FTAAs is obvious - the State's share in FTAAs is limited solely to taxes, duties and fees. Thus, such standards are inapplicable and irrelevant.

The majority opinion now makes the formulae in DAO 56-99 the heart and soul of RA 7942 because the formulae supposedly determine the consideration of the FTAA. The consideration is the most important part of the FTAA as far as the State and Filipino people are concerned. The formulae in DAO 56-99 derive life solely from the phrase "among other things." DAO 56-99 itself states that it is issued "[P]ursuant to Section 81 and other pertinent provisions of Republic Act No. 7942."

Without the phrase "among other things," the majority opinion could not point to any other provision in RA 7942 to support the existence of the formulae in DAO 56-99.

Thus, the phrase "among other things" determines whether the FTAA has the third element of a valid contract - the commercial value or consideration that the State will receive. The majority opinion in effect says that Congress made the wealth and even the future prosperity of the nation to depend on the phrase "among other things."

The DENR Secretary can change the formulae in DAO 56-99 any time even without the approval of the President or Congress. The DENR Secretary is the sole authority to determine the amount of consideration that the State shall receive in an FTAA. Section 5 of DAO 56-99 states:

> ... any amendment of an FTAA other than the provision on fiscal regime shall require the negotiation with the Negotiation Panel and the recommendation of the Secretary for approval of the President of the Republic of the Philippines.

Under Section 5, if the amendment in the FTAA involves non-fiscal matters, the amendment requires the approval of the President. However, if the amendment involves a change in the fiscal regime - referring to the consideration of the FTAA - the DENR Secretary has the final authority and approval of the President is not required. This makes the DENR Secretary more powerful than the President.

Section 5 of DAO 56-99 violates paragraphs 4 and 5 of Section 2, Article XII of the 1987 Constitution mandating that the President shall approve all FTAAs and send copies of all approved FTAAs to Congress. The consideration of the FTAA is the most important part of the FTAA as far as the State and the Filipino people are concerned. The DENR Secretary, in issuing DAO 56-99, has arrogated to himself the power to approve FTAAs, a power vested by the Constitution solely in the President. By not even informing the President of changes in the fiscal regime and thus preventing such changes from reaching Congress, DAO 56-99 even seeks to hide changes in the fiscal regime from Congress. By its provisions alone, DAO 56-99 is clearly unconstitutional and void.

Section 5 of DAO 56-99 also states that "[A]ll FTAAs approved prior to the effectivity of this Administrative Order shall remain valid and be recognized by the Government." This means that the fiscal regime of an FTAA executed prior to the effectivity of DAO 56-99 "shall remain valid and be recognized." If the earlier FTAA provides for a fiscal regime different from DAO 56-99, then the fiscal regime in the earlier FTAA shall prevail. In effect, DAO 56-99 exempts an FTAA approved prior to its effectivity from paying the State the share prescribed in the formulae under DAO 56-99 if the earlier FTAA provides for a different fiscal regime. Such is the case of the WMCP FTAA.

Based on the majority opinion's position that the 1987 Constitution requires payment in addition to taxes, duties and fees, this makes DAO 56-99 unconstitutional and void. DAO 56-99 does not require prior FTAAs to pay the State the share prescribed in the formulae under DAO 56-99 even if the consideration in the prior FTAAs is limited only to taxes, duties and fees. DAO 56-99 recognizes such payment of taxes, duties and fees as a "valid" consideration. Certainly, the DENR Secretary has no authority to exempt foreign FTAA contractors from a constitutional requirement. Not even Congress or the President can do so.

Ironically, DAO 56-99, the very authority the majority opinion cites to support its claim that the WMCP FTAA has a consideration, does not apply to the WMCP FTAA. By its own express terms, DAO 56-99 does not apply to FTAAs executed before the issuance of DAO 56-99, like the WMCP FTAA. The majority opinion's position has no leg to stand on since even DAO 56-99, assuming it is valid, cannot save the WMCP FTAA from want of consideration.

The formulae prescribed in DAO 56-99 are totally alien to the phrase "among other things." There is no relationship whatsoever between the phrase "among other things" and the highly esoteric formulae prescribed in DAO 56-99. No one in this Court can assure the Filipino people that the formulae in DAO 56-99 will guarantee the State 60%, or 30% or even 10% of the net proceeds from the mining operations. And yet the majority opinion trumpets DAO 56-99 as the savior of Section 81 from certain constitutional infirmity.

The majority opinion gives the stamp of approval and legitimacy on DAO 56-99. This assumes that the majority

understand fully the formulae in DAO 56-99. Can the majority tell the Court and the Filipino people the minimum share that the State will receive under the formulae in DAO 56-99? The formulae in DAO 56-99 are fuzzy since they do not guarantee the minimum share of the State, unlike the clear and specific income sharing provisions in the Occidental-Shell FTAA or in the case of *Consolidated Mines, Inc. v. Court of Tax Appeals*.[12]

The Solicitor General asserts that the phrase "among other things" refers to indirect taxes, an interpretation that contradicts the DENR Secretary's interpretation under DAO 56-99. The Solicitor General is correct. The *ejusdem generis* rule of statutory interpretation applies squarely to the phrase "among other things."

In *Philippine Bank of Communications v. Court of Appeals*,[13] the Court held:

> Under the rule of *ejusdem generis*, where a description of things of a particular class or kind is 'accompanied by words of a generic character, the generic words will usually be limited to things of a kindred nature with those particularly enumerated ...'

In *Grapilon v. Municipal Council of Cigara*,[14] the Court construed the general word "absence" in the phrase "absence, suspension or other temporary disability of the mayor" in Section 2195 of the Revised Administrative Code as "on the same level as 'suspension' and 'other forms of temporary disability'." The Court quoted with approval the following Opinion of the Secretary of Interior:

> The phrase 'other temporary disability' found in section 2195 of the Code, follows the words 'absence' and 'suspension' and is used as a modifier of the two preceding words, under the principle of statutory construction known as *ejusdem generis*.

In *City of Manila v. Entote*,[15] the Court ruled that broad expressions such as "and all others" or "any others" or "other matters," when accompanied by an enumeration of items of the same kind or class, "are usually to be restricted to persons or

[12] G.R. Nos. L-18843 & 18844, 29 August 1974, 157 Phil. 608 (1974).
[13] 323 Phil. 297 (1996).
[14] 112 Phil. 24 (1961).
[15] 156 Phil. 498 (1974).

things of the same kind or class with those specifically named" in the enumeration. Thus, the Court held:

> In our jurisdiction, this Court in *Ollada vs. Court of Tax Appeals, et al.* applied the rule of "*ejusdem generis*" to construe the purview of a general phrase "other matters" appearing after an enumeration of specific cases decided by the Collector of Internal Revenue and appealable to the Court of Tax Appeals found in section 7, paragraph 1, of Republic Act No. 1125, and it held that in order that a matter may come under said general clause, it is necessary that it belongs to the same kind or class of cases therein specifically enumerated.

The four requisites of the *ejusdem generis* rule[16] are present in the phrase "among other things" as appearing in Section 81 of RA 7942. First, the general phrase "among other things" is accompanied by an enumeration of specific items, namely, "the contractor's corporate income tax, excise tax, special allowance, withholding tax due from the contractor's foreign stockholders arising from dividend or interest payments to the said foreign stockholder in case of a foreign national and all such other taxes, duties and fees as provided for under existing laws." Second, all the items enumerated are of the same kind or class - they are all taxes, duties and fees. Third, the enumeration of the specific items is not exhaustive because "all such other taxes, duties and fees" are included. Thus, the enumeration of specific items is merely illustrative. Fourth, there is no indication of legislative intent to give the general phrase "among other things" a broader meaning. On the contrary, the legislative intent of RA 7942 is to limit the State's share from mining operations to taxes, duties and fees.

In short, the phrase "among other things" refers to taxes, duties and fees. The phrase "among other things" is even followed at the end of the sentence by the phrase "and all such other taxes, duties, and fees," reinforcing even more the restriction of the phrase "among other things" to taxes, duties and fees. The function of the phrase "and such other taxes, duties and fees" is to clarify that the taxes enumerated are not exhaustive but merely illustrative.

[16] Ruben E. Agpalo, Statutory Construction 217 (1998 Ed.), citing Commissioner of Customs v. Court of Appeals, G.R. No. 33471, 31 January 1972, 43 SCRA 192; Asturias Sugar Central, Inc. v. Commissioner of Customs, G.R. No. 19337, 30 September 1969, 29 SCRA 617; People v. Kottinger, 45 Phil. 352 (1923).

Formulae in DAO 56-99 a Mere Creation of DENR

The majority opinion praises the DENR for "conceiving and developing" the formulae in DAO 56-99. Thus, the majority opinion states:

> As can be seen from DAO 56-99, the agencies concerned did an admirable job of conceiving and developing not just one formula, but three different formulas for arriving at the additional government share.

Indeed, we credit the DENR for conceiving and developing on their own the formulae in DAO 56-99. The formulae are the creation of DENR, not of Congress.

The DENR conceived and developed the formulae to save Section 81 not only from constitutional infirmity, but also from blatantly depriving the State and Filipino people from any share in the income of mining companies. However, the DENR's admittedly "admirable job" cannot amend Section 81 of RA 7942. The DENR has no legislative power to correct constitutional infirmities in RA 7942. The DENR does not also possess the constitutional power to prescribe the sharing of mining income between the State and mining companies, the act the DENR attempts to do in adopting DAO 56-99.

DAO 56-99 is an Exercise in Futility

Even assuming arguendo the majority opinion is correct that the phrase "among other things" constitutes sufficient legal basis to issue DAO 56-99, the FTAA contractor can still prevent the State from collecting any share of the mining income. By invoking Section 39 of RA 7942 giving the foreign FTAA contractor the option to convert the FTAA into an MPSA, the FTAA contractor can easily place itself outside the scope of DAO 56-99 which expressly applies only to FTAAs.

Also, by invoking Section 112, the foreign contractor need not even convert its FTAA into a mineral production agreement to place its contract under Section 80 and outside of Section 81. Section 112 automatically and immediately places all FTAAs under the fiscal regime applicable to MPSAs, forcing the State to collect only the 2% excise tax. Thus, DAO 56-99 is an exercise in futility. This now compels the Court to resolve the constitutionality of Sections 39 and 112 of RA 7942 in the

present case.

Congress Prescribes the Terms and Conditions of FTAAs.

In a last-ditch attempt to justify the constitutionality of DAO 56-99, the majority opinion now claims that the President has the prerogative to prescribe the terms and conditions of FTAAs, including the fiscal regime of FTAAs. The majority opinion states:

> ... It is the President who is constitutionally mandated to enter into FTAAs with foreign corporations, and in doing so, it is within the President's prerogative to specify certain terms and conditions of the FTAAs, for example, the fiscal regime of FTAAs - i.e., the sharing of the net revenues between the contractor and the State.

The majority opinion is re-writing the 1987 Constitution and even RA 7942…

Clearly, the 1987 Constitution (in paragraph 4, Section 2, Article XII) … mandates that the President may enter into FTAAs only "according to the general terms and conditions provided by law." There is no doubt whatsoever that it is Congress that prescribes the terms and conditions of FTAAs, not the President as the majority opinion claims. The 1987 Constitution mandates the President to comply with the terms and conditions prescribed by Congress for FTAAs.

Indeed, RA 7942 stipulates the terms and conditions for FTAAs. Section 35 of RA 7942 provides that the "following terms, conditions, and warranties shall be incorporated in the financial or technical assistance agreement to wit: ..." Section 38 of RA 7942 expressly limits an FTAA to a "term not exceeding twenty-five (25) years," which is one of the issues in the present case.

The majority opinion claims that the President has the power to prescribe "the fiscal regime of FTAAs - i.e., the sharing of the net mining revenues between the contractor and the State." This claim of the majority opinion renders the entire Chapter XIV of RA 7942 an act of usurpation by Congress of Presidential power. Chapter XIV - entitled "Government Share" - prescribes the fiscal regimes of MPSAs and FTAAs. The constitutionality of Sections 80 and 81 of Chapter XIV - whether the fiscal

regimes prescribed in these sections of RA 7942 comply with the 1987 Constitution - is the threshold issue in this case.

The majority opinion seeks to uphold the constitutionality of Section 81 of RA 7942, an act of Congress prescribing the fiscal regime of FTAAs. If it is the President who has the constitutional authority to prescribe the fiscal regime of FTAAs, then Section 81 is unconstitutional for being a usurpation by Congress of a Presidential power. The majority opinion not only re-writes the 1987 Constitution, it also contradicts itself.

That is not all. By claiming that the President has the prerogative to prescribe the fiscal regime of FTAAs, the majority opinion contradicts its basic theory that DAO 56-99 draws life from the phrase "among other things" in Section 81 of RA 7942. Apparently, the majority opinion is no longer confident of its position that DAO 56-99 draws life from the phrase "among other things." The majority opinion now invokes a non-existent Presidential power that directly collides with the express constitutional power of Congress to prescribe the "general terms and conditions" of FTAAs.

Sections 80 and 84 of RA 7942 are Void on their Face

Definitely, Section 80 of RA 7942 is constitutionally infirm even based on the reasoning of the majority opinion. The majority opinion agrees that the 1987 Constitution requires the mining contractor to pay the State "more than just the usual taxes, duties and fees." Under Section 80, the excise tax - 2% for metallic and non-metallic minerals and 3% for petroleum - is the only and total share of the State from mining operations. Section 80 provides:

> Sec. 80. Government Share in Mineral Production Sharing Agreement. - The total government share in a mineral production sharing agreement shall be the excise tax on mineral products as provided in Republic Act No. 7729, amending Section 151(a) of the National Internal Revenue Code, as amended.

Section 80 has no ifs or buts. Section 84 even reiterates Section 80 that "with respect to a mineral production sharing agreement, the excise tax on mineral products shall be the government share under said agreement." There is no *ejusdem generis* phrase like "among other things" in Section 80 that

the majority opinion can cling on to save it from constitutional infirmity. DAO 56-99, the magic wand of the majority opinion, expressly applies only to FTAAs and not to MPSAs. By any legal yardstick, even by the arguments of the majority opinion, Sections 80 and 84 are void and unconstitutional.

Necessity of Resolving Constitutionality of Sections 39, 80 and 84

The majority opinion states that the constitutionality of Sections 80 and 84 of RA 7942 is not in issue in the present case. The majority opinion forgets that petitioners have assailed the constitutionality of RA 7942 and the WMCP FTAA for violation of Section 2, Article XII of the 1987 Constitution. Petitioner specifically assails the "inequitable sharing of wealth" in the WMCP FTAA, which petitioners assert is "contrary to Section 1, paragraph 1, and Section 2, paragraph 4, Article XII of the Constitution."

Section 9.1 of the WMCP FTAA grants WMCP the absolute option, by mere notice to the DENR Secretary, to convert the FTAA into an MPSA under Section 80. The "sharing of wealth" in Section 80 is "inequitable" and "contrary to ... Section 2, paragraph 4, Article XII of the Constitution" because the State will only collect the 2% excise tax in an MPSA. Such a pittance of a sharing will not make any "real contributions to the economic growth and general welfare of the country" as required in paragraph 4, Section 2, Article XII of the 1987 Constitution.

Section 39 of RA 7942 also grants foreign FTAA contractors the option, by mere notice to the DENR Secretary, to convert their FTAAs into MPSAs under Section 80. Necessarily, the constitutionality of the WMCP FTAA must be resolved in conjunction with Section 80 of RA 7942.

The WMCP FTAA is like a coin with two sides, one side is an FTAA, and the other an MPSA. By mere notice to the DENR Secretary, WMCP can convert the contract from an FTAA to an MPSA, a copy of which, complete with all terms and conditions, is annexed to the WMCP FTAA. The DENR Secretary has no option but to sign the annexed MPSA. There are only two conditions to WMCP's exercise of this option: the reduction of foreign equity in WMCP to 40%, and notice to the DENR Secretary. The first condition is already fulfilled since all the equity of WMCP is now owned by a corporation 60% Filipino owned. The notice to the

DENR Secretary is solely at the will of WMCP.

What this Court is staring at right now is a dual contract - an FTAA which, by mere notice to the DENR Secretary, immediately becomes an MPSA. The majority opinion agrees that the provisions of the WMCP FTAA, which grant a sham consideration to the State, are void. Since the majority opinion agrees that the WMCP FTAA has a sham consideration, the WMCP FTAA thus lacks the third element of a valid contract. The majority opinion should declare the WMCP FTAA void for want of consideration unless the majority opinion treats the contract as an MPSA under Section 80. Indeed, the only recourse of WMCP to save the validity of its contract is to convert it into an MPSA.

Thus, with the absence of consideration in the WMCP FTAA, what is actually before this Court is an MPSA. This squarely puts in issue whether an MPSA is constitutional if the only consideration or payment to the State is the 2% excise tax as provided in Section 80 of RA 7942.

The basic constitutional infirmity of the WMCP FTAA is the absence of a fair consideration to the State as owner of the mineral resources. Petitioners call this the "inequitable sharing of wealth." The constitutionality of the consideration for the WMCP FTAA cannot be resolved without determining the validity of both Sections 80 and 81 of RA 7942 because the consideration for the WMCP FTAA is anchored on both Sections 80 and 81.

The majority opinion refuses to face the issue of whether the WMCP contract can validly rely on Section 80 for its consideration. If this issue is not resolved now, then the WMCP FTAA has no consideration. The majority opinion admits that the consideration in the WMCP FTAA granting the State 60% share in the mining revenues is a sham and thus void *ab initio*.

Strangely, the majority opinion claims that the share of the State in the mining revenues is not the principal consideration of the FTAA. The majority opinion claims that the principal consideration of the FTAA is the "development" of the minerals by the foreign contractor. The foreign contractor can bring equipment to the mine site, tunnel the mines, and construct underground rails to bring the minerals to the surface - in short develop the mines. What will the State and the Filipino people benefit from such activities unless they receive a share

of the mining proceeds? After the minerals are exhausted, those equipment, tunnels and rails would be dilapidated and even obsolete. Besides, those equipment belong to the foreign contractor even after the expiration of the FTAA.

Plainly, even a businessman with limited experience will not agree that the principal consideration in an FTAA, as far as the State and Filipino people are concerned, is the development of the mines. It is obvious why the majority opinion will not accept that the principal consideration is the share of the State in the mining proceeds. Otherwise, the majority opinion will have to admit that the WMCP FTAA lacks the third element of a valid contract - the consideration. This will compel the majority opinion to admit that the WMCP FTAA is void ab initio.

The only way for the majority opinion to save the WMCP FTAA from nullity is to treat it as an MPSA and thus apply Section 80 of RA 7942. This puts in issue the constitutionality of Section 80. The majority opinion, however, refuses to treat the WMCP FTAA as an MPSA. Thus, the WMCP FTAA still lacks a valid consideration. However, the majority opinion insists that the WMCP FTAA is valid.

If the majority opinion puts the constitutionality of Section 80 in issue, the majority opinion will have to declare Section 80 unconstitutional. The majority opinion agrees that the 1987 Constitution requires the State to collect "more than the usual taxes, duties and fees." Section 80 indisputably limits the State to collect only the excise tax and nothing more.

The equivocal stance of the majority opinion will not put an end to this litigation. Once WMCP converts its FTAA into an MPSA to avoid paying "more than the usual taxes, duties and fees," petitioners will immediately question the validity of WMCP's MPSA as well as the constitutionality of Section 80. The case will end up again in this Court on the same issue of whether there is a valid consideration for such MPSA, which necessarily involves a determination of the constitutionality of Section 80. Clearly, this Court has no recourse but to decide now the constitutionality of Section 80.

As the Solicitor General reported in his Compliance dated 20 October 2004, the DENR has signed five MPSAs with different parties. These five MPSAs uniformly contain the following provision:

> Share of the Government - The Government Share shall be the excise tax on mineral products at the time of removal and at the rate provided for in Republic Act No. 7729 amending Section 151(a) of the National Internal Revenue Code, as amended, as well as other taxes, duties, and fees levied by existing laws.

If the constitutionality of Section 80 is not resolved now, these five MPSAs, including the WMCP FTAA once converted into an MPSA, will remain in limbo. There will be no implementation of these MPSAs until the Court finally resolves this constitutional issue.

Even if evaded now, the constitutionality of Section 80 will certainly resurface, resulting in a repeat of this litigation, most probably even between the same parties. To avoid unnecessary delay, this Court must rule now on the constitutionality of Section 80 of RA 7942.

The Constitutional Term Limit Applies to FTAAs

Section 3.3 of the WMCP FTAA provides a fixed contract term of 50 years at the option of WMCP. Thus, Section 3.3 provides:

> This Agreement shall be renewed by the Government for a further period of twenty-five (25) years under the same terms and conditions provided that the Contractor lodges a request for a renewal with the Government not less than sixty (60) days prior to the expiry of the initial term of this Agreement and provided that the Contractor is not in breach of any of the requirements of this Agreement.

This provision grants WMCP the absolute right to extend the first 25-year term of the FTAA to another 25-year term upon mere lodging of a request or notice to the Philippine Government. WMCP has the absolute right to extend the term of the FTAA to 50 years and all that the Government can do is to acquiesce to the wish of WMCP.

Section 3.3 of the WMCP FTAA is void because it violates (the first paragraph of) Section 2, Article XII of the 1987 Constitution…

The majority opinion, however, makes the startling assertion

that FTAAs are not covered by the term limit under Section 2, Article XII of the 1987 Constitution. The majority opinion states:

> I believe that the constitutional term limits do not apply to FTAAs. The reason is that the above provision is found within paragraph 1 of Section 2 of Article XII, which refers to mineral agreements - co-production agreements, joint venture agreements and mineral production sharing agreements - which the government may enter into with Filipino citizens and corporations, at least 60 percent owned by Filipino citizens.

If the term limit does not apply to FTAAs because the term limit is found in the first paragraph of Section 2, then the other limitations in the same first paragraph of Section 2 do not also apply to FTAAs. These limitations are three: first, that the State owns the natural resources; second, except for agricultural lands, natural resources shall not be alienated; third, the State shall exercise full control and supervision in the exploitation of natural resources. Under the majority opinion's interpretation, these three limitations will no longer apply to FTAAs, leading to patently absurd results. The majority opinion will also contradict its own admission that even in FTAAs the State must exercise full control and supervision in the exploitation of natural resources.

Section 2, Article XII of the 1987 Constitution is a consolidation of Sections 8 and 9, Article XIV of the 1973 Constitution, which state:

> Sec. 8. All lands of public domain, waters, minerals, coal, petroleum and other mineral oils, all forces of potential energy, fisheries, wildlife, and other natural resources of the Philippines belong to the State. With the exception of agricultural, industrial or commercial, residential, or resettlement lands of the public domain, natural resources shall not be alienated, and no license, concession, or lease for the exploration, or utilization of any of the natural resources shall be granted for a period exceeding twenty-five years, except as to water rights for irrigation, water supply, fisheries, or industrial uses other than development of water power, in which cases, beneficial use may be the measure and the limit of the grant.

> Sec. 9. The disposition, exploration, development, exploitation, or utilization of any of the natural resources of the Philippines shall be limited to citizens of the Philippines, or to corporations or associations at least sixty per centum of the capital which is owned by such citizens. The Batasang Pambansa, in the national interest, may allow such citizens, corporations or associations to enter into service contracts for financial, technical, management, or other forms of assistance with any foreign person or entity for the exploration, or utilization of any of the natural resources. Existing valid and binding service contracts for financial, technical, management, or other forms of assistance are hereby recognized as such.

Section 9, Article XIV of the 1973 Constitution, a one-paragraph section, contained the provision reserving the exploration, development and utilization of natural resources to Philippine citizens or corporations 60% Filipino owned as well as the provision on FTAAs. The provision on the 25-year term limit was found in the preceding Section 8 of Article XIV. If the 25-year term limit under the 1973 Constitution did not apply to FTAAs, then it should not also have applied to non-FTAA mining contracts, an interpretation that is obviously wrong. Thus, the term limit in Section 8, Article XIV of the 1973 Constitution necessarily applied to both non-FTAA mining contracts and FTAAs in Section 9.

What the framers of the 1987 Constitution did was to consolidate Sections 8 and 9, Article XIV of the 1973 Constitution into one section, the present Section 2, Article XII of the 1987 Constitution. The consolidation necessitated re-arranging the sentences and paragraphs without any intention of destroying their unity and coherence. Certainly, the consolidation did not mean that the FTAAs are no longer subject to the 25-year term limit. If anything, the consolidation merely strengthened the need, following the rules of statutory construction, to read and interpret together all the paragraphs, and even the sentences, of Section 2, Article XII of the 1987 Constitution.

In his book The 1987 Constitution of the Republic of the Philippines: A Commentary, Father Joaquin G. Bernas, S.J., who was a leading member of the 1986 Constitutional Commission, discussed the limitations on the exploitation of natural resources. Father Bernas states:

> 4. Other limitations
> Agreements for the exploitation of the natural resources can have a life of only twenty-five years. This twenty-five year limit dates back to the 1935 Constitution and is considered to be a "reasonable time to attract capital, local and foreign, and to enable them to recover their investment and make a profit. The twenty-five year limit on the exploitation of natural resources is not applicable to "water rights for irrigation, water supply, fisheries, or industrial uses other than the development of water power." In these cases, "beneficial use may be the measure and the limit of the grant." But in the case of water rights for water power, the twenty-five year limit is applicable."[17]

The 1935, 1973 and 1987 Constitutions all limit the exploitation of natural resources to 25-year terms. They also limit franchises for public utilities, leases of alienable lands of public domain, and water rights for power development to 25-year terms. If a different term is intended, the Constitution expressly says so as in water rights for uses other than power development. Under the 1973 and 1987 Constitutions, there is no separate term for FTAAs other than the 25-year term for the exploitation of natural resources.

The WMCP FTAA draws life from Executive Order No. 279 issued on 25 July 1987 by then President Corazon C. Aquino when she still exercised legislative powers. Section 1.1 of the WMCP FTAA expressly states, "This Agreement is a Financial & Technical Assistance Agreement entered into pursuant to Executive Order No. 279." Section 7 of Executive Order No. 279 provides:

> Sec. 7. All provisions of Presidential Decree No. 463, as amended, other existing mining laws, and their implementing rules and regulations, or parts thereof, which are not inconsistent with the provisions of this Executive Order, shall continue in force and effect.

Section 40 of Presidential Decree No. 463 (PD 463), as amended by Presidential Decree No. 1385, provides:

> Sec. 40. Issuance of Mining Lease Contracts - ... After the

[17] p. 1140 (2003).

> mining claim has been verified as to its mineral contents and its actual location on the ground as determined through reports submitted to the Director, the Secretary shall approve and issue the corresponding mining lease contract, which shall be for a period not exceeding twenty-five (25) years, renewable upon the expiration thereof for another period not exceeding twenty-five (25) years under such terms and conditions as provided by law.

Thus, at the time of execution of the WMCP FTAA, statutory law limited the term of all mining contracts to 25-year terms. PD 463 merely implemented the mandate of the 1973 Constitution on the 25-year term limit, which is the same 25-year term limit in the 1987 Constitution. Under Section 7 of Executive Order No. 279, Section 40 of PD 463 limiting mining contracts to a 25-year term applies to the WMCP FTAA. Therefore, Section 3.3 of the WMCP FTAA providing for a 50-year term is void.

Then President Aquino also issued Executive Order No. 211 on 10 July 1987, a bare 17 days before issuing Executive Order No. 279. Section 3 of Executive Order No. 211 states:

> Sec. 3. The processing, evaluation and approval of all mining applications, declarations of locations, operating agreements and service contracts as provided for in Section 2 above, shall be governed by Presidential Decree No. 463, as amended, other existing mining laws, and their implementing rules and regulations: Provided, However, that the privileges granted as well as the terms and conditions thereof shall be subject to any and all modifications or alterations which Congress may adopt pursuant to Section 2, Article XII of the 1987 Constitution.

Section 3 of Executive Order No. 211 applies to the WMCP FTAA which was executed on 22 March 1995, more than seven years after the issuance of Executive Order No. 211. Subsequently, Congress enacted RA 7942 to prescribe new terms and conditions for all mineral agreements. RA 7942 took effect on 9 April 1995.

RA 7942 governs the WMCP FTAA because Executive Order No. 211 expressly makes mining agreements like the WMCP FTAA subject to "any and all modifications or alterations which Congress may adopt pursuant to Section 2, Article XII of the 1987 Constitution." Section 38 of RA 7942 provides for a 25-

year term limit specifically for FTAAs, thus:

> Sec. 38. Term of Financial or Technical Assistance Agreement. - A financial or technical assistance agreement shall have a term not exceeding twenty-five (25) years to start from the execution thereof, renewable for not more than twenty-five (25) years under such terms and conditions as may be provided by law.

Thus, the 25-year term limit specifically for FTAAs in Section 38 of RA 7942 applies to the WMCP FTAA. Again, Section 3.3 of the WMCP FTAA providing for a 50-year term is void.

What is clear from the foregoing is that the 25-year statutory term limit on mining contracts is merely an implementation of the 25-year constitutional term limit, whether under the 1935, 1973 or 1987 Constitutions. The majority opinion's assertion that the 25-year term in the first paragraph of Section 2, Article XII of the 1987 Constitutions does not apply to FTAAs is obviously wrong.

Section 112 of RA 7942 Applies to the WMCP FTAA

The majority opinion insists that Section 112 of RA 7942 does not apply to the WMCP FTAA. Section 112 provides:

> Sec. 112. Non-impairment of Existing Mining/Quarrying Rights. - All valid and existing mining lease contracts, permits/licenses, leases pending renewal, mineral production- sharing agreements granted under Executive Order No. 279, at the date of effectivity of this Act, shall remain valid, shall not be impaired, and shall be recognized by the Government: Provided, That the provisions of Chapter XIV on government share in mineral production-sharing agreement and of Chapter XVI on incentives of this Act shall immediately govern and apply to a mining lessee or contractor unless the mining lessee or contractor indicates his intention to the secretary, in writing, not to avail of said provisions: Provided, further, That no renewal of mining lease contracts shall be made after the expiration of its term: Provided, finally, That such leases, production-sharing agreements, financial or technical assistance agreements shall comply with the applicable provisions of this Act and its implementing rules and regulations.

Section 112 "immediately" applies the fiscal regime under Section 80 on "mineral production sharing agreement" to "all valid and existing mining" contracts, including those "granted under Executive Order No. 279." If Section 112 applies to the WMCP FTAA, then the WMCP FTAA is subject only to the 2% excise tax under Section 80 as the "total share" of the Philippine Government.

The majority opinion states, "Whether Section 112 may properly apply to co-production or joint venture agreements, the fact of the matter is that it cannot be made to apply to FTAAs." This position of the majority opinion is understandable. If Section 112 applies to FTAAs, the majority opinion would have to rule on the constitutionality of Section 80 of RA 7942. The majority opinion already agrees that the 1987 Constitution requires the FTAA contractor to pay the State "more than the usual taxes, duties and fees." If Section 112 applies to FTAAs, the majority opinion would have no choice but declare unconstitutional Section 80.

Thus, the majority opinion insists that Section 112 "cannot be made to apply to FTAAs." This insistence of the majority opinion collides with the very clear and plain language of Section 112 of RA 7942 and Section 1.1 of the WMCP FTAA. This insistence of the majority opinion will lead to absurd results.

First, Section 112 of RA 7942 speaks of "all valid and existing mining" contracts. The phrase "all valid and existing mining" contracts means the entire or total mining contracts in existence "at the date of effectivity" of RA 7942 without exception. The word "all" negates any exception. This certainly includes the WMCP FTAA, unless the majority opinion concedes that the WMCP FTAA is not a mining contract, or if it is, that it is not a valid contract.

Second, the last proviso of Section 112 itself expressly states that "financial or technical assistance agreements shall comply with the applicable provisions of this Act and its implementing rules and regulations." There is no shadow of doubt whatsoever that Section 112, by its own plain, clear and indisputable language, commands that FTAAs shall comply with RA 7942. I truly cannot fathom how the majority opinion can assert that Section 112 cannot apply to FTAAs.

Third, Section 112 expressly refers to Chapters XIV and XVI

of RA 7942. Chapter XIV refers to the "Government Share" and covers Sections 80, 81 and 82 of RA 7942. Section 81, as the majority opinion concedes, applies to FTAAs. Chapter XVI refers to "Incentives" and covers Section 90 to 94 of RA 7942. Section 90 states that the "contractors in mineral agreements, and financial technical and assistance agreements shall be entitled to the fiscal and non-fiscal incentives as provided under Executive Order No. 226 ..." Clearly, Section 112 applies to FTAAs.

Fourth, Section 1.1 of the WMCP FTAA expressly states, "This Agreement is a Financial & Technical Assistance Agreement entered into pursuant to Executive Order No. 279." Section 112 states in unequivocal language that "all valid and existing" agreements "granted under Executive Order No. 279" are immediately placed under the fiscal regime of MPSAs. In short, mining agreements granted under Executive Order No. 279 are expressly among the agreements included in Section 112 and placed under the fiscal regime prescribed in Section 80. There is no doubt whatsoever that Section 112 applies to the WMCP FTAA which was "entered into pursuant to Executive Order No. 279."

Fifth, Section 3 of Executive Order No. 211 expressly subjects all mining contracts executed by the Executive Department to the terms and conditions of new mining laws that Congress might enact in the future. Thus, Section 3 of Executive Order No. 211 states:

> Sec. 3. The processing, evaluation and approval of all mining applications, declarations of locations, operating agreements and service contracts as provided for in Section 2 above, shall be governed by Presidential Decree No. 463, as amended, other existing mining laws, and their implementing rules and regulations: Provided, However, that the privileges granted as well as the terms and conditions thereof shall be subject to any and all modifications or alterations which Congress may adopt pursuant to Section 2, Article XII of the 1987 Constitution.

There is no dispute that Executive Order No. 211, issued prior to the execution of the WMCP FTAA, applies to the WMCP FTAA. There is also no dispute that RA 7942 took effect after the issuance of Executive Order No. 211 and after the execution of the WMCP FTAA. Therefore, Section 112 of RA 7942 applies

specifically to the WMCP FTAA.

Indeed, it is plain to see why Section 112 of RA 7942 applies to FTAAs, like the WMCP FTAA, that were executed prior to the enactment of RA 7942. Section 112 is found in Chapter XX of RA 7942 on "Transitory and Miscellaneous Provisions." The title of Section 112 refers to the "[N]on-impairment of Existing Mining Quarrying Rights." RA 7942 is the general law governing all kinds of mineral agreements, including FTAAs. In fact, Chapter VI of RA 7942, covering nine sections, deals exclusively on FTAAs. The fiscal regime in FTAAs executed prior to the enactment of RA 7942 may differ from the fiscal regime prescribed in RA 7942. Hence, Section 112 provides the transitory provisions to resolve differences in the fiscal regimes, ostensibly to avoid impairment of contract obligations. Clearly, Section 112 applies to FTAAs.

There are no ifs or buts in Section 112. The plain, simple and clear language of Section 112 makes FTAAs, like the WMCP FTAA, subject to Section 112…

With such clear and unequivocal language, how can the majority opinion blithely state that Section 112 "cannot be made to apply to FTAAs"? It defies common sense, simple logic and plain English to assert that Section 112 does not apply to FTAAs. It defies the fundamental rule of statutory construction as repeated again and again in jurisprudence:

> Time and time again, it has been repeatedly declared by this Court that where the law speaks in clear and categorical language, there is no room for interpretation. There is only room for application.[18] For nothing is better settled than that the first and fundamental duty of courts is to apply the law as they find it, not as they like it to be. Fidelity to such a task precludes construction or interpretation, unless application is impossible or inadequate without it.[19]
> Where the law is clear and unambiguous, it must be taken to mean exactly what it says and the court has no choice but to see to it that its mandate is obeyed.[20]

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[18] Cebu Portland Cement Company v. Municipality of Naga, Cebu, et al., 133 Phil. 695 (1968).

[19] Resins, Inc. v. Auditor General, 134 Phil. 697 (1968).

[20] Luzon Surety Co., Inc. v. De Garcia, et al., 140 Phil. 509 (1969); Quijano, et al. v. Development Bank of the Phils., et al., 146 Phil. 283 (1970); Chartered Bank Employees

If Section 112 of RA 7942 does not apply to FTAAs as the majority opinion asserts, what will govern FTAAs executed before the enactment of RA 7942, like the WMCP FTAA? Section 112 expressly addresses FTAAs executed before the enactment of RA 7942, requiring these earlier FTAAs to comply with the provisions of RA 7942 and its implementing rules. Executive Order No. 211, issued seven years before the execution of the WMCP FTAA, requires all FTAAs subsequently executed to comply with the terms and conditions of any future mining law that Congress may enact. That law is RA 7942 which took effect after the execution of the WMCP FTAA.

The majority opinion allows the WMCP FTAA to become *sui generis*, an FTAA outside the scope of RA 7942 which expressly governs "all" mining agreements, whether MPSAs or FTAAs. This means that the WMCP FTAA is not even governed by Section 81 of RA 7942 and its phrase "among other things," which the majority opinion claims is the authority to subject the WMCP FTAA to the payment of consideration that is "more than the usual taxes, duties and fees."

This makes the majority opinion's position self-contradictory and inutile. The majority opinion claims that the WMCP FTAA is subject to the phrase "among other things" in Section 81. At the same time, the majority opinion asserts that Section 112, which requires earlier FTAAs to comply with Section 81 and other provisions of RA 7942, does not apply to the WMCP FTAA. The majority opinion is caught in a web of self-contradictions.

This exemption by the majority opinion of the WMCP FTAA from Section 112 is judicial class legislation. Why is the WMCP FTAA so special that the majority opinion wants it exempted from Section 112 of RA 7942? Why are only "all" other FTAAs subject to the terms and conditions of RA 7942 and not the WMCP FTAA?

Foreign Corporations and Contractors Cannot Hold Exploration Permits

The majority opinion states that "there is no prohibition at all against foreign or local corporations or contractors holding exploration permits." This is another assertion of the majority opinion that directly collides with the plain language of the 1987 Constitution.

Association v. Ople, No. L- 44717, 28 August 1985, 138 SCRA 273.

Section 2, Article XII of the 1987 Constitution expressly reserves to Philippine citizens and corporations 60% Filipino owned the "exploration, development and utilization of natural resources." The majority opinion rationalizes its assertion in this manner:

> Pursuant to Section 20 of RA 7942, an exploration permit merely grants to a qualified person the right to conduct exploration for minerals in specified areas. Such a permit does not amount to an authorization to extract and carry off the mineral resources that may be discovered. ...

The issue is not whether an exploration permit allows a foreign contractor or corporation to extract mineral resources, for apparently by its language alone a mere exploration permit does not. There is no dispute that an exploration permit merely means authority to explore, not to extract. The issue is whether the issuance of an exploration permit to a foreign contractor violates the constitutional limitation that only Philippine citizens or corporations 60% Filipino owned can engage in the "exploration ... of natural resources."

The plain language of Section 2, Article XII of the 1987 Constitution clearly limits to Philippine citizens or to corporations 60% Filipino owned the right to engage in the "exploration ... of natural resources." To engage in "exploration" is simply to explore, not to develop, utilize or extract. To engage in exploration one must secure an exploration permit. The mere issuance of the exploration permit is the authority to engage in the exploration of natural resources.

This activity of exploration, which requires an exploration permit, is a reserved activity not allowed to foreign contractors or foreign corporations. Foreign contractors and foreign corporations cannot secure exploration permits because they cannot engage in the exploration of natural resources. If, as the majority opinion asserts, foreign contractors or foreign corporations can secure and hold exploration permits, then they can engage in the "exploration ... of natural resources." This violates Section 2, Article XII of the 1987 Constitution.

Consequently, Section 3(aq) of RA 7942, which provides that "a legally organized foreign-owned corporation shall be deemed a qualified person for purposes of granting an exploration permit," is void and unconstitutional.

However, the State may directly undertake to explore, develop and utilize the natural resources. To do this the State may contract a foreign corporation to conduct the physical act of exploration in the State's behalf, as in an FTAA. In such a case, the foreign FTAA contractor is merely an agent of the State which holds the right to explore. No exploration permit is given to the foreign contractor because it is the State that is directly undertaking the exploration, development and utilization of the natural resources.

The requirement reserving "exploration ... of natural resources" to Philippine citizens or to corporations 60% Filipino owned is not a matter of constitutional whim. The State cannot allow foreign corporations, except as contractual agents under the full control and supervision of the State, to explore our natural resources because information derived from such exploration may have national security implications.

If a Chinese company from the People's Republic of China is allowed to explore for oil and gas in the Spratlys, the technical information obtained by the Chinese company may only bolster the resolve of the Chinese Government to hold on to their occupied reefs in the Spratlys despite these reefs being within the Exclusive Economic Zone of the Philippines. Certainly, we cannot expect the Chinese company to disclose to the Philippine Government the important technical data obtained from such exploration.

In Africa, foreign mining companies who have explored the mineral resources of certain countries shift their support back and forth between government and rebel forces depending on who can give them better terms in exploiting the mineral resources. Technical data obtained from mineral exploration have triggered or fueled wars and rebellions in many countries. The right to explore mineral resources is not a trivial matter as the majority opinion would want us to believe.

Even if the foreign companies come from countries with no territorial dispute with the Philippines, can we expect them to disclose fully to the Philippine Government all the technical data they obtain on our mineral resources? These foreign companies know that the Philippine Government will use the very same data in negotiating from them a higher share of

the mining revenues. Why will the foreign companies give to the Philippine Government technical data justifying a higher share for the Philippine Government and a lower share for the foreign companies? The framers of the 1935, 1973 and 1986 Constitutions were acutely aware of this problem. That is why the 1987 Constitution not only reserves the "exploration ... of natural resources" to Philippine citizens and to corporations 60% Filipino owned, it also now requires the State to exercise "full control and supervision" over the "exploration x xx of natural resources."

The State is Entitled to 60% Share in the Net Mining Revenues

The majority opinion claims that the Constitution does not require that the State's share in FTAAs or other mineral agreements should be at least 60% of the net mining revenues. Thus, the majority opinion states that "the Charter did not intend to fix an iron-clad rule on the 60 percent share, applicable to all situations at all times and in all circumstances."

The majority opinion makes this claim despite the express admission by intervenor CMP and respondent WMCP that the State, as owner of the natural resources, is entitled to 60% of the net mining revenues. The intervenor CMP admits that under an FTAA, the Philippine Government "stands in the place of the 60% Filipino owned company" and hence must retain 60% of the net income. Thus, intervenor CMP concedes that:

> ... In other words, in the FTAA situation, the Government stands in the place of the 60% Filipino-owned company, and the 100% foreign-owned contractor company takes all the risks of failure to find a commercially viable large-scale ore body or oil deposit, for which the contractor will get 40% of the financial benefits.

As applied to the WMCP FTAA, intervenor CMP asserts that the "contractor's stipulated share under the WMCP FTAA is limited to a maximum of 40% of the net production." Intervenor CMP further insists that "60% of its (contractor's) net returns from mining, if any, will go to the Government under the WMCP FTAA."

Like intervenor CMP, respondent WMCP also maintains that under an FTAA, the State is "guaranteed" a 60% share of the

foreign contractor's Net Mining Revenues. Respondent WMCP admits that:

> In other words, the State is guaranteed a sixty per centum (60%) share of the Mining Revenues, or 60% of the actual fruits of the endeavor. This is in line with the intent behind Section 2 of Article XII that the Filipino people, as represented by the State, benefit primarily from the exploration, development, and utilization of the Philippines' natural resources.
> Incidentally, this sharing ratio between the Philippine Government and the Contractor is also in accordance with the 60%-40% equity requirement for Filipino-owned corporations in Paragraph 1 of Section 2 of Article XII.

In short, the entire mining industry, as represented by intervenor CMP, is willing to pay the State a share equivalent to 60% of the net mining revenues. Even the foreign contractor WMCP agrees to pay the State 60% of its net mining revenues, albeit dishonestly.

However, the majority opinion refuses to accept that the State is entitled to what the entire mining industry is willing to pay the State. Incredibly, the majority opinion claims that "there is no independent showing that the taking of at least 60 percent share in the after-tax income of a mining company operated by a foreign contractor is fair and reasonable under most if not all circumstances." Despite the willingness of the entire mining industry to pay the State a 60% share without exception, the majority opinion insists that such sharing is not fair and reasonable to the mining industry "under most if not all circumstances." What is the basis of the majority opinion in saying this when the entire mining industry already admits, concedes and accepts that the State is entitled, without exception, to 60% of the net mining revenues?

Oddly, the majority opinion cites only the personal experience of the *ponente*, who had previously "been engaged in private business for many years." The majority opinion even states, in insisting that the State should receive less than 60% share, that "[F]airness is a credo not only in law, but also in business." The majority opinion cannot be more "popish" than the Pope. The majority opinion *ponente's* business judgment cannot supplant the unanimous business judgment of the entire mining industry, as manifested by intervenor CMP before this Court.

What is obvious is that it is not fair to deprive the Filipino people, many of whom live in hand to mouth existence, of what is legally their share of the national patrimony, in light of the willingness of the entire mining industry to pay the Filipino people their rightful share.

The majority opinion gives a "simplified illustration" to show that the State does not deserve a 60% share of the net proceeds from mining revenues. The majority opinion states:

> ... Let us base it on gross revenues of, say, P500. After deducting operating expenses, but prior to income tax, suppose a mining makes a taxable income of P100. A corporate income tax of 32 percent results in P32 of taxable income going to the government, leaving the mining firm with P68. Government then takes 60 percent thereof, equivalent to P40.80, leaving only P27.20 for the mining firm.

The majority opinion's "simplified illustration" is indeed too simplified because it does not even consider the exploration, development and capital expenses. The majority opinion's "simplified illustration" deducts from gross revenues only "operating expenses." This is an egregious error that makes this "simplified illustration" misleading. Exploration, development and other capital expenses constitute a huge part of the deductions from gross revenues. In the early years of commercial production, the exploration, development and capital expenses, if not subject to a cap or limitation, can wipe out the gross revenues.

The majority opinion's operating expenses are not even taken from mining industry rates. One can even zero out the taxable income by simply jacking up the operating expenses. A "simplified illustration" of an income statement of an operating mining company, omitting the deduction of amortized capital expenses, serves no purpose whatsoever. What is important is the return on the investment of the foreign contractor. The absolute amount that goes to the contractor may be smaller than what goes to the State. However, the amount that goes to the contractor may be a hundred times its investment. This can only be determined if the capital expenditures of the contractor are taken into account.

Under an FTAA, the State is directly undertaking the exploitation of mineral resources. The net proceeds are not

subject to income tax since there is no separate taxable entity. The State is an entity but not a taxable corporate entity. The State does not pay income tax to itself, and even if it does, it is just a book entry since it is the payor and payee at the same time. Only the 40% share of the FTAA contractor is subject to the 32% corporate income tax. On this score alone, the majority opinion's "simplified illustration" is wrong.

Intervenor CMP and respondent WMCP are correct in anchoring on Section 2, Article XII of the 1987 Constitution their admission that the State is entitled to 60% of the net mining revenues. Their common position is based on the Constitution, existing laws and industry practice.

First, the State owns the mineral resources. To the owner of the mineral resources belongs the income from any exploitation of the mineral resources. The owner may share its income with the contractor as compensation to the contractor, which is an agent of the owner. The industry practice is the owner receives an equal or larger share of the income as against the share of the contractor or agent.

In the Occidental-Shell FTAA covering Malampaya, where the contractor contributed all the capital and technology, the State receives 60% of the net proceeds. In addition, Occidental-Shell's 40% share is subject to the 32% Philippine income tax. Occidental-Shell's US$2 billion investment in Malampaya is by far the single biggest foreign investment in the Philippines. The offshore Malampaya gas extraction is also by far more capital intensive and riskier than land-based mineral extraction. Over the 20-year life of the natural gas reserves, the State will receive US$8-10 billion from its share in the Occidental-Shell FTAA.

In *Consolidated Mines, Inc. v. Court of Tax Appeals*,[21] a case decided under the 1973 Constitution, Consolidated Mines, the concessionaire of the mines, shared equally the net mining income with Benguet Consolidated Mines, the mining operator or contractor. Thus, as quoted in Consolidated Mines, the agreement between the concessionaire and operator stated:

> X. After Benguet has been fully reimbursed for its expenditures, advances and disbursements as aforesaid the net profits from the operation shall be divided between

[21] 157 Phil. 608 (1974).

> Benguet and Consolidated share and share alike, it being understood however, that the net profits as the term is used in this agreement shall be computed by deducting from gross income all operating expenses and all disbursements of any nature whatsoever as may be made in order to carry out the terms of this agreement.

Incidentally, in Consolidated Mines the State did not receive any share in the net mining income because of the "license, concession or lease" system under the 1935 and 1973 Constitutions. The State and the Filipino people received only taxes, duties and fees.

Second, the State exercises "full control and supervision" over the exploitation of mineral resources. "Full control" as used in the Constitution means more than ordinary majority control. In corporate practice, ordinary control of a corporation means a simple majority control, or at least 50% plus one of the total voting stock. In contrast, full or total control means two-thirds of the voting stock, which enables the owner of the two-thirds equity to amend any provision in the charter of the corporation.

However, since foreigners can own up to 40% of the equity of mining companies, "full control" cannot exceed the control corresponding to the State's 60% equity. Thus, the State's share in the net proceeds of mining companies should correspond to its 60% interest and control in mining companies.

Third, Section 2, Article XII of the 1987 Constitution requires that the FTAA must make "real contributions to the economic growth and general welfare of the country." As respondent WMCP aptly admits, "the intent behind Section 2 of Article XII (is) that the Filipino people, as represented by the State, (shall) benefit primarily from the exploration, development, and utilization of the Philippines' natural resources." For the Filipino people to benefit primarily from the exploitation of natural resources, and for FTAAs to make real contributions to the national economy, the majority of the net proceeds from mining operations must accrue to the State.

Fourth, the 1987 Constitution ordains the State to "conserve and develop our patrimony." The nation's mineral resources are part of our national patrimony. The State can "conserve" our mineral resources only if the majority of the net proceeds from the exploitation of mineral resources accrue to the State.

In sum, only the majority opinion refuses to accept that the State has a right to receive at least 60% of the net proceeds from mining operations. The principal parties involved in this case do not object that the State shall receive such share. The entire mining industry and respondent WMCP admit that the State is entitled to a 60% share of the net proceeds. The State, represented by the Government, will certainly not object to such share.

More than anything else, the intent and language of the 1987 Constitution require that the State receive the bulk of the income from mining operations. Only Congress, through a law, may allow a share lesser than 60% if certain compelling conditions are present. Congress may authorize the President to make such determination subject to standards and limitations that Congress shall prescribe.

The majority opinion wants to give the President the absolute discretion to determine the State's share from mining revenues. The President will be hard put accepting anything less than 60% of the net proceeds. If the President accepts less than 60%, the President is open to a charge of entering into a manifestly and grossly disadvantageous contract to the Government because the entire mining industry, including WMCP, has already agreed to pay 60% of the net proceeds to the State. The only way to avoid this is for Congress to enact a law providing for the conditions when the State may receive less than 60% of the net proceeds.

La Bugal-B'Laan was decided with finality by the Court *en banc* in a short resolution dated February 1, 2005, with Justice Carpio again registering his uncompromising **dissent**:

> **"The P47 trillion mineral wealth of the nation is the Filipino people's inheritance from the Creator. This mineral wealth is exhaustible and non-renewable. Once removed from the earth, this mineral wealth is gone forever. This mineral wealth is a major part of the patrimony of the nation. The 1987 Constitution mandates the State to 'conserve and develop the national patrimony for the benefit of the Filipino people. 'Sections 3(aq), 39, 80, 81, 84 and 112, as well as DAO 56-99, constitute a sell-out of the national patrimony to foreigners**."

Let it not be said that no one warned this Court of the tragedy about to strike the Filipino people as a result of the Resolution of 1 December 2004. One can just imagine the anger of the Filipino people once they realize they will not receive any share in the mining profits of foreign contractors. The Filipino people will inherit a land environmentally degraded before by forest denudation, and now by large-scale mining. The Filipino people did not receive any share in the profits of logging concessionaires. Now, the Filipino people will also not receive any share in the profits of mining contractors. To save themselves from the Filipino people's ire, the mining industry, the legislature and the executive will all point to this Court's Resolution of 1 December 2004. Sadly, the blame will fall squarely on this Court.

By validating DAO 56-99, the Court's Resolution of 1 December 2004 legitimizes the plunder of the P47 trillion mineral wealth of the nation. This reminds us of the plunder by the Spanish *conquistadores* in the 16th century of the riches of the Aztecs, Mayans and Incas. The only difference is that the Aztecs, Mayans and Incas lost their wealth involuntarily by force of arms. Under the Resolution of 1 December 2004, the Filipino people will lose their mineral wealth voluntarily to foreigners by judicial fiat of this Court.

The decision of this Court in the present case will determine largely whether this country will remain poor, or whether this country can parlay its P47 trillion mineral resources into developing the national economy. History will judge whether this Court has met in the present case the challenge of conserving and developing the national patrimony for the benefit of the Filipino people.

Section 3. Lands of the public domain are classified into agricultural, forest or timber, mineral lands and national parks. Agricultural lands of the public domain may be further classified by law according to the uses to which they may be devoted. Alienable lands of the public domain shall be limited to agricultural lands. Private corporations or associations may not hold such alienable lands of the public domain except by lease, for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and not to exceed one thousand hectares in area. Citizens of the Philippines may

lease not more than five hundred hectares, or acquire not more than twelve hectares thereof, by purchase, homestead, or grant.

Taking into account the requirements of conservation, ecology, and development, and subject to the requirements of agrarian reform, the Congress shall determine, by law, the size of lands of the public domain which may be acquired, developed, held, or leased and the conditions therefor.

The landmark case **CHAVEZ v. PUBLIC ESTATES AUTHORITY**, G.R. No. 133250, July 9, 2002, 433 Phil. 506, served, in the opinion[22] of Atty. Maria Luz A. Cabegin, Court Attorney VI, Supreme Court, "as a deterrent" not only "to those who attempt to dispose of inalienable natural resources of the State," but also "to private corporations from acquiring lands of the public domain." In this "vital ruling," the Court *en banc*, speaking through Justice Carpio, stated:

> The **Regalian doctrine** is deeply implanted in our legal system. Foreshore and submerged areas form part of the public domain and are inalienable. Lands reclaimed from foreshore and submerged areas also form part of the public domain and are also inalienable, unless converted pursuant to law into alienable or disposable lands of the public domain. Historically, lands reclaimed by the government are *sui generis*, not available for sale to private parties unlike other alienable public lands. Reclaimed lands retain their inherent potential as areas for public use or public service. Alienable lands of the public domain, increasingly becoming scarce natural resources, are to be distributed equitably among our ever-growing population. **To insure such equitable distribution, the 1973 and 1987 Constitutions have barred private corporations from acquiring any kind of alienable land of the public domain. Those who attempt to dispose of inalienable natural resources of the State, or seek to circumvent the constitutional ban on alienation of lands of the public domain to private corporations, do so at their own risk.**

The petition in **Chavez** prayed that the PEA publicly disclose the terms and conditions of then on-going negotiations for a new agreement, or Amended Joint Venture Agreement, with AMARI Coastal Bay and

[22] Response of Atty. Maria Luz A. Cabegin, January 31, 2019.

Development Corporation, and that the PEA be enjoined from privately entering into, perfecting or executing an Amended JVA. Justice Carpio reviewed the Amended JVA as follows:

> The subject matter of the Amended JVA, as stated in its second Whereas clause, consists of three properties, namely:
>
> > 1. "[T]hree partially reclaimed and substantially eroded islands along Emilio Aguinaldo Boulevard in Paranaque and Las Piñas, Metro Manila, with a combined titled area of 1,578,441 square meters;"
> > 2. "[A]nother area of 2,421,559 square meters contiguous to the three islands;" and
> > 3. "[A]t AMARI's option as approved by PEA, an additional 350 hectares more or less to regularize the configuration of the reclaimed area."
>
> PEA confirms that the Amended JVA involves "the development of the Freedom Islands and further reclamation of about 250 hectares ..." plus an option "granted to AMARI to subsequently reclaim another 350 hectares..."
>
> In short, the Amended JVA covers a reclamation area of 750 hectares. Only 157.84 hectares of the 750-hectare reclamation project have been reclaimed, and the rest of the 592.15 hectares are still submerged areas forming part of Manila Bay.
>
> Under the Amended JVA, AMARI will reimburse PEA the sum of P1,894,129,200.00 for PEA's "actual cost" in partially reclaiming the Freedom Islands. AMARI will also complete, at its own expense, the reclamation of the Freedom Islands. AMARI will further shoulder all the reclamation costs of all the other areas, totaling 592.15 hectares, still to be reclaimed. AMARI and PEA will share, in the proportion of 70 percent and 30 percent, respectively, the total net usable area which is defined in the Amended JVA as the total reclaimed area less 30 percent earmarked for common areas. Title to AMARI's share in the net usable area, totaling 367.5 hectares, will be issued in the name of AMARI. Section 5.2 (c) of the Amended JVA provides that -
>
> > ... PEA shall have the duty to execute without delay the necessary deed of transfer or conveyance of the title pertaining to AMARI's Land share based on the Land Allocation Plan. PEA, when requested in writing by AMARI,

> shall then cause the issuance and delivery of the proper certificates of title covering AMARI's Land Share in the name of AMARI, ...; provided, that if more than seventy percent (70%) of the titled area at any given time pertains to AMARI, PEA shall deliver to AMARI only seventy percent (70%) of the titles pertaining to AMARI, until such time when a corresponding proportionate area of additional land pertaining to PEA has been titled.

Indisputably, under the Amended JVA AMARI will acquire and own a maximum of 367.5 hectares of reclaimed land which will be titled in its name.

To implement the Amended JVA, PEA delegated to the unincorporated PEA-AMARI joint venture PEA's statutory authority, rights and privileges to reclaim foreshore and submerged areas in Manila Bay. Section 3.2.a of the Amended JVA states that -

> PEA hereby contributes to the joint venture its rights and privileges to perform Rawland Reclamation and Horizontal Development as well as own the Reclamation Area, thereby granting the Joint Venture the full and exclusive right, authority and privilege to undertake the Project in accordance with the Master Development Plan.

The Amended JVA in **Chavez** was the product of a renegotiation of the original JVA and its supplemental agreement. Because the prayer to enjoin was based on constitutional grounds, that is, that the negotiation of the Amended JVA was **a violation of Section 3, Article XII**, Justice Carpio considered it the Court's duty to enjoin its implementation, and if already implemented, to annul the effects, if it were in fact an **unconstitutional contract**:

> The Amended JVA is not an ordinary commercial contract but one which seeks to transfer title and ownership to 367.5 hectares of reclaimed lands and submerged areas of Manila Bay to a single private corporation. **It now becomes more compelling for the Court to resolve the issue to insure the government itself does not violate a provision of the Constitution intended to safeguard the national patrimony. Supervening events, whether intended or accidental, cannot prevent the Court from rendering a decision if there is a grave violation of the Constitution. In the instant case, if the Amended JVA runs counter to**

the Constitution, the Court can still prevent the transfer of title and ownership of alienable lands of the public domain in the name of AMARI. Even in cases where supervening events had made the cases moot, the Court did not hesitate to resolve the legal or constitutional issues raised to formulate controlling principles to guide the bench, bar, and the public.[23]

Also, the instant petition is a case of first impression. All previous decisions of the Court involving Section 3, Article XII of the 1987 Constitution, or its counterpart provision in the 1973 Constitution,[24] **covered agricultural lands** sold to private corporations which acquired the lands from private parties. The transferors of the private corporations claimed or could claim the right to judicial confirmation of their imperfect titles[25] under Title II of Commonwealth Act. 141 (CA No. 141). **In the instant case, AMARI seeks to acquire from PEA, a public corporation, reclaimed lands and submerged areas for non-agricultural** purposes **by purchase** under **PD No. 1084 (charter of PEA) and Title III** of CA No. 141. Certain undertakings by AMARI under the Amended JVA constitute the consideration for the purchase. Neither AMARI nor PEA can claim judicial confirmation of their titles because the lands covered by the Amended JVA are newly reclaimed or still to be reclaimed. Judicial confirmation of imperfect title requires open, continuous, exclusive and notorious occupation of agricultural lands of the public domain for at least thirty years since June 12, 1945 or earlier. Besides, the deadline for filing applications for judicial confirmation of imperfect title expired on December 31, 1987.[26]

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[23] Salonga v. Paño, 134 SCRA 438 (1985); Gonzales v. Marcos, 65 SCRA 624 (1975); Aquino v. Enrile, 59 SCRA 183 (1974); Dela Camara v. Enage, 41 SCRA 1 (1971).

[24] Const., Art. XIV, Sec. 11.

[25] Manila Electric Co. v. Judge F. Castro-Bartolome, 114 SCRA 799 (1982); Republic v. CA and Iglesia, and Republic v. Cendana and Iglesia ni Cristo, 119 SCRA 449 (1982); Republic v. Villanueva and Iglesia ni Cristo, 114 SCRA 875 (1982); Director of Lands v. Lood, 124 SCRA 460 (1983); Republic v. Iglesia ni Cristo, 128 SCRA 44 (1984); Director of Lands v. Hermanos y Hermanas de Sta. Cruz de Mayo, Inc., 141 SCRA 21 (1986); Director of Lands v. IAC and Acme Plywood & Veneer Co., 146 SCRA 509 (1986); Republic v. IAC and Roman Catholic Bishop of Lucena, 168 SCRA 165 (1988); Natividad v. CA, 202 SCRA 493 (1991); Villaflor v. CA and Nasipit Lumber Co., 280 SCRA 297 (1997). In Ayog v. Cusi, 118 SCRA 492 (1982), the Court did not apply the constitutional ban in the 1973 Constitution because the applicant corporation, Biñan Development Co., Inc., had fully complied with all its obligations and even paid the full purchase price before the effectivity of the 1973 Constitution, although the sales patent was issued after the 1973 Constitution took effect.

[26] PD No. 1073.

> **Lastly, there is a need to resolve immediately the constitutional issue raised in this petition because of the possible transfer at any time by PEA to AMARI of title and ownership to portions of the reclaimed lands.** Under the Amended JVA, PEA is obligated to transfer to AMARI the latter's seventy percent proportionate share in the reclaimed areas as the reclamation progresses. The Amended JVA even allows AMARI to mortgage at any time the entire reclaimed area to raise financing for the reclamation project.

In **Chavez**, the Court therefore had to decide on whether the stipulations in the Amended JVA for the transfer to AMARI of lands, reclaimed or to be reclaimed, violated the Constitution. To do so, Justice Carpio exhaustively discussed the history of the **Regalian Doctrine** and the various laws relating to the **disposition of lands**:[27]

> **The Regalian Doctrine**
>
> The ownership of lands reclaimed from foreshore and submerged areas is rooted in the Regalian doctrine which holds that the State owns all lands and waters of the public domain. Upon the Spanish conquest of the Philippines, ownership of all "lands, territories and possessions" in the Philippines passed to the Spanish Crown.[28] The King, as the sovereign ruler and representative of the people, acquired and owned all lands and territories in the Philippines except those he disposed of by grant or sale to private individuals.
>
> **The 1935, 1973 and 1987 Constitutions adopted the Regalian doctrine substituting, however, the State, in lieu of the King, as the owner of all lands and waters of the**

[27] See also Collado v. Court of Appeals, G.R. No. 107764, October 04, 2002, 439 Phil. 149, penned by Justice Carpio for the First Division.

[28] The *Recopilacion de Leyes de las Indias* declared that: We, having acquired full sovereignty over the Indies, and all lands, territories, and possessions not heretofore ceded away by our royal predecessors, or by us, or in our name, still pertaining to the royal crown and patrimony, it is our will that all lands which are held without proper and true deeds of grant be restored to us according as they belong to us, in order that after reserving before all what to us or to our viceroys, *audiencias*, and governors may seem necessary for public squares, ways, pastures, and commons in those places which are peopled, taking into consideration not only their present condition, but also their future and their probable increase, and after distributing to the natives what may be necessary for tillage and pasturage, confirming them in what they now have and giving them more if necessary, all the rest of said lands may remain free and unencumbered for us to dispose of as we may wish.
See concurring opinion of Justice Reynato S. Puno in Republic Real Estate Corporation v. Court of Appeals, 299 SCRA 199 (1998).

public domain. The Regalian doctrine is the foundation of the time-honored principle of land ownership that "all lands that were not acquired from the Government, either by purchase or by grant, belong to the public domain."[29] Article 339 of the Civil Code of 1889, which is now Article 420 of the Civil Code of 1950, incorporated the Regalian doctrine.

Ownership and Disposition of Reclaimed Lands

The Spanish Law of Waters of 1866 was the first statutory law governing the ownership and disposition of reclaimed lands in the Philippines. On May 18, 1907, the Philippine Commission enacted Act No. 1654 which provided **for the lease, but not the sale, of reclaimed lands of the government to corporations and individuals**. Later, on November 29, 1919, the Philippine Legislature approved Act No. 2874, the Public Land Act, which authorized **the lease, but not the sale, of reclaimed lands of the government to corporations and individuals**. On November 7, 1936, the National Assembly passed Commonwealth Act No. 141, also known as the Public Land Act, which **authorized the lease, but not the sale, of reclaimed lands of the government to corporations and individuals**. CA No. 141 continues to this day as the general law governing the classification and disposition of lands of the public domain.

The Spanish Law of Waters of 1866 and the Civil Code of 1889

Under the Spanish Law of Waters of 1866, the shores, bays, coves, inlets and all waters within the maritime zone of the Spanish territory belonged to the public domain for

[29] Cariño v. Insular Government, 41 Phil. 935 (1909). The exception mentioned in Cariño, referring to lands in the possession of an occupant and of his predecessors-in-interest, since time immemorial, is actually a species of a grant by the State. The United States Supreme Court, speaking through Justice Oliver Wendell Holmes, Jr., declared in Cariño: "Prescription is mentioned again in the royal cedula of October 15, 1754, cited in 3 Philippine, 546; 'Where such possessors shall not be able to produce title deeds, it shall be sufficient if they shall show that ancient possession, as a valid title by prescription.' It may be that this means possession from before 1700; but, at all events, the principle is admitted. As prescription, even against the Crown lands, was recognized by the laws of Spain, we see no sufficient reason for hesitating to admit that it was recognized in the Philippines in regard to lands over which Spain had only a paper sovereignty." See also Republic v. Lee, 197 SCRA 13 (1991).

public use.[30] The Spanish Law of Waters of 1866 allowed the reclamation of the sea under Article 5, which provided as follows:

> Art. 5. Lands reclaimed from the sea in consequence of works constructed by the State, or by the provinces, pueblos or private persons, with proper permission, shall become the property of the party constructing such works, unless otherwise provided by the terms of the grant of authority.

Under the Spanish Law of Waters, land reclaimed from the sea belonged to the party undertaking the reclamation, provided the government issued the necessary permit and did not reserve ownership of the reclaimed land to the State.

Article 339 of the Civil Code of 1889 defined property of public dominion as follows:

> Art. 339. Property of public dominion is -
> 1. That devoted to public use, such as roads, canals, rivers, torrents, ports and bridges constructed by the State, riverbanks, shores, roadsteads, and that of a similar character;
> 2. That belonging exclusively to the State which, without being of general public use, is employed in some public service, or in the development of the national wealth, such as walls, fortresses, and other works for the defense of the territory, and mines, until granted to private individuals.

Property devoted to public use referred to property open for use by the public. In contrast, property devoted to public service referred to property used for some specific public service and open only to those authorized to use the property.

Property of public dominion referred not only to property devoted to public use, but also to property not so used but employed to develop the national wealth. This class of property constituted property of public dominion although employed for some economic or commercial activity to increase the national wealth.

Article 341 of the Civil Code of 1889 governed the re-classification of property of public dominion into private property, to wit:

[30] Spanish Law of Waters of 1866, Art. 1.

> Art. 341. Property of public dominion, when no longer devoted to public use or to the defense of the territory, shall become a part of the private property of the State.

This provision, however, was not self-executing. The legislature, or the executive department pursuant to law, must declare the property no longer needed for public use or territorial defense before the government could lease or alienate the property to private parties.[31]

Act No. 1654 of the Philippine Commission

On May 8, 1907, the Philippine Commission enacted Act No. 1654 which **regulated the lease of reclaimed and foreshore lands.** The salient provisions of this law were as follows:

> Sec. 1. The control and disposition of the foreshore as defined in existing law, and the title to all Government or public lands made or reclaimed by the Government by dredging or filling or otherwise throughout the Philippine Islands, shall be retained by the Government without prejudice to vested rights and without prejudice to rights conceded to the City of Manila in the Luneta Extension.
> Sec. 2. (a) The Secretary of the Interior shall cause all Government or public lands made or reclaimed by the Government by dredging or filling or otherwise to be divided into lots or blocks, with the necessary streets and alleyways located thereon, and shall cause plats and plans of such surveys to be prepared and filed with the Bureau of Lands.
> (b) Upon completion of such plats and plans the Governor-General shall give notice to the public that such parts of the lands so made or reclaimed as are not needed for public purposes will be leased for commercial and business purposes, ...
> ...
> (e) The leases above provided for shall be disposed of to the highest and best bidder therefore, subject to such regulations and safeguards as the Governor-General may by executive order prescribe.

Act No. 1654 mandated that the **government should retain**

[31] Ignacio v. Director of Lands, 108 Phil. 335 (1960); Joven v. Director of Lands, 93 Phil. 134 (1953); Laurel v. Garcia, 187 SCRA 797 (1990). See concurring opinion of Justice Reynato S. Puno in Republic Real Estate Corporation v. Court of Appeals, 299 SCRA 199 (1998).

title to all lands reclaimed by the government. The Act also vested in the government control and disposition of foreshore lands. Private parties could lease lands reclaimed by the government only if these lands were no longer needed for public purpose. Act No. 1654 mandated public bidding in the lease of government reclaimed lands. Act No. 1654 made government reclaimed lands *sui generis* in that unlike other public lands which the government could sell to private parties, these reclaimed lands were available only for lease to private parties.

Act No. 1654, however, did not repeal Section 5 of the Spanish Law of Waters of 1866. Act No. 1654 did not prohibit private parties from reclaiming parts of the sea under Section 5 of the Spanish Law of Waters. Lands reclaimed from the sea by private parties with government permission remained private lands.

Act No. 2874 of the Philippine Legislature

On November 29, 1919, the Philippine Legislature enacted Act No. 2874, the Public Land Act.[32] The salient provisions of Act No. 2874, on reclaimed lands, were as follows:

> Sec. 6. The Governor-General, upon the recommendation of the Secretary of Agriculture and Natural Resources, shall from time to time classify the lands of the public domain into -
> (a) Alienable or disposable,
> (b) Timber, and
> (c) Mineral lands, ...
> Sec. 7. For the purposes of the government and disposition of alienable or disposable public lands, the Governor-General, upon recommendation by the Secretary of Agriculture and Natural Resources, shall from time to time declare what lands are open to disposition or concession under this Act."
> Sec. 8. Only those lands shall be declared open to disposition or concession which have been officially delimited or classified.
> ...

[32] Act No. 926, enacted on October 7, 1903, was also titled The Public Land Act. This Act, however, did not cover reclaimed lands. Nevertheless, Sec. 23 of this Act provided as follows: ... In no case may lands leased under the provisions of this chapter be taken so as to gain control of adjacent land, water, stream, shore line, way, roadstead, or other valuable right which in the opinion of the Chief of the Bureau of Public Lands would be prejudicial to the interests of the public.

> Sec. 55. Any tract of land of the public domain which, being neither timber nor mineral land, shall be classified as suitable for residential purposes or for commercial, industrial, or other productive purposes other than agricultural purposes, and shall be open to disposition or concession, shall be disposed of under the provisions of this chapter, and not otherwise.
> Sec. 56. The lands disposable under this title shall be classified as follows:
> (a) Lands reclaimed by the Government by dredging, filling, or other means;
> (b) Foreshore;
> (c) Marshy lands or lands covered with water bordering upon the shores or banks of navigable lakes or rivers;
> (d) Lands not included in any of the foregoing classes.
> ...
> Sec. 58. The lands comprised in classes (a), (b), and (c) of section fifty-six shall be disposed of to private parties by lease only and not otherwise, as soon as the Governor-General, upon recommendation by the Secretary of Agriculture and Natural Resources, shall declare that the same are not necessary for the public service and are open to disposition under this chapter. The lands included in class (d) may be disposed of by sale or lease under the provisions of this Act.

Section 6 of Act No. 2874 authorized the Governor-General to "classify lands of the public domain into ... alienable or disposable"[33] lands. Section 7 of the Act empowered the Governor-General to "declare what lands are open to disposition or concession." Section 8 of the Act limited alienable or disposable lands only to those lands which have been "officially delimited and classified."

Section 56 of Act No. 2874 stated that lands "disposable under this title[34] shall be classified" as government reclaimed, foreshore and marshy lands, as well as other lands. All these lands, however, must be suitable for residential, commercial,

[33] Act No. 2874, Sec. 10 provides: The words "alienation," "disposition," or "concession" as used in this Act, shall mean any of the methods authorized by this Act for the acquisition, lease, use, or benefit of the lands of the public domain other than timber or mineral lands.

[34] Title II of Act No. 2874 governed alienable lands of the public domain for agricultural purposes, while Title III of the same Act governed alienable lands of the public domain for non-agricultural purposes.

industrial or other productive non-agricultural purposes. These provisions vested upon the Governor-General the power to classify inalienable lands of the public domain into disposable lands of the public domain. These provisions also empowered the Governor-General to classify further such disposable lands of the public domain into government reclaimed, foreshore or marshy lands of the public domain, as well as other non-agricultural lands.

Section 58 of Act No. 2874 categorically mandated that disposable lands of the public domain classified as government reclaimed, foreshore and marshy lands **"shall be disposed of to private parties by lease only and not otherwise."** The Governor-General, before allowing the lease of these lands to private parties, must formally declare that the lands were **"**not necessary for the public service.**"** Act No. 2874 reiterated the State policy to lease and not to sell government reclaimed, foreshore and marshy lands of the public domain, a policy first enunciated in 1907 in Act No. 1654. Government reclaimed, foreshore and marshy lands remained *sui generis*, as the only alienable or disposable lands of the public domain that the government could not sell to private parties.

The rationale behind this State policy is obvious. Government reclaimed, foreshore and marshy public lands for non-agricultural purposes retain their inherent potential as areas for public service. This is the reason the government prohibited the sale, and only allowed the lease, of these lands to private parties. The State always reserved these lands for some future public service.

Act No. 2874 did not authorize the reclassification of government reclaimed, foreshore and marshy lands into other non-agricultural lands under Section 56 (d). Lands falling under Section 56 (d) were the only lands for non-agricultural purposes the government could sell to private parties. Thus, under Act No. 2874, the government could not sell government reclaimed, foreshore and marshy lands to private parties**, unless the legislature passed a law allowing their sale**.[35]

Act No. 2874 did not prohibit private parties from reclaiming

[35] Act No. 2874, Sec. 57 provides: ...; but the land so granted, donated, or transferred to a province, municipality, or branch or subdivision of the Government shall not be alienated, encumbered, or otherwise disposed of in a manner affecting its title, except when authorized by the legislature; ...

parts of the sea pursuant to Section 5 of the Spanish Law of Waters of 1866. Lands reclaimed from the sea by private parties with government permission remained private lands.

Dispositions under the 1935 Constitution

On May 14, 1935, the 1935 Constitution took effect upon its ratification by the Filipino people. The 1935 Constitution, in adopting the Regalian doctrine, declared in Section 1, Article XIII, that -

> Sec. 1. All agricultural, timber, and mineral lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy and other natural resources of the Philippines belong to the State, and their disposition, exploitation, development, or utilization shall be limited to citizens of the Philippines or to corporations or associations at least sixty per centum of the capital of which is owned by such citizens, subject to any existing right, grant, lease, or concession at the time of the inauguration of the Government established under this Constitution. Natural resources, with the exception of public agricultural land, shall not be alienated, and no license, concession, or lease for the exploitation, development, or utilization of any of the natural resources shall be granted for a period exceeding twenty-five years, renewable for another twenty-five years, except as to water rights for irrigation, water supply, fisheries, or industrial uses other than the development of water power, in which cases beneficial use may be the measure and limit of the grant.

The 1935 Constitution barred the alienation of all natural resources except public agricultural lands, which were the only natural resources the State could alienate. Thus, foreshore lands, considered part of the State's natural resources, became inalienable by constitutional fiat, available only for lease for 25 years, renewable for another 25 years. The government could alienate foreshore lands only after these lands were reclaimed and classified as alienable agricultural lands of the public domain. Government reclaimed and marshy lands of the public domain, being neither timber nor mineral lands, fell under the classification of public agricultural lands.[36] However, government reclaimed and

[36] Krivenko v. Register of Deeds, 79 Phil. 461 (1947).

marshy lands, although subject to classification as disposable public agricultural lands, could only be leased and not sold to private parties because of Act No. 2874.

The prohibition on private parties from acquiring ownership of government reclaimed and marshy lands of the public domain was only a statutory prohibition and the legislature could therefore remove such prohibition. The 1935 Constitution did not prohibit individuals and corporations from acquiring government reclaimed and marshy lands of the public domain that were classified as agricultural lands under existing public land laws. Section 2, Article XIII of the 1935 Constitution provided as follows:

> Sec. 2. No private corporation or association may acquire, lease, or hold public agricultural lands in excess of one thousand and twenty four hectares, nor may any individual acquire such lands by purchase in excess of one hundred and forty hectares, or by lease in excess of one thousand and twenty-four hectares, or by homestead in excess of twenty-four hectares. Lands adapted to grazing, not exceeding two thousand hectares, may be leased to an individual, private corporation, or association.

Still, after the effectivity of the 1935 Constitution, the legislature did not repeal Section 58 of Act No. 2874 to open for sale to private parties government reclaimed and marshy lands of the public domain. On the contrary, the legislature continued the long established State policy of retaining for the government title and ownership of government reclaimed and marshy lands of the public domain.

Commonwealth Act No. 141 of the Philippine National Assembly

On November 7, 1936, the National Assembly approved Commonwealth Act No. 141, also known as the Public Land Act, which compiled the then existing laws on lands of the public domain. **CA No. 141, as amended, remains to this day the existing general law** governing the classification and disposition of lands of the public domain other than timber and mineral lands.[37]

[37] CA No. 141, Sec. 2 states: The provisions of this Act shall apply to the lands of the public domain; but timber and mineral lands shall be governed by special laws and

Section 6 of CA No. 141 empowers the President to classify lands of the public domain into "alienable or disposable"[38] lands of the public domain, which prior to such classification are inalienable and outside the commerce of man. Section 7 of CA No. 141 authorizes the President to "declare what lands are open to disposition or concession." Section 8 of CA No. 141 states that the government can declare open for disposition or concession only lands that are "officially delimited and classified." Sections 6, 7 and 8 of CA No. 141 read as follows:

> Sec. 6. The President, upon the recommendation of the Secretary of Agriculture and Commerce, shall from time to time classify the lands of the public domain into -
> (a) Alienable or disposable,
> (b) Timber, and
> (c) Mineral lands,
> and may at any time and in like manner transfer such lands from one class to another,[39] for the purpose of their administration and disposition.
> Sec. 7. For the purposes of the administration and disposition of alienable or disposable public lands, the President, upon recommendation by the Secretary of Agriculture and Commerce, shall from time to time declare what lands are open to disposition or concession under this Act.
> Sec. 8. Only those lands shall be declared open to disposition or concession which have been officially delimited and classified and, when practicable, surveyed, and which have not been reserved for public or quasi-public uses, nor appropriated by the Government, nor in any manner become private property, nor those on which a private right authorized and recognized by this Act or any other valid law may be claimed, or which, having been reserved or

nothing in this Act provided shall be understood or construed to change or modify the administration and disposition of the lands commonly called "friar lands" and those which, being privately owned, have reverted to or become the property of the Commonwealth of the Philippines, which administration and disposition shall be governed by the laws at present in force or which may hereafter be enacted.

[38] Like Act No. 2874, Sec. 10 of CA No. 141 defined the terms "alienation" and "disposition" as follows: The words "alienation," "disposition," or "concession" as used in this Act, shall mean any of the methods authorized by this Act for the acquisition, lease, use, or benefit of the lands of the public domain other than timber or mineral lands.

[39] RA No. 6657 has suspended the authority of the President to reclassify forest or mineral lands into agricultural lands. Sec. 4 (a) of RA No. 6657 (Comprehensive Agrarian Reform Law of 1988) states, "No reclassification of forest or mineral lands to agricultural lands shall be undertaken after the approval of this Act until Congress, taking into account ecological, developmental and equity considerations, shall have delimited by law, the specific limits of the public domain."

appropriated, have ceased to be so. ...

Thus, before the government could alienate or dispose of lands of the public domain, the President must first officially classify these lands as alienable or disposable, and then declare them open to disposition or concession. There must be no law reserving these lands for public or quasi-public uses.

The salient provisions of CA No. 141, on government reclaimed, foreshore and marshy lands of the public domain, are as follows:

> Sec. 58. Any tract of land of the public domain which, being neither timber nor mineral land, is intended to be used for residential purposes or for commercial, industrial, or other productive purposes other than agricultural, and is open to disposition or concession, shall be disposed of under the provisions of this chapter and not otherwise.
> Sec. 59. The lands disposable under this title shall be classified as follows:
> (a) Lands reclaimed by the Government by dredging, filling, or other means;
> (b) Foreshore;
> (c) Marshy lands or lands covered with water bordering upon the shores or banks of navigable lakes or rivers;
> (d) Lands not included in any of the foregoing classes.
> Sec. 60. Any tract of land comprised under this title may be leased or sold, as the case may be, to any person, corporation, or association authorized to purchase or lease public lands for agricultural purposes. ...
> Sec. 61. The lands comprised in classes (a), (b), and (c) of section fifty-nine shall be disposed of to private parties by lease only and not otherwise, as soon as the President, upon recommendation by the Secretary of Agriculture, shall declare that the same are not necessary for the public service and are open to disposition under this chapter. The lands included in class (d) may be disposed of by sale or lease under the provisions of this Act.

Section 61 of CA No. 141 readopted, after the effectivity of the 1935 Constitution, Section 58 of Act No. 2874 prohibiting the sale of government reclaimed, foreshore and marshy disposable lands of the public domain. All these lands are intended for residential, commercial, industrial or other non-agricultural purposes. As before, Section 61 allowed only the lease of such lands to private

parties. The government could sell to private parties only lands falling under Section 59 (d) of CA No. 141, or those lands for non-agricultural purposes not classified as government reclaimed, foreshore and marshy disposable lands of the public domain. Foreshore lands, however, became inalienable under the 1935 Constitution which only allowed the lease of these lands to qualified private parties.

Section 58 of CA No. 141 expressly states that disposable lands of the public domain intended for residential, commercial, industrial or other productive purposes other than agricultural "**shall be disposed of under the provisions of this chapter and not otherwise**." Under Section 10 of CA No. 141, the term "disposition" includes lease of the land. Any disposition of government reclaimed, foreshore and marshy disposable lands for non-agricultural purposes must comply with Chapter IX, Title III of CA No. 141,[40] unless a subsequent law amended or repealed these provisions.

In his concurring opinion in the landmark case of *Republic Real Estate Corporation v. Court of Appeals,*[41] Justice Reynato S. Puno summarized succinctly the law on this matter, as follows:

> Foreshore lands are lands of public dominion intended for public use. So too are lands reclaimed by the government by dredging, filling, or other means. Act 1654 mandated that the control and disposition of the foreshore and lands under water remained in the national government. Said law allowed only the 'leasing' of reclaimed land. The Public Land Acts of 1919 and 1936 also declared that the foreshore and lands reclaimed by the government were to be "disposed of to private parties by lease only and not otherwise." Before leasing, however, the Governor-General, upon recommendation of the Secretary of Agriculture and Natural Resources, had first to determine that the land reclaimed was not necessary for the public service. This requisite must have been met before the land could be disposed of. But even then, the foreshore and lands under water were not to be alienated and sold to private parties. The disposition of the reclaimed land was only by lease. The land remained property of the State.

[40] Covering Secs. 58 to 68 of CA No. 141.
[41] 299 SCRA 199 (1998).

As observed by Justice Puno in his concurring opinion, "Commonwealth Act No. 141 has remained in effect at present."

The State policy prohibiting the sale to private parties of government reclaimed, foreshore and marshy alienable lands of the public domain, first implemented in 1907 was thus reaffirmed in CA No. 141 after the 1935 Constitution took effect. The prohibition on the sale of foreshore lands, however, became a constitutional edict under the 1935 Constitution. Foreshore lands became inalienable as natural resources of the State, unless reclaimed by the government and classified as agricultural lands of the public domain, in which case they would fall under the classification of government reclaimed lands.

After the effectivity of the 1935 Constitution, government reclaimed and marshy disposable lands of the public domain continued to be only leased and not sold to private parties.[42] These lands remained *sui generis*, as the only alienable or disposable lands of the public domain the government could not sell to private parties.

Since then and until now, the only way the government can sell to private parties government reclaimed and marshy disposable lands of the public domain is for the legislature to pass a law authorizing such sale. CA No. 141 does not authorize the President to reclassify government reclaimed and marshy lands into other non-agricultural lands under Section 59 (d). Lands classified under Section 59 (d) are the only alienable or disposable lands for non-agricultural purposes that the government could sell to private parties.

Moreover, Section 60 of CA No. 141 expressly requires congressional authority before lands under Section 59 that the government previously transferred to government units or entities could be sold to private parties. Section 60 of CA No. 141 declares that -

[42] Sec. 1, Art. XIII of the 1935 Constitution limited the disposition and utilization of public agricultural lands to Philippine citizens or to corporations at least sixty percent owned by Philippine citizens. This was, however, subject to the original Ordinance appended to the 1935 Constitution stating, among others, that until the withdrawal of United States sovereignty in the Philippines, "Citizens and corporations of the United States shall enjoy in the Commonwealth of the Philippines all the civil rights of the citizens and corporations, respectively, thereof."

> Sec. 60. ... The area so leased or sold shall be such as shall, in the judgment of the Secretary of Agriculture and Natural Resources, be reasonably necessary for the purposes for which such sale or lease is requested, and shall not exceed one hundred and forty-four hectares: Provided, however, That this limitation shall not apply to grants, donations, or transfers made to a province, municipality or branch or subdivision of the Government for the purposes deemed by said entities conducive to the public interest; but the land so granted, donated, or transferred to a province, municipality or branch or subdivision of the Government shall not be alienated, encumbered, or otherwise disposed of in a manner affecting its title, except when authorized by Congress...

The congressional authority required in Section 60 of CA No. 141 mirrors the legislative authority required in Section 56 of Act No. 2874.

One reason for the congressional authority is that Section 60 of CA No. 141 exempted government units and entities from the maximum area of public lands that could be acquired from the State. These government units and entities should not just turn around and sell these lands to private parties in violation of constitutional or statutory limitations. Otherwise, the transfer of lands for non-agricultural purposes to government units and entities could be used to circumvent constitutional limitations on ownership of alienable or disposable lands of the public domain. In the same manner, such transfers could also be used to evade the statutory prohibition in CA No. 141 on the sale of government reclaimed and marshy lands of the public domain to private parties. Section 60 of CA No. 141 constitutes by operation of law a lien on these lands.[43]

In case of **sale or lease of disposable lands of the public domain** falling under Section 59 of CA No. 141, Sections 63 and 67 require a public bidding. Sections 63 and 67 of CA No. 141 provide as follows:

> Sec. 63. Whenever it is decided that lands covered by this chapter are not needed for public purposes, the Director of

[43] PD No. 1529, Sec. 44 (previously Act No. 496, Sec. 39) provides that "liens, claims or rights arising or existing under the laws and the Constitution of the Philippines which are not by law required to appear of record in the Registry of Deeds in order to be valid against subsequent purchasers or encumbrancers of record" constitute statutory liens affecting the title.

> Lands shall ask the Secretary of Agriculture and Commerce (now the Secretary of Natural Resources) for authority to dispose of the same. Upon receipt of such authority, the Director of Lands shall give notice by public advertisement in the same manner as in the case of leases or sales of agricultural public land, ...
> ...
> Sec. 67. The lease or sale shall be made by oral bidding; and adjudication shall be made to the highest bidder. ...

Thus, CA No. 141 mandates the Government to put to public auction all leases or sales of alienable or disposable lands of the public domain.[44]

Like Act No. 1654 and Act No. 2874 before it, CA No. 141 did not repeal Section 5 of the Spanish Law of Waters of 1866. Private parties could still reclaim portions of the sea with government permission. However, the **reclaimed land could become private land only if classified as alienable agricultural land of the public domain** open to disposition under CA No. 141. The 1935 Constitution prohibited the alienation of all natural resources except public agricultural lands.

The Civil Code of 1950

The Civil Code of 1950 readopted substantially the definition of property of public dominion found in the Civil Code of 1889. Articles 420 and 422 of the Civil Code of 1950 state that -

> Art. 420. The following things are property of public dominion:

[44] RA No. 730, which took effect on June 18, 1952, authorized the private sale of home lots to actual occupants of public lands not needed for public service. RA No. 730, Sec. 1 provides: Notwithstanding the provisions of Secs. 61 and 67 of Commonwealth Act No. 141, as amended by RA No. 293, any Filipino citizen of legal age who is not the owner of a home lot in the municipality or city in which he resides and who had in good faith established his residence on a parcel of land of the Republic of the Philippines which is not needed for public service, shall be given preference to purchase at a private sale of which reasonable notice shall be given to him, not more than one thousand square meters at a price to be fixed by the Director of Lands with the approval of the Secretary of Agriculture and Natural Resources. ...
In addition, on June 16, 1948, Congress enacted RA No. 293 allowing the private sale of marshy alienable or disposable lands of the public domain to lessees who have improved and utilized the same as farms, fishponds or other similar purposes for at least five years from the date of the lease contract with the government. RA No. 293, however, did not apply to marshy lands under Sec. 56 (c), Title III of CA No. 141 which refers to marshy lands leased for residential, commercial, industrial or other non-agricultural purposes.

> (1) Those intended for public use, such as roads, canals, rivers, torrents, ports and bridges constructed by the State, banks, shores, roadsteads, and others of similar character;
> (2) Those which belong to the State, without being for public use, and are intended for some public service or for the development of the national wealth.
> ...
> Art. 422. Property of public dominion, when no longer intended for public use or for public service, shall form part of the patrimonial property of the State.

Again, the government must formally declare that the property of public dominion is no longer needed for public use or public service, before the same could be classified as patrimonial property of the State.[45] In the case of government reclaimed and marshy lands of the public domain, the declaration of their being disposable, as well as the manner of their disposition, is governed by the applicable provisions of CA No. 141.

Like the Civil Code of 1889, the Civil Code of 1950 included as property of public dominion those properties of the State which, without being for public use, are intended for public service or the "development of the national wealth." Thus, government reclaimed and marshy lands of the State, even if not employed for public use or public service, if developed to enhance the national wealth, are classified as property of public dominion.

Dispositions under the 1973 Constitution

The 1973 Constitution, which took effect on January 17, 1973, likewise adopted the Regalian doctrine. Section 8, Article XIV of the 1973 Constitution stated that -

> Sec. 8. All lands of the public domain, waters, minerals, coal, petroleum and other mineral oils, all forces of potential energy, fisheries, wildlife, and other natural resources of the Philippines belong to the State. With the exception of agricultural, industrial or commercial, residential, and resettlement lands of the public domain, natural resources shall not be alienated, and no license, concession, or lease for the exploration, development, exploitation, or utilization

[45] Act No. 2874, Sec. 57 provides: ... but the land so granted, donated, or transferred to a province, municipality, or branch or subdivision of the Government shall not be alienated, encumbered, or otherwise disposed of in a manner affecting its title, except when authorized by the legislature; ...

> of any of the natural resources shall be granted for a period exceeding twenty-five years, renewable for not more than twenty-five years, except as to water rights for irrigation, water supply, fisheries, or industrial uses other than the development of water power, in which cases, beneficial use may be the measure and the limit of the grant.

The 1973 Constitution prohibited the alienation of all natural resources with the exception of "agricultural, industrial or commercial, residential, and resettlement lands of the public domain." In contrast, the 1935 Constitution barred the alienation of all natural resources except "public agricultural lands." However, the term "public agricultural lands" in the 1935 Constitution encompassed industrial, commercial, residential and resettlement lands of the public domain.[46] If the land of public domain were neither timber nor mineral land, it would fall under the classification of agricultural land of the public domain. **Both the 1935 and 1973 Constitutions, therefore, prohibited the alienation of all natural resources except agricultural lands of the public domain**.

The 1973 Constitution, however, limited the alienation of lands of the public domain to individuals who were citizens of the Philippines. Private corporations, even if wholly owned by Philippine citizens, were no longer allowed to acquire alienable lands of the public domain unlike in the 1935 Constitution. Section 11, Article XIV of the 1973 Constitution declared that -

> Sec. 11. The Batasang Pambansa, taking into account conservation, ecological, and development requirements of the natural resources, shall determine by law the size of land of the public domain which may be developed, held or acquired by, or leased to, any qualified individual, corporation, or association, and the conditions therefor. No private corporation or association may hold alienable lands of the public domain except by lease not to exceed one thousand hectares in area nor may any citizen hold such lands by lease in excess of five hundred hectares or acquire by purchase, homestead or grant, in excess of twenty-four hectares. No private corporation or association may hold by lease, concession, license or permit, timber or forest lands and other timber or forest resources in excess of one hundred

[46] Krivenko v. Register of Deeds, 79 Phil. 461 (1947).

> thousand hectares. However, such area may be increased by the Batasang Pambansa upon recommendation of the National Economic and Development Authority.

Thus, under the 1973 Constitution, private corporations could hold alienable lands of the public domain only through lease. Only individuals could now acquire alienable lands of the public domain, and **private corporations became absolutely barred from acquiring any kind of alienable land of the public domain**. The constitutional ban extended to all kinds of alienable lands of the public domain, while the statutory ban under CA No. 141 applied only to government reclaimed, foreshore and marshy alienable lands of the public domain.

PD No. 1084 Creating the Public Estates Authority

On February 4, 1977, then President Ferdinand Marcos issued Presidential Decree No. 1084 creating PEA, a wholly government owned and controlled corporation with a special charter. Sections 4 and 8 of PD No. 1084, vests PEA with the following purposes and powers:

> Sec. 4. Purpose. The Authority is hereby created for the following purposes:
> (a) To reclaim land, including foreshore and submerged areas, by dredging, filling or other means, or to acquire reclaimed land;
> (b) To develop, improve, acquire, administer, deal in, subdivide, dispose, lease and sell any and all kinds of lands, buildings, estates and other forms of real property, owned, managed, controlled and/or operated by the government;
> (c) To provide for, operate or administer such service as may be necessary for the efficient, economical and beneficial utilization of the above properties.
> Sec. 5. Powers and functions of the Authority. The Authority shall, in carrying out the purposes for which it is created, have the following powers and functions:
> (a) To prescribe its by-laws.
> ...
> (i) To hold lands of the public domain in excess of the area permitted to private corporations by statute.
> (j) To reclaim lands and to construct work across, or otherwise, any stream, watercourse, canal, ditch, flume ...
> ...

> (o) To perform such acts and exercise such functions as may be necessary for the attainment of the purposes and objectives herein specified.

PD No. 1084 authorizes PEA to reclaim both foreshore and submerged areas of the public domain. Foreshore areas are those covered and uncovered by the ebb and flow of the tide.[47] Submerged areas are those permanently under water regardless of the ebb and flow of the tide.[48] Foreshore and submerged areas indisputably belong to the public domain[49] and are inalienable unless reclaimed, classified as alienable lands open to disposition, and further declared no longer needed for public service.

The ban in the 1973 Constitution on private corporations from acquiring alienable lands of the public domain did not apply to PEA since it was then, and until today, a fully owned government corporation. The constitutional ban applied then, as it still applies now, only to "private corporations and associations." PD No. 1084 expressly empowers **PEA "to hold lands of the public domain**" even "in excess of the area permitted to private corporations by statute." **Thus, PEA can hold title to private lands, as well as title to lands of the public domain.**

In order for PEA to sell its reclaimed foreshore and submerged alienable lands of the public domain, there must be legislative authority empowering PEA to sell these lands. This legislative authority is necessary in view of Section 60 of CA No.141, which states -

> Sec. 60. ... but the land so granted, donated or transferred to a province, municipality, or branch or subdivision of the Government shall not be alienated, encumbered or otherwise disposed of in a manner affecting its title, except when authorized by Congress; ...

Without such legislative authority, PEA could not sell but only lease its reclaimed foreshore and submerged alienable lands of the public domain. Nevertheless, any legislative authority granted to PEA to sell its reclaimed alienable lands of the public domain would be subject

[47] Republic Real Estate Corporation v. Court of Appeals, 299 SCRA 199 (1998).
[48] Ibid.
[49] Insular Government v. Aldecoa, 19 Phil. 505 (1911); Government v. Cabangis, 53 Phil. 112 (1929).

> **to the constitutional ban on private corporations from acquiring alienable lands of the public domain. Hence, such legislative authority could only benefit private individuals.**

Set against that comprehensive historical backdrop, Justice Carpio then discussed, in **Chavez,** the Regalian Doctrine as adopted in **Sections 2 and 3, Article XII and the constitutional ban** against private corporations acquiring alienable lands of the public domain:

> ***Dispositions under the 1987 Constitution***
>
> The 1987 Constitution, like the 1935 and 1973 Constitutions before it, has adopted the Regalian doctrine. **The 1987 Constitution declares that all natural resources are "owned by the State," and except for alienable agricultural lands of the public domain, natural resources cannot be alienated (as provided in Sections 2 and 3, Article XII) …**
>
> The 1987 Constitution continues the State policy in the 1973 Constitution **banning private corporations from acquiring any kind of alienable land of the public domain**. Like the 1973 Constitution, the 1987 Constitution **allows private corporations to hold alienable lands of the public domain only through lease**. As in the 1935 and 1973 Constitutions, the general law governing the lease to private corporations of reclaimed, foreshore and marshy alienable lands of the public domain is still CA No. 141.
>
> ***The Rationale behind the Constitutional Ban***
>
> The rationale behind the constitutional ban on corporations from acquiring, except through lease, alienable lands of the public domain is not well understood. During the deliberations of the 1986 Constitutional Commission, the commissioners probed the rationale behind this ban, thus:
>
> > FR. BERNAS: Mr. Vice-President, my questions have reference to page 3, line 5 which says:
> > "No private corporation or association may hold alienable lands of the public domain except by lease, not to exceed one thousand hectares in area."
> > If we recall, this provision did not exist under the 1935 Constitution, but this was introduced in the 1973 Constitution. In effect, it prohibits private corporations from

> acquiring alienable public lands. But it has not been very clear in jurisprudence what the reason for this is. In some of the cases decided in 1982 and 1983, it was indicated that the purpose of this is to prevent large landholdings. Is that the intent of this provision?
> MR. VILLEGAS: I think that is the spirit of the provision.
> FR. BERNAS: In existing decisions involving the Iglesia ni Cristo, there were instances where the Iglesia ni Cristo was not allowed to acquire a mere 313-square meter land where a chapel stood because the Supreme Court said it would be in violation of this.

In *Ayog v. Cusi*,[50] the Court explained the rationale behind this constitutional ban in this way:

> Indeed, one purpose of the constitutional prohibition against purchases of public agricultural lands by private corporations is to equitably diffuse land ownership or to encourage 'owner-cultivatorship and the economic family-size farm' and to prevent a recurrence of cases like the instant case. Huge landholdings by corporations or private persons had spawned social unrest.

However, if the constitutional intent is to prevent huge landholdings, the Constitution could have simply limited the size of alienable lands of the public domain that corporations could acquire. The Constitution could have followed the limitations on individuals, who could acquire not more than 24 hectares of alienable lands of the public domain under the 1973 Constitution, and not more than 12 hectares under the 1987 Constitution.

If the constitutional intent is to encourage economic family-size farms, placing the land in the name of a corporation would be more effective in preventing the break-up of farmlands. If the farmland is registered in the name of a corporation, upon the death of the owner, his heirs would inherit shares in the corporation instead of subdivided parcels of the farmland. This would prevent the continuing break-up of farmlands into smaller and smaller plots from one generation to the next.

In actual practice, the constitutional ban strengthens the constitutional limitation on individuals from acquiring more than the allowed area of alienable lands

[50] 118 SCRA 492 (1982).

> **of the public domain. Without the constitutional ban, individuals who already acquired the maximum area of alienable lands of the public domain could easily set up corporations to acquire more alienable public lands. An individual could own as many corporations as his means would allow him. An individual could even hide his ownership of a corporation by putting his nominees as stockholders of the corporation. The corporation is a convenient vehicle to circumvent the constitutional limitation on acquisition by individuals of alienable lands of the public domain.**
>
> **The constitutional intent, under the 1973 and 1987 Constitutions, is to transfer ownership of only a limited area of alienable land of the public domain to a qualified individual. This constitutional intent is safeguarded by the provision prohibiting corporations from acquiring alienable lands of the public domain, since the vehicle to circumvent the constitutional intent is removed. The available alienable public lands are gradually decreasing in the face of an ever-growing population. The most effective way to insure faithful adherence to this constitutional intent is to grant or sell alienable lands of the public domain only to individuals. This, it would seem, is the practical benefit arising from the constitutional ban.**

Based on the foregoing, the Court, speaking through Justice Carpio, then ruled on the threshold issue of **Chavez**:

> The threshold issue is whether AMARI, a private corporation, can acquire and own under the Amended JVA 367.5 hectares of reclaimed foreshore and submerged areas in Manila Bay in view of Sections 2 and 3, Article XII of the 1987 Constitution…
>
> ***Classification of Reclaimed Foreshore and Submerged Areas***
>
> PEA readily concedes that lands reclaimed from foreshore or submerged areas of Manila Bay are alienable or disposable lands of the public domain. In its Memorandum, PEA admits that -
>
> > Under the Public Land Act (CA 141, as amended), reclaimed lands are classified as alienable and disposable lands of the public domain:

> Sec. 59. The lands disposable under this title shall be classified as follows:
> (a) Lands reclaimed by the government by dredging, filling, or other means; ...

Likewise, the Legal Task Force constituted under Presidential Administrative Order No. 365 admitted in its Report and Recommendation to then President Fidel V. Ramos, "[R]eclaimed lands are classified as alienable and disposable lands of the public domain." The Legal Task Force concluded that -

> D. Conclusion
> Reclaimed lands are lands of the public domain. However, by statutory authority, the rights of ownership and disposition over reclaimed lands have been transferred to PEA, by virtue of which PEA, as owner, may validly convey the same to any qualified person without violating the Constitution or any statute.
> The constitutional provision prohibiting private corporations from holding public land, except by lease (Sec. 3, Art. [XII], 1987 Constitution), does not apply to reclaimed lands whose ownership has passed on to PEA by statutory grant.

Under Section 2, Article XII of the 1987 Constitution, the foreshore and submerged areas of Manila Bay are part of the "lands of the public domain, waters ... and other natural resources" and consequently "owned by the State." As such, foreshore and submerged areas "shall not be alienated," unless they are classified as "agricultural lands" of the public domain. The mere reclamation of these areas by PEA does not convert these inalienable natural resources of the State into alienable or disposable lands of the public domain. There must be a law or presidential proclamation officially classifying these reclaimed lands as alienable or disposable and open to disposition or concession. Moreover, these reclaimed lands cannot be classified as alienable or disposable if the law has reserved them for some public or quasi-public use.

Section 8 of CA No. 141 provides that "only those lands shall be declared open to disposition or concession which have been officially delimited and classified." The President has the authority to classify inalienable lands of the public domain into alienable or disposable lands of the public domain, pursuant to

Section 6 of CA No. 141. In *Laurel v. Garcia*,[73] the Executive Department attempted to sell the Roppongi property in Tokyo, Japan, which was acquired by the Philippine Government for use as the Chancery of the Philippine Embassy. Although the Chancery had transferred to another location thirteen years earlier, the Court still ruled that, under Article 422[51] of the Civil Code, **a property of public dominion retains such character until formally declared otherwise**. The Court ruled that -

> The fact that the Roppongi site has not been used for a long time for actual Embassy service does not automatically convert it to patrimonial property. Any such conversion happens only if the property is withdrawn from public use (*Cebu Oxygen and Acetylene Co. v. Bercilles*, 66 SCRA 481 [1975]. A property continues to be part of the public domain, not available for private appropriation or ownership 'until there is a formal declaration on the part of the government to withdraw it from being such' (*Ignacio v. Director of Lands*, 108 Phil. 335 [1960].

PD No. 1085, issued on February 4, 1977, authorized the issuance of special land patents for lands reclaimed by PEA from the foreshore or submerged areas of Manila Bay. On January 19, 1988 then President Corazon C. Aquino issued Special Patent No. 3517 in the name of PEA for the 157.84 hectares comprising the partially reclaimed Freedom Islands. Subsequently, on April 9, 1999 the Register of Deeds of the Municipality of Paranaque issued TCT Nos. 7309, 7311 and 7312 in the name of PEA pursuant to Section 103 of PD No. 1529 authorizing the issuance of certificates of title corresponding to land patents. To this day, these certificates of title are still in the name of PEA.

PD No. 1085, coupled with President Aquino's **actual issuance** of a special patent covering the Freedom Islands, is equivalent to an official proclamation classifying the Freedom Islands as alienable or disposable lands of the public domain. PD No. 1085 and President Aquino's issuance of a land patent also constitute a declaration that the Freedom Islands are no longer needed for public service. **The Freedom Islands are thus alienable or disposable lands of the public domain,**

[51] Civil Code, Art. 422 states: Property of public dominion, when no longer needed for public use or public service, shall form part of the patrimonial property of the State.

open to disposition or concession to qualified parties.

At the time then President Aquino issued Special Patent No. 3517, PEA had already reclaimed the Freedom Islands although subsequently there were partial erosions on some areas. The government had also completed the necessary surveys on these islands. **Thus, the Freedom Islands were no longer part of Manila Bay but part of the land mass. Section 3, Article XII of the 1987 Constitution classifies lands of the public domain into "agricultural, forest or timber, mineral lands, and national parks." Being neither timber, mineral, nor national park lands, the reclaimed Freedom Islands necessarily fall under the classification of agricultural lands of the public domain. Under the 1987 Constitution, agricultural lands of the public domain are the only natural resources that the State may alienate to qualified private parties. All other natural resources, such as the seas or bays, are "waters ... owned by the State" forming part of the public domain, and are inalienable pursuant to Section 2, Article XII of the 1987 Constitution.**

AMARI claims that the Freedom Islands are private lands because CDCP, then a private corporation, reclaimed the islands under a contract dated November 20, 1973 with the Commissioner of Public Highways. AMARI, citing Article 5 of the Spanish Law of Waters of 1866, argues that "if the ownership of reclaimed lands may be given to the party constructing the works, then it cannot be said that reclaimed lands are lands of the public domain which the State may not alienate." Article 5 of the Spanish Law of Waters reads as follows:

> Art. 5. Lands reclaimed from the sea in consequence of works constructed by the State, or by the provinces, pueblos or private persons, with proper permission, shall become the property of the party constructing such works, unless otherwise provided by the terms of the grant of authority.

Under Article 5 of the Spanish Law of Waters of 1866, private parties could reclaim from the sea only with "proper permission" from the State. Private parties could own the reclaimed land only if not "otherwise provided by the terms of the grant of authority." This clearly meant that no one could reclaim from the sea without permission from the State because the sea is property of public dominion. It also meant that the State could

grant or withhold ownership of the reclaimed land because any reclaimed land, like the sea from which it emerged, belonged to the State. Thus, a private person reclaiming from the sea without permission from the State could not acquire ownership of the reclaimed land which would remain property of public dominion like the sea it replaced.[52] Article 5 of the Spanish Law of Waters of 1866 adopted the time-honored principle of land ownership that "all lands that were not acquired from the government, either by purchase or by grant, belong to the public domain."[53]

Article 5 of the Spanish Law of Waters must be read together with laws subsequently enacted on the disposition of public lands. In particular, CA No. 141 requires that lands of the public domain must first be classified as alienable or disposable before the government can alienate them. These lands must not be reserved for public or quasi-public purposes.[54] Moreover, the contract between CDCP and the government was executed after the effectivity of the 1973 Constitution which barred private corporations from acquiring any kind of alienable land of the public domain. This contract could not have converted the Freedom Islands into private lands of a private corporation.

Presidential Decree No. 3-A, issued on January 11, 1973, revoked all laws authorizing the reclamation of areas under water and revested solely in the National Government the power to reclaim lands. Section 1 of PD No. 3-A declared that -

> The provisions of any law to the contrary notwithstanding, the reclamation of areas under water, whether foreshore or inland, shall be limited to the National Government or any person authorized by it under a proper contract …

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[52] Dizon v. Rodriguez, 13 SCRA 705 (1965); Republic v. Lat Vda. de Castillo, 163 SCRA 286 (1988).

[53] Cariño v. Insular Government, 41 Phil. 935 (1909).

[54] Proclamation No. 41, issued by President Ramon Magsaysay on July 5, 1954, reserved for "National Park purposes" 464.66 hectares of the public domain in Manila Bay "situated in the cities of Manila and Pasay and the municipality of Paranaque, Province of Rizal, Island of Luzon," which area, as described in detail in the Proclamation, is "Bounded on the North, by Manila Bay; on the East, by Dewey Boulevard; and on the south and west, by Manila Bay." See concurring opinion of Justice Reynato S. Puno in Republic Real Estate Corporation v. Court of Appeals, 299 SCRA 1999 (1998). Under Secs. 2 and 3, Art. XII of the 1987 Constitution, "national parks" are inalienable natural resources of the State.

PD No. 3-A repealed Section 5 of the Spanish Law of Waters of 1866 because reclamation of areas under water could now be undertaken only by the National Government or by a person contracted by the National Government. Private parties may reclaim from the sea only under a contract with the National Government, and no longer by grant or permission as provided in Section 5 of the Spanish Law of Waters of 1866.

Executive Order No. 525, issued on February 14, 1979, designated PEA as the National Government's implementing arm to undertake "all reclamation projects of the government," which "shall be undertaken by the PEA or through a proper contract executed by it with any person or entity." Under such contract, a private party receives compensation for reclamation services rendered to PEA. Payment to the contractor may be in cash, or in kind consisting of portions of the reclaimed land, subject to the constitutional ban on private corporations from acquiring alienable lands of the public domain. The reclaimed land can be used as payment in kind only if the reclaimed land is first classified as alienable or disposable land open to disposition, and then declared no longer needed for public service.

The Amended JVA covers not only the Freedom Islands, but also an additional 592.15 hectares which are still submerged and forming part of Manila Bay. There is no legislative or Presidential act classifying these submerged areas as alienable or disposable lands of the public domain open to disposition. **These submerged areas are not covered by any patent or certificate of title. There can be no dispute that these submerged areas form part of the public domain, and in their present state are inalienable and outside the commerce of man. Until reclaimed from the sea, these submerged areas are, under the Constitution, "waters ... owned by the State," forming part of the public domain and consequently inalienable. Only when actually reclaimed from the sea can these submerged areas be classified as public agricultural lands, which under the Constitution are the only natural resources that the State may alienate. Once reclaimed and transformed into public agricultural lands, the government may then officially classify these lands as alienable or disposable lands open to disposition. Thereafter, the government may declare these lands no longer needed for public service. Only then can these reclaimed lands**

be considered alienable or disposable lands of the public domain and within the commerce of man.

The classification of PEA's reclaimed foreshore and submerged lands into alienable or disposable lands open to disposition is necessary because PEA is tasked under its charter to undertake public services that require the use of lands of the public domain. Under Section 5 of PD No. 1084, the functions of PEA include the following: "[T]o own or operate railroads, tramways and other kinds of land transportation, ...; [T]o construct, maintain and operate such systems of sanitary sewers as may be necessary; [T]o construct, maintain and operate such storm drains as may be necessary." PEA is empowered to issue "rules and regulations as may be necessary for the proper use by private parties of any or all of the highways, roads, utilities, buildings and/or any of its properties and to impose or collect fees or tolls for their use." Thus, part of the reclaimed foreshore and submerged lands held by the PEA would actually be needed for public use or service since many of the functions imposed on PEA by its charter constitute essential public services.

Moreover, Section 1 of Executive Order No. 525 provides that PEA "shall be primarily responsible for integrating, directing, and coordinating all reclamation projects for and on behalf of the National Government." The same section also states that "[A]ll reclamation projects shall be approved by the President upon recommendation of the PEA, and shall be undertaken by the PEA or through a proper contract executed by it with any person or entity; ..." Thus, under EO No. 525, in relation to PD No. 3-A and PD No.1084, PEA became the primary implementing agency of the National Government to reclaim foreshore and submerged lands of the public domain. EO No. 525 recognized PEA as the government entity "to undertake the reclamation of lands and ensure their maximum utilization in promoting public welfare and interests." Since large portions of these reclaimed lands would obviously be needed for public service, there must be a formal declaration segregating reclaimed lands no longer needed for public service from those still needed for public service.

Section 3 of EO No. 525, by declaring that all lands reclaimed by PEA "shall belong to or be owned by the PEA," could not automatically operate to classify inalienable lands into alienable or disposable lands of the public domain. Otherwise, reclaimed foreshore and submerged lands of the public domain

would automatically become alienable once reclaimed by PEA, whether or not classified as alienable or disposable.

The Revised Administrative Code of 1987, a later law than either PD No. 1084 or EO No. 525, vests in the Department of Environment and Natural Resources (DENR) the following powers and functions:

> Sec. 4. Powers and Functions. The Department shall:
> ...
> (4) Exercise supervision and control over forest lands, alienable and disposable public lands, mineral resources and, in the process of exercising such control, impose appropriate taxes, fees, charges, rentals and any such form of levy and collect such revenues for the exploration, development, utilization or gathering of such resources;
> ...
> (14) Promulgate rules, regulations and guidelines on the issuance of licenses, permits, concessions, lease agreements and such other privileges concerning the development, exploration and utilization of the country's marine, freshwater, and brackish water and over all aquatic resources of the country and shall continue to oversee, supervise and police our natural resources; cancel or cause to cancel such privileges upon failure, non-compliance or violations of any regulation, order, and for all other causes which are in furtherance of the conservation of natural resources and supportive of the national interest;
> (15) Exercise exclusive jurisdiction on the management and disposition of all lands of the public domain and serve as the sole agency responsible for classification, sub-classification, surveying and titling of lands in consultation with appropriate agencies.

As manager, conservator and overseer of the natural resources of the State, DENR exercises "supervision and control over alienable and disposable public lands." DENR also exercises "exclusive jurisdiction on the management and disposition of all lands of the public domain." Thus, DENR decides whether areas under water, like foreshore or submerged areas of Manila Bay, should be reclaimed or not. This means that PEA needs authorization from DENR before PEA can undertake reclamation projects in Manila Bay, or in any part of the country.

DENR also exercises exclusive jurisdiction over the disposition of all lands of the public domain. Hence, DENR decides whether reclaimed lands of PEA should be classified as alienable under Sections 6[55] and 7[56] of CA No. 141. Once DENR decides that the reclaimed lands should be so classified, it then recommends to the President the issuance of a proclamation classifying the lands as alienable or disposable lands of the public domain open to disposition. We note that then DENR Secretary Fulgencio S. Factoran, Jr. countersigned Special Patent No. 3517 in compliance with the Revised Administrative Code and Sections 6 and 7 of CA No. 141.

In short, DENR is vested with the power to authorize the reclamation of areas under water, while PEA is vested with the power to undertake the physical reclamation of areas under water, whether directly or through private contractors. DENR is also empowered to classify lands of the public domain into alienable or disposable lands subject to the approval of the President. On the other hand, PEA is tasked to develop, sell or lease the reclaimed alienable lands of the public domain.

Clearly, the mere physical act of reclamation by PEA of foreshore or submerged areas does not make the reclaimed lands alienable or disposable lands of the public domain, much less patrimonial lands of PEA. Likewise, the mere transfer by the National Government of lands of the public domain to PEA does not make the lands alienable or disposable lands of the public domain, much less patrimonial lands of PEA.

Absent two official acts - a classification that these lands are alienable or disposable and open to disposition and a declaration that these lands are not needed for public service, lands reclaimed by PEA remain inalienable lands of the public domain. Only such an official classification and formal declaration can convert reclaimed lands into alienable or disposable lands of the public domain, open to disposition under the Constitution, Title I and Title

[55] CA No 141, Sec. 6 provides: The President, upon the recommendation of the Secretary of Agriculture and Commerce, shall from time to time classify the lands of the public domain into - (a) Alienable or disposable, ...

[56] CA No. 141, Sec. 7 provides: For purposes of the administration and disposition of alienable or disposable public lands, the President, upon recommendation by the Secretary of Agriculture and Commerce, shall from time to time declare what lands are open to disposition or concession under this Act.

III[57] of CA No. 141 and other applicable laws.

PEA's Authority to Sell Reclaimed Lands

PEA, like the Legal Task Force, argues that as alienable or disposable lands of the public domain, the reclaimed lands shall be disposed of in accordance with CA No. 141, the Public Land Act. PEA, citing Section 60 of CA No. 141, admits that reclaimed lands transferred to a branch or subdivision of the government "shall not be alienated, encumbered, or otherwise disposed of in a manner affecting its title, except when authorized by Congress: ..."

In *Laurel v. Garcia*,[58] the Court cited Section 48 of the Revised Administrative Code of 1987, which states that -

> Sec. 48. Official Authorized to Convey Real Property. Whenever real property of the Government **is** authorized by law to be conveyed, the deed of conveyance shall be executed in behalf of the government by the following: ...

Thus, the Court concluded that a law is needed to convey any real property belonging to the Government. The Court declared that -

> It is not for the President to convey real property of the government on his or her own sole will. Any such conveyance must be authorized and approved by a law enacted by the Congress. It requires executive and legislative concurrence.

PEA contends that PD No. 1085 and EO No. 525 constitute the legislative authority allowing PEA to sell its reclaimed lands. PD No. 1085, issued on February 4, 1977, provides that -

> The land reclaimed in the foreshore and offshore area of Manila Bay pursuant to the contract for the reclamation and construction of the Manila-Cavite Coastal Road Project between the Republic of the Philippines and the Construction and Development Corporation of the Philippines dated November 20, 1973 and/or any other contract or reclamation covering the same area is hereby transferred, conveyed and assigned to the ownership and administration of the

[57] On Lands For Residential, Commercial, Or Industrial And Other Similar Purposes.
[58] 187 SCRA 797 (1990).

> Public Estates Authority established pursuant to PD No. 1084; Provided, however, That the rights and interests of the Construction and Development Corporation of the Philippines pursuant to the aforesaid contract shall be recognized and respected.
> Henceforth, the Public Estates Authority shall exercise the rights and assume the obligations of the Republic of the Philippines (Department of Public Highways) arising from, or incident to, the aforesaid contract between the Republic of the Philippines and the Construction and Development Corporation of the Philippines.
> In consideration of the foregoing transfer and assignment, the Public Estates Authority shall issue in favor of the Republic of the Philippines the corresponding shares of stock in said entity with an issued value of said shares of stock (which) shall be deemed fully paid and non-assessable.
> The Secretary of Public Highways and the General Manager of the Public Estates Authority shall execute such contracts or agreements, including appropriate agreements with the Construction and Development Corporation of the Philippines, as may be necessary to implement the above.
> Special land patent/patents shall be issued by the Secretary of Natural Resources in favor of the Public Estates Authority without prejudice to the subsequent transfer to the contractor or his assignees of such portion or portions of the land reclaimed or to be reclaimed as provided for in the above-mentioned contract. On the basis of such patents, the Land Registration Commission shall issue the corresponding certificate of title.

On the other hand, Section 3 of EO No. 525, issued on February 14, 1979, provides that -

> Sec. 3. All lands reclaimed by PEA shall belong to or be owned by the PEA which shall be responsible for its administration, development, utilization or disposition in accordance with the provisions of Presidential Decree No. 1084. Any and all income that the PEA may derive from the sale, lease or use of reclaimed lands shall be used in accordance with the provisions of Presidential Decree No. 1084.

There is no express authority under either PD No. 1085 or EO No. 525 for PEA to sell its reclaimed lands. PD No. 1085 merely transferred "ownership and administration" of lands reclaimed

from Manila Bay to PEA, while EO No. 525 declared that lands reclaimed by PEA "shall belong to or be owned by PEA." EO No. 525 expressly states that PEA should dispose of its reclaimed lands "in accordance with the provisions of Presidential Decree No. 1084," the charter of PEA.

PEA's charter, however, expressly tasks PEA "to develop, improve, acquire, administer, deal in, subdivide, dispose, lease and sell any and all kinds of lands ... owned, managed, controlled and/or operated by the government."[59] **There is, therefore, legislative authority granted to PEA to sell its lands, whether patrimonial or alienable lands of the public domain**. **PEA may sell to private parties its patrimonial properties in accordance with the PEA charter free from constitutional limitations. The constitutional ban on private corporations from acquiring alienable lands of the public domain does not apply to the sale of PEA's patrimonial lands.**

PEA may also sell its alienable or disposable lands of the public domain to private individuals since, with the legislative authority, there is no longer any statutory prohibition against such sales and the constitutional ban does not apply to individuals. PEA, however, cannot sell any of its alienable or disposable lands of the public domain to private corporations since Section 3, Article XII of the 1987 Constitution expressly prohibits such sales. The legislative authority benefits only individuals. Private corporations remain barred from acquiring any kind of alienable land of the public domain, including government reclaimed lands.

The provision in PD No. 1085 stating that portions of the reclaimed lands could be transferred by PEA to the "contractor or his assignees" would not apply to private corporations but only to individuals because of the constitutional ban. Otherwise, the provisions of PD No. 1085 would violate both the 1973 and 1987 Constitutions.

The Requirement of Public Auction in the Sale of Reclaimed Lands

Assuming the reclaimed lands of PEA are classified as alienable or disposable lands open to disposition, and further declared no

[59] PD No. 1084, Sec. 4(b).

longer needed for public service, PEA would have to conduct a public bidding in selling or leasing these lands. PEA must observe the provisions of Sections 63 and 67 of CA No. 141 requiring public auction, in the absence of a law exempting PEA from holding a public auction.[60] Special Patent No. 3517 expressly states that the patent is issued by authority of the Constitution and PD No. 1084, "supplemented by Commonwealth Act No. 141, as amended." This is an acknowledgment that the provisions of CA No. 141 apply to the disposition of reclaimed alienable lands of the public domain unless otherwise provided by law. Executive Order No. 654,[61] which authorizes PEA "to determine the kind and manner of payment for the transfer" of its assets and properties, does not exempt PEA from the requirement of public auction. EO No. 654 merely authorizes PEA to decide the mode of payment, whether in kind and in installment, but does not authorize PEA to dispense with public auction.

Moreover, under Section 79 of PD No. 1445, otherwise known as the Government Auditing Code, the government is required to sell valuable government property through public bidding. Section 79 of PD No. 1445 mandates that -

> Sec. 79. When government property has become unserviceable for any cause, or is no longer needed, it shall, upon application of the officer accountable therefore, be inspected by the head of the agency or his duly authorized representative in the presence of the auditor concerned and, if found to be valueless or unsaleable, it may be destroyed in their presence. If found to be valuable, it may be sold at public auction to the highest bidder under the supervision of the proper committee on award or similar body in the presence of the auditor concerned or other authorized representative of the Commission, after advertising by printed notice in the Official Gazette, or for not less than three consecutive days in any newspaper of general circulation, or where the value of the property does not warrant the expense of publication, by notices posted for a like period in at least three public places in the locality where the property is to be sold. In the event that the public auction fails, the property may be sold at a private sale at such price as may be fixed by the same committee or body concerned and approved by the Commission.

[60] RA No. 730 allows the private sale of home lots to actual occupants of public lands. See Insular Government v. Aldecoa, 19 Phil. 505 (1911); Government v. Cabangis, 53 Phil. 112 (1929).

[61] Issued on February 26, 1981.

It is only when the public auction fails that a negotiated sale is allowed, in which case the Commission on Audit must approve the selling price. The Commission on Audit implements Section 79 of the Government Auditing Code through Circular No. 89-296[62] dated January 27, 1989. This circular emphasizes that government assets must be disposed of only through public auction, and a negotiated sale can be resorted to only in case of "failure of public auction."

At the public auction sale, only Philippine citizens are qualified to bid for PEA's reclaimed foreshore and submerged alienable lands of the public domain. Private corporations are barred from bidding at the auction sale of any kind of alienable land of the public domain.

PEA originally scheduled a public bidding for the Freedom Islands on December 10, 1991. PEA imposed a condition that the winning bidder should reclaim another 250 hectares of submerged areas to regularize the shape of the Freedom Islands, under a 60-40 sharing of the additional reclaimed areas in favor of the winning bidder. No one, however, submitted a bid. On December 23, 1994, the Government Corporate Counsel advised PEA it could sell the Freedom Islands through negotiation, without need of another public bidding, because of the failure of the public bidding on December 10, 1991.

However, the original JVA dated April 25, 1995 covered not only the Freedom Islands and the additional 250 hectares still to be reclaimed, it also granted an option to AMARI to reclaim another 350 hectares. The original JVA, a negotiated contract, enlarged the reclamation area to 750 hectares. The failure of public bidding on December 10, 1991, involving only 407.84 hectares, is not a valid justification for a negotiated sale of 750 hectares, almost double the area publicly auctioned. Besides, the failure of public bidding happened on December 10, 1991, more than three years before the signing of the original JVA on April 25, 1995. The economic situation in the country had greatly improved during the intervening period.

[62] Paragraph 2 (a) of COA Circular No. 89-296, on "Sale Thru Negotiation," states that disposal through negotiated sale may be resorted to if "[T]here was a failure of public auction."

Reclamation under the BOT Law and the Local Government Code

The constitutional prohibition in Section 3, Article XII of the 1987 Constitution is absolute and clear: "Private corporations or associations may not hold such alienable lands of the public domain except by lease, ..." Even Republic Act No. 6957 (BOT Law), cited by PEA and AMARI as legislative authority to sell reclaimed lands to private parties, recognizes the constitutional ban. Section 6 of RA No. 6957 states -

> Sec. 6. Repayment Scheme. - For the financing, construction, operation and maintenance of any infrastructure projects undertaken through the build-operate-and-transfer arrangement or any of its variations pursuant to the provisions of this Act, the project proponent ... may likewise be repaid in the form of a share in the revenue of the project or other non-monetary payments, such as, but not limited to, the grant of a portion or percentage of the reclaimed land, subject to the constitutional requirements with respect to the ownership of the land: ...

A private corporation, even one that undertakes the physical reclamation of a government BOT project, cannot acquire reclaimed alienable lands of the public domain in view of the constitutional ban.

Section 302 of the Local Government Code, also mentioned by PEA and AMARI, authorizes local governments in land reclamation projects to pay the contractor or developer in kind consisting of a percentage of the reclaimed land, to wit:

> Sec. 302. Financing, Construction, Maintenance, Operation, and Management of Infrastructure Projects by the Private Sector. ...
> ...
> In case of land reclamation or construction of industrial estates, the repayment plan may consist of the grant of a portion or percentage of the reclaimed land or the industrial estate constructed.

Although Section 302 of the Local Government Code does not contain a proviso similar to that of the BOT Law, the constitutional restrictions on land ownership automatically

apply even though not expressly mentioned in the Local Government Code.

Thus, under either the BOT Law or the Local Government Code, the contractor or developer, if a corporate entity, can only be paid with leaseholds on portions of the reclaimed land. If the contractor or developer is an individual, portions of the reclaimed land, not exceeding 12 hectares[63] of non-agricultural lands, may be conveyed to him in ownership in view of the legislative authority allowing such conveyance. This is the only way these provisions of the BOT Law and the Local Government Code can avoid a direct collision with Section 3, Article XII of the 1987 Constitution.

Registration of Lands of the Public Domain

Finally, PEA theorizes that the "act of conveying the ownership of the reclaimed lands to public respondent PEA transformed such lands of the public domain to private lands." This theory is echoed by AMARI which maintains that the "issuance of the special patent leading to the eventual issuance of title takes the subject land away from the land of public domain and converts the property into patrimonial or private property." In short, PEA and AMARI contend that with the issuance of Special Patent No. 3517 and the corresponding certificates of titles, the 157.84 hectares comprising the Freedom Islands have become private lands of PEA. In support of their theory, PEA and AMARI cite the following rulings of the Court:

1. *Sumail v. Judge of CFI of Cotabato*,[64] where the Court held -

"Once the patent was granted and the corresponding certificate of title was issued, the land ceased to be part of the public domain and became private property over which the Director of Lands has neither control nor jurisdiction."

2. *Lee Hong Hok v. David*,[65] where the Court declared -

"After the registration and issuance of the certificate and duplicate certificate of title based on a public land patent, the land covered thereby automatically comes under the operation

[63] Const., Art. XII, Sec. 3 …, however, RA No. 6657, Sec. 6 of (Comprehensive Agrarian Reform Law) limits the ownership of "public or private agricultural land" to a maximum of five hectares per person.

[64] 96 Phil. 946 (1955).

[65] 48 SCRA 372 (1977).

of Republic Act 496 subject to all the safeguards provided therein."

3. *Heirs of Gregorio Tengco v. Heirs of Jose Aliwalas*,[66] where the Court ruled -
"While the Director of Lands has the power to review homestead patents, he may do so only so long as the land remains part of the public domain and continues to be under his exclusive control; but once the patent is registered and a certificate of title is issued, the land ceases to be part of the public domain and becomes private property over which the Director of Lands has neither control nor jurisdiction."

4. *Manalo v. Intermediate Appellate Court*,[67] where the Court held -
"When the lots in dispute were certified as disposable on May 19, 1971, and free patents were issued covering the same in favor of the private respondents, the said lots ceased to be part of the public domain and, therefore, the Director of Lands lost jurisdiction over the same."

5. *Republic v. Court of Appeals*,[68] where the Court stated -
"Proclamation No. 350, dated October 9, 1956, of President Magsaysay legally effected a land grant to the Mindanao Medical Center, Bureau of Medical Services, Department of Health, of the whole lot, validly sufficient for initial registration under the Land Registration Act. Such land grant is constitutive of a 'fee simple' title or absolute title in favor of petitioner Mindanao Medical Center. Thus, Section 122 of the Act, which governs the registration of grants or patents involving public lands, provides that 'Whenever public lands in the Philippine Islands belonging to the Government of the United States or to the Government of the Philippines are alienated, granted or conveyed to persons or to public or private corporations, the same shall be brought forthwith under the operation of this Act (Land Registration Act, Act 496) and shall become registered lands.'"

The first four cases cited involve petitions to cancel the land patents and the corresponding certificates of titles issued to private parties. These four cases uniformly hold that the

[66] 168 SCRA 198 (1988).
[67] 172 SCRA 795 (1989).
[68] 73 SCRA 146 (1976).

Director of Lands has no jurisdiction over private lands or that upon issuance of the certificate of title the land automatically comes under the Torrens System. The fifth case cited involves the registration under the Torrens System of a 12.8-hectare public land granted by the National Government to Mindanao Medical Center, a government unit under the Department of Health. The National Government transferred the 12.8-hectare public land to serve as the site for the hospital buildings and other facilities of Mindanao Medical Center, which performed a public service. The Court affirmed the registration of the 12.8-hectare public land in the name of Mindanao Medical Center under Section 122 of Act No. 496. This fifth case is an example of a public land being registered under Act No. 496 without the land losing its character as a property of public dominion.

In the instant case, the only patent and certificates of title issued are those in the name of PEA, a wholly government owned corporation performing public as well as proprietary functions. No patent or certificate of title has been issued to any private party. No one is asking the Director of Lands to cancel PEA's patent or certificates of title. In fact, the thrust of the instant petition is that PEA's certificates of title should remain with PEA, and the land covered by these certificates, being alienable lands of the public domain, should not be sold to a private corporation.

Registration of land under Act No. 496 or PD No. 1529 does not vest in the registrant private or public ownership of the land. Registration is not a mode of acquiring ownership but is merely evidence of ownership previously conferred by any of the recognized modes of acquiring ownership. Registration does not give the registrant a better right than what the registrant had prior to the registration.[69] The registration of lands of the public domain under the Torrens system, by itself, cannot convert public lands into private lands.[70]

Jurisprudence holding that upon the grant of the patent or issuance of the certificate of title the alienable land of the public domain automatically becomes private land cannot apply to government units and entities like PEA. The transfer of the Freedom Islands to PEA was made subject to the provisions of CA No. 141 as expressly stated in Special Patent No. 3517

[69] Avila v. Tapucar, 201 SCRA 148 (1991).

[70] Republic v. Ayala Cia, 14 SCRA 259 (1965); Dizon v. Rodriguez, 13 SCRA 705 (1965).

issued by then President Aquino, to wit:

> NOW, THEREFORE, KNOW YE, that by authority of the Constitution of the Philippines and in conformity with the provisions of Presidential Decree No. 1084, supplemented by Commonwealth Act No. 141, as amended, there are hereby granted and conveyed unto the Public Estates Authority the aforesaid tracts of land containing a total area of one million nine hundred fifteen thousand eight hundred ninety four (1,915,894) square meters; the technical description of which are hereto attached and made an integral part hereof.

Thus, the provisions of CA No. 141 apply to the Freedom Islands on matters not covered by PD No. 1084. Section 60 of CA No. 141 prohibits, "except when authorized by Congress," the sale of alienable lands of the public domain that are transferred to government units or entities. Section 60 of CA No. 141 constitutes, under Section 44 of PD No. 1529, a "statutory lien affecting title" of the registered land even if not annotated on the certificate of title.[71] Alienable lands of the public domain held by government entities under Section 60 of CA No. 141 remain public lands because they cannot be alienated or encumbered unless Congress passes a law authorizing their disposition. **Congress, however, cannot authorize the sale to private corporations of reclaimed alienable lands of the public domain because of the constitutional ban. Only individuals can benefit from such law.**

The grant of legislative authority to sell public lands in accordance with Section 60 of CA No. 141 does not automatically convert alienable lands of the public domain into private or patrimonial lands. The alienable lands of the public domain must be transferred to qualified private parties, or to government entities not tasked to dispose of public lands, before these lands can become private or patrimonial lands. Otherwise, the constitutional ban will become illusory if Congress can declare

71 PD No. 1529, Sec. 44 states: Every registered owner receiving a certificate of title in pursuance of a decree of registration, and every subsequent purchaser of registered land taking a certificate of title for value and in good faith, shall hold the same free from all encumbrances except those noted on said certificate and any of the following encumbrances which may be subsisting, namely: First. Liens, claims or rights arising or existing under the laws and Constitution of the Philippines which are not by law required to appear of record in the Registry of Deeds in order to be valid against subsequent purchasers or encumbrancers of record. ...
Under Sec. 103 of PD No. 1529, Sec. 44 applies to certificates of title issued pursuant to a land patent granted by the government.

lands of the public domain as private or patrimonial lands in the hands of a government agency tasked to dispose of public lands. This will allow private corporations to acquire directly from government agencies limitless areas of lands which, prior to such law, are concededly public lands.

Under EO No. 525, PEA became the central implementing agency of the National Government to reclaim foreshore and submerged areas of the public domain. Thus, EO No. 525 declares that -

EXECUTIVE ORDER NO. 525

> ...
> Whereas, a central authority is needed to act on behalf of the National Government which shall ensure a coordinated and integrated approach in the reclamation of lands;
> Whereas, Presidential Decree No. 1084 creates the Public Estates Authority as a government corporation to undertake reclamation of lands and ensure their maximum utilization in promoting public welfare and interests; and
> Whereas, Presidential Decree No. 1416 provides the President with continuing authority to reorganize the national government including the transfer, abolition, or merger of functions and offices.
> NOW, THEREFORE, I, FERDINAND E. MARCOS, President of the Philippines, by virtue of the powers vested in me by the Constitution and pursuant to Presidential Decree No. 1416, do hereby order and direct the following:
> Sec. 1. The Public Estates Authority (PEA) shall be primarily responsible for integrating, directing, and coordinating all reclamation projects for and on behalf of the National Government. All reclamation projects shall be approved by the President upon recommendation of the PEA, and shall be undertaken by the PEA or through a proper contract executed by it with any person or entity; Provided, that, reclamation projects of any national government agency or entity authorized under its charter shall be undertaken in consultation with the PEA upon approval of the President.
> ...

As the central implementing agency tasked to undertake reclamation projects nationwide, with authority to sell reclaimed lands, PEA took the place of DENR as the government agency charged with leasing or selling reclaimed lands of the public domain. The reclaimed lands being leased or sold by PEA are

not private lands, in the same manner that DENR, when it disposes of other alienable lands, does not dispose of private lands but alienable lands of the public domain. Only when qualified private parties acquire these lands will the lands become private lands. **In the hands of the government agency tasked and authorized to dispose of alienable of disposable lands of the public domain, these lands are still public, not private lands**.

Furthermore, PEA's charter expressly states that PEA "shall hold lands of the public domain" as well as "any and all kinds of lands." PEA can hold both lands of the public domain and private lands. Thus, the mere fact that alienable lands of the public domain like the Freedom Islands are transferred to PEA and issued land patents or certificates of title in PEA's name does not automatically make such lands private.

To allow vast areas of reclaimed lands of the public domain to be transferred to PEA as private lands will sanction a gross violation of the constitutional ban on private corporations from acquiring any kind of alienable land of the public domain. PEA will simply turn around, as PEA has now done under the Amended JVA, and transfer several hundreds of hectares of these reclaimed and still to be reclaimed lands to a single private corporation in only one transaction. This scheme will effectively nullify the constitutional ban in Section 3, Article XII of the 1987 Constitution which was intended to diffuse equitably the ownership of alienable lands of the public domain among Filipinos, now numbering over 80 million strong.

This scheme, if allowed, can even be applied to alienable agricultural lands of the public domain since PEA can "acquire ... any and all kinds of lands." **This will open the floodgates to corporations and even individuals acquiring hundreds of hectares of alienable lands of the public domain under the guise that in the hands of PEA these lands are private lands. This will result in corporations amassing huge landholdings never before seen in this country - creating the very evil that the constitutional ban was designed to prevent. This will completely reverse the clear direction of constitutional development in this country. The 1935 Constitution allowed private corporations to acquire not more than 1,024 hectares of public lands.**[72] The 1973

[72] Const. (1935), Art. XIII, Sec. 2.

Constitution prohibited private corporations from acquiring any kind of public land, and the 1987 Constitution has unequivocally reiterated this prohibition.

The contention of PEA and AMARI that public lands, once registered under Act No. 496 or PD No. 1529, automatically become private lands is contrary to existing laws. Several laws authorize lands of the public domain to be registered under the Torrens System or Act No. 496, now PD No. 1529, without losing their character as public lands. Section 122 of Act No. 496, and Section 103 of PD No. 1529, respectively, provide as follows:

> Act No. 496
> Sec. 122. Whenever public lands in the Philippine Islands belonging to the ... Government of the Philippine Islands are alienated, granted, or conveyed to persons or the public or private corporations, the same shall be brought forthwith under the operation of this Act and shall become registered lands."
> PD No. 1529
> Sec. 103. Certificate of Title to Patents. Whenever public land is by the Government alienated, granted or conveyed to any person, the same shall be brought forthwith under the operation of this Decree.

Based on its legislative history, the phrase "conveyed to any person" in Section 103 of PD No. 1529 includes conveyances of public lands to public corporations.

Alienable lands of the public domain "granted, donated, or transferred to a province, municipality, or branch or subdivision of the Government," as provided in Section 60 of CA No. 141, may be registered under the Torrens System pursuant to Section 103 of PD No. 1529. Such registration, however, is expressly subject to the condition in Section 60 of CA No. 141 that the land "shall not be alienated, encumbered or otherwise disposed of in a manner affecting its title, except when authorized by Congress." This provision refers to government reclaimed, foreshore and marshy lands of the public domain that have been titled but still cannot be alienated or encumbered unless expressly authorized by Congress. The need for legislative authority prevents the registered land of the public domain from becoming private land that can be disposed of to qualified private parties.

The Revised Administrative Code of 1987 also recognizes that lands of the public domain may be registered under the Torrens System. Section 48, Chapter 12, Book I of the Code states -

> Sec. 48. Official Authorized to Convey Real Property. Whenever real property of the Government is authorized by law to be conveyed, the deed of conveyance shall be executed in behalf of the government by the following:
> ...
> (2) For property belonging to the Republic of the Philippines, but titled in the name of any political subdivision or of any corporate agency or instrumentality, by the executive head of the agency or instrumentality.

Thus, private property purchased by the National Government for expansion of a public wharf may be titled in the name of a government corporation regulating port operations in the country. Private property purchased by the National Government for expansion of an airport may also be titled in the name of the government agency tasked to administer the airport. Private property donated to a municipality for use as a town plaza or public school site may likewise be titled in the name of the municipality.[73] All these properties become properties of the public domain, and if already registered under Act No. 496 or PD No. 1529, remain registered land. There is no requirement or provision in any existing law for the de-registration of land from the Torrens System.

Private lands taken by the Government for public use under its power of eminent domain become unquestionably part of the public domain. Nevertheless, Section 85 of PD No. 1529 authorizes the Register of Deeds to issue in the name of the National Government new certificates of title covering such expropriated lands. Section 85 of PD No. 1529 states -

> Sec. 85. Land taken by eminent domain. Whenever any registered land, or interest therein, is expropriated or taken by eminent domain, the National Government, province, city or municipality, or any other agency or instrumentality exercising such right shall file for registration in the proper Registry a certified copy of the judgment which shall state definitely by an adequate description, the particular property or interest expropriated, the number of the certificate of

[73] Harty v. Municipality of Victoria, 13 Phil. 152 (1909).

> title, and the nature of the public use. A memorandum of the right or interest taken shall be made on each certificate of title by the Register of Deeds, and where the fee simple is taken, a new certificate shall be issued in favor of the National Government, province, city, municipality, or any other agency or instrumentality exercising such right for the land so taken. The legal expenses incident to the memorandum of registration or issuance of a new certificate of title shall be for the account of the authority taking the land or interest therein.

Consequently, lands registered under Act No. 496 or PD No. 1529 are not exclusively private or patrimonial lands. Lands of the public domain may also be registered pursuant to existing laws.

AMARI makes a parting shot that the Amended JVA is not a sale to AMARI of the Freedom Islands or of the lands to be reclaimed from submerged areas of Manila Bay. In the words of AMARI, the Amended JVA "is not a sale but a joint venture with a stipulation for reimbursement of the original cost incurred by PEA for the earlier reclamation and construction works performed by the CDCP under its 1973 contract with the Republic." Whether the Amended JVA is a sale or a joint venture, the fact remains that the Amended JVA requires PEA to "cause the issuance and delivery of the certificates of title conveying AMARI's Land Share in the name of AMARI."

This stipulation still contravenes Section 3, Article XII of the 1987 Constitution which provides that private corporations "shall not hold such alienable lands of the public domain except by lease." The transfer of title and ownership to AMARI clearly means that AMARI will "hold" the reclaimed lands other than by lease. The transfer of title and ownership is a "disposition" of the reclaimed lands, a transaction considered a sale or alienation under CA No. 141,[74] the Government Auditing Code,[75] and Section 3, Article XII of the 1987 Constitution.

The conclusions of Justice Carpio in **Chavez** were definitive:

1. The 157.84 hectares of reclaimed lands comprising the

[74] CA No. 141, Sec. 10 provides: The words "alienation," "disposition," or "concession" as used in this Act, shall mean any of the methods authorized by this Act for the acquisition, lease, use, or benefit of the lands of the public domain other than timber or mineral lands.

[75] Sec. 79 of the Government Auditing Code, which requires public auction in the sale

Freedom Islands, now covered by certificates of title in the name of PEA, are alienable lands of the public domain. PEA may lease these lands to private corporations but may not sell or transfer ownership of these lands to private corporations. PEA may only sell these lands to Philippine citizens, subject to the ownership limitations in the 1987 Constitution and existing laws.

2. The 592.15 hectares of submerged areas of Manila Bay remain inalienable natural resources of the public domain until classified as alienable or disposable lands open to disposition and declared no longer needed for public service. The government can make such classification and declaration only after PEA has reclaimed these submerged areas. Only then can these lands qualify as agricultural lands of the public domain, which are the only natural resources the government can alienate. In their present state, the 592.15 hectares of submerged areas are inalienable and outside the commerce of man.

3. **Since the Amended JVA seeks to transfer to AMARI, a private corporation, ownership of 77.34 hectares of the Freedom Islands, such transfer is void for being contrary to Section 3, Article XII of the 1987 Constitution which prohibits private corporations from acquiring any kind of alienable land of the public domain.**

4. **Since the Amended JVA also seeks to transfer to AMARI ownership of 290.156 hectares of still submerged areas of Manila Bay, such transfer is void for being contrary to Section 2, Article XII of the 1987 Constitution which prohibits the alienation of natural resources other than agricultural lands of the public domain.** PEA may reclaim these submerged areas. Thereafter, the government can classify the reclaimed lands as alienable or disposable, and further declare them no longer needed for public service. Still, the transfer of such reclaimed alienable lands of the public domain to AMARI will be void in view of Section 3, Article XII

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of government assets, includes all kinds of disposal or divestment of government assets. Thus, COA Audit Circular No. 86-264 dated October 16, 1986 speaks of "guidelines (which) shall govern the general procedures on the divestment or disposal of assets of government-owned and/or controlled corporations and their subsidiaries." Likewise, COA Audit Circular No. 89-296 dated January 27, speaks of "guidelines (which) shall be observed and adhered to in the divestment or disposal of property and other assets of all government entities/instrumentalities" and that "divestment shall refer to the manner or scheme of taking away, depriving, withdrawing of an authority, power or title." These COA Circulars implement Sec. 79 of the Government Auditing Code.

of the 1987 Constitution which prohibits private corporations from acquiring any kind of alienable land of the public domain.

Clearly, the Amended JVA violates glaringly Sections 2 and 3, Article XII of the 1987 Constitution. Under Article 1409[76] of the Civil Code, contracts whose "object or purpose is contrary to law," or whose "object is outside the commerce of men," are "inexistent and void from the beginning." **The Court must perform its duty to defend and uphold the Constitution, and therefore declares the Amended JVA null and void ab initio**.

Section 4. The Congress shall, as soon as possible, determine, by law, the specific limits of forest lands and national parks, marking clearly their boundaries on the ground. Thereafter, such forest lands and national parks shall be conserved and may not be increased nor diminished, except by law. The Congress shall provide for such period as it may determine, measures to prohibit logging in endangered forests and watershed areas.

Section 5. The State, subject to the provisions of this Constitution and national development policies and programs, shall protect the rights of indigenous cultural communities to their ancestral lands to ensure their economic, social, and cultural well-being.

The Congress may provide for the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain.

Section 6. The use of property bears a social function, and all economic agents shall contribute to the common good. Individuals and private groups, including corporations, cooperatives, and similar collective organizations, shall have the right to own, establish, and operate economic enterprises, subject to the duty of the State to promote distributive justice and to intervene when the common good so demands.

ALYANSA PARA SA BAGONG PILIPINAS, INC. (ABP) v.

[76] Civil Code, Art. 1409 provides: The following contracts are inexistent and void from the beginning: (1) Those whose cause, object or purpose is contrary to law; ...; (4) Those whose object is outside the commerce of men; ...

ENERGY REGULATORY COMMISSION, G.R. No. 227670, May 3, 2019,[77] was a petition for *certiorari* and prohibition, with an application for a temporary restraining order or writ of preliminary injunction, that sought an order from the Court for the implementation by the ERC of the Competitive Selection Process (CSP) in accordance with the relevant Department of Energy Circular and ERC Resolution. Ultimately, the Court *en banc* granted the petition and mandated compliance with the CSP. Justice Carpio prefaced his *ponencia* with a reference to this **Section 6, Article XII**:

> **The outcome of this case will greatly affect, for the next two decades, all consumers of electricity in the Philippines, which include the over 95 million Filipinos living in the Philippines as well as the millions of business enterprises operating in the Philippines.**
>
> …
> **Indisputably, (citing Section 6, Article XII) the use of electricity bears a vital social function. The State, in requiring competitive public bidding in the purchase of power by distribution utilities, has exercised its constitutional "duty ... to intervene when the common good so demands."**[78]
>
> The breakdown of charges in a Manila Electric Company (Meralco) bill contains the following: Generation Charge, Transmission Charge, System Loss Charge, Distribution Charge (Meralco), Subsidies, Government Taxes, Universal Charges, FiT-All Charge (Renewable), and Other Charges. The Power Supply Agreements (PSAs) involved in the present case were executed in April 2016 and have terms that range from 20 to 21 years.

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[77] See discussion under Art. XII, Sec. 19.

[78] Another way for the State to intervene is to examine the accounts of public utilities. Administrative Code of 1987, Book V, Title I, Subtitle B, Chap. 4, Sec. 22 provides: Authority to Examine Accounts of Public Utilities. - (1) The Commission [on Audit] shall examine and audit the books, records and accounts of public utilities in connection with the fixing of rates of every nature, or in relation to the proceedings of the proper regulatory agencies, for purposes of determining franchise taxes;
(2) Any public utility refusing to allow an examination and audit of its books of accounts and pertinent records, or offering unnecessary obstruction to the examination and audit, or found guilty of concealing any material information concerning its financial status shall be subject to the penalties provided by law; and
(3) During the examination and audit, the public utility concerned shall produce all the reports, records, books of accounts and such other papers as may be required. The Commission shall have the power to examine under oath any official or employee of the said public utility.

> Section 43 of Republic Act No. 9136, or the Electric Power Industry Reform Act of 2001 (EPIRA), includes a description, in broad strokes, of the functions of the Energy Regulatory Commission (ERC): "The ERC shall promote competition, encourage market development, ensure customer choice and discourage/penalize abuse of market power in the restructured electricity industry." Moreover, Section 2 of the EPIRA declares it a state policy to "ensure the ... affordability of the supply of electric power." Further, Section 45 of the EPIRA mandates the ERC to enforce safeguards to "promote true market competition and prevent harmful monopoly and market power abuse." If the ERC violates its statutory functions, this Court, as mandated by Section 1, Article VIII of the 1987 Constitution, has the duty to strike down the acts of ERC whenever these are performed with grave abuse of discretion amounting to lack or excess of jurisdiction.

Section 7. Save in cases of hereditary succession, no private lands shall be transferred or conveyed except to individuals, corporations, or associations qualified to acquire or hold lands of the public domain.

In **STRATEGIC ALLIANCE DEVELOPMENT CORPORATION v. RADSTOCK SECURITIES LIMITED**, G.R. No. 178158, December 4, 2009, 622 Phil. 431,[79] the Court *en banc* ruled that certain acts of the Board of the Philippine National Construction Corporation (PNCC) constituted evident bad faith and gross inexcusable negligence, amounting to fraud, and that the Compromise Agreement between PNCC and Radstock was "indisputably contrary to the Constitution, existing laws and public policy." In arriving at this ruling, Justice Carpio had occasion to discuss the extent of **Section 7 of this Article XII, in relation to Section 3:**

> **Radstock is not qualified to own land in the Philippines.**
>
> Radstock is a private corporation incorporated in the British Virgin Islands. Its office address is at Suite 14021 Duddell Street, Central Hongkong. **As a foreign corporation, with unknown owners whose nationalities are also unknown, Radstock is not qualified to own land in the Philippines pursuant to Section 7, in relation to Section 3, Article**

[79] See discussion under Art. VI, Sec. 29.

XII of the Constitution…

The OGCC admits that Radstock cannot own lands in the Philippines. However, the OGCC claims that Radstock can own the rights to ownership of lands in the Philippines, thus:

> ASSOCIATE JUSTICE CARPIO: Under the law, a foreigner cannot own land, correct?
> ATTY. AGRA: Yes, Your Honor.
> ASSOCIATE JUSTICE CARPIO: Can a foreigner who ... cannot own land assign the right of ownership to the land?
> ATTY. AGRA: Again, Your Honor, at that particular time, it will be PNCC, not through Radstock, that chain of events should be, there's a qualified nominee (interrupted)
> ASSOCIATE JUSTICE CARPIO: Yes, ... you said, Radstock will assign the right of ownership to the qualified assignee[.] So my question is, can a foreigner own the right to ownership of a land when it cannot own the land itself?
> ATTY. AGRA: The foreigner cannot own the land, Your Honor.
> ASSOCIATE JUSTICE CARPIO: But you are saying it can own the right of ownership to the land, because you are saying, the right of ownership will be assigned by Radstock.
> ATTY. AGRA: The rights over the properties, Your Honors, if there's a valid assignment made to a qualified party, then the assignment will be made.
> ASSOCIATE JUSTICE CARPIO: Who makes the assignment?
> ATTY. AGRA: It will be Radstock, Your Honor.
> ASSOCIATE JUSTICE CARPIO: So, if Radstock makes the assignment, it must own its rights, otherwise, it cannot assign it, correct?
> ATTY. AGRA: Pursuant to the compromise agreement, once approved, yes, Your Honors.
> ASSOCIATE JUSTICE CARPIO: So, you are saying that Radstock can own the rights to ownership of the land?
> ATTY. AGRA: Yes, Your Honors.
> ASSOCIATE JUSTICE CARPIO: Yes?
> ATTY. AGRA: The premise, Your Honor, you mentioned a while ago was, if this Court approves said compromise (interrupted)
> ASSOCIATE JUSTICE CARPIO: No, no. Whether there is such a compromise agreement - - It's an academic question I am asking you, can a foreigner assign rights to ownership of a land in the Philippines?

ATTY. AGRA: Under the Compromise Agreement, Your Honors, these rights should be respected.
ASSOCIATE JUSTICE CARPIO: So, it can?
ATTY. AGRA: It can. Your Honor. But again, this right must, cannot be perfected or cannot be, could not take effect.
ASSOCIATE JUSTICE CARPIO: But if it cannot - - It's not perfected, how can it assign?
ATTY. AGRA: Not directly, Your Honors. Again, there must be a qualified nominee assigned by Radstock.
ASSOCIATE JUSTICE CARPIO: It's very clear, it's an indirect way of selling property that is prohibited by law, is it not?
ATTY. AGRA: Again, Your Honor, know, believe this is a Compromise Agreement. This is a *dacion en pago*.
ASSOCIATE JUSTICE CARPIO: So, *dacion en pago* is an exception to the constitutional prohibition.
ATTY. AGRA: No, Your Honor. PNCC, will still hold on to the property, absent a valid assignment of properties.
ASSOCIATE JUSTICE CARPIO: But what rights will PNCC have over that land when it has already signed the compromise? It is just waiting for instruction ... from Radstock what to do with it? So, it's a trustee of somebody, because it does not, it cannot, [it] has no dominion over it anymore? It's just holding it for Radstock. So, PNCC becomes a dummy, at that point, of Radstock, correct?
ATTY. AGRA: No, Your Honor, I believe it (interrupted)
ASSOCIATE JUSTICE CARPIO: Yeah, but it does not own the land, but it still holding the land in favor of the other party to the Compromise Agreement
ATTY. AGRA: Pursuant to the compromise agreement, that will happen.
ASSOCIATE JUSTICE CARPIO: Okay. May I (interrupted)
ATTY. AGRA: Again, Your Honor, if the compromise agreement ended with a statement that Radstock will be the owner of the property (interrupted)
ASSOCIATE JUSTICE CARPIO: Yeah. Unfortunately, it says, to a qualified assignee.
ATTY. AGRA: Yes, Your Honor.
ASSOCIATE JUSTICE CARPIO: And at this point, when it is signed and execute[d] and approved, PNCC has no dominion over that land anymore. Who has dominion over it?
ATTY. AGRA: Pending the assignment to a qualified party, Your Honor, PNCC will hold on to the property.
ASSOCIATE JUSTICE CARPIO: Hold on, but who ... can

> exercise acts of dominion, to sell it, to lease it?
> ATTY. AGRA: Again, Your Honor, without the valid assignment to a qualified nominee, the compromise agreement in so far as the transfer of these properties will not become effective. It is subject to such condition. Your Honor.

There is no dispute that Radstock is disqualified to own lands in the Philippines. Consequently, Radstock is also disqualified to own the rights to ownership of lands in the Philippines. Contrary to the OGCC's claim, **Radstock cannot own the rights to ownership of any land in the Philippines because Radstock cannot lawfully own the land itself. Otherwise, there will be a blatant circumvention of the Constitution, which prohibits a foreign private corporation from owning land in the Philippines. In addition, Radstock cannot transfer the rights to ownership of land in the Philippines if it cannot own the land itself. It is basic that an assignor or seller cannot assign or sell something he does not own at the time the ownership, or the rights to the ownership, are to be transferred to the assignee or buyer.**[80]

The third party assignee under the Compromise Agreement who will be designated by Radstock can only acquire rights duplicating those which its assignor (Radstock) is entitled by law to exercise.[81] Thus, the assignee can acquire ownership of the land only if its assignor, Radstock, owns the land. Clearly, the assignment by PNCC of the real properties to a nominee to be designated by Radstock is a circumvention of the Constitutional prohibition against a private foreign corporation owning lands in the Philippines. Such circumvention renders the Compromise Agreement void.

Public bidding is required for the disposal of government properties.

Under Section 79 of the Government Auditing Code,[82] the

[80] Civil Code, Art. 1459.

[81] Casabuena v. Court of Appeals, 350 Phil. 237 (1998).

[82] Government Auditing Code, Sec. 79 provides: When government property has become unserviceable for any cause, or is no longer needed, it shall, upon application of the officer accountable therefor, be inspected by the head of the agency or his duly authorized representative in the presence of the auditor concerned and, if found to be valueless or unsaleable, it may be destroyed in their presence. If found to be valuable, it

disposition of government lands to private parties requires public bidding.[83] COA Circular No. 89-926, issued on 27 January 1989, sets forth the guidelines on the disposal of property and other assets of the government. Part V of the COA Circular provides:

> V. MODE OF DISPOSAL/DIVESTMENT: -
> This Commission recognizes the following modes of disposal/ divestment of assets and property of national government agencies, local government units and government-owned or controlled corporations and their subsidiaries, aside from other such modes as may be provided for by law.
> 1. Public Auction
> Conformably to existing state policy, the divestment or disposal of government property as contemplated herein shall be undertaken primarily thru public auction. Such mode of divestment or disposal shall observe and adhere to established mechanics and procedures in public bidding, viz:
> a. adequate publicity and notification so as to attract the greatest number of interested parties; (vide, Sec. 79, P.D. 1445)
> b. sufficient time frame between publication and date of auction;
> c. opportunity afforded to interested parties to inspect the property or assets to be disposed of;
> d. confidentiality of sealed proposals;
> e. bond and other prequalification requirements to guarantee performance; and
> f. fair evaluation of tenders and proper notification of award.
> It is understood that the Government reserves the right to reject any or all of the tenders.

Under the Compromise Agreement, PNCC shall dispose of substantial parcels of land, by way of *dacion en pago*, in favor

may be sold at public auction to the highest bidder under the supervision of the proper committee on award or similar body in the presence of the auditor concerned or other authorized representative of the Commission, after advertising by printed notice in the Official Gazette, or for not less than three consecutive days in any newspaper of general circulation, or where the value of the property does not warrant the expense of publication, by notices posted for a like period in at least three public places in the locality where the property is to be sold. In the event that the public auction fails, the property may be sold at a private sale at such price as may be fixed by the same committee or body concerned and approved by the Commission.

[83] Chavez v. Public Estates Authority, 433 Phil. 506 (2002), penned by Justice Carpio and excerpted previously.

of Radstock. Citing *Uy v. Sandiganbayan*,[84] PNCC argues that a *dacion en pago* is an exception to the requirement of a public bidding.

PNCC's reliance on *Uy* is misplaced. There is nothing in *Uy* declaring that public bidding is dispensed with in a *dacion en pago* transaction. The Court explained the transaction in *Uy* as follows:

> We do not see any infirmity in either the MOA or the SSA executed between PIEDRAS and respondent banks. By virtue of its shareholdings in OPMC, PIEDRAS was entitled to subscribe to 3,749,906,250 class "A" and 2,499,937,500 class "B" OPMC shares. Admittedly, it was financially sound for PIEDRAS to exercise its pre-emptive rights as an existing shareholder of OPMC lest its proportionate shareholdings be diluted to its detriment. However, PIEDRAS lacked the necessary funds to pay for the additional subscription. Thus, it resorted to contract loans from respondent banks to finance the payment of its additional subscription. The mode of payment agreed upon by the parties was that the payment would be made in the form of part of the shares subscribed to by PIEDRAS. The OPMC shares therefore were agreed upon by the parties to be equivalent payment for the amount advanced by respondent banks. We see the wisdom in the conditions of the loan transaction. In order to save PIEDRAS and/or the government from the trouble of selling the shares in order to raise funds to pay off the loans, an easier and more direct way was devised in the form of the *dacion en pago* agreements.
>
> Moreover, we agree with the Sandiganbayan that neither PIEDRAS nor the government sustained any loss in these transactions. In fact, after deducting the shares to be given to respondent banks as payment for the shares, PIEDRAS stood to gain about 1,540,781,554 class "A" and 710,550,000 class "B" OPMC shares virtually for free. Indeed, the question that must be asked is whether or not PIEDRAS, in the exercise of its pre-emptive rights, would have been able to acquire any of these shares at all if it did not enter into the financing agreements with the respondent banks.

Suffice it to state that in *Uy*, neither PIEDRAS nor the government suffered any loss in the *dacion en pago* transactions,

[84] G.R. No. 111544, 6 July 2004, 433 SCRA 424.

unlike here where the government stands to lose at least P6.185 billion worth of assets.

Besides, a *dacion en pago* is in essence a form of sale, which basically involves a disposition of a property. In *Filinvest Credit Corp. v. Philippine Acetylene, Co., Inc.*,[85] the Court defined *dacion en pago* in this wise:

> *Dacion en pago*, according to Manresa, is the transmission of the ownership of a thing by the debtor to the creditor as an accepted equivalent of the performance of obligation. In *dacion en pago*, as a special mode of payment, the debtor offers another thing to the creditor who accepts it as equivalent of payment of an outstanding debt. The undertaking really partakes in one sense of the nature of sale, that is, the creditor is really buying the thing or property of the debtor, payment for which is to be charged against the debtor's debt. As such, the essential elements of a contract of sale, namely, consent, object certain, and cause or consideration must be present. In its modern concept, what actually takes place in *dacion en pago* is an objective novation of the obligation where the thing offered as an accepted equivalent of the performance of an obligation is considered as the object of the contract of sale, while the debt is considered as the purchase price. In any case, common consent is an essential prerequisite, be it sale or innovation to have the effect of totally extinguishing the debt or obligation.

Section 8. Notwithstanding the provisions of Section 7 of this Article, a natural-born citizen of the Philippines who has lost his Philippine citizenship may be a transferee of private lands, subject to limitations provided by law.

Section 9. The Congress may establish an independent economic and planning agency headed by the President, which shall, after consultations with the appropriate public agencies, various private sectors, and local government units, recommend to Congress, and implement continuing integrated and coordinated programs and policies for national development.

Until the Congress provides otherwise, the National

[85] 197 Phil. 394 (1982).

Economic and Development Authority shall function as the independent planning agency of the government.

As previously discussed, Justice Carpio, in his **concurring** opinion in **GONZALES v. OFFICE OF THE PRESIDENT OF THE PHILIPPINES**, G.R. No. 196231, September 4, 2012, 694 Phil. 52,[86] explained:

> Our Constitution does not impart a fixed and rigid concept of independence among the offices that it creates. While it declares certain bodies as "independent", we cannot assume that the independence of the Ombudsman is the same as the independence of the Judiciary. Neither is the independence of the Constitutional Commissions the same as that of **the National Economic and Development Authority,** the Bangko Sentral ng Pilipinas or the Commission on Human Rights.[87] This Court cannot make a "one size fits all" concept of independence because the Constitution itself differentiates the degree of independence of these bodies.
> …
>
> **When the 1987 Constitution speaks of "independent" bodies, it does not mean complete insulation from other offices.** The text, history and structure of the Constitution contemplate checks and balances that result in the expansion, contraction or concurrence of powers, a coordinate functioning among different bodies of government that is not limited to the executive, legislative and judicial branches, but includes the "independent" constitutional bodies. …
>
> … The Constitution clearly intended different degrees of independence among the "independent" bodies that it created. **For some, such as the National Economic and Development Authority,** Bangko Sentral ng Pilipinas and Commission on Human Rights, **the operationalization of independence is constitutionally committed to the discretion of Congress.**[88]
> …

[86] Consolidated with Barreras-Sulit v. Ochoa, G.R. No. 196232. See discussion under Arts. IX-A, Sec. 1 and XI, Sec. 5.

[87] These are the bodies that the 1987 Constitution considers as "independent." See Const., Arts. IX-A, Sec. 1, XII, Secs. 9 and 20, XIII, Sec. 17. See also Art. XI, Sec. 5.

[88] Const., Art. XII, Secs. 9 and 20; Art. XIII, Sec. 17.

> ... The fact that different constitutional bodies are treated differently under the Constitution shows that independence is a broadly delineated norm. With this level of generality, the constitutional meaning of independence is only that of independent decision-making that is free from partisanship and political pressures. It does not even mean fiscal autonomy unless the Constitution says so.[89]

Section 10. The Congress shall, upon recommendation of the economic and planning agency, when the national interest dictates, reserve to citizens of the Philippines or to corporations or associations at least sixty per centum of whose capital is owned by such citizens, or such higher percentage as Congress may prescribe, certain areas of investments. The Congress shall enact measures that will encourage the formation and operation of enterprises whose capital is wholly owned by Filipinos.

In the grant of rights, privileges, and concessions covering the national economy and patrimony, the State shall give preference to qualified Filipinos.

The State shall regulate and exercise authority over foreign investments within its national jurisdiction and in accordance with its national goals and priorities.

Section 11. No franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or associations organized under the laws of the Philippines, at least sixty per centum of whose capital is owned by such citizens; nor shall such franchise, certificate, or authorization be exclusive in character or for a longer period than fifty years. Neither shall any such franchise or right be granted except under the condition that it shall be subject to amendment, alteration, or repeal by the Congress when the common good so requires. The State shall encourage equity participation in public utilities by the general public. The participation of foreign investors in the governing body of any public utility enterprise shall be limited to their proportionate share in its capital, and all the executive and managing officers of such

[89] Commission on Human Rights Employees' Association (CHREA) v. Commission on Human Rights, G.R. No. 155336, 21 July 2006, 496 SCRA 226.

corporation or association must be citizens of the Philippines.

Definition of "Capital"

As previously discussed, in **GAMBOA v. TEVES,** G.R. No. 176579, June 28, 2011, 668 Phil. 1, speaking for the Court *en banc*, Justice Carpio categorically settled the definition of "capital" for purposes of complying with the nationality requirement of **Sections 10 and 11 of this Article XII**. The importance of this landmark decision was explained by Atty. Eleanor S. Francisco-Anunciacion, Deputy Secretary, Senate Electoral Tribunal, in this wise - "an erroneous interpretation of the word 'capital,' in circumvention of the language of the Constitution wrongfully denies us of a 'self-reliant and independent national economy effectively controlled by Filipinos.'"[90]

> 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 interpretation of the term "capital" in Section 11, Article XII of the Constitution has far-reaching implications to the national economy. In fact, a resolution of this issue will determine whether Filipinos are masters, or second class citizens, in their own country. What is at stake here is whether Filipinos or foreigners will have effective control of the national economy. Indeed, if ever there is a legal issue that has far-reaching implications to the entire nation, and to future generations of Filipinos, it is the threshold legal issue presented in this case."**
>
> The Court first encountered the issue on the definition of the term "capital" in Section 11, Article XII of the Constitution in the case of *Fernandez v. Cojuangco*, docketed as G.R. No. 157360. That case involved the same public utility (PLDT) and substantially the same private respondents. Despite the importance and novelty of the constitutional issue raised therein

[90] Response of Atty. Eleanor S. Francisco-Anunciacion dated February 1, 2019.

and despite the fact that the petition involved a purely legal question, the Court declined to resolve the case on the merits, and instead denied the same for disregarding the hierarchy of courts. There, petitioner Fernandez assailed on a pure question of law the Regional Trial Court's Decision of 21 February 2003 via a petition for review under Rule 45. The Court's Resolution, denying the petition, became final on 21 December 2004.

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-reliant and independent national economy effectively controlled by Filipinos."**[91] **Besides, in the light of vague and confusing positions taken by government agencies on this purely legal issue, present and future foreign investors in this country deserve, as a matter of basic fairness, a categorical ruling from this Court on the extent of their participation in the capital of public utilities and other nationalized businesses.**

Despite its far-reaching implications to the national economy, this purely legal issue has remained unresolved for over 75 years since the 1935 Constitution. There is no reason for this Court to evade this ever recurring fundamental issue and delay again defining the term "capital," which appears not only in Section 11, Article XII of the Constitution, but also in Section 2, Article XII on co-production and joint venture agreements for the development of our natural resources, in Section 7, Article XII on ownership of private lands, **in Section 10, Article XII on the reservation of certain investments to Filipino citizens**, in Section 4(2), Article XIV on the ownership of educational institutions, and in Section 11(2), Article XVI on the ownership of advertising companies.

The antecedents of **Garcia,** an original petition for prohibition, injunction, declaratory relief and declaration of nullity of the sale of shares of stock of Philippine Telecommunications Investment

[91] Const., Art. II, Sec. 19.

Corporation by the Government to Metro Pacific Assets Holdings, Inc., an affiliate of First Pacific Company Limited, were stated in the *en banc* decision:

> The facts, according to petitioner Wilson P. Gamboa, a stockholder of Philippine Long Distance Telephone Company (PLDT), are as follows:
>
> On 28 November 1928, the Philippine Legislature enacted Act No. 3436 which granted PLDT a franchise and the right to engage in telecommunications business. In 1969, General Telephone and Electronics Corporation (GTE), an American company and a major PLDT stockholder, sold 26 percent of the outstanding common shares of PLDT to PTIC. In 1977, Prime Holdings, Inc. (PHI) was incorporated by several persons, including Roland Gapud and Jose Campos, Jr. Subsequently, PHI became the owner of 111,415 shares of stock of PTIC by virtue of three Deeds of Assignment executed by PTIC stockholders Ramon Cojuangco and Luis Tirso Rivilla. In 1986, the 111,415 shares of stock of PTIC held by PHI were sequestered by the Presidential Commission on Good Government (PCGG). The 111,415 PTIC shares, which represent about 46.125 percent of the outstanding capital stock of PTIC, were later declared by this Court to be owned by the Republic of the Philippines.[92]
>
> In 1999, First Pacific, a Bermuda-registered, Hong Kong-based investment firm, acquired the remaining 54 percent of the outstanding capital stock of PTIC. On 20 November 2006, the Inter-Agency Privatization Council (IPC) of the Philippine Government announced that it would sell the 111,415 PTIC shares, or 46.125 percent of the outstanding capital stock of PTIC, through a public bidding to be conducted on 4 December 2006. Subsequently, the public bidding was reset to 8 December 2006, and only two bidders, Parallax Venture Fund XXVII (Parallax) and Pan-Asia Presidio Capital, submitted their bids. Parallax won with a bid of P25.6 billion or US$510 million.
>
> Thereafter, First Pacific announced that it would exercise its right of first refusal as a PTIC stockholder and buy the 111,415 PTIC shares by matching the bid price of Parallax. However, First Pacific failed to do so by the 1 February 2007 deadline set by IPC and instead, yielded its right to PTIC itself which was

[92] See Cojuangco v. Sandiganbayan, G.R. No. 183278, 24 April 2009, 586 SCRA 790.

then given by IPC until 2 March 2007 to buy the PTIC shares. On 14 February 2007, First Pacific, through its subsidiary, MPAH, entered into a Conditional Sale and Purchase Agreement of the 111,415 PTIC shares, or 46.125 percent of the outstanding capital stock of PTIC, with the Philippine Government for the price of P25,217,556,000 or US$510,580,189. The sale was completed on 28 February 2007.

Since PTIC is a stockholder of PLDT, the sale by the Philippine Government of 46.125 percent of PTIC shares is actually an indirect sale of 12 million shares or about 6.3 percent of the outstanding common shares of PLDT. With the sale, First Pacific's common shareholdings in PLDT increased from 30.7 percent to 37 percent, thereby increasing the common shareholdings of foreigners in PLDT to about 81.47 percent. This violates Section 11, Article XII of the 1987 Philippine Constitution which limits foreign ownership of the capital of a public utility to not more than 40 percent.

On the other hand, public respondents Finance Secretary Margarito B. Teves, Undersecretary John P. Sevilla, and PCGG Commissioner Ricardo Abcede allege the following relevant facts:

On 9 November 1967, PTIC was incorporated and had since engaged in the business of investment holdings. PTIC held 26,034,263 PLDT common shares, or 13.847 percent of the total PLDT outstanding common shares. PHI, on the other hand, was incorporated in 1977, and became the owner of 111,415 PTIC shares or 46.125 percent of the outstanding capital stock of PTIC by virtue of three Deeds of Assignment executed by Ramon Cojuangco and Luis Tirso Rivilla. In 1986, the 111,415 PTIC shares held by PHI were sequestered by the PCGG, and subsequently declared by this Court as part of the ill-gotten wealth of former President Ferdinand Marcos. The sequestered PTIC shares were reconveyed to the Republic of the Philippines in accordance with this Court's decision[93] which became final and executory on 8 August 2006.

The Philippine Government decided to sell the 111,415 PTIC shares, which represent 6.4 percent of the outstanding common shares of stock of PLDT, and designated the Inter-Agency Privatization Council (IPC), composed of the Department of

[93] Yuchengco v. Sandiganbayan, G.R. No. 149802, 20 January 2006, 479 SCRA 1.

Finance and the PCGG, as the disposing entity. An invitation to bid was published in seven different newspapers from 13 to 24 November 2006. On 20 November 2006, a pre-bid conference was held, and the original deadline for bidding scheduled on 4 December 2006 was reset to 8 December 2006. The extension was published in nine different newspapers.

During the 8 December 2006 bidding, Parallax Capital Management LP emerged as the highest bidder with a bid of P25,217,556,000. The government notified First Pacific, the majority owner of PTIC shares, of the bidding results and gave First Pacific until 1 February 2007 to exercise its right of first refusal in accordance with PTIC's Articles of Incorporation. First Pacific announced its intention to match Parallax's bid.

On 31 January 2007, the House of Representatives (HR) Committee on Good Government conducted a public hearing on the particulars of the then impending sale of the 111,415 PTIC shares. Respondents Teves and Sevilla were among those who attended the public hearing. The HR Committee Report No. 2270 concluded that: (a) the auction of the government's 111,415 PTIC shares bore due diligence, transparency and conformity with existing legal procedures; and (b) First Pacific's intended acquisition of the government's 111,415 PTIC shares resulting in First Pacific's 100% ownership of PTIC will not violate the 40 percent constitutional limit on foreign ownership of a public utility since PTIC holds only 13.847 percent of the total outstanding common shares of PLDT. On 28 February 2007, First Pacific completed the acquisition of the 111,415 shares of stock of PTIC.

Respondent Manuel V. Pangilinan admits the following facts: (a) the IPC conducted a public bidding for the sale of 111,415 PTIC shares or 46 percent of the outstanding capital stock of PTIC (the remaining 54 percent of PTIC shares was already owned by First Pacific and its affiliates); (b) Parallax offered the highest bid amounting to P25,217,556,000; (c) pursuant to the right of first refusal in favor of PTIC and its shareholders granted in PTIC's Articles of Incorporation, MPAH, a First Pacific affiliate, exercised its right of first refusal by matching the highest bid offered for PTIC shares on 13 February 2007; and (d) on 28 February 2007, the sale was consummated when MPAH paid IPC P25,217,556,000 and the government delivered the certificates for the 111,415 PTIC shares. Respondent

Pangilinan denies the other allegations of facts of petitioner.

On 28 February 2007, petitioner filed the instant petition for prohibition, injunction, declaratory relief, and declaration of nullity of sale of the 111,415 PTIC shares. Petitioner claims, among others, that the sale of the 111,415 PTIC shares would result in an increase in First Pacific's common shareholdings in PLDT from 30.7 percent to 37 percent, and this, combined with Japanese NTT DoCoMo's common shareholdings in PLDT, would result to a total foreign common shareholdings in PLDT of 51.56 percent which is over the 40 percent constitutional limit. Petitioner asserts:

> If and when the sale is completed, First Pacific's equity in PLDT will go up from 30.7 percent to 37.0 percent of its common - or voting - stockholdings, ... Hence, the consummation of the sale will put the two largest foreign investors in PLDT - First Pacific and Japan's NTT DoCoMo, which is the world's largest wireless telecommunications firm, owning 51.56 percent of PLDT common equity. ... With the completion of the sale, data culled from the official website of the New York Stock Exchange (www.nyse.com) showed that those foreign entities, which own at least five percent of common equity, will collectively own 81.47 percent of PLDT's common equity. ...
> ... as the annual disclosure reports, also referred to as Form 20-K reports ... which PLDT submitted to the New York Stock Exchange for the period 2003-2005, revealed that First Pacific and several other foreign entities breached the constitutional limit of 40 percent ownership as early as 2003. ...

Petitioner raises the following issues: (1) whether the consummation of the then impending sale of 111,415 PTIC shares to First Pacific violates the constitutional limit on foreign ownership of a public utility; (2) whether public respondents committed grave abuse of discretion in allowing the sale of the 111,415 PTIC shares to First Pacific; and (3) whether the sale of common shares to foreigners in excess of 40 percent of the entire subscribed common capital stock violates the constitutional limit on foreign ownership of a public utility.

On 13 August 2007, Pablito V. Sanidad and Arno V. Sanidad filed a Motion for Leave to Intervene and Admit Attached Petition-in-Intervention. In the Resolution of 28 August 2007, the Court granted the motion and noted the Petition-

in-Intervention.

Petitioners-in-intervention "join petitioner Wilson Gamboa ... in seeking, among others, to enjoin and/or nullify the sale by respondents of the 111,415 PTIC shares to First Pacific or assignee." Petitioners-in-intervention claim that, as PLDT subscribers, they have a "stake in the outcome of the controversy ... where the Philippine Government is completing the sale of government owned assets in [PLDT], unquestionably a public utility, in violation of the nationality restrictions of the Philippine Constitution."

The Issue

This Court is not a trier of facts. Factual questions such as those raised by petitioner, which indisputably demand a thorough examination of the evidence of the parties, are generally beyond this Court's jurisdiction. Adhering to this well-settled principle, the Court shall confine the resolution of the instant controversy solely on the threshold and purely legal issue of whether the term "capital" in Section 11, Article XII of the Constitution refers to the total common shares only or to the total outstanding capital stock (combined total of common and non-voting preferred shares) of PLDT, a public utility.

The Ruling of the Court

The petition is partly meritorious.

Petition for Declaratory Relief Treated as Petition for Mandamus

At the outset, petitioner is faced with a procedural barrier. Among the remedies petitioner seeks, only the petition for prohibition is within the original jurisdiction of this court, which however is not exclusive but is concurrent with the Regional Trial Court and the Court of Appeals. The actions for declaratory relief, injunction, and annulment of sale are not embraced within the original jurisdiction of the Supreme Court. On this ground alone, the petition could have been dismissed outright.

While direct resort to this Court may be justified in a petition for prohibition, the Court shall nevertheless refrain from discussing the grounds in support of the petition for prohibition since on

28 February 2007, the questioned sale was consummated when MPAH paid IPC P25,217,556,000 and the government delivered the certificates for the 111,415 PTIC shares.

However, since the threshold and purely legal issue on the definition of the term "capital" in Section 11, Article XII of the Constitution has far-reaching implications to the national economy, the Court treats the petition for declaratory relief as one for *mandamus*.

In *Salvacion v. Central Bank of the Philippines*,[94] the Court treated the petition for declaratory relief as one for *mandamus* considering the grave injustice that would result in the interpretation of a banking law. In that case, which involved the crime of rape committed by a foreign tourist against a Filipino minor and the execution of the final judgment in the civil case for damages on the tourist's dollar deposit with a local bank, the Court declared Section 113 of Central Bank Circular No. 960, exempting foreign currency deposits from attachment, garnishment or any other order or process of any court, inapplicable due to the peculiar circumstances of the case. The Court held that "injustice would result especially to a citizen aggrieved by a foreign guest like accused ..." that would "negate Article 10 of the Civil Code which provides that `in case of doubt in the interpretation or application of laws, it is presumed that the lawmaking body intended right and justice to prevail.'" The Court therefore required respondents Central Bank of the Philippines, the local bank, and the accused to comply with the writ of execution issued in the civil case for damages and to release the dollar deposit of the accused to satisfy the judgment.

In *Alliance of Government Workers v. Minister of Labor*,[95] the Court similarly brushed aside the procedural infirmity of the petition for declaratory relief and treated the same as one for *mandamus*. In Alliance, the issue was whether the government unlawfully excluded petitioners, who were government employees, from the enjoyment of rights to which they were entitled under the law. Specifically, the question was: "Are the branches, agencies, subdivisions, and instrumentalities of the Government, including government

[94] 343 Phil. 539 (1997).

[95] 209 Phil. 1 (1983), citing Nacionalista Party v. Angelo Bautista, 85 Phil. 101, and Aquino v. Commission on Elections, 62 SCRA 275.

owned or controlled corporations included among the four `employers' under Presidential Decree No. 851 which are required to pay their employees ... a thirteenth (13th) month pay ... ?" The Constitutional principle involved therein affected all government employees, clearly justifying a relaxation of the technical rules of procedure, and certainly requiring the interpretation of the assailed presidential decree.

In short, it is well-settled that this Court may treat a petition for declaratory relief as one for *mandamus* if the issue involved has far-reaching implications. As this Court held in *Salvacion*:

> The Court has no original and exclusive jurisdiction over a petition for declaratory relief. However, exceptions to this rule have been recognized. Thus, where the petition has far-reaching implications and raises questions that should be resolved, it may be treated as one for *mandamus*[96]...

...

Petitioner has *Locus Standi*

There is no dispute that petitioner is a stockholder of PLDT. As such, he has the right to question the subject sale, which he claims to violate the nationality requirement prescribed in Section 11, Article XII of the Constitution. If the sale indeed violates the Constitution, then there is a possibility that PLDT's franchise could be revoked, a dire consequence directly affecting petitioner's interest as a stockholder.

More importantly, there is no question that the instant petition raises matters of transcendental importance to the public. The fundamental and threshold legal issue in this case, involving the national economy and the economic welfare of the Filipino people, far outweighs any perceived impediment in the legal personality of the petitioner to bring this action.

In *Chavez v. PCGG*,[97] the Court upheld the right of a citizen to bring a suit on matters of transcendental importance to the public, thus:

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[96] 343 Phil. 539 (1997).

[97] G.R. No. 130716, 9 December 1998, 299 SCRA 744 cited in Chavez v. Public Estates Authority, 433 Phil. 506 (2002), penned by Justice Carpio and excerpted previously. See also David v. Macapagal-Arroyo, G.R. No. 171396, 3 May 2006, 489 SCRA 160; Santiago v. Commission on Elections, G.R. No. 127325, 19 March 1997, 270 SCRA 106; Kilosbayan, Inc. v. Guingona, Jr., G.R. No. 113375, 5 May 1994, 232 SCRA 110 (1994).

> In *Tañada v. Tuvera*, the Court asserted that when the issue concerns a public right and the object of *mandamus* is to obtain the enforcement of a public duty, the people are regarded as the real parties in interest; and because it is sufficient that petitioner is a citizen and as such is interested in the execution of the laws, he need not show that he has any legal or special interest in the result of the action. In the aforesaid case, the petitioners sought to enforce their right to be informed on matters of public concern, a right then recognized in Section 6, Article IV of the 1973 Constitution, in connection with the rule that laws in order to be valid and enforceable must be published in the Official Gazette or otherwise effectively promulgated. In ruling for the petitioners' legal standing, the Court declared that the right they sought to be enforced `is a public right recognized by no less than the fundamental law of the land.'
>
> *Legaspi v. Civil Service Commission*, while reiterating *Tañada*, further declared that 'when a *mandamus* proceeding involves the assertion of a public right, the requirement of personal interest is satisfied by the mere fact that petitioner is a citizen and, therefore, part of the general 'public' which possesses the right.'
>
> Further, in *Albano v. Reyes*, we said that while expenditure of public funds may not have been involved under the questioned contract for the development, management and operation of the Manila International Container Terminal, `public interest [was] definitely involved considering the important role [of the subject contract] ... in the economic development of the country and the magnitude of the financial consideration involved.' We concluded that, as a consequence, the disclosure provision in the Constitution would constitute sufficient authority for upholding the petitioner's standing.

Clearly, since the instant petition, brought by a citizen, involves matters of transcendental public importance, the petitioner has the requisite *locus standi*.

Definition of the Term "Capital" in Section 11, Article XII of the 1987 Constitution

Section 11, Article XII (National Economy and Patrimony) of the 1987 Constitution mandates the Filipinization of public utilities...

The above provision substantially reiterates Section 5, Article XIV of the 1973 Constitution, thus:

> Sec. 5. No franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or associations organized under the laws of the Philippines at least sixty per centum of the capital of which is owned by such citizens, nor shall such franchise, certificate, or authorization be exclusive in character or for a longer period than fifty years. Neither shall any such franchise or right be granted except under the condition that it shall be subject to amendment, alteration, or repeal by the National Assembly when the public interest so requires. The State shall encourage equity participation in public utilities by the general public. The participation of foreign investors in the governing body of any public utility enterprise shall be limited to their proportionate share in the capital thereof.

The foregoing provision in the 1973 Constitution reproduced Section 8, Article XIV of the 1935 Constitution, viz:

> Sec. 8. No franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or other entities organized under the laws of the Philippines sixty per centum of the capital of which is owned by citizens of the Philippines, nor shall such franchise, certificate, or authorization be exclusive in character or for a longer period than fifty years. No franchise or right shall be granted to any individual, firm, or corporation, except under the condition that it shall be subject to amendment, alteration, or repeal by the Congress when the public interest so requires.

Father Joaquin G. Bernas, S.J., a leading member of the 1986 Constitutional Commission, reminds us that the Filipinization provision in the 1987 Constitution is one of the products of the spirit of nationalism which gripped the 1935 Constitutional Convention.[98] The 1987 Constitution "provides for the Filipinization of public utilities by requiring that any form of authorization for the operation of public utilities should be

[98] Joaquin G. Bernas, The Constitution Of The Republic Of The Philippines 452, citing Smith, Bell and Co. v. Natividad, 40 Phil. 136, 148 (1919); Luzon Stevedoring Corporation v. Anti-Dummy Board, 46 SCRA 474, 490 (1972).

granted only to `citizens of the Philippines or to corporations or associations organized under the laws of the Philippines at least sixty per centum of whose capital is owned by such citizens.' The provision is [an express] recognition of the sensitive and vital position of public utilities both in the national economy and for national security."[99] 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.[100] 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"[101] and ensure "a self-reliant and independent national economy effectively controlled by Filipinos."[102]

Any citizen or juridical entity desiring to operate a public utility must therefore meet the minimum nationality requirement prescribed in Section 11, Article XII of the Constitution. Hence, for a corporation to be granted authority to operate a public utility, at least 60 percent of its "capital" must be owned by Filipino citizens.

The crux of the controversy is the definition of the term "capital." Does the term "capital" in Section 11, Article XII of the Constitution refer to common shares or to the total outstanding capital stock (combined total of common and non-voting preferred shares)?

Petitioner submits that the 40 percent foreign equity limitation in domestic public utilities refers only to common shares because such shares are entitled to vote and it is through voting that control over a corporation is exercised. Petitioner posits that the term "capital" in Section 11, Article XII of the Constitution refers to "the ownership of common capital stock subscribed and outstanding, which class of shares alone, under the corporate set-up of PLDT, can vote and elect members of the board of directors." It is undisputed that PLDT's non-voting preferred shares are held mostly by Filipino citizens. This arose from Presidential Decree No. 217,[103] issued on 16 June 1973 by then President Ferdinand Marcos, requiring every applicant

[99] Ibid.
[100] 2 Hector De Leon, Philippine Constitutional Law (Principles And Cases) 848 (1999).
[101] Const., Preamble; 2 Hector De Leon, Philippine Constitutional Law (Principles And Cases) 788 (1999).
[102] Const., Art. II, Sec. 19.
[103] Establishing Basic Policies For The Telephone Industry, Amending For The Purpose

of a PLDT telephone line to subscribe to non-voting preferred shares to pay for the investment cost of installing the telephone line.[104]

Petitioners-in-intervention basically reiterate petitioner's arguments and adopt petitioner's definition of the term "capital." Petitioners-in-intervention allege that "the approximate foreign ownership of common capital stock of PLDT ... already amounts to at least 63.54% of the total outstanding common stock," which means that foreigners exercise significant control over PLDT, patently violating the 40 percent foreign equity limitation in public utilities prescribed by the Constitution.

Respondents, on the other hand, do not offer any definition of the term "capital" in Section 11, Article XII of the Constitution. More importantly, private respondents Nazareno and Pangilinan of PLDT do not dispute that more than 40 percent of the common shares of PLDT are held by foreigners.

In particular, respondent Nazareno's Memorandum, consisting of 73 pages, harps mainly on the procedural infirmities of the petition and the supposed violation of the due process rights of the "affected foreign common shareholders." Respondent Nazareno does not deny petitioner's allegation of foreigners' dominating the common shareholdings of PLDT. Nazareno stressed mainly that the petition "seeks to divest foreign common shareholders purportedly exceeding 40% of the total common shareholdings in PLDT of their ownership over their shares." Thus, "the foreign natural and juridical PLDT shareholders must be impleaded in this suit so that they can be heard." Essentially, Nazareno invokes denial of due process on behalf of the foreign common shareholders.

While Nazareno does not introduce any definition of the term

The Pertinent Provisions Of Commonwealth Act No. 146, As Amended, Otherwise Known As The Public Service Act, As Amended, And All Inconsistent Legislative And Municipal Franchise Of The Philippine Long Distance Telephone Company Under Act No. 3436, As Amended, And All Inconsistent Legislative And Municipal Franchises Including Other Existing Laws.

[104] Upon approval by the National Telecommunications Commission, this mandatory requirement to subscribe to non-voting preferred shares was made optional starting 22 April 2003. See PLDT 20- F 2005 filing with the United States Securities and Exchange Commission at http://www.wikinvest.com/stock/Philippine_Long_Distance_TelephoneCompany_(PHI)/Filing/20-F/2- -5/F2923101. See also Philippine Consumers Foundation, Inc. v. NTC and PLDT, G.R. No. L-63318, 18 April 1984, on the origin and rationale of the SIP.

"capital," he states that "among the factual assertions that need to be established to counter petitioner's allegations is the uniform interpretation by government agencies (such as the SEC), institutions and corporations (such as the Philippine National Oil Company-Energy Development Corporation or PNOC-EDC) of including both preferred shares and common shares in "controlling interest" in view of testing compliance with the 40% constitutional limitation on foreign ownership in public utilities."

Similarly, respondent Manuel V. Pangilinan does not define the term "capital" in Section 11, Article XII of the Constitution. Neither does he refute petitioner's claim of foreigners holding more than 40 percent of PLDT's common shares. Instead, respondent Pangilinan focuses on the procedural flaws of the petition and the alleged violation of the due process rights of foreigners. Respondent Pangilinan emphasizes in his Memorandum (1) the absence of this Court's jurisdiction over the petition; (2) petitioner's lack of standing; (3) mootness of the petition; (4) non-availability of declaratory relief; and (5) the denial of due process rights. Moreover, respondent Pangilinan alleges that the issue should be whether "owners of shares in PLDT as well as owners of shares in companies holding shares in PLDT may be required to relinquish their shares in PLDT and in those companies without any law requiring them to surrender their shares and also without notice and trial."

Respondent Pangilinan further asserts that "Section 11, [Article XII of the Constitution] imposes no nationality requirement on the shareholders of the utility company as a condition for keeping their shares in the utility company." According to him, "Section 11 does not authorize taking one person's property (the shareholder's stock in the utility company) on the basis of another party's alleged failure to satisfy a requirement that is a condition only for that other party's retention of another piece of property (the utility company being at least 60% Filipino-owned to keep its franchise)."

The OSG, representing public respondents Secretary Margarito Teves, Undersecretary John P. Sevilla, Commissioner Ricardo Abcede, and Chairman Fe Barin, is likewise silent on the definition of the term "capital." In its Memorandum dated 24 September 2007, the OSG also limits its discussion on the supposed procedural defects of the petition, i.e. lack of standing, lack of jurisdiction, non-inclusion of interested parties, and lack

of basis for injunction. The OSG does not present any definition or interpretation of the term "capital" in Section 11, Article XII of the Constitution. The OSG contends that "the petition actually partakes of a collateral attack on PLDT's franchise as a public utility," which in effect requires a "full-blown trial where all the parties in interest are given their day in court."

Respondent Francisco Ed Lim, impleaded as President and Chief Executive Officer of the Philippine Stock Exchange (PSE), does not also define the term "capital" and seeks the dismissal of the petition on the following grounds: (1) failure to state a cause of action against Lim; (2) the PSE allegedly implemented its rules and required all listed companies, including PLDT, to make proper and timely disclosures; and (3) the reliefs prayed for in the petition would adversely impact the stock market.

In the earlier case of *Fernandez v. Cojuangco*, petitioner Fernandez who claimed to be a stockholder of record of PLDT, contended that the term "capital" in the 1987 Constitution refers to shares entitled to vote or the common shares. *Fernandez* explained thus:

> The forty percent (40%) foreign equity limitation in public utilities prescribed by the Constitution refers to ownership of shares of stock entitled to vote, i.e., common shares, considering that it is through voting that control is being exercised. ...
> Obviously, the intent of the framers of the Constitution in imposing limitations and restrictions on fully nationalized and partially nationalized activities is for Filipino nationals to be always in control of the corporation undertaking said activities. Otherwise, if the Trial Court's ruling upholding respondents' arguments were to be given credence, it would be possible for the ownership structure of a public utility corporation to be divided into one percent (1%) common stocks and ninety-nine percent (99%) preferred stocks. Following the Trial Court's ruling adopting respondents' arguments, the common shares can be owned entirely by foreigners thus creating an absurd situation wherein foreigners, who are supposed to be minority shareholders, control the public utility corporation. ...
> Thus, the 40% foreign ownership limitation should be interpreted to apply to both the beneficial ownership and the controlling interest. ...
> Clearly, therefore, the forty percent (40%) foreign equity

> limitation in public utilities prescribed by the Constitution refers to ownership of shares of stock entitled to vote, i.e., common shares. Furthermore, ownership of record of shares will not suffice but it must be shown that the legal and beneficial ownership rests in the hands of Filipino citizens. Consequently, in the case of petitioner PLDT, since it is already admitted that the voting interests of foreigners which would gain entry to petitioner PLDT by the acquisition of SMART shares through the Questioned Transactions is equivalent to 82.99%, and the nominee arrangements between the foreign principals and the Filipino owners is likewise admitted, there is, therefore, a violation of Section 11, Article XII of the Constitution.
>
> Parenthetically, the Opinions dated February 15, 1988 and April 14, 1987 cited by the Trial Court to support the proposition that the meaning of the word "capital" as used in Section 11, Article XII of the Constitution allegedly refers to the sum total of the shares subscribed and paid-in by the shareholder and it allegedly is immaterial how the stock is classified, whether as common or preferred, cannot stand in the face of a clear legislative policy as stated in the FIA which took effect in 1991 or way after said opinions were rendered, and as clarified by the above-quoted Amendments. In this regard, suffice it to state that as between the law and an opinion rendered by an administrative agency, the law indubitably prevails. Moreover, said Opinions are merely advisory and cannot prevail over the clear intent of the framers of the Constitution.
>
> In the same vein, the SEC's construction of Section 11, Article XII of the Constitution is at best merely advisory for it is the courts that finally determine what a law means.

On the other hand, respondents therein, Antonio O. Cojuangco, Manuel V. Pangilinan, Carlos A. Arellano, Helen Y. Dee, Magdangal B. Elma, Mariles Cacho-Romulo, Fr. Bienvenido F. Nebres, Ray C. Espinosa, Napoleon L. Nazareno, Albert F. Del Rosario, and Orlando B. Vea, argued that the term "capital" in Section 11, Article XII of the Constitution includes preferred shares since the Constitution does not distinguish among classes of stock, thus:

> 16. The Constitution applies its foreign ownership limitation on the corporation's "capital," without distinction as to classes of shares. ...
>
> In this connection, the Corporation Code - which was

already in force at the time the present (1987) Constitution was drafted - defined outstanding capital stock as follows:

> Sec. 137. Outstanding capital stock defined. - The term "outstanding capital stock", as used in this Code, means the total shares of stock issued under binding subscription agreements to subscribers or stockholders, whether or not fully or partially paid, except treasury shares.

Section 137 of the Corporation Code also does not distinguish between common and preferred shares, nor exclude either class of shares, in determining the outstanding capital stock (the "capital") of a corporation. Consequently, petitioner's suggestion to reckon PLDT's foreign equity only on the basis of PLDT's outstanding common shares is without legal basis. The language of the Constitution should be understood in the sense it has in common use. ...

17. But even assuming that resort to the proceedings of the Constitutional Commission is necessary, there is nothing in the Record of the Constitutional Commission (Vol. III) - which petitioner misleadingly cited in the Petition ... which supports petitioner's view that only common shares should form the basis for computing a public utility's foreign equity. ...

18. In addition, the SEC - the government agency primarily responsible for implementing the Corporation Code, and which also has the responsibility of ensuring compliance with the Constitution's foreign equity restrictions as regards nationalized activities ... has categorically ruled that both common and preferred shares are properly considered in determining outstanding capital stock and the nationality composition thereof.

We agree with petitioner and petitioners-in-intervention. **The term "capital" in Section 11, Article XII of the Constitution refers only to shares of stock entitled to vote in the election of directors, and thus in the present case only to common shares, and not to the total outstanding capital stock comprising both common and non-voting preferred shares.**

The Corporation Code of the Philippines classifies shares as common or preferred, thus:

> Sec. 6. Classification of shares. - The shares of stock of stock corporations may be divided into classes or series of shares, or both, any of which classes or series of shares may have

such rights, privileges or restrictions as may be stated in the articles of incorporation: Provided, That no share may be deprived of voting rights except those classified and issued as "preferred" or "redeemable" shares, unless otherwise provided in this Code: Provided, further, That there shall always be a class or series of shares which have complete voting rights. Any or all of the shares or series of shares may have a par value or have no par value as may be provided for in the articles of incorporation: Provided, however, That banks, trust companies, insurance companies, public utilities, and building and loan associations shall not be permitted to issue no-par value shares of stock.

Preferred shares of stock issued by any corporation may be given preference in the distribution of the assets of the corporation in case of liquidation and in the distribution of dividends, or such other preferences as may be stated in the articles of incorporation which are not violative of the provisions of this Code: Provided, That preferred shares of stock may be issued only with a stated par value. The Board of Directors, where authorized in the articles of incorporation, may fix the terms and conditions of preferred shares of stock or any series thereof: Provided, That such terms and conditions shall be effective upon the filing of a certificate thereof with the Securities and Exchange Commission.

Shares of capital stock issued without par value shall be deemed fully paid and non-assessable and the holder of such shares shall not be liable to the corporation or to its creditors in respect thereto: Provided; That shares without par value may not be issued for a consideration less than the value of five (P5.00) pesos per share: Provided, further, That the entire consideration received by the corporation for its no-par value shares shall be treated as capital and shall not be available for distribution as dividends.

A corporation may, furthermore, classify its shares for the purpose of insuring compliance with constitutional or legal requirements.

Except as otherwise provided in the articles of incorporation and stated in the certificate of stock, each share shall be equal in all respects to every other share.

Where the articles of incorporation provide for non-voting shares in the cases allowed by this Code, the holders of such shares shall nevertheless be entitled to vote on the following matters:

1. Amendment of the articles of incorporation;
2. Adoption and amendment of by-laws;

> 3. Sale, lease, exchange, mortgage, pledge or other disposition of all or substantially all of the corporate property;
> 4. Incurring, creating or increasing bonded indebtedness;
> 5. Increase or decrease of capital stock;
> 6. Merger or consolidation of the corporation with another corporation or other corporations;
> 7. Investment of corporate funds in another corporation or business in accordance with this Code; and
> 8. Dissolution of the corporation.
>
> Except as provided in the immediately preceding paragraph, the vote necessary to approve a particular corporate act as provided in this Code shall be deemed to refer only to stocks with voting rights.

Indisputably, one of the rights of a stockholder is the right to participate in the control or management of the corporation. This is exercised through his vote in the election of directors because it is the board of directors that controls or manages the corporation. In the absence of provisions in the articles of incorporation denying voting rights to preferred shares, preferred shares have the same voting rights as common shares. However, preferred shareholders are often excluded from any control, that is, deprived of the right to vote in the election of directors and on other matters, on the theory that the preferred shareholders are merely investors in the corporation for income in the same manner as bondholders. In fact, under the Corporation Code only preferred or redeemable shares can be deprived of the right to vote. Common shares cannot be deprived of the right to vote in any corporate meeting, and any provision in the articles of incorporation restricting the right of common shareholders to vote is invalid.[105]

Considering that common shares have voting rights which translate to control, as opposed to preferred shares which usually have no voting rights, the term "capital" in Section 11, Article XII of the Constitution refers only to common shares. However, if the preferred shares also have the right to vote in the election of directors, then the term "capital" shall include such preferred shares because the right to participate in the control or management of the corporation is exercised through the right to vote in the election of directors. In

[105] 2 Ruben E. Agpalo, Comments On The Corporation Code Of The Philippines 36 (2001).

short, the term "capital" in Section 11, Article XII of the Constitution refers only to shares of stock that can vote in the election of directors.

This interpretation is consistent with the intent of the framers of the Constitution to place in the hands of Filipino citizens the control and management of public utilities. As revealed in the deliberations of the Constitutional Commission, "capital" refers to the voting stock or controlling interest of a corporation, to wit:

> MR. NOLLEDO. In Sections 3, 9 and 15, the Committee stated local or Filipino equity and foreign equity; namely, 60-40 in Section 3, 60-40 in Section 9 and 2/3-1/3 in Section 15.
> MR. VILLEGAS. That is right.
> MR. NOLLEDO. In teaching law, we are always faced with this question: "Where do we base the equity requirement, is it on the authorized capital stock, on the subscribed capital stock, or on the paid-up capital stock of a corporation"? Will the Committee please enlighten me on this?
> MR. VILLEGAS. We have just had a long discussion with the members of the team from the UP Law Center who provided us a draft. The phrase that is contained here which we adopted from the UP draft is "60 percent of voting stock."
> MR. NOLLEDO. That must be based on the subscribed capital stock, because unless declared delinquent, unpaid capital stock shall be entitled to vote.
> MR. VILLEGAS. That is right.
> MR. NOLLEDO. Thank you.
> With respect to an investment by one corporation in another corporation, say, a corporation with 60-40 percent equity invests in another corporation which is permitted by the Corporation Code, does the Committee adopt the grandfather rule?
> MR. VILLEGAS. Yes, that is the understanding of the Committee. MR. NOLLEDO. Therefore, we need additional Filipino capital?
> MR. VILLEGAS. Yes.[106]
> ...
> MR. AZCUNA. May I be clarified as to that portion that was accepted by the Committee.
> MR. VILLEGAS. The portion accepted by the Committee

[106] III Record, Constitutional Commission 255-256.

> is the deletion of the phrase "voting stock or controlling interest."
> MR. AZCUNA. Hence, without the Davide amendment, the committee report would read: "corporations or associations at least sixty percent of whose CAPITAL is owned by such citizens."
> MR. VILLEGAS. Yes.
> MR. AZCUNA. So if the Davide amendment is lost, we are stuck with 60 percent of the capital to be owned by citizens.
> MR. VILLEGAS. That is right.
> MR. AZCUNA. But the control can be with the foreigners even if they are the minority. Let us say 40 percent of the capital is owned by them, but it is the voting capital, whereas, the Filipinos own the nonvoting shares. So we can have a situation where the corporation is controlled by foreigners despite being the minority because they have the voting capital. That is the anomaly that would result here.
> MR. BENGZON. No, the reason we eliminated the word "stock" as stated in the 1973 and 1935 Constitutions is that according to Commissioner Rodrigo, there are associations that do not have stocks. That is why we say "CAPITAL."
> MR. AZCUNA. We should not eliminate the phrase "controlling interest."
> MR. BENGZON. In the case of stock corporations, it is assumed.[107]

Thus, 60 percent of the "capital" assumes, or should result in, "controlling interest" in the corporation. Reinforcing this interpretation of the term "capital," as referring to controlling interest or shares entitled to vote, is the definition of a "Philippine national" in the Foreign Investments Act of 1991,[108] to wit:

> Sec. 3. Definitions. - As used in this Act:
> a. The term "Philippine national" shall mean a citizen of the Philippines; or a domestic partnership or association wholly owned by citizens of the Philippines; or a corporation organized under the laws of the Philippines of which at least sixty percent (60%) of the capital stock outstanding and entitled to vote is owned and held by citizens of the Philippines; or a corporation organized abroad and registered

[107] Id. at 360.
[108] RA No. 7042 entitled An Act To Promote Foreign Investments, Prescribe The Procedures For Registering Enterprises Doing Business In The Philippines And For Other Purposes.

> as doing business in the Philippines under the Corporation Code of which one hundred percent (100%) of the capital stock outstanding and entitled to vote is wholly owned by Filipinos or a trustee of funds for pension or other employee retirement or separation benefits, where the trustee is a Philippine national and at least sixty percent (60%) of the fund will accrue to the benefit of Philippine nationals: Provided, That where a corporation and its non-Filipino stockholders own stocks in a Securities and Exchange Commission (SEC) registered enterprise, at least sixty percent (60%) of the capital stock outstanding and entitled to vote of each of both corporations must be owned and held by citizens of the Philippines and at least sixty percent (60%) of the members of the Board of Directors of each of both corporations must be citizens of the Philippines, in order that the corporation, shall be considered a "Philippine national."

In explaining the definition of a "Philippine national," the Implementing Rules and Regulations of the Foreign Investments Act of 1991 provide:

> b. "Philippine national" shall mean a citizen of the Philippines or a domestic partnership or association wholly owned by the citizens of the Philippines; or a corporation organized under the laws of the Philippines of which at least sixty percent [60%] of the capital stock outstanding and entitled to vote is owned and held by citizens of the Philippines; or a trustee of funds for pension or other employee retirement or separation benefits, where the trustee is a Philippine national and at least sixty percent [60%] of the fund will accrue to the benefit of the Philippine nationals; Provided, that where a corporation its non-Filipino stockholders own stocks in a Securities and Exchange Commission [SEC] registered enterprise, at least sixty percent [60%] of the capital stock outstanding and entitled to vote of both corporations must be owned and held by citizens of the Philippines and at least sixty percent [60%] of the members of the Board of Directors of each of both corporation must be citizens of the Philippines, in order that the corporation shall be considered a Philippine national. The control test shall be applied for this purpose.
>
> Compliance with the required Filipino ownership of a corporation shall be determined on the basis of outstanding capital stock whether fully paid or not, but only such stocks which are generally entitled to vote are considered.

> For stocks to be deemed owned and held by Philippine citizens or Philippine nationals, mere legal title is not enough to meet the required Filipino equity. Full beneficial ownership of the stocks, coupled with appropriate voting rights is essential. Thus, stocks, the voting rights of which have been assigned or transferred to aliens cannot be considered held by Philippine citizens or Philippine nationals.
> Individuals or juridical entities not meeting the aforementioned qualifications are considered as non-Philippine nationals.

Mere legal title is insufficient to meet the 60 percent Filipino-owned "capital" required in the Constitution. Full beneficial ownership of 60 percent of the outstanding capital stock, coupled with 60 percent of the voting rights, is required. The legal and beneficial ownership of 60 percent of the outstanding capital stock must rest in the hands of Filipino nationals in accordance with the constitutional mandate. Otherwise, the corporation is "considered as non-Philippine national[s]."

Under Section 10, Article XII of the Constitution, Congress may "reserve to citizens of the Philippines or to corporations or associations at least sixty per centum of whose capital is owned by such citizens, or such higher percentage as Congress may prescribe, certain areas of investments."

Thus, in numerous laws Congress has reserved certain areas of investments to Filipino citizens or to corporations at least sixty percent of the "capital" of which is owned by Filipino citizens. Some of these laws are: (1) Regulation of Award of Government Contracts or RA No. 5183; (2) Philippine Inventors Incentives Act or RA No. 3850; (3) Magna Carta for Micro, Small and Medium Enterprises or RA No. 6977; (4) Philippine Overseas Shipping Development Act or RA No. 7471; (5) Domestic Shipping Development Act of 2004 or RA No. 9295; (6) Philippine Technology Transfer Act of 2009 or RA No. 10055; and (7) Ship Mortgage Decree or P.D. No. 1521. Hence, the term "capital" in Section 11, Article XII of the Constitution is also used in the same context in numerous laws reserving certain areas of investments to Filipino citizens.

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."

A broad definition unjustifiably disregards who owns the all-important voting stock, which necessarily equates to control of the public utility.

We shall illustrate the glaring anomaly in giving a broad definition to the term "capital." Let us assume that a corporation has 100 common shares owned by foreigners and 1,000,000 non-voting preferred shares owned by Filipinos, with both classes of share having a par value of one peso (P1.00) per share. Under the broad definition of the term "capital," such corporation would be considered compliant with the 40 percent constitutional limit on foreign equity of public utilities since the overwhelming majority, or more than 99.999 percent, of the total outstanding capital stock is Filipino owned. This is obviously absurd.

In the example given, only the foreigners holding the common shares have voting rights in the election of directors, even if they hold only 100 shares. The foreigners, with a minuscule equity of less than 0.001 percent, exercise control over the public utility. On the other hand, the Filipinos, holding more than 99.999 percent of the equity, cannot vote in the election of directors and hence, have no control over the public utility. This starkly circumvents the intent of the framers of the Constitution, as well as the clear language of the Constitution, to place the control of public utilities in the hands of Filipinos. It also renders illusory the State policy of an independent national economy effectively controlled by Filipinos.

The example given is not theoretical but can be found in the real world, and in fact exists in the present case.

Holders of PLDT preferred shares are explicitly denied of the right to vote in the election of directors. PLDT's Articles of Incorporation expressly state that "the holders of Serial Preferred Stock shall not be entitled to vote at any meeting of the stockholders for the election of directors or for any other purpose or otherwise participate in any action taken by

the corporation or its stockholders, or to receive notice of any meeting of stockholders."

On the other hand, holders of common shares are granted the exclusive right to vote in the election of directors. PLDT's Articles of Incorporation state that "each holder of Common Capital Stock shall have one vote in respect of each share of such stock held by him on all matters voted upon by the stockholders, and the holders of Common Capital Stock shall have the exclusive right to vote for the election of directors and for all other purposes."

In short, only holders of common shares can vote in the election of directors, meaning only common shareholders exercise control over PLDT. Conversely, holders of preferred shares, who have no voting rights in the election of directors, do not have any control over PLDT. In fact, under PLDT's Articles of Incorporation, holders of common shares have voting rights for all purposes, while holders of preferred shares have no voting right for any purpose whatsoever.

It must be stressed, and respondents do not dispute, that foreigners hold a majority of the common shares of PLDT. In fact, based on PLDT's 2010 General Information Sheet (GIS), which is a document required to be submitted annually to the Securities and Exchange Commission, foreigners hold 120,046,690 common shares of PLDT whereas Filipinos hold only 66,750,622 common shares. In other words, foreigners hold 64.27% of the total number of PLDT's common shares, while Filipinos hold only 35.73%. Since holding a majority of the common shares equates to control, it is clear that foreigners exercise control over PLDT. Such amount of control unmistakably exceeds the allowable 40 percent limit on foreign ownership of public utilities expressly mandated in Section 11, Article XII of the Constitution.

Moreover, the Dividend Declarations of PLDT for 2009, as submitted to the SEC, shows that per share the SIP preferred shares earn a pittance in dividends compared to the common shares. PLDT declared dividends for the common shares at P70.00 per share, while the declared dividends for the preferred shares amounted to a measly P1.00 per share. So the preferred shares not only cannot vote in the election of directors, they also have very little and obviously negligible dividend earning capacity compared to common shares.

As shown in PLDT's 2010 GIS, as submitted to the SEC, the par value of PLDT common shares is P5.00 per share, whereas the par value of preferred shares is P10.00 per share. In other words, preferred shares have twice the par value of common shares but cannot elect directors and have only 1/70 of the dividends of common shares. Moreover, 99.44% of the preferred shares are owned by Filipinos while foreigners own only a minuscule 0.56% of the preferred shares. Worse, preferred shares constitute 77.85% of the authorized capital stock of PLDT while common shares constitute only 22.15%. This undeniably shows that beneficial interest in PLDT is not with the non-voting preferred shares but with the common shares, blatantly violating the constitutional requirement of 60 percent Filipino control and Filipino beneficial ownership in a public utility.

The legal and beneficial ownership of 60 percent of the outstanding capital stock must rest in the hands of Filipinos in accordance with the constitutional mandate. Full beneficial ownership of 60 percent of the outstanding capital stock, coupled with 60 percent of the voting rights, is constitutionally required for the State's grant of authority to operate a public utility. The undisputed fact that the PLDT preferred shares, 99.44% owned by Filipinos, are non-voting and earn only 1/70 of the dividends that PLDT common shares earn, grossly violates the constitutional requirement of 60 percent Filipino control and Filipino beneficial ownership of a public utility.

In short, Filipinos hold less than 60 percent of the voting stock, and earn less than 60 percent of the dividends, of PLDT. This directly contravenes the express command in Section 11, Article XII of the Constitution that "[n]o franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to ... corporations ... organized under the laws of the Philippines, at least sixty per centum of whose capital is owned by such citizens ..."

To repeat, (1) foreigners own 64.27% of the common shares of PLDT, which class of shares exercises the sole right to vote in the election of directors, and thus exercise control over PLDT; (2) Filipinos own only 35.73% of PLDT's common shares, constituting a minority of the voting stock, and thus do not exercise control over PLDT; (3) preferred shares, 99.44% owned by Filipinos, have no voting rights; (4) preferred shares earn only 1/70 of the dividends that common shares earn; (5) preferred shares have twice the par value of common shares;

and (6) preferred shares constitute 77.85% of the authorized capital stock of PLDT and common shares only 22.15%. This kind of ownership and control of a public utility is a mockery of the Constitution.

Incidentally, the fact that PLDT common shares with a par value of P5.00 have a current stock market value of P2,328.00 per share, while PLDT preferred shares with a par value of P10.00 per share have a current stock market value ranging from only P10.92 to P11.06 per share, is a glaring confirmation by the market that control and beneficial ownership of PLDT rest with the common shares, not with the preferred shares.

Indisputably, construing the term "capital" in Section 11, Article XII of the Constitution to include both voting and non-voting shares will result in the abject surrender of our telecommunications industry to foreigners, amounting to a clear abdication of the State's constitutional duty to limit control of public utilities to Filipino citizens. Such an interpretation certainly runs counter to the constitutional provision reserving certain areas of investment to Filipino citizens, such as the exploitation of natural resources as well as the ownership of land, educational institutions and advertising businesses. **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 11, Article XII of the Constitution, like other provisions of the Constitution expressly reserving to Filipinos specific areas of investment, such as the development of natural resources and ownership of land, educational institutions and advertising business, is self-executing. There is no need for legislation to implement these self-executing provisions of the Constitution.[109] The rationale why these constitutional provisions are self-executing was explained in *Manila Prince Hotel v. GSIS,*[110] thus:

[109] Differentiate with the discussion under Art. II, Secs 7, 8, 16 and 18.
[110] 335 Phil. 82 (1997).

> ... Hence, unless it is expressly provided that a legislative act is necessary to enforce a constitutional mandate, the presumption now is that all provisions of the constitution are self-executing. If the constitutional provisions are treated as requiring legislation instead of self- executing, the legislature would have the power to ignore and practically nullify the mandate of the fundamental law. This can be cataclysmic. That is why the prevailing view is, as it has always been, that -
> … in case of doubt, the Constitution should be considered self-executing rather than non-self-executing ... Unless the contrary is clearly intended, the provisions of the Constitution should be considered self-executing, as a contrary rule would give the legislature discretion to determine when, or whether, they shall be effective. These provisions would be subordinated to the will of the lawmaking body, which could make them entirely meaningless by simply refusing to pass the needed implementing statute.

In *Manila Prince Hotel*, even the Dissenting Opinion of then Associate Justice Reynato S. Puno, later Chief Justice, agreed that constitutional provisions are presumed to be self-executing. Justice Puno stated:

> Courts as a rule consider the provisions of the Constitution as self-executing, rather than as requiring future legislation for their enforcement. The reason is not difficult to discern. For if they are not treated as self-executing, the mandate of the fundamental law ratified by the sovereign people can be easily ignored and nullified by Congress. Suffused with wisdom of the ages is the unyielding rule that legislative actions may give breath to constitutional rights but congressional inaction should not suffocate them.
> Thus, we have treated as self-executing the provisions in the Bill of Rights on arrests, searches and seizures, the rights of a person under custodial investigation, the rights of an accused, and the privilege against self-incrimination. It is recognized that legislation is unnecessary to enable courts to effectuate constitutional provisions guaranteeing the fundamental rights of life, liberty and the protection of property. The same treatment is accorded to constitutional provisions forbidding the taking or damaging of property for public use without just compensation.

Thus, in numerous cases,[111] this Court, even in the absence of implementing legislation, applied directly the provisions of the 1935, 1973 and 1987 Constitutions limiting land ownership to Filipinos. In *Soriano v. Ong Hoo*,[112] this Court ruled:

> ... As the Constitution is silent as to the effects or consequences of a sale by a citizen of his land to an alien, and as both the citizen and the alien have violated the law, none of them should have a recourse against the other, and it should only be the State that should be allowed to intervene and determine what is to be done with the property subject of the violation. We have said that what the State should do or could do in such matters is a matter of public policy, entirely beyond the scope of judicial authority. (*Dinglasan v. Lee Bun Ting*, G. R. No. L-5996, June 27, 1956.) While the legislature has not definitely decided what policy should be followed in cases of violations against the constitutional prohibition, courts of justice cannot go beyond by declaring the disposition to be null and void as violative of the Constitution. ...

To treat Section 11, Article XII of the Constitution as not self-executing would mean that since the 1935 Constitution, or over the last 75 years, not one of the constitutional provisions expressly reserving specific areas of investments to corporations, at least 60 percent of the "capital" of which is owned by Filipinos, was enforceable. In short, the framers of the 1935, 1973 and 1987 Constitutions miserably failed to effectively reserve to Filipinos specific areas of investment, like the operation by corporations of public utilities, the exploitation by corporations of mineral resources, the ownership by corporations of real estate, and the ownership of educational institutions. All the legislatures that convened since 1935 also miserably failed to enact legislations to implement these vital constitutional provisions that determine who will effectively control the national economy, Filipinos or foreigners. This Court cannot allow such an absurd interpretation of the Constitution.

This Court has held that the SEC "has both regulatory and

[111] Krivenko v. Register of Deeds, 79 Phil. 461 (1947); Rellosa v. Gaw Chee Hun, 93 Phil. 827 (1953); Vasquez v. Li Seng Giap, 96 Phil. 447 (1955); Soriano v. Ong Hoo, 103 Phil. 829 (1958); Philippine Banking Corporation v. Lui She, 128 Phil. 53 (1967); Frenzel v. Catito, 453 Phil. 885 (2003).

[112] 103 Phil. 829 (1958).

adjudicative functions."[113] Under its regulatory functions, the SEC can be compelled by *mandamus* to perform its statutory duty when it unlawfully neglects to perform the same. Under its adjudicative or quasi-judicial functions, the SEC can be also be compelled by *mandamus* to hear and decide a possible violation of any law it administers or enforces when it is mandated by law to investigate such violation.

Under Section 17(4) of the Corporation Code, the SEC has the regulatory function to reject or disapprove the Articles of Incorporation of any corporation where "the required percentage of ownership of the capital stock to be owned by citizens of the Philippines has not been complied with as required by existing laws or the Constitution." Thus, the SEC is the government agency tasked with the statutory duty to enforce the nationality requirement prescribed in Section 11, Article XII of the Constitution on the ownership of public utilities. This Court, in a petition for declaratory relief that is treated as a petition for *mandamus* as in the present case, can direct the SEC to perform its statutory duty under the law, a duty that the SEC has apparently unlawfully neglected to do based on the 2010 GIS that respondent PLDT submitted to the SEC.

Under Section 5(m) of the Securities Regulation Code, the SEC is vested with the "power and function" to "suspend or revoke, after proper notice and hearing, the franchise or certificate of registration of corporations, partnerships or associations, upon any of the grounds provided by law." The SEC is mandated under Section 5(d) of the same Code with the "power and function" to "investigate ... the activities of persons to ensure compliance" with the laws and regulations that SEC administers or enforces. The GIS that all corporations are required to submit to SEC annually should put the SEC on guard against violations of the nationality requirement prescribed in the Constitution and existing laws. This Court can compel the SEC, in a petition for declaratory relief that is treated as a petition for *mandamus* as in the present case, to hear and decide a possible violation of Section 11, Article XII of the Constitution in view of the ownership structure of PLDT's voting shares, as admitted by respondents and as stated in PLDT's 2010 GIS that PLDT submitted to SEC.

Ultimately, in **Gamboa**, the Court *en banc*, through Justice Carpio,

[113] Securities and Exchange Commission v. Court of Appeals, 316 Phil. 903 (1995).

ruled that **the term "capital" in Section 11, Article XII referred only to shares of stock entitled to vote in the election of directors,** and thus, in the case of PLDT, only to common shares, and not to its total outstanding capital stock (common and non-voting preferred shares). The Chairperson of the SEC was directed to apply this definition of the term "capital" to determine the extent of allowable foreign ownership in PLDT, and if there were a violation of this Section 11, Article XII, to impose the appropriate sanctions under the law.[114]

Non-Exclusive Franchise

PILIPINO TELEPHONE CORPORATION v. NATIONAL TELECOMMUNICATIONS COMMISSION, G.R. No. 138295, August 28, 2003, 457 Phil. 101, was a petition for review on *certiorari* which sought to reverse the decisions of the Court of Appeals denying due course to the petition for *certiorari* filed by PILTEL and dismissing the same. Justice Carpio, on behalf of the First Division, denied the petition and affirmed the decisions of the Court of Appeals. The facts were presented as follows:

> On 20 March 1995, the National Telecommunications Commission (NTC) issued PILTEL a Provisional Authority (PA) to install, operate and maintain telephone exchanges and public calling offices. The areas covered by PILTEL's PA included Sulu, Zamboanga del Norte, Zamboanga del Sur, Tawi-Tawi, Misamis Occidental, Davao del Sur, South Cotabato, Saranggani and Davao City.
>
> On 21 June 1996, while PILTEL's PA was still valid and subsisting, the International Communications Corporation (ICC) applied with the NTC for a PA to construct, operate and maintain local exchange services in some of the areas covered by PILTEL's PA. Among the areas included in ICC's application were Misamis Occidental, Zamboanga del Sur, Davao del Sur, South Cotabato and Saranggani.
>
> On 11 November 1996, PILTEL filed its Opposition to ICC's PA application.
>
> On 9 March 1998, the NTC issued an Order (NTC Order)

[114] But see Roy v. Herbosa, G.R. No. 207246, November 22, 2016, and April 18, 2017, decided by the Court *en banc*, and to which Justice Carpio dissented.

granting ICC a PA to establish local exchange services in areas that included Misamis Occidental, Zamboanga del Sur, Davao del Sur, South Cotabato and Saranggani.

PILTEL filed a petition for *certiorari* with prayer for the issuance of a temporary restraining order or writ of preliminary injunction with the Court of Appeals on 5 June 1998 to nullify the NTC Order. On 28 July 1998, ICC filed its Comment to PILTEL's Petition, while PILTEL filed its Reply on 28 August 1998.

On 21 September 1998, PILTEL filed an Urgent Motion to Resolve its application for the issuance of a temporary restraining order. PILTEL alleged, among others, that it had yet to receive ICC's Comment despite the lapse of a considerable time from the Court of Appeals' requiring ICC to file its Comment.

On 15 April 1999, the Court of Appeals issued a Joint Decision, the dispositive portion of which reads:

> WHEREFORE, for finding no grave abuse of discretion, tantamount to lack ... or excess of jurisdiction, on the part of the National Telecommunications Commission in issuing its challenged Order dated March 9, 1998 in NTC Case No. 96-194 which granted a provisional authority to International Communications Corporation, the two (2) consolidated cases of CA-G.R. SP No. 47752 and CA-G.R. SP No. 47972 are both hereby DENIED DUE COURSE and accordingly DISMISSED…

The issue in **PILTEL** - whether NTC committed grave abuse of discretion - relevant to **Section 11 of this Article XII on a non-exclusive franchise,** and the ruling thereon, were as follows:

> B. The National Telecommunications Commission acted with grave abuse of discretion amounting to lack or excess of jurisdiction considering that:
> 1. The grant of the provisional authority to ICC to operate local exchange service in areas previously assigned to PILTEL under its own provisional authority is violative of NTC memorandum circular no. 11-9-93.
> 2. The grant of the provisional authority to ICC to operate local exchange service in areas previously assigned to PILTEL is tantamount to confiscation of property without due process of law.

> 3. The grant of the provisional authority to ICC to operate local exchange service in areas previously assigned to PILTEL would violate the latter's rights as a prior operator and its right to be protected in its investment…

In *Benito v. Commission on Elections*,[115] the Court defined grave abuse of discretion as follows:

> Grave abuse of discretion means such capricious and whimsical exercise of judgment as is equivalent to lack of jurisdiction, or, in other words where the power is exercised in an arbitrary or despotic manner by reason of passion or personal hostility, and it must be so patent and gross as to amount to an evasion of positive duty or to a virtual refusal to perform the duty enjoined or to act at all in contemplation of law. It is not sufficient that a tribunal, in the exercise of its power, abused its discretion, such abuse must be grave.

Assuming that PILTEL's petition for *certiorari* was proper, PILTEL nevertheless miserably failed to show that the NTC gravely abused its discretion amounting to lack or excess of jurisdiction in issuing the NTC Order. The NTC is the regulatory agency of the national government with jurisdiction over all telecommunications entities.[116] The law expressly vests in the NTC the power and discretion to grant a provisional permit or authority.[117] In this case, the NTC did not commit grave abuse of discretion when it issued the questioned Order. The NTC Order explicitly provides for the basis of the issuance of the PA:

> … WHEREFORE, it appearing that a prima facie evidence exists that applicant is financially and technically capable of undertaking the proposed project, and in order to fast-track the development of telecommunication services through the provisioning of telephone services to all areas of the country, and to foster as well healthy competition among authorized service providers, the Commission hereby grants applicant International Communications Corporation a Provisional Authority (P.A.), predicated upon its legislative franchise, RA No. 3259, as amended by RA No. 4905, and RA No. 7633, to install, operate

[115] G.R. No. 134913, 19 January 2001, 349 SCRA 705.
[116] Philippine Long Distance Telephone Co. v. National Telecommunications Commission, G.R. No. 88404, 18 October 1990, 190 SCRA 717.
[117] Ibid.

> and maintain local telephone exchanges in the following provinces, ...

We will not disturb the factual findings of the NTC on the technical and financial capability of the ICC to undertake the proposed project. We generally accord great weight and even finality to factual findings of administrative bodies such as the NTC, if substantial evidence supports the findings as in this case.[118] The exception to this rule is when the administrative agency arbitrarily disregarded evidence before it or misapprehended evidence to such an extent as to compel a contrary conclusion had it properly appreciated the evidence.[119] PILTEL gravely failed to show that this exception applies to the instant case. Moreover, the exercise of administrative discretion, such as the issuance of a PA, is a policy decision and a matter that the NTC can best discharge, not the courts.[120]

PILTEL contends that the NTC violated Section 23 of NTC Memorandum Circular No. 11-9-93, otherwise known as the "Implementing Guidelines on the Provisions of EO 109," which states:

> Sec. 23. No other company or entity shall be authorized to provide local exchange service in areas where the LECs comply with the relevant provisions of NTC MC No. 10-17-90 and NTC MC No. 10-16-90 and that the local exchange service area is not underserved.

Section 23 of EO 109 does not categorically state that the issuance of a PA is exclusive to any telecommunications company. Neither Congress nor the NTC can grant an exclusive "franchise, certificate, of any other form of authorization" to operate a public utility. In *Republic v. Express Telecommunications Co.*,[121] the Court held that "the Constitution is quite emphatic that the operation of a public utility shall not be exclusive"… (as provided in) Section 11, Article XII of the Constitution …

Thus, in *Radio Communications of the Philippines, Inc. v. National Telecommunications Commission*,[122] the Court ruled

[118] Batangas Laguna Tayabas Bus Co., Inc. v. Bitanga, 415 Phil. 43 (2001).
[119] Ibid.
[120] Remolona v. Civil Service Commission, 414 Phil. 590 (2001).
[121] G.R. Nos. 147096 147210, 15 January 2002, 373 SCRA 316.
[122] G.R. No. L-68729, 29 May 1987, 150 SCRA 450.

that the "Constitution mandates that a franchise cannot be exclusive in nature."

Even PILTEL's franchise, Republic Act No. 6030 (RA 6030), expressly declares that PILTEL's right to provide telecommunications services is not exclusive. Section 13 of RA 6030 states:

> Sec. 13. The rights herein granted shall not be exclusive, and the right and power to grant to any corporation, association or person other than the grantee franchise for the telephone or electrical transmission of messages and signals shall not be impaired or affected by the granting of this franchise: ..."

Moreover, Section 1 of RA 6030 expressly states that the grant of a franchise to PILTEL is "[s]ubject to the conditions established ... in the Constitution." Consequently, PILTEL does not enjoy any exclusive right to operate telecommunications services in the areas covered by its PA.

Among the declared national policies in Republic Act No. 7925, otherwise known as the "Public Telecommunications Policy Act of the Philippines," is the healthy competition among telecommunications carriers, to wit:[123]

> A healthy competitive environment shall be fostered, one in which telecommunications carriers are free to make business decisions and to interact with one another in providing telecommunications services, with the end in view of encouraging their financial viability while maintaining affordable rates.

Obviously, "the need for a healthy competitive environment in telecommunications is sufficient impetus for the NTC to consider all those applicants, who are willing to offer competition, develop the market and provide the environment necessary for greater public service."[124] Furthermore, "free competition in the industry may also provide the answer to a much-desired improvement in the quality and delivery of this type of public utility, to improved

[123] Republic v. Express Telecommunications Co., Inc., G.R. Nos. 147096 147210, 15 January 2002, 373 SCRA 316.
[124] Ibid.

technology, fast and handy mobil[e] service, and reduced user dissatisfaction."[125]

PILTEL's contention that the NTC Order amounts to a confiscation of property without due process of law is untenable. "Confiscation" means the seizure of private property by the government without compensation to the owner.[126] A franchise to operate a public utility is not an exclusive private property of the franchisee. Under the Constitution, no franchisee can demand or acquire exclusivity in the operation of a public utility. Thus, a franchisee of a public utility cannot complain of seizure or taking of property because of the issuance of another franchise to a competitor. Every franchise, certificate or authority to operate a public utility is, by constitutional mandate, non-exclusive. PILTEL cannot complain of a taking of an exclusive right that it does not own and which no franchisee can ever own.

Likewise, PILTEL's argument that the NTC Order violates PILTEL's rights as a prior operator has no merit. The Court resolved a similar question in *Republic v. Republic Telephone Company, Inc.*[127] In striking down Retelco's claim that it had a right to be protected in its investment as a franchise- holder and prior operator of a telephone service in Malolos, Bulacan, the Court held:

> RETELCO's foremost argument is that "such operations and maintenance of the telephone system and solicitation of subscribers by [petitioners] constituted an unfair and ruinous competition to the detriment of [RETELCO which] is a grantee of both municipal and legislative franchises for the purpose." In effect, RETELCO pleads for protection from the courts on the assumption that its franchises vested in it an exclusive right as prior operator. There is no clear showing by RETELCO, however, that its franchises are of an exclusive character. ... At any rate, it may very well be pointed out as well that neither did the franchise of PLDT at the time of the controversy confer exclusive rights upon PLDT in the operation of a telephone system. In fact, we have made it a matter of judicial notice that all legislative

[125] Philippine Long Distance Telephone Co. v. National Telecommunications Commission, G.R. No. 88404, 18 October 1990, 190 SCRA 717. See also Republic v. Republic Telephone Company, Inc., G.R. No. 64888, 28 November 1996, 265 SCRA 1.
[126] Black's Law Dictionary, Fifth Edition, 1979.
[127] G.R. No. 64888, 28 November 1996, 265 SCRA 1.

franchises for the operation of a telephone system contain the following provision:

> It is expressly provided that in the event the Philippine Government should desire to maintain and operate for itself the system and enterprise herein authorized, the grantee shall surrender his franchise and will turn over to the Government said system and all serviceable equipment therein, at cost, less reasonable depreciation.

Section 11 of this Article XII was again discussed by Justice Carpio, on behalf of the Court *en banc*, in **TAWANG MULTI-PURPOSE COOPERATIVE v. LA TRINIDAD WATER DISTRICT**, G.R. No. 166471, March 22, 2011, 661 Phil. 390, a petition for review on *certiorari* that challenged a judgment and order of the Regional Trial Court:

The Facts

Tawang Multi-Purpose Cooperative (TMPC) is a cooperative, registered with the Cooperative Development Authority, and organized to provide domestic water services in Barangay Tawang, La Trinidad, Benguet.

La Trinidad Water District (LTWD) is a local water utility created under Presidential Decree (PD) No. 198, as amended. It is authorized to supply water for domestic, industrial and commercial purposes within the municipality of La Trinidad, Benguet.

On 9 October 2000, TMPC filed with the National Water Resources Board (NWRB) an application for a certificate of public convenience (CPC) to operate and maintain a waterworks system in Barangay Tawang. LTWD opposed TMPC's application. LTWD claimed that, under Section 47 of PD No. 198, as amended, its franchise is exclusive. Section 47 states that:

> Sec. 47. Exclusive Franchise. No franchise shall be granted to any other person or agency for domestic, industrial or commercial water service within the district or any portion thereof unless and except to the extent that the board of directors of said district consents thereto by resolution duly adopted, such resolution, however, shall be subject to review by the Administration.

In its No. 04-0702 dated 23 July 2002, the NWRB approved

TMPC's application for a CPC.

In its 15 August 2002 Decision, the NWRB held that LTWD's franchise cannot be exclusive since exclusive franchises are unconstitutional and found that TMPC is legally and financially qualified to operate and maintain a waterworks system. NWRB stated that:

> With respect to LTWD's opposition, this Board observes that:
> 1. It is a substantial reproduction of its opposition to the application for water permits previously filed by this same CPC applicant, under WUC No. 98-17 and 98-62 which was decided upon by this Board on April 27, 2000. The issues being raised by Oppositor had been already resolved when this Board said in pertinent portions of its decision:
>
> > The authority granted to LTWD by virtue of P.D. 198 is not Exclusive. While Barangay Tawang is within their territorial jurisdiction, this does not mean that all others are excluded in engaging in such service, especially, if the district is not capable of supplying water within the area. This Board has time and again ruled that the "Exclusive Franchise" provision under P.D. 198 has misled most water districts to believe that it likewise extends to be [sic] the waters within their territorial boundaries. Such ideological adherence collides head on with the constitutional provision that "ALL WATERS AND NATURAL RESOURCES BELONG TO THE STATE". (Sec. 2, Art. XII) and that "No franchise, certificate or authorization for the operation of public [sic] shall be exclusive in character". ...
>
> All the foregoing premises all considered, and finding that Applicant is legally and financially qualified to operate and maintain a waterworks system; that the said operation shall redound to the benefit of the homeowners/residents of the subdivision, thereby, promoting public service in a proper and suitable manner, the instant application for a Certificate of Public Convenience is, hereby, GRANTED.

LTWD filed a motion for reconsideration. In its 18 November 2002 Resolution, the NWRB denied the motion. LTWD appealed to the RTC.

The RTC's Ruling

In its 1 October 2004 Judgment, the RTC set aside the NWRB's 23 July 2002 and 15 August 2002 Decision and cancelled TMPC's CPC. The RTC held that Section 47 is valid. The RTC stated that:

> The Constitution uses the term "exclusive in character". To give effect to this provision, a reasonable, practical and logical interpretation should be adopted without disregard to the ultimate purpose of the Constitution. What is this ultimate purpose? It is for the state, through its authorized agencies or instrumentalities, to be able to keep and maintain ultimate control and supervision over the operation of public utilities. Essential part of this control and supervision is the authority to grant a franchise for the operation of a public utility to any person or entity, and to amend or repeal an existing franchise to serve the requirements of public interest. Thus, what is repugnant to the Constitution is a grant of franchise "exclusive in character" so as to preclude the State itself from granting a franchise to any other person or entity than the present grantee when public interest so requires. In other words, no franchise of whatever nature can preclude the State, through its duly authorized agencies or instrumentalities, from granting franchise to any person or entity, or to repeal or amend a franchise already granted. Consequently, the Constitution does not necessarily prohibit a franchise that is exclusive on its face, meaning, that the grantee shall be allowed to exercise this present right or privilege to the exclusion of all others. Nonetheless, the grantee cannot set up its exclusive franchise against the ultimate authority of the State.

TMPC filed a motion for reconsideration. In its 6 November 2004 Order, the RTC denied the motion.

Hence, the present petition.

Issue

TMPC raises as issue that the RTC erred in holding that Section 47 of PD No. 198, as amended, is valid.

In granting the **Tawang** petition, Justice Carpio, for the Court *en banc*, declared Section 47 of Presidential Decree No. 198 unconstitutional, set aside the judgement and order of the Regional Trial Court, and reinstated the resolution and decision of the National Water

Resources Board:

> The petition is meritorious.
>
> **What cannot be legally done directly cannot be done indirectly. This rule is basic and, to a reasonable mind, does not need explanation. Indeed, if acts that cannot be legally done directly can be done indirectly, then all laws would be illusory.**
>
> In *Alvarez v. PICOP Resources, Inc.*,[128] the Court held that, "What one cannot do directly, he cannot do indirectly." In *Akbayan Citizens Action Party v. Aquino*,[129] quoting *Agan, Jr. v. Philippine International Air Terminals Co., Inc.*,[130] the Court held that, "This Court has long and consistently adhered to the legal maxim that those that cannot be done directly cannot be done indirectly." In *Central Bank Employees Association, Inc. v. Bangko Sentral ng Pilipinas*,[131] the Court held that, "No one is allowed to do indirectly what he is prohibited to do directly."
>
> The President, Congress and the Court cannot create directly franchises for the operation of a public utility that are exclusive in character. The 1935, 1973 and 1987 Constitutions expressly and clearly prohibit the creation of franchises that are exclusive in character. Section 8, Article XIII of the 1935 Constitution states that:
>
> > No franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or other entities organized under the laws of the Philippines, sixty per centum of the capital of which is owned by citizens of the Philippines, nor shall such franchise, certificate or authorization be exclusive in character or for a longer period than fifty years.
>
> Section 5, Article XIV of the 1973 Constitution states that:
>
> > No franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or associations

[128] G.R. Nos. 162243, 164516 and 171875, 3 December 2009, 606 SCRA 444.
[129] G.R. No. 170516, 16 July 2008, 558 SCRA 468.
[130] 450 Phil. 744 (2003).
[131] 487 Phil. 531 (2004).

> organized under the laws of the Philippines at least sixty per centum of the capital of which is owned by such citizens, nor shall such franchise, certificate or authorization be exclusive in character or for a longer period than fifty years.

In **Tawang,** having identified the precursors of **Section 11 of this Article XII,** Justice Carpio, then categorically ruled on its import and effect:

> **Plain words do not require explanation. The 1935, 1973 and 1987 Constitutions are clear -- franchises for the operation of a public utility cannot be exclusive in character. The 1935, 1973 and 1987 Constitutions expressly and clearly state that, "nor shall such franchise ... be exclusive in character." There is no exception.**
>
> When the law is clear, there is nothing for the courts to do but to apply it. The duty of the Court is to apply the law the way it is worded. In *Security Bank and Trust Company v. Regional Trial Court of Makati, Branch 61*,[132] the Court held that:
>
> > Basic is the rule of statutory construction that when the law is clear and unambiguous, the court is left with no alternative but to apply the same according to its clear language. As we have held in the case of *Quijano v. Development Bank of the Philippines*:
> >
> > > ... We cannot see any room for interpretation or construction in the clear and unambiguous language of the above-quoted provision of law. This Court had steadfastly adhered to the doctrine that its first and fundamental duty is the application of the law according to its express terms, interpretation being called for only when such literal application is impossible. No process of interpretation or construction need be resorted to where a provision of law peremptorily calls for application. Where a requirement or condition is made in explicit and unambiguous terms, no discretion is left to the judiciary. It must see to it that its mandate is obeyed.
>
> In *Republic of the Philippines v. Express Telecommunications Co., Inc.*,[133] the Court held that, "(t)he Constitution is quite emphatic that the operation of a public utility shall not be

[132] G.R. No. 113926, 23 October 1996, 263 SCRA 483.
[133] 424 Phil. 372 (2002).

exclusive." In **Pilipino Telephone Corporation v. National Telecommunications Commission**,[134] the Court held that, "Neither Congress nor the NTC can grant an exclusive `franchise, certificate, or any other form of authorization' to operate a public utility." In *National Power Corp. v. Court of Appeals,*[135] the Court held that, "Exclusivity of any public franchise has not been favored by this Court such that in most, if not all, grants by the government to private corporations, the interpretation of rights, privileges or franchises is taken against the grantee." In *Radio Communications of the Philippines, Inc. v. National Telecommunications Commission*,[136] the Court held that, "The Constitution mandates that a franchise cannot be exclusive in nature."

Indeed, the President, Congress and the Court cannot create directly franchises that are exclusive in character. What the President, Congress and the Court cannot legally do directly they cannot do indirectly. Thus, the President, Congress and the Court cannot create indirectly franchises that are exclusive in character by allowing the Board of Directors (BOD) of a water district and the Local Water Utilities Administration (LWUA) to create franchises that are exclusive in character.

In PD No. 198, as amended, former President Ferdinand E. Marcos (President Marcos) created indirectly franchises that are exclusive in character by allowing the BOD of LTWD and the LWUA to create directly franchises that are exclusive in character. Section 47 of PD No. 198, as amended, allows the BOD and the LWUA to create directly franchises that are exclusive in character. Section 47 states:

> Sec. 47. Exclusive Franchise. No franchise shall be granted to any other person or agency for domestic, industrial or commercial water service within the district or any portion thereof unless and except to the extent that the board of directors of said district consents thereto by resolution duly adopted, such resolution, however, shall be subject to review by the Administration.

In case of conflict between the Constitution and a statute, the Constitution always prevails because the Constitution is the

[134] 457 Phil. 101 (2003), penned by Justice Carpio and excerpted above.
[135] 345 Phil. 9 (1997).
[136] 234 Phil. 443 (1987).

basic law to which all other laws must conform to. The duty of the Court is to uphold the Constitution and to declare void all laws that do not conform to it.

In *Social Justice Society v. Dangerous Drugs Board*,[137] the Court held that, "It is basic that if a law or an administrative rule violates any norm of the Constitution, that issuance is null and void and has no effect. The Constitution is the basic law to which all laws must conform; no act shall be valid if it conflicts with the Constitution." In *Sabio v. Gordon*,[138] the Court held that, "the Constitution is the highest law of the land. It is the `basic and paramount law to which all other laws must conform.'" In *Atty. Macalintal v. Commission on Elections*,[139] the Court held that, "The Constitution is the fundamental and paramount law of the nation to which all other laws must conform and in accordance with which all private rights must be determined and all public authority administered. Laws that do not conform to the Constitution shall be stricken down for being unconstitutional." In *Manila Prince Hotel v. Government Service Insurance System*,[140] the Court held that:

> Under the doctrine of constitutional supremacy, if a law or contract violates any norm of the constitution that law or contract whether promulgated by the legislative or by the executive branch or entered into by private persons for private purposes is null and void and without any force and effect. Thus, since the Constitution is the fundamental, paramount and supreme law of the nation, it is deemed written in every statute and contract.

To reiterate, the 1935, 1973 and 1987 Constitutions expressly prohibit the creation of franchises that are exclusive in character. They uniformly command that "nor shall such franchise ... be exclusive in character." This constitutional prohibition is absolute and accepts no exception. On the other hand, PD No. 198, as amended, allows the BOD of LTWD and LWUA to create franchises that are exclusive in character. Section 47 states that, "No franchise shall be granted to any other person or agency ... unless and except to the extent that the board of directors consents thereto ... subject to review by the Administration." Section 47

[137] G.R. Nos. 157870, 158633 and 161658, 3 November 2008, 570 SCRA 410.
[138] G.R. No. 174340, 17 October 2006, 504 SCRA 704.
[139] 453 Phil. 586 (2003).
[140] 335 Phil. 82 (1997).

creates a glaring exception to the absolute prohibition in the Constitution. Clearly, it is patently unconstitutional.

Section 47 gives the BOD and the LWUA the authority to make an exception to the absolute prohibition in the Constitution. In short, the BOD and the LWUA are given the discretion to create franchises that are exclusive in character. The BOD and the LWUA are not even legislative bodies. The BOD is not a regulatory body but simply a management board of a water district. Indeed, neither the BOD nor the LWUA can be granted the power to create any exception to the absolute prohibition in the Constitution, a power that Congress itself cannot exercise.

In *Metropolitan Cebu Water District v. Adala*,[141] the Court categorically declared Section 47 void. The Court held that:

> Nonetheless, while the prohibition in Section 47 of P.D. 198 applies to the issuance of CPCs for the reasons discussed above, the same provision must be deemed void ab initio for being irreconcilable with Article XIV, Section 5 of the 1973 Constitution which was ratified on January 17, 1973 -- the constitution in force when P.D. 198 was issued on May 25, 1973. Thus, Section 5 of Art. XIV of the 1973 Constitution reads…
> This provision has been substantially reproduced in Article XII Section 11 of the 1987 Constitution…
> Since Section 47 of P.D. 198, which vests an "exclusive franchise" upon public utilities, is clearly repugnant to Article XIV, Section 5 of the 1973 Constitution, it is unconstitutional and may not, therefore, be relied upon by petitioner in support of its opposition against respondent's application for CPC and the subsequent grant thereof by the NWRB.
> WHEREFORE, Section 47 of P.D. 198 is unconstitutional.

The dissenting opinion[142] declares Section 47 valid and constitutional. In effect, the dissenting opinion holds that (1) President Marcos can create indirectly franchises that are exclusive in character; (2) the BOD can create directly franchises that are exclusive in character; (3) the LWUA can create directly franchises that are exclusive in character; and (4) the Court should allow the creation of franchises that are exclusive in character.

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[141] G.R. No. 168914, 4 July 2007, 526 SCRA 465.
[142] Dissenting opinion, Brion, J.

Stated differently, the dissenting opinion holds that (1) President Marcos can violate indirectly the Constitution; (2) the BOD can violate directly the Constitution; (3) the LWUA can violate directly the Constitution; and (4) the Court should allow the violation of the Constitution.

The dissenting opinion states that the BOD and the LWUA can create franchises that are exclusive in character "based on reasonable and legitimate grounds," and such creation "should not be construed as a violation of the constitutional mandate on the non-exclusivity of a franchise" because it "merely refers to regulation" which is part of "the government's inherent right to exercise police power in regulating public utilities" and that their violation of the Constitution "would carry with it the legal presumption that public officers regularly perform their official functions." The dissenting opinion states that:

To begin with, a government agency's refusal to grant a franchise to another entity, based on reasonable and legitimate grounds, should not be construed as a violation of the constitutional mandate on the non-exclusivity of a franchise; this merely refers to regulation, which the Constitution does not prohibit. To say that a legal provision is unconstitutional simply because it enables a government instrumentality to determine the propriety of granting a franchise is contrary to the government's inherent right to exercise police power in regulating public utilities for the protection of the public and the utilities themselves. The refusal of the local water district or the LWUA to consent to the grant of other franchises would carry with it the legal presumption that public officers regularly perform their official functions.

The dissenting opinion states two "reasonable and legitimate grounds" for the creation of exclusive franchise: (1) protection of "the government's investment," and (2) avoidance of "a situation where ruinous competition could compromise the supply of public utilities in poor and remote areas."

There is no "reasonable and legitimate" ground to violate the Constitution. The Constitution should never be violated by anyone. Right or wrong, the President, Congress, the Court, the BOD and the LWUA have no choice but to follow the Constitution. Any act, however noble its intentions, is void if it violates the Constitution. This rule is basic.

In *Social Justice Society*,[143] the Court held that, "In the discharge of their defined functions, the three departments of government have no choice but to yield obedience to the commands of the Constitution. Whatever limits it imposes must be observed." In *Sabio*,[144] the Court held that, "the Constitution is the highest law of the land. It is `the basic and paramount law to which ... all persons, including the highest officials of the land, must defer. No act shall be valid, however noble its intentions, if it conflicts with the Constitution.'" In *Bengzon v. Drilon*,[145] the Court held that, "the three branches of government must discharge their respective functions within the limits of authority conferred by the Constitution." In *Mutuc v. Commission on Elections*,[146] the Court held that, "The three departments of government in the discharge of the functions with which it is [sic] entrusted have no choice but to yield obedience to [the Constitution's] commands. Whatever limits it imposes must be observed."

Police power does not include the power to violate the Constitution. Police power is the plenary power vested in Congress to make laws not repugnant to the Constitution. This rule is basic.

In *Metropolitan Manila Development Authority v. Viron Transportation Co., Inc.*,[147] the Court held that, "Police power is the plenary power vested in the legislature to make, ordain, and establish wholesome and reasonable laws, statutes and ordinances, not repugnant to the Constitution." In *Carlos Superdrug Corp. v. Department of Social Welfare and Development*,[148] the Court held that, police power "is `the power vested in the legislature by the constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances ... not repugnant to the constitution.'" In *Metropolitan Manila Development Authority v. Garin*,[149] the Court held that, "police power, as an inherent attribute of sovereignty, is the power vested by the Constitution in the legislature to make, ordain, and establish all manner of wholesome and reasonable laws, statutes and ordinances ... not repugnant to the Constitution."

[143] G.R. Nos. 157870, 158633 and 161658, 3 November 2008, 570 SCRA 410.
[144] G.R. No. 174340, 17 October 2006, 504 SCRA 704.
[145] G.R. No. 103524, 15 April 1992, 208 SCRA 133.
[146] 146 Phil. 798 (1970).
[147] G.R. Nos. 170656 and 170657, 15 August 2007, 530 SCRA 341.
[148] G.R. No. 166494, 29 June 2007, 526 SCRA 130.
[149] 496 Phil. 83 (2005).

There is no question that the effect of Section 47 is the creation of franchises that are exclusive in character. Section 47 expressly allows the BOD and the LWUA to create franchises that are exclusive in character.

The dissenting opinion explains why the BOD and the LWUA should be allowed to create franchises that are exclusive in character -- to protect "the government's investment" and to avoid "a situation where ruinous competition could compromise the supply of public utilities in poor and remote areas." The dissenting opinion declares that these are "reasonable and legitimate grounds." The dissenting opinion also states that, "The refusal of the local water district or the LWUA to consent to the grant of other franchises would carry with it the legal presumption that public officers regularly perform their official functions."

When the effect of a law is unconstitutional, it is void. In *Sabio*,[150] the Court held that, "A statute may be declared unconstitutional because it is not within the legislative power to enact; or it creates or establishes methods or forms that infringe constitutional principles; or its purpose or effect violates the Constitution or its basic principles." The effect of Section 47 violates the Constitution, thus, it is void.

In **Strategic Alliance Development Corporation v. Radstock Securities Limited**,[151] the Court held that, "This Court must perform its duty to defend and uphold the Constitution." In *Bengzon*,[152] the Court held that, "The Constitution expressly confers on the judiciary the power to maintain inviolate what it decrees." In *Mutuc*,[153] the Court held that:

> The concept of the Constitution as the fundamental law, setting forth the criterion for the validity of any public act whether proceeding from the highest official or the lowest functionary, is a postulate of our system of government. That is to manifest fealty to the rule of law, with priority accorded to that which occupies the topmost rung in the legal hierarchy. The three departments of government in

[150] G.R. No. 174340, 17 October 2006, 504 SCRA 704.
[151] G.R. Nos. 178158 and 180428, 4 December 2009, 607 SCRA 413, penned by Justice Carpio and excerpted above.
[152] G.R. No. 103524, 15 April 1992, 208 SCRA 133.
[153] 146 Phil. 798 (1970).

> the discharge of the functions with which it is [sic] entrusted have no choice but to yield obedience to its commands. Whatever limits it imposes must be observed. Congress in the enactment of statutes must ever be on guard lest the restrictions on its authority, whether substantive or formal, be transcended. The Presidency in the execution of the laws cannot ignore or disregard what it ordains. In its task of applying the law to the facts as found in deciding cases, the judiciary is called upon to maintain inviolate what is decreed by the fundamental law. Even its power of judicial review to pass upon the validity of the acts of the coordinate branches in the course of adjudication is a logical corollary of this basic principle that the Constitution is paramount. It overrides any governmental measure that fails to live up to its mandates. Thereby there is a recognition of its being the supreme law.
>
> Sustaining the RTC's ruling would make a dangerous precedent. It will allow Congress to do indirectly what it cannot do directly. In order to circumvent the constitutional prohibition on franchises that are exclusive in character, all Congress has to do is to create a law allowing the BOD and the LWUA to create franchises that are exclusive in character, as in the present case.

Section 12. The State shall promote the preferential use of Filipino labor, domestic materials and locally produced goods, and adopt measures that help make them competitive.

Section 13. The State shall pursue a trade policy that serves the general welfare and utilizes all forms and arrangements of exchange on the basis of equality and reciprocity.

Section 14. The sustained development of a reservoir of national talents consisting of Filipino scientists, entrepreneurs, professionals, managers, high-level technical manpower and skilled workers and craftsmen in all fields shall be promoted by the State. The State shall encourage appropriate technology and regulate its transfer for the national benefit. The practice of all professions in the Philippines shall be limited to Filipino citizens, save in cases prescribed by law.

Section 15. The Congress shall create an agency to promote

the viability and growth of cooperatives as instruments for social justice and economic development.

Section 16. The Congress shall not, except by general law, provide for the formation, organization, or regulation of private corporations. Government-owned or controlled corporations may be created or established by special charters in the interest of the common good and subject to the test of economic viability.

FELICIANO v. COMMISSION ON AUDIT, G.R. No. 147402, January 14, 2004, 464 Phil. 439, was a petition for *certiorari* to annul the COA's resolution and its decision denying the motion for reconsideration thereon. COA denied petitioner Ranulfo C. Feliciano's request for the COA to cease all audit services, and to stop charging auditing fees, to the Leyte Metropolitan Water District (LMWD). In affirming both the resolution and decision of the COA, Justice Carpio, speaking for the Court *en banc*, ruled that the second sentence of Section 20 of Presidential Decree No. 198 was void for being inconsistent with Sections 2(1) and 3, Article IX-D of the Constitution, which provide for the audit jurisdiction of the COA.[154] One of the issues raised by the petitioner was whether local water districts (LWDs) were **private or government-owned and controlled corporations with original charters**:

> Petitioner seeks to revive a well-settled issue. Petitioner asks for a re-examination of a doctrine backed by a long line of cases culminating in *Davao City Water District v. Civil Service Commission*[155] and just recently reiterated in *De Jesus v. Commission on Audit*.[156] Petitioner maintains that LWDs are not government-owned and controlled corporations with original charters. Petitioner even argues that LWDs are private corporations. Petitioner asks the Court to consider certain interpretations of the applicable laws, which would give a "new perspective to the issue of the true character of water districts."
>
> Petitioner theorizes that what PD 198 created was the Local Waters Utilities Administration (LWUA) and not the LWDs. Petitioner claims that LWDs are created "pursuant to" and not created directly by PD 198. Thus, petitioner concludes that PD

[154] See discussions under Art. IX-D.
[155] G.R. No. 95237-38, 13 September 1991, 201 SCRA 593.
[156] G.R. No. 149154, 10 June 2003.

198 is not an "original charter" that would place LWDs within the audit jurisdiction of COA as defined in Section 2(1), Article IX-D of the Constitution. Petitioner elaborates that PD 198 does not create LWDs since it does not expressly direct the creation of such entities, but only provides for their formation on an optional or voluntary basis. Petitioner adds that the operative act that creates an LWD is the approval of the Sanggunian as specified in PD 198.

Petitioner's contention deserves scant consideration.

We begin by explaining the general framework under the fundamental law. The Constitution recognizes two classes of corporations. The first refers to private corporations created under a general law. The second refers to government-owned or controlled corporations created by special charters (citing) Section 16, Article XII of the Constitution…

The Constitution emphatically prohibits the creation of private corporations except by a general law applicable to all citizens.[157] The purpose of this constitutional provision is to ban private corporations created by special charters, which historically gave certain individuals, families or groups special privileges denied to other citizens.[158]

In short, Congress cannot enact a law creating a private corporation with a special charter. Such legislation would be unconstitutional. Private corporations may exist only under a general law. If the corporation is private, it must necessarily exist under a general law. Stated differently, only corporations created under a general law can qualify as private corporations. Under existing laws, that general law is the Corporation Code,[159] except that the Cooperative Code governs the incorporation of cooperatives.[160]

The Constitution authorizes Congress to create government-owned or controlled corporations through special charters. Since private corporations cannot

[157] See National Development Company v. Philippine Veterans Bank, G.R. Nos. 84132-33, 10 December 1990, 192 SCRA 257.
[158] Joaquin G. Bernas, The 1987 Constitution Of The Republic Of The Philippines: A Commentary 1181 (2003).
[159] Batas Pambansa Blg. 68.
[160] RA. No. 6938. See also RA No. 6939 or The Cooperative Development Authority Law.

have special charters, it follows that Congress can create corporations with special charters only if such corporations are government-owned or controlled.

Obviously, LWDs are not private corporations because they are not created under the Corporation Code. LWDs are not registered with the Securities and Exchange Commission. Section 14 of the Corporation Code states that "[A]ll corporations organized under this code shall file with the Securities and Exchange Commission articles of incorporation ..." LWDs have no articles of incorporation, no incorporators and no stockholders or members. There are no stockholders or members to elect the board directors of LWDs as in the case of all corporations registered with the Securities and Exchange Commission. The local mayor or the provincial governor appoints the directors of LWDs for a fixed term of office. This Court has ruled that LWDs are not created under the Corporation Code, thus:

> From the foregoing pronouncement, it is clear that what has been excluded from the coverage of the CSC are those corporations created pursuant to the Corporation Code. Significantly, petitioners are not created under the said code, but on the contrary, they were created pursuant to a special law and are governed primarily by its provision.[161]

LWDs exist by virtue of PD 198, which constitutes their special charter. Since under the Constitution only government-owned or controlled corporations may have special charters, LWDs can validly exist only if they are government-owned or controlled. To claim that LWDs are private corporations with a special charter is to admit that their existence is constitutionally infirm.

Unlike private corporations, which derive their legal existence and power from the Corporation Code, LWDs derive their legal existence and power from PD 198. Sections 6 and 25 of PD 198[162] provide:

> Sec. 6. Formation of District. - This Act is the source of authorization and power to form and maintain a district. For purposes of this Act, a district shall be considered as a quasi-public corporation performing public service and

[161] G.R. No. 95237-38, 13 September 1991, 201 SCRA 593.
[162] As amended by PD 1479.

supplying public wants. As such, a district shall exercise the powers, rights and privileges given to private corporations under existing laws, in addition to the powers granted in, and subject to such restrictions imposed, under this Act.
(a) The name of the local water district, which shall include the name of the city, municipality, or province, or region thereof, served by said system, followed by the words "Water District".
(b) A description of the boundary of the district. In the case of a city or municipality, such boundary may include all lands within the city or municipality. A district may include one or more municipalities, cities or provinces, or portions thereof.
(c) A statement completely transferring any and all waterworks and/or sewerage facilities managed, operated by or under the control of such city, municipality or province to such district upon the filing of resolution forming the district.
(d) A statement identifying the purpose for which the district is formed, which shall include those purposes outlined in Section 5 above.
(e) The names of the initial directors of the district with the date of expiration of term of office for each.
(f) A statement that the district may only be dissolved on the grounds and under the conditions set forth in Section 44 of this Title.
(g) A statement acknowledging the powers, rights and obligations as set forth in Section 36 of this Title.
Nothing in the resolution of formation shall state or infer that the local legislative body has the power to dissolve, alter or affect the district beyond that specifically provided for in this Act.
If two or more cities, municipalities or provinces, or any combination thereof, desire to form a single district, a similar resolution shall be adopted in each city, municipality and province. …
Sec. 25. Authorization. - The district may exercise all the powers which are expressly granted by this Title or which are necessarily implied from or incidental to the powers and purposes herein stated. For the purpose of carrying out the objectives of this Act, a district is hereby granted the power of eminent domain, the exercise thereof shall, however, be subject to review by the Administration.

Clearly, LWDs exist as corporations only by virtue of PD 198, which expressly confers on LWDs corporate powers. Section 6

of PD 198 provides that LWDs "shall exercise the powers, rights and privileges given to private corporations under existing laws." Without PD 198, LWDs would have no corporate powers. Thus, PD 198 constitutes the special enabling charter of LWDs. The ineluctable conclusion is that LWDs are government-owned and controlled corporations with a special charter.

The phrase "government-owned and controlled corporations with original charters" means GOCCs created under special laws and not under the general incorporation law. There is no difference between the term "original charters" and "special charters." The Court clarified this in *National Service Corporation v. NLRC*[163] by citing the deliberations in the Constitutional Commission, as follows:

> THE PRESIDING OFFICER (Mr. Trenas). The session is resumed. Commissioner Romulo is recognized.
> MR. ROMULO. Mr. Presiding Officer, I am amending my original proposed amendment to now read as follows: "including government-owned or controlled corporations WITH ORIGINAL CHARTERS." The purpose of this amendment is to indicate that government corporations such as the GSIS and SSS, which have original charters, fall within the ambit of the civil service. However, corporations which are subsidiaries of these chartered agencies such as the Philippine Airlines, Manila Hotel and Hyatt are excluded from the coverage of the civil service.
> THE PRESIDING OFFICER (Mr. Trenas). What does the Committee say?
> MR. FOZ. Just one question, Mr. Presiding Officer. By the term "original charters," what exactly do we mean?
> MR. ROMULO. We mean that they were created by law, by an act of Congress, or by special law.
> MR. FOZ. And not under the general corporation law.
> MR. ROMULO. That is correct. Mr. Presiding Officer.
> MR. FOZ. With that understanding and clarification, the Committee accepts the amendment.
> MR. NATIVIDAD. Mr. Presiding Officer, so those created by the general corporation law are out.
> MR. ROMULO. That is correct.

Again, in *Davao City Water District v. Civil Service*

[163] G.R. No. L-69870, 29 November 1988, 168 SCRA 122.

Commission,[164] the Court reiterated the meaning of the phrase "government-owned and controlled corporations with original charters" in this wise:

> By "government-owned or controlled corporation with original charter," We mean government owned or controlled corporation created by a special law and not under the Corporation Code of the Philippines. Thus, in the case of *Lumanta v. NLRC* (G.R. No. 82819, February 8, 1989, 170 SCRA 79, 82), We held:
>
> > The Court, in *National Service Corporation (NASECO) v. National Labor Relations Commission*, G.R. No. 69870, promulgated on 29 November 1988, quoting extensively from the deliberations of the 1986 Constitutional Commission in respect of the intent and meaning of the new phrase 'with original charter,' in effect held that government-owned and controlled corporations with original charter refer to corporations chartered by special law as distinguished from corporations organized under our general incorporation statute - the Corporation Code. In *NASECO*, the company involved had been organized under the general incorporation statute and was a subsidiary of the National Investment Development Corporation (NIDC) which in turn was a subsidiary of the Philippine National Bank, a bank chartered by a special statute. Thus, government-owned or controlled corporations like NASECO are effectively, excluded from the scope of the Civil Service.

Petitioner's contention that the Sangguniang Bayan resolution creates the LWDs assumes that the Sangguniang Bayan has the power to create corporations. This is a patently baseless assumption.

The Local Government Code[165] does not vest in the Sangguniang Bayan the power to create corporations.[166] What the Local Government Code empowers the Sangguniang Bayan to do is to provide for the establishment of a waterworks system "subject to existing laws." Thus, Section 447(5) (vii) of the Local Government Code provides:

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[164] G.R. No. 95237-38, 13 September 1991, 201 SCRA 593.
[165] RA No. 7160.
[166] See Sec. 447 of the Local Government Code on the powers of the Sangguniang Bayan.

> Sec. 447. Powers, Duties, Functions and Compensation. - (a) The sangguniang bayan, as the legislative body of the municipality, shall enact ordinances, approve resolutions and appropriate funds for the general welfare of the municipality and its inhabitants pursuant to Section 16 of this Code and in the proper exercise of the corporate powers of the municipality as provided for under Section 22 of this Code, and shall:
> … (vii) Subject to existing laws, provide for the establishment, operation, maintenance, and repair of an efficient waterworks system to supply water for the inhabitants; regulate the construction, maintenance, repair and use of hydrants, pumps, cisterns and reservoirs; protect the purity and quantity of the water supply of the municipality and, for this purpose, extend the coverage of appropriate ordinances over all territory within the drainage area of said water supply and within one hundred (100) meters of the reservoir, conduit, canal, aqueduct, pumping station, or watershed used in connection with the water service; and regulate the consumption, use or wastage of water …

The Sangguniang Bayan may establish a waterworks system only in accordance with the provisions of PD 198. The Sangguniang Bayan has no power to create a corporate entity that will operate its waterworks system. However, the Sangguniang Bayan may avail of existing enabling laws, like PD 198, to form and incorporate a water district. Besides, even assuming for the sake of argument that the Sangguniang Bayan has the power to create corporations, the LWDs would remain government-owned or controlled corporations subject to COA's audit jurisdiction. The resolution of the Sangguniang Bayan would constitute an LWD's special charter, making the LWD a government-owned and controlled corporation with an original charter. In any event, the Court has already ruled in *Baguio Water District v. Trajano*[167] that the Sangguniang Bayan resolution is not the special charter of LWDs, thus:

> While it is true that a resolution of a local sanggunian is still necessary for the final creation of a district, this Court is of the opinion that said resolution cannot be considered as its charter, the same being intended only to implement the provisions of said decree.

[167] 212 Phil. 674 (1984).

> Petitioner further contends that a law must create directly and explicitly a GOCC in order that it may have an original charter. In short, petitioner argues that one special law cannot serve as enabling law for several GOCCs but only for one GOCC. Section 16, Article XII of the Constitution mandates that "Congress shall not, except by general law," provide for the creation of private corporations. Thus, the Constitution prohibits one special law to create one private corporation, requiring instead a "general law" to create private corporations. In contrast, the same Section 16 states that "Government-owned or controlled corporations may be created or established by special charters." Thus, the Constitution permits Congress to create a GOCC with a special charter. There is, however, no prohibition on Congress to create several GOCCs of the same class under one special enabling charter.
>
> The rationale behind the prohibition on private corporations having special charters does not apply to GOCCs. There is no danger of creating special privileges to certain individuals, families or groups if there is one special law creating each GOCC. Certainly, such danger will not exist whether one special law creates one GOCC, or one special enabling law creates several GOCCs. Thus, Congress may create GOCCs either by special charters specific to each GOCC, or by one special enabling charter applicable to a class of GOCCs, like PD 198 which applies only to LWDs.

MANILA INTERNATIONAL AIRPORT AUTHORITY v. COURT OF APPEALS, G.R. No. 155650, July 20, 2006, 528 Phil. 181,[168] was a petition for review that raised the threshold issue of whether the Airport Lands and Buildings of MIAA are exempt from real estate tax under existing laws. Justice Carpio, on behalf of the Court *en banc*, ruled that the real properties of MIAA are owned by the Republic of the Philippines and thus exempt from real estate tax:

> To summarize, MIAA is not a government-owned or controlled corporation under Section 2(13) of the Introductory Provisions of the Administrative Code because it is not organized as a stock or non-stock corporation. **Neither is MIAA a government-owned or controlled corporation under Section 16, Article XII of the 1987 Constitution because MIAA is not required to meet the test of economic viability. MIAA is a government instrumentality vested**

[168] See discussion under Art. X, Sec. 5.

with corporate powers and performing essential public services pursuant to Section 2(10) of the Introductory Provisions of the Administrative Code. As a government instrumentality, MIAA is not subject to any kind of tax by local governments under Section 133(o) of the Local Government Code. The exception to the exemption in Section 234(a) does not apply to MIAA because MIAA is not a taxable entity under the Local Government Code. Such exception applies only if the beneficial use of real property owned by the Republic is given to a taxable entity.

Finally, the Airport Lands and Buildings of MIAA are properties devoted to public use and thus are properties of public dominion. Properties of public dominion are owned by the State or the Republic. Article 420 of the Civil Code provides:

> Art. 420. The following things are property of public dominion:
> (1) Those intended for public use, such as roads, canals, rivers, torrents, ports and bridges constructed by the State, banks, shores, roadsteads, and others of similar character;
> (2) Those which belong to the State, without being for public use, and are intended for some public service or for the development of the national wealth.

The term "ports ... constructed by the State" includes airports and seaports. The Airport Lands and Buildings of MIAA are intended for public use, and at the very least intended for public service. Whether intended for public use or public service, the Airport Lands and Buildings are properties of public dominion. As properties of public dominion, the Airport Lands and Buildings are owned by the Republic and thus exempt from real estate tax under Section 234(a) of the Local Government Code.
…

In penning the decision in **MIAA**, Justice Carpio thought it necessary to refute the opinion of the minority of the Court[169] and, consequently, had occasion to discuss **Section 16 of this Article XII** at length:

> The minority also contends that the phrase "government-owned or controlled corporation" should apply only to corporations organized under the Corporation Code, the

[169] Separate opinions, Austria-Martinez, J., and Callejo, Sr., J., and dissenting opinion, Tinga, J.

general incorporation law, and not to corporations created by special charters. The minority sees no reason why government corporations with special charters should have a capital stock. Thus, the minority declares:

> I submit that the definition of "government-owned or controlled corporations" under the Administrative Code refer to those corporations owned by the government or its instrumentalities which are created not by legislative enactment, but formed and organized under the Corporation Code through registration with the Securities and Exchange Commission. In short, these are GOCCs without original charters. ...
>
> It might as well be worth pointing out that there is no point in requiring a capital structure for GOCCs whose full ownership is limited by its charter to the State or Republic. Such GOCCs are not empowered to declare dividends or alienate their capital shares.

The contention of the minority is seriously flawed. It is not in accord with the Constitution and existing legislations. It will also result in gross absurdities.

First, the Administrative Code definition of the phrase "government-owned or controlled corporation" does not distinguish between one incorporated under the Corporation Code or under a special charter. Where the law does not distinguish, courts should not distinguish.

Second, Congress has created through special charters several government-owned corporations organized as stock corporations. Prime examples are the Land Bank of the Philippines and the Development Bank of the Philippines. The special charter[170] of the Land Bank of the Philippines provides:

> Sec. 81. Capital. - The authorized capital stock of the Bank shall be nine billion pesos, divided into seven hundred and eighty million common shares with a par value of ten pesos each, which shall be fully subscribed by the Government, and one hundred and twenty million preferred shares with a par value of ten pesos each, which shall be issued in accordance with the provisions of Sections seventy-seven and eighty-three of this Code.

[170] RA No. 3844, 8 August 1963, as amended by RA No. 7907, 23 February 1995.

Likewise, the special charter[171] of the Development Bank of the Philippines provides:

> Sec. 7. Authorized Capital Stock "Par value." The capital stock of the Bank shall be Five Billion Pesos to be divided into Fifty Million common shares with par value of P100 per share. These shares are available for subscription by the National Government. Upon the effectivity of this Charter, the National Government shall subscribe to Twenty-Five Million common shares of stock worth Two Billion Five Hundred Million which shall be deemed paid for by the Government with the net asset values of the Bank remaining after the transfer of assets and liabilities as provided in Section 30 hereof.

Other government-owned corporations organized as stock corporations under their special charters are the Philippine Crop Insurance Corporation,[172] Philippine International Trading Corporation,[173] and the Philippine National Bank[174] before it was reorganized as a stock corporation under the Corporation Code. All these government-owned corporations organized under special charters as stock corporations are subject to real estate tax on real properties owned by them. To rule that they are not government-owned or controlled corporations because they are not registered with the Securities and Exchange Commission would remove them from the reach of Section 234 of the Local Government Code, thus exempting them from real estate tax.

Third, the government-owned or controlled corporations created through special charters are those that meet the two conditions prescribed in Section 16, Article XII of the Constitution. The first condition is that the government-owned or controlled corporation must be established for the common good. The second condition is that the government-owned or controlled corporation must meet the test of economic viability (in) Section 16, Article XII of the 1987 Constitution…

The Constitution expressly authorizes the legislature to

[171] EO No. 81, 3 December 1986.
[172] RA No. 8175, 29 December 1995.
[173] PD No. 252, 21 July 1973, as amended by PD No. 1071, 25 January 1977 and EO No. 1067, 25 November 1985.
[174] EO No. 80, 3 December 1986.

create "government-owned or controlled corporations" through special charters only if these entities are required to meet the twin conditions of common good and economic viability. In other words, Congress has no power to create government-owned or controlled corporations with special charters unless they are made to comply with the two conditions of common good and economic viability. The test of economic viability applies only to government-owned or controlled corporations that perform economic or commercial activities and need to compete in the market place. Being essentially economic vehicles of the State for the common good "meaning for economic development purposes "these government-owned or controlled corporations with special charters are usually organized as stock corporations just like ordinary private corporations.

In contrast, government instrumentalities vested with corporate powers and performing governmental or public functions need not meet the test of economic viability. These instrumentalities perform essential public services for the common good, services that every modern State must provide its citizens. These instrumentalities need not be economically viable since the government may even subsidize their entire operations. These instrumentalities are not the "government-owned or controlled corporations" referred to in Section 16, Article XII of the 1987 Constitution.

Thus, the Constitution imposes no limitation when the legislature creates government instrumentalities vested with corporate powers but performing essential governmental or public functions. Congress has plenary authority to create government instrumentalities vested with corporate powers provided these instrumentalities perform essential government functions or public services. However, when the legislature creates through special charters corporations that perform economic or commercial activities, such entities " known as "government-owned or controlled corporations" "must meet the test of economic viability" because they compete in the market place.

This is the situation of the Land Bank of the Philippines and the Development Bank of the Philippines and similar government-owned or controlled corporations, which derive their income to meet operating expenses solely from commercial transactions

in competition with the private sector. The intent of the Constitution is to prevent the creation of government-owned or controlled corporations that cannot survive on their own in the market place and thus merely drain the public coffers.

Commissioner Blas F. Ople, proponent of the test of economic viability, explained to the Constitutional Commission the purpose of this test, as follows:

> MR. OPLE: Madam President, the reason for this concern is really that when the government creates a corporation, there is a sense in which this corporation becomes exempt from the test of economic performance. We know what happened in the past. If a government corporation loses, then it makes its claim upon the taxpayers" money through new equity infusions from the government and what is always invoked is the common good. That is the reason why this year, out of a budget of P115 billion for the entire government, about P28 billion of this will go into equity infusions to support a few government financial institutions. And this is all taxpayers' money which could have been relocated to agrarian reform, to social services like health and education, to augment the salaries of grossly underpaid public employees. And yet this is all going down the drain.
> Therefore, when we insert the phrase "ECONOMIC VIABILITY" together with the "common good," this becomes a restraint on future enthusiasts for state capitalism to excuse themselves from the responsibility of meeting the market test so that they become viable. And so, Madam President, I reiterate, for the committee's consideration and I am glad that I am joined in this proposal by Commissioner Foz, the insertion of the standard of "ECONOMIC VIABILITY OR THE ECONOMIC TEST," together with the common good.[175]

Father Joaquin G. Bernas, a leading member of the Constitutional Commission, explains in his textbook The 1987 Constitution of the Republic of the Philippines: A Commentary:

> The second sentence was added by the 1986 Constitutional Commission. The significant addition, however, is the phrase "in the interest of the common good and subject to the test of economic viability." The addition includes the ideas that they must show capacity to function efficiently in business

[175] III Records, Constitutional Commission 63 (22 August 1986).

> and that they should not go into activities which the private sector can do better. Moreover, economic viability is more than financial viability but also includes capability to make profit and generate benefits not quantifiable in financial terms.[176]

Clearly, the test of economic viability does not apply to government entities vested with corporate powers and performing essential public services. The State is obligated to render essential public services regardless of the economic viability of providing such service. The non-economic viability of rendering such essential public service does not excuse the State from withholding such essential services from the public. However, government-owned or controlled corporations with special charters, organized essentially for economic or commercial objectives, must meet the test of economic viability. These are the government-owned or controlled corporations that are usually organized under their special charters as stock corporations, like the Land Bank of the Philippines and the Development Bank of the Philippines. These are the government-owned or controlled corporations, along with government- owned or controlled corporations organized under the Corporation Code, that fall under the definition of "government-owned or controlled corporations" in Section 2(10) of the Administrative Code.

The MIAA need not meet the test of economic viability because the legislature did not create MIAA to compete in the market place. MIAA does not compete in the market place because there is no competing international airport operated by the private sector. MIAA performs an essential public service as the primary domestic and international airport of the Philippines. The operation of an international airport requires the presence of personnel from the following government agencies:

1. The Bureau of Immigration and Deportation, to document the arrival and departure of passengers, screening out those without visas or travel documents, or those with hold departure orders;
2. The Bureau of Customs, to collect import duties or enforce the ban on prohibited importations;
3. The quarantine office of the Department of Health, to

[176] p. 1181 (2003).

enforce health measures against the spread of infectious diseases into the country;
4. The Department of Agriculture, to enforce measures against the spread of plant and animal diseases into the country;
5. The Aviation Security Command of the Philippine National Police, to prevent the entry of terrorists and the escape of criminals, as well as to secure the airport premises from terrorist attack or seizure;
6. The Air Traffic Office of the Department of Transportation and Communications, to authorize aircraft to enter or leave Philippine airspace, as well as to land on, or take off from, the airport; and
7. The MIAA, to provide the proper premises - such as runway and buildings - for the government personnel, passengers, and airlines, and to manage the airport operations.

All these agencies of government perform government functions essential to the operation of an international airport.

MIAA performs an essential public service that every modern State must provide its citizens. MIAA derives its revenues principally from the mandatory fees and charges MIAA imposes on passengers and airlines. The terminal fees that MIAA charges every passenger are regulatory or administrative fees[177] and not income from commercial transactions.

MIAA falls under the definition of a government instrumentality under Section 2(10) of the Introductory Provisions of the Administrative Code, which provides:

> Sec. 2. General Terms Defined. - ...
> (10) Instrumentality refers to any agency of the National Government, not integrated within the department framework, vested with special functions or jurisdiction by law, endowed with some if not all corporate powers, administering special funds, and enjoying operational autonomy, usually through a charter. ...

The fact alone that MIAA is endowed with corporate powers does not make MIAA a government-owned or controlled

[177] Manila International Airport Authority v. Airspan Corporation, G.R. No. 157581, 1 December 2004, 445 SCRA 471.

> corporation. Without a change in its capital structure, MIAA remains a government instrumentality under Section 2(10) of the Introductory Provisions of the Administrative Code. More importantly, as long as MIAA renders essential public services, it need not comply with the test of economic viability. Thus, MIAA is outside the scope of the phrase "government-owned or controlled corporations" under Section 16, Article XII of the 1987 Constitution.
>
> The minority belittles the use in the Local Government Code of the phrase "government-owned or controlled corporation" as merely "clarificatory or illustrative." This is fatal. The 1987 Constitution prescribes explicit conditions for the creation of "government-owned or controlled corporations." The Administrative Code defines what constitutes a "government-owned or controlled corporation." To belittle this phrase as "clarificatory or illustrative" is grave error.[178]

Section 17. In times of national emergency, when the public interest so requires, the State may, during the emergency and under reasonable terms prescribed by it, temporarily take over or direct the operation of any privately-owned public utility or business affected with public interest.

In **LAGMAN v. MEDIALDEA**, G.R. No. 231658, July 4, 2017, 812 Phil. 179,[179] consolidated petitions[180] 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

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[178] The 2006 MIAA case was reiterated in Manila International Airport Authority v. City of Pasay, G.R. No. 163072, April 02, 2009, 602 Phil. 160, a petition for review on *certiorari* of a decision and resolution of the Court of Appeals, also penned by Justice Carpio: In Manila International Airport Authority v. Court of Appeals (2006 MIAA case), this Court already resolved the issue of whether the airport lands and buildings of MIAA are exempt from tax under existing laws. The 2006 MIAA case originated from a petition for prohibition and injunction which MIAA filed with the Court of Appeals, seeking to restrain the City of Parañaque from imposing real property tax on, levying against, and auctioning for public sale the airport lands and buildings located in Parañaque City. The only difference between the 2006 MIAA case and this case is that the 2006 MIAA case involved airport lands and buildings located in Parañaque City while this case involved airport lands and buildings located in Pasay City. The 2006 MIAA case and this case raised the same threshold issue: whether the local government can impose real property tax on the airport lands, consisting mostly of the runways, as well as the airport buildings, of MIAA …

[179] See discussion under Art. VI, Sec. 23, and Art. VII, Sec. 18.

[180] Consolidated with Cullamat v. Duterte, G.R. No. 231771 and Mohamad v. Medialdea, G.R. No. 231774.

martial law and suspended the privilege of the writ of *habeas corpus* in the whole of Mindanao. In his **dissent**, Justice Carpio discussed the consequences of the proclamation of martial law, and referenced this **Section 17, Article XII** in relation to Section 23 of Article VI on the authority of Congress to delegate emergency powers to the President:

> 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:
>
> > 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, ...
> > Section 17, Article XII must be understood as an aspect of the emergency powers clause. The taking over of private business affected with public interest is just another facet of the emergency powers generally reposed upon Congress. Thus, when Section 17 states that the "the State may, during the emergency and under reasonable terms prescribed by it, temporarily take over or direct the operation of any privately owned public utility or business affected with public interest," it refers to Congress, not the President. Now, whether or not the President may exercise such power is dependent on whether Congress may delegate it to him pursuant to a law prescribing the reasonable terms thereof. ...
> > ...
> > Let it be emphasized that while the President alone can declare a state of national emergency, however, without legislation, he has no power to take over privately-owned public utility or business affected with public interest. The President cannot decide whether exceptional circumstances exist warranting the takeover of privately-owned public utility or business affected with public interest. Nor can he determine when such exceptional circumstances have ceased. Likewise, without legislation, the President has no power to point out the types of businesses affected with public

> interest that should be taken over. In short, the President has no absolute authority to exercise all the powers of the State under Section 17, Article VII in the absence of an emergency powers act passed by Congress.

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;

Notably, a perusal of the congressional franchises granted to radio and television operators, such as ABS-CBN Broadcasting Corporation and GMA Network, Inc., shows the following provision:

> Sec. 5. Right of the Government. - A special right is hereby reserved to the President of the Philippines, in times of war, rebellion, public peril, calamity, emergency, disaster or serious disturbance of peace and order; to temporarily take over and operate the stations or facilities of the grantee; to

> temporarily suspend the operation of any station or facility in the interest of public safety, security and public welfare; or to authorize the temporary use and operation thereof by any agency of the government, upon due compensation to the grantee, for the use of the stations or facilities of the grantee during the period when these shall be so operated.

The grant of franchise to the National Grid Corporation of the Philippines, a privately-owned corporation in charge of operating, maintaining and developing the country's state-owned power grid, is also subject to the takeover emergency power of the President in times of rebellion. Republic Act No. 9511 thus reads in pertinent part:

> Sec. 5. Right of the Government. - A special right is hereby reserved to the President of the Philippines, in times of war, rebellion, public peril, calamity, emergency, disaster, or disturbance of peace and order, to temporarily take over and operate the transmission system, and/or the sub-transmission systems operated and maintained by the Grantee, to temporarily suspend the operation of any portion thereof, or the facility in the interest of public safety, security and public welfare, or to authorize the temporary use and operation thereof by any agency of the government upon due compensation to the Grantee for the use of the said transmission system, and sub transmission systems and any portion thereof during the period when they shall be so operated.

Similarly, Section 14 of Republic Act No. 8479, or the Downstream Oil Industry Deregulation Act of 1998, vests the Secretary of the Department of Energy, in times of national emergency and when the public interest so requires, with the power to take over or direct the operation of any business of importing, exporting, re-exporting, shipping, transporting, processing, refining, storing, distributing, marketing and/or selling crude oil, gasoline, diesel, liquefied petroleum gas, kerosene, and other petroleum products.

The grant of transport service franchise to Cebu Air, Inc. is likewise subject to the takeover emergency power of the President. Republic Act No. 7151 thus reads:

> Sec. 8. Right of Government. - In case of war, insurrection, domestic trouble, public calamity or national emergency,

> the Philippine Government, upon the order of the President, shall have the right to take over and operate the equipment of the grantee paying for its use or damages.

The franchise of Philippine Long Distance Telephone Company also authorizes the President to take over in times of "rebellion, ... emergency, ... or disturbance of peace and order." Act No. 3436, as amended by Republic Act No. 7082, thus reads:

> Sec. 10. A special right is hereby reserved to the President of the Philippines in times of war, rebellion, public peril, calamity, emergency, disaster, or disturbance of peace and order to take over and operate the transmitting, receiving, and switching stations or to authorize the temporary use and operation thereof by any department of the Government upon due compensation to the grantee of said stations during the period when they shall be so operated.

Section 18. The State may, in the interest of national welfare or defense, establish and operate vital industries and, upon payment of just compensation, transfer to public ownership utilities and other private enterprises to be operated by the Government.

Section 19. The State shall regulate or prohibit monopolies when the public interest so requires. No combinations in restraint of trade or unfair competition shall be allowed.

In **ALYANSA PARA SA BAGONG PILIPINAS, INC. (ABP) v. ENERGY REGULATORY COMMISSION**, G.R. No. 227670, May 3, 2019, Justice Carpio prefaced his *ponencia* for the Court *en banc* as follows:

> **The outcome of this case will greatly affect, for the next two decades, all consumers of electricity in the Philippines, which include the over 95 million Filipinos living in the Philippines as well as the millions of business enterprises operating in the Philippines.**
>
> (Pursuant to) **Section 19, Article XII of the 1987 Constitution** ... The State grants electricity distribution utilities, through legislative franchises, a regulated monopoly

within their respective franchise areas. Competitors are legally barred within the franchise areas of distribution utilities. Facing no competition, distribution utilities can easily dictate the price of electricity that they charge consumers. To protect the consuming public from exorbitant or unconscionable charges by distribution utilities, the State regulates the acquisition cost of electricity that distribution utilities can pass on to consumers.

As part of its regulation of this monopoly, the State requires distribution utilities to subject to competitive public bidding their purchases of electricity from power generating companies. Competitive public bidding is essential since the power cost purchased by distribution utilities is entirely passed on to consumers, along with other operating expenses of distribution utilities. Competitive public bidding is the most efficient, transparent, and effective guarantee that there will be no price gouging by distribution utilities.

Indeed, the requirement of competitive public bidding for power purchases of distribution utilities has been adopted in the United States, Europe, Latin America, India, and many developing countries.[181] This requirement is primarily aimed at ensuring a fair, reasonable, and least-cost generation charge to consumers, under a transparent power sale mechanism between the generation companies and the distribution utilities.

…

Indisputably, (citing Section 6, Article XII) the use of electricity bears a vital social function. The State, in requiring competitive public bidding in the purchase of power by distribution utilities, has exercised its constitutional "duty ... to intervene when the common good so demands."[182]

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[181] See Renewable Energy Auctions in Developing Countries (2013), https://www.irena.org/documentdownloads/publications/irena_renewable_energy_auctions_in_developing_countries .pdf; Electricity Auctions: An Overview of Efficient Practices (2011), http://hdl.handle .net/10986/2346; Competitive Procurement of Retail Electricity Supply: Recent Trends in State Policies and Utility Practices (2008), https://www.analysisgroup.com/uploadedfiles/content/ insights/publishing/competitive_procurement.pdf [All accessed 4 March 2019].

[182] Another way for the State to intervene is to examine the accounts of public utilities. Administrative Code of 1987, Book V, Title I, Subtitle B, Chap. 4, Sec. 22 provides: Authority to Examine Accounts of Public Utilities. - (1) The Commission [on Audit]

> The breakdown of charges in a Manila Electric Company (Meralco) bill contains the following: Generation Charge, Transmission Charge, System Loss Charge, Distribution Charge (Meralco), Subsidies, Government Taxes, Universal Charges, FiT-All Charge (Renewable), and Other Charges. The Power Supply Agreements (PSAs) involved in the present case were executed in April 2016 and have terms that range from 20 to 21 years.
>
> Section 43 of Republic Act No. 9136, or the Electric Power Industry Reform Act of 2001 (EPIRA), includes a description, in broad strokes, of the functions of the Energy Regulatory Commission (ERC): "The ERC shall promote competition, encourage market development, ensure customer choice and discourage/penalize abuse of market power in the restructured electricity industry." Moreover, Section 2 of the EPIRA declares it a state policy to "ensure the ... affordability of the supply of electric power." Further, Section 45 of the EPIRA mandates the ERC to enforce safeguards to "promote true market competition and prevent harmful monopoly and market power abuse." If the ERC violates its statutory functions, this Court, as mandated by Section 1, Article VIII of the 1987 Constitution, has the duty to strike down the acts of ERC whenever these are performed with grave abuse of discretion amounting to lack or excess of jurisdiction.

The petition for *certiorari* and prohibition, with an application for a temporary restraining order or writ of preliminary injunction, filed in **ABP** sought the declaration as void of ERC Resolution No. 1, Series of 2016 (ERC Clarificatory Resolution), the disapproval of the Power Supply Agreements (PSAs) of the Distribution Utilities (DUs) submitted after 7 November 2015 for failure to conduct Competitive Selection Process (CSP), and the implementation by the ERC of the CSP in accordance with the relevant Department of Energy Circular (2015 DOE Circular) and ERC Resolution (CSP Guidelines).

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shall examine and audit the books, records and accounts of public utilities in connection with the fixing of rates of every nature, or in relation to the proceedings of the proper regulatory agencies, for purposes of determining franchise taxes;
(2) Any public utility refusing to allow an examination and audit of its books of accounts and pertinent records, or offering unnecessary obstruction to the examination and audit, or found guilty of concealing any material information concerning its financial status shall be subject to the penalties provided by law; and
(3) During the examination and audit, the public utility concerned shall produce all the reports, records, books of accounts and such other papers as may be required. The Commission shall have the power to examine under oath any official or employee of the said public utility.

The Facts

On 11 June 2015, the DOE issued the 2015 DOE Circular entitled "Mandating All Distribution Utilities to Undergo Competitive Selection Process (CSP) in Securing Power Supply Agreements (PSA)." Sections 3 and 10 of the 2015 DOE Circular provide:

> Section 3. Standard Features in the Conduct of the CSP. After the effectivity of this Circular, all DUs shall procure PSAs only through CSP conducted through a Third Party duly recognized by the ERC and the DOE. In the case of [Electric Cooperatives (ECs)], the Third Party shall also be duly recognized by the National Electrification Administration (NEA).
> Under this Circular, CSPs for the procurement of PSAs of all DUs shall observe the following:
> (a) Aggregation for un-contracted demand requirements of DUs;
> (b) Annually conducted; and
> (c) Uniform template for the terms and conditions in the PSA to be issued by the ERC in coordination with the DOE.
> Within one hundred twenty (120) days from the effectivity of this Circular, the ERC and [the] DOE shall jointly issue the guidelines and procedures for the aggregation of the un-contracted demand requirements of the DUs and the process for the recognition or accreditation of the Third Party that conducts the CSP as hereto provided. For clarity, the term aggregation as used in this Circular refers to the wholesale demand and energy requirements of DUs, and not of the Contestable Markets under Retail Competition and Open Access (RCOA) regime.
> As used in this section, the un-contracted demand or energy requirements of the DUs shall refer to the energy and demand not yet procured individually or collectively by the DUs, excluding those energy and capacity covered by PSAs that have been filed for approval before the ERC.
> ...
> Section 10. Effectivity. This Circular shall take effect immediately upon its publication in two (2) newspapers of general circulation and shall remain in effect until otherwise revoked.

Section 3 of the 2015 DOE Circular expressly and categorically

mandates CSP, or competitive public bidding, whenever DUs secure PSAs. The 2015 DOE Circular took effect on 30 June 2015 upon its publication in two newspapers of general circulation. Section 3 expressly states that "[a]fter the effectivity of this Circular, all DUs shall procure PSAs only through CSP..."

On 20 October 2015, Joint Resolution No. 1 (Joint Resolution), executed by the DOE and the ERC, reiterated the need to adopt a "regime of transparent process in securing Power Supply Agreements." The fifth Whereas clause of the Joint Resolution provides:

> WHEREAS, the DOE and ERC recognize the adoption of competitive selection as a policy that will encourage investments in the power generation business thereby ensuring electric power supply availability in a regime of transparent process in securing Power Supply Agreements (PSAs), which is an integral part of the power sector reform agenda.

Under the Joint Resolution, the DOE and the ERC agreed that ERC shall issue the appropriate regulation to implement CSP. Section 1 of the Joint Resolution states:

> Section 1. Competitive Selection Process. Consistent with their respective mandates, the DOE and ERC recognize that Competitive Selection Process (CSP) in the procurement of Power Supply Agreements (PSAs) by the DUs engenders transparency, enhances security of supply, and ensures stability of electricity prices to captive electricity end-users in the long-term. Consequently, by agreement of the DOE and ERC, the ERC shall issue the appropriate regulation to implement the same.

On the same date, 20 October 2015, the ERC issued the CSP Guidelines, which directed all DUs to conduct CSP in the procurement of their power supply for their captive markets.

The CSP Guidelines fixed a new date of effectivity for compliance with CSP. This is the first instance that the ERC unilaterally fixed a different date from 30 June 2015, effectively postponing the date of effectivity of CSP from 30 June 2015 to 7 November 2015 or by 130 days:

> Section 4. Applicability. The CSP requirement herein

> mandated shall not apply to PSAs already filed with the ERC as of the effectivity of this Resolution. For PSAs already executed but are not yet filed or for those that are still in the process of negotiation, the concerned DUs are directed to comply with the CSP requirement before their PSA applications will be accepted by the ERC.
> This Resolution shall take effect immediately following its publication in a newspaper of general circulation in the Philippines. …

Based on its provisions, the CSP Guidelines took effect on 7 November 2015, following its publication in the Philippine Daily Inquirer and the Philippine Star. Section 4 of the CSP Guidelines expressly provides that CSP "shall not apply to PSAs already filed with the ERC as of the effectivity of this Resolution." Thus, the ERC no longer required CSP for all PSAs already filed with the ERC on or before 7 November 2015. Section 4 of the CSP Guidelines further states that "[f] or PSAs already executed but are not yet filed or for those that are still in the process of negotiation, the concerned DUs are directed to comply with the CSP requirement before their PSA applications will be accepted by the ERC."

On 15 March 2016, however, the ERC, for the second time, unilaterally postponed the date of effectivity of CSP. The ERC issued the ERC Clarificatory Resolution, which restated the date of effectivity of the CSP Guidelines from 7 November 2015 to 30 April 2016. Paragraph 1 of the ERC Clarificatory Resolution reads:

> 1. The effectivity of the CSP [Guidelines] is hereby restated to be 30 April 2016. All PSAs executed on or after the said date shall be required, without exception, to comply with the provisions of the CSP [Guidelines].

The second postponement of the effectivity of CSP from 7 November 2015 to 30 April 2016, or by 175 days, allowed DUs to enter into contracts during the period of postponement to avoid the mandatory CSP.

The table below shows that the following PSAs between Meralco and its power suppliers were executed and submitted to the ERC within 10 days prior the restated 30 April 2016 deadline. According to the ERC Clarificatory Resolution, these PSAs are not required to comply with CSP.

Power Supplier	Power Purchaser	Amount of Power Purchased	Term of Agreement	Start of Negotiations	Date of PSA Execution	Date of Submission of Application to ERC
Redondo Peninsula Energy, Inc. (RPE)	Manila Electric Company (Meralco)	225 Megawatts (MW)	20 years	19 July 2012	20 April 2016	28 April 2016
Atimonan One Energy, Inc. (AlE)	Meralco	2 x 600 MW (net)	20 years and six months	3rd or 4th quarter of 2014	26 April 2016	28 April 2016
St. Raphael Power Generation Corporation (SRPGC)	Meralco	Up to 400 MW	20 years and four months	Latter part of 2014	26 April 2016	28 April 2016
Panay Energy Development Corporation (PEDC)	Meralco	Up to 70 Mw	20 years	21 May 2014	26 April 2016	27 April 2016
Global Luzon Energy Development Corporation (GLEDC)	Meralco	600 MW	20 years	9 December 2014	27 April 2016	29 April 2016
Central Luzon Premiere Power Corporation (CLPPC)	Meralco	Up to 528 MW	21 years	18 March 2015	26 April 2016	29 April 2016
Mariveles Power Generation Corporation (MPGC)	Meralco	Up to 528 MW	21 years	11 February 2015	26 April 2016	29 April 2016

AlE and RPE are subsidiaries or affiliates of Meralco. In paragraph 3.71 of its Comment, Meralco stated that "[a]t the time of the signing of the AlE PSA, AlE was wholly-owned by Meralco PowerGen Corporation ('PowerGen'), a wholly-owned subsidiary of Meralco. On the other hand, at the time of the signing of the RPE PSA, forty-seven percent (47%) of the total subscribed capital of RPE was owned by PowerGen, and three percent (3%) of its total subscribed capital was owned by the Meralco Pension Fund."

CLPPC and MPGC are subsidiaries of SMC Global Power Holdings Corp. (SMC Global), the subsidiary of San Miguel Corporation (SMC) engaged in the construction and operation of various power projects.

In its Comment, Meralco admitted that "no actual bidding is conducted," and that "the PSAs entered into by Meralco undergo competitive selection and thorough negotiations, taking into consideration its specific and unique requirements." In short, no CSP was conducted through a third party recognized by the ERC as mandated in the 2015 DOE Circular.

Meralco also stated that, apart from the seven (7) PSAs between Meralco and its power suppliers, there are eighty-three (83) other PSAs filed with the ERC during the period from 16 April 2016 to 29 April 2016, bringing the total PSAs excluded from CSP to ninety (90) PSAs.

Date	**No. of PSAs**	**Generation Companies**
16 to 24 April 2016	4 PSAs	Mineral Power, Palm Concepcion, Astroenergy, GNPower Kauswagan
25 April 2016	5 PSAs	GNPower Dinginin
26 April 2016	5 PSAs	GNPower Dinginin, Astroenergy
27 April 2016	4 PSAs	GNPower Dinginin
28 April 2016	10 PSAs	A. Brown, GNPower Dinginin, Southern Philippines Power, SMCPC, Surepep, Total Power, Upper Manupali Hydro

29 April 2016	55 PSAs	SMEC, MPGC, SCPC, SMCPC, LPPC, PEDC, GLEDC, CLPPC, A. Brown, A 1E, Anda, Astronenergy, Delta P, GNPower Dinginin, GPower, Isabela Power, Levan Marketing, Mapalad Power, Minergy, RPE, SRPGC, Sunasia Energy, TeaM Energy, Trans-Asia, Unified Leyte Geothermal Energy, Western Power Mindanao

Meralco further stated in its Comment:

> 1.41. Furthermore, apart from MERALCO, the following DUs and electric cooperatives also filed more than one PSA with the ERC during the second (211d) half of April 2016: (a) Agusan del Sur Electric Cooperative, Inc.; (b) Bukidnon Second Electric Cooperative, Inc.; (c) Cagayan Electric Power & Light Company, Inc.; (d) Cotabato Light and Power Company; (e) Davao del Sur Electric Cooperative; (f) Iloilo I Electric Cooperative; (g) Ilocos Sur Electric Cooperative Incorporation; (h) Isabela I Electric Cooperative, Inc.; (i) Isabela II Electric Cooperative; (j) Leyte III Electric Cooperative, Inc.; (k) La Union Electric Cooperative, Inc.; (l) Pangasinan Electric Cooperative III; (m) Peninsula Electric Cooperative, Inc.; (n) Tarlac II Electric Cooperative, Inc.; (o) Zamboanga City Electric Cooperative, Inc.; and (p) Zamboanga del Sur Electric Cooperative, Inc.

The Issues

ABP raised the following issues:

> 1. Whether or not the ERC committed grave abuse of discretion in issuing the [ERC Clarificatory Resolution].
> 2. Whether or not the separate PSAs of Meralco with respondent generation companies should be disapproved for their failure to comply with the requirements of the [2015 DOE Circular] and the [CSP Guidelines].

ABP's petition thus presents a purely legal issue: Does ERC have the statutory authority to postpone the date of effectivity of CSP, thereby amending the 2015 DOE Circular which required CSP to take effect on 30 June 2015?

The determination of the extent of the ERC's statutory authority in the present case is a purely legal question and can be resolved without making any finding of fact. The affirmative or negative resolution of this purely legal question will necessarily result in legal consequences, thus:

(a) If the Court rules affirmatively (that is, the ERC has the statutory authority to postpone the date of effectivity of CSP, and thereby ERC can amend the 2015 DOE Circular), then the legal consequence is that the 90 PSAs submitted to the ERC before the amended effectivity of CSP (30 April 2016) will serve as basis to pass on the power cost to consumers for the duration of the PSAs, whatever the duration of these PSAs.

(b) If the Court rules negatively (that is, the ERC does not have the statutory authority to postpone the date of effectivity of CSP, and thereby cannot amend the 2015 DOE Circular), then the legal consequence is that the 90 PSAs submitted to the ERC after the effectivity of CSP on or after 30 June 2015 cannot serve as basis to pass on the power cost to consumers. In such a case, the ERC will have to conduct CSP on all PSA applications submitted on or after 30 June 2015.

Clearly, there is no factual issue in dispute in the present case, and no factual issue has been raised by any of the parties. Thus, the present case can be resolved purely on the legal issue raised by ABP even as the resolution of this purely legal issue will necessarily result in legal consequences either way.

The Court's Ruling

We GRANT ABP's petition. The ERC does not have the statutory authority to postpone the date of effectivity of CSP, and thereby cannot amend the 2015 DOE Circular. As a result, the 90 PSAs submitted to the ERC after the effectivity of CSP on or after 30 June 2015 cannot serve as basis to pass on the power cost to consumers. The ERC must require CSP on all PSA applications submitted on or after 30 June 2015.

Certiorari and Prohibition As Remedy

Petitioner ABP correctly filed a petition for *certiorari* and prohibition before this Court.

> [T]he remedies of *certiorari* and prohibition are necessarily

> broader in scope and reach, and the writ of *certiorari* or prohibition may be issued to correct errors of jurisdiction committed not only by a tribunal, corporation, board or officer exercising judicial, quasi-judicial or ministerial functions but also to set right, undo and restrain any act of grave abuse of discretion amounting to lack or excess of jurisdiction by any branch or instrumentality of the Government, even if the latter does not exercise judicial, quasi-judicial or ministerial functions. This application is expressly authorized by the text of the second paragraph of Section 1, [Article 8 of the 1987 Constitution].[183]

Not every abuse of discretion can be occasion for this Court to exercise its jurisdiction. Grave abuse of discretion means "such capricious and whimsical exercise of judgment as is equivalent to lack of jurisdiction, or, in other words where the power is exercised in an arbitrary or despotic manner by reason of passion or personal hostility, and it must be so patent and gross as to amount to an evasion of positive duty or to a virtual refusal to perform the duty enjoined or to act at all in contemplation of law. It is not sufficient that a tribunal, in the exercise of its power, abused its discretion, such abuse must be grave."[184]

The Dissenting Opinion of Justice Andres B. Reyes, Jr. would rather have this Court dismiss the petition. Justice Reyes asserts that the ERC, in issuing the ERC Clarificatory Resolution, acted within its jurisdiction[185] and did not act with grave abuse of discretion amounting to lack or excess of jurisdiction.[186] Justice Reyes claims that the ERC was exercising its quasi-legislative power, as granted by Sections 43 and 45 of the EPIRA and as defined in Sections 3 and 4 of the 2015 DOE Circular, when the ERC issued the ERC Clarificatory Resolution. Justice Reyes advances three reasons to justify his assertion that the ERC did not act with grave abuse of discretion amounting to lack or excess of jurisdiction.

> First, the implementation of ERC Resolution No. 13 caused an avalanche of concerns and confusion from the stakeholders of the industry regarding the actual implementation of the provisions of the resolution, so much so that a multitude of

[183] Araullo v. President Benigno S. C. Aquino, III, 737 Phil. 457, 531 (2014).
[184] Filipino Telephone Corporation v. NTC, 457 Phil. 101, 113 (2003), citing Benito v. Commission on Elections, 402 Phil. 764 (2001).
[185] Dissenting opinion, Reyes, Jr., J., pp. 5-7.
[186] Id. at 7-12.

> [Distribution Utilities] DUs, mostly electric cooperatives, sought for an exemption from the guidelines in the resolution.
> …
> Second, ERC did not "evade" its positive duty as provided for in the Constitution, the EPIRA, [the 2015 DOE Circular], or [the CSP Guidelines] as the petitioners would like the Court to believe. ....
> ERC's action on merely "restating" the date of effectivity of [the ERC Clarificatory Resolution] - its own resolution that has been in effect since April, 2016 - has not been shown to have been promulgated with grave abuse of discretion amounting to lack or excess of jurisdiction.
> Third, it must also be emphasized that [the ERC Clarificatory Resolution] enjoys a strong presumption of its validity. ...[187]

Justice Reyes's Dissenting Opinion also finds no problem with the issuance and the contents of the ERC Clarificatory Resolution. According to Justice Reyes, under the Joint Resolution executed by the DOE and the ERC on 20 October 2015, the DOE and the ERC agreed that the ERC shall issue the appropriate regulation to implement CSP."[188]

Justice Reyes is correct - consistent with their respective mandates under EPIRA, the DOE and the ERC agreed that the ERC shall issue the appropriate regulation to implement CSP in accordance with the 2015 DOE Circular.[189] However, the ERC's delegated authority is limited to implementing or executing CSP in accordance with the 2015 DOE Circular, not postponing CSP so as to freeze CSP for at least 20 years, effectively suspending CSP for one entire generation of Filipinos. The delegated authority to implement CSP does not include the authority to postpone or suspend CSP for 20 years, beyond the seven-year terms of office[190] of the ERC Commissioners postponing or suspending the CSP, and beyond the seven-year terms of office of their next successors, as well as beyond the six-year terms of office of three Presidents of the Republic.

The ERC's exercise of its quasi-legislative power, which took

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[187] Id. at 8-11.

[188] Id. at 9.

[189] Joint Resolution No. 1, Sec. l. Competitive Selection Process. Consistent with their respective mandates, the DOE and ERC recognize that Competitive Selection Process (CSP) in the procurement of PSAs by the DUs engenders transparency, enhances security of supply, and ensures stability of electricity prices to captive electricity end-users in the long-term. Consequently, by agreement of the DOE and ERC, the ERC shall issue the appropriate regulations to implement the same.

[190] RA No. 9136, Sec. 38.

the form of the issuance of the ERC Clarificatory Resolution, was done in excess of its jurisdiction. The postponement of the effectivity of CSP was without the approval, and even without coordination with the DOE, in clear and blatant violation of Section 4 of the 2015 DOE Circular mandating CSP. The ERC has no power to postpone the effectivity of the 2015 DOE Circular. Under the 2015 DOE Circular, the ERC can only issue supplemental guidelines, which means guidelines to implement the 2015 DOE Circular, and not to amend it. Postponing the effectivity of CSP amends the 2015 DOE Circular, and does not constitute issuance of mere supplemental guidelines.

The issuance of the ERC Clarificatory Resolution was attended with grave abuse of discretion amounting to lack or excess of jurisdiction for the following reasons:

(1) Postponing the effectivity of CSP from 30 June 2015 to 7 November 2015, and again postponing the effectivity of CSP from 7 November 2015 to 30 April 2016, or a total of 305 days, allowed DUs nationwide to avoid the mandatory CSP;

(2) Postponing the effectivity of CSP effectively freezes for at least 20 years the DOE-mandated CSP to the great prejudice of the public. The purpose of CSP is to compel DUs to purchase their electric power at a transparent, reasonable, and least-cost basis, since this cost is entirely passed on to consumers. The ERC's postponement unconscionably placed this public purpose in deep freeze for at least 20 years.

Indisputably, the ERC committed grave abuse of discretion amounting to lack or excess of jurisdiction when the ERC postponed the effectivity of CSP. The postponement effectively prevented for at least 20 years the enforcement of a mechanism intended to ensure "transparent and reasonable prices in a regime of free and fair competition," as mandated by law under EPIRA, a mechanism implemented in the 2015 DOE Circular which took effect on 30 June 2015.

In short, in the absence of CSP, there is no transparency in the purchase by DUs of electric power, and thus there is no assurance of the reasonableness of the power rates charged to consumers. As a consequence, all PSA applications submitted to the ERC on or after 30 June 2015 should be deemed not submitted and should be made to comply with CSP.

Why the ERC Acted in Excess of its Jurisdiction: Purpose of CSP and Significance of the Postponement of the CSP Deadline

The EPIRA was enacted on 8 June 2001. Among the EPIRA's declared State policies are, as stated in its Section 2:

> ...
> (b) To ensure the quality, reliability, security and affordability of the supply of electric power;
> (c) To ensure transparent and reasonable prices of electricity in a regime of free and fair competition and full public accountability to achieve greater operational and economic efficiency and enhance the competitiveness of Philippine products in the global market; [and]
> ...
> (f) To protect the public interest as it is affected by the rates and services of electric utilities and other providers of electric power; ...

The EPIRA mandates the DOE to "supervise the restructuring of the electricity industry."[191] The EPIRA amended Section 5 of Republic Act No. 7638, or "The Department of Energy Act of 1992," to allow the DOE to fulfill this new mandate under the EPIRA.

More importantly, Section 37 of the EPIRA includes the following in its enumeration of the DOE's powers and functions:

> (a) Formulate policies for the planning and implementation of a comprehensive program for the efficient supply and economical use of energy consistent with the approved national economic plan ... and provide a mechanism for the integration, rationalization, and coordination of the various energy programs of the Government;
> ...
> (d) Ensure the reliability, quality and security of supply of electric power;
> (e) ... [T]he DOE shall, among others,
> …
> (ii) Facilitate and encourage reforms in the structure and operations of distribution utilities for greater efficiency and lower costs;
> ...

[191] RA No. 9136, Sec. 37.

> (h) Exercise supervision and control over all government activities relative to energy projects in order to attain the goals embodied in Section 2 of RA 7638;
> (p) Formulate such rules and regulations as may be necessary to implement the objectives of this Act; ...

Under the EPIRA, it is the DOE that issues the rules and regulations to implement the EPIRA, including the implementation of the policy objectives stated in Section 2 of the EPIRA. Rules and regulations include circulars that have the force and effect of rules or regulations. Thus, pursuant to its powers and functions under the EPIRA, the DOE issued the 2015 DOE Circular mandating the conduct of CSP.

The 2015 DOE Circular, as stated in its very provisions, was issued pursuant to the DOE's power to "formulate such rules and regulations as may be necessary to implement the objectives of the EPIRA,"[192] where the State policy is to "[p]rotect the public interest as it is affected by the rates and services of electric utilities and other providers of electric power."[193] Under the EPIRA, it is also the State policy to "ensure the ... affordability of the supply of electric power."[194] The purpose of the 2015 DOE Circular is to implement the State policies prescribed in the EPIRA. Clearly, the 2015 DOE Circular constitutes a rule or regulation issued by the DOE pursuant to its rule-making power under Section 37(p) of the EPIRA.

The EPIRA also provides for the powers and functions of the ERC. Section 43 of the EPIRA mandates that the ERC "shall be responsible for the following key functions in the restructured industry:"

> (a) Enforce the implementing rules and regulations of this Act. ...
> …
> (o) Monitor the activities in the generation and supply of the electric power industry with the end in view of promoting free market competition and ensuring that the allocation or pass through of bulk purchase cost by distributors is transparent, non-discriminatory and that any existing subsidies shall be divided pro-rata among all retail suppliers; ...

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192 2015 DOE Circular, Second Whereas Clause, par. (d).
193 2015 DOE Circular, First Whereas Clause, par. (d).
194 RA No. 9136, Sec. 2(b).

Thus, the very first mandate of the ERC under its charter, the EPIRA, is to "[e]nforce the implementing rules and regulations" of the EPIRA as formulated and adopted by DOE. Clearly, under the EPIRA, it is the DOE that formulates the policies, and issues the rules and regulations, to implement the EPIRA. The function of the ERC is to enforce and implement the policies formulated, as well as the rules and regulations issued, by the DOE. The ERC has no power whatsoever to amend the implementing rules and regulations of the EPIRA as issued by the DOE. The ERC is further mandated under EPIRA to ensure that the "pass through of bulk purchase cost by distributors is transparent [and] non-discriminatory."[195]

Despite the ERC's characterization as an "independent, quasi-judicial regulatory body,"[196] it is incorrect to conclude, as Justice Alfredo Benjamin S. Caguioa holds, that the ERC exercises "inherent and sufficient power,"[197] and "sufficient power, as the independent regulator of the industry,"[198] to supplant or change, as it did in the present case, policies, rules, and regulations prescribed by the DOE. The power involved in the ERC's implementation of the 2015 DOE Circular is not quasi-judicial but executive. There are no adverse parties involved in the implementation by the ERC of the 2015 DOE Circular. The ERC does not adjudicate rights and obligations of adverse parties in the present case. The issue presented here involves the propriety of the exercise of the ERC's executive implementation of the policies, as well as the rules and regulations of the EPIRA as issued by the DOE.

Moreover, the nature of the power involved in the ERC's postponement of the effectivity of CSP as mandated in the 2015 DOE Circular is not quasi-judicial but delegated legislative power. Justice Caguioa states that "the ERC could solely issue"[199] any resolution changing the dates of effectivity of CSP as set by the CSP Guidelines and the ERC Clarificatory Resolution "because it was empowered by the law, i.e., the EPIRA."[200]

We quote below the entirety of Section 43 of the EPIRA, prescribing the functions of the ERC, and there is absolutely

195 RA No. 9136, Sec. 43(o).
196 RA No. 9136, Sec. 38.
197 Dissenting opinion, Caguioa, J., p. 11.
198 Id. at 12.
199 Id. at 25.
200 Ibid.

nothing whatsoever in this complete enumeration of the ERC's functions that grants the ERC rule-making power to supplant or change the policies, rules, regulations, or circulars prescribed by the DOE. The ERC's functions, as granted by the EPIRA, are limited, inter alia, to the enforcement of the implementing rules and regulations of the EPIRA, and not to amend or revoke them. At most, as stated in paragraph (m) of Section 43, the ERC may only take any other action delegated to it pursuant to EPIRA. The ERC may not exceed its delegated authority. Section 43 of the EPIRA provides as follows:

> Section 43. Functions of the ERC. - The ERC shall promote competition, encourage market development, ensure customer choice and discourage/penalize abuse of market power in the restructured electricity industry. In appropriate cases, the ERC is authorized to issue cease and desist order after due notice and hearing. Towards this end, it shall be responsible for the following key functions in the restructured industry:
> (a) Enforce the implementing rules and regulations of this Act;
> (b) Within six (6) months from the effectivity of this Act, promulgate and enforce, in accordance with law, a National Grid Code and a Distribution Code which shall include, but not limited to, the following:
>
> (i) Performance standards for TRANSCO O&M Concessionaire, distribution utilities and suppliers: Provided, That in the establishment of the performance standards, the nature and function of the entities shall be considered; and
>
> (ii) Financial capability standards for the generating companies, the TRANSCO, distribution utilities and suppliers: Provided, That in the formulation of the financial capability standards, the nature and function of the entity shall be considered: Provided, further, That such standards are set to ensure that the electric power industry participants meet the minimum financial standards to protect the public interest. Determine, fix, and approve, after due notice and public hearings the universal charge, to be imposed on all electricity end-users pursuant to Section 34 hereof;
>
> (c) Enforce the rules and regulations governing the operations of the electricity spot market and the activities of the spot market operator and other participants in the spot market, for the purpose of ensuring a greater supply and rational pricing of electricity;

(d) Determine the level of cross subsidies in the existing retail rate until the same is removed pursuant to Section 74 hereof;
(e) Amend or revoke, after due notice and hearing, the authority to operate of any person or entity which fails to comply with the provisions hereof, the IRR or any order or resolution of the ERC. In the event a divestment is required, the ERC shall allow the affected party sufficient time to remedy the infraction or for an orderly disposal, but shall in no case exceed twelve (12) months from the issuance of the order;
(f) In the public interest, establish and enforce a methodology for setting transmission and distribution wheeling rates and retail rates for the captive market of a distribution utility, taking into account all relevant considerations, including the efficiency or inefficiency of the regulated entities. The rates must be such as to allow the recovery of just and reasonable costs and a reasonable return on rate base (RORB) to enable the entity to operate viably. The ERC may adopt alternative forms of internationally accepted rate-resetting methodology as it may deem appropriate. The rate-setting methodology so adopted and applied must ensure a reasonable price of electricity. The rates prescribed shall be non- discriminatory. To achieve this objective and to ensure the complete removal of cross subsidies, the cap on the recoverable rate of system losses prescribed in Section 10 of Republic Act No. 7832, is hereby amended and shall be replaced by caps which shall be determined by the ERC based on load density, sales mix, cost of service, delivery voltage and other technical considerations it may promulgate. The ERC shall determine such form of rate-setting methodology, which shall promote efficiency. In case the rate setting methodology used is RORB, it shall be subject to the following guidelines:
(i) For purposes of determining the rate base, the TRANSCO or any distribution utility may be allowed to revalue its eligible assets not more than once every three (3) years by an independent appraisal company: Provided, however, That ERC may give an exemption in case of unusual devaluation: Provided, further, That the ERC shall exert efforts to minimize price shocks in order to protect the consumers;

(ii) Interest expenses are not allowable deductions from permissible return on rate base;

(iii) In determining eligible cost of services that will be passed on to the end-users, the ERC shall establish minimum efficiency performance standards for the TRANSCO and distribution utilities including systems

losses, interruption frequency rates, and collection efficiency;

(iv) Further, in determining rate base, the TRANSCO or any distribution utility shall not be allowed to include management inefficiencies like cost of project delays not excused by force majeure, penalties and related interest during construction applicable to these unexcused delays; and

(v) Any significant operating costs or project investments of TRANSCO and distribution utilities which shall become part of the rate base shall be subject to verification by the ERC to ensure that the contracting and procurement of the equipment, assets and services have been subjected to transparent and accepted industry procurement and purchasing practices to protect the public interest.

(g) Three (3) years after the imposition of the universal charge, ensure that the charges of the TRANSCO or any distribution utility shall bear no cross subsidies between grids, within grids, or between classes of customers, except as provided herein;

(h) Review and approve any changes on the terms and conditions of service of the TRANSCO or any distribution utility;

(i) Allow TRANSCO to charge user fees for ancillary services to all electric power industry participants or self-generating entities connected to the grid. Such fees shall be fixed by the ERC after due notice and public hearing;

(j) Set a lifeline rate for the marginalized end-users;

(k) Monitor and take measures in accordance with this Act to penalize abuse of market power, cartelization, and anti-competitive or discriminatory behavior by any electric power industry participant;

(l) Impose fines or penalties for any non-compliance with or breach of this Act, the IRR of this Act and the rules and regulations which it promulgates or administers;

(m) Take any other action delegated to it pursuant to this Act;

(n) Before the end of April of each year, submit to the Office of the President of the Philippines and Congress, copy furnished the DOE, an annual report containing such matters or cases which have been filed before or referred to it during the preceding year, the actions and proceedings undertaken and its decision or resolution in each case. The ERC shall make copies of such reports available to any interested party upon payment of a charge which reflects the printing costs. The ERC shall publish all its decisions involving rates and anti-

competitive cases in at least one (1) newspaper of general circulation, and/or post electronically and circulate to all interested electric power industry participants copies of its resolutions to ensure fair and impartial treatment;
(o) Monitor the activities of the generation and supply of the electric power industry with the end in view of promoting free market competition and ensuring that the allocation or pass through of bulk purchase cost by distributors is transparent, non-discriminatory and that any existing subsidies shall be divided pro-rata among all retail suppliers;
(p) Act on applications for or modifications of certificates of public convenience and/or necessity, licenses or permits of franchised electric utilities in accordance with law and revoke, review and modify such certificates, licenses or permits in appropriate cases, such as in cases of violations of the Grid Code, Distribution Code and other rules and regulations issued by the ERC in accordance with law;
(q) Act on applications for cost recovery and return on demand side management projects;
(r) In the exercise of its investigative and quasi-judicial powers, act against any participant or player in the energy sector for violations of any law, rule and regulation governing the same, including the rules on cross-ownership, anti-competitive practices, abuse of market positions and similar or related acts by any participant in the energy sector or by any person, as may be provided by law, and require any person or entity to submit any report or data relative to any investigation or hearing conducted pursuant to this Act;
(s) Inspect, on its own or through duly authorized representatives, the premises, books of accounts and records of any person or entity at any time, in the exercise of its quasi-judicial power for purposes of determining the existence of any anti-competitive behavior and/or market power abuse and any violation of rules and regulations issued by the ERC;
(t) Perform such other regulatory functions as are appropriate in order to ensure the successful restructuring and modernization of the electric power industry, such as, but not limited to, the rules and guidelines under which generation companies, distribution utilities which are not publicly listed shall offer and sell to the public a portion not less than fifteen percent (15%) of their common shares of stocks: Provided, however, That generation companies, distribution utilities or their respective holding companies that are already listed in the PSE are deemed in compliance. For existing companies, such public offering shall be implemented not later than five

> (5) years from the effectivity of this Act. New companies shall implement their respective public offerings not later than five (5) years from the issuance of their certificate of compliance; and
> (u) The ERC shall have the original and exclusive jurisdiction over all cases contesting rates, fees, fines and penalties imposed by the ERC in the exercise of the abovementioned powers, functions and responsibilities and over all cases involving disputes between and among participants or players in the energy sector.
> All notices of hearings to be conducted by the ERC for the purpose of fixing rates or fees shall be published at least twice for two successive weeks in two (2) newspapers of nationwide circulation.

In the present case, where there is no exercise of the ERC's quasi-judicial powers, the ERC is legally bound to enforce the rules and regulations of the DOE as authorized under the EPIRA. The ERC has no independence or discretion to ignore, waive, amend, postpone, or revoke the rules and regulations of the DOE pursuant to the EPIRA, as it is hornbook doctrine that rules and regulations issued pursuant to law by administrative agencies, like the DOE, have the force and effect of law.[201] In fact, the first duty and function of the ERC under its charter is to "enforce the implementing rules and regulations" of the EPIRA as issued by the DOE. Certainly, the ERC has no power to ignore, waive, amend, postpone, or revoke the policies, rules, regulations, and circulars issued by the DOE pursuant to the EPIRA.

In any event, even in quasi-judicial cases, the ERC is bound to apply the policies, rules, regulations, and circulars issued by the DOE as the ERC has no power to ignore, waive, amend, postpone, or revoke the policies, rules, regulations, and circulars issued by the DOE pursuant to the EPIRA. To repeat, the DOE's rules, regulations, and circulars issued pursuant to the DOE's rule-making power under the EPIRA have the force and effect of law which the ERC is legally bound to follow, whether the ERC is exercising executive, quasi-legislative, or quasi-judicial powers.

Pursuant to the DOE's mandate under the EPIRA,[202] the 2015

[201] Victorias Milling Co., Inc. v. Office of the Presidential Assistant for Legal Affairs, 237 Phil. 306 (1987).
[202] EPIRA, Sec. 37: Powers and Functions of the DOE. - In addition to its existing powers and functions, the DOE is hereby mandated to supervise the restructuring of

DOE Circular required all DUs to undergo CSP in procuring

the electricity industry. In pursuance thereof, Sec. 5 of RA No. 7638, otherwise known as "The Department of Energy Act of 1992," is hereby amended to read as follows:
(a) Formulate policies for the planning and implementation of a comprehensive program for the efficient supply and economical use of energy consistent with the approved national economic plan and with the policies on environmental protection and conservation and maintenance of ecological balance, and provide a mechanism for the integration, rationalization, and coordination of the various energy programs of the Government;
(b) Develop and update annually the existing Philippine Energy Plan, hereinafter referred to as 'The Plan', which shall provide for an integrated and comprehensive exploration, development, utilization, distribution, and conservation of energy resources, with preferential bias for environment-friendly, indigenous, and low-cost sources of energy. The plan shall include a policy direction towards the privatization of government agencies related to energy, deregulation of the power and energy industry, and reduction of dependency on oil-fired plants. Said Plan shall be submitted to Congress not later than the fifteenth day of September and every year thereafter;
(c) Prepare and update annually a Power Development Program (PDP) and integrate the same into the Philippine Energy Plan. The PDP shall consider and integrate the individual or joint development plans of the transmission, generation, and distribution sectors of the electric power industry, which are submitted to the Department: Provided, however, That the ERC shall have exclusive authority covering the Grid Code and the pertinent rules and regulations it may issue;
(d) Ensure the reliability, quality and security of supply of electric power;
(e) Following the restructuring of the electricity sector, the DOE shall, among others:
(i) Encourage private sector investments in the electricity sector and promote development of indigenous and renewable energy sources;
(ii) Facilitate and encourage reforms in the structure and operations of distribution utilities for greater efficiency and lower costs;
(iii) In consultation with other government agencies, promote a system of incentives to encourage industry participants, including new generating companies and end-users to provide adequate and reliable electric supply; and
(iv) Undertake in coordination with the ERC, NPC, NEA and the Philippine Information Agency (PIA), information campaign to educate the public on the restructuring of the electricity sector and privatization of NPC assets.
(f) Jointly with the electric power industry participants, establish the wholesale electricity spot market and formulate the detailed rules governing the operations thereof;
(g) Establish and administer programs for the exploration, transportation, marketing, distribution, utilization, conservation, stockpiling, and storage of energy resources of all forms, whether conventional or non-conventional;
(h) Exercise supervision and control over all government activities relative to energy projects in order to attain the goals embodied in Section 2 of RA 7638;
(i) Develop policies and procedures and, as appropriate, promote a system of energy development incentives to enable and encourage electric power industry participants to provide adequate capacity to meet demand including, among others, reserve requirements;
(j) Monitor private sector activities relative to energy projects in order to attain the goals of the restructuring, privatization, and modernization of the electric power sector as provided for under existing laws: Provided, That the Department shall endeavor to provide for an environment conducive to free and active private sector participation and investment in all energy activities;
(k) Assess the requirements of, determine priorities for, provide direction to, and disseminate information resulting from energy research and development programs for the optimal development of various forms of energy production and utilization technologies;
(l) Formulate and implement programs, including a system of providing incentives and

PSAs. The DOE issued on 11 June 2015 the 2015 DOE Circular which took effect upon its publication on 30 June 2015.

The 2015 DOE Circular recognized that under the EPIRA, the DOE has the mandate to "formulate such rules and regulations as may be necessary to implement the objectives of the EPIRA,"[203] where the State policy is to "[p]rotect the public interest as it is affected by the rates and services of electric utilities and other providers of electric power."[204] The 2015 DOE Circular reiterated the EPIRA's mandate that "all Distribution Utilities (DUs) shall have the obligation to supply electricity in the least-cost manner to their Captive Market, subject to the collection of retail rate du[l]y approved by the [ERC]."[205]

The 2015 DOE Circular mandated that DUs, including electric cooperatives, obtain their PSAs through CSP. Section 1 of the 2015 DOE Circular states the principles behind CSP:

> Section 1. General Principles. Consistent with its mandate, the DOE recognizes that Competitive Selection Process (CSP) in the procurement of PSAs by the DUs ensures security and certainty of electricity prices of electric power to end-users in the long-term. Towards this end, all CSPs undertaken by the DUs shall be guided by the following principles:
> (a) Increase the transparency needed in the procurement process to reduce risks;
> (b) Promote and instill competition in the procurement and supply of electric power to all end-users;
> (c) Ascertain least-cost outcomes that are unlikely to be

penalties, for the judicious and efficient use of energy in all energy-consuming sectors of the economy;
(m) Formulate and implement a program for the accelerated development of non-conventional energy systems and the promotion and commercialization of its applications;
(n) Devise ways and means of giving direct benefit to the province, city, or municipality, especially the community and people affected, and equitable preferential benefit to the region that hosts the energy resource and/or the energy-generating facility: Provided, however, That the other provinces, cities, municipalities, or regions shall not be deprived of their energy requirements;
(o) Encourage private enterprises engaged in energy projects, including corporations, cooperatives, and similar collective organizations, to broaden the base of their ownership and thereby encourage the widest public ownership of energy-oriented corporations;
(p) Formulate such rules and regulations as may be necessary to implement the objectives of this Act; and
(q) Exercise such other powers as may be necessary or incidental to attain the objectives of this Act.

[203] 2015 DOE Circular, Second Whereas Clause, par. (d).
[204] 2015 DOE Circular, First Whereas Clause, par. (d).
[205] 015 DOE Circular, Third Whereas Clause.

challenged in the future as the political and institutional scenarios should change; and
(d) Protect the interest of the general public.

In sum, the *raison d'etre* of CSP is to ensure transparency and competition in the procurement of power supply by DUs so as to provide the least-cost electricity to the consuming public.

The clear text of Section 3 of the 2015 DOE Circular mandates the conduct of CSP after the Circular's effectivity on 30 June 2015.

> Section 3. Standard Features in the Conduct of CSP. After the effectivity of this Circular, all DUs shall procure PSAs only through CSP conducted through a Third Party duly recognized by the ERC and the DOE. In case of the [Electric Cooperatives (ECs)], the Third Party shall also be duly recognized by the National Electrification Administration (NEA). ...

Section 5 of the 2015 DOE Circular states the non-retroactivity of the Circular's effect.

> Section 5. Non-Retroactivity. This Circular shall have prospective application and will not apply to PSAs with tariff rates already approved and/or have been filed for approval by the ERC before the effectivity of this Circular.

Clearly, PSAs filed with the ERC after the effectivity of the 2015 DOE Circular must comply with CSP as only PSAs filed "before the effectivity" of the Circular are excluded from CSP.

Section 10 of the 2015 DOE Circular provides for its effectivity:

> Section 10. Effectivity. This Circular shall take effect immediately upon its publication in two (2) newspapers of general circulation and shall remain in effect until otherwise revoked.

The 2015 DOE Circular took effect upon its publication on 30 June 2015 in the Philippine Daily Inquirer and the Philippine Star. Section 10 expressly declares that the "Circular ... shall remain in effect until otherwise revoked." Indisputably, CSP became mandatory as of 30 June 2015. Taking all these provisions together, all PSAs submitted to the ERC after the effectivity of

the 2015 DOE Circular, on or after 30 June 2015, are required to undergo CSP.

Since the 2015 DOE Circular was issued solely by the DOE, it is solely the DOE that can amend, postpone, or revoke the 2015 DOE Circular unless a higher authority, like the Congress or the President, amends or revokes it. Certainly, the ERC has no authority to amend, postpone, or revoke the 2015 DOE Circular, including its date of effectivity.

The Joint Resolution executed by DOE and the ERC on 20 October 2015 reiterated that the ERC shall issue the appropriate regulation to implement CSP. The Joint Resolution did not authorize the ERC to change the date of effectivity of the mandatory CSP. The Joint Resolution expressly mandated that the "ERC shall issue the appropriate regulation to implement" CSP. The power "to implement" CSP does not include the power to postpone the date of effectivity of CSP, which is expressly mandated in the 2015 DOE Circular to take effect upon the publication of the Circular. In fact, to postpone is the opposite of "to implement."

On the same date, 20 October 2015, the ERC issued the CSP Guidelines, which directed all DUs to conduct CSP in the procurement of their power supply for their captive markets. While the 2015 DOE Circular mandated CSP to take effect on 30 June 2015, the ERC under the CSP Guidelines unilaterally postponed the date of effectivity of CSP from 30 June 2015 to 7 November 2015 or by 130 days. This marks the first postponement by ERC of the effectivity of the mandatory CSP.

On 15 March 2016, however, the ERC, for the second time, unilaterally postponed the date of effectivity of the mandatory CSP. On this date the ERC issued the ERC Clarificatory Resolution, which restated the date of effectivity of CSP from 7 November 2015 to 30 April 2016. The second postponement of the effectivity of CSP from 7 November 2015 to 30 April 2016, or by 175 days, allowed DUs to enter into contracts during the period of postponement to avoid the mandatory CSP .

Why the ERC Acted in Excess of its Jurisdiction: Required Coordination Between the DOE and the ERC

The 2015 DOE Circular explicitly stated the instances that

required joint action of the DOE and the ERC:

> 1. Recognition of the Third Party that will conduct the CSP for the procurement of PSAs by the DUs;
> 2. Issuance of guidelines and procedures for the aggregation of the un-contracted demand requirements of the DUs;
> 3. Issuance of guidelines and procedures for the recognition or accreditation of the Third Party that conducts the CSP; and
> 4. Issuance of supplemental guidelines and procedures to properly guide the DUs and the Third Party in the design and execution of the CSP.

These instances are in Sections 3 and 4 of the 2015 DOE Circular:

> Section 3. Standard Features in the Conduct of CSP. After the effectivity of this Circular, all DUs shall procure PSAs only through CSP conducted through a Third Party duly recognized by the ERC and the DOE. In case of the [Electric Cooperatives (ECs)], the Third Party shall also be duly recognized by the National Electrification Administration (NEA).
> ...
> Within one hundred twenty (120) days from the effectivity of this Circular, the ERC and [the] DOE shall jointly issue guidelines and procedures for the aggregation of the un-contracted demand requirements of the DUs and the process for the recognition or accreditation of the Third Party that conducts the CSP as hereto provided. ...
> Section 4. Supplemental Guidelines. To ensure efficiency and transparency of the CSP Process [sic], the ERC, upon its determination and in coordination with the DOE shall issue supplemental guidelines and procedures to properly guide the DUs and the Third Party in the design and execution of the CSP. The supplemental guidelines should ensure that any CSP and its outcome shall redound to greater transparency in the procurement of electric supply, and promote greater private sector participation in the generation and supply sectors, consistent with the declared policies under EPIRA.

In all the foregoing instances, the ERC is mandated to act jointly with the DOE. All these instances merely implement CSP, and do not postpone CSP or amend the 2015 DOE Circular, which are beyond mere implementation of CSP. If the ERC cannot act by itself on certain instances in the mere implementation of CSP, then the ERC certainly cannot act by itself in the postponement of CSP or in the amendment of the 2015 DOE Circular.

We reiterate that the ERC unilaterally postponed the effectivity of the mandatory CSP twice. The ERC made the first unilateral postponement on 20 October 2015, when it stated that PSAs already filed with the ERC on or before 7 November 2015 were not required to undergo CSP. This first unilateral postponement was from 30 June 2015 to 7 November 2015, or a period of postponement of 130 days. The ERC made a second unilateral postponement on 15 March 2016, when it restated the effectivity of the CSP Guidelines from 7 November 2015 to 30 April 2016, or a postponement of 175 days. All in all, the ERC, by itself and without authorization from or coordination with the DOE, postponed the effectivity of the mandatory CSP for 305 days.

The ERC thus amended, and not merely supplemented, the "guidelines and procedures to properly guide the DUs and the Third Party in the design and execution of the CSP."[206] This is contrary to what the 2015 DOE Circular clearly intended - that CSP shall take effect upon the Circular's publication on 30 June 2015.

In its Comment to the present petition, the DOE denied any responsibility in the ERC's restatement of the effective date in the ERC Clarificatory Resolution. The DOE stated:

> 15. DOE is not aware of the cut-off date shift. There is nothing on record that shows that ERC, contrary to Section 4 of the [2015] DOE Circular, coordinated with DOE in "restating" the date of effectivity to a later date, or from 7 November 2015 to 30 April 2016 for a period of one-hundred and seventy-five (175) days.

In contrast, there is nothing in the ERC's 60-page Comment which disavowed DOE's allegation of non-coordination. If anything, the ERC's Comment underscored its assertion that the ERC Clarificatory Resolution was solely issued by the ERC supposedly as "a legitimate exercise of its quasi-legislative powers granted by law."

We do not doubt that the ERC has the power to issue the appropriate regulation to implement CSP. This is clear from the EPIRA and the 2015 DOE Circular. Indeed, Justice Reyes in his Dissenting Opinion belabored this delegated power by underscoring the existence of the Joint Resolution. Justice

[206] 2015 DOE Circular, Sec. 4.

Reyes misunderstood the delegation of power to mean that the Joint Resolution, by itself, is the required "coordination" in the implementation of CSP. Under this theory of Justice Reyes, the required "coordination" could take place only once upon the issuance of the Joint Resolution, and there can be no other coordination required in the future even if the ERC issues additional guidelines or regulations to implement CSP. This interpretation is obviously erroneous.

Moreover, the ERC's power is neither absolute nor unbridled. The ERC can only promulgate rules, but only insofar as it is authorized. Section 4(b) of Rule 3 of the Implementing Rules and Regulations of the EPIRA states:

Pursuant to Sections 43 and 45 of the Act, the ERC shall promulgate such rules and regulations as authorized thereby, including but not limited to Competition Rules and limitations on recovery of system losses, and shall impose fines or penalties for any non-compliance with or breach of the Act, these Rules and the rules and regulations which it promulgates or administers.

The 2015 DOE Circular specifically stated that the ERC's power to issue CSP guidelines and procedures should be exercised "in coordination with the DOE." The purpose of such coordination was "to ensure efficiency and transparency in the CSP." In short, the ERC could not issue CSP guidelines and procedures without coordination with DOE. The DOE has expressly declared that the ERC did not coordinate with DOE in issuing the ERC Clarificatory Resolution. The ERC's unilateral postponement of CSP for 305 days, allowing DUs to avoid the mandatory CSP to the great prejudice of the public, was clearly without authority and manifestly constituted grave abuse of discretion. Moreover, the ERC's unilateral postponement of CSP egregiously prevented "transparency" and resulted in inefficiency by delaying the implementation of CSP.

In their Dissenting Opinions, Justice Reyes[207] and Justice Caguioa[208] both use the DOE's letter dated 18 January 2016,[209]

[207] Dissenting opinion, Reyes, Jr., J., p. 5.
[208] Dissenting opinion, Caguioa, J., p. 32.
[209] The letter reads:
18 January 2016
HON. JOSE VICENTE B. SALAZAR
Chairman

which requested the ERC to allow an electric cooperative (Abra Electric Cooperative, Inc. [ABRECO]) to directly negotiate with a power supplier despite the mandatory CSP, to justify the ERC's alleged power to amend the 2015 DOE Circular.

First, Justice Reyes overlooks the direction of the exercise of power in this instance: instead of the ERC acting alone, the DOE directed the ERC to take action on the matter. This letter proves that the power to amend the 2015 DOE Circular belongs to the DOE, not to the ERC. There is clearly a necessity for the ERC to coordinate with the DOE with regard to CSP matters.

Second, the DOE's endorsement to the ERC, as expressly stated in the DOE's letter dated 18 January 2016, "does not preclude the ERC from exercising its authority to evaluate ABRECO's PSAs and require further action, such as subjecting ABRECO's PSA to a Swiss challenge." A Swiss challenge is "a hybrid mechanism between the direct negotiation approach and the competitive bidding route."[210] It is a system where "[a] third party can bid on a project during a designated period but the original proponent can counter match any superior offer."[211] In short, a Swiss

ENERGY REGULATORY COMMISSION
Pacific Center Building, San Miguel Avenue, Ortigas Avenue, 1500 Pasig City, Metro Manila
Subject: ABRECO'S Interim Power Supply Requirement
Dear Chairman Salazar:
We refer to the attached communication we received from the Abra Electric Cooperative, Inc. (ABRECO) dated 24 November 2015, seeking DOE's endorsement to ERC to allow ABRECO to directly negotiate with a power supplier for their short-term requirement in its quest for a secured and affordable power supply and to consequently relieve them from full exposure with the WESM.
In its attached letter to ERC, ABRECO mentioned that AES is considering a 2MW Interim supply for the EC's power requirements for the next three (3) years from 2016 to 2018. We welcome this as a positive move for the improvement of ABRECO's operations, thus, we are endorsing for ERC's consideration to allow ABRECO to directly negotiate with a power supplier for its short-term requirement, albeit the requirement for competitive selection process. This request is made in consideration of ABRECO's situation as an ailing EC and to prevent its vulnerability to volatile WESM prices given its supply [is] sourced from the WESM currently. This endorsement, however, does not preclude the ERC from exercising its authority to evaluate the DUs Power Supply Agreements (PSAs) and require further action, such as, but not limited to subjecting ABRECO's PSA to a Swiss challenge.
For your consideration. Thank you.
Very truly yours,
(signed)
Zenaida Y. Monsada
Secretary

[210] SM Land, Inc. v. Bases Conversion and Development Authority, 741 Phil. 269, 288 (2014).

[211] Footnote 13 of SM Land, Inc. v. Bases Conversion and Development Authority, id.

challenge is a form of public bidding, and is recognized in the implementing rules of laws such as Republic Act No. 6957, "An Act Authorizing the Financing, Construction, Operation and Maintenance of Infrastructure Projects by the Private Sector and for Other Purposes," as amended by Republic Act No. 7718,[212] and Executive Order No. 146,[213] "Delegating to the National Economic and Development Authority (NEDA) Board the Power of the President to Approve Reclamation Projects."[214]

Third, even assuming that the DOE letter exempted one specific DU from CSP, it did not authorize ERC to postpone the effectivity of the mandatory CSP for 305 days for all other DUs nationwide.

Fourth, the term of exemption for ABRECO was only for three years, or from 2016 to 2018. The PSAs executed during ERC's unilateral 305-day postponement had terms that range from 20 to 21 years.

In view of the DOE's explicit assertion that the ERC did not coordinate with the DOE regarding the issuance of the ERC

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[212] The term "Swiss Challenge" is also found in Sec. 3.2 of the Revised Implementing Rules and Regulations of RA No. 6957, An Act Authorizing The Financing, Construction, Operation And Maintenance Of Infrastructure Projects By The Private Sector And For Other Purposes, as amended by RA No. 7718. Sec. 3.2 reads as follows:
Responsibility of the PBAC. -The PBAC herein created shall be responsible for all aspects of the pre-bidding and bidding process in the case of solicited proposals, and for the comparative bidding process (otherwise known as the "Swiss Challenge"), in the case of Unsolicited Proposals, including, among others, the preparation of the bidding/tender documents, publication of the invitation to pre-qualify and bid, pre-qualification of prospective bidders, conduct of pre-bid conferences and issuance of supplemental notices, interpretation of the rules regarding the bidding, the conduct of bidding, evaluation of bids, resolution of disputes between bidders, and recommendation for the acceptance of the bid and/or for the award of the project.

[213] Repealed by EO No. 74 (2019). The Philippine Reclamation Authority (PRA) shall be under the control and supervision of the Office of the President, while the power of the President to approve all reclamation projects shall be delegated to the PRA governing board.

[214] The term "Swiss Challenge" is also found in Sec. 6.2 of the Implementing Rules and Regulations of Executive Order No. 146, dated 13 November 2013, "Delegating To The National Economic And Development Authority (NEDA) Board The Power Of The President To Approve Reclamation Projects." Sec. 6.2 reads as follows:
6.2. Reclamation projects identified under Secs. 2.2.2, 2.3.2, 2.4 and 2.5, after undergoing a thorough review, evaluation and negotiation process and upon acceptance by the PRA Board , shall be subjected to a competitive challenge process ("Swiss Challenge") in accordance with existing laws such as but not limited to the BOT Law, NEDA JV Guidelines and based on the parameters as approved by the NEDA Board, upon recommendation of the PRA Board.
In all cases, the Public Bidding in Sec. 6.1 and competitive challenge process ("Swiss Challenge") under Sec. 6.2 shall be undertaken after the NEDA Board approval in compliance with the competitive bidding requirement of EO No. 146.

Clarificatory Resolution, and the ERC's corresponding silence on the same matter, we hold that the ERC's issuance of the ERC Clarificatory Resolution is void, because it was issued with grave abuse of discretion and in excess of its rule-making authority.

Why the ERC Gravely Abused its Discretion: Effective Twenty-Year Freeze of the Mandatory CSP

The PSAs between Meralco and its power suppliers were executed and submitted to the ERC within 10 days prior to the restated 30 April 2016 deadline. The data collated in the above-mentioned tables are, as indicated in the footnotes, found in the pleadings submitted by the pertinent parties. These are judicial admissions, and are not findings of fact. According to the ERC Clarificatory Resolution, these PSAs are not required to comply with CSP.

Obviously, the rationale behind CSP - to ensure transparency in the purchase by DUs of bulk power supply so as to provide the consuming public affordable electricity rates - acquires greater force and urgency when the DU or its parent company holds a significant equity interest in the bulk power supplier. Such a parent-subsidiary relationship, or even a significant equity interest in the bulk power supplier, does not lend itself to fair and arms-length transactions between the DU and the bulk power supplier.

From Meralco's Comment, we see that the effect of the non-implementation of CSP is more widespread and far-reaching than what petitioners initially presented. Non-implementation of CSP affects various areas of the country and not just Meralco's extensive service areas. Postponement of the effectivity of the mandatory CSP resulted in the exemption from CSP of a total of ninety (90) PSAs covering various areas of the country. Under the ERC Clarificatory Resolution, the dates of submission put these PSAs outside the ambit of the mandatory CSP for at least 20 years based on the contract terms of these PSAs.

In effect, the ERC Clarificatory Resolution signaled to DUs to rush the negotiations and finalize their PSAs with power generation companies. Meeting the extended deadline would then render the 2015 DOE Circular mandating CSP inutile for at least 20 years. We cannot, in conscience, allow this to happen. To validate the ERC's postponement of CSP under the

CSP Guidelines and the ERC Clarificatory Resolution means to validate ERC's arbitrary and unauthorized act of putting into deep freeze, for at least 20 years, the principles behind CSP to the great prejudice of the public.[215]

Why the ERC Gravely Abused its Discretion: The Whereas Clauses of the CSP Guidelines and of the ERC Clarificatory Resolution

The ERC's Comment states: "It must be emphasized that the considerable amount of time, money, and effort it took to enter into a PSA would have been wasted if the CSP [Guidelines] took effect immediately." Granting that negotiations for the PSAs took considerable time, the issuance of the 2015 DOE Circular and of the CSP Guidelines was not conjured on a whim. We find that ERC's Comment fails to consider the efforts of both the DOE and the ERC prior to the issuance of the 2015 DOE Circular as well as the CSP Guidelines.

As early as 5 December 2003, the DOE issued Department Circular No. 2003-12-011, entitled "Enjoining All Distribution Utilities to Supply Adequate, Affordable, Quality and Reliable Electricity," which reiterated the state policy that "all DUs must ... take cognizance and assume full responsibility to forecast, assure and contract for the supply of electric power within their respective franchise areas to meet their obligations as a DU particularly to their Captive Market."[216] Moreover, the DOE had conducted a series of nationwide public consultations on the proposed policy on competitive procurement of electric power for all electricity end-users.[217] The dates and manner of consultations, as well as the acts of the DOE and the ERC, were specifically mentioned in the Whereas Clauses of the CSP Guidelines, thus:

> ...
> WHEREAS, on February 19, 2013, the ERC issued a Notice in ERC Case No. 2013-005 RM, entitled "In the Matter of the Promulgation of the Rules Governing the Execution, Review and Evaluation of Power Supply Agreements Entered Into by Distribution Utilities for the Supply of Electricity to their Captive Market" (PSA Rules), which was posted on the

[215] 2015 DOE Circular, Sec. 1.
[216] See 2015 DOE Circular, Fourth Whereas Clause.
[217] See 2015 DOE Circular, Seventh Whereas Clause.

ERC's website, directing all interested parties to submit their respective comments on the first draft of the PSA Rules, not later than March 22, 2013;

WHEREAS, on various dates, the ERC received comments on the first draft of the PSA Rules from interested parties, namely: a) Cagayan Electric Power and Light Co., Inc. (CEPALCO); b) Visayan Electric Company, Inc. (VECO); c) Quezon Power (Philippines) Ltd. Co. (QPL); d) Power Source Philippines, Inc. (PSPI); e) National Grid Corporation of the Philippines (NGCP); f) Philippine Independent Power Producers Association, Inc. (PIPPA); g) Next Power Consortium, Inc.; h) SN Aboitiz Power Group (SNAP); i) Aboitiz Power Corporation (APC); j) Philippine Electricity Market Corporation (PEMC); k) Manila Electric Company (MERALCO); l) Department of Energy (DOE); m) Philippine Rural Electric Cooperatives Associations, Inc. (PHILRECA); and n) National Rural Electric Cooperative Association (NRECA);

WHEREAS, on October 16, 2013, the ERC issued a Notice of Posting and Publication in the aforementioned case, which was posted on the ERC's website, directing all interested parties to submit their respective comments on the second draft of the PSA Rules and setting the same for public consultations on December 2, 2013 in Pasig City for the Luzon stakeholders and on December 5, 2013 in Cebu City for the Visayas and Mindanao stakeholders;

WHEREAS, on various dates, the ERC received comments on the second draft of the PSA Rules from interested parties, namely: a) PHILRECA; b) CEPALCO; c) VECO; d) QPL; e) PSPI; f) NGCP; g) PIPPA; h) Next Power Consortium, Inc.; i) SNAP; j) APC; k) PEMC; l) MERALCO; m) DOE; and n) NRECA;

WHEREAS, on January 27, 2014, the ERC issued a Notice of Posting and Public Consultation setting the second draft of the PSA Rules for public consultations on February 18, 20 and 24, 2014 in Davao City, Cebu City and Pasig City for the Mindanao, Visayas and Luzon stakeholders, respectively;

WHEREAS, on February 18, 20 and 24, 2014, the ERC conducted public consultations wherein the comments of the interested partied were discussed;

WHEREAS, the ERC, likewise, conducted Focus Group Discussions (FGDs) with the stakeholders on April 22 to 24, 2014 in Pasig City, May 6 to 8, 2014 in Cebu City, May 13 to 14, 2014 in Cagayan De Oro City and May 20 to 22, 2014 in Pasig City, to thoroughly discuss major issues in

relation to the draft PSA Rules, such as: a) the requirement of Competitive Selection Process (CSP); b) the proposed PSA template; c) the joint filing of PSA applications by the DUs and generation companies (GenCos); and d) the "walk-away" provision in the PSA, and the ERC likewise set the deadline for the submission of additional comments or position papers for May 30, 2014;

WHEREAS, on various dates, the ERC received position papers/additional comments from interested parties, namely: a) PIPPA; b) APC; c) Mindanao Coalition of Power Consumers; and d) Association of Mindanao Rural Electric Cooperatives, Inc. (AMRECO);

WHEREAS, Article III of the draft PSA Rules requires the DU to undertake a transparent and competitive selection process before contracting for the supply of electricity to its captive market;

WHEREAS, in October 2014, the DOE issued for comments its draft Circular on the proposed Demand Aggregation and Supply Auctioning Policy (DASAP);

WHEREAS, in the proposed DASAP, all DUS will be mandated to comply with the auction requirement prescribed therein and other rules and guidelines as may be prescribed in the implementation of the DASAP;

WHEREAS, by reason of the issuance of the DASAP and pending the finalization thereof, the ERC held in abeyance its action on ERC Case No. 2013-005 RM and final approval of the draft PSA Rules;

WHEREAS, on June 11, 2015, the Department of Energy (DOE) issued Department Circular No. DC2015-06-008, Mandating All Distribution Utilities to Undergo Competitive Selection Process (CSP) in Securing Power Supply Agreements (PSA);

WHEREAS, on October 20, 2015, the DOE and the ERC approved the issuance of a Joint Resolution embodying their agreement on the CSP, particularly, that the ERC shall issue the appropriate regulations requiring the DUs to undertake a CSP for the PSAs they will enter into for the supply to their captive markets;

WHEREAS, the ERC and the DOE are convinced that there is an advantage to be gained by having a CSP in place, in terms of ensuring transparency in the DUs' supply procurement and providing opportunities to elicit the best price offers and other PSA terms and conditions from suppliers[.][218]

[218] CSP Guidelines, Third to Seventeenth Whereas Clauses.

In stark contrast to the extensive consensus-building which attended the drafting of the 2015 DOE Circular and the CSP Guidelines, the ERC Clarificatory Resolution explicitly admitted that its issuance was not accompanied by any public consultation or focus group discussion. Rather, the ERC Clarificatory Resolution was unilaterally issued by the ERC, without coordinating with DOE, on the basis of "several letters from stakeholders." The stakeholders had no way of knowing the concerns of their peers as there was no interaction or discussion among the stakeholders.

> WHEREAS, since the publication of the CSP [Guidelines] on 06 November 2015, the [ERC] has received several letters from stakeholders which raised issues on the constitutionality of the effectivity of the CSP [Guidelines], sought clarification on the implementation of the CSP and its applicability to the renewal and extension of PSAs, requested a determination of the accepted forms of CSP, and submitted grounds for exemption from its applicability, among others.
> WHEREAS, after judicious study and due consideration of the different perspectives raised in the aforementioned letters, with the end in view of ensuring the successful implementation of the CSP for the benefit of consumers, DUs, and GenCos, the [ERC] has resolved to allow a period of transition for the full implementation of the CSP [Guidelines] and, as such, restates the effectivity date of the CSP [Guidelines] to a later date[.][219]

The CSP Guidelines did not, in the words of the OSG, "take effect immediately." Rather, it was the product of years of negotiation. The stakeholders were aware of the contents and the eventual implementation of CSP. Moreover, the CSP Guidelines, although signed on 20 October 2015, took effect on 7 November 2015, or 18 days after signing.

Why the ERC Gravely Abused its Discretion: Obligations of a Distribution Utility in the Electric Power Industry

The EPIRA divided the electric power industry into four sectors, namely: generation, transmission, distribution, and supply.[220] The distribution of electricity to end-users is a regulated common

[219] ERC Clarificatory Resolution, Seventh and Eighth Whereas Clauses.
[220] See RA No. 9136, Sec. 5.

carrier business requiring a franchise.[221] We reiterate that the EPIRA mandates that a distribution utility has the obligation to supply electricity in the least-cost manner to its captive market, subject to the collection of distribution retail supply rate duly approved by the ERC.[222]

Republic Act No. 9209 granted Meralco a congressional franchise to construct, operate, and maintain a distribution system for the conveyance of electric power to the end-users in the cities and municipalities of Metro Manila, Bulacan, Cavite, and Rizal, and certain cities, municipalities, and barangays in Batangas, Laguna, Quezon, and Pampanga. Meralco's franchise is in the nature of a monopoly because it does not have any competitor in its designated areas. The actual monopolistic nature of Meralco's franchise was recognized and addressed by the framers of our Constitution, thus:

> MR. DAVIDE: ... Under Section 15 on franchise, certificate, or any other form of authorization for the operation of a public utility, we notice that the restriction, provided in the 1973 Constitution that it should not be exclusive in character, is no longer provided. Therefore, a franchise, certificate or any form of authorization for the operation of a public utility may be exclusive in character.
> MR. VILLEGAS: I think, yes.
> MR. DAVIDE: It may be "yes." But would it not violate precisely the thrust against monopolies?
> MR. VILLEGAS: The question is, we do not include the provision about the franchise being exclusive in character.
> MR. SUAREZ: This matter was taken up during the Committee meetings. The example of the public utility given was the MERALCO. If there is a proliferation of public utilities engaged in the servicing of the needs of the public for electric current, this may lead to more problems for the nation. That is why the Commissioner is correct in saying that that will constitute an exemption to the general rule that there must be no monopoly of any kind, but it could be operative in the case of public utilities.
> MR. DAVIDE: Does not the Commissioner believe that the other side of the coin may also be conducive to more keen competition and better public service?
> MR. SUAREZ: The Commissioner may be right.

[221] See RA No. 9136, Sec. 22.
[222] See RA No. 9136, Sec. 23.

> MR. DAVIDE: Does not the Commissioner believe that we should restore the qualification that it should not be exclusive in character?
> MR. SUAREZ: In other words, under the Commissioner's proposal, Metro Manila, for example, could be serviced by two or more public utilities similar to or identical with what MERALCO is giving to the public?
> MR. DAVIDE: That is correct.
> MR. SUAREZ: The Commissioner feels that that may create or generate improvement in the services?
> MR. DAVIDE: Yes, because if we now allow an exclusive grant of a franchise, that might not be conducive to public service.
> MR. SUAREZ: We will consider that in the committee level.
> MR. MONSOD: With the Commissioner's permission, may I just amplify this.
> MR. VILLEGAS: Commissioner Monsod would like to make a clarification.
> MR. MONSOD: I believe the Commissioner is addressing himself to a situation where it lends itself to more than one franchise. For example, electric power, it is possible that within a single grid, we may have different distribution companies. So the Commissioner is right in that sense that perhaps in some situations, non-exclusivity may be good for the public. But in the case of power generation, this may be a natural activity that can only be generated by one company, in which case, prohibiting exclusive franchise may not be in the public interest.[223]

Section 5 of Republic Act No. 9209 provides that "[t]he retail rates to [Meralco's] captive market and charges for the distribution of electric power by [Meralco] to its end-users shall be regulated by and subject to the approval of the ERC." As the holder of a distribution franchise, Meralco is obligated to provide electricity at the least cost to its consumers. The ERC, as Meralco's rate regulator, approves the retail rates - comprising of power and distribution costs - to be charged to end-users. As we have demonstrated above, both Meralco and the ERC have been remiss in their obligations. Going through competitive public bidding as prescribed in the 2015 DOE Circular is the only way to ensure a transparent and reasonable cost of electricity to consumers.

Lest we forget, the ERC is expressly mandated in Section 43(o) of the EPIRA of "ensuring that the ... pass through of bulk purchase

[223] III Record, Constitutional Commission 261-262 (13 August 1986).

cost by distributors is transparent." **The ERC's postponement of CSP twice, totaling 305 days and enabling 90 PSAs in various areas of the country to avoid CSP for at least 20 years, directly and glaringly violates this express mandate of the ERC, resulting in the non-transparent, secretive fixing of prices for bulk purchases of electricity, to the great prejudice of the 95 million Filipinos living in this country as well as the millions of business enterprises operating in this country. This ERC action is a most extreme instance of grave abuse of discretion, amounting to lack or excess of jurisdiction, warranting the strong condemnation by this Court and the annulment of the ERC's action.**

Absent compliance with CSP in accordance with the 2015 DOE Circular, the PSAs shall be valid only as between the DUs and the power generation suppliers, and shall not bind the DOE, the ERC, and the public for purposes of determining the transparent and reasonable power purchase cost to be passed on to consumers.

On 1 February 2018, the DOE issued Circular No. DC2018-02-0003 entitled "Adopting and Prescribing the Policy for the Competitive Selection Process in the Procurement by the Distribution Utilities of Power Supply Agreements for the Captive Market" (2018 DOE Circular). The DOE prescribed, in Annex "A" of this 2018 DOE Circular, the DOE's own CSP Policy in the procurement of power supply by DUs for their captive market (2018 DOE CSP Policy). Section 16.1 of the 2018 DOE CSP Policy expressly repealed Section 4 of the 2015 DOE Circular authorizing ERC to issue supplemental guidelines to implement CSP.

In short, the DOE revoked the authority it delegated to the ERC to issue supplemental guidelines to implement CSP, and the DOE itself issued its own guidelines, the 2018 DOE CSP Policy, to implement CSP under the 2015 DOE Circular. This means that the CSP Guidelines issued by the ERC have become *functus officio* and have been superseded by the 2018 DOE CSP Policy. Under its Section 15, the 2018 DOE CSP Policy is expressly made to apply to "all prospective PSAs." The 2018 DOE Circular, including its Annex "A," took effect upon its publication on 9 February 2018. Thus, the 90 PSAs mentioned in this present case must undergo CSP in accordance with the 2018 DOE Circular, in particular the 2018 DOE CSP Policy prescribed in Annex "A" of the 2018 DOE Circular.

> WHEREFORE, the petition for *certiorari* and prohibition is GRANTED. The first paragraph of Section 4 of Energy Regulatory Commission Resolution No. 13, Series of 2015 (CSP Guidelines), and Energy Regulatory Commission Resolution No. 1, Series of 2016 (ERC Clarificatory Resolution), are hereby declared VOID ab initio. Consequently, all Power Supply Agreement applications submitted by Distribution Utilities to the Energy Regulatory Commission on or after 30 June 2015 shall comply with the Competitive Selection Process in accordance with Department of Energy Circular No. DC2018-02-0003 (2018 DOE Circular) and its Annex "A." Upon compliance with the Competitive Selection Process, the power purchase cost resulting from such compliance shall retroact to the date of effectivity of the complying Power Supply Agreement, but in no case earlier than 30 June 2015, for purposes of passing on the power purchase cost to consumers.

Section 20. The Congress shall establish an independent central monetary authority, the members of whose governing board must be natural-born Filipino citizens, of known probity, integrity, and patriotism, the majority of whom shall come from the private sector. They shall also be subject to such other qualifications and disabilities as may be prescribed by law. The authority shall provide policy direction in the areas of money, banking, and credit. It shall have supervision over the operations of banks and exercise such regulatory powers as may be provided by law over the operations of finance companies and other institutions performing similar functions.

Until the Congress otherwise provides, the Central Bank of the Philippines operating under existing laws, shall function as the central monetary authority.

In his **concurring** opinion in **GONZALES v. OFFICE OF THE PRESIDENT OF THE PHILIPPINES**, G.R. No. 196231, September 4, 2012, 694 Phil. 52,[224] Justice Carpio explained:

> Our Constitution does not impart a fixed and rigid concept of independence among the office that it creates. While it declares certain bodies as "independent", we cannot assume that the independence of the Ombudsman is the same as the

[224] Consolidated with Barreras-Sulit v. Ochoa, G.R. No. 196232. See discussion under Arts. IX-A, Sec. 1, XI, Sec. 5, XII, Secs. 9, XIII, Sec. 17.

independence of the Judiciary. Neither is the independence of the Constitutional Commissions the same as that of the National Economic and Development Authority, **the Bangko Sentral ng Pilipinas** or the Commission on Human Rights.[225] This Court cannot make a "one size fits all" concept of independence because the Constitution itself differentiates the degree of independence of these bodies.

…

When the 1987 Constitution speaks of "independent" bodies, it does not mean complete insulation from other offices. The text, history and structure of the Constitution contemplate checks and balances that result in the expansion, contraction or concurrence of powers, a coordinate functioning among different bodies of government that is not limited to the executive, legislative and judicial branches, but includes the "independent" constitutional bodies. The very structure of our government belies the claim that "independent" bodies necessarily have exclusive authority to discipline its officers.

…

... The Constitution clearly intended different degrees of independence among the "independent" bodies that it created. **For some,** such as the National Economic and Development Authority, **Bangko Sentral ng Pilipinas** and Commission on Human Rights, **the operationalization of independence is constitutionally committed to the discretion of Congress.**[226]

…

Any reading of the 1987 Constitution does not warrant the conclusion that all bodies declared by the Constitution as "independent" have exclusive disciplinary authority over all their respective officials and employees. …

There are other constitutional bodies declared "independent," but disciplinary authority is statutorily lodged somewhere else. **Under the New Central Bank Act (Republic Act No. 7653), the President also has the power to remove a member of the Monetary Board on specified grounds.**[227] **There is nothing anomalous in this mode of removal because**

[225] These are the bodies that the 1987 Constitution considers as "independent." See Const., Arts. IX-A, Sec. 1, XI, Sec. 5, XII, Secs. 9 and 20, XIII, Sec. 17.
[226] Const., Arts. XII, Secs. 9 and 20, XIII, Sec. 17.
[227] R.A. No. 7653, Sec. 10.

> **the Constitution expressly authorizes the legislature to provide for such mode of removal.** This Court cannot enforce a speculative notion of independence - that an "independent" body has exclusive disciplinary authority - for doing so would be a species of judicial legislation or a disguised constitutional amendment.
>
> … The fact that different constitutional bodies are treated differently under the Constitution shows that independence is a broadly delineated norm. With this level of generality, the constitutional meaning of independence is only that of independent decision-making that is free from partisanship and political pressures. …

As previously discussed, **DEVELOPMENT BANK OF THE PHILIPPINES v. COMMISSION ON AUDIT**, G.R. No. 88435, January 16, 2002, 424 Phil. 411,[228] ruled that the constitutional power of the COA to examine and audit the DBP was not exclusive and did not preclude a concurrent audit of the DBP by a private external auditor. Explaining for the Court *en banc*, Justice Carpio cited **Section 20 of this Article XII**:

> **There is another constitutional barrier to the COA's insistence of exclusive power to examine and audit all government agencies. The COA's claim clashes directly with the Central Bank's constitutional power of "supervision" over banks under Section 20, Article XII of the Constitution…**
>
> Historically, the Central Bank has been conducting periodic and special examination and audit of banks to determine the soundness of their operations and the safety of the deposits of the public. Undeniably, the Central Bank's power of "supervision" includes the power to examine and audit banks, as the banking laws have always recognized this power of the Central Bank. Hence, the COA's power to examine and audit government banks must be reconciled with the Central Bank's power to supervise the same banks. **The inevitable conclusion is that the COA and the Central Bank have concurrent jurisdiction, under the Constitution, to examine and audit government banks.**
>
> However, **despite the Central Bank's concurrent**

[228] See discussion under Art. IX-D.

jurisdiction over government banks, the COA's audit still prevails over that of the Central Bank since the COA is the constitutionally mandated auditor of government banks. And in matters falling under the second paragraph of Section 2, Article IX-D of the Constitution, the COA's jurisdiction is exclusive. Thus, the Central Bank is devoid of authority to allow or disallow expenditures of government banks since this function belongs exclusively to the COA.

…

The Central Bank promulgated Circular No. 1124 on December 5, 1986 pursuant to its power under the Freedom Constitution, the fundamental law then in force, as well as pursuant to its general rule making authority under the General Banking Act (RA No. 337), the banking law in effect at that time. Under the Freedom Constitution, the Central Bank exercised supervisory authority over the banking system. Section 14, Article XV of the 1973 Constitution, which was re-adopted in the Freedom Constitution, provided as follows:

> Sec. 14. The Batasang Pambansa shall establish a central monetary authority which shall provide policy direction in the areas of money, banking and credit. It shall have supervisory authority over the operations of banks and exercise such regulatory authority as may be provided by law over the operations of finance companies and other institutions performing similar functions. Until the Batasang Pambansa shall otherwise provide, the Central Bank of the Philippines, operating under existing laws, shall function as the central monetary authority.

Section 6-D of the General Banking Act (RA No. 337) vested the Monetary Board with the specific power to "require a bank to engage the services of an independent auditor to be chosen by the bank concerned from a list of certified public accountants acceptable to the Monetary Board."

The 1987 Constitution created an independent central monetary authority with substantially the same powers as the Central Bank under the 1973 Constitution and the Freedom Constitution. Section 20, Article XII of the 1987 Constitution provides that the Monetary Board "shall have supervision over the operations of banks". The specific power of the Central Bank under the General Banking Act (RA No. 337) to require an independent audit of

banks was re-enacted in Section 58 of the General Banking Law of 2000 (RA No. 8791).

Indubitably, the Central Bank had the express constitutional and statutory power to promulgate Circular No. 1124 on December 5, 1986. The power granted to the Central Bank to issue Circular No. 1124 with respect to the independent audit of banks is direct, unambiguous, and beyond dispute. The Bangko Sentral ng Pilipinas, which succeeded the Central Bank, retained under the 1987 Constitution and the General Banking Law of 2000 (RA No. 8791) the same constitutional and statutory power the Central Bank had under the Freedom Constitution and the General Banking Act (RA No. 337) with respect to the independent audit of banks.

Circular No. 1124 has the force and effect of law. In a long line of decisions,[229] this Court has held consistently that the rules and regulations issued by the Central Bank pursuant to its supervisory and regulatory powers have the force and effect of law. The DBP, being a bank under the constitutional and statutory supervision of the Central Bank, was under a clear legal obligation to comply with the requirement of Circular No. 1124 on the private audit of banks. Refusal by the DBP to comply with the Circular would have rendered the DBP and its officers liable to the penal provisions of the General Banking Act, as well as the administrative and penal sanctions under the Central Bank Act.

Section 21. Foreign loans may only be incurred in accordance with law and the regulation of the monetary authority. Information on foreign loans obtained or guaranteed by the Government shall be made available to the public.

Section 22. Acts which circumvent or negate any of the provisions of this Article shall be considered inimical to the national interest and subject to criminal and civil sanctions, as may be provided by law.

[229] Banco Filipino Savings & Mortgage Bank v. Navarro, 152 SCRA 346 (1987); Gonzalo Sy Trading v. Central Bank, 70 SCRA 570 (1976); Batchelder v. Central Bank, 46 SCRA 102 (1972); People v. Que Po Lay, 94 Phil. 640 (1954).

ARTICLE XIII

SOCIAL JUSTICE AND HUMAN RIGHTS

Section 1. The Congress shall give highest priority to the enactment of measures that protect and enhance the right of all the people to human dignity, reduce social, economic, and political inequalities, and remove cultural inequities by equitably diffusing wealth and political power for the common good.

To this end, the State shall regulate the acquisition, ownership, use, and disposition of property and its increments.

Section 2. The promotion of social justice shall include the commitment to create economic opportunities based on freedom of initiative and self-reliance.

LABOR

Section 3. The State shall afford full protection to labor, local and overseas, organized and unorganized, and promote full employment and equality of employment opportunities for all.

It shall guarantee the rights of all workers to self-organization, collective bargaining and negotiations, and peaceful concerted activities, including the right to strike in accordance with law. They shall be entitled to security of tenure, humane conditions of work, and a living wage. They shall also participate in policy and decision-making processes affecting their rights and benefits as may be provided by law.

The State shall promote the principle of shared responsibility between workers and employers and the preferential use of voluntary modes in settling disputes, including conciliation, and shall enforce their mutual compliance therewith to foster industrial peace.

The State shall regulate the relations between workers and employers, recognizing the right of labor to its just share in the

fruits of production and the right of enterprises to reasonable returns on investments, and to expansion and growth.

Security of Tenure

SONZA v. ABS-CBN BROADCASTING CORPORATION, G.R. No. 138051, June 10, 2004, 475 Phil. 539, a case of first impression, was a petition for review on *certiorari* assailing the decision of the Court of Appeals dismissing the petition filed by Jose Y. Sonza:

> Although Philippine labor laws and jurisprudence define clearly the elements of an employer-employee relationship, this is the first time that the Court will resolve the nature of the relationship between a television and radio station and one of its "talents." There is no case law stating that a radio and television program host is an employee of the broadcast station.

In **Sonza**, Justice Carpio, for the First Division, affirmed that the National Labor Relations Commission and the Labor Arbiter, had no jurisdiction over the case, and had occasion to discuss **Section 3 of this Article XIII on the constitutional right of labor to security of tenure:**

> ABS-CBN claims that there exists a prevailing practice in the broadcast and entertainment industries to treat talents like SONZA as independent contractors. SONZA argues that if such practice exists, it is void for violating the right of labor to security of tenure.
>
> **The right of labor to security of tenure as guaranteed in the Constitution arises only if there is an employer-employee relationship under labor laws. Not every performance of services for a fee creates an employer-employee relationship. To hold that every person who renders services to another for a fee is an employee - to give meaning to the security of tenure clause - will lead to absurd results.**
>
> Individuals with special skills, expertise or talent enjoy the freedom to offer their services as independent contractors. The right to life and livelihood guarantees this freedom to contract as independent contractors. The right of labor to security of tenure cannot operate to deprive an individual, possessed with special skills, expertise and talent, of his right to contract as an

> independent contractor. An individual like an artist or talent has a right to render his services without any one controlling the means and methods by which he performs his art or craft. This Court will not interpret the right of labor to security of tenure to compel artists and talents to render their services only as employees. If radio and television program hosts can render their services only as employees, the station owners and managers can dictate to the radio and television hosts what they say in their shows. This is not conducive to freedom of the press.

Right to Self-Organization

BANK OF THE PHILIPPINE ISLANDS v. BPI EMPLOYEES UNION-DAVAO CHAPTER-FEDERATION OF UNIONS IN BPI UNIBANK, G.R. No. 164301, August 10, 2010, 642 Phil. 47, was a petition for review of the decision and resolution of the Court of Appeals that reversed and set aside the decision of the voluntary arbitrator, who ruled that employees who were not "new employees" and were absorbed "by operation of law" could not be compelled to join the existing union, as it was their constitutional right to join or not to join any organization. The Court *en banc* was thus confronted with this issue - "may a corporation (Bank of the Philippine Islands) invoke its merger with another corporation (Far East Bank and Trust Company) as a valid ground to exempt its 'absorbed employees' from the coverage of a union shop clause contained in its existing collective bargaining agreement with its own certified labor union?" The Court answered in the negative, denied the petition and affirmed the decision of the Court of Appeals. Justice Carpio **dissented**, voted to grant the petition, and expressed his views[1] on the constitutional provisions on **labor contained in Section 3 of this Article XIII**:

> The petition calls upon this Court to review the Court of Appeals decision which reversed the decision of the Voluntary Arbitrator. The Voluntary Arbitrator ruled that the FEBTC employees absorbed by BPI are not covered by the union shop clause in the CBA between BPI and BPI Employees Union (Union) because said absorbed employees are not "new employees" and they "cannot be compelled to join the Union as it is their constitutional right to join or not to join any organization."
>
> In its Memorandum, petitioner BPI reiterated that "the State policy of promoting unionism should not be blindly and indiscriminately implemented at the expense of other rights

[1] Citations omitted in the original.

as enshrined in the Constitution and the laws." Petitioner discussed the protection of the rights of workers as provided in the Constitution and the Labor Code. …

Respondent Union requested petitioner BPI to implement the union shop clause of the CBA against absorbed FEBTC employees who refused to join the Union, and to terminate their employment pursuant to the union shop clause.

BPI, independently of the absorbed FEBTC employees, has the right to challenge the constitutionality of the union shop clause as applied to the absorbed FEBTC employees because BPI is being compelled, against its best interests, to terminate their employment if they do not join the Union. Besides, this Court cannot adopt as part of its jurisprudence a practice that clearly violates a fundamental constitutional right just because the aggrieved employees gave up the fight to protect such right.

The Constitution guarantees the fundamental right of all workers to "self-organization." The right to "self-organization" is a species of the broader constitutional right of the people "to form unions, associations, or societies for purposes not contrary to law," which right "shall not be abridged."

The right of workers to self-organization is protected under the Labor Code which provides that workers "shall have the right to self-organization and to form, join, or assist labor organizations of their own choosing for purpose of collective bargaining." The Code proscribes the abridgment of this right, stating that: "It shall be unlawful for any person to restrain, coerce, discriminate against or unduly interfere with employees and workers in their exercise of the right to self-organization. Such right shall include the right to form, join, or assist labor organizations for the purpose of collective bargaining through representatives of their own choosing ..."

The right of workers to self-organization means that workers themselves voluntarily organize, without compulsion from outside forces. "Self-organization" means voluntary association without compulsion, threat of punishment, or threat of loss of livelihood. Workers who "self-organize" are workers who on their own volition freely and voluntarily form or join a union. Compulsory membership is anathema to "self-organization."

The right to self-organize includes the right not to exercise such right. Freedom to associate necessarily includes the freedom not to associate. Thus, freedom to join unions necessarily includes the freedom not to join unions. *Reyes v. Trajano*[2] cannot be any clearer on this point:

> Logically, the right NOT to join, affiliate with, or assist any union, and to disaffiliate or resign from a labor organization, is subsumed in the right to join, affiliate with, or assist any union, and to maintain membership therein. The right to form or join a labor organization necessarily includes the right to refuse or refrain from exercising said right. It is self-evident that just as no one should be denied the exercise of a right granted by law, so also, no one should be compelled to exercise such a conferred right.

Reyes was decided on 2 June 1992 under the 1987 Constitution. Even prior to *Reyes*, this Court already declared in *Victoriano v. Elizalde Rope Workers' Union*,[3] decided on 12 September 1974 under the 1973 Constitution, that:

> What the Constitution and Industrial Peace Act recognize and guarantee is the 'right' to form or join associations. Notwithstanding the different theories propounded by the different schools of jurisprudence regarding the nature and contents of a 'right,' it can be safely said that whatever theory one subscribes to, a right comprehends at least two broad notions, namely: first, liberty or freedom, i.e., the absence of legal restraint, whereby an employee may act for himself without being prevented by law; second, power, whereby an employee may, as he pleases, join or refrain from joining an association. It is therefore the employee who should decide for himself whether he should join or not an association; and should he choose to join, he himself makes up his mind as to which association he would join; and even after he has joined, he still retains the liberty and the power to leave and cancel his membership with said organization at any time ... It is clear, therefore, that the right to join a union includes the right to abstain from joining any union. … Inasmuch as what both the Constitution and the Industrial Peace Act have recognized, and guaranteed to the employee, is the 'right' to join associations of his choice, it would be absurd to say that

[2] G.R. No. 84433, 2 June 2 1992.
[3] G.R. No. L-25246, 12 September 1974.

> the law also imposes, in the same breath, upon the employee the duty to join associations. The law does not enjoin an employee to sign up with any association.

The ruling in *Victoriano* has been reiterated in a plethora of cases, including *Basa v. Federacion Obrera de la Industria Tabaquera y Otros Trabajadores de Filipinas* (1974), *Anucension v. National Labor Union* (1977), *Gonzales v. Central Azucarera de Tarlac Labor Union* (1985), and *Knitjoy Manufacturing, Inc. v. Ferrer-Calleja* (1992).[4] In the case of *Philips Industrial Development, Inc. v. NLRC*,[5] decided on 25 June 1992, this Court held:

> ... in holding that they are included in the bargaining unit for the rank and file employees of PIDI, the NLRC practically forced them to become members of PEO-FFW or to be subject to its sphere of influence, it being the certified bargaining agent for the subject bargaining unit. This violates, obstructs, impairs and impedes the service engineers' and the sales representatives' constitutional right to form unions or associations and to self- organization.

Thus, it is the worker who should personally decide whether or not to join a labor union. The union, the management, the courts, and even the State cannot decide this for the worker, more so against his will.

The State encourages union membership to protect an individual employee from the power of the employer. A union is an instrumentality utilized to achieve the objective of protecting the rights of workers. In *Guijarno v. Court of Industrial Relations*,[6] we clarified the purpose of a union:

> ... The State shall assure the rights of workers to self-organization, collective bargaining, security of tenure, and just and humane conditions of work." (Art. II, Sec. 9 of the Revised Constitution) Where does that leave a labor union, it may be asked. Correctly understood, it is nothing but the means of assuring that such fundamental objectives would be achieved. It is the instrumentality through which an individual laborer who is helpless as against a powerful

[4] Citations omitted in the original.
[5] G.R. No. 88957, 25 June 1992.
[6] G.R. Nos. L-28791-93, 27 August 1973.

> employer may, through concerted effort and activity, achieve the goal of economic well-being. That is the philosophy underlying the Industrial Peace Act. (Republic Act No. 875 [1953]) For, rightly has it been said that workers unorganized are weak; workers organized are strong. Necessarily then, they join labor unions.

To further strengthen the powers of a union, the State has allowed the inclusion of union security clauses, including a "union shop" (the type of union security clause involved in this case), in collective bargaining agreements (CBA). In a "union shop," employees who are not union members at the time of signing of the contract need not join the union, but all workers hired thereafter must join. Non-members may be hired, but to retain employment must become union members after a certain period. The *ponencia* points out the validity in this jurisdiction of the more stringent union security of "closed shop" and its applicability to old employees who are non-union members at the time of effectivity of the CBA. In a "closed shop," only union members can be hired by the company and they must remain union members to retain employment in the company.

As explained in *Guijarno*, it was to "further increase the effectiveness of [unions] that a closed shop has been allowed." However, this undertaking did not come without detrimental effects on the workers themselves, such that in *Confederated Sons of Labor v. Anakan Lumber Co.*,[7] we declared that a closed shop is "so harsh that it must be strictly construed" and that "doubts must be resolved against [it]." We also ruled in *Anakan* that "In order that an employer may be deemed bound, under a collective bargaining agreement, to dismiss employees for non-union membership, the stipulation to this effect must be so clear and unequivocal as to leave no room for doubt thereon."

Guijarno elucidated the downside of a closed shop and its compulsory membership, thus:

> ... To further increase the effectiveness of such organizations, a closed shop has been allowed. It could happen, though, that such a stipulation which assures further weight to a labor union at the bargaining table could be utilized against minority groups or individual members thereof. ... Respondent

[7] G.R. No. L-12503, 29 April 29 1960.

> Court, it would appear, was not sufficiently alert to such a danger. What is worse, it paid no heed to the controlling doctrine which is merely a recognition of a basic fact in life, namely, that power in a collectivity could be the means of crushing opposition and stifling the voices of those who are in dissent. The right to join others of like persuasion is indeed valuable. An individual by himself may feel inadequate to meet the exigencies of life or even to express his personality without the right to association being vitalized. It could happen though that whatever group may be in control of the organization may simply ignore his most-cherished desires and treat him as if he counts for naught. The antagonism between him and the group becomes marked. Dissatisfaction if given expression may be labeled disloyalty. In the labor field, the union under such circumstances may no longer be a haven of refuge, but indeed as much of a potential foe as management itself. Precisely with the *Anakan* doctrine, such an undesirable eventuality has been sought to be minimized, if not entirely avoided. ...

Justice Fernando, in his concurring opinion in *Victoriano*, highlighted the importance of freedom of association, while referring to closed shop and its coercive nature with manifest disapproval, viz:

> ... Thought must be given to the freedom of association, likewise an aspect of intellectual liberty. For the late Professor Howe a constitutionalist and in his lifetime the biographer of the great Holmes, it even partakes of the political theory of pluralistic sovereignty. So great is the respect for the autonomy accorded voluntary societies. Such a right implies at the very least that one can determine for himself whether or not he should join or refrain from joining a labor organization, an institutional device for promoting the welfare of the working man. A closed shop, on the other hand, is inherently coercive. That is why, as is unmistakably reflected in our decisions, the latest of which is *Guijarno v. Court of Industrial Relations*, it is far from being a favorite of the law. For a statutory provision then to further curtail its operation, is precisely to follow the dictates of sound public policy.

…

Union security agreements were adopted in our jurisdiction primarily to safeguard the rights of the working man. Where utilized to achieve a contrary purpose, these union devices

should be curtailed and carefully maneuvered to remain within the periphery of labor protection.

In this case, the CBA between BPI and the BPI Employees Union contains a union shop clause requiring that "new employees" of BPI join the Union within 30 days after they become regularized, as a condition for their continued employment.

The *ponencia*[8] points out that the absorption of FEBTC employees was purely voluntary on the part of BPI, and was not mandated by law or by a contract between the merging entities. The *ponencia* holds that in the absence of a stipulation in the plan of merger regarding the absorption of FEBTC's employees by BPI, the latter has no obligation to absorb or continue the employment of said FEBTC employees.

I do not agree.

Upon merger, BPI, as the surviving entity, absorbs FEBTC and continues the combined business of the two banks. BPI assumes the legal personality of FEBTC, and automatically acquires FEBTC's rights, privileges and powers, as well as its liabilities and obligations (citing) Section 80 of Batas Pambansa Blg. 68, otherwise known as "The Corporation Code of the Philippines"…

Among the obligations and liabilities of FEBTC is to continue the employment of FEBTC employees. These employees have already acquired certain employment status, tenure, salary and benefits. They are regular employees of FEBTC. Since after the merger, BPI has continued the business of FEBTC, FEBTC's obligation to these employees is assumed by BPI, and BPI becomes duty-bound to continue the employment of these FEBTC employees.

Under Article 279 of the Labor Code, regular employees acquire security of tenure, and hence, may not be terminated by the employer except upon legal grounds. These grounds are the "just causes" enumerated under Article 282 of the Code, which include serious misconduct or willful disobedience by the employee, gross habitual neglect of duties, fraud or willful breach of employer's trust, and commission of a crime; or "authorized causes" under Article 283, which include installation of labor saving devices, redundancy, retrenchment to prevent losses, and closing or cessation of business operations. Without any of these legal

[8] Majority opinion, Leonardo-De Castro, J.

grounds, the employer cannot validly terminate the employment of regular employees; otherwise, the employees' right to security of tenure would be violated.

The merger of two corporations does not authorize the surviving corporation to terminate the employees of the absorbed corporation in the absence of just or authorized causes as provided in Articles 282 and 283 of the Labor Code. Merger of two corporations is not one of the just or authorized causes for termination of employment. Not even a union shop agreement is just or authorized cause to terminate a permanent employee. A union shop clause is only a ground to terminate a probationary employee who refuses to join the union as a condition for continued employment. Once an employee becomes permanent, he is protected by the security of tenure clause in the Constitution, and he can be terminated only for just or authorized causes as provided by law.

The right to security of tenure of regular employees is enshrined in the Constitution. This right cannot be eroded, let alone be forfeited except upon a clear and convincing showing of a just and lawful cause. In this case, there is no showing that legal ground exists to warrant a termination of the FEBTC employees. Therefore, BPI is obligated to continue FEBTC employees' regular employment in deference to their constitutional right to security of tenure.

Meanwhile, the FEBTC employees had no choice but to accept the absorption by way of merger. A merger is a legitimate management prerogative which cannot be opposed or rejected by the employees of the merging entities. Hence, the absorption by BPI of the FEBTC employees was not within the FEBTC employees' control, and the latter had no choice but to be absorbed by BPI, unless they opted to give up their means of livelihood.

Upon the effectivity of the CBA in this case, BPI employees who were members of the Union were required to maintain their membership as a condition for continued employment. On the other hand, the then non-union employees of BPI were not compelled to join the Union -- they were given a choice whether or not to join the Union at no risk to their continued employment. In other words, non-union BPI employees could opt not to join the Union and still retain their employment with BPI. Meanwhile, "new employees" or those who were hired by BPI after the effectivity and during the life of the CBA were

automatically required to join the Union within 30 days after they were regularized.

Existing BPI employees who were non-union members were not compelled to join the Union as a condition for their continued employment, as this would violate their fundamental constitutional right not to join a union. This freedom of choice exercised by non-union BPI employees was in recognition of their fundamental constitutional right to join or not to join a union which is part of their broader constitutional right to form associations. To force these employees to join a labor union at the risk of losing their means of livelihood would violate the Constitution.

Thus, under the CBA, the BPI employees required to acquire or maintain union membership as a condition for their continued employment are (1) the union members at the time of the effectivity of the CBA and (2) the "new employees" who were hired during the effectivity of the CBA. Non-union BPI employees at the time of the effectivity of the CBA were not, and are still not, required to join the Union.

In the case of "new employees" hired by BPI during the life of the CBA, there is no violation of their constitutional right not to join a union. At the time of their application for employment with BPI, or at the latest, at the time they were hired by BPI, these employees knew that they were required to join the Union within 30 days upon regularization as a condition for continued employment with BPI. In short, the employees knew beforehand that they had to join the Union to be employed with BPI. Thus, these employees had a clear choice whether or not to be employed with BPI, which requires that they must join the Union upon regularization.

The *ponencia* holds that the absorbed FEBTC employees should be considered as "new employees" of BPI, and therefore, required to join the Union pursuant to the union shop clause of the CBA. The *ponencia* deprives the absorbed employees of their fundamental constitutional right to choose whether or not to join the Union.

I cannot subscribe to this view.

The former FEBTC employees should not be considered as "new employees" of BPI. The former FEBTC employees were absorbed

by BPI immediately upon merger, leaving no gap in their employment. The employees retained their previous employment status, tenure, salary and benefits. This clearly indicates the intention of BPI to assume and continue the employer-employee relations of FEBTC and its employees. The FEBTC employees' employment remained continuous and unchanged, except that their employer, FEBTC, merged with BPI which, as the surviving entity, continued the combined business of the two banks.

Thus, the former FEBTC employees are immediately regularized and made permanent employees of BPI. They are not subject to any probationary period as in the case of "new employees" of BPI. The 30-day period within which regularized "new employees" of BPI must join the Union does not apply to former FEBTC employees who are not probationary employees but are immediately regularized as permanent employees of BPI. In short, the former FEBTC employees are immediately given the same permanent status as old employees of BPI.

The absorbed FEBTC employees are not "new employees" who are seeking jobs for the first time. These absorbed employees are employees who have been working with FEBTC for years, or even decades, and were only absorbed by BPI because of the merger. Without the merger, these employees would have remained FEBTC employees without being required to join a union to retain their employment. These absorbed employees are recognized by BPI and even by the Union as permanent employees immediately upon their absorption by BPI because these employees do not have to go through a probationary period. These absorbed employees are different from the newly-hired employees of BPI, as these absorbed employees already had existing employment tenure, and were earning a livelihood when they were told that they had to join the Union at the risk of losing their livelihood.

To require these absorbed employees to join the Union at the risk of losing their jobs is akin to forcing an existing non-union BPI employee to join the Union on pain of termination. In the same way that an existing non-union BPI employee is given the constitutional right to choose whether or not to join a union, an absorbed employee should be equally given the same right. And this right must be conferred to the absorbed employee upon the effectivity of the merger between FEBTC and BPI.

Indisputably, the right to join or not to join a Union is

part of the fundamental constitutional right to form associations. In *Sta. Clara Homeowners' Association v. Gaston*,[9] we held that, "(t)he constitutionally guaranteed freedom of association includes the freedom not to associate. The right to choose with whom one will associate oneself is the very foundation and essence of that partnership. It should be noted that the provision guarantees the right to form an association. It does not include the right to compel others to form or join one." Thus, to compel the absorbed FEBTC employees to join the Union at the risk of losing their jobs is violative of their constitutional freedom to associate.

To consider the former FEBTC employees not "new employees" of BPI for the purpose of the union shop clause of the CBA does not necessarily mean that the FEBTC employees are considered "old employees" of BPI, hired by BPI on the date that the employees were hired by FEBTC. The former FEBTC employees are not old BPI employees. They are former FEBTC employees absorbed by BPI upon effectivity of the merger. Nevertheless, as absorbed employees, these former FEBTC employees cannot be relegated to being "new employees" of BPI within the contemplation of the union shop clause of the CBA.

If the absorbed employees are treated as "new employees," and they refuse to join the Union, the Union can ask BPI to terminate their employment. And BPI can validly terminate their employment pursuant to the union shop clause. It is well-settled that termination of employment by virtue of a union security clause embodied in a CBA is recognized in our jurisdiction, and an employer who merely complies in good faith with the union's request for the dismissal of an employee pursuant to the CBA cannot be considered guilty of unfair labor practice.

Upon such termination, the absorbed employees are not entitled to separation pay under the law. Grant of separation pay to employees dismissed pursuant to a union shop clause of a CBA is not a statutory requirement. Worse, assuming that the absorbed employees have already reached the age of 60 years or above, as "new employees" of BPI, they will not be entitled to retirement benefits under the law. For instance, an absorbed employee who is 60 years old or above, but less than 65 years which is the compulsory retirement age, cannot avail of optional retirement benefits since the law requires that the employee

[9] G.R. No. 141961, 23 January 2002.

"has served at least five (5) years in the said establishment." Considering that the absorbed employees are required to join the Union within 30 days from regularization, and the law requires that probationary employment shall not exceed six months from the date the employee started working, after which the employee shall be considered a regular employee, it may be assumed that the absorbed employees had not yet served BPI for at least five years when required to join the Union. If, on the other hand, the absorbed employee has already reached the compulsory retirement age of 65 years, then neither can the employee avail of any retirement benefit since the law provides that a compulsory retiree shall be entitled to "at least one-half (1/2) month salary for every year of service, a fraction of at least six (6) months being considered as one whole year." Assuming that the absorbed employee has not yet rendered service in BPI for at least six months when said employee reached the compulsory retirement age of 65 years, then the employee will not be entitled to receive any retirement benefit. Thus, to consider the absorbed FEBTC employees as "new employees" of BPI can have dire consequences on the absorbed employees who refuse to join the Union, not the least of which is the forfeiture of benefits which should be properly accorded these employees after years, or probably even decades, of loyal service to FEBTC.

The *ponencia* points to Article 248 (e) of the Labor Code which states, thus: "... (n)othing in this Code or in any other law shall stop the parties from requiring membership in a recognized collective bargaining agent as a condition for employment, except those employees who are already members of another union at the time of the signing of the collective bargaining agreement. ..."

The above provision presupposes that the parties agreed on "requiring membership in a recognized collective bargaining agent as a condition for employment," with the stated exception. In this case, BPI and the Union agreed on a union shop clause concerning "new employees" only. We quote:

> Sec. 2. Union Shop - New employees falling within the bargaining unit as defined in Article I of the Agreement, who may hereafter be regularly employed by the Bank shall, within thirty (30) days after they become regular employees, join the Union as a condition of their continued employment. ...

As previously discussed, the absorbed FEBTC employees are NOT and cannot be considered as "new employees" within the contemplation of the union shop clause.

Verily, BPI and the Union never agreed on requiring the former FEBTC employees to join the Union as a condition for their employment by BPI. On the contrary, BPI is questioning the applicability of the union shop clause to said employees.

The *ponencia* states, "When certain employees are obliged to join a particular union as a requisite for continued employment, as in the case of a Union Shop Clause, a form of discrimination or a derogation of the freedom or right not to join any labor organization occurs but these are valid restrictions because they are in favor of unionism." In this case, a derogation of the employees' fundamental constitutional right not to join a union is being done without a determination of whether the employees are in favor of unionism. Certainly, the union shop clause in a CBA cannot prevail over the fundamental constitutional right of a worker to join or not to join a union.

Finally, the *ponencia* agrees with the Court of Appeals that sustaining petitioner's position will result in an awkward and unfair situation wherein the absorbed employees will be in a better position than the existing BPI employees, since the latter will be required to pay monthly union dues, while the absorbed employees will "enjoy the fruits of labor of the [union] and its members for nothing in exchange." This is not correct. Section 248(e) of the Labor Code provides that, "Employees of an appropriate collective bargaining unit who are not members of the recognized collective bargaining agent may be assessed a reasonable fee equivalent to the dues and other fees paid by members of the recognized collective bargaining agent, if such non-union members accept the benefits under the collective bargaining agreement ..." The absorbed FEBTC employees who refuse to join the Union will not be free riders.

We held in *Holy Cross of Davao College, Inc. v. Joaquin*[10] that the collection of agency fees in an amount equivalent to union dues and fees, from employees who are not union members, is recognized by Article 248 (e) of the Labor Code. The employee's acceptance of benefits resulting from a CBA justifies the deduction of agency fees from his pay and the union's entitlement thereto.

[10] G.R. No. 110007, 18 October 1996.

In this aspect, the legal basis of the union's right to agency fees is neither contractual nor statutory, but quasi-contractual, deriving from the established principle that non-union employees may not unjustly enrich themselves by benefiting from employment conditions negotiated by the bargaining union.

In the present case, since the absorbed FEBTC employees will pay all union dues and fees, there is no reason to force them to join the Union except to humiliate them by trampling upon their fundamental constitutional right to join or not to join a union. This the Court should not allow.

It is this Court's solemn duty to implement the State policy of promoting unionism. However, this duty cannot be done at the expense of a fundamental constitutional right of a worker. We cannot exalt union rights over and above the freedom and right of employees to join or not to join a union.

AGRARIAN AND NATURAL RESOURCES REFORM

Section 4. The State shall, by law, undertake an agrarian reform program founded on the right of farmers and regular farmworkers who are landless, to own directly or collectively the lands they till or, in the case of other farmworkers, to receive a just share of the fruits thereof. To this end, the State shall encourage and undertake the just distribution of all agricultural lands, subject to such priorities and reasonable retention limits as the Congress may prescribe, taking into account ecological, developmental, or equity considerations, and subject to the payment of just compensation. In determining retention limits, the State shall respect the right of small landowners. The State shall further provide incentives for voluntary land-sharing.

The phrase **"subject to the payment of just compensation" in Section 4 of this Article XIII** was explained in **LAND BANK OF THE PHILIPPINES v. DOMINGO**, G.R. No. 168533, February 4, 2008, 567 Phil. 593. Speaking for the Second Division of the Supreme Court, Justice Carpio identified the "crux of the controversy" as the determination of "the proper land valuation to compute the just compensation for purposes of agrarian reform under PD 27:"

Section 9, Article III of the 1987 Constitution provides that no private property shall be taken for public use without just compensation. As a concept in the Bill of Rights, just compensation is defined as the fair or market value of the property as between one who receives, and one who desires to sell.[11]

Section 4, Article XIII of the 1987 Constitution mandates that the redistribution of agricultural lands shall be "subject to the payment of just compensation." The deliberations of the 1986 Constitutional Commission on this subject reveal that just compensation should not do violence to the Bill of Rights but should also not make an insurmountable obstacle to a successful agrarian reform.[12] Hence, the landowners' right to just compensation should be balanced with agrarian reform. In *Land Bank v. Court of Appeals*,[13] we declared that it is the duty of the court to protect the weak and the underprivileged, but this duty should not be carried out to such an extent as to deny justice to the landowner whenever truth and justice happen to be on his side.

In *Land Bank v. Natividad*,[14] the Court held that the determination of just compensation "in accordance with RA 6657, and not PD 27 and EO 228, is especially imperative considering that just compensation should be the full and fair equivalent of the property taken from its owner by the expropriator, the equivalent being real, substantial, full and ample." In this same case, this Court also had the occasion to discuss the just compensation for PD 27 lands, thus:

> Land Bank's contention that the property was acquired for purposes of agrarian reform on October 21, 1972, the time of the effectivity of PD 27, ergo just compensation should be based on the value of the property as of that time and not at the time of possession in 1993, is likewise erroneous. In *Office of the President, Malacañang, Manila v. Court of Appeals*, we ruled that the seizure of the landholding did not take place on the date of effectivity of PD 27 but would take effect on the payment of just compensation.
>
> Under the factual circumstances of this case, the agrarian reform process is still incomplete as the just compensation to

[11] Republic v. Court of Appeals, G.R. No. 147245, 31 March 2005, 454 SCRA 516, 534.
[12] Joaquin G. Bernas, The 1987 Constitution Of The Republic Of The Philippines: A Commentary 1071.
[13] 319 Phil. 246, 249 (1995).
[14] G.R. No. 127198, 16 May 2005, 458 SCRA 441, 452.

be paid private respondents has yet to be settled. Considering the passage of Republic Act No. 6657 (RA 6657) before the completion of this process, the just compensation should be determined and the process concluded under the said law. Indeed, RA 6657 is the applicable law, with PD 27 and EO 228 having only suppletory effect, conformably with our ruling in *Paris v. Alfeche*.

Section 17 of RA 6657 which is particularly relevant, providing as it does the guideposts for the determination of just compensation, reads as follows:

> Sec. 17. Determination of Just Compensation. - In determining just compensation, the cost of acquisition of the land, the current value of the like properties, its nature, actual use and income, the sworn valuation by the owner, the tax declarations, and the assessment made by government assessors shall be considered. The social and economic benefits contributed by the farmers and the farmworkers and by the Government to the property as well as the non-payment of taxes or loans secured from any government financing institution on the said land shall be considered as additional factors to determine its valuation.

It would certainly be inequitable to determine just compensation based on the guideline provided by PD 27 and EO 228 considering the DAR's failure to determine the just compensation for a considerable length of time. That just compensation should be determined in accordance with RA 6657, and not PD 27 or EO 228, is especially imperative considering that just compensation should be the full and fair equivalent of the property taken from its owner by the expropriator, the equivalent being real, substantial, full and ample.

There is no doubt that Domingo's land was taken by the government under PD 27. However, it was only in 1994 when LBP prepared the Land Transfer Payment Form which was superseded by a Claims Processing Form issued in 2002.

In *Association of Small Landowners v. Secretary of Agrarian Reform*,[15] the Court held that it is a recognized rule that title to the property expropriated shall pass from the owner to the expropriator only upon full payment of just compensation. The Court further held that:

[15] G.R. No. 78742, 14 July 1989, 175 SCRA 343, 389.

> It is true that P.D. No. 27 expressly ordered the emancipation of tenant-farmer as [of] October 21, 1972 and declared that he shall 'be deemed the owner' of a portion of land consisting of a family-sized farm except that 'no title to the land owned by him was to be actually issued to him unless and until he had become a full-fledged member of a duly recognized farmer's cooperative.' It was understood, however, that full payment of just compensation also had to be made first, conformably to the constitutional requirement.

LBP's contention that the property was taken on 21 October 1972, the date of effectivity of PD 27, thus just compensation should be computed based on the GSP in 1972, is erroneous. The date of taking of the subject land for purposes of computing just compensation should be reckoned from the issuance dates of the emancipation patents. An emancipation patent constitutes the conclusive authority for the issuance of a Transfer Certificate of Title in the name of the grantee.[16] It is from the issuance of an emancipation patent that the grantee can acquire the vested right of ownership in the landholding,[17] subject to the payment of just compensation to the landowner.

When RA 6657 was enacted into law in 1988, the agrarian reform process in the present case was still incomplete as the amount of just compensation to be paid to Domingo had yet to be settled. Just compensation should therefore be determined and the expropriation process concluded under RA 6657.

Guided by this precept, just compensation for purposes of agrarian reform under PD 27 should adhere to Section 17 of RA 6657 which states:

> Sec. 17. Determination of Just Compensation. - In determining just compensation, the cost of acquisition of the land, the current value of the like properties, its nature, actual use and income, the sworn valuation by the owner, the tax declarations, and the assessment made by government assessors shall be considered. The social and economic benefits contributed by the farmers and the farmworkers and by the Government to the property as well as the non-payment of taxes or loans secured from any government financing institution on the said land shall be considered as

[16] Pagtalunan v. Tamayo, G.R. No. 54281, 19 March 1990, 183 SCRA 252, 259.
[17] Ibid.

additional factors to determine its valuation.

In *Land Bank v. Natividad*,[18] the Court upheld the trial court's decision valuing the property on account of its nature, location, market value, assessor's value and volume and value of its produce.

In *Land Bank v. Estanislao*,[19] this Court upheld the just compensation of P20 per square meter which was determined in accordance with Section 17 of RA 6657.

In *Lubrica v. Land Bank*,[20] the Court mandated that "Land Bank should compensate the landowner in such amount as may be agreed upon by the landowner and the DAR and the LBP or as may be finally determined by the Court as the just compensation."

In sum, we affirm the rulings of the trial court and the appellate court that the provisions of RA 6657 apply to the present case and that the date of taking of Domingo's riceland for purposes of computing just compensation should be reckoned from the issuance dates of emancipation patents. However, the just compensation for the subject land in the present case should be computed in accordance with *Lubrica v. Land Bank*. The partial payment of P1,845,999.71 should be deducted from the computation.

Section 5. The State shall recognize the right of farmers, farmworkers, and landowners, as well as cooperatives, and other independent farmers' organizations to participate in the planning, organization, and management of the program, and shall provide support to agriculture through appropriate technology and research, and adequate financial, production, marketing, and other support services.

Section 6. The State shall apply the principles of agrarian reform or stewardship, whenever applicable in accordance with law, in the disposition or utilization of other natural resources, including lands of the public domain under lease or concession suitable to agriculture, subject to prior rights,

[18] G.R. No. 127198, 16 May 2005, 458 SCRA 441, 452-453.
[19] G.R. No. 166777, 10 July 2007, 527 SCRA 181, 188-189.
[20] G.R. No. 170220, 20 November 2006, 507 SCRA 415, 424-425.

homestead rights of small settlers, and the rights of indigenous communities to their ancestral lands. The State may resettle landless farmers and farmworkers in its own agricultural estates which shall be distributed to them in the manner provided by law.

Section 7. The State shall protect the rights of subsistence fishermen, especially of local communities, to the preferential use of the communal marine and fishing resources, both inland and offshore. It shall provide support to such fishermen through appropriate technology and research, adequate financial, production, and marketing assistance, and other services. The State shall also protect, develop, and conserve such resources. The protection shall extend to offshore fishing grounds of subsistence fishermen against foreign intrusion. Fishworkers shall receive a just share from their labor in the utilization of marine and fishing resources.

Section 8. The State shall provide incentives to landowners to invest the proceeds of the agrarian reform program to promote industrialization, employment creation, and privatization of public sector enterprises. Financial instruments used as payment for their lands shall be honored as equity in enterprises of their choice.

URBAN LAND REFORM AND HOUSING

Section 9. The State shall, by law, and for the common good, undertake, in cooperation with the private sector, a continuing program of urban land reform and housing which will make available at affordable cost, decent housing and basic services to underprivileged and homeless citizens in urban centers and resettlement areas. It shall also promote adequate employment opportunities to such citizens. In the implementation of such program the State shall respect the rights of small property owners.

Section 10. Urban or rural poor dwellers shall not be evicted nor their dwelling demolished, except in accordance with law and in a just and humane manner.

No resettlement of urban or rural dwellers shall be undertaken without adequate consultation with them and the communities where they are to be relocated.

HEALTH

Section 11. The State shall adopt an integrated and comprehensive approach to health development which shall endeavor to make essential goods, health and other social services available to all the people at affordable cost. There shall be priority for the needs of the under-privileged, sick, elderly, disabled, women, and children. The State shall endeavor to provide free medical care to paupers.

In **SISON v. COURT OF APPEALS**, G.R. No. 124086, June 26, 2006, 525 Phil. 574, a petition for review on *certiorari* of the decision of the Court of Appeals ordering Godofredo S. Sison and the Social Security System to pay 80% of the claims of Leona O. Lim Memorial Hospital and Paulina Lim Memorial Hospital under the Medical Care Program, Justice Carpio, speaking for the Third Division, resolved the main issue of "whether petitioner can be compelled by *mandamus* to pay respondent's claims:"

> As a general rule, the performance of an official act or duty which necessarily involves the exercise of judgment cannot be compelled by *mandamus*. It is nonetheless also available to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment in a particular manner. However, this rule admits of exceptions. *Mandamus* is the proper remedy in cases where there is gross abuse of discretion, manifest injustice, or palpable excess of authority.[21] The exception applies to the present case.
>
> We agree with petitioner that his office has the discretionary authority to withhold payment of fraudulent claims. Petitioner's desire to protect government funds is laudable. Even so, his zeal has to be tempered by the application of the mandate of Medicare laws and regulations. Contrary to petitioner's assertions, the exercise of his discretionary authority to approve and deny claims is not absolute. Petitioner's exercise of authority is defined by the limits provided by Circular No. 258. Petitioner's mandate under Circular No. 258 is clear. Petitioner can only deny a patently wrongful claim. For doubtful claims, petitioner only has two options: (1) file a case within 90 days and suspend

[21] See Roque v. Office of the Ombudsman, 366 Phil. 568 (1999) citing Angchangco, Jr. v. Ombudsman, G.R. No. 122728, 13 February 1997, 268 SCRA 301; First Philippine Holdings Corporation v. Sandiganbayan, 323 Phil. 36 (1996); Kant Kwong v. Presidential Commission on Good Government, No. L-79484, 7 December 1987, 156 SCRA 222.

> payment or (2) pay within 90 days and subject the claim to pre-audit. Payment of the claim does not prejudice petitioner from filing a case at a later time. Moreover, the exercise of petitioner's discretionary authority cannot be indefinitely held in abeyance. As in the present case, government's inaction puts the financial standing of participating hospitals in a precarious position. Indeed, instead of placing a premium on participation in the government's Medicare program, petitioner effectively punished an accredited provider by refusing to provide payment for services already rendered.[22]
>
> The regulations have provided an adequate safeguard for fraudulent claims which balance the government's interests in providing a comprehensive medical care plan and in giving such benefits to rightful claimants. Petitioner's allegations of violation of Medicare laws and regulations are causes of action which are separate and distinct from the case at hand. The allegations, accompanied by voluminous exhibits, are petitioner's attempts in justifying his willful neglect in addressing respondent's claims. However, the same allegations do not excuse petitioner from acting on respondent's claims with dispatch.

In **Sison**, it was on the issue of exhaustion of administrative remedies that Justice Carpio quoted **Section 11 of this Article XIII**:

> Assuming arguendo that respondent made a mistake in procedure, the state policy would still weigh heavily against petitioner. **Application of the doctrine of exhaustion of administrative remedies is relaxed when a strong public interest is involved.**[23] **In addition to the protection and promotion of the people's right to health,**[24] **the Constitution provides (for a policy on an integrated and comprehensive approach to health development, in Article XIII, Section 11) …**

Section 12. The State shall establish and maintain an effective food and drug regulatory system and undertake appropriate health, manpower development, and research, responsive to the country's health needs and problems.

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[22] See Philippine Health Insurance Corporation v. Chinese General Hospital and Medical Center, G.R. No. 163123, 15 April 2005, 456 SCRA 459.

[23] Ibid.

[24] Const., Art. II, Sec. 15.

Section 13. The State shall establish a special agency for disabled persons for their rehabilitation, self-development, and self-reliance, and their integration into the mainstream of society.

WOMEN

Section 14. The State shall protect working women by providing safe and healthful working conditions, taking into account their maternal functions, and such facilities and opportunities that will enhance their welfare and enable them to realize their full potential in the service of the nation.

ROLE AND RIGHTS OF PEOPLE'S ORGANIZATIONS

Section 15. The State shall respect the role of independent people's organizations to enable the people to pursue and protect, within the democratic framework, their legitimate and collective interests and aspirations through peaceful and lawful means.

People's organizations are *bona fide* associations of citizens with demonstrated capacity to promote the public interest and with identifiable leadership, membership, and structure.

Section 16. The right of the people and their organizations to effective and reasonable participation at all levels of social, political, and economic decision-making shall not be abridged. The State shall, by law, facilitate the establishment of adequate consultation mechanisms.

HUMAN RIGHTS

Section 17. (1) There is hereby created an independent office called the Commission on Human Rights.

(2) The Commission shall be composed of a Chairman and four Members who must be natural-born citizens of the Philippines and a majority of whom shall be members of the Bar. The term of office and other qualifications and disabilities of the Members of the Commission shall be provided by law.

(3) Until this Commission is constituted, the existing Presidential Committee on Human Rights shall continue to exercise its present functions and powers.

(4) The approved annual appropriations of the Commission shall be automatically and regularly released.

As previously discussed, in his **concurring** opinion in **GONZALES v. OFFICE OF THE PRESIDENT OF THE PHILIPPINES**, G.R. No. 196231, September 4, 2012, 694 Phil. 52,[25] Justice Carpio explained:

> Our Constitution does not impart a fixed and rigid concept of independence among the office that it creates. While it declares certain bodies as "independent", we cannot assume that the independence of the Ombudsman is the same as the independence of the Judiciary. Neither is the independence of the Constitutional Commissions the same as that of the National Economic and Development Authority, the Bangko Sentral ng Pilipinas or **the Commission on Human Rights.**[26] This Court cannot make a "one size fits all" concept of independence because the Constitution itself differentiates the degree of independence of these bodies.
> …
>
> … The Constitution clearly intended different degrees of independence among the "independent" bodies that it created. For some, such as the National Economic and Development Authority, Bangko Sentral ng Pilipinas and **Commission on Human Rights,** the operationalization of independence is constitutionally committed to the discretion of Congress.[27] …
> …
>
> … The fact that different constitutional bodies are treated differently under the Constitution shows that independence is a broadly delineated norm. With this level of generality, the constitutional meaning of independence is only that of independent decision-making that is free from partisanship and political pressures. It does not even mean fiscal autonomy unless the Constitution says so.[28]…

[25] Consolidated with Barreras-Sulit v. Ochoa, G.R. No. 196232. See discussion under Arts. IX-A, Sec. 1, XI, Sec. 5, and XII, Secs. 9 and 20.

[26] These are the bodies that the 1987 Constitution considers as "independent." See Const., Arts. IX-A, Sec. 1, XI, Sec. 5, XII, Secs. 9 and 20, and XIII, Sec. 17.

[27] Const., Arts. XII, Secs. 9 and 20, XIII, Sec. 17.

[28] Commission on Human Rights Employees' Association (CHREA) v. Commission on Human Rights, G.R. No. 155336, 21 July 2006, 496 SCRA 226.

Section 18. The Commission on Human Rights shall have the following powers and functions:

(1) Investigate, on its own or on complaint by any party, all forms of human rights violations involving civil and political rights;

(2) Adopt its operational guidelines and rules of procedure, and cite for contempt for violations thereof in accordance with the Rules of Court;

(3) Provide appropriate legal measures for the protection of human rights of all persons within the Philippines, as well as Filipinos residing abroad, and provide for preventive measures and legal aid services to the underprivileged whose human rights have been violated or need protection;

(4) Exercise visitatorial powers over jails, prisons, or detention facilities;

(5) Establish a continuing program of research, education, and information to enhance respect for the primacy of human rights;

(6) Recommend to Congress effective measures to promote human rights and to provide for compensation to victims of violations of human rights, or their families;

(7) Monitor the Philippine Government's compliance with international treaty obligations on human rights;

(8) Grant immunity from prosecution to any person whose testimony or whose possession of documents or other evidence is necessary or convenient to determine the truth in any investigation conducted by it or under its authority;

(9) Request the assistance of any department, bureau, office, or agency in the performance of its functions;

(10) Appoint its officers and employees in accordance with law; and

(11) Perform such other duties and functions as may be provided by law.

In **MVRS PUBLICATIONS, INC. v. ISLAMIC DA'WAH COUNCIL OF THE PHILIPPINES, INC.**, G.R. No. 135306, January 28, 2003, 444 Phil 230,[29] 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, Justice Carpio had occasion to explain **Section 18 of Article XIII** in his **dissenting opinion**:

> … **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." 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.
> > 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. …[30]
>
> …
> The Covenant, being an international treaty to which the Philippines is a signatory, is part of the country's municipal law.[31] The Covenant carries great weight in the interpretation of

[29] See discussion under Art. II, Sec. 11.
[30] Simon, Jr. v. Commission on Human Rights, 229 SCRA 117 (1994).
[31] La Chemise Lacoste, S. A. v. Fernandez, 129 SCRA 373 (1984), Ram Singh v. Insular Collector of Customs, 38 Phil. 862 (1918).

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.**

Section 19. The Congress may provide for other cases of violations of human rights that should fall within the authority of the Commission, taking into account its recommendations.

ARTICLE XIV

EDUCATION, SCIENCE AND TECHNOLOGY, ARTS, CULTURE AND SPORTS

EDUCATION

Section 1. The State shall protect and promote the right of all citizens to quality education at all levels, and shall take appropriate steps to make such education accessible to all.

Section 2. The State shall:

(1) Establish, maintain, and support a complete, adequate, and integrated system of education relevant to the needs of the people and society;

(2) Establish and maintain, a system of free public education in the elementary and high school levels. Without limiting the natural rights of parents to rear their children, elementary education is compulsory for all children of school age;

(3) Establish and maintain a system of scholarship grants, student loan programs, subsidies, and other incentives which shall be available to deserving students in both public and private schools, especially to the underprivileged;

(4) Encourage non-formal, informal, and indigenous learning systems, as well as self-learning, independent, and out-of-school study programs particularly those that respond to community needs; and

(5) Provide adult citizens, the disabled, and out-of-school youth with training in civics, vocational efficiency, and other skills.

Section 3. (1) All educational institutions shall include the study of the Constitution as part of the curricula.

(2) They shall inculcate patriotism and nationalism, foster love of humanity, respect for human rights, appreciation of

the role of national heroes in the historical development of the country, teach the rights and duties of citizenship, strengthen ethical and spiritual values, develop moral character and personal discipline, encourage critical and creative thinking, broaden scientific and technological knowledge, and promote vocational efficiency.

(3) At the option expressed in writing by the parents or guardians, religion shall be allowed to be taught to their children or wards in public elementary and high schools within the regular class hours by instructors designated or approved by the religious authorities of the religion to which the children or wards belong, without additional cost to the Government.

Section 4. (1) The State recognizes the complementary roles of public and private institutions in the educational system and shall exercise reasonable supervision and regulation of all educational institutions.

(2) Educational institutions, other than those established by religious groups and mission boards, shall be owned solely by citizens of the Philippines or corporations or associations at least sixty per centum of the capital of which is owned by such citizens. The Congress may, however, require increased Filipino equity participation in all educational institutions.

The control and administration of educational institutions shall be vested in citizens of the Philippines.

No educational institution shall be established exclusively for aliens and no group of aliens shall comprise more than one-third of the enrollment in any school. The provisions of this subsection shall not apply to schools established for foreign diplomatic personnel and their dependents and, unless otherwise provided by law, for other foreign temporary residents.

(3) All revenues and assets of non-stock, non-profit educational institutions used actually, directly, and exclusively for educational purposes shall be exempt from taxes and duties. Upon the dissolution or cessation of the corporate existence of such institutions, their assets shall be disposed of in the manner provided by law.

Proprietary educational institutions, including those cooperatively owned, may likewise be entitled to such exemptions, subject to the limitations provided by law, including restrictions on dividends and provisions for reinvestment.

(4) Subject to conditions prescribed by law, all grants, endowments, donations, or contributions used actually, directly, and exclusively for educational purposes shall be exempt from tax.

As previously discussed, **GAMBOA v. TEVES,** G.R. No. 176579, June 28, 2011, 668 Phil. 1,[1] an original petition for prohibition, injunction, declaratory relief and declaration of nullity of the sale of shares of stock of Philippine Telecommunications Investment Corporation, penned by Justice Carpio for the Court *en banc*, categorically settled the definition of "capital" for purposes of complying with the nationality requirement of **Section 4(2) of this Article XIV:**.

> Despite its far-reaching implications to the national economy, this purely legal issue has remained unresolved for over 75 years since the 1935 Constitution. **There is no reason for this Court to evade this ever recurring fundamental issue and delay again defining the term "capital,"** which appears not only in Section 11, Article XII of the Constitution, but also in Section 2, Article XII on co-production and joint venture agreements for the development of our natural resources**,** in Section 7, Article XII on ownership of private lands, in Section 10, Article XII on the reservation of certain investments to Filipino citizens, in **Section 4(2), Article XIV on the ownership of educational institutions**, and in Section 11(2), Article XVI on the ownership of advertising companies.
> …
>
> … **The term "capital"** in Section 11, Article XII of the Constitution **refers only to shares of stock entitled to vote in the election of directors,** and thus in the present case only to common shares, and not to the total outstanding capital stock comprising both common and non-voting preferred shares.
> …
>
> Section 11, Article XII of the Constitution, like other **provisions of the Constitution expressly reserving to Filipinos specific**

[1] See discussion under Art. XII, Sec. 11.

areas of investment, such as the development of natural resources and ownership of land, **educational institutions** and advertising business, is self-executing. **There is no need for legislation to implement these self-executing provisions of the Constitution.**

Section 5. (1) The State shall take into account regional and sectoral needs and conditions and shall encourage local planning in the development of educational policies and programs.

(2) Academic freedom shall be enjoyed in all institutions of higher learning.

(3) Every citizen has a right to select a profession or course of study, subject to fair, reasonable, and equitable admission and academic requirements.

(4) The State shall enhance the right of teachers to professional advancement. Non-teaching academic and non-academic personnel shall enjoy the protection of the State.

(5) The State shall assign the highest budgetary priority to education and ensure that teaching will attract and retain its rightful share of the best available talents through adequate remuneration and other means of job satisfaction and fulfillment.

LANGUAGE

Section 6. The national language of the Philippines is Filipino. As it evolves, it shall be further developed and enriched on the basis of existing Philippine and other languages.

Subject to provisions of law and as the Congress may deem appropriate, the Government shall take steps to initiate and sustain the use of Filipino as a medium of official communication and as language of instruction in the educational system.

Section 7. For purposes of communication and instruction, the official languages of the Philippines are Filipino and, until otherwise provided by law, English.

The regional languages are the auxiliary official languages in

the regions and shall serve as auxiliary media of instruction therein.

Spanish and Arabic shall be promoted on a voluntary and optional basis.

Section 8. This Constitution shall be promulgated in Filipino and English and shall be translated into major regional languages, Arabic, and Spanish.

Section 9. The Congress shall establish a national language commission composed of representatives of various regions and disciplines which shall undertake, coordinate, and promote researches for the development, propagation, and preservation of Filipino and other languages.

SCIENCE AND TECHNOLOGY

Section 10. Science and technology are essential for national development and progress. The State shall give priority to research and development, invention, innovation, and their utilization; and to science and technology education, training, and services. It shall support indigenous, appropriate, and self-reliant scientific and technological capabilities, and their application to the country's productive systems and national life.

Section 11. The Congress may provide for incentives, including tax deductions, to encourage private participation in programs of basic and applied scientific research. Scholarships, grants-in-aid, or other forms of incentives shall be provided to deserving science students, researchers, scientists, inventors, technologists, and specially gifted citizens.

Section 12. The State shall regulate the transfer and promote the adaptation of technology from all sources for the national benefit. It shall encourage the widest participation of private groups, local governments, and community-based organizations in the generation and utilization of science and technology.

Section 13. The State shall protect and secure the exclusive rights of scientists, inventors, artists, and other gifted citizens to their intellectual property and creations, particularly when beneficial to the people, for such period as may be provided by law.

ARTS AND CULTURE

Section 14. The State shall foster the preservation, enrichment, and dynamic evolution of a Filipino national culture based on the principle of unity in diversity in a climate of free artistic and intellectual expression.

Section 15. Arts and letters shall enjoy the patronage of the State. The State shall conserve, promote, and popularize the nation's historical and cultural heritage and resources, as well as artistic creations.

KNIGHTS OF RIZAL v. DMCI HOMES, INC., G.R. No. 213948, April 25, 2017, 809 Phil. 453, [2] a petition for injunction filed by the KOR to stop the construction of DMCI's Torre de Manila, was one of the most poignant *ponencias* of Justice Carpio. It was prefaced with a poem, a rare occurrence in his decisions:

Bury me in the ground, place a stone and a cross over it.
My name, the date of my birth, and of my death.
Nothing more.
If you later wish to surround my grave with a fence,
you may do so.
No anniversaries. I prefer Paang Bundok.

- Jose Rizal

Justice Carpio, in dismissing, for the Court *en banc*, the **Knights of Rizal** petition in the absence of a law prohibiting the construction of the Torre de Manila, briefly discussed **Section 15 of this Article XIV:**

> Section 15, Article XIV of the Constitution, which deals with the subject of arts and culture, provides that "[t]he State shall conserve, promote and popularize the nation's historical and cultural heritage and resources ..." **Since this provision is not self-executory, Congress passed laws dealing with the preservation and conservation of our cultural heritage.**
>
> One such law is Republic Act No. 10066,[3] or the National Cultural Heritage Act of 2009, which empowers the National Commission

[2] See discussion under Art. VIII.

[3] An Act Providing For The Protection And Conservation Of The National Cultural Heritage, Strengthening The National Commission For Culture And The Arts (NCCA) And Its Affiliated Cultural Agencies, And For Other Purposes (2010).

> for Culture and the Arts and other cultural agencies to issue a cease and desist order "when the physical integrity of the national cultural treasures or important cultural properties [is] found to be in danger of destruction or significant alteration from its original state."[4] This law declares that the State should protect the "physical integrity" of the heritage property or building if there is "danger of destruction or significant alteration from its original state." Physical integrity refers to the structure itself - how strong and sound the structure is. The same law does not mention that another project, building, or property, not itself a heritage property or building, may be the subject of a cease and desist order when it adversely affects the background view, vista, or sightline of a heritage property or building. Thus, Republic Act No. 10066 cannot apply to the Torre de Manila condominium project.
>
> …

Despite the typical straightforward ruling on the lack of merit of the petition, the poignancy of Justice Carpio's *ponencia* in **Knights of Rizal** is evident in this:

> **A Final Word**
>
> It had been Rizal's wish to die facing the rising sun. In his *Mi Ultimo Adios*, the poem he left for his family the night before he was executed, Rizal wrote:
>
> *Yo muero cuando veo que el cielo se colora Y al fin anuncia el dia tras lobrego capuz*[5]
> [Ako'y mamamatay, ngayong namamalas na sa Silanganan ay namamanaag yaong
> maligayang araw na sisikat sa likod ng luksang nagtabing na ulap.][6]
> [I die just when I see the dawn break, Through the gloom of night, to herald the day][7]
>
> Yet at the point of his execution, he was made to stand facing West

[4] RA No. 10066, Sec. 25.

[5] From the untitled poem written by Jose Rizal given to his family the night before his execution in 1896, <https://en.wikipedia.org/wiki/Mi_%C3%BAltimo_adi%C3%B3s> (accessed on 16 February 2017). The poem was later given the title Mi Ultimo Adios by Mariano Ponce. <http://www.joserizal.ph/pm03.html>.

[6] From Pahimakas ni Dr. Jose Rizal, Tagalog translation of Rizal's Mi Ultimo Adios by Andres Bonifacio <https://en.wikipedia.org/wiki/Mi_%C3%BAltimo_adi%C3%B3s>.

[7] English translation by Charles Derbyshire <http://en.wikipilipinas.org/index.php/Mi_Ultimo_Adios>.

towards Manila Bay, with his back to the firing squad, like the traitor the colonial government wished to portray him. He asked to face his executioners, facing the East where the sun would be rising since it was early morning, but the Spanish captain did not allow it. As he was shot and a single bullet struck his frail body, Rizal forced himself, with his last remaining strength, to turn around to face the East and thus he fell on his back with his face to the sky and the rising sun. Then, the Spanish captain approached Rizal and finished him off with one pistol shot to his head.

Before his death, Rizal wrote a letter to his family. He asked for a simple tomb, marked with a cross and a stone with only his name and the date of his birth and death; no anniversary celebrations; and interment at Paang Bundok (now, the Manila North Cemetery). Rizal never wanted his grave to be a burden to future generations.

The letter never made it to his family and his wishes were not carried out. The letter was discovered many years later, in 1953. By then, his remains had been entombed at the Rizal Monument, countless anniversaries had been celebrated, with memorials and monuments built throughout the world.

Rizal's wish was unmistakable: to be buried without pomp or pageantry, to the point of reaching oblivion or obscurity in the future.[8] For Rizal's life was never about fame or vainglory, but for the country he loved dearly and for which he gave up his life.

The Rizal Monument is expressly against Rizal's own wishes. That Rizal's statue now stands facing West towards Manila Bay, with Rizal's back to the East, adds salt to the wound. If we continue the present orientation of Rizal's statue, with Rizal facing West, we would be like the Spanish captain who refused Rizal's request to die facing the rising sun in the East. On the other hand, if Rizal 's statue is made to face East, as Rizal had desired when he was about to be shot, the background - the blue sky above Manila Bay would forever be clear of obstruction, and we would be faithful to Rizal's dying wish.

[8] Dr. Pablo S. Trillana, Were Rizal's Burial Wishes Honored?, http://newsinfo.inquirer.net/554367/were-rizals-burial-wishes-honored

Section 16. All the country's artistic and historic wealth constitutes the cultural treasure of the nation and shall be under the protection of the State which may regulate its disposition.

Section 17. The State shall recognize, respect, and protect the rights of indigenous cultural communities to preserve and develop their cultures, traditions, and institutions. It shall consider these rights in the formulation of national plans and policies.

Section 18. (1) The State shall ensure equal access to cultural opportunities through the educational system, public or private cultural entities, scholarships, grants and other incentives, and community cultural centers, and other public venues.

(2) The State shall encourage and support researches and studies on the arts and culture.

SPORTS

Section 19. (1) The State shall promote physical education and encourage sports programs, league competitions, and amateur sports, including training for international competitions, to foster self-discipline, teamwork, and excellence for the development of a healthy and alert citizenry.

(2) All educational institutions shall undertake regular sports activities throughout the country in cooperation with athletic clubs and other sectors.

ARTICLE XV

THE FAMILY

Section 1. The State recognizes the Filipino family as the foundation of the nation. Accordingly, it shall strengthen its solidarity and actively promote its total development.

Section 2. Marriage, as an inviolable social institution, is the foundation of the family and shall be protected by the State.

In **ESTRADA v. ESCRITOR**. A.M. No. P-02-1651, June 22, 2006, 525 Phil 110, the remanded case[1] resulted in the dismissal of the administrative charges against Soledad S. Escritor. Justice Carpio maintained his **dissent** and had occasion to discuss this **Section 2 of Article XV**:

> **Equally compelling is the State's interest in the preservation of marriage and the family as basic social institutions**, which is ultimately the public policy underlying Articles 334 and 349 of the Revised Penal Code. This Court has recognized in countless cases that marriage and the family are basic social institutions in which the State is vitally interested[2] and in the protection of which the State has the strongest interest.[3] In *Domingo v. Court of Appeals*,[4] the Court stressed that:
>
> > Marriage, a sacrosanct institution, declared by the Constitution as an "inviolable social institution, is the foundation of the family;" as such, it "shall be protected by the State." ... So crucial are marriage and the family to the stability and peace of the nation that their "nature, consequences, and incidents are governed by law and not subject to stipulation.

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1 Estrada v. Escritor, A.M. No. P-02-1651, August 4, 2003, discussed under Art. II, Sec. 6, and Art. III, Sec. 5.

2 Goitia v. Campos-Rueda, 35 Phil. 252 (1919); Brown v. Yambao, 102 Phil. 168, 172 (1957).

3 Arroyo, Jr. v. Court of Appeals, G.R. Nos. 96602 and 96715, 203 SCRA 750,761 (1991).

4 G.R. No. 104818, 226 SCRA 572, 584 (1993).

The same sentiment has been expressed in Article 149 of the Family Code:

> The family, being the foundation of the nation, is a basic social institution which public policy cherishes and protects. Consequently, family relations are governed by law and no custom, practice or agreement destructive of the family shall be recognized or given effect.

And yet, notwithstanding the foregoing compelling state interests at stake, the majority all too willingly and easily places them in jeopardy by upholding Escritor's claim of exemption. On this point, Professor William P. Marshall aptly observes that one of the problems involved in free exercise exemption analysis is that it requires the Court to weigh the state interest against the interest of the narrower class comprised only of those seeking exemption. On the other hand, in other doctrinal areas, the Court balances the state interest in the regulation at issue against the interests of the regulated class taken as a whole. Prof. Marshall persuasively argues that this leads to both unpredictability in the exemption balancing process and potential inconsistency in result "as each regulation may be subject to limitless challenges based upon the peculiar identity of the challenger."[5] Moreover, Prof. Marshall notes that the exemption balancing process necessarily leads to underestimating the strength of the countervailing state interest.[6] Indeed, the state interest in a challenged regulation will seldom be seriously threatened if only a few persons seek exemption from it.[7]

In dismissing the administrative complaint against Escritor, the majority opinion effectively condones and accords a semblance of legitimacy to her patently unlawful cohabitation with Quilapio, while in the eyes of the law, Quilapio remains married to his legal wife. This condonation in fact facilitates the circumvention by Escritor and Quilapio of Articles 334 and 349 of the Revised Penal Code on concubinage and bigamy. Without having his first marriage legally dissolved, Quilapio can now continue to cohabit with Escritor with impunity. **How do we reconcile this scenario with the Constitution's emphatic declaration that marriage is "an inviolable social institution"?**

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[5] William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 311-312 (1991).

[6] Ibid.

[7] Ibid.

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. The majority's opinion here bestows "a credibility and legitimacy upon the religious belief in question simply by its being judicially recognized as constitutionally sacrosanct."[8]…

Catholics may secure a church annulment of their marriage. A church annulment does not exempt Catholics from criminal or administrative liability if they cohabit with someone other than their legal spouse before their marriage is finally annulled by a civil court. Catholics cannot legally justify before civil courts such act of concubinage on the ground that the act conforms to their religious beliefs because they have a secured a church annulment which freed them from their marital vows. If this Court condones Escritor's act of concubinage on religious grounds, then it will have to condone acts of concubinage by Catholics who have secured church annulment of their marriage even without a final annulment from a civil court. The majority pushes their opinion on a slippery slope.

It may well be asked how, under a well-meaning but overly solicitous grant of exemption based on the Freedom of Exercise Clause of our Constitution, an individual can be given the private right to ignore a generally applicable, religion-neutral law. For this is what the majority opinion has effectually granted Escritor in dismissing the administrative complaint against her. **The accommodation of Escritor's religious beliefs under the benevolent neutrality approach is too high a price to pay when weighed against its prejudicial effect on the sound administration of justice and the protection of marriage and the family as basic social institutions.**

Section 3. The State shall defend:

(1) The right of spouses to found a family in accordance with their religious convictions and the demands of responsible parenthood;

(2) The right of children to assistance, including proper care and nutrition, and special protection from all forms of neglect,

[8] William P. Marshall, op. cit., at 322-23.

abuse, cruelty, exploitation and other conditions prejudicial to their development;

(3) The right of the family to a family living wage and income; and

(4) The right of families or family associations to participate in the planning and implementation of policies and programs that affect them.

Section 4. The family has the duty to care for its elderly members but the State may also do so through just programs of social security.

ARTICLE XVI

GENERAL PROVISIONS

Section 1. The flag of the Philippines shall be red, white, and blue, with a sun and three stars, as consecrated and honored by the people and recognized by law.

Section 2. The Congress may, by law, adopt a new name for the country, a national anthem, or a national seal, which shall all be truly reflective and symbolic of the ideals, history, and traditions of the people. Such law shall take effect only upon its ratification by the people in a national referendum.

Section 3. The State may not be sued without its consent.

Section 4. The Armed Forces of the Philippines shall be composed of a citizen armed force which shall undergo military training and serve as may be provided by law. It shall keep a regular force necessary for the security of the State.

Section 5. (1) All members of the armed forces shall take an oath or affirmation to uphold and defend this Constitution.

(2) The State shall strengthen the patriotic spirit and nationalist consciousness of the military, and respect for people's rights in the performance of their duty.

(3) Professionalism in the armed forces and adequate remuneration and benefits of its members shall be a prime concern of the State. The armed forces shall be insulated from partisan politics.

No member of the military shall engage, directly or indirectly, in any partisan political activity, except to vote.

(4) No member of the armed forces in the active service shall, at any time, be appointed or designated in any capacity to a civilian position in the Government, including government-owned or controlled corporations or any of their subsidiaries.

(5) Laws on retirement of military officers shall not allow extension of their service.

(6) The officers and men of the regular force of the armed forces shall be recruited proportionately from all provinces and cities as far as practicable.

(7) The tour of duty of the Chief of Staff of the armed forces shall not exceed three years. However, in times of war or other national emergency declared by the Congress, the President may extend such tour of duty.

Section 6. The State shall establish and maintain one police force, which shall be national in scope and civilian in character, to be administered and controlled by a national police commission. The authority of local executives over the police units in their jurisdiction shall be provided by law.

Section 7. The State shall provide immediate and adequate care, benefits, and other forms of assistance to war veterans and veterans of military campaigns, their surviving spouses and orphans. Funds shall be provided therefor and due consideration shall be given them in the disposition of agricultural lands of the public domain and, in appropriate cases, in the utilization of natural resources.

Section 8. The State shall, from time to time, review to increase the pensions and other benefits due to retirees of both the government and the private sectors.

Section 9. The State shall protect consumers from trade malpractices and from substandard or hazardous products.

Section 10. The State shall provide the policy environment for the full development of Filipino capability and the emergence of communication structures suitable to the needs and aspirations of the nation and the balanced flow of information into, out of, and across the country, in accordance with a policy that respects the freedom of speech and of the press.

Section 11. (1) The ownership and management of mass media shall be limited to citizens of the Philippines, or to corporations, cooperatives or associations, wholly-owned and managed by such citizens.

The Congress shall regulate or prohibit monopolies in commercial mass media when the public interest so requires. No combinations in restraint of trade or unfair competition therein shall be allowed.

(2) 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.

Only Filipino citizens or corporations or associations at least seventy per centum of the capital of which is owned by such citizens shall be allowed to engage in the advertising industry.

The participation of foreign investors in the governing body of entities in such industry shall be limited to their proportionate share in the capital thereof, and all the executive and managing officers of such entities must be citizens of the Philippines.

As stated previously, **GAMBOA v. TEVES,** G.R. No. 176579, June 28, 2011, 668 Phil. 1,[1] an original petition for prohibition, injunction, declaratory relief and declaration of nullity of the sale of shares of stock of Philippine Telecommunications Investment Corporation, penned by Justice Carpio for the Court *en banc*, categorically settled the definition of "capital" for purposes of complying with the nationality requirement of **Section 11(2) of this Article XVI:**

> Despite its far-reaching implications to the national economy, this purely legal issue has remained unresolved for over 75 years since the 1935 Constitution. **There is no reason for this Court to evade this ever recurring fundamental issue and delay again defining the term "capital,"** which appears not only in Section 11, Article XII of the Constitution, but also in Section 2, Article XII on co-production and joint venture agreements for the development of our natural resources**,** in Section 7, Article XII on ownership of private lands, in Section 10, Article XII on the reservation of certain investments to Filipino citizens, in Section 4(2), Article XIV on the ownership of educational institutions, and in **Section 11(2), Article XVI on the ownership of advertising companies.**
> …
>
> … **The term "capital"** in Section 11, Article XII of the

[1] See discussion under Art. XII, Sec. 11.

Constitution **refers only to shares of stock entitled to vote in the election of directors,** and thus in the present case only to common shares, and not to the total outstanding capital stock comprising both common and non-voting preferred shares.
…

Section 11, Article XII of the Constitution, like other **provisions of the Constitution expressly reserving to Filipinos specific areas of investment,** such as the development of natural resources and ownership of land, educational institutions and **advertising business**, is self-executing. **There is no need for legislation to implement these self-executing provisions of the Constitution.**

Section 12. The Congress may create a consultative body to advise the President on policies affecting indigenous cultural communities, the majority of the members of which shall come from such communities.

ARTICLE XVII

AMENDMENTS OR REVISIONS

Section 1. Any amendment to, or revision of, this Constitution may be proposed by:

(1) The Congress, upon a vote of three-fourths of all its Members; or

(2) A constitutional convention.

Section 2. Amendments to this Constitution may likewise be directly proposed by the people through initiative upon a petition of at least twelve 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 therein. No amendment under this section shall be authorized within five years following the ratification of this Constitution nor oftener than once every five years thereafter.

The Congress shall provide for the implementation of the exercise of this right.

Section 3. The Congress may, by a vote of two-thirds of all its Members, call a constitutional convention, or by a majority vote of all its Members, submit to the electorate the question of calling such a convention.

Section 4. Any amendment to, or revision of, this Constitution under Section 1 hereof shall be valid when ratified by a majority of the votes cast in a plebiscite which shall be held not earlier than sixty days nor later than ninety days after the approval of such amendment or revision.

Any amendment under Section 2 hereof shall be valid when ratified by a majority of the votes cast in a plebiscite which shall be held not earlier than sixty days nor later than ninety days after the certification by the Commission on Elections of the sufficiency of the petition.

The *en banc* decision penned by Justice Carpio in **LAMBINO v. COMMISSION ON ELECTIONS,** G.R. No. 174153, October 25, 2006, 536 Phil. 1, was his quintessential contribution to constitutional law and, consequently, was one of his most forceful *ponencias*.

For Atty. Nelda Ethel P. Torio, Court Attorney VI, Supreme Court, this case exemplified the "underlying philosophy" of Justice Carpio's decisions - "the rule of law should remain the beacon in storms brought about by populist beliefs. When arguments by parties appealed to sentimentality and possibilities, he presented arguments based on written law and existing facts. When a particular point of view proved to be short-sighted, he presented a point of view that withstands the test of time. When a scenario had the potential to award benefits to the powerful few, he presented a scenario that advances what is necessary for the Filipino people."[1]

For Atty. Eleanor S. Francisco-Anunciacion, Deputy Secretary, Senate Electoral Tribunal, "in his straightforward and scathing *ponencia*, Justice Carpio underscored the evils arising from a constitutionally flawed mode of changing the Constitution, and reflected not only Justice Carpio's independence and fearless stance against the incumbent government's political agenda but also his unquestionable and deep sense of faithfulness to the Constitution. This landmark decision will forever be etched in history as a formidable shield against those in power attempting to desecrate the fundamental law in order to stay in power by revising the Constitution. At the same time, it will serve as a strong reminder to the members of the highest Court to consistently adhere and defend the Constitution, which they have sworn to protect and uphold."[2]

In **Lambino,** Justice Carpio concluded:

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

[1] Response from Atty. Nelda Ethel P. Torio, January 29, 2019.
[2] Response of Atty. Eleanor S. Francisco-Anunciacion, February 1, 2019.

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

An overwhelming majority - 16,622,111 voters comprising 76.3 percent of the total votes cast[3] - approved our Constitution in a national plebiscite held on 11 February 1987. That approval is the unmistakable voice of the people, the full expression of the people's sovereign will. That approval included the prescribed modes for amending or revising the Constitution.

No amount of signatures, not even the 6,327,952 million signatures gathered by the Lambino Group, can change our Constitution contrary to the specific modes that the people, in their sovereign capacity, prescribed when they ratified the Constitution. The alternative is an extra-constitutional change, which means subverting the people's sovereign will and discarding the Constitution. This is one act the Court cannot and should never do. **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.**

Incantations of "people's voice," "people's sovereign will," or "let the people decide" cannot override the specific modes of changing the Constitution as prescribed in the Constitution itself. **Otherwise, the Constitution, the people's fundamental covenant that provides enduring stability to our society becomes easily susceptible to manipulative changes by political groups gathering signatures through false promises. Then, the Constitution ceases to be the bedrock of the nation's stability.**

The Lambino Group claims that their initiative is the "people's

[3] Presidential Proclamation No. 58 dated February 11, 1987, entitled Proclaiming The Ratification Of The Constitution Of The Republic Of The Philippines Adopted By The Constitutional Commission Of 1986, Including The Ordinance Appended Thereto.

> voice." However, the Lambino Group unabashedly states in ULAP No. 2006-02, in the verification of their petition with the COMELEC, that "ULAP maintains its unqualified support to the agenda of Her Excellency President Gloria Macapagal-Arroyo for constitutional reforms." The Lambino Group thus admits that their "people's" initiative is an "unqualified support to the agenda" of the incumbent President to change the Constitution. This forewarns the Court to be wary of incantations of "people's voice" or "sovereign will" in the present initiative.
>
> **This Court cannot betray its primordial duty to defend and protect the Constitution. The Constitution, which embodies the people's sovereign will, is the bible of this Court. This Court exists to defend and protect the Constitution. To allow this constitutionally infirm initiative, propelled by deceptively gathered signatures, to alter basic principles in the Constitution is to allow a desecration of the Constitution. To allow such alteration and desecration is to lose this Court's *raison d'etre*.**

Lambino was a consolidated petition[4] on a resolution of the COMELEC denying due course to an initiative petition to amend the Constitution, anteceded by the following facts:

> On 15 February 2006, petitioners in G.R. No. 174153, namely Raul L. Lambino and Erico B. Aumentado (Lambino Group), with other groups and individuals, commenced gathering signatures for an initiative petition to change the 1987 Constitution. On 25 August 2006, the Lambino Group filed a petition with the COMELEC to hold a plebiscite that will ratify their initiative petition under Section 5(b) and (c)[5] and Section 7[6] of Republic Act

[4] Consolidated with Binay v. COMELEC, G.R. No. 174299.

[5] This provision states: Requirements. - ...
(b) A petition for an initiative on the 1987 Constitution must have at least twelve per centum (12%) of the total number of registered voters as signatories, of which every legislative district must be represented by at least three per centum (3%) of the registered voters therein. Initiative on the Constitution may be exercised only after five (5) years from the ratification of the 1987 Constitution and only once every five (5) years thereafter.
(c) The petition shall state the following:
c.1. contents or text of the proposed law sought to be enacted, approved or rejected, amended or repealed, as the case may be;
c.2. the proposition;
c.3. the reason or reasons therefor;
c.4. that it is not one of the exceptions provided herein;
c.5. signatures of the petitioners or registered voters; and
c.6. an abstract or summary in not more than one hundred (100) words which shall be legibly written or printed at the top of every page of the petition.

[6] This provision states: Verification of Signatures. - The Election Registrar shall verify the signatures on the basis of the registry list of voters, voters' affidavits and voters

No. 6735 or the Initiative and Referendum Act (RA 6735).

The Lambino Group alleged that their petition had the support of 6,327,952 individuals constituting at least twelve per centum (12%) of all registered voters, with each legislative district represented by at least three per centum (3%) of its registered voters. The Lambino Group also claimed that COMELEC election registrars had verified the signatures of the 6.3 million individuals.

The Lambino Group's initiative petition changes the 1987 Constitution by modifying Sections 1-7 of Article VI (Legislative Department) and Sections 1-4 of Article VII (Executive Department) and by adding Article XVIII entitled "Transitory Provisions." These proposed changes will shift the present Bicameral-Presidential system to a Unicameral-Parliamentary form of government. The Lambino Group prayed that after due publication of their petition, the COMELEC should submit the following proposition in a plebiscite for the voters' ratification:

> Do you approve the amendment of Articles VI and VII of the 1987 constitution, changing the form of government from the present bicameral-presidential to a unicameral-parliamentary system, and providing Article XVIII as transitory provisions for the orderly shift from one system to the other?

On 30 August 2006, the Lambino Group filed an Amended Petition with the COMELEC indicating modifications in the proposed Article XVIII (Transitory Provisions) of their initiative.

The Ruling of the COMELEC

On 31 August 2006, the COMELEC issued its Resolution denying due course to the Lambino Group's petition for lack of an enabling law governing initiative petitions to amend the Constitution. The COMELEC invoked this Court's ruling in *Santiago v. Commission on Elections*[7] declaring RA 6735 inadequate to implement the initiative clause on proposals to amend the Constitution.

In G.R. No. 174153, the Lambino Group prays for the issuance of the writs of *certiorari* and *mandamus* to set aside the COMELEC Resolution of 31 August 2006 and to compel the COMELEC

identification cards used in the immediately preceding election.

[7] 336 Phil. 848 (1997).

to give due course to their initiative petition. The Lambino Group contends that the COMELEC committed grave abuse of discretion in denying due course to their petition since *Santiago* is not a binding precedent. Alternatively, the Lambino Group claims that *Santiago* binds only the parties to that case, and their petition deserves cognizance as an expression of the "will of the sovereign people."

In G.R. No. 174299, petitioners (Binay Group) pray that the Court require respondent COMELEC Commissioners to show cause why they should not be cited in contempt for the COMELEC's verification of signatures and for "entertaining" the Lambino Group's petition despite the permanent injunction in *Santiago*. The Court treated the Binay Group's petition as an opposition-in-intervention.

In his Comment to the Lambino Group's petition, the Solicitor General joined causes with the petitioners, urging the Court to grant the petition despite the *Santiago* ruling. The Solicitor General proposed that the Court treat RA 6735 and its implementing rules "as temporary devises to implement the system of initiative."

Various groups and individuals sought intervention, filing pleadings supporting or opposing the Lambino Group's petition. The supporting intervenors uniformly hold the view that the COMELEC committed grave abuse of discretion in relying on *Santiago*. On the other hand, the opposing intervenors hold the contrary view and maintain that *Santiago* is a binding precedent. The opposing intervenors also challenged (1) the Lambino Group's standing to file the petition; (2) the validity of the signature gathering and verification process; (3) the Lambino Group's compliance with the minimum requirement for the percentage of voters supporting an initiative petition under Section 2, Article XVII of the 1987 Constitution; (4) the nature of the proposed changes as revisions and not mere amendments as provided under Section 2, Article XVII of the 1987 Constitution; and (5) the Lambino Group's compliance with the requirement in Section 10(a) of RA 6735 limiting initiative petitions to only one subject.

The Court heard the parties and intervenors in oral arguments on 26 September 2006. After receiving the parties' memoranda, the Court considered the case submitted for resolution.

The Issues

The petitions raise the following issues:

1. Whether the Lambino Group's initiative petition complies with Section 2, Article XVII of the Constitution on amendments to the Constitution through a people's initiative;
2. Whether this Court should revisit its ruling in Santiago declaring RA 6735 "incomplete, inadequate or wanting in essential terms and conditions" to implement the initiative clause on proposals to amend the Constitution; and
3. Whether the COMELEC committed grave abuse of discretion in denying due course to the Lambino Group's petition.

The denial of the **Lambino** petition by Justice Carpio, on behalf of the Court *en banc*, was apodictic:

> The Lambino Group **miserably failed to comply with the basic requirements of the Constitution for conducting a people's initiative.** Thus, there is even no need to revisit **Santiago**, as the present petition warrants dismissal based alone on the Lambino Group's glaring failure to comply with the basic requirements of the Constitution. For following the Court's ruling in *Santiago*, no grave abuse of discretion is attributable to the Commission on Elections.

The Initiative Petition Does Not Comply with Section 2, Article XVII of the Constitution on Direct Proposal by the People

Section 2, Article XVII of the Constitution is the governing constitutional provision that allows a people's initiative to propose amendments to the Constitution…

The deliberations of the Constitutional Commission vividly explain the meaning of an amendment "directly proposed by the people through initiative upon a petition," thus:

> MR. RODRIGO: Let us look at the mechanics. Let us say some voters want to propose a constitutional amendment. Is the draft of the proposed constitutional amendment ready to be shown to the people when they are asked to sign?

> MR. SUAREZ: That can be reasonably assumed, Madam President.
> MR. RODRIGO: What does the sponsor mean? The draft is ready and shown to them before they sign. Now, who prepares the draft?
> MR. SUAREZ: The people themselves, Madam President.
> MR. RODRIGO: No, because before they sign there is already a draft shown to them and they are asked whether or not they want to propose this constitutional amendment.
> MR. SUAREZ: As it is envisioned, any Filipino can prepare that proposal and pass it around for signature.[8]

Clearly, the framers of the Constitution intended that the "draft of the proposed constitutional amendment" should be "ready and shown" to the people "before" they sign such proposal. The framers plainly stated that "before they sign there is already a draft shown to them." The framers also "envisioned" that the people should sign on the proposal itself because the proponents must "prepare that proposal and pass it around for signature."

The essence of amendments "directly proposed by the people through initiative upon a petition" is that the entire proposal on its face is a petition by the people. This means two essential elements must be present. First, the people must author and thus sign the entire proposal. No agent or representative can sign on their behalf. Second, as an initiative upon a petition, the proposal must be embodied in a petition.

These essential elements are present only if the full text of the proposed amendments is first shown to the people who express their assent by signing such complete proposal in a petition. Thus, an amendment is "directly proposed by the people through initiative upon a petition" only if the people sign on a petition that contains the full text of the proposed amendments.

The full text of the proposed amendments may be either written on the face of the petition, or attached to it. If so attached, the petition must state the fact of such attachment. This is an assurance that every one of the several millions of signatories to the petition had seen the full text of the proposed amendments before signing. Otherwise, it is physically impossible, given the time constraint, to prove that every one of the millions of

[8] I Record, Constitutional Commission 387-388.

signatories had seen the full text of the proposed amendments before signing.

The framers of the Constitution directly borrowed[9] the concept of people's initiative from the United States where various State constitutions incorporate an initiative clause. In almost all States[10] which allow initiative petitions, the unbending requirement is that the people must first see the full text of the proposed amendments before they sign to signify their assent, and that the people must sign on an initiative petition that contains the full text of the proposed amendments.[11]

The rationale for this requirement has been repeatedly explained in several decisions of various courts. Thus, in *Capezzuto v. State Ballot Commission*, the Supreme Court of Massachusetts, affirmed by the First Circuit Court of Appeals, declared:

> [A] signature requirement would be meaningless if the person supplying the signature has not first seen what it is that he or she is signing. Further, and more importantly, loose interpretation of the subscription requirement can

[9] During the deliberations of the Constitutional Commission, Commissioner Rene V. Sarmiento made the following report (I Record 389): MR. SARMIENTO: Madam President, I am happy that the Committee on Amendments and Transitory Provisions decided to retain the system of initiative as a mode of amending the Constitution. I made a survey of American constitutions and I discovered that 13 States provide for a system of initiative as a mode of amending the Constitution - Arizona, Arkansas, California, Colorado, Massachusetts, Michigan, Missouri, Nebraska, Nevada, North Dakota, Ohio, Oklahoma and Oregon. The initiative for ordinary laws only is used in Idaho, Maine, Montana and South Dakota. So, I am happy that this was accepted or retained by the Committee. ...
The Americans in turn copied the concept of initiatives from the Swiss beginning in 1898 when South Dakota adopted the initiative in its constitution. The Swiss cantons experimented with initiatives in the 1830s. In 1891, the Swiss incorporated the initiative as a mode of amending their national constitution. Initiatives promote "direct democracy" by allowing the people to directly propose amendments to the constitution. In contrast, the traditional mode of changing the constitution is known as "indirect democracy" because the amendments are referred to the voters by the legislature or the constitutional convention.

[10] Florida requires only that the title and summary of the proposed amendment are "printed in clear and unambiguous language." Advisory Opinion to the Attorney General RE Right of Citizens to Choose Health Care Providers, No. 90160, 22 January 1998, Supreme Court of Florida.

[11] State ex. rel Patton v. Myers, 127 Ohio St. 95, 186 N.E. 872 (1933); Whitman v. Moore, 59 Ariz. 211, 125 P.2d 445 (1942); Heidtman v. City of Shaker Heights, 99 Ohio App. 415, 119 N.E. 2d 644 (1954); Christen v. Baker, 138 Colo. 27, 328 P.2d 951 (1958); Stop the Pay Hike Committee v. Town Council of Town of Irvington, 166 N.J. Super. 197, 399 A.2d 336 (1979); State ex rel Evans v. Blackwell, Slip copy, 2006 WL 1102804 (Ohio App. 10 Dist.), 2006-Ohio-2076.

> pose a significant potential for fraud. A person permitted to describe orally the contents of an initiative petition to a potential signer, without the signer having actually examined the petition, could easily mislead the signer by, for example, omitting, downplaying, or even flatly misrepresenting, portions of the petition that might not be to the signer's liking. This danger seems particularly acute when, in this case, the person giving the description is the drafter of the petition, who obviously has a vested interest in seeing that it gets the requisite signatures to qualify for the ballot.[12]

Likewise, in *Kerr v. Bradbury*,[13] the Court of Appeals of Oregon explained:

> The purposes of "full text" provisions that apply to amendments by initiative commonly are described in similar terms. ... (The purpose of the full text requirement is to provide sufficient information so that registered voters can intelligently evaluate whether to sign the initiative petition."); ... (publication of full text of amended constitutional provision required because it is "essential for the elector to have ... the section which is proposed to be added to or subtracted from. If he is to vote intelligently, he must have this knowledge. Otherwise in many instances he would be required to vote in the dark.")

Moreover, "an initiative signer must be informed at the time of signing of the nature and effect of that which is proposed" and failure to do so is "deceptive and misleading" which renders the initiative void.[14]

Section 2, Article XVII of the Constitution does not expressly state that the petition must set forth the full text of the proposed amendments. However, the deliberations of the framers of our Constitution clearly show that the framers intended to adopt the relevant American jurisprudence on people's initiative. In particular, the deliberations of the Constitutional Commission explicitly reveal that the framers intended that the people must

[12] 407 Mass. 949, 955 (1990). Affirmed by the District Court of Massachusetts in Henry v. Conolly, 743 F. Supp. 922 (1990) and by the Court of Appeals, First Circuit, in Henry v. Conolly, 9109 F. 2d. 1000 (1990), and cited in Marino v. Town Council of Southbridge, 13 Mass.L.Rptr. 14 (2001).

[13] 89 P.3d 1227, 1235 (2004).

[14] Stumpf v. Law, 839 P. 2d 120, 124 (1992).

first see the full text of the proposed amendments before they sign, and that the people must sign on a petition containing such full text. Indeed, Section 5(b) of Republic Act No. 6735, the Initiative and Referendum Act that the Lambino Group invokes as valid, requires that the people must sign the "petition ... as signatories."

The proponents of the initiative secure the signatures from the people. The proponents secure the signatures in their private capacity and not as public officials. The proponents are not disinterested parties who can impartially explain the advantages and disadvantages of the proposed amendments to the people. The proponents present favorably their proposal to the people and do not present the arguments against their proposal. The proponents, or their supporters, often pay those who gather the signatures.

Thus, there is no presumption that the proponents observed the constitutional requirements in gathering the signatures. The proponents bear the burden of proving that they complied with the constitutional requirements in gathering the signatures - that the petition contained, or incorporated by attachment, the full text of the proposed amendments.

The Lambino Group did not attach to their present petition with this Court a copy of the paper that the people signed as their initiative petition. The Lambino Group submitted to this Court a copy of a signature sheet after the oral arguments of 26 September 2006 when they filed their Memorandum on 11 October 2006. The signature sheet with this Court during the oral arguments was the signature sheet attached to the opposition in intervention filed on 7 September 2006 by intervenor Atty. Pete Quirino-Quadra.

The signature sheet attached to Atty. Quadra's opposition and the signature sheet attached to the Lambino Group's Memorandum are the same…

There is not a single word, phrase, or sentence of text of the Lambino Group's proposed changes in the signature sheet. Neither does the signature sheet state that the text of the proposed changes is attached to it. Petitioner Atty. Raul Lambino admitted this during the oral arguments before this Court on 26 September 2006.

The signature sheet merely asks a question whether the people approve a shift from the Bicameral-Presidential to the Unicameral-Parliamentary system of government. The signature sheet does not show to the people the draft of the proposed changes before they are asked to sign the signature sheet. Clearly, the signature sheet is not the "petition" that the framers of the Constitution envisioned when they formulated the initiative clause in Section 2, Article XVII of the Constitution.

Petitioner Atty. Lambino, however, explained that during the signature-gathering from February to August 2006, the Lambino Group circulated, together with the signature sheets, printed copies of the Lambino Group's draft petition which they later filed on 25 August 2006 with the COMELEC. When asked if his group also circulated the draft of their amended petition filed on 30 August 2006 with the COMELEC, Atty. Lambino initially replied that they circulated both. However, Atty. Lambino changed his answer and stated that what his group circulated was the draft of the 30 August 2006 amended petition, not the draft of the 25 August 2006 petition.

The Lambino Group would have this Court believe that they prepared the draft of the 30 August 2006 amended petition almost seven months earlier in February 2006 when they started gathering signatures. Petitioner Erico B. Aumentado's "Verification/Certification" of the 25 August 2006 petition, as well as of the 30 August 2006 amended petition, filed with the COMELEC, states as follows:

> I have caused the preparation of the foregoing [Amended] Petition in my personal capacity as a registered voter, for and on behalf of the Union of Local Authorities of the Philippines, as shown by ULAP No. 2006-02 hereto attached, and as representative of the mass of signatories hereto.

The Lambino Group failed to attach a copy of ULAP No. 2006-02 to the present petition.

However, the "Official Website of the Union of Local Authorities of the Philippines" has posted the full text of No. 2006-02, which provides:

Resolution No. 2006-02
Resolution Supporting The Proposals Of The People's
Consultative Commission On Charter Change Through

People's Initiative And Referendum
As A Mode Of Amending The 1987 Constitution

WHEREAS, there is a need for the Union of Local Authorities of the Philippines (ULAP) to adopt a common stand on the approach to support the proposals of the People's Consultative Commission on Charter Change;

WHEREAS, ULAP maintains its unqualified support to the agenda of Her Excellency President Gloria Macapagal-Arroyo for constitutional reforms as embodied in the ULAP Joint Declaration for Constitutional Reforms signed by the members of the ULAP and the majority coalition of the House of Representatives in Manila Hotel sometime in October 2005;

WHEREAS, the People's Consultative Commission on Charter Change created by Her Excellency to recommend amendments to the 1987 Constitution has submitted its final report sometime in December 2005;

WHEREAS, the ULAP is mindful of the current political developments in Congress which militates against the use of the expeditious form of amending the 1987 Constitution;

WHEREAS, subject to the ratification of its institutional members and the failure of Congress to amend the Constitution as a constituent assembly, ULAP has unanimously agreed to pursue the constitutional reform agenda through People's Initiative and Referendum without prejudice to other pragmatic means to pursue the same;

WHEREFORE, BE IT RESOLVED AS IT IS HEREBY RESOLVED, THAT ALL THE MEMBER- LEAGUES OF THE UNION OF LOCAL AUTHORITIES OF THE PHILIPPINES (ULAP) SUPPORT THE PORPOSALS (SIC) OF THE PEOPLE'S CONSULATATIVE (SIC) COMMISSION ON CHARTER CHANGE THROUGH PEOPLE'S INITIATIVE AND REFERENDUM AS A MODE OF AMENDING THE 1987 CONSTITUTION;

DONE, during the ULAP National Executive Board special meeting held on 14 January 2006 at the Century Park Hotel, Manila.

ULAP No. 2006-02 does not authorize petitioner Aumentado to prepare the 25 August 2006 petition, or the 30 August 2006 amended petition, filed with the COMELEC. ULAP No. 2006-02 "support(s) the porposals (sic) of the Consulatative (sic) Commission on Charter Change through people's initiative and referendum as a mode of amending the 1987 Constitution." The proposals of the Consultative Commission are vastly different from the proposed changes of the Lambino Group in the 25

August 2006 petition or 30 August 2006 amended petition filed with the COMELEC.

For example, the proposed revisions of the Consultative Commission affect all provisions of the existing Constitution, from the Preamble to the Transitory Provisions. The proposed revisions have profound impact on the Judiciary and the National Patrimony provisions of the existing Constitution, provisions that the Lambino Group's proposed changes do not touch. The Lambino Group's proposed changes purport to affect only Articles VI and VII of the existing Constitution, including the introduction of new Transitory Provisions.

The ULAP adopted No. 2006-02 on 14 January 2006 or more than six months before the filing of the 25 August 2006 petition or the 30 August 2006 amended petition with the COMELEC. However, ULAP No. 2006-02 does not establish that ULAP or the Lambino Group caused the circulation of the draft petition, together with the signature sheets, six months before the filing with the COMELEC. On the contrary, ULAP No. 2006-02 casts grave doubt on the Lambino Group's claim that they circulated the draft petition together with the signature sheets. ULAP No. 2006-02 does not refer at all to the draft petition or to the Lambino Group's proposed changes.

In their Manifestation explaining their amended petition before the COMELEC, the Lambino Group declared:

> After the Petition was filed, Petitioners belatedly realized that the proposed amendments alleged in the Petition, more specifically, paragraph 3 of Section 4 and paragraph 2 of Section 5 of the Transitory Provisions were inaccurately stated and failed to correctly reflect their proposed amendments.

The Lambino Group did not allege that they were amending the petition because the amended petition was what they had shown to the people during the February to August 2006 signature-gathering. Instead, the Lambino Group alleged that the petition of 25 August 2006 "inaccurately stated and failed to correctly reflect their proposed amendments."

The Lambino Group never alleged in the 25 August 2006 petition or the 30 August 2006 amended petition with the COMELEC that they circulated printed copies of the draft petition together with the signature sheets. Likewise, the Lambino Group did

not allege in their present petition before this Court that they circulated printed copies of the draft petition together with the signature sheets. The signature sheets do not also contain any indication that the draft petition is attached to, or circulated with, the signature sheets.

It is only in their Consolidated Reply to the Opposition-in-Interventions that the Lambino Group first claimed that they circulated the "petition for initiative filed with the COMELEC," thus:

> [T]here is persuasive authority to the effect that "(w)here there is not (sic) fraud, a signer who did not read the measure attached to a referendum petition cannot question his signature on the ground that he did not understand the nature of the act." [82 C.J.S. S128h. Mo. State v. Sullivan, 224, S.W. 327, 283 Mo. 546.] Thus, the registered voters who signed the signature sheets circulated together with the petition for initiative filed with the COMELEC below, are presumed to have understood the proposition contained in the petition.

The Lambino Group's statement that they circulated to the people "the petition for initiative filed with the COMELEC" appears an afterthought, made after the intervenors Integrated Bar of the Philippines (Cebu City Chapter and Cebu Province Chapters) and Atty. Quadra had pointed out that the signature sheets did not contain the text of the proposed changes. In their Consolidated Reply, the Lambino Group alleged that they circulated "the petition for initiative" but failed to mention the amended petition. This contradicts what Atty. Lambino finally stated during the oral arguments that what they circulated was the draft of the amended petition of 30 August 2006.

The Lambino Group cites as authority *Corpus Juris Secundum*, stating that "a signer who did not read the measure attached to a referendum petition cannot question his signature on the ground that he did not understand the nature of the act." The Lambino Group quotes an authority that cites a proposed change attached to the petition signed by the people. Even the authority the Lambino Group quotes requires that the proposed change must be attached to the petition. The same authority the Lambino Group quotes requires the people to sign on the petition itself.

Indeed, it is basic in American jurisprudence that the proposed

amendment must be incorporated with, or attached to, the initiative petition signed by the people. In the present initiative, the Lambino Group's proposed changes were not incorporated with, or attached to, the signature sheets. The Lambino Group's citation of *Corpus Juris Secundum* pulls the rug from under their feet.

It is extremely doubtful that the Lambino Group prepared, printed, circulated, from February to August 2006 during the signature-gathering period, the draft of the petition or amended petition they filed later with the COMELEC. The Lambino Group are less than candid with this Court in their belated claim that they printed and circulated, together with the signature sheets, the petition or amended petition. Nevertheless, even assuming the Lambino Group circulated the amended petition during the signature-gathering period, the Lambino Group admitted circulating only very limited copies of the petition.

During the oral arguments, Atty. Lambino expressly admitted that they printed only 100,000 copies of the draft petition they filed more than six months later with the COMELEC. Atty. Lambino added that he also asked other supporters to print additional copies of the draft petition but he could not state with certainty how many additional copies the other supporters printed. Atty. Lambino could only assure this Court of the printing of 100,000 copies because he himself caused the printing of these 100,000 copies.

Likewise, in the Lambino Group's Memorandum filed on 11 October 2006, the Lambino Group expressly admits that "petitioner Lambino initiated the printing and reproduction of 100,000 copies of the petition for initiative ..." This admission binds the Lambino Group and establishes beyond any doubt that the Lambino Group failed to show the full text of the proposed changes to the great majority of the people who signed the signature sheets.

Thus, of the 6.3 million signatories, only 100,000 signatories could have received with certainty one copy each of the petition, assuming a 100 percent distribution with no wastage. If Atty. Lambino and company attached one copy of the petition to each signature sheet, only 100,000 signature sheets could have circulated with the petition. Each signature sheet contains space for ten signatures. Assuming ten people signed each of these 100,000 signature sheets with the attached petition, the

maximum number of people who saw the petition before they signed the signature sheets would not exceed 1,000,000.

With only 100,000 printed copies of the petition, it would be physically impossible for all or a great majority of the 6.3 million signatories to have seen the petition before they signed the signature sheets. The inescapable conclusion is that the Lambino Group failed to show to the 6.3 million signatories the full text of the proposed changes. If ever, not more than one million signatories saw the petition before they signed the signature sheets.

In any event, the Lambino Group's signature sheets do not contain the full text of the proposed changes, either on the face of the signature sheets, or as attachment with an indication in the signature sheet of such attachment. Petitioner Atty. Lambino admitted this during the oral arguments, and this admission binds the Lambino Group. This fact is also obvious from a mere reading of the signature sheet. This omission is fatal. The failure to so include the text of the proposed changes in the signature sheets renders the initiative void for non-compliance with the constitutional requirement that the amendment must be "directly proposed by the people through initiative upon a petition." The signature sheet is not the "petition" envisioned in the initiative clause of the Constitution.

For sure, the great majority of the 6.3 million people who signed the signature sheets did not see the full text of the proposed changes before signing. They could not have known the nature and effect of the proposed changes, among which are:

1. The term limits on members of the legislature will be lifted and thus members of Parliament can be re-elected indefinitely;

2. The interim Parliament can continue to function indefinitely until its members, who are almost all the present members of Congress, decide to call for new parliamentary elections. Thus, the members of the interim Parliament will determine the expiration of their own term of office;

3. Within 45 days from the ratification of the proposed changes, the interim Parliament shall convene to propose further amendments or revisions to the Constitution.

These three specific amendments are not stated or even indicated in the Lambino Group's signature sheets. The people who signed

the signature sheets had no idea that they were proposing these amendments. These three proposed changes are highly controversial. The people could not have inferred or divined these proposed changes merely from a reading or rereading of the contents of the signature sheets.

During the oral arguments, petitioner Atty. Lambino stated that he and his group assured the people during the signature-gathering that the elections for the regular Parliament would be held during the 2007 local elections if the proposed changes were ratified before the 2007 local elections. However, the text of the proposed changes belies this.

The proposed Section 5(2), Article XVIII on Transitory Provisions, as found in the amended petition, states:

> Sec. 5(2). The interim Parliament shall provide for the election of the members of Parliament, which shall be synchronized and held simultaneously with the election of all local government officials. ...

Section 5(2) does not state that the elections for the regular Parliament will be held simultaneously with the 2007 local elections. This section merely requires that the elections for the regular Parliament shall be held simultaneously with the local elections without specifying the year.

Petitioner Atty. Lambino, who claims to be the principal drafter of the proposed changes, could have easily written the word "next" before the phrase "election of all local government officials." This would have insured that the elections for the regular Parliament would be held in the next local elections following the ratification of the proposed changes. However, the absence of the word "next" allows the interim Parliament to schedule the elections for the regular Parliament simultaneously with any future local elections.

Thus, the members of the interim Parliament will decide the expiration of their own term of office. This allows incumbent members of the House of Representatives to hold office beyond their current three- year term of office, and possibly even beyond the five-year term of office of regular members of the Parliament. Certainly, this is contrary to the representations of Atty. Lambino and his group to the 6.3 million people who signed the signature sheets. Atty. Lambino and his group deceived the 6.3

million signatories, and even the entire nation.

This lucidly shows the absolute need for the people to sign an initiative petition that contains the full text of the proposed amendments to avoid fraud or misrepresentation. In the present initiative, the 6.3 million signatories had to rely on the verbal representations of Atty. Lambino and his group because the signature sheets did not contain the full text of the proposed changes. The result is a grand deception on the 6.3 million signatories who were led to believe that the proposed changes would require the holding in 2007 of elections for the regular Parliament simultaneously with the local elections.

The Lambino Group's initiative springs another surprise on the people who signed the signature sheets. The proposed changes mandate the interim Parliament to make further amendments or revisions to the Constitution. The proposed Section 4(4), Article XVIII on Transitory Provisions, provides:

> Sec. 4(4). Within forty-five days from ratification of these amendments, the interim Parliament shall convene to propose amendments to, or revisions of, this Constitution consistent with the principles of local autonomy, decentralization and a strong bureaucracy.

During the oral arguments, Atty. Lambino stated that this provision is a "surplusage" and the Court and the people should simply ignore it. Far from being a surplusage, this provision invalidates the Lambino Group's initiative.

Section 4(4) is a subject matter totally unrelated to the shift from the Bicameral-Presidential to the Unicameral-Parliamentary system. American jurisprudence on initiatives outlaws this as logrolling - when the initiative petition incorporates an unrelated subject matter in the same petition. This puts the people in a dilemma since they can answer only either yes or no to the entire proposition, forcing them to sign a petition that effectively contains two propositions, one of which they may find unacceptable.

Under American jurisprudence, the effect of logrolling is to nullify the entire proposition and not only the unrelated subject matter. Thus, in *Fine v. Firestone*,[15] the Supreme Court of Florida

[15] 448 So.2d 984, 994 (1984).

declared:

> Combining multiple propositions into one proposal constitutes "logrolling," which, if our judicial responsibility is to mean anything, we cannot permit. The very broadness of the proposed amendment amounts to logrolling because the electorate cannot know what it is voting on - the amendment's proponents' simplistic explanation reveals only the tip of the iceberg. ... The ballot must give the electorate fair notice of the proposed amendment being voted on. ... The ballot language in the instant case fails to do that. The very broadness of the proposal makes it impossible to state what it will affect and effect and violates the requirement that proposed amendments embrace only one subject.

Logrolling confuses and even deceives the people. In *Yute Air Alaska v. McAlpine*,[16] the Supreme Court of Alaska warned against "inadvertence, stealth and fraud" in logrolling:

> Whenever a bill becomes law through the initiative process, all of the problems that the single-subject rule was enacted to prevent are exacerbated. There is a greater danger of logrolling, or the deliberate intermingling of issues to increase the likelihood of an initiative's passage, and there is a greater opportunity for "inadvertence, stealth and fraud" in the enactment-by-initiative process. The drafters of an initiative operate independently of any structured or supervised process. They often emphasize particular provisions of their proposition, while remaining silent on other (more complex or less appealing) provisions, when communicating to the public. ... Indeed, initiative promoters typically use simplistic advertising to present their initiative to potential petition-signers and eventual voters. Many voters will never read the full text of the initiative before the election. More importantly, there is no process for amending or splitting the several provisions in an initiative proposal. These difficulties clearly distinguish the initiative from the legislative process.

Thus, the present initiative appears merely a preliminary step for further amendments or revisions to be undertaken by the interim Parliament as a constituent assembly. The people who signed the signature sheets could not have known that their signatures would be used to propose an amendment mandating

[16] 698 P.2d 1173, 1184 (1985).

the interim Parliament to propose further amendments or revisions to the Constitution.

Apparently, the Lambino Group inserted the proposed Section 4(4) to compel the interim Parliament to amend or revise again the Constitution within 45 days from ratification of the proposed changes, or before the May 2007 elections. In the absence of the proposed Section 4(4), the interim Parliament has the discretion whether to amend or revise again the Constitution. With the proposed Section 4(4), the initiative proponents want the interim Parliament mandated to immediately amend or revise again the Constitution.

However, the signature sheets do not explain the reason for this rush in amending or revising again so soon the Constitution. The signature sheets do not also explain what specific amendments or revisions the initiative proponents want the interim Parliament to make, and why there is a need for such further amendments or revisions. The people are again left in the dark to fathom the nature and effect of the proposed changes. Certainly, such an initiative is not "directly proposed by the people" because the people do not even know the nature and effect of the proposed changes.

There is another intriguing provision inserted in the Lambino Group's amended petition of 30 August 2006. The proposed Section 4(3) of the Transitory Provisions states:

> Sec. 4(3). Senators whose term of office ends in 2010 shall be members of Parliament until noon of the thirtieth day of June 2010.

After 30 June 2010, not one of the present Senators will remain as member of Parliament if the interim Parliament does not schedule elections for the regular Parliament by 30 June 2010. However, there is no counterpart provision for the present members of the House of Representatives even if their term of office will all end on 30 June 2007, three years earlier than that of half of the present Senators. Thus, all the present members of the House will remain members of the interim Parliament after 30 June 2010.

The term of the incumbent President ends on 30 June 2010. Thereafter, the Prime Minister exercises all the powers of the President. If the interim Parliament does not schedule elections

for the regular Parliament by 30 June 2010, the Prime Minister will come only from the present members of the House of Representatives to the exclusion of the present Senators.

The signature sheets do not explain this discrimination against the Senators. The 6.3 million people who signed the signature sheets could not have known that their signatures would be used to discriminate against the Senators. They could not have known that their signatures would be used to limit, after 30 June 2010, the interim Parliament's choice of Prime Minister only to members of the existing House of Representatives.

An initiative that gathers signatures from the people without first showing to the people the full text of the proposed amendments is most likely a deception, and can operate as a gigantic fraud on the people. That is why the Constitution requires that an initiative must be "directly proposed by the people ... in a petition" - meaning that the people must sign on a petition that contains the full text of the proposed amendments. On so vital an issue as amending the nation's fundamental law, the writing of the text of the proposed amendments cannot be hidden from the people under a general or special power of attorney to unnamed, faceless, and unelected individuals.

The Constitution entrusts to the people the power to directly propose amendments to the Constitution. This Court trusts the wisdom of the people even if the members of this Court do not personally know the people who sign the petition. However, this trust emanates from a fundamental assumption: the full text of the proposed amendment is first shown to the people before they sign the petition, not after they have signed the petition.

In short, the Lambino Group's initiative is void and unconstitutional because it dismally fails to comply with the requirement of Section 2, Article XVII of the Constitution that the initiative must be "directly proposed by the people through initiative upon a petition."

The Initiative Violates Section 2, Article XVII of the Constitution Disallowing Revision through Initiatives

A people's initiative to change the Constitution applies only to

an amendment of the Constitution and not to its revision. In contrast, Congress or a constitutional convention can propose both amendments and revisions to the Constitution… (citing Article XVII).

Article XVII of the Constitution speaks of three modes of amending the Constitution. The first mode is through Congress upon three-fourths vote of all its Members. The second mode is through a constitutional convention. The third mode is through a people's initiative.

Section 1 of Article XVII, referring to the first and second modes, applies to "[A]ny amendment to, or revision of, this Constitution." In contrast, Section 2 of Article XVII, referring to the third mode, applies only to "[A]mendments to this Constitution." This distinction was intentional as shown by the following deliberations of the Constitutional Commission:

> MR. SUAREZ: Thank you, Madam President.
> May we respectfully call the attention of the Members of the Commission that pursuant to the mandate given to us last night, we submitted this afternoon a complete Committee Report No. 7 which embodies the proposed provision governing the matter of initiative. This is now covered by Section 2 of the complete committee report. With the permission of the Members, may I quote Section 2:
> The people may, after five years from the date of the last plebiscite held, directly propose amendments to this Constitution thru initiative upon petition of at least ten percent of the registered voters.
> This completes the blanks appearing in the original Committee Report No. 7. This proposal was suggested on the theory that this matter of initiative, which came about because of the extraordinary developments this year, has to be separated from the traditional modes of amending the Constitution as embodied in Section 1. The committee members felt that this system of initiative should be limited to amendments to the Constitution and should not extend to the revision of the entire Constitution, so we removed it from the operation of Section 1 of the proposed Article on Amendment or Revision.
> ...
> ...
> MS. AQUINO: [I] am seriously bothered by providing this process of initiative as a separate section in the Article on

> Amendment. Would the sponsor be amenable to accepting an amendment in terms of realigning Section 2 as another subparagraph (c) of Section 1, instead of setting it up as another separate section as if it were a self-executing provision?
> MR. SUAREZ: We would be amenable except that, as we clarified a while ago, this process of initiative is limited to the matter of amendment and should not expand into a revision which contemplates a total overhaul of the Constitution. That was the sense that was conveyed by the Committee.
> MS. AQUINO: In other words, the Committee was attempting to distinguish the coverage of modes (a) and (b) in Section 1 to include the process of revision; whereas, the process of initiation to amend, which is given to the public, would only apply to amendments?
> MR. SUAREZ: That is right. Those were the terms envisioned in the Committee.
> MS. AQUINO: I thank the sponsor; and thank you, Madam President.
> ...
> MR. MAAMBONG: My first question: Commissioner Davide's proposed amendment on line 1 refers to "amendments." Does it not cover the word "revision" as defined by Commissioner Padilla when he made the distinction between the words "amendments" and "revision"?
> MR. DAVIDE: No, it does not, because "amendments" and "revision" should be covered by Section 1. So insofar as initiative is concerned, it can only relate to "amendments" not "revision."
> MR. MAAMBONG: Thank you.[17]

There can be no mistake about it. The framers of the Constitution intended, and wrote, a clear distinction between "amendment" and "revision" of the Constitution. The framers intended, and wrote, that only Congress or a constitutional convention may propose revisions to the Constitution. The framers intended, and wrote, that a people's initiative may propose only amendments to the Constitution. Where the intent and language of the Constitution clearly withhold from the people the power to propose revisions to the Constitution, the people cannot propose revisions even as they are empowered to propose amendments.

[17] I Record, Constitutional Commission 386, 392, 402-403.

This has been the consistent ruling of state supreme courts in the United States. Thus, in *McFadden v. Jordan*,[18] the Supreme Court of California ruled:

> The initiative power reserved by the people by amendment to the Constitution ... applies only to the proposing and the adopting or rejecting of "laws and amendments to the Constitution" and does not purport to extend to a constitutional revision. ... It is thus clear that a revision of the Constitution may be accomplished only through ratification by the people of a revised constitution proposed by a convention called for that purpose as outlined hereinabove. Consequently if the scope of the proposed initiative measure (hereinafter termed "the measure") now before us is so broad that if such measure became law a substantial revision of our present state Constitution would be effected, then the measure may not properly be submitted to the electorate until and unless it is first agreed upon by a constitutional convention, and the writ sought by petitioner should issue. ...

Likewise, the Supreme Court of Oregon ruled in *Holmes v. Appling*:[19]

> It is well established that when a constitution specifies the manner in which it may be amended or revised, it can be altered by those who favor amendments, revision, or other change only through the use of one of the specified means. The constitution itself recognizes that there is a difference between an amendment and a revision; and it is obvious from an examination of the measure here in question that it is not an amendment as that term is generally understood and as it is used in Article IV, Section 1. The document appears to be based in large part on the revision of the constitution drafted by the "Commission for Constitutional Revision" authorized by the 1961 Legislative Assembly, ... and submitted to the 1963 Legislative Assembly. It failed to receive in the Assembly the two-third's majority vote of both houses required by Article XVII, Section 2, and hence failed of adoption, ...
>
> While differing from that document in material respects, the measure sponsored by the plaintiffs is, nevertheless, a thorough overhauling of the present constitution ...

[18] 196 P.2d 787, 790 (1948). See also Lowe v. Keisling, 130 Or.App. 1, 882 P.2d 91 (1994).

[19] 392 P.2d 636, 638 (1964).

> To call it an amendment is a misnomer.
> Whether it be a revision or a new constitution, it is not such a measure as can be submitted to the people through the initiative. If a revision, it is subject to the requirements of Article XVII, Section 2(1); if a new constitution, it can only be proposed at a convention called in the manner provided in Article XVII, Section 1. ...

Similarly, in this jurisdiction there can be no dispute that a people's initiative can only propose amendments to the Constitution since the Constitution itself limits initiatives to amendments. There can be no deviation from the constitutionally prescribed modes of revising the Constitution. A popular clamor, even one backed by 6.3 million signatures, cannot justify a deviation from the specific modes prescribed in the Constitution itself.

As the Supreme Court of Oklahoma ruled in *In re Initiative Petition No. 364*:[20]

> It is a fundamental principle that a constitution can only be revised or amended in the manner prescribed by the instrument itself, and that any attempt to revise a constitution in a manner other than the one provided in the instrument is almost invariably treated as extra-constitutional and revolutionary. ... "While it is universally conceded that the people are sovereign and that they have power to adopt a constitution and to change their own work at will, they must, in doing so, act in an orderly manner and according to the settled principles of constitutional law. And where the people, in adopting a constitution, have prescribed the method by which the people may alter or amend it, an attempt to change the fundamental law in violation of the self-imposed restrictions, is unconstitutional." ...

This Court, whose members are sworn to defend and protect the Constitution, cannot shirk from its solemn oath and duty to insure compliance with the clear command of the Constitution that a people's initiative may only amend, never revise, the Constitution.

The question is, does the Lambino Group's initiative constitute an amendment or revision of the Constitution? If the Lambino

[20] 930 P.2d 186, 196 (1996).

Group's initiative constitutes a revision, then the present petition should be dismissed for being outside the scope of Section 2, Article XVII of the Constitution.

Courts have long recognized the distinction between an amendment and a revision of a constitution. One of the earliest cases that recognized the distinction described the fundamental difference in this manner:

> [T]he very term "constitution" implies an instrument of a permanent and abiding nature, and the provisions contained therein for its revision indicate the will of the people that the underlying principles upon which it rests, as well as the substantial entirety of the instrument, shall be of a like permanent and abiding nature. On the other hand, the significance of the term "amendment" implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed.[21]

Revision broadly implies a change that alters a basic principle in the constitution, like altering the principle of separation of powers or the system of checks-and-balances. There is also revision if the change alters the substantial entirety of the constitution, as when the change affects substantial provisions of the constitution. On the other hand, amendment broadly refers to a change that adds, reduces, or deletes without altering the basic principle involved. Revision generally affects several provisions of the constitution, while amendment generally affects only the specific provision being amended.

In California where the initiative clause allows amendments but not revisions to the constitution just like in our Constitution, courts have developed a two-part test: the quantitative test and the qualitative test. The quantitative test asks whether the proposed change is "so extensive in its provisions as to change directly the 'substantial entirety' of the constitution by the deletion or alteration of numerous existing provisions."[22] The court examines only the number of provisions affected and does not consider the degree of the change.

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[21] Livermore v. Waite, 102 Cal. 113, 118-119 (1894).

[22] Amador Valley Joint Union High School District v. State Board of Equalization, 583 P.2d 1281, 1286 (1978).

The qualitative test inquires into the qualitative effects of the proposed change in the constitution. The main inquiry is whether the change will "accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision."[23] Whether there is an alteration in the structure of government is a proper subject of inquiry. Thus, "a change in the nature of [the] basic governmental plan" includes "change in its fundamental framework or the fundamental powers of its Branches."[24] A change in the nature of the basic governmental plan also includes changes that "jeopardize the traditional form of government and the system of check and balances."[25]

Under both the quantitative and qualitative tests, the Lambino Group's initiative is a revision and not merely an amendment. Quantitatively, the Lambino Group's proposed changes overhaul two articles - Article VI on the Legislature and Article VII on the Executive - affecting a total of 105 provisions in the entire Constitution.[26] Qualitatively, the proposed changes alter substantially the basic plan of government, from presidential to parliamentary, and from a bicameral to a unicameral legislature.

A change in the structure of government is a revision of the Constitution, as when the three great co-equal branches of government in the present Constitution are reduced into two. This alters the separation of powers in the Constitution. A shift from the present Bicameral-Presidential system to a Unicameral-Parliamentary system is a revision of the Constitution. Merging the legislative and executive branches is a radical change in the structure of government.

The abolition alone of the Office of the President as the locus of Executive Power alters the separation of powers and thus constitutes a revision of the Constitution. Likewise, the abolition alone of one chamber of Congress alters the system of checks-and-balances within the legislature and constitutes a revision of the Constitution.

By any legal test and under any jurisdiction, a shift from a Bicameral-Presidential to a Unicameral-Parliamentary

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[23] Ibid.

[24] Legislature of the State of California v. EU, 54 Cal.3d 492, 509 (1991).

[25] California Association of Retail Tobacconists v. State, 109 Cal.App.4th 792, 836 (2003).

[26] As stated by Associate Justice Romeo J. Callejo, Sr. during the 26 September 2006 oral arguments.

system, involving the abolition of the Office of the President and the abolition of one chamber of Congress, is beyond doubt a revision, not a mere amendment. On the face alone of the Lambino Group's proposed changes, it is readily apparent that the changes will radically alter the framework of government as set forth in the Constitution. Father Joaquin Bernas, S.J., a leading member of the Constitutional Commission, writes:

> An amendment envisages an alteration of one or a few specific and separable provisions. The guiding original intention of an amendment is to improve specific parts or to add new provisions deemed necessary to meet new conditions or to suppress specific portions that may have become obsolete or that are judged to be dangerous. In revision, however, the guiding original intention and plan contemplates a re-examination of the entire document, or of provisions of the document which have over-all implications for the entire document, to determine how and to what extent they should be altered. Thus, for instance a switch from the presidential system to a parliamentary system would be a revision because of its over-all impact on the entire constitutional structure. So would a switch from a bicameral system to a unicameral system be because of its effect on other important provisions of the Constitution.[27]

In *Adams v. Gunter*,[28] an initiative petition proposed the amendment of the Florida State constitution to shift from a bicameral to a unicameral legislature. The issue turned on whether the initiative "was defective and unauthorized where [the] proposed amendment would ... affect several other provisions of [the] Constitution." The Supreme Court of Florida, striking down the initiative as outside the scope of the initiative clause, ruled as follows:

> The proposal here to amend Section 1 of Article III of the 1968 Constitution to provide for a Unicameral Legislature affects not only many other provisions of the Constitution but provides for a change in the form of the legislative branch of government, which has been in existence in the United States Congress and in all of the states of the nation, except

[27] Joaquin G. Bernas, The 1987 Constitution Of The Republic Of The Philippines: A Commentary 1294 (2003).
[28] 238 So.2d 824 (1970).

> one, since the earliest days. It would be difficult to visualize a more revolutionary change. The concept of a House and a Senate is basic in the American form of government. It would not only radically change the whole pattern of government in this state and tear apart the whole fabric of the Constitution, but would even affect the physical facilities necessary to carry on government.
> ...
> We conclude with the observation that if such proposed amendment were adopted by the people at the General Election and if the Legislature at its next session should fail to submit further amendments to revise and clarify the numerous inconsistencies and conflicts which would result, or if after submission of appropriate amendments the people should refuse to adopt them, simple chaos would prevail in the government of this State. The same result would obtain from an amendment, for instance, of Section 1 of Article V, to provide for only a Supreme Court and Circuit Courts-and there could be other examples too numerous to detail. These examples point unerringly to the answer.
> The purpose of the long and arduous work of the hundreds of men and women and many sessions of the Legislature in bringing about the Constitution of 1968 was to eliminate inconsistencies and conflicts and to give the State a workable, accordant, homogenous and up-to-date document. All of this could disappear very quickly if we were to hold that it could be amended in the manner proposed in the initiative petition here.

The rationale of the *Adams* decision applies with greater force to the present petition. The Lambino Group's initiative not only seeks a shift from a bicameral to a unicameral legislature, it also seeks to merge the executive and legislative departments. The initiative in *Adams* did not even touch the executive department.

In *Adams*, the Supreme Court of Florida enumerated 18 sections of the Florida Constitution that would be affected by the shift from a bicameral to a unicameral legislature. In the Lambino Group's present initiative, no less than 105 provisions of the Constitution would be affected based on the count of Associate Justice Romeo J. Callejo, Sr.[29] There is no doubt that the Lambino Group's present initiative seeks far more radical changes in the structure of government than the initiative in *Adams*.

[29] As stated by Associate Justice Romeo J. Callejo, Sr. during the 26 September 2006 oral arguments.

The Lambino Group theorizes that the difference between "amendment" and "revision" is only one of procedure, not of substance. The Lambino Group posits that when a deliberative body drafts and proposes changes to the Constitution, substantive changes are called "revisions" because members of the deliberative body work full-time on the changes. However, the same substantive changes, when proposed through an initiative, are called "amendments" because the changes are made by ordinary people who do not make an "occupation, profession, or vocation" out of such endeavor.

Thus, the Lambino Group makes the following exposition of their theory in their Memorandum:

> 99. With this distinction in mind, we note that the constitutional provisions expressly provide for both "amendment" and "revision" when it speaks of legislators and constitutional delegates, while the same provisions expressly provide only for "amendment" when it speaks of the people. It would seem that the apparent distinction is based on the actual experience of the people, that on one hand the common people in general are not expected to work full-time on the matter of correcting the constitution because that is not their occupation, profession or vocation; while on the other hand, the legislators and constitutional convention delegates are expected to work full-time on the same matter because that is their occupation, profession or vocation. Thus, the difference between the words "revision" and "amendment" pertain only to the process or procedure of coming up with the corrections, for purposes of interpreting the constitutional provisions.
> 100. Stated otherwise, the difference between "amendment" and "revision" cannot reasonably be in the substance or extent of the correction. ...

The Lambino Group in effect argues that if Congress or a constitutional convention had drafted the same proposed changes that the Lambino Group wrote in the present initiative, the changes would constitute a revision of the Constitution. Thus, the Lambino Group concedes that the proposed changes in the present initiative constitute a revision if Congress or a constitutional convention had drafted the changes. However, since the Lambino Group as private individuals drafted the proposed changes, the changes are merely amendments to the Constitution. The Lambino Group trivializes the serious matter of changing the fundamental law of the land.

The express intent of the framers and the plain language of the Constitution contradict the Lambino Group's theory. Where the intent of the framers and the language of the Constitution are clear and plainly stated, courts do not deviate from such categorical intent and language.[30] Any theory espousing a construction contrary to such intent and language deserves scant consideration. More so, if such theory wreaks havoc by creating inconsistencies in the form of government established in the Constitution. Such a theory, devoid of any jurisprudential mooring and inviting inconsistencies in the Constitution, only exposes the flimsiness of the Lambino Group's position. Any theory advocating that a proposed change involving a radical structural change in government does not constitute a revision justly deserves rejection.

The Lambino Group simply recycles a theory that initiative proponents in American jurisdictions have attempted to advance without any success. In *Lowe v. Keisling*,[31] the Supreme Court of Oregon rejected this theory, thus:

> Mabon argues that Article XVII, section 2, does not apply to changes to the constitution proposed by initiative. His theory is that Article XVII, section 2 merely provides a procedure by which the legislature can propose a revision of the constitution, but it does not affect proposed revisions initiated by the people.
> Plaintiffs argue that the proposed ballot measure constitutes a wholesale change to the constitution that cannot be enacted through the initiative process. They assert that the distinction between amendment and revision is determined by reviewing the scope and subject matter of the proposed enactment, and that revisions are not limited to "a formal overhauling of the constitution." They argue that this ballot measure proposes far reaching changes outside the lines of the original instrument, including profound impacts on existing fundamental rights and radical restructuring of the government's relationship with a defined group of citizens. Plaintiffs assert that, because the proposed ballot measure "will refashion the most basic principles of Oregon constitutional law," the trial court correctly held that it violated Article XVII, section 2, and

[30] Francisco, Jr. v. House of Representatives, G.R. No. 160261, 10 November 2003, 415 SCRA 44; J.M. Tuason & Co., Inc. v. Land Tenure Administration, 142 Phil. 393 (1970); Gold Creek Mining Corporation v. Rodriguez, 66 Phil. 259 (1938).

[31] 882 P.2d 91, 96-97 (1994). On the merits, the Court in Lowe v. Keisling found the amendment in question was not a revision.

> cannot appear on the ballot without the prior approval of the legislature.
>
> We first address Mabon's argument that Article XVII, section 2(1), does not prohibit revisions instituted by initiative. In Holmes v. Appling, ... the Supreme Court concluded that a revision of the constitution may not be accomplished by initiative, because of the provisions of Article XVII, section 2. After reviewing Article XVII, section 1, relating to proposed amendments, the court said:
>
> > From the foregoing it appears that Article IV, Section 1, authorizes the use of the initiative as a means of amending the Oregon Constitution, but it contains no similar sanction for its use as a means of revising the constitution. ...
>
> It then reviewed Article XVII, section 2, relating to revisions, and said: "It is the only section of the constitution which provides the means for constitutional revision and it excludes the idea that an individual, through the initiative, may place such a measure before the electorate." ...
>
> Accordingly, we reject Mabon's argument that Article XVII, section 2, does not apply to constitutional revisions proposed by initiative.

Similarly, this Court must reject the Lambino Group's theory which negates the express intent of the framers and the plain language of the Constitution.

We can visualize amendments and revisions as a spectrum, at one end green for amendments and at the other end red for revisions. Towards the middle of the spectrum, colors fuse and difficulties arise in determining whether there is an amendment or revision. The present initiative is indisputably located at the far end of the red spectrum where revision begins. The present initiative seeks a radical overhaul of the existing separation of powers among the three co-equal departments of government, requiring far-reaching amendments in several sections and articles of the Constitution.

Where the proposed change applies only to a specific provision of the Constitution without affecting any other section or article, the change may generally be considered an amendment and not a revision. For example, a change reducing the voting age from 18 years to 15 years is an amendment and not a revision. Similarly, a change reducing Filipino ownership of mass media companies from 100 percent to 60 percent is an amendment and not a revision. Also, a change requiring a college degree as

an additional qualification for election to the Presidency is an amendment and not a revision.

The changes in these examples do not entail any modification of sections or articles of the Constitution other than the specific provision being amended. These changes do not also affect the structure of government or the system of checks-and-balances among or within the three branches. These three examples are located at the far green end of the spectrum, opposite the far red end where the revision sought by the present petition is located.

However, there can be no fixed rule on whether a change is an amendment or a revision. A change in a single word of one sentence of the Constitution may be a revision and not an amendment. For example, the substitution of the word "republican" with "monarchic" or "theocratic" in Section 1, Article II of the Constitution radically overhauls the entire structure of government and the fundamental ideological basis of the Constitution. Thus, each specific change will have to be examined case-by-case, depending on how it affects other provisions, as well as how it affects the structure of government, the carefully crafted system of checks-and-balances, and the underlying ideological basis of the existing Constitution.

Since a revision of a constitution affects basic principles, or several provisions of a constitution, a deliberative body with recorded proceedings is best suited to undertake a revision. A revision requires harmonizing not only several provisions, but also the altered principles with those that remain unaltered. Thus, constitutions normally authorize deliberative bodies like constituent assemblies or constitutional conventions to undertake revisions. On the other hand, constitutions allow people's initiatives, which do not have fixed and identifiable deliberative bodies or recorded proceedings, to undertake only amendments and not revisions.

In the present initiative, the Lambino Group's proposed Section 2 of the Transitory Provisions states:

> Sec. 2. Upon the expiration of the term of the incumbent President and Vice President, with the exception of Sections 1, 2, 3, 4, 5, 6 and 7 of Article VI of the 1987 Constitution which shall hereby be amended and Sections 18 and 24 which shall be deleted, all other Sections of Article VI are hereby retained and renumbered sequentially as Section 2,

> ad seriatim up to 26, unless they are inconsistent with the Parliamentary system of government, in which case, they shall be amended to conform with a unicameral parliamentary form of government; ...

The basic rule in statutory construction is that if a later law is irreconcilably inconsistent with a prior law, the later law prevails. This rule also applies to construction of constitutions. However, the Lambino Group's draft of Section 2 of the Transitory Provisions turns on its head this rule of construction by stating that in case of such irreconcilable inconsistency, the earlier provision "shall be amended to conform with a unicameral parliamentary form of government." The effect is to freeze the two irreconcilable provisions until the earlier one "shall be amended," which requires a future separate constitutional amendment.

Realizing the absurdity of the need for such an amendment, petitioner Atty. Lambino readily conceded during the oral arguments that the requirement of a future amendment is a "surplusage." In short, Atty. Lambino wants to reinstate the rule of statutory construction so that the later provision automatically prevails in case of irreconcilable inconsistency. However, it is not as simple as that.

The irreconcilable inconsistency envisioned in the proposed Section 2 of the Transitory Provisions is not between a provision in Article VI of the 1987 Constitution and a provision in the proposed changes. The inconsistency is between a provision in Article VI of the 1987 Constitution and the "Parliamentary system of government," and the inconsistency shall be resolved in favor of a "unicameral parliamentary form of government."

Now, what "unicameral parliamentary form of government" do the Lambino Group's proposed changes refer to - the Bangladeshi, Singaporean, Israeli, or New Zealand models, which are among the few countries with unicameral parliaments? The proposed changes could not possibly refer to the traditional and well-known parliamentary forms of government - the British, French, Spanish, German, Italian, Canadian, Australian, or Malaysian models, which have all bicameral parliaments. Did the people who signed the signature sheets realize that they were adopting the Bangladeshi, Singaporean, Israeli, or New Zealand parliamentary form of government?

This drives home the point that the people's initiative is not meant for revisions of the Constitution but only for amendments. A shift from the present Bicameral-Presidential to a Unicameral-Parliamentary system requires harmonizing several provisions in many articles of the Constitution. Revision of the Constitution through a people's initiative will only result in gross absurdities in the Constitution.

In sum, there is no doubt whatsoever that the Lambino Group's initiative is a revision and not an amendment. Thus, the present initiative is void and unconstitutional because it violates Section 2, Article XVII of the Constitution limiting the scope of a people's initiative to "[A]mendments to this Constitution."

A Revisit of *Santiago v. COMELEC* is Not Necessary

The present petition warrants dismissal for failure to comply with the basic requirements of Section 2, Article XVII of the Constitution on the conduct and scope of a people's initiative to amend the Constitution. There is no need to revisit this Court's ruling in *Santiago* declaring RA 6735 "incomplete, inadequate or wanting in essential terms and conditions" to cover the system of initiative to amend the Constitution. An affirmation or reversal of *Santiago* will not change the outcome of the present petition. Thus, this Court must decline to revisit *Santiago* which effectively ruled that RA 6735 does not comply with the requirements of the Constitution to implement the initiative clause on amendments to the Constitution.

This Court must avoid revisiting a ruling involving the constitutionality of a statute if the case before the Court can be resolved on some other grounds. Such avoidance is a logical consequence of the well-settled doctrine that courts will not pass upon the constitutionality of a statute if the case can be resolved on some other grounds.[32]

Nevertheless, even assuming that RA 6735 is valid to implement the constitutional provision on initiatives to amend the Constitution, this will not change the result here because the present petition violates Section 2, Article XVII of the Constitution. To be a valid initiative, the present initiative must

[32] Spouses Mirasol v. Court of Appeals, 403 Phil. 760 (2001); Intia Jr. v. COA, 366 Phil. 273 (1999).

first comply with Section 2, Article XVII of the Constitution even before complying with RA 6735.

Even then, the present initiative violates Section 5(b) of RA 6735 which requires that the "petition for an initiative on the 1987 Constitution must have at least twelve per centum (12%) of the total number of registered voters as signatories." Section 5(b) of RA 6735 requires that the people must sign the "petition ... as signatories."

The 6.3 million signatories did not sign the petition of 25 August 2006 or the amended petition of 30 August 2006 filed with the COMELEC. Only Atty. Lambino, Atty. Demosthenes B. Donato, and Atty. Alberto C. Agra signed the petition and amended petition as counsels for "Raul L. Lambino and Erico B. Aumentado, Petitioners." In the COMELEC, the Lambino Group, claiming to act "together with" the 6.3 million signatories, merely attached the signature sheets to the petition and amended petition. Thus, the petition and amended petition filed with the COMELEC did not even comply with the basic requirement of RA 6735 that the Lambino Group claims as valid.

The Lambino Group's logrolling initiative also violates Section 10(a) of RA 6735 stating, "No petition embracing more than one (1) subject shall be submitted to the electorate; ..." The proposed Section 4(4) of the Transitory Provisions, mandating the interim Parliament to propose further amendments or revisions to the Constitution, is a subject matter totally unrelated to the shift in the form of government. Since the present initiative embraces more than one subject matter, RA 6735 prohibits submission of the initiative petition to the electorate. Thus, even if RA 6735 is valid, the Lambino Group's initiative will still fail.

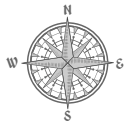
The COMELEC Did Not Commit Grave Abuse of Discretion in Dismissing the Lambino Group's Initiative

In dismissing the Lambino Group's initiative petition, the COMELEC *en banc* merely followed this Court's ruling in *Santiago* and *People's Initiative for Reform, Modernization and Action (PIRMA) v. COMELEC*.[33] For following this Court's ruling, no grave abuse of discretion is attributable to the COMELEC. On this ground alone, the present petition warrants outright

[33] G.R. No. 129754, dated 23 September 1997.

dismissal. Thus, this Court should reiterate its unanimous ruling in *PIRMA*:

> The Court ruled, first, by a unanimous vote, that no grave abuse of discretion could be attributed to the public respondent COMELEC in dismissing the petition filed by PIRMA therein, it appearing that it only complied with the dispositions in the Decisions of this Court in G.R. No. 127325, promulgated on March 19, 1997, and its Resolution of June 10, 1997.



ARTICLE XVIII

TRANSITORY PROVISIONS

Section 1. The first elections of Members of the Congress under this Constitution shall be held on the second Monday of May, 1987.

The first local elections shall be held on a date to be determined by the President, which may be simultaneous with the election of the Members of the Congress. It shall include the election of all Members of the city or municipal councils in the Metropolitan Manila area.

Section 2. The Senators, Members of the House of Representatives, and the local officials first elected under this Constitution shall serve until noon of June 30, 1992.

Of the Senators elected in the elections in 1992, the first twelve obtaining the highest number of votes shall serve for six years and the remaining twelve for three years.

Section 3. All existing laws, decrees, executive orders, proclamations, letters of instructions, and other executive issuances not inconsistent with this Constitution shall remain operative until amended, repealed, or revoked.

Section 4. All existing treaties or international agreements which have not been ratified shall not be renewed or extended without the concurrence of at least two-thirds of all the Members of the Senate.

Section 5. The six-year term of the incumbent President and Vice-President elected in the February 7, 1986 election is, for purposes of synchronization of elections, hereby extended to noon of June 30, 1992.

The first regular elections for the President and Vice-President under this Constitution shall be held on the second Monday of May, 1992.

Section 6. The incumbent President shall continue to exercise legislative powers until the first Congress is convened.

Section 7. Until a law is passed, the President may fill by appointment from a list of nominees by the respective sectors, the seats reserved for sectoral representation in paragraph (2), Section 5 of Article VI of this Constitution.

Section 8. Until otherwise provided by the Congress, the President may constitute the Metropolitan Manila Authority to be composed of the heads of all local government units comprising the Metropolitan Manila area.

Section 9. A sub-province shall continue to exist and operate until it is converted into a regular province or until its component municipalities are reverted to the mother province.

Section 10. All courts existing at the time of the ratification of this Constitution shall continue to exercise their jurisdiction, until otherwise provided by law. The provisions of the existing Rules of Court, judiciary acts, and procedural laws not inconsistent with this Constitution shall remain operative unless amended or repealed by the Supreme Court or the Congress.

Section 11. The incumbent Members of the Judiciary shall continue in office until they reach the age of seventy years or become incapacitated to discharge the duties of their office or are removed for cause.

Section 12. The Supreme Court shall, within one year after the ratification of this Constitution, adopt a systematic plan to expedite the decision or resolution of cases or matters pending in the Supreme Court or the lower courts prior to the effectivity of this Constitution. A similar plan shall be adopted for all special courts and quasi-judicial bodies.

Section 13. The legal effect of the lapse, before the ratification of this Constitution, of the applicable period for the decision or resolution of the cases or matters submitted for adjudication by the courts, shall be determined by the Supreme Court as soon as practicable.

Section 14. The provisions of paragraphs (3) and (4), Section

15 of Article VIII of this Constitution shall apply to cases or matters filed before the ratification of this Constitution, when the applicable period lapses after such ratification.

Section 15. The incumbent Members of the Civil Service Commission, the Commission on Elections, and the Commission on Audit shall continue in office for one year after the ratification of this Constitution, unless they are sooner removed for cause or become incapacitated to discharge the duties of their office or appointed to a new term thereunder. In no case shall any Member serve longer than seven years including service before the ratification of this Constitution.

Section 16. Career civil service employees separated from the service not for cause but as a result of the reorganization pursuant to Proclamation No. 3 dated March 25, 1986 and the reorganization following the ratification of this Constitution shall be entitled to appropriate separation pay and to retirement and other benefits accruing to them under the laws of general application in force at the time of their separation. In lieu thereof, at the option of the employees, they may be considered for employment in the Government or in any of its subdivisions, instrumentalities, or agencies, including government-owned or controlled corporations and their subsidiaries. This provision also applies to career officers whose resignation, tendered in line with the existing policy, had been accepted.

Section 17. Until the Congress provides otherwise, the President shall receive an annual salary of three hundred thousand pesos; the Vice-President, the President of the Senate, the Speaker of the House of Representatives, and the Chief Justice of the Supreme Court, two hundred forty thousand pesos each; the Senators, the Members of the House of Representatives, the Associate Justices of the Supreme Court, and the Chairmen of the Constitutional Commissions, two hundred four thousand pesos each; and the Members of the Constitutional Commissions, one hundred eighty thousand pesos each.

Section 18. At the earliest possible time, the Government shall increase the salary scales of the other officials and employees of the National Government.

Section 19. All properties, records, equipment, buildings, facilities, and other assets of any office or body abolished or

reorganized under Proclamation No. 3 dated March 25, 1986 or this Constitution shall be transferred to the office or body to which its powers, functions, and responsibilities substantially pertain.

Section 20. The first Congress shall give priority to the determination of the period for the full implementation of free public secondary education.

Section 21. The Congress shall provide efficacious procedures and adequate remedies for the reversion to the State of all lands of the public domain and real rights connected therewith which were acquired in violation of the Constitution or the public land laws, or through corrupt practices. No transfer or disposition of such lands or real rights shall be allowed until after the lapse of one year from the ratification of this Constitution.

Section 22. At the earliest possible time, the Government shall expropriate idle or abandoned agricultural lands as may be defined by law, for distribution to the beneficiaries of the agrarian reform program.

Section 23. Advertising entities affected by paragraph (2), Section 11 of Article XV1 of this Constitution shall have five years from its ratification to comply on a graduated and proportionate basis with the minimum Filipino ownership requirement therein.

Section 24. Private armies and other armed groups not recognized by duly constituted authority shall be dismantled. All paramilitary forces including Civilian Home Defense Forces not consistent with the citizen armed force established in this Constitution, shall be dissolved or, where appropriate, converted into the regular force.

Section 25. After the expiration in 1991 of the Agreement between the Republic of the Philippines and the United States of America concerning military bases, foreign military bases, troops, or facilities shall not be allowed in the Philippines except under a treaty duly concurred in by the Senate and, when the Congress so requires, ratified by a majority of the votes cast by the people in a national referendum held for that purpose, and recognized as a treaty by the other contracting State.

Section 26. The authority to issue sequestration or freeze orders under Proclamation No. 3 dated March 25, 1986 in relation to the recovery of ill-gotten wealth shall remain operative for not more than eighteen months after the ratification of this Constitution. However, in the national interest, as certified by the President, the Congress may extend such period.

A sequestration or freeze order shall be issued only upon showing of a prima facie case. The order and the list of the sequestered or frozen properties shall forthwith be registered with the proper court. For orders issued before the ratification of this Constitution, the corresponding judicial action or proceeding shall be filed within six months from its ratification. For those issued after such ratification, the judicial action or proceeding shall be commenced within six months from the issuance thereof.

The sequestration or freeze order is deemed automatically lifted if no judicial action or proceeding is commenced as herein provided.

REPUBLIC OF THE PHILIPPINES v. SANDIGANBAYAN, G.R. No. 104768, July 21, 2003, 454 Phil. 504, was a petition for review on *certiorari* seeking to set aside resolutions of the Sandiganbayan (First Division). Ultimately, the Court, speaking through Justice Carpio, dismissed the petition and affirmed the questioned resolutions, which remanded the records to the Ombudsman for such appropriate action as the evidence warranted, and referred the case to the Commissioner of the Bureau of Internal Revenue for a determination of the tax liability of Elizabeth Dimaano. The antecedent facts and issues were presented in the *en banc* decision:

> Immediately upon her assumption to office following the successful EDSA Revolution, then President Corazon C. Aquino issued Executive Order No. 1 (EO No. 1) creating the Presidential Commission on Good Government (PCGG). EO No. 1 primarily tasked the PCGG to recover all ill-gotten wealth of former President Ferdinand E. Marcos, his immediate family, relatives, subordinates and close associates. EO No. 1 vested the PCGG with the power "(a) to conduct investigation as may be necessary in order to accomplish and carry out the purposes of this order" and the power "(h) to promulgate such rules and regulations as may be necessary to carry out the purpose of this order." Accordingly, the PCGG, through its then Chairman

Jovito R. Salonga, created an AFP Anti-Graft Board (AFP Board) tasked to investigate reports of unexplained wealth and corrupt practices by AFP personnel, whether in the active service or retired.[1]

Based on its mandate, the AFP Board investigated various reports of alleged unexplained wealth of respondent Major General Josephus Q. Ramas (Ramas). On 27 July 1987, the AFP Board issued a on its findings and recommendation on the reported unexplained wealth of Ramas…

> Wherefore it is recommended that Maj. Gen. Josephus Q. Ramas (ret.) be prosecuted and tried for violation of RA 3019, as amended, otherwise known as "Anti-Graft and Corrupt Practices Act" and RA 1379, as amended, otherwise known as "The Act for the Forfeiture of Unlawfully Acquired Property."

Thus, on 1 August 1987, the PCGG filed a petition for forfeiture under Republic Act No. 1379 (RA No. 1379)[2] against Ramas.

Before Ramas could answer the petition, then Solicitor General Francisco I. Chavez filed an Amended Complaint naming the Republic of the Philippines (petitioner), represented by the PCGG, as plaintiff and Ramas as defendant. The Amended Complaint also impleaded Elizabeth Dimaano (Dimaano) as co-defendant.

The Amended Complaint alleged that Ramas was the Commanding General of the Philippine Army until 1986. On the other hand, Dimaano was a confidential agent of the Military Security Unit, Philippine Army, assigned as a clerk-typist at the office of Ramas from 1 January 1978 to February 1979. The Amended Complaint further alleged that Ramas "acquired funds, assets and properties manifestly out of proportion to his salary as an army officer and his other income from legitimately acquired property by taking undue advantage of his public office and/or using his power, authority and influence as such officer of the Armed Forces of the Philippines and as a subordinate and close associate of the deposed President Ferdinand Marcos."

The Amended Complaint also alleged that the AFP Board, after

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[1] Republic v. Migrino, G.R. No. 89483, 30 August 1990, 189 SCRA 289.

[2] An Act Declaring Forfeiture In Favor Of The State Any Property Found To Have Been Unlawfully Acquired By Any Public Officer Or Employee And Providing For The Proceedings Therefor.

a previous inquiry, found reasonable ground to believe that respondents have violated RA No. 1379. The Amended Complaint prayed for, among others, the forfeiture of respondents' properties, funds and equipment in favor of the State.

Ramas filed an Answer with Special and/or Affirmative Defenses and Compulsory Counterclaim to the Amended Complaint. In his Answer, Ramas contended that his property consisted only of a residential house at La Vista Subdivision, Quezon City, valued at P700,000, which was not out of proportion to his salary and other legitimate income. He denied ownership of any mansion in Cebu City and the cash, communications equipment and other items confiscated from the house of Dimaano.

Dimaano filed her own Answer to the Amended Complaint. Admitting her employment as a clerk-typist in the office of Ramas from January-November 1978 only, Dimaano claimed ownership of the monies, communications equipment, jewelry and land titles taken from her house by the Philippine Constabulary raiding team.

After termination of the pre-trial, the court set the case for trial on the merits on 9-11 November 1988.

On 9 November 1988, petitioner asked for a deferment of the hearing due to its lack of preparation for trial and the absence of witnesses and vital documents to support its case. The court reset the hearing to 17 and 18 April 1989.

On 13 April 1989, petitioner filed a motion for leave to amend the complaint in order "to charge the delinquent properties with being subject to forfeiture as having been unlawfully acquired by defendant Dimaano alone ..."

Nevertheless, in an order dated 17 April 1989, the Sandiganbayan proceeded with petitioner's presentation of evidence on the ground that the motion for leave to amend complaint did not state when petitioner would file the amended complaint. The Sandiganbayan further stated that the subject matter of the amended complaint was on its face vague and not related to the existing complaint. The Sandiganbayan also held that due to the time that the case had been pending in court, petitioner should proceed to present its evidence.

After presenting only three witnesses, petitioner asked for a

postponement of the trial.

On 28 September 1989, during the continuation of the trial, petitioner manifested its inability to proceed to trial because of the absence of other witnesses or lack of further evidence to present. Instead, petitioner reiterated its motion to amend the complaint to conform to the evidence already presented or to change the averments to show that Dimaano alone unlawfully acquired the monies or properties subject of the forfeiture.

The Sandiganbayan noted that petitioner had already delayed the case for over a year mainly because of its many postponements. Moreover, petitioner would want the case to revert to its preliminary stage when in fact the case had long been ready for trial. The Sandiganbayan ordered petitioner to prepare for presentation of its additional evidence, if any.

During the trial on 23 March 1990, petitioner again admitted its inability to present further evidence. Giving petitioner one more chance to present further evidence or to amend the complaint to conform to its evidence, the Sandiganbayan reset the trial to 18 May 1990. The Sandiganbayan, however, hinted that the re-setting was without prejudice to any action that private respondents might take under the circumstances.

However, on 18 May 1990, petitioner again expressed its inability to proceed to trial because it had no further evidence to present. Again, in the interest of justice, the Sandiganbayan granted petitioner 60 days within which to file an appropriate pleading. The Sandiganbayan, however, warned petitioner that failure to act would constrain the court to take drastic action.

Private respondents then filed their motions to dismiss based on *Republic v. Migrino*.[3] The Court held in *Migrino* that the PCGG does not have jurisdiction to investigate and prosecute military officers by reason of mere position held without a showing that they are "subordinates" of former President Marcos.

On 18 November 1991, the Sandiganbayan rendered a resolution, the dispositive portion of which states:

> WHEREFORE, judgment is hereby rendered dismissing the Amended Complaint, without pronouncement as to costs. The

[3] G.R. No. 89483, 30 August 1990, 189 SCRA 289.

> counterclaims are likewise dismissed for lack of merit, but the confiscated sum of money, communications equipment, jewelry and land titles are ordered returned to Elizabeth Dimaano.
> The records of this case are hereby remanded and referred to the Hon. Ombudsman, who has primary jurisdiction over the forfeiture cases under RA No. 1379, for such appropriate action as the evidence warrants. This case is also referred to the Commissioner of the Bureau of Internal Revenue for a determination of any tax liability of respondent Elizabeth Dimaano in connection herewith…

On 4 December 1991, petitioner filed its Motion for Reconsideration.

In answer to the Motion for Reconsideration, private respondents filed a Joint Comment/Opposition to which petitioner filed its Reply on 10 January 1992.

On 25 March 1992, the Sandiganbayan rendered a denying the Motion for Reconsideration.

Ruling of the Sandiganbayan

The Sandiganbayan dismissed the Amended Complaint on the following grounds:

> 1. The actions taken by the PCGG are not in accordance with the rulings of the Supreme Court in *Cruz, Jr. v. Sandiganbayan*[4] and *Republic v. Migrino*[5] which involve the same issues.
> 2. No previous inquiry similar to preliminary investigations in criminal cases was conducted against Ramas and Dimaano.
> 3. The evidence adduced against Ramas does not constitute a prima facie case against him.
> 4. There was an illegal search and seizure of the items confiscated.

The Issues

Petitioner raises the following issues:

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[4] G.R. No. 94595, 26 February 1991, 194 SCRA 474.
[5] G.R. No. 89483, 30 August 1990, 189 SCRA 289.

A. Respondent Court seriously erred in concluding that petitioner's evidence cannot make a case for forfeiture and that there was no showing of conspiracy, collusion or relationship by consanguinity or affinity by and between respondent Ramas and respondent Dimaano notwithstanding the fact that such conclusions were clearly unfounded and premature, having been rendered prior to the completion of the presentation of the evidence of the petitioner.

B. Respondent court seriously erred in holding that the actions taken by the petitioner, including the filing of the original complaint and the amended complaint, should be struck out in line with the rulings of the Supreme Court in *Cruz, Jr. v. Sandiganbayan*, 194 SCRA 474 and *Republic v. Migrino*, 189 SCRA 289, notwithstanding the fact that:

1. The cases of *Cruz, Jr. v. Sandiganbayan*, supra, and *Republic v. Migrino*, supra, are clearly not applicable to this case;
2. Any procedural defect in the institution of the complaint in Civil Case No. 0037 was cured and/or waived by respondents with the filing of their respective answers with counterclaim; and
3. The separate motions to dismiss were evidently improper considering that they were filed after commencement of the presentation of the evidence of the petitioner and even before the latter was allowed to formally offer its evidence and rest its case;

C. Respondent Court seriously erred in holding that the articles and things such as sums of money, communications equipment, jewelry and land titles confiscated from the house of respondent Dimaano were illegally seized and therefore excluded as evidence.

Justice Carpio, speaking for the Court, on the primary issue of **Republic** - whether the PCGG had jurisdiction to investigate and cause the filing of a forfeiture petition against Ramas and Dimaano for unexplained wealth under RA No. 1379 - ruled that the PCGG had no such jurisdiction, citing *Cruz, Jr. v. Sandiganbayan*[6] and *Republic v. Migrino*[7]:

> The PCGG, through the AFP Board, can only investigate the unexplained wealth and corrupt practices of AFP personnel

[6] G.R. No. 94595, 26 February 1991, 194 SCRA 474.
[7] G.R. No. 89483, 30 August 1990, 189 SCRA 289.

who fall under either of the two categories mentioned in Section 2 of EO No. 1. These are: (1) AFP personnel who have accumulated ill-gotten wealth during the administration of former President Marcos by being the latter's immediate family, relative, subordinate or close associate, taking undue advantage of their public office or using their powers, influence[8] ... or (2) AFP personnel involved in other cases of graft and corruption provided the President assigns their cases to the PCGG.[9]

Petitioner, however, does not claim that the President assigned Ramas' case to the PCGG. Therefore, Ramas' case should fall under the first category of AFP personnel before the PCGG could exercise its jurisdiction over him. Petitioner argues that Ramas was undoubtedly a subordinate of former President Marcos because of his position as the Commanding General of the Philippine Army. Petitioner claims that Ramas' position enabled him to receive orders directly from his commander-in-chief, undeniably making him a subordinate of former President Marcos.

We hold that Ramas was not a "subordinate" of former President Marcos in the sense contemplated under EO No. 1 and its amendments…

Petitioner has no jurisdiction over private respondents. Thus, there is no jurisdiction to waive in the first place. The PCGG cannot exercise investigative or prosecutorial powers never granted to it. PCGG's powers are specific and limited. Unless given additional assignment by the President, PCGG's sole task is only to recover the ill-gotten wealth of the Marcoses, their relatives and cronies.[10] Without these elements, the PCGG cannot claim jurisdiction over a case…

Consequently, the petition should be dismissed for lack of jurisdiction by the PCGG to conduct the preliminary investigation. The Ombudsman may still conduct the proper preliminary investigation for violation of RA No. 1379, and if warranted, the Solicitor General may file the forfeiture petition with the Sandiganbayan.[11] The right of the State to forfeit unexplained wealth under RA No. 1379 is not subject to prescription, laches or estoppel.[12]

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[8] Ibid.
[9] Republic v. Sandiganbayan, G.R. No. 115906, 29 September 1994, 237 SCRA 242.
[10] Republic v. Migrino, G.R. No. 89483, 30 August 1990, 189 SCRA 289.
[11] Ibid.
[12] Cojuangco, Jr. v. Presidential Commission on Good Gov't., G.R. Nos. 92319-20, 2

On the second issue of **Republic** - the propriety of dismissal of the case before completion of presentation of evidence - Justice Carpio ruled in favor of the Sandiganbayan:

> Based on these circumstances, obviously petitioner has only itself to blame for failure to complete the presentation of its evidence. The Sandiganbayan gave petitioner more than sufficient time to finish the presentation of its evidence. The Sandiganbayan overlooked petitioner's delays and yet petitioner ended the long-string of delays with the filing of a Re-Amended Complaint, which would only prolong even more the disposition of the case.
>
> Moreover, the pronouncements of the Court in *Migrino* and *Cruz* prompted the Sandiganbayan to dismiss the case since the PCGG has no jurisdiction to investigate and prosecute the case against private respondents. This alone would have been sufficient legal basis for the Sandiganbayan to dismiss the forfeiture case against private respondents.
>
> Thus, we hold that the Sandiganbayan did not err in dismissing the case before completion of the presentation of petitioner's evidence.

It is on the third issue of **Republic** - the legality of the search and seizure - that **Section 26 of this Article XVIII on sequestration orders**, specifically its history and rationale, was discussed. As summarized by Atty. Rosalinda E. Beltran-Kawada, Judicial Staff Head, Office of the Senior Associate Justice, Supreme Court, "the Court, through Justice Carpio, affirmed that the EDSA Revolution was in defiance of the 1973 Constitution; the revolutionary government was not bound by any constitution; the 1987 Constitution was not operative during the interregnum; and an individual could not invoke any exclusionary right under the Bill of Rights. However, the rights of the Filipino people remained protected during the interregnum because the revolutionary government assumed responsibility for the State by complying with the International Covenant on Civil and Political Rights, to which the Philippines was a signatory, and the Universal Declaration of Human Rights, which the Court had interpreted as part of the generally accepted principles of international law and binding on the State. While the Bill of Rights of individuals under the 1987 Constitution could not be invoked, the revolutionary government was bound to observe these rights under international law."[13]

October 1990, 190 SCRA 226.

[13] Response of Atty. Rosalinda E. Beltran-Kawada, February 1, 2019.

Petitioner claims that the Sandiganbayan erred in declaring the properties confiscated from Dimaano's house as illegally seized and therefore inadmissible in evidence. This issue bears a significant effect on petitioner's case since these properties comprise most of petitioner's evidence against private respondents. Petitioner will not have much evidence to support its case against private respondents if these properties are inadmissible in evidence.

On 3 March 1986, the Constabulary raiding team served at Dimaano's residence a search warrant captioned "Illegal Possession of Firearms and Ammunition." Dimaano was not present during the raid but Dimaano's cousins witnessed the raid. The raiding team seized the items detailed in the seizure receipt together with other items not included in the search warrant. The raiding team seized these items: one baby armalite rifle with two magazines; 40 rounds of 5.56 ammunition; one pistol, caliber .45; communications equipment, cash consisting of P2,870,000 and US$50,000, jewelry, and land titles.

Petitioner wants the Court to take judicial notice that the raiding team conducted the search and seizure "on March 3, 1986 or five days after the successful EDSA revolution." Petitioner argues that a revolutionary government was operative at that time by virtue of Proclamation No. 1 announcing that President Aquino and Vice President Laurel were "taking power in the name and by the will of the Filipino people." Petitioner asserts that the revolutionary government effectively withheld the operation of the 1973 Constitution which guaranteed private respondents' exclusionary right.

Moreover, petitioner argues that the exclusionary right arising from an illegal search applies only beginning 2 February 1987, the date of ratification of the 1987 Constitution. Petitioner contends that all rights under the Bill of Rights had already reverted to its embryonic stage at the time of the search. Therefore, the government may confiscate the monies and items taken from Dimaano and use the same in evidence against her since at the time of their seizure, private respondents did not enjoy any constitutional right.

Petitioner is partly right in its arguments.

The EDSA Revolution took place on 23-25 February 1986. As succinctly stated in President Aquino's Proclamation No. 3 dated

25 March 1986, the EDSA Revolution was "done in defiance of the provisions of the 1973 Constitution."[14] The resulting government was indisputably a revolutionary government bound by no constitution or legal limitations except treaty obligations that the revolutionary government, as the de jure government in the Philippines, assumed under international law.

The correct issues are: (1) whether the revolutionary government was bound by the Bill of Rights of the 1973 Constitution during the interregnum, that is, after the actual and effective take-over of power by the revolutionary government following the cessation of resistance by loyalist forces up to 24 March 1986 (immediately before the adoption of the Provisional Constitution); and (2) whether the protection accorded to individuals under the International Covenant on Civil and Political Rights (Covenant) and the Universal Declaration of Human Rights (Declaration) remained in effect during the interregnum.

We hold that the Bill of Rights under the 1973 Constitution was not operative during the interregnum. However, we rule that the protection accorded to individuals under the Covenant and the Declaration remained in effect during the interregnum.

During the interregnum, the directives and orders of the revolutionary government were the supreme law because no constitution limited the extent and scope of such directives and orders. With the abrogation of the 1973 Constitution by the successful revolution, there was no municipal law higher than the directives and orders of the revolutionary government. Thus, during the interregnum, a person could not invoke any exclusionary right under a Bill of Rights because there was neither a constitution nor a Bill of Rights during the interregnum. As the Court explained in *Letter of Associate Justice Reynato S. Puno*:[15]

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[14] Proclamation No. 3, "Provisional Constitution Of The Republic Of The Philippines," provides: WHEREAS, the new government under President Corazon C. Aquino was installed through a direct exercise of the power of the Filipino people assisted by units of the New Armed Forces of the Philippines; WHEREAS, the heroic action of the people was done in defiance of the provisions of the 1973 Constitution, as amended …
See also Estrada v. Desierto, G.R. No. 146710-15 and G.R. No. 146738, 3 April 2001, 356 SCRA 108; Mun. of San Juan, Metro Manila v. Court of Appeals, 345 Phil. 220 (1997).

[15] A.M. No. 90-11-2697-CA, 29 June 1992, 210 SCRA 589.

> A revolution has been defined as "the complete overthrow of the established government in any country or state by those who were previously subject to it" or as "a sudden, radical and fundamental change in the government or political system, usually effected with violence or at least some acts of violence." In Kelsen's book, General Theory of Law and State, it is defined as that which "occurs whenever the legal order of a community is nullified and replaced by a new order ... a way not prescribed by the first order itself."
> It was through the February 1986 revolution, a relatively peaceful one, and more popularly known as the "people power revolution" that the Filipino people tore themselves away from an existing regime. This revolution also saw the unprecedented rise to power of the Aquino government.
> From the natural law point of view, the right of revolution has been defined as "an inherent right of a people to cast out their rulers, change their policy or effect radical reforms in their system of government or institutions by force or a general uprising when the legal and constitutional methods of making such change have proved inadequate or are so obstructed as to be unavailable." It has been said that "the locus of positive law-making power lies with the people of the state" and from there is derived "the right of the people to abolish, to reform and to alter any existing form of government without regard to the existing constitution."
> ...
> It is widely known that Mrs. Aquino's rise to the presidency was not due to constitutional processes; in fact, it was achieved in violation of the provisions of the 1973 Constitution as a Batasang Pambansa resolution had earlier declared Mr. Marcos as the winner in the 1986 presidential election. Thus it can be said that the organization of Mrs. Aquino's Government which was met by little resistance and her control of the state evidenced by the appointment of the Cabinet and other key officers of the administration, the departure of the Marcos Cabinet officials, revamp of the Judiciary and the Military signaled the point where the legal system then in effect, had ceased to be obeyed by the Filipino.

To hold that the Bill of Rights under the 1973 Constitution remained operative during the interregnum would render void all sequestration orders issued by the Philippine Commission on Good Government (PCGG) before the adoption of the Freedom Constitution. The sequestration orders, which direct the freezing

and even the take-over of private property by mere executive issuance without judicial action, would violate the due process and search and seizure clauses of the Bill of Rights.

During the interregnum, the government in power was concededly a revolutionary government bound by no constitution. No one could validly question the sequestration orders as violative of the Bill of Rights because there was no Bill of Rights during the interregnum. However, upon the adoption of the Freedom Constitution, the sequestered companies assailed the sequestration orders as contrary to the Bill of Rights of the Freedom Constitution.

In *Bataan Shipyard & Engineering Co. Inc. v. Presidential Commission on Good Government*,[16] petitioner Baseco, while conceding there was no Bill of Rights during the interregnum, questioned the continued validity of the sequestration orders upon adoption of the Freedom Constitution in view of the due process clause in its Bill of Rights. The Court ruled that the Freedom Constitution, and later the 1987 Constitution, expressly recognized the validity of sequestration orders, thus:

> If any doubt should still persist in the face of the foregoing considerations as to the validity and propriety of sequestration, freeze and takeover orders, it should be dispelled by the fact that these particular remedies and the authority of the PCGG to issue them have received constitutional approbation and sanction. As already mentioned, the Provisional or "Freedom" Constitution recognizes the power and duty of the President to enact "measures to achieve the mandate of the people to ... (r)ecover ill-gotten properties amassed by the leaders and supporters of the previous regime and protect the interest of the people through orders of sequestration or freezing of assets or accounts." And as also already adverted to, Section 26, Article XVIII of the 1987 Constitution treats of, and ratifies the "authority to issue sequestration or freeze orders under Proclamation No. 3 dated March 25, 1986."

The framers of both the Freedom Constitution and the 1987 Constitution were fully aware that the sequestration orders would clash with the Bill of Rights. Thus, the framers of both constitutions had to include specific

[16] No. L-75885, 27 May 1987, 150 SCRA 181.

language recognizing the validity of the sequestration orders. The following discourse by Commissioner Joaquin G. Bernas during the deliberations of the Constitutional Commission is instructive:

> FR. BERNAS: Madam President, there is something schizophrenic about the arguments in defense of the present amendment.
> For instance, I have carefully studied Minister Salonga's lecture in the Gregorio Araneta University Foundation, of which all of us have been given a copy. On the one hand, he argues that everything the Commission is doing is traditionally legal. This is repeated by Commissioner Romulo also. Minister Salonga spends a major portion of his lecture developing that argument. On the other hand, almost as an afterthought, he says that in the end what matters are the results and not the legal niceties, thus suggesting that the PCGG should be allowed to make some legal shortcuts, another word for niceties or exceptions.
> Now, if everything the PCGG is doing is legal, why is it asking the CONCOM for special protection? The answer is clear. What they are doing will not stand the test of ordinary due process, hence they are asking for protection, for exceptions. *Grandes malos, grandes remedios*, fine, as the saying stands, but let us not say *grandes malos, grande y malos remedios*. That is not an allowable extrapolation. Hence, we should not give the exceptions asked for, and let me elaborate and give three reasons:
> First, the whole point of the February Revolution and of the work of the CONCOM is to hasten constitutional normalization. Very much at the heart of the constitutional normalization is the full effectivity of the Bill of Rights. We cannot, in one breath, ask for constitutional normalization and at the same time ask for a temporary halt to the full functioning of what is at the heart of constitutionalism. That would be hypocritical; that would be a repetition of Marcosian protestation of due process and rule of law. The New Society word for that is "backsliding." It is tragic when we begin to backslide even before we get there.
> Second, this is really a corollary of the first. Habits tend to become ingrained. The committee report asks for extraordinary exceptions from the Bill of Rights for six months after the convening of Congress, and Congress may even extend this longer.
> Good deeds repeated ripen into virtue; bad deeds repeated

become vice. What the committee report is asking for is that we should allow the new government to acquire the vice of disregarding the Bill of Rights.

Vices, once they become ingrained, become difficult to shed. The practitioners of the vice begin to think that they have a vested right to its practice, and they will fight tooth and nail to keep the franchise. That would be an unhealthy way of consolidating the gains of a democratic revolution.

Third, the argument that what matters are the results and not the legal niceties is an argument that is very disturbing. When it comes from a staunch Christian like Commissioner Salonga, a Minister, and repeated verbatim by another staunch Christian like Commissioner Tingson, it becomes doubly disturbing and even discombobulating. The argument makes the PCGG an auctioneer, placing the Bill of Rights on the auction block. If the price is right, the search and seizure clause will be sold. "Open your Swiss bank account to us and we will award you the search and seizure clause. You can keep it in your private safe."

Alternatively, the argument looks on the present government as hostage to the hoarders of hidden wealth. The hoarders will release the hidden health if the ransom price is paid and the ransom price is the Bill of Rights, specifically the due process in the search and seizure clauses. So, there is something positively revolving about either argument. The Bill of Rights is not for sale to the highest bidder nor can it be used to ransom captive dollars. This nation will survive and grow strong, only if it would become convinced of the values enshrined in the Constitution of a price that is beyond monetary estimation.

For these reasons, the honorable course for the Constitutional Commission is to delete all of Section 8 of the committee report and allow the new Constitution to take effect in full vigor. If Section 8 is deleted, the PCGG has two options. First, it can pursue the Salonga and the Romulo argument - that what the PCGG has been doing has been completely within the pale of the law. If sustained, the PCGG can go on and should be able to go on, even without the support of Section 8. If not sustained, however, the PCGG has only one honorable option, it must bow to the majesty of the Bill of Rights.

The PCGG extrapolation of the law is defended by staunch Christians. Let me conclude with what another Christian replied when asked to toy around with the law. From his prison cell, Thomas More said, "I'll give the devil benefit of

law for my nation's safety sake." I ask the Commission to give the devil benefit of law for our nation's sake. And we should delete Section 8.
Thank you, Madam President.

Despite the impassioned plea by Commissioner Bernas against the amendment excepting sequestration orders from the Bill of Rights, the Constitutional Commission still adopted the amendment as Section 26, Article XVIII of the 1987 Constitution. The framers of the Constitution were fully aware that absent Section 26, sequestration orders would not stand the test of due process under the Bill of Rights.

Thus, to rule that the Bill of Rights of the 1973 Constitution remained in force during the interregnum, absent a constitutional provision excepting sequestration orders from such Bill of Rights, would clearly render all sequestration orders void during the interregnum. Nevertheless, even during the interregnum the Filipino people continued to enjoy, under the Covenant and the Declaration, almost the same rights found in the Bill of Rights of the 1973 Constitution.

The revolutionary government, after installing itself as the *de jure* government, assumed responsibility for the State's good faith compliance with the Covenant to which the Philippines is a signatory. Article 2(1) of the Covenant requires each signatory State "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights[17] recognized in

[17] Among the rights of individuals recognized in the Covenant are: (1) No one shall be arbitrarily deprived of his life [Art. 6(1)]; (2) No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. [Art. 7]; (3) Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release [Art. 9(1 & 3)]; (4) Anyone who is arrested shall be informed, at the time of the arrest, of the reasons for his arrest and shall be promptly informed of the charges against him [Art. 9(2)]; (5) Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. Everyone shall be free to leave any country, including his own. No one shall be arbitrarily deprived of the right to enter his own country [Art. 12(1, 2 & 3)]; (6) Everyone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law [Art. 14(2)]; (7) Everyone shall have the right of freedom of thought, conscience and religion [Art. 18(1)]; (8) Everyone shall have the right to hold opinions

the present Covenant." Under Article 17(1) of the Covenant, the revolutionary government had the duty to insure that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence."

The Declaration, to which the Philippines is also a signatory, provides in its Article 17(2) that "[n]o one shall be arbitrarily deprived of his property." Although the signatories to the Declaration did not intend it as a legally binding document, being only a declaration, the Court has interpreted the Declaration as part of the generally accepted principles of international law and binding on the State.[18] Thus, the revolutionary government was also obligated under international law to observe the rights[19] of individuals under the Declaration.

The revolutionary government did not repudiate the Covenant or the Declaration during the interregnum. Whether the revolutionary government could have repudiated all its obligations under the Covenant or the Declaration is another matter and is not the issue here. Suffice it to say that the Court considers the Declaration as part of customary international law, and that Filipinos as human beings are proper subjects of the rules of international law laid down in the Covenant. The fact is the revolutionary government did not repudiate the Covenant or the Declaration in the same way it repudiated the 1973 Constitution. As the de jure government, the revolutionary government could not escape responsibility for the State's good faith compliance with its treaty obligations under international law.

It was only upon the adoption of the Provisional Constitution on 25 March 1986 that the directives and orders of the revolutionary government became subject to a higher municipal law that, if

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without interference. Everyone shall have the right to freedom of expression [Art. 19(1 & 2)]; (9) The right of peaceful assembly shall be recognized [Art. 21]; (10) Everyone shall have the right of freedom of association with others [Art. 22(1)]; (11) All persons are equal before the law and are entitled without any discrimination to the equal protection of the law [Art. 26].

[18] Andreu v. Commissioner of Immigration, 90 Phil. 347 (1951); Chirskoff v. Commissioner of Immigration, 90 Phil. 256 (1951); Borovsky v. Commissioner of Immigration, 90 Phil. 107 (1951); Mejoff v. Director of Prisons, 90 Phil. 70 (1951).

[19] Among the rights enshrined in the Declaration are: (1) Everyone has the right to own property alone or in association with others [Art. 17(1)]; (2) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives [Art. 21(1)]; (3) Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment [Art. 23(1)].

contravened, rendered such directives and orders void. The Provisional Constitution adopted verbatim the Bill of Rights of the 1973 Constitution.[20] The Provisional Constitution served as a self-limitation by the revolutionary government to avoid abuses of the absolute powers entrusted to it by the people.

During the interregnum when no constitution or Bill of Rights existed, directives and orders issued by government officers were valid so long as these officers did not exceed the authority granted them by the revolutionary government. The directives and orders should not have also violated the Covenant or the Declaration. In this case, the revolutionary government presumptively sanctioned the warrant since the revolutionary government did not repudiate it. The warrant, issued by a judge upon proper application, specified the items to be searched and seized. The warrant is thus valid with respect to the items specifically described in the warrant.

However, the Constabulary raiding team seized items not included in the warrant. As admitted by petitioner's witnesses, the raiding team confiscated items not included in the warrant…

It is obvious from the testimony of Captain Sebastian that the warrant did not include the monies, communications equipment, jewelry and land titles that the raiding team confiscated. The search warrant did not particularly describe these items and the raiding team confiscated them on its own authority. The raiding team had no legal basis to seize these items without showing that these items could be the subject of warrantless search and seizure.[21] Clearly, the raiding team exceeded its authority when it seized these items.

The seizure of these items was therefore void, and unless these items are contraband per se,[22] and they are not, they must be

[20] Sec. 1, Art. I of the Provisional Constitution provides: The provisions of ... Article IV (Bill of Rights) ... of the 1973 Constitution, as amended, remain in force and effect and are hereby adopted *in toto* as part of this provisional Constitution.

[21] Five generally accepted exceptions to the rule against warrantless search and seizure have been judicially formulated as follows: (1) search incidental to a lawful arrest, (2) search of moving vehicles, (3) seizure of evidence in plain view, (4) customs searches, and (5) waiver by the accused themselves of their right against unreasonable search and seizure. (People v. Que Ming Kha, G.R. No. 133265, 31 May 2002; Caballes v. Court of Appeals, G.R. No. 136292, 15 January 2002; People v. Lacerna, G.R. No. 109250, 5 September 1997, 278 SCRA 561).

[22] People v. Lim, G.R. No. 141699, 7 August 2002; Del Rosario v. People, G.R. No. 142295, 31 May 2001, 358 SCRA 373.

returned to the person from whom the raiding team seized them. However, we do not declare that such person is the lawful owner of these items, merely that the search and seizure warrant could not be used as basis to seize and withhold these items from the possessor. We thus hold that these items should be returned immediately to Dimaano.

Section 27. This Constitution shall take effect immediately upon its ratification by a majority of the votes cast in a plebiscite held for the purpose and shall supersede all previous Constitutions.

List of Cases
(In Alphabetical Order)

Decisions

Case Title	Case No. and Date	Articles of the Constitution
ALDABA v. COMMISSION ON ELECTIONS	G.R. No. 188078, January 25, 2010, 624 Phil. 805 En banc	VI, 5
ALICIAS, JR. v. MACATANGAY	A.C. No. 7478, January 11, 2017 En banc	XI, 13
ALYANSA PARA SA BAGONG PILIPINAS, INC. (ABP) v. ENERGY REGULATORY COMMISSION	G.R. No. 227670, May 3, 2019 En banc	XII, 6, 19
ASSOCIATED COMMUNICATIONS & WIRELESS SERVICES, LTD. v. DUMLAO	G. R. No. 136762, November 21, 2002, 440 Phil. 787 First Division	III, 1
ATONG PAGLAUM, INC. v. COMMISSION ON ELECTIONS	G.R. No. 203766, April 2, 2013, 707 Phil. 454 En Banc	VI, 5
BAGUIO MARKET VENDORS MULTI-PURPOSE COOPERATIVE (BAMARVEMPCO) v. CABATO-CORTES	G.R. No. 165922, February 26, 2010, 627 Phil. 543 Second Division	VIII, 5
BANCIL v. REYES	A.M. No. MTJ-16-1869, July 27, 2016 Second Division	VIII, 15
BARANGAY ASSOCIATION FOR NATIONAL ADVANCEMENT AND TRANSPARENCY (BANAT) v. COMMISSION ON ELECTIONS	G.R. No. 179271, April 21, 2009, 604 Phil. 131 July 8, 2009 En banc	VI, 5

BARANGAY ASSOCIATION FOR NATIONAL ADVANCEMENT AND TRANSPARENCY (BANAT) PARTY-LIST v. COMMISSION ON ELECTIONS	G.R. No. 177508, August 7, 2009, 612 Phil. 793 En banc	III, 10 VI, 17, 26(1) VII, 4 IX-C 2(6)
BARBERS v. COMMISSION ON ELECTIONS	G.R. No. 165691, June 22, 2005, 499 Phil. 570 En banc	VI, 17
BASES CONVERSION AND DEVELOPMENT AUTHORITY v. COMMISSION ON AUDIT	G.R. No. 178160, February 26, 2009, 599 Phil. 455 En banc	II, 5, 18 III, 1
BAYTAN v. COMMISSION ON ELECTIONS	G.R. No. 153945, February 4, 2003, 444 Phil. 812 En banc	IX-C, 2, 3
CHAVEZ v. PUBLIC ESTATES AUTHORITY	G.R. No. 133250, July 9, 2002 En banc	II, 28 III, 7 VIII, 5(1) XI, 1 XII, 2, 3
CIVIL SERVICE COMMISSION v. ANDAL	G.R. No. 185749, December 16, 2009, 623 Phil. 280 En banc	VIII, 6
COMMISSIONER OF INTERNAL REVENUE v. ST. LUKE'S MEDICAL CENTER, INC.	G.R. No. 195909, September 26, 2012, 695 Phil. 867 Second Division	VI, 28(3)
CORDORA v. COMMISSION ON ELECTIONS	G.R. No. 176947, February 19, 2009 En banc	IV, 5
CRUZ-AGANA v. SANTIAGO-LAGMAN	G.R. No. 139018, April 11, 2005, 495 Phil. 188 First Division	VIII, 5
DEVELOPMENT BANK OF THE PHILIPPINES v. COMMISSION ON AUDIT	G.R. No. 88435, January 16, 2002, 424 Phil. 411 En banc	IX-D, 2, 3 XII, 20

DEVELOPMENT BANK OF THE PHILIPPINES v. COMMISSION ON AUDIT	G.R. No. 144516, February 11, 2004, 467 Phil. 62 En banc	IX-A, 7 IX-D, 2
DIZON v. COMMISSION ON ELECTIONS	G.R. No. 182088, January 30, 2009, 597 Phil. 571 En banc	X, 8
ESTRADA v. OFFICE OF THE OMBUDSMAN	G.R. Nos. 212140-41, January 21, 2015, 751 Phil. 821 En banc	III, 1
FELICIANO v. COMMISSION ON AUDIT	G.R. No. 147402, January 14, 2004, 464 Phil. 439 En banc	IX-D, 2(1), 3 XII, 16
GAMAS v. OCO	A.M. No. MTJ-99-1231, March 17, 2004, 469 Phil. 633 First Division	III, 14
GAMBOA v. TEVES	G.R. No. 176579, June 28, 2011, 668 Phil. 1 En banc	II, 19 XII, 2, 10, 11 XIV, 4(2) XVI 11(2)
GOH v. BAYRON	G.R. No. 212584, November 25, 2014, 748 Phil. 282 En banc	VI, 25(5)
GOVERNMENT SERVICE INSURANCE SYSTEM, CEBU CITY BRANCH v. MONTESCLAROS	G.R. No. 146494, July 14, 2004, 478 Phil. 573 En banc	III, 1
HALILI v. COMMISSION ON ELECTIONS	G.R. No. 231643, January 15, 2019 En banc	X, 8
IVLER v. MODESTO-SAN PEDRO	G.R. No. 172716, November 17, 2010, 649 Phil. 478 Second Division	III, 21
KARA-AN v. OFFICE OF THE OMBUDSMAN	G.R. No. 119990, June 21, 2004, 476 Phil. 536 First Division	XI, 12

KILUSANG MAYO UNO v. NATIONAL ECONOMIC DEVELOPMENT AUTHORITY	G.R. No. 167798, April 19, 2006, 521 Phil. 732 En banc	III, 1, 2, 3 VII, 17
KNIGHTS OF RIZAL v. DMCI HOMES, INC.	G.R. No. 213948, April 25, 2017 En banc	VIII, 1 XIV, 15
LAMBINO v. COMMISSION ON ELECTIONS	G.R. No. 174153, October 25, 2006, 536 Phil. 1 En banc	Preamble VIII, 1 XVII, 1, 2, 3, 4
LAND BANK OF THE PHILIPPINES v. DOMINGO	G.R. No. 168533, February 4, 2008, 567 Phil. 593 Second Division	XIII, 4
LIBAN v. GORDON	G.R. No. 175352, July 15, 2009, 610 Phil. 476 En banc	VI, 13
LONEY v. PEOPLE OF THE PHILIPPINES	G.R. No. 152644, February 10, 2006, 517 Phil. 408 Third Division	III, 21
MAGALLONA v. ERMITA	G.R No. 187167, August 16, 2011, 671 Phil. 243 En banc	I II, 2, 16
MANILA INTERNATIONAL AIRPORT AUTHORITY v. COURT OF APPEALS	G.R. No. 155650, July 20, 2006, 528 Phil. 181 En banc	X, 5 XII, 16
MATIBAG v. BENIPAYO	G.R. No. 149036, April 2, 2002 En banc	VII, 16 IX-A, 1 IX-B, 1(2), 2(3) IX-C, 1(2), 3 IX-D, 1(2)
MIRASOL v. DEPARTMENT OF PUBLIC WORKS AND HIGHWAYS	G.R. No. 158793, June 8, 2006, 523 Phil. 713 En banc	III, 1
MONTESCLAROS v. COMMISSION ON ELECTIONS	G.R. No. 152295, July 9, 2002, 433 Phil. 620 En banc	VIII, 1 IX-C, 2(1), (7) XI, 1

NATIONAL ELECTRIFICATION ADMINISTRATION v. COMMISSION ON AUDIT	G. R. No. 143481, February 15, 2002, 427 Phil. 464 En banc	VII, 17 IX-D, 2
OFFICE OF THE COURT ADMINISTRATOR v. SILONGAN	A.M. No. P-13-3137, August 23, 2016 En banc	XI, 1
OFFICE OF THE OMBUDSMAN v. COURT OF APPEALS	G.R. No. 168079, July 17, 2007, 554 Phil. 656 En banc	XI, 13
PARREÑO v. COMMISSION ON AUDIT	G.R. No. 162224, June 7, 2007, 551 Phil. 368 En banc	II, 4 III, 1 IX-D, 2
PEOPLE v. BREIS	G.R. No. 205823, August 17, 2015, 766 Phil. 785 Second Division	III, 2
PHILIPPINE CONSTITUTION ASSOCIATION (PHILCONSA) v. PHILIPPINE GOVERNMENT (GPH)	G.R. No. 218406, November 29, 2016 En banc	VIII, 1
PILIPINO TELEPHONE CORPORATION (PILTEL) v. NATIONAL TELECOMMUNICATIONS COMMISSION	G.R. No. 138295, August 28, 2003, 457 Phil. 101 First Division	XII, 11
PIMENTEL v. ERMITA	G.R. No. 164978, October 13, 2005, 509 Phil. 567 En banc	VI, 18 VII, 16
PIMENTEL v. HOUSE OF REPRESENTATIVES ELECTORAL TRIBUNAL	G.R. No. 141489, November 29, 2002, 441 Phil. 492 En banc	VI, 18
PIMENTEL v. SENATE COMMITTEE OF THE WHOLE	G.R. No. 187714, March 8, 2011, 660 Phil. 202 En banc	VI, 16(3), 21

POWER SECTOR ASSETS AND LIABILITIES MANAGEMENT CORPORATION v. COMMISSIONER OF INTERNAL REVENUE	G.R. No. 198146, August 8, 2017 En banc	VII, 17
PROVINCE OF NEGROS OCCIDENTAL v. COMMISSION ON AUDIT	G.R. No. 182574, September 28, 2010, 646 Phil. 50 En banc	X, 4
REPOL v. COMMISSION ON ELECTIONS	G.R. No. 161418, April 28, 2004 En banc	IX-A, 7 IX-C, 3
REPUBLIC OF THE PHILIPPINES v. COURT OF APPEALS	G.R. No. 160379, August 14, 2009, 612 Phil. 965 First Division	III, 9
REPUBLIC OF THE PHILIPPINES v. SANDIGANBAYAN	G.R. No. 104768, July 21, 2003, 454 Phil. 504 En banc	XVIII, 26
REVIEW CENTER ASSOCIATION OF THE PHILIPPINES v. ERMITA	G.R. No. 180046, April 2, 2009, 602 Phil. 342 En banc	VI, 1
RUFINO v. ENDRIGA	G.R. No. 139554, July 21, 2006, 528 Phil. 473 En banc	VII, 16, 17
SALUDAY v. PEOPLE OF THE PHILIPPINES	G.R. No. 215305, April 3, 2018 En banc	III, 2
SAMBARANI v. COMMISSION ON ELECTIONS	G.R. No. 160427, September 15, 2004, 481 Phil. 661 En banc	V, 1 IX-C, 2(1)
SEMA v. COMMISSION ON ELECTIONS	G.R. No. 177597, July 16, 2008, 580 Phil. 623 En banc	VI, 5 X, 10, 15, 20
SISON v. COURT OF APPEALS	G.R. No. 124086, June 26, 2006, 525 Phil. 574 Third Division	XIII, 11
SMART COMMUNICATIONS, INC. v. MUNICIPALITY OF MALVAR, BATANGAS	G.R. No. 204429, February 18, 2014, 727 Phil. 430 En banc	X, 5

SOCRATES v. COMMISSION ON ELECTIONS	G.R. No. 154512, November 12, 2002, 440 Phil. 106 En banc	X, 8
SONZA v. ABS-CBN BROADCASTING CORPORATION	G.R. No. 138051, June 10, 2004, 475 Phil. 539 First Division	XIII, 3
SORIANO, JR. v. COMMISSION ON ELECTIONS	G.R. Nos. 164496-505, April 2, 2007, 548 Phil. 639 En banc	IX-C, 3
SPOUSES CONSING v. COURT OF APPEALS	G.R. No. 143584, March 10, 2004, 469 Phil. 148 First Division	VIII, 14
STRATEGIC ALLIANCE DEVELOPMENT CORPORATION v. RADSTOCK SECURITIES LIMITED	G.R. No. 178158, December 4, 2009, 622 Phil. 431 En banc	VI, 29 VIII, 1 XII, 3, 7
TAWANG MULTI-PURPOSE COOPERATIVE v. LA TRINIDAD WATER DISTRICT	G.R. No. 166471, March 22, 2011, 661 Phil. 390 En banc	XII, 11
TECHNICAL EDUCATION AND SKILLS DEVELOPMENT AUTHORITY v. COMMISSION ON AUDIT	G.R. No. 204869, March 11, 2014, 729 Phil. 60 En banc	VI, 29(1) IX-D, 2(2)
TOLENTINO v. COMMISSION ON ELECTIONS	G.R. No. 148334, January 21, 2004, 465 Phil. 385 En banc	VI, 9 VII, 9
VELICARIA-GARAFIL v. OFFICE OF THE PRESIDENT	G.R. No. 203372, June 16, 2015, 760 Phil. 410 En banc	VII, 15
VERGARA v. OMBUDSMAN	G.R. No. 174567, March 12, 2009, 600 Phil. 26 En banc	XI, 13
VILLA v. FERNANDEZ	G.R. No. 219548, October 17, 2018 Second Division	III, 14(2)

Separate and Concurring Opinions

BELGICA v. OCHOA	G.R. No. 208566, November 19, 2013, 721 Phil. 416	VI, 27
CHAVEZ v. GONZALES	G.R. No. 168338, February 15, 2008	III, 4
GONZALES v. OFFICE OF THE PRESIDENT OF THE PHILIPPINES	G.R. No. 196231, September 4, 2012	IX-A, 1 XI, 5 XII, 9, 20 XIII, 17
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.	Per curiam Resolution, February 14, 2012	VIII, 5, 13
IMBONG v. OCHOA	G.R. No. 204819, April 8, 2014	II, 12
MACALINTAL v. COMMISSION ON ELECTIONS	G.R. No. 157013, July 10, 2003	V
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,	II, 22
QUINTO v. COMMISSION ON ELECTIONS	G.R. No. 189698, February 22, 2010	IX-B, 2(4)

Dissenting Opinions

BANK OF THE PHILIPPINE ISLANDS v. BPI EMPLOYEES UNION- DAVAO CHAPTER-FEDERATION OF UNIONS IN BPI UNIBANK	G.R. No. 164301, August 10, 2010, 642 Phil. 47	XIII, 3
CORPUZ v. PEOPLE OF THE PHILIPPINES	G.R. No. 180016, April 29, 2014, 734 Phil. 352	III, 19
ESTRADA v. ESCRITOR	A.M. No. P-02-1651, August 4, 2003 June 22, 2006	II, 6 III, 5 XV, 2
LA BUGAL-B'LAAN TRIBAL ASSOCIATION, INC. v. RAMOS	G.R. No. 127882, December 1, 2004, 486 Phil. 754	XII, 2
LAGMAN v. MEDIALDEA	G.R. No. 231658, July 4, 2017, December 5, 2017	VI, 23 VII, 18 XII, 17
LAGMAN v. MEDIALDEA	G.R. No. 243522, February 19, 2019	VII, 18
LAGMAN v. PIMENTEL	G.R. No. 235935, February 6, 2018	VII, 18
LEAGUE OF CITIES OF THE PHILIPPINES v. COMMISSION ON ELECTIONS	G.R. No. 176951, November 18, 2008, December 21, 2009, August 24, 2010, February 15, 2011, April 12, 2011, June 28, 2011	III, 1 X, 10
LEAVE DIVISION, OCA-OAS v. HEUSDENS	A.M. No. P-11-2927, December 13, 2011, 678 Phil. 328	III, 6
MVRS PUBLICATIONS, INC. v. ISLAMIC DA'WAH COUNCIL OF THE PHILIPPINES, INC.	G.R. No. 135306, January 28, 2003, 444 Phil. 230	II, 11 XIII, 18
NAVARRO v. ERMITA	G.R. No. 180050, April 12, 2011	VI, 1, 5 X, 10
NERI v. SENATE COMMITTEE ON ACCOUNTABILITY OF PUBLIC OFFICERS AND INVESTIGATIONS	G.R. No. 180643, March 25, 2008, 572 Phil. 554	VI, 21 VII, 1

POE-LLAMANZARES v. COMMISSION ON ELECTIONS	G.R. No. 221697 and G.R. Nos. 221698-700, March 8, 2016, 786 SCRA 1	II, 2 IV, 1, 2
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	A.M. No. 07-09-13-SC, August 8, 2008, 583 Phil. 391	III, 4
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"	A.M. No. 10-10-4-SC, March 8, 2011	III, 4
REPUBLIC v. SERENO	G.R. No. 237428, May 11, 2018	XI, 2, 3 XI, 17
SORIANO v. LAGUARDIA	G.R. No. 164785 and G.R. No. 165636, April 29, 2009, 605 Phil. 43 March 15, 2010	III, 4

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BATAS NG BAYAN
SUPREME COU
BATAS